

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2977-CR

Cir. Ct. No. 2009CF79

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TALLY ANN ROWAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Tally Rowan appeals her convictions for two counts of threatening judges, contrary to WIS. STAT. § 940.203(2)(b),¹ and an

¹ References to Wisconsin Statutes are to the 2009-10 version unless noted.

order denying postconviction relief. Rowan argues that she did not knowingly, intelligently and voluntarily waive her right to counsel. We reject her arguments and affirm.

¶2 A criminal complaint alleged that between April 25 and May 4, 2009, Rowan threatened bodily harm to Pierce County Circuit Court Judge Robert Wing and Buffalo County Circuit Court Judge James Duvall. While being held in the same cell block with Rowan in the Pierce County jail, Kimberly Kahler and Sandra Dahl each heard Rowan threaten to shoot both judges. Following a jury trial in which she represented herself with standby counsel, Rowan was convicted on both counts. The circuit court imposed two years' initial confinement and one year extended supervision, concurrent to each other and consecutive to a sentence Rowan was then serving. Rowan filed a postconviction motion claiming she did not knowingly, intelligently and voluntarily waive her right to counsel. The circuit court denied the motion and Rowan now appeals.

¶3 As a prerequisite to a defendant's self-representation, a circuit court must ensure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se. See *State v. Imani*, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. If the circuit court finds that both conditions are met, the court must permit the defendant to represent herself. *Id.* Rowan does not challenge her competence to proceed; her argument is that she did not knowingly, intelligently and voluntarily waive her right to counsel.

¶4 Whether a defendant knowingly, intelligently and voluntarily waived the Sixth Amendment right to counsel requires the application of constitutional principles to the facts. *State v. Ernst*, 2005 WI 107, ¶10, 283 Wis. 2d 300, 699

N.W.2d 92. We review this question independently, but we benefit from the circuit court’s analysis. *Id.* “The central component for a valid waiver [of counsel] is simply that the defendant ‘knows what [s]he is doing and [her] choice is made with [her] eyes open.’” *Id.*, ¶16 (citation omitted). This analysis “will depend on a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.” *Id.*; see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¶5 To make it easier for courts to determine whether a defendant’s waiver was voluntary and knowing, our supreme court mandated the circuit courts’ use of a colloquy to show the defendant’s valid waiver. See *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). The colloquy is designed to ensure that the defendant:

(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against [her], and (4) was aware of the general range of penalties that could have been imposed on [her]

Id.

¶6 The *Klessig* requirements are not based on either the United States or Wisconsin Constitutions. *Ernst*, 283 Wis. 2d 300, ¶18. “Instead, [the supreme court] made it clear that the requirements were a court-made procedural rule.” *Id.* A circuit court’s failure to conduct a *Klessig* colloquy is not necessarily fatal if the “collective, ongoing record” on the subject of self-representation constitutes the functional equivalent of the *Klessig* colloquy. See *State v. Ruszkiewicz*, 2000 WI

App 125, ¶30, 237 Wis. 2d 441, 613 N.W.2d 893.² “We do not impose on circuit courts the requirement of placing form over substance and using ‘magic words’ when the reality of the circumstances dictate the answer.” *Imani*, 326 Wis. 2d 179, ¶26. What the State must prove is “that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate ... colloquy failed to afford [her].” *Ernst*, 283 Wis. 2d 300, ¶31 (quoting *State v. Bangert*, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986)).

¶7 Here, the State does not dispute that the circuit court did not conduct a full *Klessig* colloquy. However, the circuit court held an evidentiary hearing on Rowan’s postconviction motion and concluded based upon the collective record that Rowan’s waiver was knowing, intelligent and voluntary.

¶8 Our independent review of the record makes it clear that Rowan knowingly, intelligently and voluntarily waived her right to counsel. The history of the present case and evidence from an earlier case involving Rowan demonstrate that her waiver of counsel was valid and she was very aware of the issues accompanying pro se representation.

¶9 Just over two months before her initial appearance in this case for threatening to kill the judges, Rowan appeared before Judge Duvall in a case for battery to a police officer.³ Rowan’s third lawyer on that case, attorney Peter Morin, sought to withdraw as counsel prior to Rowan’s sentencing. Rowan’s two

² WISCONSIN JI—CRIMINAL SM-30 (May 2006), sets out suggested procedures and colloquies that circuit courts should follow when faced with a self-representation situation.

³ It was because of perceived slights by Judges Wing and Duvall during that case that Rowan threatened to kill them, leading to the charges at issue here.

prior attorneys withdrew due to conflicts with Rowan, and Morin sought to do the same, as Rowan had filed an Office of Lawyer Regulation complaint against him. Rowan stated:

I want him to withdraw. I filed complaints against you [Judge Duvall] and Mr. Morin prior to the commencement of the trial. I have been misrepresented, and I would do better on my own. I have the right to represent myself and be provided the means to do so even while incarcerated.

¶10 Judge Duvall initially ordered the public defender to attempt to find a fourth attorney and stated that “unless and until a new attorney goes on, I ask Mr. Morin to do his best to prepare for sentencing.” However, Judge Duvall then proceeded to conduct a lengthy colloquy with Rowan to determine whether she could in fact represent herself as she requested. He asked about her education, her understanding of the English language, her physical and mental state, and her experience with prior self-representation. Judge Duvall also advised her of the maximum penalties and the gravity of the crimes. He also discussed her prior experience with attorneys and ensured that she was well aware of attorneys’ work and the potential disadvantages and difficulties of self-representation. The colloquy ended as follows:

THE COURT: Ms. Rowan, do you have any questions for me concerning your right to an attorney or your right to self[-]representation?

MS. ROWAN: No.

....

THE COURT: Do you want time to talk with Mr. Morin about this issue privately?

MS. ROWAN: No.

THE COURT: Then what is your desire, do you wish to represent yourself or do you wish to be represented by an attorney?

MS. ROWAN: I'm representing myself, and I'm filing suit on the state public defender's office.

¶11 Judge Duvall then found that Rowan knowingly and voluntarily waived counsel in that case and asked attorney Morin to remain as standby counsel. The judge also advised Rowan that despite her waiver, she continued to have the right to have an attorney represent her and that she could always change her mind and request representation at any time.

¶12 However, Rowan continued to represent herself. She represented herself at sentencing, held just twenty-one days before Rowan's initial appearance in the present case.⁴ The court noted that attorney Francis Rivard was seated at counsel table with Rowan. Rivard stated that "Ms. Rowan does want to continue to represent herself." Judge Duvall spoke with Rowan again at sentencing about her desire to continue pro se and Rowan confirmed the court's understanding that Rivard was her standby counsel. She indicated that she understood her decision to represent herself was not irrevocable and that she could "always request he directly represent you." Rowan indicated she had no questions about her right to have an attorney represent her and she still wanted to represent herself.

¶13 Yet, Rowan now suggests she did not knowingly and voluntarily waive her right to counsel when the present case commenced twenty-one days later. In fact, Rowan insists that she "prepared for this case's trial on her own without the benefit of any prior substantive colloquy ensuring that she would

⁴ Attorney Rivard replaced attorney Morin as standby counsel.

undertake the numerous and difficult tasks of pro se trial preparations knowingly, intelligently, and voluntarily.” Rowan also insists she did not understand the seriousness and general range of the penalties that could be imposed in this case.

¶14 We emphasize at the outset that Rowan ignores the circuit court’s findings that Rowan’s testimony at the postconviction hearing was “self[-]serving and not credible.” As the court stated,

For her to suggest during her testimony today and trying to now testify that she did not know what she was doing, that she did not understand any of the laws or that she had no choice or that somehow this proceeding was different because sentencing is not representing myself at trial I find to be self[-]serving and not credible.

I take very seriously the right of the defendant to representation. Ms. Rowan from the beginning in this Court’s mind fully understood what was happening.

¶15 Witness credibility is the province of the trial court and it is clear from the record that its determination on the credibility issue was justified. *See In re Estate of Dejmal*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶16 Moreover, Rowan’s own actions indicate an intent to represent herself. At the initial appearance, the court asked Rowan, “Would you like me to read the Complaint out loud on the record at this time?” Rowan answered, “No.” Rowan also answered affirmatively when asked whether she understood “what you’ve been charged with and the penalties that can be imposed by this court if you are found guilty.”

¶17 At the preliminary hearing, Rivard noted his appearance as standby counsel and Rowan did not object or request attorney representation. Rowan proceeded to act as her own attorney, asking for sequestration of witnesses, raising

objections during the State's direct examination, and conducting cross-examination. Rowan also filed several motions she had prepared herself, including motions for change of venue and a speedy trial. These actions represent a clear intent to represent herself.

¶18 Following a finding of probable cause, the court read each count of the Information to Rowan charging her with threatening to cause bodily harm to the two judges. The court also specifically informed Rowan that each of the two charges was a Class H felony and carried a penalty of up to a \$10,000 fine and imprisonment for up to six years. The nature of the charges and the general range of penalties were not complex. Rowan responded by pleading not guilty. Rowan's motions were then presented to the court. The court then again reminded Rowan that it "may be in your best interest to have counsel represent you So if at some point in time you wish to change your mind and allow Counsel to take his rightful place as counsel in this case, all you need to do is let me know." Rowan responded, "Okay." The court then asked, "Okay, anything else?" Rowan did not respond and the hearing concluded.

¶19 Before the trial commenced, the following colloquy took place:

THE COURT: Okay. Once again you have asked that you be allowed to proceed without an attorney in this matter. The court has appointed Mr. Rivard to be your standby counsel. I will allow you to consult with him but I would ask that any conversations be quiet and outside the hearing of the jury. If you need to take a break because you want to have more extensive conversation with standby counsel, please indicate that to me during the trial and we will take a break to allow you to do that, okay.

MR. RIVARD: Does the court want me at the counsel table then?

THE COURT: Yeah. I will explain to the jury that Miss Rowan has exercised her constitutional right to represent herself and that's why she will be conducting her trial, okay. I will also have to take your waiver of your right to counsel on the record. Are you prepared to do that at this time?

MR. RIVARD: She is asking you if you want to proceed by yourself or whether you want an attorney to actually represent you.

THE DEFENDANT: Sure.

THE COURT: Okay. Miss Rowan, you are prepared at this time to waive your right to counsel, is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that – could you tell me how old you are?

THE DEFENDANT: 34.

THE COURT: And how far did you get in school?

THE DEFENDANT: I have nearly a two-year degree in criminal justice. Four classes shy of that. I have a real estate agent's license and travel certificate.

THE COURT: Okay. So you're very versed in the English language, yes?

THE DEFENDANT: Yes.

....

THE COURT: Do you understand that no one can force you to proceed without an attorney. That that's a right that you have to give up. Are you prepared to do that at this time?

THE DEFENDANT: Yes.

THE COURT: Anyone threatening, forcing or coercing you in any fashion to waive your right to counsel?

THE DEFENDANT: No.

THE COURT: Do you understand that although the court will accept your constitutional right to proceed without an

attorney, that I will provide counsel for you to assist you in the proceedings of this case. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And if at any time you wish to consult with that counsel, you're welcome to ask and I will allow you to consult outside the presence of the jury with your attorney.

THE DEFENDANT: Yes.

THE COURT: Okay. Just so that you understand this is a – have you had a jury trial before?

THE DEFENDANT: Yes.

THE COURT: Okay. So you know what a jury trial is like. I cannot give you much leeway with regard to the statutory requirements, legal requirements of a jury trial simply because you're representing yourself. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So I will hold you to the same standards with regard to evidence and relevancy as I would [the prosecutor]. Do you understand that? Yes?

THE DEFENDANT: Yes.

THE COURT: Okay. During the course of the trial if you change your mind, you understand that it would be very difficult at that point to end the trial and allow you then to have counsel?

THE DEFENDANT: Yes.

THE COURT: We won't start over again but if you want during the course of the trial to ask that Mr. Rivard continue with the case, I will allow you to do that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So that if you become overwhelmed during the trial and change your mind and wish to have Mr. Rivard take over, I will allow him to do that. Do you understand?

THE DEFENDANT: Yes.

¶20 At trial, Rowan proceeded as her own attorney and demonstrated a substantial degree of legal acumen. She opposed a motion and made her own opening statement and closing argument. She examined witnesses and raised objections. The record also reflects that she talked things over with her standby counsel on several occasions. As the circuit court noted in its oral decision at the postconviction hearing, not once did Rowan indicate that she wanted standby counsel to step in and represent her as counsel.

¶21 Accordingly, the record shows that Rowan in fact possessed the constitutionally required understanding and knowledge that she alleges the court's colloquy failed to afford her. See *Ernst*, 283 Wis. 2d 300, ¶31. The court's failure to utter magic words does not trump the reality of the circumstances. With open eyes, Rowan made the knowing, intelligent and voluntary choice to waive her right to counsel in her prior case before Judge Duvall, and she made such a choice again shortly thereafter in the present case. The court properly found that Rowan's waiver of counsel was valid.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

