COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 1996

NOTICE

No. 95-0877-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARLTON B. CAMPBELL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Reversed and cause remanded*.

SUNDBY, J. In this criminal prosecution for disorderly conduct as a repeat offender, we[1] conclude that defendant-appellant Carlton B. Campbell must be granted a new trial because he did not receive the effective assistance of counsel required by the Sixth Amendment to the United States Constitution and art. I, § 7, of the Wisconsin Constitution. The trial court found that trial counsel

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

did not advise Campbell that he could poll the jury. The State does not claim that this finding is clearly erroneous.

"The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict." ***State v. Behnke***, 155 Wis.2d 796, 801, 456 N.W.2d 610, 612 (1990). "The right to poll the jury is intertwined with the defendant's constitutional right to counsel at the return of the jury verdict." ***Id***. at 802, 456 N.W.2d at 612 (citing ***Smith v. State***, 51 Wis. 615, 8 N.W. 410 (1881)).

The State argues that we held in ***State v. Jackson***, 188 Wis.2d 537, 541, 525 N.W.2d 165, 167 (Ct. App. 1994), that "[w]hen a defendant accepts counsel, the decision to assert or waive certain constitutional rights is delegated to that attorney." (Citing ***State v. Wilkens***, 159 Wis.2d 618, 622-23, 465 N.W.2d 206, 208 (Ct. App. 1990)). We do not believe the State seriously suggests that the defendant gives up control of the decision whether to poll the jury simply because he or she elects to be represented by counsel. ***Jackson*** and ***Wilkens*** stand for the proposition that the trial court need not conduct a colloquy with the defendant as to the purpose and value of polling the jury. However, counsel is ineffective if he or she does not inform the defendant of this valuable right.

It is dangerous for counsel to assume that polling the jury is a waste of time, as the State suggests is a choice counsel may reasonably make. In ***State v. Cartagena***, 140 Wis.2d 59, 409 N.W.2d 386 (Ct. App. 1987), a juror changed his mind overnight and dissented before the verdict was accepted. We concluded that the sealed verdict lost its validity. ***Id***. at 63, 409 N.W.2d at 387. In ***Jackson***, this writer pointed out that the Criminal Benchbook Committee recommends that the trial court poll the jury in every case. 188 Wis.2d at 543, 525 N.W.2d at 168 (citing WISCONSIN JUDICIAL BENCHBOOK, CR 25-3 (1994)) (Sundby, J., concurring).

There is language in ***State v. McMahon***, 186 Wis.2d 68, 96, 519 N.W.2d 621, 632-33 (Ct. App. 1994), to the effect that unless there is some showing of uncertainty by the jury, it is not error for counsel to fail to poll the jury. However, it is deficient performance for counsel to fail to inform his or her client of that valuable right.

Here, at a supplemental ***Machner***[2] hearing, Campbell's trial counsel testified that he had no recollection of informing Campbell of his right to poll the jury. Campbell testified that had he known he had that right, he would have exercised it.

The trial court concluded that while counsel's failure to inform Campbell of his right to poll the jury may not have been the action expected of fully competent counsel, Campbell was not prejudiced by the failure. Because defendant's right to poll the jury "is intertwined with the defendant's constitutional right to counsel," ***Behnke***, 155 Wis.2d at 802, 456 N.W.2d at 612, we conclude that prejudice is presumed from counsel's failure to inform his or her client of that right, at least in the absence of active jury involvement with the trial court during its deliberations, demonstrating that it resolved any uncertainty, as was the case in ***McMahon***. We therefore conclude Campbell was prejudiced by counsel's failure to poll the jury and to inform Campbell that he had that right. Accordingly, Campbell is entitled to a new trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).