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DISTRICT II

November 6, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP684-CR State of Wisconsin v. Vincent E. Boyd (L.C. #2010CF344)

Before Brown, C.J., Reilly and Gundrum, JJ.

Vincent E. Boyd appeals from a judgment convicting him of two counts of first-degree sexual assault of a child. Boyd entered no-contest pleas while proceeding pro se but without the benefit of a ***Klessig***[1] colloquy. The dispositive issue is whether we should reverse the judgment and remand with instructions that he be permitted to withdraw his no-contest pleas, as Boyd requests, or, as the State urges, reverse and remand for an evidentiary hearing to determine

[1] ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

if Boyd knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. We are persuaded that the State is correct. We therefore reverse and remand for an evidentiary hearing. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2]

The day before his trial was to begin, Boyd filed a pro se motion to have a new lawyer appointed on grounds that his current one, Attorney John Wallace, was unprepared for trial and that communication had broken down between them. When the circuit court denied the motion, Boyd asked to represent himself. The court agreed and, based only on its "experiences" with Boyd, found Boyd competent to proceed pro se. It did not engage Boyd in a colloquy to assess whether he knowingly, intelligently, and voluntarily waived the right to counsel. The court also directed Wallace to act as standby counsel without defining the role to Wallace or Boyd. The next day, Wallace worked out a plea deal with the State, presented it to the court, assisted Boyd with the plea questionnaire, signed it as Boyd's attorney, and answered questions during the plea colloquy. Despite saying he felt "pressured," Boyd entered no-contest pleas.

A few weeks later, Boyd—not yet sentenced—filed a pro se motion to withdraw his pleas, alleging that they were coerced and not knowingly, intelligently, and voluntarily made, and that counsel was ineffective. New counsel, appointed shortly thereafter, filed a similar motion. He also argued at the motion hearing that Wallace overstepped the boundaries of standby counsel. The court refused to allow Boyd to withdraw his pleas and proceeded to sentencing. This appeal followed.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

While Boyd raises issues regarding the contours of the role of standby counsel and a court's duty to inform a pro se defendant of those limits, our disposition of this case turns on the circuit court's failure to ascertain whether Boyd's waiver of counsel was knowing, intelligent, and voluntary. A defendant has a constitutional right to conduct his or her own defense. ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). First, however, the circuit court must ensure that the defendant is competent to do so and has knowingly, intelligently, and voluntarily waived the right to counsel. ***Id.*** To demonstrate a valid waiver, the court must verify that the defendant deliberately chose to proceed without counsel and was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges, and the general range of potential penalties. ***Id.*** at 206. This colloquy is mandatory. ***Id.***

The State concedes that the circuit court did not conduct a ***Klessig*** colloquy. The parties' views of the proper remedy differ, however. Boyd argues that the court's failures to conduct a ***Klessig*** colloquy, to establish Boyd's competence to represent himself, and to delineate the contours of the role of standby counsel, and Wallace's exceeding the bounds of the role plainly constitute "fair and just reasons" to withdraw his pleas. *See* ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. He contends we should address all issues on the record before us, reverse the judgment, and remand with instructions that he be permitted to withdraw his no-contest pleas. The State asserts that we must remand for an evidentiary hearing to determine the validity of Boyd's waiver of counsel. We agree with the State.

When a circuit court fails to conduct a ***Klessig*** colloquy, a reviewing court cannot assess the validity of the waiver from the record. *See* ***Klessig***, 211 Wis. 2d at 206. Rather, the appropriate remedy is a remand for an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary. *See* ***id.*** at 206-07; *see also* ***State v. Imani***, 2010

WI 66, ¶¶41, 43, 326 Wis. 2d 179, 786 N.W.2d 40 (Crooks, J., concurring). Nonwaiver is presumed unless the State establishes by clear and convincing evidence that the waiver was knowing, intelligent, and voluntary. ***Klessig***, 211 Wis. 2d at 204, 207. If the State can satisfy its burden, Boyd's conviction will stand. *See* ***id.*** at 207. If not, he will be entitled to withdraw his plea. *See* ***id.***

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and cause remanded, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals