STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2010AP001414-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KENNETH B. BONNER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT ADMITTING ERROR

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STATEMENT OF THE ISSUES

Did the Circuit Court properly deny the Defendant's Motion to Withdraw Guilty Plea?

Trial Court Answered: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a misdemeanor case to be decided by a single judge. Neither oral argument nor publication is necessary to resolve the issues herein.

STATEMENT OF THE CASE

On May 11, 2010, the Circuit Court denied the Defendant's Motion to Withdraw Guilty Plea. (R39:20) Bonner was attempting to withdraw a guilty plea that he had entered on March 1, 2010, to one misdemeanor count of Issuance of Worthless Check contrary to § 943.24(1) and 939.51(3)(a) Wis. Stats. (R37:23)

On March 1, 2010, Bonner appeared without counsel for a previously scheduled jury trial. (R37:2) Bonner was to be tried on one count of misdemeanor Issuance of Worthless Check and one count of felony Issuance of Worthless Check as charged by the State on September 24, 2009. (R2:1-2)

On March 1, 2010, Bonner informed the court that he was going to represent himself without the assistance of counsel. (R37:3) Bonner informed the court that he had only received the discovery from his prior counsel on the morning of trial. (R37:5) The court pointed out to Bonner that he had pursued two separate mechanisms to achieve representation: first, he had a court-appointed attorney who Bonner had asked to withdraw; and second, he had hired his own attorney. (R37:5-7) The court accepted that Bonner was free to choose to represent himself. (R37:5)

The court informed Bonner of the maximum penalties that he faced and the role of the court in regards to any plea agreement. (R37:9-10) Bonner then informed the court that it was his intention to go to trial. (R37:10) He told the court, however, that the matter could be settled and he continually sought an indication from the court that it would go along with the State's plea recommendation. (R37:11) The court reiterated the factors that it considers in sentencing and the point that the court does not participate in plea negotiations. (R37:12-13)

Bonner requested and, was allowed, to take a break to speak to the Assistant District Attorney regarding the plea recommendation. (R37:15) After the break, the parties returned and the State filed an Amended Information alleging a single misdemeanor count of Issuance of Worthless Check contrary to § 943.24(1) and 939.51(3)(a) Wis. Stats. (R37:16, R14) Bonner told the court that he did not agree with one of the elements contained in the Amended Information. (R37:16)

The terms of the State's plea recommendation were then explained to the court. (R37:18) The State's recommendation was that the defendant be placed on probation for a period of 12 months, with restitution to be paid during the probationary period, with all other terms and conditions being left up to the court. (Id.) The State also informed the court that if the defendant successfully paid back the restitution prior to the expiration of the 12 months, that the State would not object to the probation being terminated early. (Id.) The court then re-informed Bonner of the maximum penalties that he faced and the fact that the court was not bound by the negotiations. (R37:19-20)

The court then explained the elements of the crime with which Bonner had been charged. (R37:20-21) When asked if he understood the elements, Bonner inquired, "Are there things for me to share?" (R37:21) The court, surmising what Bonner was alluding to based on the earlier colloquy, stated, "Certainly those are mitigating circumstances, but they are not a defense, sir." (R37:21) Bonner stated that he understood what the court meant by this statement. (R37:22)

After Bonner stated that he understood what the court meant, the court then went into a lengthy colloquy regarding the element that Bonner had highlighted in his questions:

> THE COURT: If you write a check for $10,000.00 on December 16th, 2008, and you don't have the money into it, the law presumes that you didn't intend it to be paid. Okay?
>
> MR. BONNER: I understand that.
>
> THE COURT: So do you agree that you didn't have the money in your checking account on December 16th, 2008?

> MR. BONNER: I agree to that, but what I'm saying is I was told by an attorney -- I gave him my routing number and my checking account number, and he guaranteed me he was going to wire that money in there on behalf of his client. I took him at his word, and that's how I deposited those checks. When he didn't come through, I was left holding the bag.
>
> THE COURT: That's a mitigating circumstance, sir. That's not a defense. Okay?
>
> MR. BONNER: All right. Let's get it over with.
>
> THE COURT: But you have to admit that you issued the check.
>
> MR. BONNER: I did.
>
> THE COURT: And that you intended it not be paid because there wasn't enough money in your checking account to cover it.
>
> MR. BONNER: I can't agree with that, but it happened.
>
> THE COURT: You have to agree that you intended that it not be paid because at the time you wrote the check there wasn't $10,000.00 in the account. You may have had a promise that $10,000.00 was going to be put in there, but that ain't good enough. Do you understand that, sir?
>
> MR. BONNER: I understand that.
>
> THE COURT: And you admit to those facts?
>
> MR. BONNER: Yes, sir.
>
> THE COURT: So, therefore you are pleading guilty to the amended charge?
>
> MR. BONNER: I'm guilty for writing the check. I'm guilty for writing it. I should never have trusted him. So I'm guilty. I wrote the check. I was innocent in what I did, but I'm guilty for doing it. (R37:22-23)

The court then accepted Bonner's guilty plea and went through the plea colloquy with him. (R37:23-36) The lengthy colloquy gave the court confidence that Bonner was entering his plea freely, voluntarily and intelligently. (R37:35)

During the plea colloquy, the court informed Bonner that "all 12 members of the jury would have to find you guilty." (R37:25) The court returned to the issue of jury unanimity a few moments later when it stated, "You are also giving up your right to a jury trial where all 12 jurors would have to agree you are guilty or not guilty." (R37:26) The official court-reported transcript also reflects that the court informed Bonner that his silence could be used against him. (R37:25)

Bonner then filed a motion to withdraw his guilty plea and a hearing was conducted on the motion on May 11, 2010. (R39) The State conceded that Bonner had presented a prima facie showing in his motion. (R39:3) Bonner testified that he felt forced by the plea offer to plead guilty so as to gain the benefit of the plea agreement. (R39:6) Bonner testified that he felt this was because he was informed by the court that he did not have a defense. (R39:7)

Bonner further testified that he did not understand the issue of jury unanimity. (R39:13) Bonner testified that he did not understand his right to remain silent. (R39:15) The court concluded that Bonner had made the deliberate choice to proceed without counsel during the guilty plea on March 1, 2010, and was informed of the consequences of that decision. (R39:25) The court stressed that, although the record reflects that the court told Bonner that his silence could be used against him, he had properly understood his right to remain silent. (R39:27) The court found that Bonner had been informed of the rebuttable presumption regarding the payment of the check. (R39:28) Based on these factors, the court denied Defendant's Motion to Withdraw Guilty Plea. (*Id*.) This appeal then followed.

STANDARD OF REVIEW

A circuit court's denial of a motion to withdraw a plea is reviewed under an erroneous exercise of discretion standard. *State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363. The appellate court's general standard of review is to "accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but [to] determine independently whether those facts demonstrate that the

defendant's plea was knowing, intelligent, and voluntary." *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906. The decision to allow the withdrawal of a plea rests with the circuit court and the appellate court will only reverse that decision where the circuit court has failed to exercise that discretion properly. *Id*.

ARGUMENT

THE RECORD DOES NOT REFLECT THAT THE DEFENDANT MADE A KNOWING, INTELLIGENT AND VOLUNTARY DECISION TO PROCEED WITHOUT COUNSEL

The circuit court in the present case satisfied itself that Bonner was making a knowing, intelligent and voluntary decision to proceed without counsel. (R39:25) In *State v. Klessig* (1997), the Supreme Court determined the factors that a circuit court is to use in determining whether a defendant has made a knowing, intelligent and voluntary waiver of his right to the assistance of counsel. 211 Wis. 2d 194, 203, 564 N.W.2d 716. The Court did a detailed analysis of the source of this right in Article 1, §7of the Wisconsin Constitution[1] and the United States Constitution through the Sixth Amendment[2] and its

[1] Wis. Const. Art. 1 §7, provides:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

[2] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

application to the States through the Fourteenth Amendment.[3] *Id.*, at 201-202. *But, cf., State v. Ernst*, 283 Wis. 2d 300, 315, 699 N.W.2d 92 (2005) (*locating source of authority in Art. 7 §3 superintending and administrating authority*).

The Court found that the defendant's right to the assistance of counsel can only be waived validly where the circuit court has conducted an inquiry in compliance with the colloquy set forth in *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601(1980), and where the record ably demonstrates the defendant's knowing, intelligent and voluntary waiver. *Klessig*, at 206. The *Klessig* Court overruled *Pickens* in that it diminished the circuit court's discretion and mandated the four-factor colloquy laid out in *Pickens*. *Id*. The Court explained the mandated colloquy through the following guidance:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy 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 him, and (4) was aware of the general range of penalties that could have been imposed on him. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel. [internal citation omitted]. *Id.*

In the present case, the circuit court inquired of Bonner whether he intended to hire an attorney and accepted that he made a deliberate choice to proceed without counsel. (R37:3) The court made an inquiry into Bonner's ability to pay for an attorney such as the one that the court conducts during an indigency hearing. (R37:3-7)

The factors that the court inquired into on March 1, 2010, comply with the assessments of the competency that are outlined in SM-30 Wis. JI-Criminal. (R37:3-4, 24-27) The

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[3] The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Special Materials Jury Instruction guides the court by supplying the following factors:

- Age
- Education and vocational training
- Present employment and employment history
- Present mental health condition and mental health history
- Present alcohol use and history of alcohol use
- Present medication or drug use
- Difficulty in understanding the court

SM-30 Wis. JI-Criminal

The circuit court asked the questions related to this inquiry and received answers that are in compliance with both the guidance of SM-30 and the Court's ruling in *Klessig*. (R37:3-4, 24-27)

The problem with the circuit court's analysis of the four *Pickens* factors as laid out in *Klessig* is that the record does not explicitly show that Bonner was aware of the difficulties and disadvantages of self-representation. 211 Wis.2d at 206. It is this second factor where the court has relied on facts such as Bonner having court-appointed counsel who he had withdraw and having hired his own attorney. (R37:2,6) The court concluded that Bonner had knowledge of the advantages of counsel, but it is difficult to say that the record makes it explicit to the reviewing Court that the circuit court complied with the mandates of *Klessig*. The circuit court made a ruling based on its discretion and its on-the-ground, there-in-the-moment understanding of what Bonner understood about the proceedings, but it did not lay out the factors as *Klessig* requests. 211 Wis. 2d at 206.

The court did inform Bonner of the maximum possible penalties and the seriousness of the charge against him. (R37:18-19,27) The record makes it clear that that the court held a colloquy that supports its conclusion that Bonner was making a voluntary, intelligent and knowing waiver based on the third and fourth factors. The problem is that there is simply no explicit place in the record that shows that the court conducted a colloquy concerning the second factor mandated by *Klessig*. 211 Wis. 2d at 206.

During the May 11, 2010, hearing on the Defendant's Motion to Withdraw Guilty Plea Bonner clearly sought to demonstrate how the twinned colloquy regarding the decision to proceed without the assistance of counsel and the plea itself were impacted by his decision. (R39) In *State v. Jenkins*, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24 (2007), the Court made it clear that the adequacy of a plea colloquy is a protection for the defendant as well as the court. In the present case, the court went through the waiver of rights forms with Bonner on the record.(R37:30-33) The problem with the colloquy is that there were two distinct moments of confusion that could possibly confound a *pro se* defendant.

A defendant has the right to receive a unanimous jury verdict and must be informed of this during a plea colloquy. *State v. Baldwin*, 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). The court must comply with Wis. Stat. 971.08, et seq., not just in technical answers, but also in spirit. *State v. Bangert*, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). During the plea colloquy, the court informed Bonner that "all 12 members of the jury would have to find you guilty." (R37:25) The court returned to the issue of jury unanimity a few moments later when it stated, "You are also giving up your right to a jury trial where all 12 jurors would have to agree you are guilty or not guilty." (R37:26) Although the court correctly informed Bonner, there is still the possibility of confusion. Bonner testified that this did result in confusion. (R39:13) Although Bonner had every incentive to emphasize his misunderstanding and confusion at the motion hearing, the record itself shows that a *pro se* defendant was informed of his rights in a way that does not make clear that he fully understood them. (R37:25)

Similarly, the record makes it appear that Bonner was informed that his silence would be used against him. (R37:25) The court was convinced that this was an error in the transcription, but Bonner testified to the contrary at the motion hearing. (R39:27) In *State v. Van Camp*, the Supreme Court considered whether the circuit court can consider a defendant's prior or general familiarity with his rights in determining that the precepts of *Bangert* have been met. 213 Wis. 2d 131, 149, 569 N.W.2d 577 (1997). The Court held that a circuit court may not rely on a general sense of what the defendant understood and must, instead, determine what the defendant

understood at the moment of the plea. *Id*. In this case, the only record of what Bonner understood came from Bonner himself during the May 11, 2010, hearing.(R39:25) Bonner was not represented by counsel at the plea, so the usual mechanism of examining defense counsel regarding the defendant's knowledge was unavailable to the court and the State in this case. The inquiry that *Van Camp* makes clear a reviewing court is to follow is a careful reading of what is contained in the record and not to rely on what it can be speculated that the defendant should have known by the time a plea is actually taken. 213 Wis. 2d at 150-51.

Lastly, Bonner claims that the court misinformed him regarding the presence of any defenses against the charge. (*Defendant—Appellant's Brief:* 24) Bonner states that the court "disregarded the Defendant's protestations of innocence." *Id. State v. Moederndorfer*, 141 Wis. 2d 823, 830, 416 N.W.2d 627 (1987), makes it clear that mere protestations regarding an element during a plea colloquy do not evince a lack of understanding. The trouble with the present record, however, is that the court does seem to inform Bonner regarding the likelihood of his success on the merits based on the 'defenses' he is suggesting he could raise. (R37:21, 22-23) The court calls these mitigating circumstances: essentially telling Bonner that the court will take them into account at sentencing. (R37:21) The court was trying to deal gently with a pro se defendant, but the record makes it appear that the court misinformed Bonner regarding the defenses against intent. (*Id.*)

CONCLUSION

Having reviewed the facts made of record during the motion hearing and the plea hearing, and comparing those facts to the applicable law, the State concedes that the record does not reflect that the defendant made a knowing, voluntary and intelligent waiver of his rights during the March 1, 2010, plea hearing. The State therefore joins in the defendant's demand that this case be remanded to the circuit court and that the defendant be allowed to withdraw his plea.

Dated this _____ day of October, 2010.

Respectfully submitted,

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_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,153.

_____ _____
Date Jon R. Neuleib
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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____ _____

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