RECEIVED
05-28-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CASE No. 2020AP000365 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JERRY A. LEISTER,
Defendant-Appellant

APPEAL FROM THE CONVICTION AND SENTENCE AFTER A JURY TRIAL AND DENIAL OF POSTCONVICTION MOTION

THE HONORABLE JUDGE PATRICIA BARRETT PRESIDING

Sauk County Case # 2017CM000557

DEFENDANT'S BRIEF AND APPENDIX

Respectfully submitted by:

Attorney Bill Ginsberg
306 East Wilson Street
Madison, WI 53703
Office: (608) 256-7765
Fax: (608) 256-7723
E-mail: mandellginsberglaw@tds.net

State Bar ID: 1006779
Attorney for the Defendant – Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES…………………………..ii

STATEMENT OF THE ISSUES PRESENTED…........iii

STATEMENT ON PUBLICATION…………………..iii

STATEMENT ON ORAL ARGUMENT……………..iii

STATEMENT OF THE CASE…………………………1

ARGUMENT……………………………………….....6

1) The trial court erred by failing to ascertain before trial that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se………………….…6

2) The State failed to establish by clear and convincing evidence at the postconviction motion hearing that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se……………………………..….8

CONCLUSION…………………………………….....11

CERTIFICATION OF THE BRIEF……………………13

CERTIFICATION OF ELECTRONIC FILING……….13

CERTIFICATION OF APPENDIX CONTENT……….14

TABLE OF CONTENTS – APPENDIX……………….15

TABLE OF AUTHORITIES

Wisconsin cases

Pickens v. State, 96 Wis. 2d 549, 292 N.W.2d 601(1980)….7

State v. Klessig, 211 Wis. 2d 194,
564 N.W.2d 716 (1997)……………………..4, 6, 7, 8, passim

State v. Woods, 117 Wis. 2d 701, 345 N.W.2d 457 (1984)…9

Federal cases

Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799,
83 S. Ct. 792 (1963)………………………………...…….6

Johnson v. Zerbst, 304 U.S. 458 (1938)………………..…6, 7

STATEMENT OF THE ISSUES PRESENTED

1) Whether the trial court committed error when it allowed the defendant to proceed at trial pro se without first ascertaining that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se.

   The trial court said "no".

2) Whether the State met its burden of proof at the postconviction motion to show that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se.

   The trial court said "yes".

STATEMENT ON PUBLICATION

Publication is not requested.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court believes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE

According to the criminal complaint, law enforcement was dispatched to the Township of Honey Creek to interview ZC about allegations of animal abuse. (R.1 at 1) ZC stated that she had been renting her house for approximately five months and that she had been keeping two horses on the property. *Id.* ZC stated that in September of 2017, her boyfriend DR returned home to their residence and discovered that her dog Cooper was missing and that there was a pool of blood on the driveway. *Id*. at 2. DR saw the defendant, Jerry Leister, pulling out of the driveway when DR was pulling in. *Id*. (The complaint doesn't say this explicitly, but Leister is the owner of the property.)

According to ZC, she spoke with Leister who explained that he found Cooper after he had apparently been struck by a vehicle. *Id*. Leister stated that he took and buried the dog because he was concerned about ZC's child seeing it. *Id*. ZC stated that on 10/20/17, Leister was very angry and screaming at her because some construction workers she had referred to Leister had not shown up as promised. *Id*.

ZC further stated that on 10/23/17, she fed both of her horses and put horse blankets around them. *Id*. According to ZC, the horses were in good condition. *Id*. However, at about 10:30 that night, ZC and DR saw Leister using machinery around the horse paddock. *Id*. The next morning, ZC noticed that one of her horses, Sandy, had severe facial injuries around the muzzle. *Id*. Also, she noticed that ZC's blanket was tightly knotted into a ball. *Id*. A veterinarian confirmed that the horse's injuries were caused by blunt force trauma. *Id*. at 3.

Leister declined to speak with law enforcement. However, the complaint alleges that Leister spoke with

another tenant, TA, and stated the horse got caught up in the straps of the blanket and panicked. *Id.* Leister was subsequently charged with two counts of mistreating animals. Count 1 alleged mistreatment of the dog and count 2 alleged mistreatment of the horse. *Id.* at 1.

At the initial appearance (12/13/17), Leister appeared without an attorney. (R.97 at 2:1 – 3) Leister waived his right to an attorney for the purposes of the initial appearance. *Id.* at 4:15 – 5:1. At the return date (01/17/18), Leister again appeared without an attorney. (R.98 at 2:1 – 3) Leister explained that he had contacted two law firms but Leister seemed confused about the various cases; civil, criminal, and traffic, that he was litigating. *Id.* at 2:5 – 5:2) The court set new dates to give Leister time to get an attorney. *Id.* at 6:18 – 7:12.

At the second return date (02/08/18), Leister stated that he needed more information before he could get an attorney. (R.99 at 2:8 – 13) The court stated it would give Leister more time, and advised Leister that he had the right to an attorney. *Id.* at 2:14 – 3:19. The court also offered Leister a waiver of right to an attorney form, but Leister politely declined. *Id.* at 5:6 – 11. At a third return date (03/06/18), Leister again explained that he had contacted law firms but that he needed more information to supply to the firms. (R.100 at 2:14 – 22) Leister affirmed his intent to retain a law firm. *Id.* at 2:23 – 3:7. Assistant District Attorney Dennis Ryan expressed frustration and stated that Leister knew the system and knew what was expected. *Id.* at 5:21 – 6:9. The court reset the hearing to give Leister more time to get an attorney. *Id.* at 8:24 – 9:5. At the fourth return date (03/20/18), Leister stated again that he wanted to retain a law firm for this case and two others. (R.101 at 4:15 – 25) The court insisted on Leister entering a plea at this point, but stated he could still hire an

attorney. *Id*. at 5:14 – 6:2. Leister replied "I was advised by law firms and legal counsel that I should not make a plea until they have their decision and they want to make it for me." *Id*. at 6:3 – 6. The court entered a not guilty plea on Leister's behalf and stated if Leister hired an attorney, then they would file a notice of retainer. *Id*. at 6:7 – 24.

At the next hearing (05/31/18), Leister appeared with Attorney Kara Rolf, of the Pemberton and England Law Offices. (R.102 at 2:9 – 11) Rolf stated that she had just been retained the prior week. *Id*. at 2:16 – 19. She stated that her representation would be contingent on there being a continuance for the upcoming jury trial. *Id*. at 2:20 – 3:4. Rolf also noted that Leister had spoken with several law firms and had been working on getting a lawyer previously. *Id*. at 3:5 – 8. ADA Ryan stated that both sides would be better served if Leister was represented and locked into a retainer for representation. *Id*. at 3:23 – 25. The court granted the continuance. *Id*. at 4:3 – 6.

However, on 08/08/18, Rolf filed a motion to withdraw stating in an attached affidavit that Leister had failed to comply with the terms and conditions of the Representation and Fee Agreement which Leister had signed on 05/21/18. (R.11 at 1 and R.10 at 1) The Honorable Judge Patricia Barrett, who by this time had been assigned to this case, signed the order allowing Rolf to withdraw without a hearing. (R.12 at 1)

Leister appeared pro se at the subsequent hearings through the jury trial. At no point during any of these proceedings did the court go through a colloquy with Leister about the disadvantages of proceeding without counsel. The waiver of right to an attorney form, which was offered to Leister at a time when he was clearly trying to retain an

attorney, was not mentioned. After a two-day jury trial, Leister was convicted of count 2 for mistreating the horse. Leister subsequently retained this attorney, William Ginsberg, for the sentencing hearing and for postconviction proceedings.[1] Leister was sentenced to five months in the Sauk County Jail. (R.108 at 52:18 – 24) His sentence was subsequently stayed pending appeal. (R.82 at 1)

Leister filed a postconviction motion alleging multiple errors; most notably that the court failed to ascertain whether Leister had voluntarily waived his right to trial and was competent to proceed pro se as required by *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). (R.85 at 1)[2] The State declined to file a written brief or response to the post-conviction claim.

The court held the postconviction motion hearing on 01/24/20. (R.109 at 1 – 29) Ginsberg began by quoting from Justice Abrahamson's concurrence in the *Klessig* case, stating that "…when the record is devoid of any indication that the defendant was apprised of his rights he was forgoing…its hard to conceive of a meaningful inquiry that would reveal a knowing and voluntary waiver…where the record is inadequate to establish waiver of a constitutional entitlement, there is simply no waiver." *Id.* at 2:23 – 3:10. Ginsberg further argued that under *Klessig*, the State was required to prove by clear and convincing evidence that Leister's waiver

[1] For the remainder of this brief, this attorney will refer to himself in the third person.

[2] Attorney Ginsberg also filed a supplemental motion alleging numerous trial errors. (R.88 at 1 – 2) However, Ginsberg ultimately decided to focus on the strongest issue, the court's failure to conduct a *Klessig* colloquy. It is notable that the State and the trial court declined to follow the *Klessig* requirements yet instead argued that Leister was highly experienced and competent as a pro se litigant. Yet Leister's inexperience was apparent at the jury instruction conference as noted in the supplemental motion. *Id.* at 2.

of counsel was knowing, intelligent, and voluntary. *Id.* at 3:11 – 25.

Ginsberg reiterated that at no point during this case was there a *Klessig* colloquy. *Id.* at 4:1 – 13. Ginsberg argued there was a clear record that Leister asked for delays and set-overs because he wanted to get a lawyer. *Id.* at 4:16 – 20. Ginsberg further stated that there was never any hearing after Attorney Rolf motioned to withdraw from the case. *Id.* at 4:21 – 5:7. Ginsberg argued Leister didn't have a clue as to what he was doing regarding calling witnesses or eliciting testimony. *Id.* at 7:10 – 15. After establishing the record that there wasn't a *Klessig* colloquy, Ginsberg invited that State to call Leister to the stand. *Id.* at 7:22 – 8:4.

The State declined the offer. Assistant District Attorney Dennis Ryan explained that he didn't respond in writing because "I kept on running into a wall on how silly this is." *Id.* at 8:6 – 10. Ryan conceded that there was some merit to Ginsberg's submission, but then seemed to indicate that it was dishonest to address it. *Id.* at 8:11 – 19. Ryan asked how it could be that Leister could claim harm in this loophole. *Id.* at 8:20 – 9:8. Ryan stated "I cannot totally articulate within the law why this motion should be denied…" *Id.* at 10:18 – 19. However Ryan expressed shame that it was necessary to hold the hands of a 60 year old man with a gargantuan history in the courts. *Id.* at 11:1 – 4. Ryan finished his argument saying "…the state is always willing to fall on it's own sword. It's difficult though when that sword is placed in your back…" *Id.* at 11:5 – 8.

Ryan's argument, though poetic at times, never addressed the central issue of the motion, whether Leister knowingly, intelligently, and voluntarily waived his right to

counsel. Ryan did not introduce any exhibits or testimony during the hearing.

In making its ruling, the court differentiated Leister from Klessig, arguing in effect that Leister was more experienced. *Id.* at 11:9 – 13:17. Ginsberg objected unsuccessfully that the court was referring to matters outside the record. *Id.* at 12:12 – 13:17. The court stated that Leister declined to accept a waiver of right to an attorney form. *Id.* at 13:18 – 24. Ginsberg argued that Leister didn't take the form because he didn't want to waive his right to a lawyer. *Id.* at 15:5 – 9. The court argued that Leister understood what his defenses were and that he was very good at asking the appropriate questions of each and every witness. *Id.* at 22:3 – 13. The court denied Leister's motion without addressing its failure to conform with the *Klessig* requirements. Leister appeals both the conviction and the court's denial of his postconviction motion. (R.94)

ARGUMENT

1. **The trial court erred by failing to ascertain before trial that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se.**

The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served. *State vs. Klessig*, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997), citing *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This protecting duty imposes the serious and

weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

In *Pickens v. State*, 96 Wis. 2d. 549, 292 N.W.2d 601(1980), The Supreme Court of Wisconsin held that "…in order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found." *Pickens* at 563 – 564. The *Pickens* court also stated "When a defendant expresses a desire to proceed pro se, the trial court should examine him on the record to determine not only whether his waiver of counsel is knowing and voluntary, but also to determine whether he possesses the minimum competence necessary to conduct his own defense." *Id*. at 568 – 569.

In *Klessig*, the Supreme Court of Wisconsin overruled *Pickens* to the extent that it mandated… "the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." *Klessig*, 211 Wis. 2d 194, 206. The *Klessig* court further stated "Conducting such an examination is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions." *Id*. Furthermore, the *Klessig* court affirmed *Pickens* in that the trial court must also determine the defendant's competency to represent himself, and that there was a higher standard for

determining whether a defendant is competent to represent oneself than for whether a defendant is competent to stand trial. *Id* at 212.

In the instant case, the trial court utterly failed to follow the requirements mandated by *Klessig*. The only time Leister waived his right to an attorney was solely for the purpose of having an initial appearance. (R.97 at 4:21 – 5:1) In multiple subsequent hearings, Leister time and time again explained his efforts to obtain counsel. At one point, the court offered Leister a waiver of right to an attorney form, but Leister politely declined because the record clearly showed that he still wanted to obtain counsel. (R.99 at 1 – 6)

In fact, Leister ultimately retained Attorney Rolf to represent him, but for reasons that are not apparent from the record, Rolf withdrew from the case without any hearing. (See R.10, R.11, and R.12) Leister subsequently represented himself through the jury trial. At no point did the trial court conduct any sort of colloquy as to whether Leister wanted to represent himself or whether he was competent to do so. The court indisputably failed in this regard.

2. **The State failed to establish by clear and convincing evidence at the postconviction motion hearing that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se.**

When an adequate colloquy is not conducted, and the defendant makes a motion for a new trial or other postconviction relief from the circuit court's judgment, the circuit court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent and voluntary. *Klessig*, 211 Wis. 2d 194, 206 – 207. Additionally, the State is required to prove by clear and

convincing evidence that the defendant's waiver of counsel was knowing, intelligent and voluntary. *Id.* at 207. If the State is unable to establish by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his right to assistance of counsel, the defendant will be entitled to a new trial. *Id.* The *Klessig* court also directed the circuit court to determine whether it could make a nunc pro tunc inquiry into the question of whether the defendant was competent to proceed pro se and, if so, hold a meaningful hearing. *Id.* at 213. If the circuit court finds that a meaningful hearing cannot be conducted, or that the defendant was not competent to proceed pro se, then the circuit court must grant the defendant a new trial. *Id.*

Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case, which is reviewed independently of the circuit court. *Id.* at 204, citing *State v. Woods*, 117 Wis. 2d 701, 715 – 716, 345 N.W.2d 457 (1984).

In the instant case, the State did not even try to meet its burden. Instead, Assistant District Attorney Dennis Ryan expressed contempt and disgust that the motion was being litigated in the first place. Ryan conceded that there was legal merit to the postconviction motion. (R.109 at 8:11 – 13). Ryan implied that absent a clear colloquy that the court could look at "…the totality of persistence by a pro se defendant…"; but then immediately admitted that *Klessig* did not allow for that. *Id.* at 9:9 – 21. Ryan stated that he could not articulate within the law why the motion should be denied, but instead complained that it was necessary to hold the hand of a 60 year old man with a gargantuan history in the courts. *Id.* at 10:18 – 11:4.

Although Ryan made multiple statements implying that Leister was an able litigant, Ryan did not present any evidence, nor even an argument, that Leister knowingly, intelligently, or voluntarily waived his right to counsel. While it may be understandable that Ryan was frustrated by the position in which he found himself in, that frustration did not relieve him of his burden of proof as demanded by *Klessig*.

Yet despite the State's utter abandonment of its burden, the circuit court, absent any evidence apparent from the record, ruled in the State's favor. The court devised a new test not prescribed by *Klessig*; that the court was to retroactively consider Leister's relative experience in the courtroom. *Id*. at 11:9 – 24. Ginsberg vigorously objected to the court referring to Leister's previous cases. *Id*. at 12:17 – 13:8. The court specifically referred to Sauk County 04CM427 and 04CF172. There is no indication that any transcripts from these cases were prepared, or what evidence the court relied on beyond CCAP entries. If the court had in its possession transcripts or waiver of attorney forms from prior cases, the court chose not to put these documents in the record. Additionally, there was no acknowledgment that these cases occurred 13 years before the alleged conduct in the instant case, and that Leister's knowledge and / or abilities may have deteriorated.

Worst still, the court completely ignored the totality of the record from a return hearing where Leister declined to take a waiver of right to an attorney form. (R.99 at 1 – 6) Leister made it very clear at the hearing that he was contacting multiple law firms to represent him. *Id*. at 3:3 – 4:5. Leister politely declined the form because he wasn't waiving his right to an attorney, and therefore the form wasn't needed. The fact that he ultimately hired an attorney proves

this. That was the logical choice for Leister to make. Yet the court twisted the meaning of that choice and instead seemingly held that by declining the form, Leister therefore waived the court's duty to insure at subsequent proceedings that Leister knew the advantages and disadvantages of proceeding without an attorney. (R.109 at 24:14 – 25:8)

At the postconviction motion hearing, neither the State nor the court put forth any evidence, either through testimony or documents, that Leister knowingly, intelligently, or voluntarily waived his right to an attorney. Neither the State nor the court put forth any evidence, either through testimony or documents, that Leister understood the advantages and disadvantages of proceeding pro se. The State never attempted to meet its burden of proof. The court seemed to rely on some CCAP entries while obviously misinterpreting Leister's decision to decline a waiver of attorney form.

This was an evidentiary hearing without evidence. The State's contempt for Leister blinded it to its duties. The court erred in finding that the State met its burden, compounding its earlier error in failing to hold a *Klessig* colloquy in the first place.

CONCLUSION

The Supreme Court of Wisconsin mandated the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel. *Klessig* at 206. The court did not follow this mandate. In instances where no colloquy was given, the *Klessig* court also mandated an evidentiary hearing where the State has the burden of proof that the waiver of counsel was knowingly, intelligently, and voluntarily given. *Id.* at 206 – 207. The State did not follow this mandate and the court erred in blaming the defendant for the State and the court's

own failures. Consequently, pursuant to *Klessig*, Leister is entitled to a new trial. *Id*. at 214.

Therefore, Leister moves this Honorable Court to vacate the conviction and sentence entered in this matter and to remand the case for a new trial.

Respectfully submitted this 27th day of May, 2020

____

Attorney Bill Ginsberg
Attorney for the Defendant – Appellant
State Bar ID: 1006779

Please note: Attorney Michael Covey, State Bar ID 1039256, assisted in the drafting of this brief.

CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 4092 words as counted by the commercially available Microsoft Word Processor.

____

Attorney for the Defendant-Appellant

CERTIFICATION OF ELECTRONIC FILING

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.

____

Attorney for the Defendant-Appellant

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

____

Attorney for the Defendant – Appellant

TABLE OF CONTENTS – APPENDIX

Criminal Complaint……………………………………101

Trial Attorney Withdraw Documents……………….104

Amended Judgment of Conviction………………….107

Postconviction Motion………………………………109

Postconviction Motion Transcript……………..……111