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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 DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
THE HONORABLE PATRICIA A. BARRETT, PRESIDING

Sauk County Case No. 2017CM00057

PLAINTIFF-RESPONDENT'S BRIEF

Respectfully submitted by:

Dennis J. Ryan
Assistant District Attorney
Sauk County District Attorney's Office
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913
Office: (608) 355-3280
Fax: (608) 355-3282
Email: dennis.ryan@da.wi.gov
State Bar Number: 1025653
Attorney for Plaintiff-Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, does not request oral argument or publication.

PLAINTIFF-RESPONDENT'S STATEMENT OF THE CASE AND FACTS

At issue on appeal is whether or not reversible error occurred when 1) the trial court failed to exercise a colloquy with the defendant (Leister) regarding his right to counsel as balanced against his choice to represent himself; and 2) whether or not the trial court's subsequent finding that Leister freely, voluntarily and knowingly waived his right to counsel is also in error.

On November 22, 2017, Leister was charged in a Sauk County two-count Criminal Complaint with Intentionally or Negligently treating two animals in a cruel manner, contrary to §§ 951.02 and 939.51(3)(a), Wis. Stats. The matter eventually was tried before a Sauk County jury on January 8 and 9, 2019. While Leister had retained counsel to represent him in May of 2018, that tenure was short-lived and counsel was allowed to withdraw on August 8, 2018. Between that date and the selection of a jury, numerous judges queried Leister as to his intentions on retaining successor counsel; Leister neither hired new counsel nor took advantage of pursuing the process by which a local attorney could be appointed to represent Leister at county expense. Multiple hearings ensued prior to the jury trial before Judge Patricia Barrett, Sauk County Circuit Court Branch 3. Leister filed numerous motions prior to trial, produced his own witnesses and defense exhibits, and cross examined witnesses testifying for the State. Leister also chose to make his own opening and closing statements to the jury, along with his own petition for specific jury instructions. Leister was acquitted of Count 1 of the Criminal Complaint and found guilty of Count 2. On January 16, 2019, Leister hired Attorney Ginsberg to represent him at sentencing, which was scheduled for January 17, 2019. Attorney Ginsberg requested that sentencing be adjourned in order to better familiarize himself with the facts of the case and sentencing was rescheduled to January 23, 2019. Leister appeared with Attorney Ginsberg on that date and both sides presented arguments to Judge Barrett. Attorney Ginsberg notified the court that Leister was not in favor or serving probation. Accordingly, Judge Barrett imposed a sentence of five (5) months in the Sauk County Jail to commence on or before April 8, 2019. Judge Barrett also revoked Leister's signature bond and imposed a cash bond in the amount of Five Hundred ($500) dollars. Numerous stays of this sentence have been granted owing to the appeal filed by Leister.

ARGUMENT

Leister contends that the jury verdict, as well as the intervening events which took place in this case between November 22, 2017 and his subsequent sentencing on January 23. 2019, are subject to dismissal due to judicial error. Leister asserts that the error in not being adequately advised of his rights to counsel versus his right to represent himself should be grounds to obliterate the verdict and subsequent five month jail sentence (yet unserved) he received. Leister decries the trial court for not only failing to advise him of his right to counsel but especially for agreeing with the State that the entire record in this case must be considered beyond the mandate in *State v. Klessig*, 211 Wis. 2d 194, in determining whether or not Leister was competent to represent himself. Leister argues first that no colloquy regarding his competency to represent ever took place; the State agrees, and has previously conceded, that while the record in this case is fully stitched with inquiries from the three judges who participated in various return or unduly prolonged status hearings in this case prior to final jury selection, a record was made which solidified Leister's intention and competency to represent himself. Failing the exercise of a formal colloquy between the court and a defendant who wishes to proceed pro se, *Klessig* proffers a remedy for those defendants who have not had the benefit of a colloquy regarding the pitfalls of proceeding without a lawyer's assistance: should a defendant make a motion for post-conviction relief, the court must hold an evidentiary hearing to determine whether the waiver of counsel was knowing, intelligent, and voluntary. (*Klessig* at 207). At that hearing, the circuit court must determine whether a defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. If the answer to the question is yes, the circuit court must next determine whether the defendant was indeed competent to represent himself. If the answer to this question is also yes, the conviction must stand. If, however, the answer to either question is no, a defendant is entitled to a new trial. (*Klessig* at 209).

The trial court did conduct such a hearing in the absence of a specific colloquy to Leister regarding his willingness and competency to proceed on January 24, 2020, one year after Leister had been sentenced to five months in jail for a Class A Misdemeanor offense. Leister argued that the absence of any colloquy as mandated by *Klessig* in and of itself proved a failure by the court to truly determine Leister's willingness and competency to act as his own lawyer. The State responded that the entire record of this case must be taken into account in order for that finding to be fairly made: the efforts put forth by Leister while acting as his own attorney, his refusal to hire successor counsel or even to apply for legal representation at county expense, pre-trial motions, continuous demands for set-overs and delays. The State also relied on Leister's performance at his own trial whereby Leister succeeded in having himself acquitted of Count 1 in the Criminal Complaint. Attorney Ginsberg chided the State for not calling any witnesses to buttress its argument, especially since Leister was present and presumably willing to testify to his utter lack of desire to represent himself. The State declined to do so, choosing to rest on the entire record in this case and Leister's active, forthright measures taken to not only assert his own theory of the case but to prove his innocence.

For his part, Leister succeeded in achieving that goal by one-half.

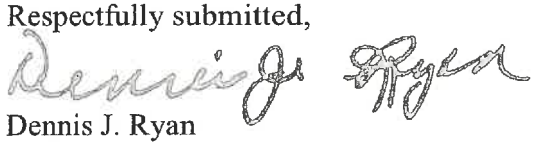
The trial court agreed that an acknowledgment of the entire record in this case was a necessary component in determining whether or not Leister's choice to proceed as his own barrister was freely, voluntarily, and intelligently made. For all the reasons expressed in its decision and providing a catalogue of pro-active measures exercised by Leister as his own counsel (the filing and arguing of motions, the submission of witness lists, the cross examination of the State's witnesses and testifying on his own behalf, etc.) the court also found that Leister was competent to represent himself. Like the State, the court chose not to isolate Leister's deliberate choice to represent himself in a vacuum, but to assess it within the wider and more accurate frame of Leister's purposeful actions throughout this case both prior to and within the actual seating of a jury.

CONCLUSION

For all the reasons expressed above, and resting upon the entire record available in this case, the State submits that the trial court did not err in finding that Leister's decision to represent himself was freely, voluntarily, and intelligently made. The finding that Leister was competent to represent himself is also beyond error. Appellant-Defendant's motion should be denied. The order of the trial court should be affirmed.

Dated this 3r[d] day of August, 2020.

Respectfully submitted,



Dennis J. Ryan
Assistant District Attorney
Sauk County District Attorney's Office
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913
Office: (608) 355-3280
Fax: (608) 355-3282
Email: dennis.ryan@da.wi.gov
State Bar Number: 1025653
Attorney for Plaintiff-Respondent

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 length of this brief is 1, 529 words.

Dennis J. Ryan
Assistant District Attorney
Sauk County, Wisconsin

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 3rd day of August, 2020.

Dennis J. Ryan
Assistant District Attorney
Sauk County, Wisconsin