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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

CASE No. 2020AP000365 CR

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**STATE OF WISCONSIN,**  
Plaintiff-Respondent,

v.

**JERRY A. LEISTER,**  
Defendant-Appellant

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**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**

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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Wisconsin case

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

### SUMMARY OF THE ISSUES

On 05/27/20, Leister submitted his brief requesting that this Court of Appeals vacate Leister's conviction and sentence for mistreatment of an animal. Leister asserts the circuit court failed to ascertain before trial that he knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se. (Leister Br. at 6 – 8) This colloquy is mandated by *State v. Klessig*, 211 Wis. 2d 194, 206. Additionally, Leister argued the State failed to establish by clear and convincing evidence at the postconviction motion hearing that he knowingly, intelligently, and voluntarily waived his right to counsel and was competent to proceed pro se. *Id.* at 8 – 11.

The State's filed its response on 08/3/20. The State asserts the trial court found Leister's choice to proceed pro se was established as part of a pattern of behavior from prior proceedings. (State Br. at 2 - 3) The State asserts the court properly exercised its discretion in denying Leister a new trial. *Id.* Additionally, the State asserts that Leister was competent to proceed pro se based on Leister's performance at trial. *Id.*

The State relies entirely on conclusionary assertions. The State's brief does not contain a single cite to the record which it purportedly relies on. Additionally, the State ignores a crucial fact; that *Klessig* assigned the burden of proof at the postconviction motion to the State to show by clear and convincing evidence the defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. *State v. Klessig*, 211 Wis. 2d 194, 207.

The State does not admit error. Yet the State failed to address the *Klessig* requirements. Worse, the State also failed

to introduce any facts to support its arguments. For these reasons, Leister's request for relief should be granted.

### ARGUMENT

**1) There is no evidence that Leister knowingly, intelligently, and voluntarily waived his right to counsel.**

In *State v. Klessig*, 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*, 211 Wis. 2d 194, 206. Furthermore, the *Klessig* court stated that the trial court must determine whether the defendant was competent to represent him or herself. *Id.* at 212. The *Klessig* court stated that the level of competency to represent oneself is higher than the level of competency to stand trial. *Id.* Where there was no colloquy, and upon motion of the defendant for a new trial, the circuit court must hold an evidentiary hearing on whether the waiver of right to counsel was knowing, intelligent, and voluntary. *Id.* at 206 – 207. The State is required to prove this by clear and convincing evidence. *Id.* at 207. If the State does not meet its burden, then the defendant is entitled to a new trial. *Id.*

It is undisputed that the court did not hold a *Klessig* colloquy during the pendency of this case. The State concedes this. (State Br. at 2) However, the State argues that the record from various return and status hearings, when “stitched” together, “...solidified Leister's intention and competency to represent himself.” *Id.* The State fails to cite to any portion of the record to back up its assertion. There is nothing in the record from any proceeding in this case where a judge had anything resembling a colloquy or discussion about the disadvantages of self-representation.

Moreover, the record is clear that Leister wanted to obtain an attorney and that he made multiple attempts to do so. (Leister Br. at 2 – 3) On the 01/17/18 return date, Leister explained that he had contacted two law firms. (R.98 at 2:5 – 5:2) At the second return date on 02/08/18, Leister stated he needed more information, but he still indicated his desire to get an attorney. (R.99 at 2:8 – 13) At the third return date on 03/06/18, Leister again explained that he had contacted law firms, but he still needed some more time. (R.100 at 2:14 – 22) At the fourth return date on 03/20/18, Leister again expressed his desire to get an attorney. (R.101 at 4:15 – 25) Leister subsequently retained Attorney Kara Wolf but she was allowed to withdraw without a hearing after alleging that Leister did not comply with his representation and fee agreement. (R.10 at 1, R.11 at 1, and R.12 at 1) Although the State claims this record “solidifies” Leister’s intention to proceed without an attorney, the transcripts indicate the opposite.

At the postconviction hearing, the State did not put forth any evidence to satisfy its burden of proof. (R.109 at 1 – 29) The State argues that the entire record of the case must be taken into account. (State Br. at 2) The State does not cite to any portion of the record, but instead makes a list of purported factors as follows: Leister’s pro se efforts in the case, his refusal to hire successor counsel, his failure to apply for a court ordered attorney, his pre-trial motions, his continuous demands for set overs and delays, and his performance at trial. *Id.*

There is no explanation as to why these factors support the State’s assertions. Moreover, the State’s argument blends together the two *Klessig* issues; the waiver of counsel and the ability to proceed pro se. These issues must be resolved separately, as each could be grounds for a new trial. Which

pre-trial motion does the State refer to? How is a request for a set-over relevant to the *Klessig* analysis? These arguments are completely undeveloped. Regrettably for the State's case, these arguments were even more undeveloped at the postconviction motion hearing. The State never attempted to meet its burden of proof. Instead it merely expressed disdain that the motion was filed in the first place. (R.109 at 8:6 – 19)

The State's seems to imply that Leister's motion has no merit because he was acquitted on count 1 at trial. (State Br. at 2 - 3) *See also* (R.109 at 10:3 – 10) Admittedly, an acquittal is relevant to a court's *nunc pro tunc* inquiry as to whether a defendant was able to proceed pro se. However, the State's undeveloped implication is not relevant at all to the question as to whether Leister knowingly, intelligently, and voluntarily waived his right to counsel before trial.

Additionally, Leister was certainly handicapped by proceeding pro se. For example, during the jury instruction conference, Leister was clearly confused about the concept of circumstantial evidence. (R.106 at 176:20 – 178:5) Leister did not know that the jury needed to present a unanimous verdict. *Id.* at 178:7 – 10. Leister seemed confused about the elements that the State needed to prove when he examined the verdict forms. *Id.* at 187:22 – 189:5. Leister was clearly at a disadvantage throughout the trial.

Furthermore, the State asserts the circuit court properly looked at the entire record in determining whether Leister knowingly, intelligently, and voluntarily waived his right to counsel. (State Br. at 3) Once again, the State fails to cite the portions of the record which the court relied on. *Id.*

At the postconviction hearing, Leister's attorney vigorously objected to the court referring to Leister's 2004

Sauk County cases without making a record of the specific facts the court relied on. (Leister Br. at 10) *See also* (R.109 at 12:17 – 13:8) The State’s brief fails to address this issue. The court also clearly misinterpreted Leister’s refusal of the waiver of attorney form. (Leister Br. at 10 – 11) *See also* (R.109 at 24:14 – 25:8) The State’s brief fails to address this issue. On the crucial issue as to whether the court held the State to its burden of proof, the State merely advises this Court of Appeals to look at the totality of the record. Unfortunately for the State, there is nothing in the record indicating that Leister knowingly, intelligently, and voluntarily waived his right to an attorney. The record only shows that Leister went to trial without one.

### CONCLUSION

The court failed to hold a *Klessig* hearing. At the postconviction hearing, the State did not even attempt to produce any evidence to meet its burden of proof that Leister knowingly, intelligently, and voluntarily waived his right to an attorney. Sadly, the circuit court did not hold the State to account for its failure. The State compounded its error by submitting an appellate brief which merely listed some undeveloped talking points without a single cite to the record. Worst of all, the State effectively ignored the *Klessig* requirements. For these reasons, Leister should be granted a new trial.

Respectfully submitted this 20<sup>th</sup> day of August, 2020

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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 1727 words as counted by the commercially available Microsoft Word Processor.

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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.

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Attorney for the Defendant-Appellant