

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0042-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. COMMON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
PETER NAZE, Judge. *Affirmed.*

¶1 CANE, C.J. Richard Common appeals from an order denying his motion for postconviction relief under WIS. STAT. § 974.06.¹ Common argues that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(continued)

the circuit court erred by determining that he knowingly, intelligently and voluntarily waived his right to the assistance of counsel, thus preventing Common from withdrawing his plea. This court concludes Common knowingly, intelligently and voluntarily waived his right to the assistance of counsel. The order is therefore affirmed.

BACKGROUND

¶2 In March of 1995, Common was charged with disorderly conduct, contrary to WIS. STAT. § 947.01. It is undisputed that Common did not qualify for a public defender appointment. Common ultimately filed a plea questionnaire and waiver of rights form stating, in relevant part: “I understand that I have a right to have an attorney represent me in this matter and that if I cannot afford an attorney, one may be appointed to represent me. I wish to go ahead without an attorney & represent myself.” The court then engaged Common in the following colloquy:

[Court]: Call the State of Wisconsin versus Richard Common, 95-CM-278. Assistant D.A. Dana Johnson on behalf of the State. Mr. Common appears in person.

Mr. Common, I would advise you that you are charged with having committed the crime of disorderly conduct. And that carries potential penalties of imprisonment for not more than 90 days and a fine of not more than \$1,000. Do you understand that?

[Common]: Yes, Your Honor.

[Court]: The bailiff has handed me a Plea Questionnaire and Waiver of Rights form, Mr. Common, you apparently filled out. There's a blank one on the table in front of you

After the time for appeal or postconviction remedy has expired, WIS. STAT. § 974.06 permits a prisoner in custody under sentence of a court to move the court that imposed the sentence to vacate, set aside or correct the sentence upon the grounds that the sentence was imposed in violation of the state or federal constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack.

if you'd like to follow along. On my copy, on the bottom of the second page is a signature, Richard J. Common, III. Is that your signature?

[Common]: Yes, it is.

[Court]: By signing that are you telling me that you've carefully read over the form and understand everything in it?

[Common]: Yes, I am.

[Court]: On the second page also at the top are the elements that make up the charge of disorderly conduct. Your initials appear next to them. Does that mean you understand those elements?

[Common]: Yes, I do.

[Court]: On the first page in the fifth paragraph are the constitutional rights that you have and that you'd be waiving or giving up by changing your plea. Have you carefully reviewed these, Mr. Common?

[Common]: Yes.

[Court]: And do you understand them?

[Common]: Yes, I do.

[Court]: And on the bottom of that page in the eighth paragraph are the rights that you have with respect to having an attorney represent you in this matter and having one appointed to represent you if you can't afford one. Do you understand those rights?

[Common]: Yes, I do.

[Court]: And it is your decision then, Mr. Common, to waive those rights and change your plea to the charge?

[Common]: Yes, Your Honor.

[Court]: And how do you wish to plead?

[Common]: No contest.

[Court]: Have you read over the facts in the complaint against you?

[Common]: Yes, I have.

[Court]: And are those facts accurate?

[Common]: Yes.

[Court]: Mr. Common, do you have any questions at all about your decision to change your plea or waive your rights?

[Common]: No, I do not.

[Court]: Is there anything at all about the hearing that you feel you don't understand?

[Common]: No.

[Court]: All right. I'll enter written findings in the matter. I'll accept Mr. Common's plea and find him to be guilty.

¶3 Following his conviction, the court placed Common on one year's probation with various conditions. Common failed to comply with the court-ordered conditions, thus violating his probation. His whereabouts, however, remained unknown to his probation agent until March of 1999, at which time Common turned himself in. Common's probation was subsequently revoked, and he was sentenced to sixty days in jail with Huber privileges. The sentence was stayed pending appeal.

¶4 In October, Common filed a WIS. STAT. § 974.06 motion to withdraw his plea. At his postconviction hearing, however, Common testified he was unaware that he may have been eligible for court appointed counsel notwithstanding the fact that he was not eligible for a state public defender appointed counsel. He argued then, as he does now, that his right to counsel was not properly waived, thus resulting in a manifest injustice that permits him to withdraw his plea. After a hearing, the circuit court denied Common's motion and this appeal followed.

ANALYSIS

¶5 Whether Common knowingly, intelligently and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case, a question of law that we review independently of the circuit court. *See State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). Nonwaiver of the right to counsel is presumed unless waiver is affirmatively shown to be

knowing, intelligent and voluntary. *See id.* “The State has the burden of overcoming the presumption of nonwaiver.” *Id.* In order to prove 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.

Id. at 206. “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.” *Id.*

¶6 Here, the State concedes that the circuit court did not determine whether Common was aware of the difficulties and disadvantages of self-representation.² Thus, the colloquy was inadequate. Where an adequate colloquy is not conducted and the defendant makes a motion for a new trial or other postconviction relief, “the circuit court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary.” *Id.* at 206-07. The State must then prove by clear and convincing evidence that the defendant’s waiver of counsel was knowing, intelligent and voluntary. *See id.* If the State satisfies its burden, the conviction will stand. *See id.* If the State cannot satisfy its burden, the defendant will be entitled to a new trial. *See id.*

² We note that although the colloquy in the present case occurred in 1995, the mandates of *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), were not imposed until 1997. However, because the State does not dispute its application, this court will address the sufficiency of the waiver of counsel under *Klessig*’s requirements.

¶7 Claiming he was unaware that he may be eligible for court-appointed counsel, notwithstanding his ineligibility for a public defender, Common contends that he did not make a deliberate choice to proceed without counsel, and thus did not adequately waive his right to counsel. Common additionally contends that he was not aware of the difficulties and disadvantages of self-representation.

¶8 At the evidentiary hearing in this case, the circuit court found that a court commissioner had informed Common of his right to an attorney, Common had not only filled out a waiver of rights form, but also verbally expressed his understanding of the rights waived—specifically, his right to counsel. The court, quoting the transcript of the colloquy, stated:

Let me read again. I read page 3 of the sentencing transcript: “On the bottom of that page, on the 8th paragraph of the rights that you have with respect to having an attorney represent you in the matter, having one appointed to represent you if you can’t afford one. Do you understand those rights, Mr. Common?” “Yes, I do.”

Notwithstanding this discourse, the circuit court did not specifically explain that Common may have had a right to appointed counsel despite his ineligibility for a public defender. However, because this court agrees with the circuit court’s determination that Common, given his income and the nature of the offense charged, would have been ineligible for court-appointed counsel, any error was harmless.

¶9 This court has recognized that “there can be no equal justice where the kind of trial a person receives depends on the amount of money he or she has.” *State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). To that end, the public defender’s office is not the exclusive means of providing counsel

to indigent defendants. *See id.* Rather, there are situations “where a defendant does not meet certain indigency criteria, but nevertheless is unable to afford counsel.” *Id.* at 512. Whether the facts require the appointment of counsel is left to the sound discretion of the trial court. *See id.* at 514. This court has recognized:

A defendant who seeks appointed counsel must present evidence to the trial court of his or her assets, income, liabilities and attempts to retain counsel. The trial court is not required to conduct an independent inquiry but must ask enough questions of the defendant so that the trial court can decide the question of indigency or order the defendant to report further to the trial court on the issue of indigency. When the trial court is deciding the question of indigency, it must consider whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community.

Id.

¶10 At the postconviction evidentiary hearing, Common testified that he had contacted between four and six attorneys attempting to obtain representation, but was unable to afford the \$1,000 retainer. The circuit court, recognizing that Common may simply have been unlucky in his calls, noted that although the attorneys contacted may have required a \$1,000 retainer, many attorneys would not require that amount to defend a disorderly conduct case. The court further inquired as to Common’s financial situation at the time he sought to retain counsel. Common testified that he was married with one child and earned between \$30,000 and \$35,000 per year as a truck driver. His wife earned approximately \$20,000 per year. Common testified that the family was renting a home and leasing a car. They had no savings account but had a checking account for monthly bills.

¶11 This court agrees with the circuit court's determination that, based on Common's income and the nature of the offense, he did not qualify for court-appointed counsel. The failure to clarify the difference between a public defender and court-appointed counsel therefore constituted harmless error. With regard to Common's contention that he was unaware of the difficulties and disadvantages of self-representation, this court agrees with the circuit court's determination that Common's repeated attempts to retain private counsel evinced his awareness of the advantages of representation by counsel. Based on the record, this court concludes that Common knowingly, intelligently and voluntarily waived his right to counsel.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

