COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0810-CR **Cir. Ct. No. 01-CM-612**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. BALDAUF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] James M. Baldauf appeals from a postconviction order rejecting his motion to withdraw his plea of no contest to a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All statutory references are to the 1999-2000 version.

charge of disorderly conduct.[2] Baldauf argues that his plea was not knowingly, intelligently and voluntarily entered because he appeared pro se and did not understand that a lawyer could assist him. Baldauf additionally contends that his plea was defective because he was not advised of the federal firearms prohibition under 18 U.S.C.A. § 922 (2002). We reject Baldauf's arguments because the trial court specifically advised Baldauf that a lawyer could benefit him and because the federal firearms prohibition is a collateral, not a direct, consequence of the conviction. Therefore, we affirm the order denying Baldauf's motion to withdraw his plea.

PROCEDURAL HISTORY

¶2 The relevant facts are not in dispute. The State issued a complaint charging Baldauf with misdemeanor battery against his girlfriend pursuant to WIS. STAT. § 940.19(1). At the initial appearance on September 12, 2001, Baldauf appeared pro se. The trial court provided Baldauf with a copy of the complaint and advised him of the potential penalties. The court also advised Baldauf that he was entitled to be represented by an attorney and that an attorney would be appointed to represent him if he could not afford one. Baldauf confirmed that he understood this information, stated that he wished to proceed without an attorney, and entered a plea of not guilty. The trial court scheduled the matter for a pretrial conference on October 11, 2001, and a jury trial on October 16, 2001.

[2] Baldauf's notice of appeal also states that the appeal is taken from the judgment of conviction. However, Baldauf's appellate argument is directed entirely at the trial court's denial of his motion to withdraw his plea.

¶3 Baldauf failed to appear at the pretrial conference, and the trial court issued a warrant for his arrest. Baldauf was arrested on the warrant and next appeared pro se on October 16, 2001. The court set a new pretrial conference date of November 1, 2001, and a new jury trial date of November 13, 2001. The court released Baldauf on cash bail.

¶4 Baldauf appeared pro se at the November 1, 2001 pretrial conference. He confirmed that he still wished to proceed without an attorney and that he understood that an attorney would be appointed to represent him if he could not afford one. During this proceeding, the trial court specifically asked Baldauf, "You understand that an attorney would be of benefit to you?" Baldauf answered, "Yes." The court confirmed the jury trial date of November 13, 2001, and then told Baldauf, "I would strongly encourage you if you want a jury trial to retain counsel. It's very difficult to represent yourself in a jury trial, so I would strongly suggest that you contact and retain counsel before the scheduled jury date."

¶5 Baldauf again appeared pro se at the scheduled jury trial. The prosecutor opened the proceedings by advising the trial court that he and Baldauf had reached a plea agreement. The State reported that the battery charge would be reduced to disorderly conduct, that Baldauf would plead no contest to the charge, and that the State would recommend twenty months of probation with sixty days imposed and stayed confinement in the county jail as a condition of probation. Baldauf confirmed that this was the agreement he had struck with the State. Baldauf then entered a no contest plea to the reduced charge and the trial court followed with a plea colloquy with him. The colloquy did not allude to any potential consequences under the federal firearms prohibition statute. During the course of this colloquy, the court again asked Baldauf whether he understood that

an attorney would be of benefit to him. Baldauf again confirmed that he understood and that he wished to proceed without an attorney. Following the plea colloquy, the court approved the plea agreement, determined that the complaint stated a factual basis for the plea, and found Baldauf guilty. The court imposed a sentence in keeping with the plea agreement.

¶6 Postconviction, Baldauf, now represented by counsel, brought a motion seeking to withdraw his plea of no contest. Baldauf's motion stated that he did not understand "the potential benefits of counsel and the pitfalls of self-representation." This motion did not cite the federal firearms prohibition statute in support of Baldauf's request to withdraw his plea. However, the memorandum submitted by Baldauf in support of his motion did cite to this statute in further support of his plea withdrawal request.

¶7 At the hearing on the motion, Baldauf testified and the State and Baldauf's counsel presented their respective arguments. The trial court denied Baldauf's request to withdraw his plea. The court ruled that its colloquy with Baldauf was in compliance with the law and properly advised Baldauf about the benefits of a lawyer. The court also held that the federal firearms prohibition was a collateral, not a direct, consequence of the conviction and therefore the court was not required to warn Baldauf about this matter. Baldauf appeals.

DISCUSSION

¶8 Whether a defendant has knowingly, intelligently and voluntarily waived his or her right to counsel requires the application of constitutional principles to the facts of the case which we review de novo. ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). "Nonwaiver is presumed unless

waiver is affirmatively shown to be knowing, intelligent and voluntary." ***Id***. The State bears the burden of overcoming the presumption of nonwaiver. ***Id***.

¶9 Our supreme court held in ***Klessig*** that 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, and (4) was aware of the general range of penalties that could have been imposed. ***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***. Instead, the circuit court must conduct an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent and voluntary. ***Id***. at 206-07.

¶10 Under these principles, we summarily reject Baldauf's argument that he did not validly waive his right to counsel and did not understand the benefits that an attorney would provide. As early as the initial appearance, the trial court advised Baldauf of his right to counsel and that counsel would be appointed for him if could not afford one. When Baldauf responded that he understood these rights, the court asked him whether he nonetheless wanted to enter a plea without the assistance of a lawyer. Baldauf responded, "Yes."

¶11 The trial court pursued this topic with Baldauf at the pretrial conference, again asking Baldauf if he understood that he had the right to be represented by a lawyer and whether he wished to proceed without counsel. Baldauf confirmed that he understood his right to counsel and that he nonetheless wanted to proceed pro se. Most importantly to the issue on appeal, the court also asked Baldauf whether he understood that a lawyer would be of benefit to him.

Baldauf replied that he understood. Moreover, at the conclusion of this hearing the court urged Baldauf to retain counsel to represent him at the jury trial.

¶12 Finally, at the plea hearing the trial court engaged in a thorough and complete plea colloquy that complied in all respects with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and ***Klessig***. In particular, the court again confirmed that Baldauf was freely and voluntarily waiving his right to counsel and that he understood that a lawyer would be of benefit to him. In addition, the court confirmed that Baldauf could read and write and that he had completed high school.

¶13 In the face of this record, Baldauf's claim that he was confused and did not understand the proceedings rings hollow. As noted, the trial court's various colloquies with Baldauf repeatedly probed the matter of Baldauf's right to a lawyer and the benefits that a lawyer would bring to the case. None of Baldauf's responses suggested or indicated that he was confused or that he did not understand the proceedings or the advice provided by the court. Instead, his responses were cogent and appropriate. We hold that Baldauf freely, voluntarily and intelligently entered his plea of no contest in full recognition and understanding of his right to counsel and the risks of self-representation.

¶14 We also summarily reject Baldauf's further argument that he was entitled to withdraw his plea because the trial court did not warn him of the federal firearms prohibition under 18 U.S.C.A. § 922(g)(9). This federal statute makes it unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm.

¶15 This issue is directly governed by the court of appeals opinion in ***State v. Kosina***, 226 Wis. 2d 482, 595 N.W.2d 464 (Ct. App. 1999). There,

Kosina was convicted of disorderly conduct as the result of a domestic incident involving his wife. Kosina pled guilty and later sought to withdraw his plea because the trial court had failed to inform him of the federal firearms prohibition. The court of appeals rejected this argument. The court said that the federal prohibition was not "an automatic consequence of Kosina's plea because the application of his misdemeanor disorderly conduct conviction to the federal statutes' scope remains open and must be resolved before the statute's firearm prohibition takes effect." ***Id***. at 487. The court noted that "the trial court made no explicit factual determination that Kosina's disorderly conduct conviction was related to domestic violence." ***Id***. In this case, the criminal complaint merely alleges a battery by Baldauf against his girlfriend. It does not reveal that Baldauf was "cohabiting with or has cohabited with the victim as a spouse" pursuant to 18 U.S.C.A. § 921(a)(33)(A)(ii). Moreover, the trial court did not make any explicit finding that this was a case of domestic violence.[3]

¶16 The ***Kosina*** court also held, in the alternative, that even if the federal statute automatically applied to the disorderly conduct conviction because it involved domestic violence, the firearms prohibition was nonetheless a collateral, not a direct, consequence of the plea. ***Kosina***, 226 Wis. 2d at 488. The court said a direct consequence is one that has a "direct, immediate, and automatic *effect on the range of Kosina's punishment* for disorderly conduct." ***Id***. The court further reasoned, "[b]ecause the prohibition to possessing a firearm arises from a body of law that is collateral to the state court proceedings, any consequence arising under

[3] We concede that at the hearing on Baldauf's motion to stay the sentence pending the hearing on his motion to withdraw the plea, the State represented that this was a domestic incident. However, as in ***State v. Kosina***, 226 Wis. 2d 482, 595 N.W.2d 464 (Ct. App. 1999), the trial court never made any explicit finding on this point.

that law must also be collateral." ***Id***. Therefore, even if we were to assume that Baldauf's disorderly conduct conviction resulted from a domestic violence incident, he still is barred from withdrawing his plea under ***Kosina*** because any application of 18 U.S.C.A. § 922(g)(9) is collateral to Baldauf's disorderly conduct conviction. Therefore, the trial court was not required to advise Baldauf of the federal firearms prohibition.

CONCLUSION

¶17 We hold that Baldauf's plea of no contest was freely, voluntarily and intelligently made with full knowledge of his right to counsel and the risks of self-representation. We also hold that the trial court was not required to advise Baldauf of the federal firearms prohibition. We affirm the order denying Baldauf's motion to withdraw his no contest plea.

By the Court.—Judgment and order affirmed.

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