Appeal No. 2010AP2273-CR **Cir. Ct. No. 2009CF28**

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON ANTHONY SOTO,

DEFENDANT-APPELLANT.

FILED

May 17, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine whether Jon Soto's statutory right to be physically present during a plea hearing was violated when the judge conducted the hearing through video teleconferencing and whether this issue was properly preserved.

BACKGROUND

Soto was charged with numerous felonies in Trempealeau County. Pursuant to a plea agreement, he pled guilty to second-degree recklessly endangering safety with a dangerous weapon. Soto, his attorney, and the State's attorney appeared at the Trempealeau County Courthouse. The judge, however, communicated through video teleconferencing from the Jackson County Courthouse. At the start of the hearing, the court asked Soto's counsel whether he was satisfied conducting the plea hearing by video teleconferencing. Counsel answered, "Yes." The court then asked, "[A]nd, Mr. Soto, is it alright with you

that we are doing this plea hearing by video teleconferencing?" Soto answered, "Yes, sir."

Following his conviction, Soto filed a motion to withdraw his guilty plea, arguing that conducting the plea hearing via video teleconferencing violated WIS. STAT. § 971.04(1)(g) (2009-10)[1] and Soto's due process rights.[2] The circuit court denied the motion. Its language suggests that Soto waived or forfeited his claim by agreeing to the video teleconference and that any error was harmless. It found the technology allowed the court to clearly see Soto, defense counsel and the State's attorney all at the same time. Soto and his counsel were also able to clearly see the court. The court concluded that Soto had the burden of establishing how the technology used denied him a fair and just hearing, and it could not imagine any different outcome from being present in the same place as Soto and his counsel.

DISCUSSION

WISCONSIN STAT. § 971.04(1)(g) provides that a defendant "shall be present" at the pronouncement of judgment and the imposition of sentence. "Present" means "physically present." ***State v. Vennemann***, 180 Wis. 2d 81, 93, 96, 508 N.W.2d 404 (1993). In ***State v. Peters***, 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, this court held that a plea taken via closed-circuit television

[1] All references to the Wisconsin Statutes refer to the 2009-10 version unless otherwise noted.

[2] The court did not differentiate in its ruling between Soto's statutory claim and his constitutional claim. Soto abandoned the due process argument on appeal.

violates WIS. STAT. § 971.04(1). In ***State v. Koopmans***, 210 Wis. 2d 670, 672, 679, 563 N.W.2d 528 (1997), the court held that a defendant may not waive his statutory right to be present.

In 2008, the supreme court created rules on the use of video conferencing and adopted WIS. STAT. § 885.60[3] to govern the use of

[3] WISCONSIN STAT. § 885.60 provides in its entirety:

> Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980.
>
> (1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding.
>
> (2)(a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.
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> (b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.
>
> (c) If an objection is made by the plaintiff or petitioner in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.
>
> (d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), the court shall sustain the objection.

teleconferencing technology in criminal cases. Subsection (1) allows the circuit court to permit the use of video conferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding. Subsection (2)(a) provides that, except as may otherwise be provided by law, a defendant in a criminal case is entitled to be physically present in the courtroom at all critical stages of the proceedings, including plea hearings at which a plea of guilty will be offered. Subsection (2)(b) creates procedures relating to a witness testifying via video conferencing technology. Subsection (2)(c) gives the court discretion regarding the use of video conferencing if an objection is made by the plaintiff or petitioner. Subsection (2)(d) gives a defendant in a criminal case veto power over conducting a plea hearing by video conferencing.

The State concedes that Soto's argument "might have some force prior to adoption of the video conferencing rules." However, the State asserts that the adoption of WIS. STAT. § 885.60 supersedes the holding in ***Koopmans***, and allows a defendant to waive or forfeit his right to be physically present at a plea hearing.

Soto contends that WIS. STAT. § 885.60(2)(a) mirrors WIS. STAT. § 971.04(1) as interpreted and does not modify it. He supports that argument with the supreme court's comments and an article published by one of the drafters of the subchapter indicating that the new teleconferencing rule was meant to preserve a defendant's existing rights. Soto argues that subsection (2)(a) is a complete exception to the general rule of subsection (1) and the provisions of subsection (2)(d) only make sense in reference to the objection discussed in subsections (2)(b) and (2)(c) which refer to witnesses' testimony, not a criminal defendant's physical presence.

Soto also argues that even if Soto's right to physical presence can be waived or forfeited, the court should have conducted a formal colloquy to fully inform Soto of his rights before accepting any waiver. The State contends that the requirement for a colloquy before waiver of a right applies only to a constitutional right, and Soto's renunciation of his statutory right is merely a forfeiture of the right for which no colloquy was necessary.

Finally, the State argues that any error in conducting the hearing by video conferencing was harmless because the quality of the technology was much better than the defective technology used in earlier cases. Soto replies that the State cannot meet its burden of proving harmless error because it is impossible for the court to know whether it has seen and heard everything that occurred in the courtroom when it was not physically present in the same room as the parties.

We certify this appeal to the Wisconsin Supreme Court to determine whether WIS. STAT. § 885.60 modifies the case law interpreting WIS. STAT. § 971.04. We also request that the court clarify whether forfeiture or waiver applies and, if forfeiture, whether Soto's agreement was sufficient, and if waiver, must the court conduct a more thorough colloquy. This court cannot overturn existing precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We assert that only the supreme court can resolve a conflict between its rule and its existing precedent. The supreme court is in the best position to interpret its own rule. In addition, courts are increasingly using video technology as the technology improves. Video conferencing can save circuit courts' time, travel, and expense and, in some situations, enhance court security and public safety. Resolution of these issues would assist the circuit courts in determining the proper use of video conferencing technology for taking guilty or no contest pleas.