COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0180-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY J. MUSCHINSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed.*

MYSE, P.J. Jeffrey J. Muschinske appeals a judgment of conviction and an order denying his motion to withdraw a previously entered plea of guilty to one count of possession of cocaine and one count of possession of drug paraphernalia contrary to §§ 961.41(3g)(c) and 961.573(1), STATS. Muschinske claims that his plea colloquy with the court was constitutionally inadequate because the court did not adequately advise him of the consequences of

his decision to waive counsel. Because this court concludes that the plea colloquy was adequate, the judgment and order denying the motion to withdraw his plea are affirmed.

The charges stem from a traffic stop by Lincoln County Deputy Sheriff B. J. Kingsley, who was advised that an anonymous caller had complained a semi-truck was "all over the road" and that "cars had to swerve to avoid a crash." In response to this complaint Kingsley stopped a semi-trailer driven by Jeffrey Muschinske on Highway 51 in Lincoln County. Kingsley administered field sobriety tests, which Muschinske failed, although preliminary breath tests indicated he had no alcohol in his system. Muschinske was arrested for operating under the influence of a controlled substance. The subsequent search of the truck disclosed a small mirror, a razor blade, and a small amount of white powder that was ultimately determined to be cocaine.

A blood test disclosed no blood alcohol, but instead disclosed levels of propoxyphene and norpropoxyphene and trizolam. The first two are prescription painkillers, while the third is an anti-depressant. Evidence suggests that the combination of these drugs could have produced drowsiness, mental confusion, temporary amnesia or blackout.

Muschinske appeared in court the next morning without counsel and pled guilty to both charges. After engaging in the plea colloquy, Muschinske was found guilty of both charges. Subsequently, Muschinske filed a motion alleging the plea colloquy was inadequate and requested that his guilty pleas be withdrawn. In support of the motion, Muschinske asserted that he was denied his right to counsel and that he failed to understand the seriousness of the charges and the

disadvantages of self-representation. The circuit court denied the motion, and this appeal ensued.

A plea may be involuntary if (1) a defendant makes a prima facie showing that his plea was accepted without the trial court's conformance with § 971.08, STATS., and other court-ordered duties; and (2) a defendant does not fully understand the nature of the charges against him or his right to be represented by counsel. Section 971.08, STATS.; ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). If the plea colloquy is constitutionally infirm, it provides a basis for the withdrawal of the plea. ***State v. Klessig***, 211 Wis.2d 194, 206, 564 N.W.2d 716, 721-22 (1997). Whether the plea is voluntarily made is reviewed as a question of constitutional fact without deference to the trial court's determination. ***State v. Van Camp***, 213 Wis.2d 131, 140, 569 N.W.2d 577, 582 (1997). The burden of proving a voluntary and knowing waiver is upon the state once a defendant satisfies his initial burden. ***Bangert***, 131 Wis.2d at 278, 389 N.W.2d at 28. The court has a specific responsibility for advising a defendant of the consequences of a proposed waiver of his right to counsel. ***Klessig***, 211 Wis.2d at 206, 564 N.W.2d at 721.

When Muschinske appeared in court the following plea colloquy took place:

> THE COURT: You have the right to have an attorney representing you. An attorney is trained in the law and might find a defense to these charges or find facts which would lessen any penalty that would be imposed if you were found guilty.
>
> If you want to have an attorney and feel you can't afford one, you can ask the State Public Defender's Office to appoint one for you. If you're eligible, they will do so.
>
> In addition to that, if they find you are not eligible for a Public Defender to represent you and you still feel you

> can't afford to hire your own attorney, you can ask for some help through the Judge by going to the attorney that you want to have representing you and having that attorney write me a letter explaining why you feel you can't afford their services and explaining your economic circumstances and requesting whatever help is going to be requested. The Court would then—the Judge would then take a look at that and make a decision as to what, if any, help would be given to you. You have those options open to you.
>
> If you'd like to talk with an attorney before you're asked to enter a plea to these charges, the court will give you an opportunity to do that.
>
> Do you want to talk with an attorney first?
>
> MR. MUSCHINSKE: No, thank you.

Muschinske contends that the plea colloquy was inadequate because the specific consequences of waiving his right to counsel were not adequately explained. Muschinske contends that he should have been advised that self-representation is unwise, that the rules governing courtroom procedure would have applied to him and he would have to abide by them even though he did not have the assistance of counsel, and that the form and manner of questioning of witnesses by Muschinske would be subject to rules with which he may not be familiar. He further suggests that the court should have gone into detail about the difficulty of his testifying as a pro se defendant. Muschinske further claims that he did not understand the nature of the proceedings or the collateral consequences that might arise from these convictions. He contends that the court failed to explain what a misdemeanor is and the difference between a misdemeanor and a felony and that there was not an affirmative showing that Muschinske understood the serious nature of the offenses with which he was charged.

This court does not agree. A court has discretion to tailor the colloquy to its style, as long as the mandated information is covered. ***State v. Brandt***, No. 97-1489-CR (S. Ct. June 8, 1999); *see also* ***Bangert***, 131 Wis.2d at

278-79, 389 N.W.2d at 28. The court specifically identified the offenses with which Muschinske was charged and the maximum punishment that could be imposed. The record specifically reflects Muschinske's acknowledgment that he understood the nature of the charge and the maximum punishments. The plea colloquy established Muschinske's understanding of the nature of the charges and their punishments to rebut his claim that he did not understand the nature of the offenses charged or the seriousness of the charges.

This court further concludes that the plea colloquy was sufficient to satisfy the mandated inquiry under ***Bangert***. The court specifically advised Muschinske of the benefit of having counsel and extended him an opportunity to obtain counsel before proceeding further. *See* ***State v. Johnson***, 50 Wis.2d 280, 283, 184 N.W.2d 107, 109 (1971). Moreover, Muschinske advised the court of his intention to enter guilty pleas to the offenses and the reasons underlying this decision. The court then specifically inquired whether the plea was freely and voluntarily made and examined Muschinske's background, schooling and whether he was suffering from any emotional problems or drugs at the time of the hearing. After determining that the waiver of counsel was freely and voluntarily made and that Muschinske was sufficiently competent to enter his pleas, the court accepted the pleas offered and introduced the factual basis supporting the charges into evidence.

Muschinske's suggestion that the court had to more elaborately explain the consequences of the waiver of counsel fails, particularly when Muschinske had previously announced his intention to plead guilty. The difficulty of presenting evidence, cross-examining witnesses and lack of technical training becomes less significant when the defendant does not intend to dispute the charges. Although the court could have elaborated on the consequences of

waiving counsel in a contested case setting, it certainly would have been superfluous to do so under the facts of this case. As long as the court was satisfied that the plea was freely and voluntarily made and that Muschinske had knowingly and intelligently waived his right to counsel and was competent to proceed with the hearing, the court has done all that was required to demonstrate the waiver of counsel was voluntarily and knowingly made. *See* ***Drake v. State***, 45 Wis.2d 226, 229,172 N.W.2d 664, 665 (1969).

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.