

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 01-1513
STATE OF WISCONSIN**

Cir. Ct. No. 98-CM-631

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROD J. BINS,

DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Outagamie County:
HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded with
directions.*

¶1 CANE, C.J.¹ Jerod J. Bins appeals an order denying his request for postconviction relief.² Bins claims that his waiver of counsel was inadequate

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

under *State v. Klessig*, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997), because the court failed to properly determine whether he knowingly, intelligently and voluntarily waived his right to assistance of counsel and whether he was competent to represent himself. Additionally, Bins argues that he is not procedurally barred from raising the invalid-waiver-of-counsel issue. Because the record fails to establish that Bins made a deliberate choice to proceed without counsel while knowing the difficulties and disadvantages of self-representation, this court has no alternative but to reverse and remand the matter to the circuit court to conduct a hearing as required by *Klessig*, 211 Wis. 2d at 213.

¶2 The underlying facts are undisputed. The State charged Bins with disorderly conduct as a repeater. He first appeared before the Outagamie County court commissioner who, after reading the charge, explained that Bins could contact the public defender's office to see if he qualified for representation. The court commissioner also stated:

If you disagree with the charges or want time to talk to the assistant district attorney assigned to the case to see if some kind of a plea agreement can be worked out, you can enter a plea of not guilty today. The case will be assigned to a judge and scheduled for a jury trial. Between now and the next court date if some kind of plea agreement is worked out, the trial date will be cancelled and your case will be scheduled for a plea and sentencing before the judge.

¶3 In response, Bins said that he did not want time to talk to an attorney. He pled not guilty, and the court commissioner set a status conference for August 28, 1998, and a jury trial for September 15, 1998. Apparently some

² This appeal was originally consolidated for purposes of briefing and disposition with another Bins case from District II out of Winnebago County because of the similarity of issues. We later determined that consolidation was improvidently granted and this case was returned to District III for disposition.

agreement was made with the State, because on September 16, Bins appeared before the trial court without counsel and pled no contest. The court accepted his plea, found him guilty, withheld sentence and placed him on probation for one year. The entire discussion of Bins' decision to proceed without counsel was:

THE COURT: You are Jerod Bins?

THE DEFENDANT: Yes.

THE COURT: You appear here without an attorney. Do you understand this is a criminal matter? The sentence could be up to three years in prison.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And because of that fact, you are entitled to an attorney. If you can't afford one and meet certain income and asset levels, the state or the county may provide one. Knowing that, do you wish to proceed without an attorney?

THE DEFENDANT: Yes, Your Honor.

¶4 The court placed Bins on probation for one year. Later, Bins' probation was revoked. On May 17, 1999, Bins returned to court for sentencing after revocation. He was sentenced to two years in prison consecutive to other convictions unrelated to this appeal.

¶5 Bins filed a notice of intent to pursue postconviction relief. His appointed counsel filed a no merit report that addressed the single issue of whether the sentence was excessive. In Bins' response to the no merit report, he challenged the validity of his conviction on the ground that he had not waived counsel at the plea hearing when he was placed on probation. On appeal, we concluded that the only matter properly before us was whether Bins' sentence after revocation was excessive, citing *State v. Drake*, 184 Wis.2d 396, 399, 515

N.W.2d 923 (Ct. App. 1994). We accepted the no merit report, affirmed the sentence and discharged Bins' attorney from further representation.

¶6 Bins then filed a WIS. STAT. § 974.06 motion in the circuit court asking that he be permitted to withdraw his plea because he had not knowingly and voluntarily waived counsel. Without a response from the State or an evidentiary hearing, the circuit court denied his motion, concluding that the plea was entered freely and voluntarily. The court also observed that this court had dismissed Bins' prior appeal after his attorney had filed a no merit report. Bins now appeals from the circuit court's order denying his WIS. STAT. § 974.06 motion.

¶7 The State first argues that under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994), Bins' present appeal from the denial of his WIS. STAT. § 974.06 motion is procedurally barred because he did not raise this waiver of counsel issue on a direct appeal when he was placed on probation. However, in *Drake*, 184 Wis. 2d at 399, which involved almost identical facts, we concluded that because the deadline for filing a direct appeal from the judgment of conviction had expired, the defendant could no longer seek relief under WIS. STAT. RULE 809.30.³ Instead, we observed that the judgment of conviction may be collaterally attacked under § 974.06 after the time for appeal or postconviction remedy had expired. *Drake*, 184 Wis. 2d at 399; *see also State v. Peters*, 2001 WI 74, ¶22, 244 Wis. 2d 470, 628 N.W.2d 797 (recognizing right-to-counsel exception to the general rule against collateral attacks on prior convictions used to

³ In fact, that was the basis for this court's previous order accepting the no merit report and dismissing Bins' other challenges to his conviction, including his contention that he had not waived counsel as required under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

enhance subsequent penalties). Therefore, we reject the State's argument that Bins is barred from challenging the waiver of counsel. Consequently, we will proceed to address his contention that his waiver of counsel was invalid under *Klessig*.

¶8 In *Klessig*, the supreme court 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." *Id.* at 206. That is, *Klessig* requires the circuit court to address the defendant personally and specifically:

[T]o 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 upon him. ... 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.

¶9 In this case, there is no dispute that the record fails to show the court's colloquy addressing the advantages of having counsel and the disadvantages to self-representation. Even though a completed Plea Questionnaire Waiver of Rights Form might arguably be used in place of the mandated colloquy, even the questionnaire in this case did not explain the disadvantages of proceeding without counsel.

¶10 Pursuant to *Klessig*, when an adequate colloquy is not conducted, and the defendant makes a motion for a new trial or other postconviction relief from the circuit court's judgment, 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. As the circuit court did not conduct a sufficient colloquy in this case, it must now hold an evidentiary hearing. *See id.* at 207. At the hearing, the State is required to prove by clear and convincing evidence that Bins' waiver of counsel was knowing, intelligent and voluntary. *See id.* If the State is able to satisfy its burden, the conviction will stand. *Id.* If the State is unable to establish by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel, the defendant will be entitled to withdraw his guilty plea. *See id.*

By the Court.—Order reversed and cause remanded with directions.

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

