COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1414-CR **Cir. Ct. No. 2009CF4375**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH B. BONNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL. *Reversed and cause remanded*.

¶1 KESSLER, J.[1] This is an appeal of the circuit court's denial of a motion to withdraw a guilty plea which was entered by an unrepresented defendant. The motion to withdraw the plea occurred after sentencing. The State joins in Bonner's request that he be allowed to withdraw his plea. After

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

independent review of the entire record, we conclude that a manifest injustice requires withdrawal of the plea because the record specifically establishes that the defendant was misinformed by the circuit court as to an element of the crime, and the record does not establish that the defendant was aware of the difficulties and disadvantages of self-representation or that he was competent to proceed *pro se*. Consequently, we reverse and remand.

BACKGROUND

¶2 Bonner was charged on September 24, 2009 with one count of misdemeanor Issuance of Worthless Check and one count of felony Issuance of Worthless Check. Bonner was first represented by appointed counsel, Attorney Lori Kuehn, from the preliminary hearing through the final pretrial conference on January 21, 2010. Bonner then retained private counsel, Attorney James Toran, who represented Bonner from January 21, 2010 through February 9, 2010, when Toran's motion to withdraw was granted. The record contains no explanation of the reason for Toran's withdrawal. After Toran's withdrawal, the circuit court scheduled the jury trial for March 1, 2010. Bonner was to be tried on one count of misdemeanor Issuance of Worthless Check and one count of felony Issuance of Worthless Check.

¶3 On March 1, 2010, Bonner appeared without counsel. A representative of Toran appeared and gave Assistant District Attorney Jon Neuleib the defense copy of discovery materials related to this case. Neuleib gave the copy to Bonner. In describing this situation to the court, Neuleib advised the court that Bonner was not ready. The court inquired regarding the tardy delivery of discovery to Bonner. Bonner responded that he had attempted on several

occasions to contact Toran by telephone and text message, but that Toran's voicemail was full.

¶4 In light of this development, the court asked Bonner whether he had hired a lawyer. Bonner responded in the negative and indicated that he intended to represent himself. The court asked a series of questions relating to Bonner's financial situation and stated: "I've given you one lawyer at County expense. I'm not giving you another. Based upon your income and your expenses, I feel that you can afford a lawyer. If you want to represent yourself, that's certainly it. I can understand that."

¶5 The court asked Bonner if he understood that "any offers at this point are off the table," announced that the court would not accept anything at an adjourned trial date "other than a plea to the two charges, the felony and the misdemeanor," and stated "[i]f you want any deal, you have to do it before we get off the record today." After telling Bonner that the court believed he was simply trying to delay matters or hoping to "get a deal by coming up with the discovery," the court reiterated: "I'm telling you today is the day. You want any deal it has to be today because I'm not going to accept anything … after today."

¶6 While the court was discussing adjourned dates with Neuleib, Bonner asked to address the court. He attempted to ask the court for advice about the plea offer, saying "[b]ecause I don't feel I'm guilty. If I accept the offer of pleading to a misdemeanor--." The court interrupted and explained to Bonner the maximum penalties he faced on the two pending charges and that the court could not be involved in plea negotiations. The court also implied that it would not be bound by any deal Bonner made with the State. Bonner replied to the court's statements several times by saying he would "go to trial."

¶7 After the court explained the factors it would consider at sentencing when it had more information, the following exchange took place:

> COURT: At this point, all I know is this is a serious crime… I'm being told that you have stolen money of $10,000.00 from a bank, and you've stolen money from your landlord in the amount of $965.
>
> BONNER: You['ve] got the wrong report…
>
> COURT: All I have is the complaint, sir.
>
> BONNER: Okay. We'll go to trial.
>
> …
>
> BONNER: We'll go to trial. Because if you say I stole … and I have the evidence to prove I didn't, we'll go to trial.
>
> COURT: What I'm stating is that you passed bad checks and got the money. Because of the bad checks that you got, people were financially hurt.
>
> That's what I read in this complaint…That's all I know about this case.
>
> BONNER: We'll go to trial.
>
> COURT: Do you understand, sir, that there will be no negotiations. In other words, if they've offered you a misdemeanor today and you show up on the day of trial and they offer you a misdemeanor again, I will say no. Do you understand that?
>
> BONNER: Yes.
>
> COURT: If, in fact, they offered you a misdemeanor, the only chance you get at a misdemeanor is today. Because I will accept that negotiation.

¶8 Unsurprisingly after this exchange, Bonner asked to talk to Neuleib. The court offered to pass the case for thirty minutes for Bonner to consider an offer from the State, which Bonner accepted. When the record resumed, the State

filed an Amended Information alleging a single misdemeanor count of Issuance of Worthless Check contrary to WIS. STAT. §§ 943.24(1) and 939.51(3)(a) (2007-08).[2]

¶9 Bonner told the court that the language in the Amended Information stating "[defendant] did issue a bank check … which at the time of issuance, the defendant intended not be paid," was incorrect. The court responded: "then you can't plea[d] because that's one of the things the State has to prove."

¶10 The State then explained its plea recommendation to the court.[3] The court informed Bonner of the maximum penalties that he faced, and explained that it was not bound by the negotiations.

¶11 The court then explained the elements of the crime with which Bonner had been charged.[4] When asked if he understood the elements, Bonner inquired, "[a]re there things for me to share?" The court, apparently surmising that Bonner was alluding to his claim of innocence based on the earlier colloquy, responded: "Certainly *those are mitigating circumstances, but they are not a defense*, sir." (Emphasis added.) The court tried to further explain the element of intent in the following colloquy:

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[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] The State recommended that the defendant be placed on probation for a period of twelve months, with restitution to be paid during the probationary period, with all other terms and conditions being left up to the court. The State also informed the court that it would not object to the probation being terminated early if the defendant successfully paid back the restitution prior to the expiration of the twelve months.

[4] The elements of a misdemeanor issuance of a worthless check crime are that the defendant issued a check; a check is an unconditional order to pay money; a check is issued when it is signed and delivered to another; and at the time the check was issued, the defendant intended that it not be paid. *See* WIS JI—CRIMINAL 1468.

COURT: If you write a check for $10,000.00 on December 16th 2008, and you don't have the money [in the account], the law presumes that you didn't intend it to be paid. Okay?

BONNER: I understand that.

…

COURT: So you agree that you didn't have the money in your checking account on December 16th, 2008?

BONNER: I agree to that, but what I'm saying is I was told by an attorney - - I gave him my routing number and my checking account number, and he guaranteed me he was going to wire that money in there on behalf of his client.

I took him at his word, and that's how I deposited those checks. When he didn't come through, I was left holding the bag.

COURT: *That's a mitigating circumstance*, sir. *That's not a defense*. Okay?

BONNER: All right. Let's get it over with.

COURT: But you have to admit that you issued the check.

BONNER: I did.

COURT: And that you intended it not to be paid because there wasn't enough money in your checking account to cover it.

BONNER: I can't agree with that, but it happened.

….

COURT: So, therefore, you are pleading guilty to the amended charge?

BONNER: I'm guilty for writing the check … I should have never trusted him. So I'm guilty. I wrote the check. I was innocent in what I did, but I'm guilty for doing it.

(Emphasis added.) There was no further discussion of the elements of the crime charged. The official transcript of the plea colloquy reflects that the court informed Bonner that his silence could be used against him.

¶12 After sentencing, Bonner obtained counsel and filed a motion to withdraw his guilty plea. A hearing was conducted on the motion. The State conceded that Bonner had presented a *prima facie* showing in his motion. Bonner testified that he felt forced to plead guilty so as to gain the benefit of the plea agreement because he was informed by the court that he did not have a defense. Bonner testified that he did not understand his right to remain silent.

¶13 The court concluded that Bonner had made the deliberate choice to proceed without counsel during the guilty plea on March 1, 2010, and was informed of the consequences of that decision. The court also stressed that Bonner properly understood his right to remain silent and that the record's reflection of the court telling Bonner that his silence could be used against him was an error in the transcript. The court found that Bonner had been informed of the rebuttable presumption regarding the payment of the check. Based on these factors, the court denied Bonner's motion to withdraw his guilty plea.

DISCUSSION

A. Relevant Law.

¶14 A question of constitutional fact is reviewed by this court independent of the lower court's conclusion. *See* ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. The circuit court's findings of evidentiary or historical facts will be sustained unless contrary to the great weight

and clear preponderance of the evidence. ***State v. Bangert***, 131 Wis. 2d 246, 283-284, 389 N.W.2d 12 (1986).

¶15 A defendant seeking to withdraw a guilty plea after sentencing bears the initial burden of establishing a *prima facie* case that the circuit court failed to conduct the plea hearing in conformity with the dictates of WIS. STAT. § 971.08 or failed to fulfill other mandated procedures. ***Bangert***, 131 Wis. 2d at 274. "The inquiry on review should not focus on 'ritualistic litany' of formal elements, but should address whether the defendant received real notice of the nature of the charge." ***Id.*** at 282-283 (citation omitted). The State concedes that Bonner made a *prima facie* showing. Thus, at the hearing on Bonner's motion to withdraw his plea, the State was required to prove by clear and convincing evidence that Bonner's plea was entered knowingly, voluntarily and intelligently despite the inadequacy of the record at the time of the plea's acceptance. ***Id.*** at 274.

¶16 Pursuant to ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), in order to prove a valid waiver of counsel on direct appeal, the circuit court must engage in a mandatory colloquy ensuring 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.

¶17 Our supreme court recently reaffirmed ***Klessig*** in ***State v. Imani***, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W. 2d 40, when it held that "[i]n order to determine whether a defendant knowingly, intelligently, and voluntarily waived the right to counsel, we apply constitutional principles to the facts of the case. We

review those facts independent of the circuit court." (Internal citations omitted). The ***Imani*** court further explained, that:

> 'So important is the right to attorney representation in a criminal proceeding that nonwaiver is presumed.' The presumption of nonwaiver is overcome only upon an affirmative showing that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. In ***Klessig***, this court mandated the circuit court's use of a colloquy in order to prove the defendant's valid waiver.

Id., 326 Wis. 2d 179, ¶22 (internal citations omitted).

B. Waiver of Right to Counsel.

¶18 Waiver of the right to counsel is a question of constitutional fact. ***Klessig***, 211 Wis. 2d at 204. The record does not show an inquiry by the court as to *why* Bonner intended to represent himself, nor is there an explanation by the court of the difficulties and disadvantages of self-representation. Both are requirements under ***Klessig***. *See* ***id.*** at 206. (To prove a valid waiver of counsel, the circuit court must conduct a colloquy that includes, among other things, an assurance that the defendant made a deliberate choice to proceed without counsel and that the defendant was aware of the difficulties and disadvantages of self-representation.) After inquiring as to Bonner's financial circumstances, before any ***Imani*** and ***Klessig*** inquiry, the court announced that it would not appoint another attorney for Bonner. Further, the court told Bonner on several occasions that it would not accept any reduction in charges (and thus reduced sentence exposure) if Bonner did not plead guilty on the same day that he was unrepresented. Even considering Bonner's repeated affirmative responses to the court's questions of whether Bonner understood the court's explanation of the elements of the crime, Bonner's "understanding" of legally incorrect information[5] can hardly support an

[5] *See infra* ¶11, 13.

inference that he knowingly, intelligently and voluntarily gave up his right to counsel. Nor does a retained counsel's withdrawal, after a mere two and a half weeks of representation, reasonably permit an inference that Bonner deliberately chose to represent himself three weeks later when there is no explanation in the record of the reasons for that withdrawal. Likewise, the fact that Bonner had previously been represented does not, without more, support an inference that Bonner appreciated the difficulties of self-representation. The circuit court's conclusions to the contrary are unsupported by the record.

C. Withdrawal of Guilty Plea.

¶19 Withdrawal of a guilty plea is a question of constitutional fact. *See* ***Bangert***, 131 Wis. 2d at 283. The record establishes that Bonner gave up his wish to go to trial only after the court told Bonner he had no defense.

> BONNER: I agree to that, but what I'm saying is I was told by an attorney - - I gave him my routing number and my checking account number, and he guaranteed me he was going to wire that money in there on behalf of his client.
>
> I took him at his word, and that's how I deposited those checks. When he didn't come through, I was left holding the bag.
>
> COURT: *That's a mitigating circumstance*, sir. *That's not a defense.* Okay?
>
> BONNER: All right. Let's get it over with.

¶20 This was an erroneous explanation of the law by the court. The facts Bonner described might have been a defense to the element of intent under the relevant statute. The court never explained the permissive inference of WIS. STAT. § 943.24 (1) and (3) relating to the element of intent. [6] Based on the facts Bonner

generally described to the court, (guarantee by an attorney that the money would

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[6] WISCONSIN STAT. § 943.24 provides in relevant part:

> **(1)** Whoever issues any check or other order for the payment of not more than $2,500 which, at the time of issuance, he or she intends shall not be paid is guilty of a Class A misdemeanor.
>
> **(3)** Any of the following is *prima facie evidence* that the person at the time he or she issued the check or other order for the payment of money, intended it should not be paid:
>
> (b) Proof that, at the time of issuance, the person did not have sufficient funds or credit with the drawee and that the person failed within 5 days after receiving written notice of nonpayment or dishonor to pay the check or other order, delivered by regular mail to either the person's last-known address or the address provided on the check or other order[.]

(Emphasis added.)

The permissive inference relating to the element of intent is explained by WIS JI—CRIMINAL 225, which states:

> **INSTRUCTING ON A "PRESUMED FACT" THAT IS AN ELEMENT OF THE CRIME - § 903.03(3)**
>
> If you are satisfied beyond a reasonable doubt that (state the basic facts)_____, you may find from this evidence alone that (identify the "presumed facts")_____, *but you are not required to do so*. You are the sole judges of the facts, and you must not find that the defendant (state the presumed fact) unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.

(Emphasis added.)

> The comments to WIS JI—CRIMINAL 225 provide in relevant part:
>
> Discussions of "*presumptions*" can become exceedingly complex. But understanding their impact in jury instructions in Wisconsin criminal cases can be simplified if one remembers that they *only point out certain inferences that jurors are free to make but which jurors are not required to make* … [T]he effect of the "presumption" and the "prima facie case" is to create a "permissive inference."

WIS JI—CRIMINAL 225, cmt. at 2 (2009) (emphasis added.)

be wired to Bonner's account), the permissive inference acknowledges a possible defense to the element of intent. The court gave Bonner an erroneous explanation of the law regarding the statutory presumption in WIS. STAT. § 943.24(3). The court's statement that the circumstances Bonner described were "not a defense" but only "mitigating circumstances" was simply wrong at this stage. A determination of whether intent could be inferred would be for a jury to make, during the trial which Bonner repeatedly requested, after consideration of *all* the circumstances. Bonner was entitled to this knowledge to accurately understand the elements of the crime. Nothing in the record supports the circuit court's later conclusion at the plea withdrawal hearing that, in spite of the erroneous explanation of the law by the court, Bonner somehow actually understood the unexplained concepts of rebuttable presumption or permissive inference.

CONCLUSION

¶21 "Understanding must have knowledge as its antecedent; knowledge, like understanding, cannot be inferred or assumed on a silent record." ***Bangert***, 131 Wis. 2d at 269. Here, as described above, the records of both the proceedings—the day the guilty plea was taken and the subsequent motion to withdraw that plea ― fail to establish that Bonner was given (or already had) the knowledge, and thus the understanding, to which he was constitutionally entitled before he (1) undertook to represent himself, and (2) entered a guilty plea. A silent record does not permit an inference of actual understanding of constitutionally significant matters. This record does not establish a knowing, intelligent and voluntary waiver of the right to counsel or that Bonner correctly understood the elements of the crime to which he pled guilty. Bonner has established a manifest injustice entitling him to withdraw his guilty plea.

Consequently, we reverse the order of the circuit court and remand for further proceedings consistent with this opinion.

By the Court.—Reversed and cause remanded.

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