COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2018-FT

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

MANITOWOC COUNTY,

PLAINTIFF-RESPONDENT,

v.

DARLENE SCHURICHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: FRED HAZLEWOOD, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Darlene Schuricht's appeal from a contempt order is based upon the following statement in ***State v. Pultz***, 206 Wis. 2d 112, 132, 556 N.W.2d 708 (1996):

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

> Before the court proceeds on the contempt motion, it should advise the *pro se* defendant that if he or she is found to be in contempt, the court could impose sanctions which may include the defendant having to spend time in jail. The court must also instruct that the defendant is entitled to be represented by an attorney.

Schuricht argues that this is a bright-line rule. Therefore, she insists that this colloquy must be conducted at the commencement of any contempt hearing. Because no colloquy was conducted at the instant contempt hearing, Schuricht claims her due process rights were denied and the contempt order must be vacated.

¶2 We agree that ***Pultz*** announced a court-mandated bright-line rule and the trial court erred by not following it. But that does not resolve the case. The question is not whether the trial court failed to follow a mandated procedure, but whether Schuricht was harmed by the failure. She must show that, due to the failure, she did not know or understand the information that should have been provided. After considering the totality of the record, we are convinced that Schuricht knew and understood that she had the right to a court-appointed attorney and that, if found in contempt, she could go to jail. We affirm.

¶3 Rather than start with the facts and then apply the facts to the law as we usually do when we write an opinion, we will start with the law and then turn to the facts. ***Pultz*** is the first case we discuss. There, a court had permanently enjoined Dale Pultz from "engaging in particular activities at Milwaukee medical clinics." ***Id.*** at 115. Apparently, Pultz continued his activities because he was personally served with a notice and motion for contempt. *See* ***id.*** at 116. Before the hearing on the contempt, he was arrested. *See* ***id.*** He missed his court date because he was sitting in jail. *See* ***id.*** When he finally appeared, he complained to the judge that he had not had a chance to hire a lawyer because of his

incarceration. *See* ***id.*** at 116-17. The trial court rebuffed the contention and found him in contempt. *See* ***id.*** 118.

¶4 The supreme court reversed. *See* ***id.*** at 115. It held that when an unrepresented litigant comes before the court on a remedial contempt motion, and his or her liberty is threatened, the court must inform the defendant of the right to an attorney and the right to appointed counsel if he or she cannot afford one. *See* ***id.*** at 129. The court said that this was a "blanket rule." *See* ***id.***

¶5 Of significance to the case at bar, nowhere in ***Pultz*** is there any indication that Pultz was aware of his right to an attorney if he could not afford one nor was there any indication that he knew he could possibly go to jail if found in contempt.

¶6 The next case is ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). There, the supreme court reaffirmed its intention to impose a mandatory duty upon the trial judge to engage in a colloquy that, among other things, affirmatively exhibited a defendant's knowledge of the constitutional rights he or she would be waiving. *See* ***id.*** at 270-71. In this regard, the trial judges of this state were instructed to use WIS JI—CRIMINAL SM-32. *See* ***Bangert***, 131 Wis. 2d at 272. But that was not what the case was about. Rather, the case was about what to do if the trial judge did not follow the mandated procedure and the defendant claimed, for instance, not to have understood which constitutional rights were being waived by a plea of guilty or no contest. The court announced the following procedure: (1) the initial burden rests with the defendant to make a prima facie showing that his or her plea was accepted without the trial court's conformance with the mandatory procedures. *See* ***id.*** at 274. (2) If that showing is made, the burden shifts to the State to show by clear and convincing evidence

"that the defendant's plea was knowingly, voluntarily and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." ***Id***. The State may then "utilize any evidence which substantiates that the plea was knowingly and voluntarily made." ***Id.*** at 274-75. The teaching of the ***Bangert*** court is that prosecutors may use the entire record to demonstrate by clear and convincing evidence that the defendant knew and understood the constitutional rights he or she would be waiving. *See* ***id.*** at 275. The court wrote that to enable a trial court to consider only the plea hearing transcript itself "essentially raises form over constitutional substance." *See* ***id.*** at 275-76.

¶7 We are convinced that the same procedures at play in ***Bangert*** should be adopted here. In both cases, the supreme court mandated a procedure in order to assure that the defendant understood what rights he or she had. In both cases, the mandated procedure was not followed. In ***Bangert***, the court wrote that the totality of the record is reviewed to determine whether the defendant nonetheless knew and understood the rights. In this case, we arrive at the same remedy. To do any less would place form over substance.

¶8 Now we can turn to the application of this law to our facts. There is no question that the procedure mandated by the supreme court in ***Pultz*** was not followed. Therefore, Schuricht has made her prima facie case. The burden shifts to Manitowoc County. The County points to the September 29, 1999 hearing regarding a motion to compel Schuricht to execute titles or bills of sale for the junked vehicles on her property. At that hearing, the court ordered Schuricht to execute the titles or bills of sale for the junked vehicles. Then the court said to Schuricht: "In the event that is not done, then, the Court will consider the imposition of contempt sanctions. That may mean you go to jail until it's taken care of." The court also said to Schuricht: "I advise you with respect to that

motion you have the right to be represented by an attorney, including one appointed at public expense, because there's a possibility you may go to jail." The court thus personally gave her the warnings, albeit at the end of the motion to compel hearing, which was the precursor to this contempt action. Not only that, but the order to show cause why Schuricht should not be held in contempt relayed the same information.

¶9 The record further shows that Schuricht obviously knew the potential ramifications of a contempt proceeding because she had the foresight to engage a lawyer for the hearing. Unfortunately, that lawyer did not appear, but asked for a continuance one-half hour before the hearing was to begin. The court did not grant the continuance, went forward with the hearing and found Schuricht in contempt.

¶10 The record, viewed in its entirety, shows that Schuricht knew she could go to jail and knew she was entitled to a lawyer—at state expense if she could not afford one. We are satisfied that the County has provided clear and convincing evidence as a matter of law. Schuricht's ***Pultz*** claim fails.

By the Court.—Order affirmed.

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