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**DISTRICT II**

November 25, 2020

*To:*

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You are hereby notified that the Court has entered the following opinion and order:

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2019AP1203-CR

State of Wisconsin v. Curtis C. McLemore (L.C. #2016CF812)

Before Neubauer, C.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Curtis C. McLemore appeals from a judgment convicting him of armed robbery and being a felon in possession of a firearm after a jury trial. On appeal, McLemore argues that the circuit court violated his right to represent himself in his circuit court proceedings. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We conclude that the circuit court erred when it denied McLemore's clear and unequivocal request to proceed pro se after declining to appoint new counsel without conducting a colloquy under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). We reverse and remand for an evidentiary hearing on McLemore's request to represent himself in the circuit court.

Throughout his circuit court proceedings, McLemore repeatedly expressed displeasure with his appointed counsel. The circuit court acknowledged on more than one occasion that McLemore had the option of representing himself. The first two attorneys appointed for McLemore withdrew. At a May 2017 hearing, McLemore's third attorney did not appear, and McLemore complained about counsel. The circuit court made clear that if McLemore wanted to proceed without counsel, he had to file a motion, and the circuit court would have to engage him in a colloquy. The third attorney was later replaced by the fourth attorney.

McLemore's fourth attorney appeared with him at a pretrial hearing on January 8, 2018. During that hearing, McLemore rejected the State's plea offer, asked for counsel to withdraw from his case, and stated that he wanted new counsel appointed for him. The circuit court declined to appoint new counsel. The following exchange ensued:

The Court: Sir, you have two choices. You can either have Mr. Flanagan represent you or you can represent yourself.

McLemore: Here's a motion, myself; that's what's gonna happen.

The court then questioned McLemore about the extent of his education, confirmed that this would be his first jury trial, and confirmed that he claimed to understand the elements of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

armed robbery and felon in possession of a firearm. During his exchange with the court, McLemore continued to complain about counsel. The circuit court denied McLemore's request to discharge counsel. The following exchange ensued:

McLemore: Okay, well, here's a motion; I want it on record.

The Court: Mr. McLemore, please.

McLemore: It's a motion to dismiss him off my case and I want it on record.

The Court: It's denied. It's on record and it's denied.

Before the hearing ended, McLemore lodged more protests against being represented by counsel.

Fourth counsel represented McLemore in his jury trial. The jury convicted McLemore of both charges against him. Counsel also represented McLemore at sentencing.

On appeal, McLemore argues that he should have a new trial because the circuit court violated his Sixth Amendment right to represent himself. Whether McLemore's Sixth Amendment "right to self-representation was violated presents a question of law, which we review de novo." *State v. Darby*, 2009 WI App 50, ¶¶11, 13, 317 Wis. 2d 478, 766 N.W.2d 770. The question is whether McLemore clearly and unequivocally invoked his right to self-representation. *Id.*, ¶24.

As a threshold matter, the State argues that McLemore forfeited his request to proceed pro se because he did not make that request in the circuit court. As we hold below, McLemore

did make that request in the circuit court.<sup>2</sup> The record on this issue is adequate to address the issue raised on appeal.

The record supports McLemore’s argument that he invoked his right to self-representation by moving the circuit court to discharge counsel after the circuit court declined to appoint new counsel. At the May 23, 2017 hearing, the circuit court made clear that if McLemore wanted to proceed without counsel, he had to file a motion to discharge counsel, and a colloquy would have to be held. On January 8, 2018, the circuit court made clear that new counsel would not be appointed. In direct response to the circuit court’s description of his two remaining options (continue with current counsel or proceed pro se), McLemore stated “[h]ere’s a motion, myself,” evidencing a desire to proceed pro se. He then made a second motion to discharge counsel. Based on this record, we conclude that McLemore clearly and unequivocally invoked his right to self-representation. *Id.*

After McLemore invoked his right to self-representation, the circuit court should have conducted a colloquy under *Klessig*, to determine whether McLemore was knowingly, voluntarily, and intelligently waiving the right to counsel and whether he was competent to proceed pro se. *Darby*, 317 Wis. 2d 478, ¶17.

[A] colloquy [is] designed to 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

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<sup>2</sup> We do not address whether a postconviction motion seeking a new trial was required to raise this issue on appeal. To the extent such a motion would have been required, we exercise our inherent authority to address the merits of this issue. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) (waiver rule is a rule of judicial administration).

(4) was aware of the general range of penalties that could have been imposed on him.

*Klessig*, 211 Wis. 2d at 206 (citation omitted).<sup>3</sup> Rather than conduct a *Klessig* colloquy and consider the necessary factors, the circuit court asked a few questions and then summarily denied McLemore's request to proceed pro se. The circuit court violated McLemore's Sixth Amendment right to self-representation.<sup>4</sup>

To remedy the circuit court's error, we reverse the judgment of conviction and remand for an evidentiary hearing under *Klessig*, 211 Wis. 2d at 206-07. If, after conducting the evidentiary hearing on remand, the circuit court concludes that *Klessig* is satisfied, then McLemore will be entitled to a new trial as a pro se litigant. *Id.* at 207. If, after conducting the evidentiary hearing on remand, the circuit court concludes that a new trial is not required, then the circuit court shall enter a judgment of conviction.

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<sup>3</sup> The State argues that the questions the circuit court asked McLemore after he declared "[h]ere's a motion, myself" could be viewed as an attempted *Klessig* colloquy. When a circuit court conducts a colloquy under *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the circuit court must make the determinations required by *Klessig* (the waiver of counsel and competency to proceed pro se). Here, the circuit court neither conducted a complete colloquy nor made the required determinations.

<sup>4</sup> The State argues that the circuit court's failure to conduct a *Klessig* colloquy or make the necessary findings and conclusions supports its argument that McLemore did not make a clear and unequivocal request to proceed pro se. That the circuit court did not perceive McLemore's clear and unequivocal request does not mean the request was not made. See *State v. Agnello*, 226 Wis. 2d 164, 175, 593 N.W.2d 427 (1999) ("parties can reasonably expect the judge to appreciate those issues that are commonplace without substantial assistance by the litigants").

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*