COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP125-CR **Cir. Ct. No. 2012CF345**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KYLE J. BRUNNER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Reversed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. The State appeals from a nonfinal order granting Kyle J. Brunner's motion collaterally attacking two prior convictions for operating

a motor vehicle while intoxicated.[1] The State contends that Brunner failed to make a prima facie showing that his prior convictions were obtained in violation of his constitutional right to counsel. We determine that even assuming Brunner's written motion alleged sufficient facts entitling him to a hearing, his sworn testimony did not support or establish his factual allegations. We conclude that Brunner failed to make a prima facie showing sufficient to shift the burden of proof to the State, and we reverse.

¶2 Following a traffic stop, Brunner was charged with operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol concentration, both as fifth offenses. The State alleged that Brunner had four prior OWI-related convictions, and Brunner filed a motion collaterally attacking his 1994 and 1997 convictions on the ground that he did not knowingly, intelligently and voluntarily waive his right to counsel in either case. Brunner's affidavit asserted that in each case he did not have an attorney, he did not recall the court asking if he wanted an attorney, and he did "not believe" that the court explained the "options about representation" or that there "was an affirmative waiver of [his] right to counsel." Brunner further alleged that he "did not have enough money to hire an attorney" and "was not made aware of the difficulties or disadvantages of self-representation." Brunner was unable to provide any transcripts from the prior proceedings due to the destruction of the court reporters' notes. *See* SCR

[1] On March 6, 2013, we granted the State's petition for leave to appeal the trial court's nonfinal order under WIS. STAT. § 808.03(2) (2011-12) and directed the parties to address the application of ***State v. Hammill***, 2006 WI App 128, 293 Wis. 2d 654, 718 N.W.2d 747, to the facts in this case.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

72.01(47) (court reporter notes may be destroyed ten years after the subject hearing).

¶3 The trial court determined that based on the pleadings and in the absence of a transcript, Brunner made a prima facie showing of the violation of his right to counsel and shifted the burden to the State to demonstrate that Brunner had knowingly, intelligently and voluntarily waived his right to counsel in the prior cases. The State called Brunner as a witness and as to each prior case, Brunner testified that he was not sure whether the judge was a man or a woman, whether a prosecutor was present in court, or if he ever received a criminal complaint. In response to the State's questions concerning the 1994 case, Brunner testified:

> Q: Do you recall ever being told what you were charged with back in '94?
>
> A: Yes, I do.
>
> Q: Okay. Who told you that? Who told you what you were charged with?
>
> A: I believe it was the judge.
>
> Q: Okay. But you—you agree that you are not sure who the judge was, right?
>
> A: Correct.
>
> Q: Okay. So when the court told you what you were charged with, what did the court say about what you were charged with?
>
> A: I don't recall.
>
> ….
>
> Q: Okay. Now you recall being advised of the charges by the judge. Do you recall whether or not the judge mentioned anything about the penalties?
>
> A: I don't recall.

> Q: Do you recall any sort of conversation you had between yourself and the judge?
>
> A: No.
>
> Q: Do you recall giving up your right to an attorney?
>
> A: No, I don't.
>
> Q: Is it fair to say that as you are sitting here today under oath, based upon how long it has been since that last hearing, you can't recall exactly what you were told and exactly what you would have responded? Is that fair? Is that a fair statement?
>
> A: Yes. I can speculate but I am not sure.

¶4 When asked about the 1997 conviction, Brunner remembered that he had appeared in court on two separate days, but did not recall significant details:

> Q: Do you know if the judge said anything to you about the charges that day? Told you what they are, in other words?
>
> A: I don't recall.
>
> Q: And penalties? Do you recall if anyone told you what the penalties would be that day?
>
> A: No, I don't.
>
> Q: Do you recall whether or not there was a sentence imposed that day?
>
> A: On the—the second court date, there was.
>
> Q: On that second court date, do you know if there was a prosecutor in court?
>
> A: I don't recall.
>
> Q: Mr. Brunner, is it safe to say when we are talking in total about the case from 1997 that based upon how long it has been since that has happened, it is—you don't really recall what the exchanges would have been between you and the court? Is that a fair statement?
>
> A: Yes.

> Q: And that would apply to both days that you were in court in the 1997 case; is that right?
>
> A: Yes.
>
> Q: And therefore, is it safe or is it accurate that as you are sitting here under oath today, you simply can't recall whether or not you were advised or gave up your right to an attorney?
>
> A: Could you re—rephrase that?
>
> Q: Sure. Sure. Is it accurate for me to say that as you are sitting here today under oath that you simply don't recall whether or not you were advised of your right to an attorney or whether or not you gave up your right to an attorney?
>
> A: Yes.

The State also introduced into evidence the clerks' minutes sheets from the prior proceedings, and a completed guilty plea questionnaire filed in the 1997 case.[2]

¶5 The trial court determined that the State failed to prove that Brunner's waiver of counsel in the earlier cases was knowing, intelligent and voluntary, or that he understood the difficulties and disadvantages of self-representation. The court ruled that neither conviction could be used to enhance the sentence for Brunner's pending OWI charge, thereby reducing the maximum possible penalties to those of a third offense.

[2] The clerk's minutes from the 1994 initial appearance indicate that Brunner was "advised of his rights" and "waived [his] rights," and the matter was briefly set over for sentencing later that day. The 1997 initial appearance minutes indicate that Brunner was advised of his rights, pled not guilty, and the matter was scheduled for a pretrial conference and a plea hearing. Brunner appeared about three months later and, according to the minutes, pled no contest and was sentenced. The guilty plea form on file indicates that Brunner understood the constitutional rights waived by a no contest plea, but makes no reference to the waiver of counsel.

¶6 A defendant may collaterally attack a prior conviction on the ground that he or she did not knowingly, voluntarily and intelligently waive his or her constitutional right to counsel in the prior proceeding. *See* ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. A valid waiver of counsel contemplates a deliberate choice by the defendant to proceed without counsel, made with an "awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he [or she] is facing and the general range of possible penalties that may be imposed if he [or she] is found guilty." ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980).[3] A defendant has the initial burden to make a prima facie showing by "point[ing] to facts that demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding." ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92 (citation omitted). We review de novo whether a party has met its burden of establishing a prima facie case. ***Id.***, ¶26. Once a party establishes a prima facie case, the burden shifts to the State to prove by clear and convincing evidence that the defendant knowingly, intelligently and voluntarily waived his or her right to counsel. ***Id.***, ¶27.

¶7 The lack of available transcripts from earlier proceedings does not automatically defeat a defendant's collateral attack claim. ***State v. Hammill***, 2006 WI App 128, ¶8, 293 Wis. 2d 654, 718 N.W.2d 747. However, in the absence of a

[3] In ***Pickens v. State***, 96 Wis. 2d 549, 564, 292 N.W.2d 601 (1980), the court did not mandate an on-the-record colloquy for a valid waiver of counsel, and to this extent, ***Pickens*** was overruled by ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). ***Klessig*** requires that the trial court engage in a colloquy to ensure that the defendant is making a deliberate choice to proceed without counsel and is aware of the difficulties and disadvantages of self-representation, the seriousness of the charge, and the general range of possible penalties. ***Id.*** It is undisputed that Brunner's waiver of counsel occurred prior to ***Klessig*** and is governed by the principles in ***Pickens***.

transcript, a defendant fails to make a prima facie showing where he or she "simply does not remember what occurred at [the earlier] plea hearing." ***Id.***, ¶11. The ***Hammill*** court explained that the lack of transcripts did not absolve Hammill of his burden to make a prima facie showing by pointing to specific facts demonstrating an invalid waiver. "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***, ¶8 (quoting ***Ernst***, 283 Wis. 2d 300, ¶25). In the absence of transcripts, the ***Hammill*** court examined the testimony presented at the evidentiary hearing and determined that because Hammill was unable to recall what transpired at the prior proceedings, he "failed to make a prima facie showing that he did not knowingly and voluntarily waive counsel":

> His testimony does not contain facts demonstrating he did not know or understand information that should have been provided to him. Rather, Hammill simply does not remember what occurred at his plea hearing. Having failed to make a prima facie showing, Hammill's collateral attack fails.

Id., ¶11(citation omitted).

¶8 The present case is virtually indistinguishable from ***Hammill***. We assume for purposes of this decision that Brunner's pleadings were sufficient to entitle him to a hearing on his allegations. Nonetheless, at the evidentiary hearing, Brunner was unable to recall what transpired at his earlier proceedings and failed to establish any affirmative evidence supporting his collateral attack. He testified that he did not remember his "exchanges" with the judge, including whether the judge explained the charges and penalties, advised Brunner of his right to an attorney, or whether or not he waived his right to an attorney. Like the defendant in ***Hammill***, Brunner relied on the lack of transcript and lack of memory of the earlier proceedings. ***Id.***, ¶¶8-9. As in ***Hammill***, this lack of evidence was

insufficient to constitute a prima facie case, and the burden should not have shifted to the State.[4]

¶9 Brunner attempts to distinguish ***Hammill*** by drawing our attention to his affidavit averring that "[he] was not made aware of the difficulties or disadvantages of self-representation." We are not persuaded that this allegation constitutes a prima facie case in the face of the testimony presented at the hearing. Under ***Pickens***, the defendant must simply have "an awareness that there are technical rules … and that presenting a defense is not a simple matter of telling one's story." ***State v. Gracia***, 2013 WI 15, ¶36, 345 Wis. 2d 488, 826 N.W.2d 87 (quoting ***Pickens***, 96 Wis. 2d at 563). What is required is "that the defendant understand the role counsel could play in the proceeding, not that the defendant must understand every possible defense." ***Id.***, ¶36 (citation omitted). Brunner testified that an attorney "knows the law and tries to help the defendant." At the time of the earlier proceedings, he understood that the role of an attorney was to "try and help the defendant out and try and find the certain findings in the case" and was concerned that a lawyer "was just going to cost [him] more money." On this record, Brunner failed to establish a prima facie case sufficient to shift the burden to the State.

By the Court.—Order reversed.

[4] The State argues that the trial court incorrectly applied the burden-shifting analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The State asks this court to determine that in all collateral attack cases where transcripts are missing, the trial court should apply the analytic framework of ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996), as explained in ***State v. Hampton***, 2004 WI 107, ¶¶51, 55, 63, 274 Wis. 2d 379, 683 N.W.2d 14. We decline to decide so broadly. Because Brunner's hearing testimony undercut the allegations in his affidavit, this case fits squarely within ***Hamill*** and further explication is unnecessary. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible ground).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.