COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2775-CR **Cir. Ct. No. 2009CT121**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CASEY D. SCHWANDT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Green Lake County: BRIAN A. PFITZINGER, Judge. *Reversed and cause remanded with directions.*

¶1 GUNDRUM, J.[1] The State appeals from a circuit court order granting Casey Schwandt's motion collaterally attacking a prior conviction for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

operating a motor vehicle while intoxicated (OWI). We reverse and remand for reinstatement of Schwandt's judgment of conviction for OWI-third offense and his sentence on that conviction.

BACKGROUND

¶2 In 2009, the State charged Schwandt with OWI-third offense. Schwandt moved to collaterally attack a 1997 prior conviction supporting the charge. No transcript was available from the plea hearing related to that conviction due to the court reporter's notes having been destroyed. In his affidavit accompanying the motion, Schwandt averred that while he may have been advised of his right to consult with an attorney at his 1997 plea hearing, he was not represented by counsel at any time during the proceedings and "was not advised of, and did not understand, the dangers of self-representation, nor that an attorney might be able to identify potential defenses of which I may not have been aware." Schwandt further averred:

> I also did not understand that an attorney would have been able to negotiate the fines, jail time, revocation time, reporting date and other aspects of a potential sentence; could file motions challenging the evidence in my case; and could argue I had a different alcohol concentration at the time I was driving compared with the time that the chemical test was performed and that this difference could have provided either a defense or a lesser sentence. Had I known these things, I would have sought counsel to assist me.

He averred that he did not knowingly, intelligently, and voluntarily waive his right to counsel, "as I was not advised by the court of the ability of counsel to assist me in my defense." The circuit court denied Schwandt's motion without a hearing, and after a jury found him guilty as charged, he was convicted and sentenced.

¶3 Schwandt appealed and we reversed, concluding that Schwandt's submissions on his motion presented a prima facie case that he did not knowingly, intelligently, and voluntarily waive his constitutional right to counsel at his 1997 plea hearing. *See* ***State v. Schwandt***, No. 2011AP2301, unpublished slip op. ¶¶12, 17 (WI App May 16, 2012) (***Schwandt I***). We remanded to give the State the opportunity to prove that despite Schwandt's averments, his waiver was nonetheless knowing, intelligent, and voluntary. ***Id.***, ¶¶15, 17. After an evidentiary hearing at which Schwandt testified, the circuit court concluded that the State had not shown by clear and convincing evidence that Schwandt's right to counsel had been properly waived. The State appeals. Additional facts are set forth as necessary.

DISCUSSION

¶4 A defendant may collaterally attack a prior conviction on the basis that he or she did not knowingly, intelligently, and voluntarily 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. As relevant here, a valid waiver of counsel requires that the defendant make a deliberate choice to proceed without counsel and be "aware[] of the difficulties and disadvantages of self-representation." ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980).[2] The defendant has the initial burden to make a prima facie showing that

[2] In ***Pickens v. State***, 96 Wis. 2d 549, 564, 292 N.W.2d 601 (1980), the court did not require an on-the-record colloquy to establish 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). As we held in our earlier opinion in this matter, Schwandt's waiver of counsel for his 1997 OWI charge occurred prior to ***Klessig*** and is therefore governed by the principles in ***Pickens***. *See* ***State v. Schwandt***, No. 2011AP2301, unpublished slip op. ¶7 (WI App May 16, 2012).

his or her waiver was invalid 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). If a defendant makes this showing, the State must then prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his or her right to counsel. ***Id.***, ¶27. Whether the State has proven this is a question of constitutional fact. *See* ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. "We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous." ***Id.*** (citation omitted). However, we review de novo whether the facts which were properly found by the circuit court or which are undisputed meet the constitutional standard. ***State v. Hindsley***, 2000 WI App 130, ¶22 & n.13, 237 Wis. 2d 358, 614 N.W.2d 48.

¶5 As we noted in ***Schwandt I***, in this case,

> Schwandt does not claim to have been unaware of his right to an attorney before entering his plea, and neither does he deny making a deliberate choice to proceed pro se. He does aver that he was not aware of certain specific actions that an attorney might have taken on his behalf and further that he was not aware of the possible advantages of seeking representation prior to pleading in an OWI case.

Schwandt I, No. 2011AP2301, ¶15. Because we have already determined that Schwandt made a prima facie case with his initial submissions,[3] we must now

[3] After the circuit court's ruling granting Schwandt's collateral attack motion, and considering the court's findings following the evidentiary hearing that Schwandt had "absolutely no independent recollection of what went on [at his 1997 plea hearing]" and that his testimony did not support the claim in his affidavit, the State moved the circuit court to deny Schwandt's motion on the ground that Schwandt had failed to "sustain" the prima facie showing he had initially made on paper. The court denied the motion.

(continued)

consider whether the State proved at the evidentiary hearing, by clear and convincing evidence, that Schwandt had a sufficient understanding at his 1997 plea hearing of the difficulties and disadvantages of proceeding without an attorney.[4] We conclude that the State has met its burden.

¶6 The minutes from the 1997 plea hearing were introduced at the evidentiary hearing through the testimony of the court clerk who had drafted them. The minutes indicate, in relevant part, that (1) the court advised Schwandt of his right to an attorney; (2) Schwandt indicated he did "not want an attorney"; (3) the court "[went] over rights with [Schwandt]. [Schwandt] waives all rights"; and (4) the court accepted Schwandt's no contest plea and sentenced him, which included twenty days in jail. *See also* ***Schwandt I***, No. 2011AP2301, ¶3. Further, the court clerk testified at the evidentiary hearing that while she had no independent recollection of Schwandt's 1997 plea, at the time of the plea she was "very familiar" with the plea hearing procedures of the judge who took Schwandt's plea and that the judge would adjourn plea hearings when a defendant would invoke the right to counsel or even express uncertainty or indecision during the hearing.

This issue has merit. *See, e.g.*, ***State v. Hammill***, 2006 WI App 128, ¶11, 293 Wis. 2d 654, 718 N.W.2d 747 (concluding that, based on the defendant's testimony at the evidentiary hearing, he had failed to make a prima facie showing because he "simply [did] not remember what occurred at his plea hearing"). However, because the State has not raised the issue on appeal and addressing it would not change the outcome of this appeal, we do not address it.

[4] The State argues on appeal that, based on a combination of our supreme court's recent decision in ***State v. Negrete***, 2012 WI 92, ¶¶29-33, 343 Wis. 2d 1, 819 N.W.2d 749, and its prior decision in ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92, we should hold that Schwandt not only bears the burden of making a prima facie showing in order to be entitled to an evidentiary hearing but that he continues bearing the burden to show by clear and convincing evidence that he did not knowingly, intelligently, and voluntarily waive his right to counsel. Because we conclude that the State carried its burden even if the more stringent pre-***Negrete*** requirements still apply, we need not decide this issue.

¶7 Schwandt also testified at the evidentiary hearing and confirmed that he was informed of his right to an attorney at the time of his arrest on January 10, 1997, which occurred just two and one-half weeks before his plea. He recalled that at his plea hearing the judge said "something about an attorney," adding that "I don't remember the details. I just remember him … saying something about an attorney." He testified at the collateral attack evidentiary hearing that he decided to proceed without an attorney at his plea hearing. While Schwandt frequently repeated at the evidentiary hearing that he was unaware at the time of his plea of what an attorney would have been able to do for him in his particular case, he also testified as to his familiarity at the time of his plea with the role of attorneys, acknowledging that he knew attorneys "had specialized training in the law" and "can appear in court on behalf of people who are appearing in court." Schwandt further testified to his appreciation at the time of his plea for the specialized training and knowledge an attorney generally would have:

> Q [Y]ou understood ... in January of 1997 ... if you were charged with operating while intoxicated homicide, killing someone, that you'd have a right to an attorney, right?
>
> A Yes.
>
> Q And in January of 1997, if you were facing that charge, you would have wanted an attorney, correct, for that serious charge?
>
> A If I was facing that serious of a charge, I obviously—I mean, yeah, I would want an attorney.
>
> Q And you would want an attorney for that serious charge because you understand an attorney might be able to assist you, correct?
>
> A Correct.
>
> Q And that's because the attorney has specialized training and knowledge, correct?

A Correct.

Schwandt also acknowledged he lacked legal training and that representing himself he would not have known how to make legal challenges. He further testified that he understood at the time of his plea about specialized training or experience for professions generally, such as the advantages of using a trained auto mechanic to fix his automobile instead of a person with no experience or training. As the State points out, Schwandt further testified with regard to his own profession that to advance from a laborer to a skilled petroleum pipeline technician he himself received specialized training.

¶8 The circuit court asked Schwandt additional questions at the evidentiary hearing:

> Q You certainly knew, though, that attorneys could get people ... out of criminal messes, right?
>
> A I—I guess I didn't really know what an attorney could do in a DUI case.
>
> Q Well, you knew that.
>
> A If I was charged for murder like he said, I probably would have maybe looked in the phone book and seen if I could find an attorney or went and consulted somebody.
>
> ….
>
> Q And why would you not hire an attorney in a operating while under the influence, but if it was a more serious crime you'd hire an attorney? Wouldn't you be wasting your money in both cases if you didn't think an attorney could do anything for you?
>
> A Well, I—I just thought you got picked up for a, you know, I didn't know—I didn't know what an attorney was able to do for me in a DUI case.
>
> ….

> Q Okay. But when you say you didn't know what an attorney could do, I'm having a lot of problems with this concept because you understood it was a criminal case. Whether it's a homicide or whether it's a traffic crime, you understand that attorneys can do—and I'll go back to something that was fairly relevant at the time. O. J. Simpson, remember that case?
>
> A Uh-huh.
>
> Q What did the attorneys do there?
>
> A Yeah, they—I guess they let him get away with murder.

¶9 This case bears close resemblance to our supreme court's recent case of ***State v. Gracia***, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, in which the court considered whether the State had shown by clear and convincing evidence that Gracia was aware at the time of his plea of the difficulties and disadvantages of proceeding without an attorney. ***Id.***, ¶¶35-36. The State agreed that Gracia had made a prima facie case that his waiver of counsel was invalid because even though Gracia had been informed he had a right to an attorney prior to his waiver of that right, he did not receive a "significant explanation" from the court at the time of his waiver of the difficulties and disadvantages of self-representation. ***Id.***, ¶¶32-33. Gracia was twenty-three years old at the time of the challenged plea hearing and had graduated from high school and attended some college. ***Id.***, ¶32. As the ***Gracia*** court explained it, at the collateral attack evidentiary hearing twelve years after his waiver and plea, ***id.***, ¶37, Gracia "asserted that he did not know during the 1998 [plea] hearing that a lawyer could look into defenses other than innocence"; however, he "admitted that [at the time of his waiver and plea] he understood that a lawyer could 'go to court' for him and that he had some familiarity with lawyers through television. He was also aware of the O.J. Simpson trial." ***Id.***, ¶33.

¶10 The court determined that Gracia "had familiarity with the role of lawyers" at the time of his waiver and plea and concluded that he had knowingly, intelligently, and voluntarily waived his right to counsel. ***Id.***, ¶41. Specifically, the court noted that at his collateral attack evidentiary hearing Gracia explained that he did not hire counsel at the time of his earlier plea hearing because he was guilty and the State's recommendation was for the minimum, which demonstrated to the ***Gracia*** court a calculated decision by Gracia not to spend money to hire an attorney in that situation. ***Id.***, ¶37. Related to the collateral attack hearing, the court noted that the circuit court had found Gracia's testimony to be "somewhat self-serving when indicating that he had no idea what an attorney could do" and pointed out that Gracia had no educational deficiencies, having completed high school and briefly attended college. ***Id.*** In concluding that Gracia made "a cost-benefit decision and knew what he was giving up" when he waived his right to counsel, the ***Gracia*** court further noted that "Gracia testified 12 years after he initially waived his right to counsel, he had additional convictions in the intervening years, and at that point he faced an enhanced penalty for his 1998 conviction." ***Id.*** The court held that "the law requires that the defendant 'understand the role counsel could play in the proceeding,' not that the defendant must understand every possible defense." ***Id.***, ¶36 (citing ***Schwandt I***, No. 2011AP2301, ¶14).

¶11 In this case, the circuit court concluded from the collateral attack hearing that Schwandt made a deliberate choice to plead because "he didn't think this was serious and so consequently his decision was to—just to proceed without counsel. And he knew that—he was advised of the penalties, and yet he continued to proceed without counsel." Schwandt does not suggest the court erred in this conclusion and the record supports it.

¶12 While Schwandt, in fact, may not have known all the different ways in which an attorney might have been able to assist him with his particular case in 1997, we conclude based on his own undisputed testimony and the findings of the circuit court that at the time of his waiver and plea, Schwandt, like Gracia, "knew what he was giving up." ***Id.***, ¶37. Based on his own testimony, Schwandt was twenty-one years old, had graduated from high school, and was gainfully employed at the time of his 1997 plea. No educational deficiencies have been suggested. He understood attorneys had specialized training in the law, appeared in court on behalf of persons, and could assist persons with criminal cases. Indeed, he acknowledged that he would have sought an attorney, rather than represent himself, if it was a more serious case. Schwandt had the requisite "familiarity with the role of lawyers." *See* ***id.***, ¶4.

¶13 Based on the foregoing, we conclude that the State has met its burden and proven that Schwandt knowingly, intelligently, and voluntarily waived his right to counsel. Thus, his waiver was valid and the 1997 conviction stands. We remand to the circuit court for reinstatement of Schwandt's May 17, 2011 judgment of conviction of OWI-third offense and his sentence on that conviction.

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.