COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP281-CR **Cir. Ct. No. 2008CF6377**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. SOCHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN and DENNIS P. MORONEY, Judges. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. James J. Socha, *pro se*, appeals the amended judgment, entered upon a jury's verdict, convicting him of operating a motor vehicle while intoxicated (OWI) as a tenth or subsequent offense. *See* WIS. STAT.

§§ 346.63(1)(a), 346.65(2)(am)7. (2007-08).[1] He also appeals the order denying his motion for postconviction relief.[2] We affirm.

BACKGROUND

¶2 Socha initially was charged with one OWI count as a tenth or subsequent offense. The complaint was later amended to include one count of operating with a prohibited alcohol concentration.

¶3 The State alleged that Socha had at least eleven prior OWI-related offenses. Prior to trial, Socha moved to collaterally attack five of the prior out-of-state convictions based on alleged constitutional violations concerning his right to counsel. In supporting affidavits, Socha averred that he did not have an attorney during the proceedings. No documentation beyond Socha's averments was provided. The trial court denied the motion following a hearing.

¶4 Later, Socha, this time *pro se*, again moved to collaterally attack seven prior out-of-state convictions arguing that they should not be counted for sentence enhancement purposes. The trial court denied the motion in an oral ruling.

¶5 A jury found Socha guilty of both counts charged.

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

[2] The Honorable Thomas P. Donegan entered the judgment of conviction. The Honorable Dennis P. Moroney, the successor to Judge Donegan's calendar, entered the order denying Socha's postconviction motion.

¶6 Prior to sentencing, Socha asked the trial court to reconsider its oral ruling. The trial court denied this motion as well.

¶7 The trial court then imposed sentence for OWI as a tenth or subsequent offense. It dismissed the charge for operating with a prohibited alcohol concentration.

¶8 Postconviction, Socha filed a *pro se* motion for relief, seeking to reopen his sentence and collaterally attack the seven out-of-state convictions. Following briefing, the postconviction court denied Socha's motion.

DISCUSSION

¶9 Socha argues that ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, *opinion clarified on denial of reconsideration*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902, allows him to collaterally attack prior convictions on grounds other than a violation of his Sixth Amendment right to counsel. Next, Socha contends that the affidavits he submitted below were adequate to establish a *prima facie* case of invalid waiver of counsel. Finally, he asserts that the record supports only a sentence for a civil first offense of OWI, and as such, this court should commute his sentence. We will address each issue in turn.[3]

A. *Collateral Attack on Prior Convictions*

¶10 Socha asserts that under ***Hahn***, he is entitled to collaterally attack his prior convictions on grounds other than a violation of his Sixth Amendment right to counsel. Specifically, he submits that his prior convictions in other states

[3] We have re-ordered the issues presented in Socha's brief.

were based on constitutionally defective pleas, which were not knowingly, intelligently, and voluntarily entered into.

¶11 Whether Socha is entitled to collaterally attack his prior convictions in an attempt to prevent them from being counted for purposes of sentence enhancement is a question of law subject to our independent review. *See* ***State v. Peters***, 2001 WI 74, ¶13, 244 Wis. 2d 470, 628 N.W.2d 797.

¶12 In ***Hahn***, our supreme court considered whether an offender convicted under Wisconsin's persistent repeater statute could challenge a prior conviction as unconstitutional because it was allegedly based on a guilty plea that was not knowing, intelligent, and voluntary. ***Id.***, 238 Wis. 2d 889, ¶3. In concluding that the offender could not use the enhanced sentence proceeding to make such a challenge, the ***Hahn*** court explained:

> [W]e conclude that considerations of judicial administration favor a bright-line rule that applies to all cases. We therefore hold that a [trial] court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. *If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge under* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), *or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence.* We do not address the appropriate disposition of any such application.

Hahn, 238 Wis. 2d 889, ¶28 (footnote omitted; emphasis added), *as clarified by* 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902.

¶13 It is the next-to-last sentence of this passage that Socha relies on, referring to it as "the sub[-]rule modification" of ***Hahn***'s bright-line rule. However, even if the language on which Socha relies can be construed to modify ***Hahn***'s bright-line rule, Socha has failed to establish how the modified language applies to him. He simply states, without further explanation or analysis, that he has no allowable mechanism to directly attack his prior convictions and is not in custody on them. No details are provided in his appellate briefs as to what, if any, attacks on his seven prior offenses from Illinois and Ohio were made. This court need not consider arguments that either are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* ***Dieck v. Unified Sch. Dist. of Antigo***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (unsupported factual assertions); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).

¶14 In any event, we are wholly unconvinced that the circumstances presented here, which mirror those before the court in ***Hahn***, warrant a deviation from the bright-line rule. As summed up by the State: "The [***Hahn***] court made explicit that a person cannot base a collateral attack on a claim that his or her plea was not knowing intelligent, and voluntary—the exact claim that Socha is attempting to make in this case." We see no basis on which to arrive at a conclusion different than the one the ***Hahn*** court arrived at. *See generally* ***State v. Hammill***, 2006 WI App 128, ¶17, 293 Wis. 2d 654, 718 N.W.2d 747 ("***Hahn*** is a broad, bright-line rule. Since Hammill's challenge to his Village of Cameron conviction is not based on the denial of his right to counsel, the challenge is barred by ***Hahn***.").

B. *Prima facie* case of Invalid Waiver of Counsel

¶15 In the trial court, Socha also attempted to collaterally attack five out-of-state convictions by arguing that he was not represented by counsel during those proceedings. On appeal, he argues that the trial court erred when it denied his motion. We are not convinced.

¶16 Socha has not shown that his prior convictions were for crimes to which the right to counsel attached. *See* ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992) ("[T]he defendant bears the initial burden of coming forward with evidence to make a *prima facie* showing of a constitutional deprivation in the prior proceeding."). He has not shown that the prior convictions were for felonies, *see* ***Gideon v. Wainwright***, 372 U.S. 335 (1963), or that he was imprisoned as a result of a misdemeanor conviction, *see* ***Scott v. Illinois***, 440 U.S. 367, 373-74 (1979). Consequently, this alone is enough for us to conclude that the collateral attacks must fail. *See* ***Hahn***, 238 Wis. 2d 889, ¶28 (collateral attacks limited to violations of constitutional right to counsel).

C. *Counting Prior Convictions*

¶17 Next, we consider whether Socha's prior out-of-state convictions were properly counted as offenses. This involves the interpretation and application of statutes to undisputed facts, which again is a question of law subject to our independent review. *See* ***State v. White***, 177 Wis. 2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993).

¶18 In determining the prior convictions to be counted as offenses, WIS. STAT. § 343.307 provides:

> **(1)** The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under ss. 114.09(2) and 346.65(2):
>
> ….
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, *as those or substantially similar terms are used in that jurisdiction's laws*.

(Emphasis added.) Here, Socha argues that the State failed to prove substantial similarity between the statutes he was convicted of violating in Ohio and Illinois and Wisconsin's OWI statute.

¶19 During the proceedings below, both before and after he was convicted, Socha submitted affidavits in which he affirmed that he was convicted of driving under the influence in Ohio on November 7, 1989, January 9, 1991, January 21, 1992, and in two cases on April 28, 1992. Socha further affirmed in affidavits that he pled guilty to driving under the influence and was sentenced in two cases in Illinois on May 4, 2000.[4] Additionally, the record reveals numerous other instances where despite challenging their validity, Socha acknowledged that the convictions existed.

[4] The affidavit detailing the Illinois convictions was submitted by Socha, who was acting *pro se*, in support of a motion he filed prior to his jury trial. Although the State repeatedly references it, we note that the affidavit is unsigned. In his postconviction motion, Socha again submitted an additional—signed—affidavit, affirming that he was convicted in two cases in Illinois.

¶20 In ***State v. Puchacz***, 2010 WI App 30, 323 Wis. 2d 741, 780 N.W.2d 536, we concluded that the final phrase of WIS. STAT. § 343.307(1)(d) "indicates the broad scope" of the counting statute. ***Puchacz***, 323 Wis. 2d 741, ¶12. We further pointed out that when determining whether to impose an enhanced penalty, "Wisconsin even counts prior offenses committed in states with OWI statutes that differ significantly from our own." ***Id.***

¶21 We then held that "'[s]ubstantially similar' simply emphasizes that the out-of-state statute need only prohibit conduct similar to the list of prohibited conduct in [WIS. STAT.] § 343.307(1)(d)." ***Puchacz***, 323 Wis. 2d 741, ¶12. This understanding aligns with the policy choice of our legislature. ***Id.*** Counting offenses committed in other states furthers the purposes of the OWI laws generally. ***Id.***; *see also* ***State v. List***, 2004 WI App 230, ¶11, 277 Wis. 2d 836, 691 N.W.2d 366. "'Because the clear policy of [Wisconsin's OWI laws] is to facilitate the identification of [alcohol and/or drug impaired] drivers and their removal from the highways, the statute must be construed to further the legislative purpose.'" ***Puchacz***, 323 Wis. 2d 741, ¶12, 780 N.W.2d 536 (quoting ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980)).

¶22 Applying this broad interpretation and application of the final phrase of WIS. STAT. § 343.307(1)(d) and placing it in the context of the public policy supporting our OWI laws, we conclude that the challenged Ohio and Illinois convictions were properly counted. Socha has acknowledged that the prior offenses he is challenging were for operating while under the influence. Consequently, we agree with the State that "[t]he precise language used in any of the statutes makes no difference."

¶23 Socha asserts that to arrive at this conclusion, we must ignore the language in ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996), which provides that it is the State's burden of establishing prior offenses as the basis for imposition of enhanced penalties. ***Id.*** at 104. The ***Wideman*** court, however, goes on to state that "[i]f an accused admits to a prior offense that admission is, of course, competent proof of a prior offense and the State is relieved of its burden to further establish the prior conviction." ***Id.*** at 105. Therefore, Socha's admissions are competent proof of the prior offenses.[5]

¶24 Finally, we address Socha's argument in his reply brief that the affidavits were not used by the trial court and that this facet of the State's argument is being raised for the first time on appeal. First, we did not rely exclusively on the affidavits but also on the numerous acknowledgements substantiating the convictions, which are sprinkled throughout the record. Second, even if the trial court relied on different information in determining that the Ohio and Illinois convictions should be counted, it arrived at the same conclusion we do. *See* ***International Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.***, 2007 WI App 187, ¶23, 304 Wis. 2d 732, 738 N.W.2d 159 (We may affirm for reasons different from those of the trial court.). We also note that this court can consider new arguments raised by respondents who seek to uphold the results reached below. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78.

[5] Contrary to his assertions, his admissions are not being used as legal conclusions; rather it is from this information that we are able to arrive at the legal conclusion that the laws he was convicted of violating in Ohio and Illinois were substantially similar to our OWI laws.

¶25 To the extent that Socha is more generally challenging the proof submitted to substantiate the number of prior convictions, we agree with the State's assessment that Socha admitted to at least nine prior convictions making the trial court's imposition of sentence for a tenth or subsequent offense appropriate.[6] *See* ***Wideman***, 206 Wis. 2d at 105 (admission of prior offense is competent proof of prior conviction for purposes of enhanced penalty).

¶26 Again, although he takes issue with their validity, Socha has never argued that the convictions do not exist. Notably at the final pretrial hearing, the following exchange occurred:

> THE COURT: You want to preserve your right to appeal, and I think we're making the record right now that you are not accepting those [prior convictions] as valid, you believe you were denied your right to counsel, you believe you have statutory and constitutional claims you can make. You are in no way waiving your right to appeal this decision, and you think the Court was wrong in its earlier ruling on your motion, and you are preserving all of your rights. However, you are acknowledging that the record now says you have 11 convictions. I don't think you can get around that.
>
> MR. SOCHA: That's fine.

Later, at Socha's sentencing, he argued that two of his Wisconsin convictions had been vacated and he asked the trial court to "bring it down to a 10th offense."

[6] The State concedes:

> It is not entirely clear from the record whether the trial court in this case examined the certified driving records that the prosecutor offered to submit to prove the fact of Socha's prior convictions. It is clear that the driving records were not admitted into evidence and are not included in the appellate record.

¶27 The trial court sentenced him under the guidelines applicable to tenth or subsequent offenses. Beyond what is referenced above, there are a number of other instances in the record where Socha acknowledges the existence of at least nine prior convictions. Consequently, we will not disturb the trial court's conclusion as to the number of prior convictions.

By the Court.—Judgment and order affirmed.

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