COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP730-CR **Cir. Ct. No. 2012CF49**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SHERWOOD A. LEBO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Reversed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 STARK, J. The State of Wisconsin appeals an order granting Sherwood Lebo's motion to collaterally attack two operating while intoxicated

(OWI) convictions and denying the State's motion for reconsideration.[1] The circuit court concluded: (1) Lebo made a prima facie showing that his right to counsel was violated in the prior proceedings; (2) the burden therefore shifted to the State to prove that Lebo knowingly, intelligently, and voluntarily waived his right to counsel; and (3) the State failed to meet its burden. Conversely, we conclude Lebo failed to make a prima facie showing that his right to counsel was violated. We therefore reverse.

BACKGROUND

¶2 On October 30, 2012, Lebo was charged in Kewaunee County with one count of OWI and one count of operating with a prohibited alcohol concentration, both as seventh, eighth, or ninth offenses. The complaint listed six prior convictions for OWI-related offenses. On May 23, 2013, Lebo moved to collaterally attack three of these prior convictions—two Shawano County OWI convictions from 1998 and 1999, and a Brown County OWI conviction from 2000. Lebo asserted he was denied his constitutional right to counsel in the Shawano and Brown County proceedings.

¶3 In an affidavit submitted in support of his motion, Lebo averred he was not represented by an attorney in the Shawano and Brown County proceedings; he is unable to read; he was in special education classes from kindergarten through twelfth grade; he was discharged from the Marine Corps because he could not read; and he has had memory problems throughout his life. Lebo further averred he could not remember "the circumstances" of the hearings

[1] We granted the State's petition for leave to appeal a nonfinal order on May 13, 2014.

that took place in the Shawano and Brown County cases. However, with respect to all three of those cases, Lebo asserted he "just agreed with everything the Judge said, because [he] didn't know what to do." Lebo also averred, "I did what 'they' told me, meaning, I went with what 'they' were going to give me for the charge."

¶4 Lebo's attorney also submitted an affidavit, in which she averred the record from the Brown County case contained a plea questionnaire/waiver of rights form, but the records from the Shawano County cases did not. A copy of the plea questionnaire/waiver of rights form from the Brown County case was attached to Lebo's collateral attack motion. Notations on the form indicated it was read to Lebo by his wife because Lebo "does not read or write."

¶5 Lebo's counsel further averred that she attempted to obtain transcripts from two hearings in the Brown County case and from the only hearing that occurred in the 1998 Shawano County case, but she was informed the court reporters' notes were destroyed after ten years, and, as a result, transcripts could no longer be obtained. Counsel also averred that she attempted to obtain a transcript of the only hearing in the 1999 Shawano County case, but the court reporter did not respond to her request. However, because the case was over ten years old, counsel stated she "presume[d]" the reporter's notes had been destroyed and the transcript was therefore unavailable.

¶6 In the absence of transcripts, Lebo submitted minutes sheets from the two Shawano County hearings. The minutes sheet from the 1998 case stated, "Does not want atty[.] Plea of 'guilty' entered. Def. advised of rights. Those rights waived." The minutes sheet from the 1999 case similarly stated, "Will represent self[.] Pleas of 'guilty' entered. Def. advised of rights. Those rights waived."

¶7 Lebo also submitted minutes sheets from two hearings in the Brown County case. The first minutes sheet, from the February 7, 2000 initial appearance, noted "Def. can't read or write." Due to the ambiguous placement of an "X" on the form, it is unclear whether the form indicates that Lebo was "advised of right to counsel" during the hearing or was "referred to public defender." The second minutes sheet from the Brown County case, from the March 14, 2000 plea and sentencing hearing, indicated Lebo entered a no contest plea. A box next to the words "Advised & Waived rights" was checked.

¶8 After considering letter briefs filed by the parties, the circuit court denied Lebo's motion to collaterally attack the Brown County conviction, concluding Lebo failed to make a prima facie showing his right to counsel was violated in the Brown County proceedings. However, the court reached a contrary conclusion with respect to the Shawano County cases. Accordingly, the court concluded the burden shifted to the State "to prove by clear and convincing evidence that [Lebo] knowingly, intelligently, and voluntarily waived his right to counsel" in the Shawano County cases.

¶9 An evidentiary hearing was held on September 5, 2013. At the hearing, Lebo testified he was not represented by counsel in the two Shawano County cases. He could only remember one of the Shawano County hearings. Lebo stated he "probably did sign some papers" during the hearing, but he could not remember anything specific about the papers. He stated the judge talked to him for "about five minutes or so[,]" but he could not "remember at all anymore" what they talked about. He could not remember whether he spoke with the judge about getting a public defender or whether they discussed his options for getting an attorney, what an attorney would do for him, or the difficulties of self-representation.

¶10 When asked whether he requested an attorney in the Shawano County proceedings, Lebo responded, "No, because I can't afford it, so I just told them I will just take it the way it is. And I don't know if I have to have a lawyer or not. I don't know." The State then asked Lebo whether he made a financial decision not to hire a lawyer in the Shawano County cases, and he responded, "I guess, yeah. I'm not sure."

¶11 When asked if he knew what the potential penalties were when he went to court in the Shawano County cases, Lebo answered, "When I went to court, yeah, but I don't remember what they were anymore." Lebo was also asked if the judges told him about the charges he faced, and he responded, "I think so, have talked about it, but I don't remember it." Lebo further testified, "Whatever the judge[] offered me, I just took it, did it. He just gave me the time. Whatever the time was, I just went and did it." He explained, "I just thought I was guilty, so I just did whatever they said to do." He also stated he "didn't know you could fight [drunk driving charges]" because "once you have that alcohol level in you, that's what you are going to get charged with no matter what." When describing what appears to be a subsequent 2000 case, during which he was represented by counsel, Lebo stated, "That's when I went to court and I didn't even know what a lawyer would do for you."

¶12 After briefing, the circuit court issued a written decision granting Lebo's motion to collaterally attack the Shawano County convictions. The court concluded the State failed to prove Lebo knowingly, intelligently and voluntarily waived his right to counsel.

¶13 The State moved for reconsideration, arguing the court erred by concluding Lebo made a prima facie showing that his right to counsel was violated

in the Shawano County proceedings. In addition, the State argued the court applied an incorrect legal standard when it shifted the burden of proof to the State. The State asserted the burden of proof shifts "only in cases in which a transcript demonstrates a deficiency in a required colloquy[.]" Because transcripts of the Shawano County hearings were unavailable, and because Lebo's affidavit did not assert the Shawano County courts failed to conduct proper waiver colloquies, the State argued the burden of proof remained with Lebo to show that his waivers of counsel were not knowing, intelligent, and voluntary.

¶14 The circuit court concluded the State's argument regarding the burden of proof had "arguable merit," but it was not directly supported by existing Wisconsin law. The court further stated that, even if the State was correct that the burden of proof remained with Lebo, Lebo proved his pleas were not knowing, intelligent, and voluntary. The court therefore entered an order granting Lebo's motion to collaterally attack the Shawano County convictions and denying the State's motion for reconsideration.

DISCUSSION

¶15 On appeal, the State renews its argument that the burden remained with Lebo to prove he did not knowingly, intelligently, and voluntarily waive his right to counsel in the Shawano cases because his collateral attack motion failed to demonstrate that the waiver colloquies in those cases were defective. To place this argument in context, we first provide some background information regarding the right to counsel and the procedure for collaterally attacking prior convictions.

¶16 "A criminal defendant in Wisconsin is guaranteed … the assistance of counsel for his defense by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution as made applicable to the

states by the Fourteenth Amendment." ***State v. Klessig***, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997) (footnotes omitted). However, a defendant also has a constitutional right to self-representation. ***Id.*** at 203. Thus, if a defendant knowingly, intelligently and voluntarily waives his or her right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to represent him or herself. ***Id.*** at 204.

¶17 Before accepting a waiver of the right to counsel, a circuit court must conduct a colloquy 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 (4) was aware of the general range of penalties that could have been imposed on him." ***Id.*** at 206. "If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." ***Id.***

¶18 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only on the ground that he or she was denied the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶25, 238 Wis. 2d 889, 618 N.W.2d 528. In ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, our supreme court set forth the procedure that applies when a defendant attempts to collaterally attack a prior conviction. First, the defendant must make a prima facie showing that his or her constitutional right to counsel was violated in the previous proceeding. ***Id.***, ¶25. To do so, the defendant must point to "specific facts" demonstrating that he or she did not know or understand the information that should have been provided in the previous proceeding and, therefore, did not knowingly, intelligently, and voluntarily waive his or her right to

counsel. ***Id.***, ¶¶25-26. "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***, ¶25.

¶19 If the defendant makes this prima facie showing, the burden shifts to the State to prove, by clear and convincing evidence, that the defendant's waiver of counsel was knowing, intelligent, and voluntary. ***Id.***, ¶27. "[T]he court should, at such a time, hold an evidentiary hearing to allow the State an opportunity to meet its burden." ***Id.*** If the State fails to meet its burden, "'the defendant will be entitled …' to attack, successfully and collaterally, his or her previous conviction." ***Id.*** (quoted source omitted).

¶20 The State argues the burden-shifting procedure for collateral attacks set forth in ***Ernst*** applies only when the defendant "point[s] to evidence demonstrating a defect in the [circuit] court's colloquy." In support of this argument, the State analogizes collateral attack motions to motions for plea withdrawal.

¶21 As the State points out, motions for plea withdrawal fall into two general categories: ***Bangert*** motions and ***Nelson***/***Bentley*** motions. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). A ***Bangert*** motion is "based on defects in the plea colloquy." ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. For purposes of a ***Bangert*** motion, "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 [WIS. STAT.] § 971.08 or other mandatory procedures[.]" ***Bangert***, 131 Wis. 2d at 274. The defendant must also allege he or she did not know or understand the information that should have been provided during the

plea hearing. ***Id.*** If the defendant makes this showing, 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 any defects in the plea colloquy. ***Id.***

¶22 Unlike a ***Bangert*** motion, a ***Nelson***/***Bentley*** motion is generally based on factors extrinsic to the plea colloquy, such as ineffective assistance of trial counsel. ***Hoppe***, 317 Wis. 2d 161, ¶3 & n.n. 3-4. If a ***Nelson***/***Bentley*** motion "on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." ***Bentley***, 201 Wis. 2d at 310. However, the court has discretion to deny the motion without a hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 309-10. At a ***Nelson***/***Bentley*** hearing, the defendant has the burden to prove, by clear and convincing evidence, that plea withdrawal is necessary to avoid a manifest injustice. ***Hoppe***, 317 Wis. 2d 161, ¶60.

¶23 The State notes that our supreme court relied on ***Bangert*** and its progeny when adopting the burden-shifting procedure for collateral attack motions set forth in ***Ernst***. *See* ***Ernst***, 283 Wis. 2d 300, ¶25. The State also observes our supreme court has clarified that, when a defendant moves to withdraw his or her plea based on a defective plea colloquy, but no transcript of the plea hearing is available, the defendant's motion should be treated as a ***Nelson***/***Bentley*** motion, rather than a ***Bangert*** motion. *See* ***State v. Negrete***, 2012 WI 92, ¶3, 343 Wis. 2d 1, 819 N.W.2d 749. The ***Negrete*** court explained that, "practically speaking, where there is no transcript of the plea colloquy, the showing required under ***Bangert***, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." ***Id.***, ¶32. The court also reasoned that, in ***Bangert*** cases, the

rationale for shifting the burden of proof to the State is that "the State can avoid such burden by ensuring that the circuit court complies with the colloquy requirements[.]" ***Id.*** However, that rationale "rings hollow" when there is no transcript of the plea hearing and, accordingly, "no evidence in the record that the court did not comply" with its required duties. ***Id.***

¶24 The State argues there is "no logical reason that the ***Bangert*** procedure … adopted in ***Ernst*** for collateral attacks is somehow different [from] the ***Bangert*** procedure that applies to direct attacks." The State therefore argues that, similar to plea withdrawal motions, when a defendant's collateral attack motion fails to point to specific evidence showing a defect in the waiver of counsel colloquy, the burden does not shift to the State. Instead, the State argues this type of collateral attack motion should be analyzed using the procedure set forth in ***Bentley***. In other words, the State argues that, even if an evidentiary hearing is held, the defendant should retain the burden to prove his or her waiver of counsel was not knowing, intelligent, and voluntary.

¶25 Lebo, in turn, argues there is no published appellate case supporting the State's argument that the burden-shifting procedure prescribed by ***Ernst*** applies only to those collateral attack motions in which the defendant points to specific evidence of a defect in the plea colloquy. In addition, Lebo asserts the State's argument is directly contrary to three prior cases: ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992); ***State v. Drexler***, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182; and ***State v. Bohlinger***, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900.

¶26 In ***Baker***, the defendant moved to collaterally attack a previous conviction based on an alleged violation of his right to counsel. ***Baker***, 169

Wis. 2d at 76. Because the transcript of the earlier proceedings was "lost,"[2] the defendant relied on his own affidavit, in which he averred he "was unrepresented by counsel [in the earlier proceedings], and did not at any time affirmatively waive his right to counsel." ***Id.*** Based on these allegations, the supreme court concluded the defendant made a prima facie showing that his right to counsel was violated, and the burden therefore shifted to the State to prove he knowingly, intelligently, and voluntarily waived that right. ***Id.*** at 78.

¶27 In ***Drexler***, the defendant averred he was not informed during prior proceedings that "'he could have the court appoint counsel for him if he could not afford counsel, and the state or the county could be held responsible for paying the cost of appointed counsel.'" ***Drexler***, 266 Wis. 2d 438, ¶6. Relying on ***Baker***, we stated a defendant's affidavit "is sufficient to establish a prima facie case of being denied the right to counsel." ***Drexler***, 266 Wis. 2d 438, ¶10. Accordingly, "[o]nce Drexler made this prima facie case … the burden was on the State to come forward with evidence countering Drexler's affidavit." ***Id.***

¶28 In ***Bohlinger***, the defendant moved to collaterally attack two prior OWI convictions. ***Bohlinger***, 346 Wis. 2d 549, ¶2. He did not allege the waiver of counsel colloquies in those cases were facially deficient; instead, he argued he was unable to understand the information provided to him because of cognitive and learning disabilities. ***Id.***, ¶5. The circuit court found that the defendant did not have the cognitive capability to waive his right to counsel in the prior cases. ***Id.***, ¶13. Nevertheless, the court denied the defendant's motion because it did not

[2] Contrary to the State's assertion, the holding of ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), was not premised on the fact that "the State lost a transcript it should have been able to produce[.]"

allege the waiver colloquies in the prior cases were deficient. ***Id.*** We reversed, reasoning, "While ***Ernst*** states that a defective colloquy '*can* form the basis for a collateral attack' when supported by additional evidence, it does not hold that a defendant must allege a defective colloquy in order to state a prima facie case." ***Bohlinger***, 346 Wis. 2d 549, ¶18 (quoting ***Ernst***, 283 Wis. 2d 300, ¶37; emphasis in ***Bohlinger***). We remanded to the circuit court to hold an evidentiary hearing, at which the State would have the burden to prove that the defendant "in fact possessed the constitutionally required knowledge and understanding to execute valid waivers of counsel." ***Id.***, ¶21.[3]

¶29 We agree with Lebo that the State's argument regarding the burden of proof is not supported by existing law. According to the State, when a defendant cannot point to a defect in the waiver of counsel colloquy evident on the face of a transcript, the defendant's collateral attack motion should be treated as a ***Nelson***/***Bentley*** motion, such that the defendant retains the burden of proof. *See* ***Negrete***, 343 Wis. 2d 1, ¶33. However, this rule would run contrary to ***Baker*** and ***Drexler***, both of which held that a defendant's affidavit alone can establish a prima facie case that the defendant's right to counsel was violated, thereby shifting the burden of proof to the State. The State's proposed rule would also conflict with ***Bohlinger***, where we applied the burden-shifting methodology set forth in ***Ernst*** despite the defendant's failure to allege any defect in the previous waiver of counsel colloquies. Moreover, while our supreme court has expressly distinguished between plea withdrawal motions that allege defects evident on the

[3] Notably, unlike the circuit court in ***State v. Bohlinger***, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, the circuit court in this case never concluded Lebo's cognitive limitations rendered him incapable of waiving his right to counsel.

face of the plea hearing transcript and motions that set forth other bases for plea withdrawal, neither the supreme court nor this court has recognized a similar distinction in the context of collateral attack motions. We therefore agree with Lebo that, in this case, the circuit court did not err by applying the burden-shifting procedure prescribed by ***Ernst***.[4]

[4] Although we do not adopt the State's argument regarding the burden of proof, we note that, in the absence of the contrary case law cited above, we would find the argument persuasive.

As we previously pointed out in ***Drexler***, the relationship between the sentencing scheme for drunk driving offenses and the supreme court rules for record retention "compounds the problem of permitting a defendant to establish a prima facie case of a constitutional deprivation simply by filing a self-serving affidavit." ***State v. Drexler***, 2003 WI App 169, ¶11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. Under the sentencing scheme for drunk driving offenses, to determine whether an offense is a second offense, any eligible offense within the previous ten-year period is counted. *See* WIS. STAT. § 346.65(2)(am)2. (2013-14). To determine whether an offense is a third or subsequent offense, all eligible offenses during the defendant's lifetime are counted. Sec. 346.65(2)(am)3.-7. (2013-14).

However, the supreme court rules for record retention provide a limited shelf life for court records that will be needed to counter collateral attacks on prior drunk driving convictions. For instance, SCR 72.01(47) permits court reporter notes to be destroyed after ten years. Traffic forfeiture case files and related documents may be destroyed after five years, *see* SCR 72.01(24), (24a), (24m), and misdemeanor case files and related documents may be destroyed after twenty years, *see* SCR 72.01(18), (19), (20).

As we noted in ***Drexler***, the lack of transcripts for prior convictions over ten years old "will make it almost impossible for the State to overcome a defendant's prima facie case of a constitutional deprivation of counsel and establish a knowing, voluntary and intelligent waiver of counsel." ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. This puts the State in an "untenable position" because, under ***Baker***, 169 Wis. 2d 49, a defendant can make a prima facie showing "by simply filing an affidavit recounting his or her version of what occurred five, ten, twenty or twenty-five years earlier." ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. Adopting a ***Nelson***/***Bentley***-type procedure for collateral attack motions where transcripts of the prior proceedings are unavailable would alleviate this problem because the defendant would retain the burden of proof.

In ***Drexler***, we called upon the supreme court to reexamine ***Baker***, or, alternatively, to reconcile SCR ch. 72 with the sentencing scheme for drunk driving offenses. *See* ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. We renew that call today, adding a suggestion that the court consider adopting a ***Nelson***/***Bentley***-type procedure for collateral attack motions like the one at issue in this case.

¶30 Nevertheless, we agree with the State that the circuit court erred by concluding Lebo made a prima facie showing his right to counsel was violated in the Shawano County cases. Whether Lebo made a prima facie showing is a question of law that we review independently. *See* ***Ernst***, 283 Wis. 2d 300, ¶26. As discussed above, to make a prima facie showing that his or her right to counsel was violated during a prior proceeding, a defendant must point to specific facts demonstrating that he or she did not know or understand information that should have been provided during the waiver of counsel colloquy. ***Id.***, ¶¶25-26.

¶31 Here, the affidavit attached to Lebo's collateral attack motion averred Lebo was not represented by an attorney in the Shawano County proceedings; is unable to read; was in special education classes during school; and suffers from memory problems. Lebo also averred he could not remember "the circumstances" of the Shawano County hearings. However, Lebo asserted he "just agreed with everything the Judge said, because [he] didn't know what to do[,]" and he did "what 'they' told me[.]"

¶32 These allegations are insufficient to make a prima facie showing that Lebo did not know or understand the information that should have been provided during the Shawano County proceedings. Notably, Lebo did not allege that he did not waive his right to counsel in the prior proceedings, that the courts failed to advise him of any information required by ***Klessig***, or that he was unaware of the required information.[5] In addition, the minutes sheet from the 1998 case stated,

[5] For this reason, Lebo's case is distinguishable from ***Baker*** and ***Drexler***, both of which found that the defendants made prima facie showings based solely on allegations in their affidavits. In ***Baker***, the defendant specifically alleged he did not waive his right to counsel. ***Baker***, 169 Wis. 2d at 76. In ***Drexler***, the defendant alleged the court never informed him an attorney could be appointed for him if he could not afford counsel. ***Drexler***, 266 Wis. 2d 438, ¶6. As summarized above, Lebo's affidavit did not contain similar allegations.

(continued)

"Does not want atty[,]" and the minutes sheet from the 1999 case similarly stated, "Will represent self[.]" Both of the minutes sheets also stated, "Def. advised of rights. Those rights waived." This provides circumstantial evidence that Lebo was advised of and waived his right to counsel.

¶33 Moreover, "upon collateral attack a judgment carries with it a presumption of regularity." ***Baker***, 169 Wis. 2d at 76. Further, as the United States Supreme Court has stated, "On collateral review, … it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." ***Parke v. Raley***, 506 U.S. 20, 30 (1992). Here, the circuit court failed to apply the presumption of regularity when it concluded Lebo made a prima facie showing that his right to counsel was violated.[6]

¶34 Finally, even if we considered Lebo's testimony from the evidentiary hearing, we would nevertheless conclude he failed to make a prima facie showing. *See* ***State v. Hammill***, 2006 WI App 128, ¶¶9-11, 293 Wis. 2d

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In addition, we observe that our supreme court recently rejected a defendant's attempt to collaterally attack a prior conviction, reasoning that, although the defendant asserted on appeal that there was no evidence indicating he was aware of the general range of penalties he faced at the time he waived his right to counsel, his affidavit did not specifically allege he was unaware of that information. *See* ***State v. Foster***, 2014 WI 131, ¶¶75-77, __ Wis. 2d __, 856 N.W.2d 847.

[6] Admittedly, collateral attack motions are also subject to a contrary principle that courts "indulge in every reasonable presumption against waiver of counsel[.]" ***Baker***, 169 Wis. 2d at 76. However, despite this principle, the defendant still bears the initial burden on a collateral attack motion to allege specific facts supporting a prima facie showing that his or her right to counsel was violated. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. Lebo has failed to do so here.

Baker also states that a waiver of the right to counsel "will not be presumed from a silent record." ***Baker***, 169 Wis. 2d at 76. However, the record in this case is not completely silent. The minutes sheets from the Shawano County proceedings support an inference that Lebo was advised of and waived his right to counsel.

654, 718 N.W.2d 747 (considering defendant's testimony at an evidentiary hearing in order to conclude defendant failed to make a prima facie showing his right to counsel was violated). At the hearing, Lebo could recall very little about what occurred during the Shawano County proceedings. He testified he could remember one of the hearings, and he remembered speaking to the judge for about five minutes, but he could not remember what they discussed. In particular, he could not remember whether they discussed representation by a public defender, what an attorney could do for him, the difficulties of self-representation, or the charges against him. *See* ***Klessig***, 211 Wis. 2d at 206. A defendant cannot make a prima facie showing simply by alleging he or she does not remember what occurred during the earlier proceedings. *See* ***Hammill***, 293 Wis. 2d 654, ¶11. In addition, Lebo specifically testified he knew the penalties for the charges against him at the time of the Shawano County proceedings. *See* ***Klessig***, 211 Wis. 2d at 206. On this record, we conclude Lebo failed to make a prima facie showing that his right to counsel was violated.

By the Court.—Order reversed.

Not recommended for publication in the official reports.