**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

January 19, 2000

**Cornelia G. Clark**
**Acting Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2197-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRUCE W. CUMMINGS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.[1] Bruce Cummings appeals from that part of a judgment sentencing him as a third offender for operating a motor vehicle while under the influence of an intoxicant. He contends that his previous OWI conviction on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

December 16, 1996, is void for purposes of being used as a penalty enhancement because his guilty plea at that hearing was not voluntary. Because the evidence is insufficient to support a finding that Cummings' plea was made knowingly, voluntarily and intelligently, the sentence portion of the judgment is reversed and the matter is remanded with directions to sentence Cummings as a second OWI offender.

¶2 In November 1998, Cummings was charged with operating a motor vehicle while intoxicated and with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(a) and (b). Both were issued as a third offense within ten years. Pursuant to a plea bargain, Cummings pled guilty to the OWI violation. However, he argued that the violation was only his second OWI conviction within ten years because the conviction obtained on December 16, 1996, was void for purposes of penalty enhancement. After conducting a hearing on this challenge where the district attorney introduced a transcript of Cummings' plea hearing, the trial court found the prior conviction valid and sentenced him as a third offender. Cummings appeals only that ruling.

¶3 Both parties agree that a defendant in a subsequent proceeding may collaterally attack prior convictions obtained in violation of a defendant's constitutional due process rights if the prior convictions are used to enhance punishment for another offense. *See* ***State v. Baker***, 169 Wis. 2d 49, 69, 485 N.W.2d 237 (1992). When attacking a prior conviction on this basis, the burden is initially with the defendant to make a prima facie showing that the plea was not accepted in conformance with mandated procedures and not understandingly made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The burden then shifts to the State to show that despite the inadequate plea transcript, the plea was made knowingly, voluntarily and intelligently. *See* ***id***. The State

does not dispute that Cummings met the initial burden and that the burden shifted to the State.

¶4 In order to safeguard a defendant's constitutional rights, WIS. STAT. § 971.08(1) requires the trial court at a plea hearing to undertake a personal colloquy with the defendant to assure, inter alia, that the plea is voluntarily and knowingly made.[2] *See* ***Bangert***, 131 Wis. 2d at 269-72. This function can be performed by a detailed colloquy between the judge and the defendant, or by referring to some portion of the record or communication between the defendant and his lawyer, which exhibits the defendant's knowledge, among other things, of the rights he or she relinquishes. *See* ***id***. at 274-75.

¶5 At the December 1996 hearing, after a recess to allow Cummings to read the plea questionnaire, the following colloquy occurred:

> THE COURT: … All right. Mr. Cummings, you have now signed the plea questionnaire, waiver of rights document. So I take it you do understand all the information you read about there as well, is that correct?
>
> [CUMMINGS]: Correct.
>
> THE COURT: You are willing to waive all the rights you read about, including holding of the trial, jury trial, or court trial, is that correct?
>
> [CUMMINGS]: Correct.

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[2] WIS. STAT. § 971.08(1) provides in relevant part:

> **Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
> (c)

> THE COURT: All right. Then how do you plead to the charge?
>
> [CUMMINGS]: Guilty.
>
> THE COURT: Do you realize if you do that, then you will summarily be found guilty and without the holding of any trial at all, do you realize that?
>
> [CUMMINGS]: Yes.
>
> THE COURT: And you are aware of the penalties that have to be imposed, is that correct?
>
> [CUMMINGS]: Yes.
>
> THE COURT: The court is satisfied then that Mr. Cummings is freely, voluntarily, and intelligently entering the plea in awareness of the implications, and that also given the information as well, that there is a factual basis for the entering of the plea and the plea is entered as to what count?
>
> [ASSISTANT DISTRICT ATTORNEY]: Count 1, your honor. I would move to dismiss Count 2.
>
> THE COURT: Count 1 is the—which charge?
>
> [ASSISTANT DISTRICT ATTORNEY]: Driving while under the influence.
>
> THE COURT: Do you agree with that, Mr. Cummings?
>
> [CUMMINGS]: Yes.
>
> THE COURT: All right. So that's a count to which the Court finds he is guilty. The other count is ordered dismissed.

¶6 Cummings reasons that the personal colloquy with him at the December 1996 plea hearing did not include any discussion as to the applicable constitutional rights he was waiving. Because the colloquy was limited to whether he had gone over the questionnaire before he signed it and whether he understood the form, he contends that it is not the substantive kind of personal exchange between the trial court and the defendant required under ***Bangert*** and WIS. STAT. § 971.08.

¶7 While our approval of a "Guilty/No Contest Plea Questionnaire and Waiver of Rights" form in ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), certainly lessened the extent and degree of the colloquy otherwise required between the trial court and the defendant, *see* ***State v. Hansen***, 168 Wis. 2d 749, 755-56, 485 N.W.2d 74 (Ct. App. 1992), it was not intended to eliminate the need for the court to make a record demonstrating, among other things, the defendant's understanding that the plea results in the waiver of the applicable constitutional rights. *See* ***id***. The record made in ***Moederndorfer*** is demonstrative. Although the personal colloquy there was also brief, it nonetheless established the defendant's understanding that by entering the plea he was giving up the rights detailed in the form. *See* ***Moederndorfer***, 141 Wis. 2d at 828-29 n.1.

¶8 Here, the State relies on a transcript from the December 1996 hearing to establish that Cummings understood each of his rights and waived them. The plea hearing colloquy establishes essentially that Cummings had read and understood a plea questionnaire form. Although the transcript makes reference to this form, it was never marked as an exhibit and made part of this record. Although the district attorney made some reference to questions in the plea form, without the referenced form, this court cannot evaluate whether it fully and adequately informed Cummings of everything that is required under ***Bangert*** and WIS. STAT. § 971.08. Thus, the State failed in its burden to demonstrate that Cummings' plea was made knowingly, voluntarily and intelligently.

¶9 Therefore, the sentence part of the judgment is reversed and the matter is remanded to the trial court to sentence Cummings as a second OWI offender.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.