COURT OF APPEALS DECISION DATED AND FILED

March 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-1434-CR

Cir. Ct. No. 03CT000680

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES B. KNUDTSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Charles Knudtson appeals a judgment that convicted him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), as a third offense. He claims the circuit court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

denying his motion to exclude two earlier OMVWI convictions from consideration for purposes of determining the penalty for his present offense. We conclude, however, that Knudtson failed to make the necessary showing under ***Iowa v. Tovar***, 124 S. Ct. 1379 (2004), to establish that the two prior convictions were obtained in violation of his Sixth Amendment right to counsel. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 The State charged Knudtson with third-offense OMVWI. He filed a motion to preclude two prior convictions for OMVWI from being used to enhance the penalties for his present offense on the grounds that his two 1992 convictions were obtained in violation of his Sixth Amendment right to counsel. He supported his motion with an affidavit in which he averred that he "was not explained the advantages of having an attorney, and [he] was not aware of the advantages of having one at the time."

¶3 Because the court proceedings leading to the two 1992 convictions occurred more than ten years ago, the court reporters' notes had been destroyed pursuant to supreme court rule, and no transcripts were therefore obtainable. *See* ***State v. Drexler****,* 2003 WI App 169, ¶11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. The State obtained and submitted the court minutes of the plea hearings, as well as plea-questionnaire-and-rights-waiver forms, from both prior cases. These documents reflect that both prior convictions followed Knudtson's pleas of no contest, entered pro se. The questionnaire/waiver form in neither case included express waiver of counsel language, and the minute sheet for only one of the plea hearings had a box checked that reads: "Defendant advised of right to attorney."

¶4 No evidentiary hearing was conducted on Knudtson's motion. The circuit court heard oral argument from the parties and subsequently issued a written decision denying the motion. The court noted that the minutes and waiver forms from the prior cases "indicate both matters were handled in a routine fashion," and cited "the presumption of regularity in the conduct of such proceedings." The court also stated that the judges who took the earlier pleas were "experienced jurists who are meticulous in handling such matters." Finally, the court discounted Knudtson's affidavit, saying: "The convictions are more than 10 years old and the Court questions the accuracy of the Defendant's memory, plus he has an overriding interest and bias to have the two convictions struck."

¶5 After the court denied the motion to exclude the 1992 convictions for sentencing purposes, Knudtson was found guilty of OMVWI on stipulated evidence. The court imposed sentence for a third offense, including a six-month jail term, and Knudtson appeals.

ANALYSIS

¶6 Knudtson argues that his prior criminal OMVWI convictions cannot be used to enhance the sentence for his current offense because he made a "prima facie case that he was not aware of the advantages of having counsel" when he entered his uncounseled pleas, and the State failed to establish otherwise. He relies on ***State v. Baker,*** 169 Wis. 2d 49, 77-78, 485 N.W.2d 237 (1992), for the proposition that a defendant's affidavit is sufficient to shift to the State the burden of proving a proper waiver of counsel in the prior cases. Knudtson also contends that the U.S. Supreme Court's recent holding in ***Tovar*** is not applicable here because, "when collaterally challenging a prior conviction[,] the law in effect at the time of the prior conviction applies." We reject Knudtson's arguments and

conclude instead that ***Tovar*** governs the present circumstances and that Knudtson did not make a prima facie showing that his two prior OMVWI convictions were obtained in violation of his Sixth Amendment right to counsel.

¶7 The defendant in ***Tovar*** collaterally attacked a prior OMVWI conviction that would have increased his penalties for a new offense, asserting that his waiver of counsel was not knowing, voluntary and intelligent because the court in the prior case had not warned him of the dangers and disadvantages of self-representation. ***Tovar***, 124 S. Ct. at 1385-86. The Iowa Supreme Court concluded that, to comply with the Sixth Amendment, a court must inform a defendant who wishes to waive counsel of two things: (1) "that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked"; and (2) "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." ***Id***. at 1389.

¶8 The U.S. Supreme Court, however, disagreed, concluding instead that the Sixth Amendment does *not* mandate these admonitions as a prelude to waiving counsel for purposes of entering a guilty plea. ***Id***. The Court noted that the information a defendant needs in order to intelligently waive counsel will vary according to the stage of the proceedings at which waiver occurs, with a "less searching or formal colloquy" being sufficient for pretrial stages than is required when a defendant wishes to proceed to trial unrepresented. ***Id***. at 1388 (citing ***Patterson v. Illinois***, 487 U.S. 285 (1988)). Explaining that, "in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel," the Court concluded that Tovar had not met this burden:

> Tovar has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty. Further, he has never "articulate[d] with precision" the additional information counsel could have provided, given the simplicity of the charge. Nor does he assert that he *was* unaware of his right to be counseled prior to and at his arraignment.

Id. at 1390 (citation omitted).

¶9 Whether a defendant has met his or her burden to establish a prima facie claim that a prior conviction was obtained in violation of the Sixth Amendment is a question of law that we decide de novo. ***Baker***, 169 Wis. 2d at 78.[2] In his affidavit supporting his motion to exclude consideration of his 1992 OMVWI convictions, Knudtson averred the following:

> 4. During either plea hearing in the above mentioned cases, I was not explained the advantages of having an attorney, and I was not aware of the advantages of having one at the time. I was not informed that an attorney could do the following: find defenses that I would be unlikely to recognize on my own, better identify mitigating factors, bring pre trial motions to dismiss the charges if appropriate, assist me at trial, or negotiate on my behalf more effectively that I could for myself. I entered the plea because I wanted to get the case over with as quickly as possible, and I didn't know what else to do.

Knudtson, like the defendant in ***Tovar***, does not claim to have been unaware of his *right* to an attorney before entering a plea, and neither does he deny making a deliberate choice to proceed pro se. He does aver that he was not informed 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

[2] Because we decide this question de novo, it makes no difference whether the circuit court denied Knudtson's motion because it concluded that he had not established a prima facie case, as the State contends, or because the court concluded that the State had refuted the claim, which is what Knudtson suggests.

to pleading. The information and awareness Knudtson cites, however, are the very things that the Supreme Court concluded in ***Tovar*** were *not* constitutionally required in order to effect a valid waiver of counsel incident to pleading guilty or no contest to OMVWI.[3]

¶10 Knudtson also averred that he was not informed of "the seriousness of the charges in either case":

> I was not informed, and was not aware, that the convictions would be recorded on my criminal record for the rest of my life, and that this information would be available to the public, including potential employers. I was not informed that the convictions would make my legal alcohol concentration go down to a lower level.

Although Knudtson claims to have been ignorant of certain collateral consequences of being convicted of criminal OMVWI, he does *not* claim that he was unaware of either the nature of the charges or the range of punishment he faced upon conviction. In short, we conclude that nothing in Knudtson's affidavit attests to the absence of any of the constitutional requirements identified in ***Tovar***

---

[3] The Supreme Court observed that the warnings prescribed by the Iowa Supreme Court might not have served to enlighten a defendant's decision whether to seek or waive counsel, and that they might even confuse or mislead a defendant:

> The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.

Iowa v. Tovar, 124 S. Ct. 1379, 1390 (2004).

for permitting an unrepresented defendant to forgo a trial and enter a plea of guilty or no contest to criminal OMVWI. *See* ***Tovar***, 124 S. Ct. at 1383 (noting that the Sixth Amendment is satisfied under these circumstances "when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.").

¶11 Thus, if the Supreme Court's holding in ***Tovar*** applies to the present case, the circuit court did not err in denying Knudtson's motion. We conclude that, even if ***Tovar*** announced a "new rule of criminal procedure," as Knudtson contends, its holding applies here. We acknowledge that, in general, whether a new rule of criminal procedure applies retroactively depends primarily on the procedural posture of the case. ***State v. Lagundoye***, 2004 WI 4, ¶12, 268 Wis. 2d 77, 674 N.W.2d 526. Wisconsin adheres to the federal rule established in ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987), that new procedural rules apply retroactively to all cases pending on direct review and all cases still in the direct appeal pipeline. ***Id***. On the other hand, new rules of criminal procedure generally do *not* apply retroactively to cases that were final before issuance of the new rule, ***Lagundoye***, 268 Wis. 2d 77, ¶13, which Knudtson claims is the case here.[4]

---

[4] If what the U.S. Supreme Court announced in ***Tovar*** was a new rule of "substantive criminal law," or if it was a procedural rule but not a "new" one, there would apparently be no bar to our applying it retroactively to any conviction, regardless of whether it was no longer in the "direct appeal pipeline." *See* ***State v. Lagundoye***, 2004 WI 4, ¶¶12, 26, 268 Wis. 2d 77, 674 N.W.2d 526. The supreme court has explained that "'substantive law is that which declares what acts are crimes and prescribes the punishment therefor; whereas, procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.'" ***Id.***, ¶21 (citation omitted). "'A case announces a new rule if the result was not dictated by precedent at the time the defendant's conviction became final.'" ***State v. Lo***, 2003 WI 107, ¶62 n.12, 264 Wis. 2d 1, 665 N.W.2d 756 (citation omitted). For purposes of our analysis, we will assume, without deciding, that the Court announced in ***Tovar*** a "new rule of criminal procedure."

¶12 There can be no dispute that, even though Knudtson was convicted of OMVWI in this case on December 11, 2003, his conviction is still in the "direct appeal pipeline" and is therefore not yet "final." It is his 1992 convictions that Knudtson claims were final before ***Tovar*** was decided, which they plainly were. *See* **Lagundoye**, 268 Wis. 2d 77, ¶20 ("A case is final if the prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been exhausted, and time for certiorari review in the United States Supreme Court has expired."). Knudtson appealed neither 1992 conviction, and his right to seek direct review thus expired years ago.

¶13 That does not mean, however, that the present case constitutes a collateral "review" of those convictions, such that we cannot apply the ***Tovar*** holding in evaluating whether either conviction was obtained in violation of Knudtson's Sixth Amendment rights. The matter before us is a direct appeal of Knudtson's 2003 OMVWI conviction, raising the issue of whether the court in this case erred in imposing sentence for a third OMVWI offense. Even though a motion such as Knudtson's to exclude a prior conviction for sentence enhancement purposes is commonly referred to as a "collateral" attack on the prior conviction, *see*, *e.g.*, ***State v. Peters***, 2001 WI 74, ¶1, 244 Wis. 2d 470, 628 N.W.2d 797, this appeal does not present a challenge to a prior conviction that, if successful, will result in the setting aside or modification of a "final" judgment of conviction, such as may be achieved via WIS. STAT. § 974.06 or habeas corpus proceedings. Put another way, regardless of what we decide regarding the "counting" or not of the 1992 convictions in this case for sentence enhancement purposes, the 1992 convictions will not be affected and their finality will not be compromised.

¶14 Because our present inquiry will not determine whether Knudtson may obtain relief from his 1992 convictions, but only whether those convictions may be used to enhance the penalty imposed for his 2003 conviction, we conclude that the rule prohibiting retroactive application of new rules of criminal procedure when conducting a collateral review of a final conviction does not apply. The procedural posture of this case is identical to that in ***Tovar***, where the U.S. Supreme Court unanimously concluded that an Iowa trial court had correctly determined that a 1996 OMVWI conviction based on an uncounseled guilty plea could be used to enhance the penalty for a 2001 conviction, despite the lack of a judicial admonition in the 1996 case regarding the difficulties and disadvantages of self-representation. As we have explained, the holding in ***Tovar*** compels us to conclude that Knudtson's 1992 convictions may similarly be counted in this case for purposes of determining his sentence on the present conviction.

¶15 Finally, we note that Knudtson's affidavit in support of his motion does set forth a prima facie claim that the courts that accepted his pleas in 1992 did not give him admonitions regarding the "difficulties and disadvantages of self-representation" as subsequently mandated by the Wisconsin Supreme Court in ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Moreover, his affidavit includes an averment that Knudtson was unaware of the advantages of being represented by counsel, which, if true, would arguably entitle him to relief from his 1992 convictions under the holding in ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980). These failings, however, while perhaps entitling a Wisconsin defendant to withdraw a guilty plea as a matter of state decisional law, do not rise to the level of a Sixth Amendment violation. *See* ***Tovar***, 124 S. Ct. at 1390 (noting that states "are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful," but that

judicial admonitions regarding the disadvantages of self-representation are not required by the U.S. Constitution).[5]

¶16 The only infirmity in a prior conviction that provides valid grounds to exclude it for purposes of enhancing the penalty on a subsequent conviction is "a violation of the *constitutional right* to a lawyer." ***State v. Hahn***, 2000 WI 118, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528 (emphasis added); *see also* ***Peters***, 244 Wis. 2d 470, ¶14 (describing the holding in ***Hahn*** as being "that a defendant generally may not collaterally attack the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges a violation of his *constitutional right* to counsel" (emphasis added)). Because, under the holding in ***Tovar***, Knudtson did not aver facts tending to show that his constitutional right to counsel was violated on either occasion in 1992, we conclude that the trial court did not err in sentencing Knudtson for a third OMVWI offense in this case.[6]

---

[5] We also note that in both ***Klessig*** and ***Pickens***, the defendants represented themselves at trial. Given the distinction noted in ***Tovar*** between waivers of counsel for purposes of trial as opposed to entering a plea, it could be argued that the requirements of ***Klessig*** and ***Pickens*** apply to only the former, although neither holding expressly includes such a limitation.

[6] As we have noted, Knudtson also contends that, because he did not understand some of the collateral consequences of criminal OMVWI convictions, he was unaware of the "seriousness" of a criminal OMVWI conviction in 1992. An awareness of the "seriousness" of a charged offense is a prerequisite for a valid waiver of counsel under ***Pickens***. *See* ***Pickens v. State***, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980). An awareness of "seriousness," however, is not a constitutional requirement for a waiver of counsel incident to entering a plea under ***Tovar***. The Sixth Amendment in that circumstance requires an understanding of only (1) "the nature of the charges," and (2) "the range of allowable punishment." ***Tovar***, 124 S. Ct. at 1383.

CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed judgment.[7]

By the Court.—Judgment affirmed.

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

---

[7] In a postconviction affidavit Knudtson filed simultaneously with his notice of appeal, he averred that, at the time of both prior pleas, he "did not know, and was not informed of the minimum fines, minimum jail time, minimum/maximum periods of revocation of drivers' license; and legal requirements for an order to do assessment and driver's safety plan." Knudtson also pointed out that the plea-questionnaire/rights-waiver forms for the 1992 convictions specified the maximum fines and jail sentences, but not the mandatory minimums or applicable civil sanctions that might be imposed, such as driver's license revocation and a driver's assessment. His counsel, in a letter to the circuit court, stated that he wished "to include this issue in the appeal," and asked the court to "reopen the case to determine whether the motion should have been granted on these grounds." There is no indication in the record whether the court acted on this request.

Knudtson's belated affidavit arguably establishes a prima facie claim of a ***Tovar*** violation (as well as an additional ***Pickens*** violation, 96 Wis. 2d at 563), in that Knudtson claims to have been ignorant of the "range" of punishment for the 1992 offenses before he pled to them. The averments come too late, however. They were not before the circuit court when it denied Knudtson's motion, and they were not filed until after Knudtson had been convicted and was commencing his appeal of the conviction. Although he notes that the circuit court did not rule on his request to reopen the conviction and to consider the belatedly filed affidavit, Knudtson does not argue that the court erroneously exercised its discretion by failing to reopen and reconsider its prior ruling. We therefore do not consider the averments in the postconviction affidavit and decide the appeal based solely on the record before the circuit court at the time of its ruling on Knudtson's motion.