COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP452-CR **Cir. Ct. No. 2009CT169**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL L. WEGENER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Randall L. Wegener appeals from a judgment convicting him of operating a motor vehicle while under the influence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(OWI),[2] third offense. Wegener makes two claims: first, that the circuit court erred when it denied his motion to suppress evidence based on lack of reasonable suspicion to detain him and, second, that the circuit court erred when it denied his motion collaterally attacking his second OWI conviction from 2002. We conclude, however, that the officer had the requisite reasonable suspicion under the Fourth Amendment to initiate a stop of Wegener's vehicle. We further conclude that the State established by clear and convincing evidence that Wegener knowingly, intelligently and voluntarily waived his right to counsel prior to his 2002 OWI conviction. We therefore uphold the circuit court's denial of Wegener's motions and affirm the judgment.

BACKGROUND

¶2 The relevant facts are as follows. At 1:00 a.m. on February 12, 2009, Fond du Lac County Sheriff's Deputy Jason Fabry was on routine patrol when he came across Wegener driving on County Trunk Highway F in Fond du Lac county. Highway F has painted double yellow lines with occasional passing breaks in the double yellow. Before seeing Wegener's vehicle, Fabry noticed fresh tire tracks in the snow that were operating left of the center line. These were the only fresh tracks that were on the roadway at the time. These tracks indicated that the driver's side front and rear tires were over the center line for approximately thirty to fifty feet before the vehicle would then reenter its lane of travel. Fabry saw this pattern of tracks twice, before he caught up with the vehicle

[2] Wegener was also found guilty of operating with prohibited blood alcohol concentration (PAC) of .08 or more, contrary to WIS. STAT. § 346.63(1)(b). However, the accompanying PAC charge was dismissed in keeping with § 346.63(7)(b), which permits the entry of but one conviction where a defendant is charged with both OWI and PAC.

whose tracks he had been following.[3] At this time, Fabry activated his squad car DVD recording device. Fabry then observed Wegener's vehicle cross the center line one time on Highway F and two times on Division Road. Fabry's observations are supported by the recording. Wegener appeared to be having difficulty controlling the vehicle, so Fabry activated his blue and red emergency lights followed by his siren and conducted a traffic stop.

¶3 Based on this traffic stop and Fabry's resulting observations,[4] the State charged Wegener with a third-offense OWI. On April 23, 2009, Wegener filed a motion to suppress based on lack of reasonable suspicion to stop his vehicle. Then, on September 15, 2009, Wegener filed a motion collaterally attacking his most recent prior OWI conviction. Both of Wegener's motions were denied, and Wegener subsequently pled no contest to OWI, third offense.

[3] The circuit court found, upon reviewing the squad car recording:

> [T]he trail/track left by the wheels, the defendant's tires are actually pretty good visible evidence…. [It gives] a visual picture of where the car went….
>
> [A]s the officer testified, he observed the tracks. I clearly find that credible. The tracks are highly visible on the DVD.
>
> I think it's easy to conclude from the DVD that these were fresh tracks, indeed Officer Fabry was able to speed up and observe the defendant's vehicle driving down the County Highway F, and the tracks that he was following led right to the defendant's vehicle. There are no other tracks in the road, no other cars on the road, so it's an easy conclusion of fact that the tracks that Officer Fabry was observing and tracking were caused by the defendant's motor vehicle.

[4] Upon contact with Wegener, Fabry observed that Wegener had slurred speech, breath emanating an alcohol-like odor, and red, glossy eyes. Fabry then conducted field sobriety tests and found that Wegener was above the legal limit and detained him for operating while under the influence.

Wegener was sentenced on February 15, 2010, for his third offense OWI. On the same day, Wegener filed this appeal.

DISCUSSION

¶4 *Reasonable Suspicion*. First, we examine whether the traffic stop violated Wegener's constitutional rights because it was not based on reasonable suspicion. The question of whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634 (*citing* ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899). A question of constitutional fact presents a mixed question of law and fact to which we apply a two-step standard of review. ***Post***, 301 Wis. 2d 1, ¶8 (*citing* ***State v. Martwick***, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552). We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. ***Post***, 301 Wis. 2d 1, ¶8 (*citing* ***Martwick***, 231 Wis. 2d 801, ¶16; ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis. 2d 380, 714 N.W.2d 548).

¶5 Investigative traffic stops are subject to the constitutional reasonableness requirement. ***Post***, 301 Wis. 2d 1, ¶12. The burden of establishing that an investigative stop is reasonable falls on the State. ***Id.*** Determination of reasonableness of an investigative stop is a commonsense test; the crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. ***Id.***, ¶13. Reasonableness of an investigative stop is determined based on the totality of the facts and circumstances. ***Id.*** A driver's actions need not be erratic, unsafe, or illegal to give rise to the reasonable suspicion necessary for a traffic stop. ***Id.***, ¶24. So long as

there are specific and articulable facts which yield reasonable inferences which, in turn, reasonably warrant a suspicion that an offense has occurred or will occur, there is reasonable suspicion. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

¶6 Wegener argues that Fabry did not have reasonable suspicion to conduct a traffic stop because he was driving appropriately for part of the time he was followed and blames his lack of control of his vehicle on the snowy weather conditions. Wegener's ability to drive appropriately for part of the two miles the deputy was following him, however, does not negate the fact that Fabry observed him crossing the center line, even if only briefly a few times. *See* ***State v. Popke***, 2009 WI 37, ¶26, 317 Wis. 2d 118, 765 N.W.2d 569 (even if not erratically driving inside or outside of designated lane, a momentary swerve over the center line gives rise to reasonable suspicion to conduct a traffic stop). The circuit court found that the weather did not excuse Wegener's lane deviations:

> The road conditions, weather, low snow condition, low blowing snow, minimal blowing snow, none of those things, in my view, would provide a legal basis to deviate from his lane of traffic. As the officer testified, he had no problems seeing. I think that would be true for the defendant as well.

¶7 Based on the above, we conclude that the officer had reasonable suspicion to conduct a traffic stop of Wegener's vehicle. Officer Fabry was justified in believing that Wegener was impaired when he saw him operating his vehicle left of center several times at 1:00 a.m. in violation of WIS. STAT. §§ 346.05(1) and 346.13(1).[5] *See* ***Post***, 301 Wis. 2d 1, ¶13.

[5] WISCONSIN STAT. § 346.05 is titled "Vehicles [are] to be driven on right side of roadway." While § 346.05(1)(a)-(f) provide exceptions to this general rule, there is no indication or argument that Wegener's conduct falls under any of them. *See also* ***State v. Puchacz***, 2010 WI App 30, ¶16, 323 Wis. 2d 741, 780 N.W.2d 536 (citing § 346.05(1)).

(continued)

¶8 *Collateral Attack.* The second issue is whether the circuit court erred in denying Wegener's motion collaterally attacking his second offense OWI conviction from 2002. A defendant who faces an enhanced sentence based upon a prior conviction may only collaterally attack the prior conviction based upon a denial of the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528; *see also* ***State v. Foust***, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997) (person charged criminally with violating WIS. STAT. § 346.63 may collaterally attack prior convictions that are being used as predicate offenses for sentence enhancement under WIS. STAT. § 346.65).

¶9 Pursuant to ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), in order to prove a valid waiver of counsel on direct appeal, the circuit court must adhere to the court-made procedural rule requiring it to engage in a mandatory colloquy ensuring 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

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WISCONSIN STAT. § 346.13 reads in pertinent part:

> **Driving on roadways laned for traffic.** Whenever any roadway has been divided into 2 or more clearly indicated lanes, including those roadways divided into lanes by clearly indicated longitudinal joints, the following rules, in addition to all others consistent with this section, apply:
>
> (1) The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.

against him, and (4) was aware of the general range of penalties that could have been imposed. *See also* ***State v. Ernst***, 2005 WI 107, ¶¶14, 18, 283 Wis. 2d 300, 699 N.W.2d 92. "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." ***Klessig***, 211 Wis. 2d at 206. However, when mounting a collateral attack, a defendant must do more than allege a defective plea colloquy or that the court failed to conform to its mandatory duties during the plea colloquy: "[T]he defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated."[6] ***Ernst***, 283 Wis. 2d 300, ¶25.

¶10 As set forth in ***Ernst***, a valid collateral attack requires the defendant "to point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.***, ¶25. 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. *See* ***State v. Baker***, 169 Wis. 2d 49, 78, 485 N.W.2d 237 (1992). If the defendant makes a prima facie showing, the burden then shifts to the State to show by clear and convincing

[6] In determining what role noncompliance with the court's directive in ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), should play in a collateral attack, the court in ***State v. Ernst***, 2005 WI 107, ¶37, 283 Wis. 2d 300, 699 N.W.2d 92, stated:

> [A]n alleged violation of the requirements of ***Klessig*** can form the basis of a collateral attack, as long as the defendant makes a prima facie showing, pointing to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her right to counsel.... [W]hen the defendant successfully makes a prima facie showing, the burden to prove that the defendant validly waived his or her right to counsel shifts to the State.

evidence that the defendant in fact possessed the constitutionally required understanding and knowledge that the defendant knowingly, intelligently, and voluntarily entered the plea. ***Ernst***, 283 Wis. 2d 300, ¶27.

¶11 Here, Wegener's motion challenging his second OWI conviction alleged that, at the plea hearing in 2002, he was not aware of the difficulties and disadvantages of self-representation in regard to an OWI case. He submitted an affidavit in which he acknowledged that the court advised him of his right to an attorney, "but the judge did not explain the difficulties or disadvantages." He then averred that he did not understand how an attorney would have been able to assist him and how this additional information would have affected his decision.[7] The circuit court ruled that the affidavit was sufficient to establish a prima facie case and shifted the burden to the State. The court then held an evidentiary hearing as to the validity of Wegener's 2002 waiver of counsel. Because the circuit court afforded Wegener a hearing, and because the parties' arguments focus on the evidence and testimony presented at that hearing, we will assume without deciding that Wegener's affidavit was sufficient to establish a prima facie case.

[7] Wegener's affidavit supporting his motion to exclude consideration of his 2002 OWI conviction, averred the following:

> Although I was told that I could consult with an attorney, I did not understand that an attorney would be able to identify defenses that I might not [have been] aware of. I further did not understand that an attorney would have been able to negotiate fines, jail time, revocation time, reporting date and other aspects of a potential sentence. I further did not understand that an attorney would have been able to file motions challenging the evidence in my case. I further did not understand that an attorney would have been able to argue that I had a different alcohol concentration at the time I was driving compared with the time that the blood was drawn 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.

¶12 In assessing Wegener's collateral attack, we draw from the supreme court's decision in ***Ernst*** and also from ***Iowa v. Tovar***, 541 U.S. 77 (2004). In ***Tovar***, the United States Supreme Court clarified that state mandated warnings as to the disadvantages of self-representation are not mandated by the Sixth Amendment: "[T]he constitutional requirement is satisfied 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 the range of allowable punishments attendant upon the entry of a guilty plea." ***Id.*** at 81. The constitution requires that a waiver of counsel be knowing, voluntary, and intelligent, and the information a defendant must possess in order to make an intelligent election "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings." ***Id.*** at 88.[8] The ***Tovar*** court concluded that the defendant had not met this burden:

> [The defendant] 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.

Tovar, 541 U.S. at 92-93 (citation omitted).

¶13 Wegener, 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

[8] The parties dispute whether the State's burden at the evidentiary hearing requires it to prove that each of the ***Klessig*** requirements were satisfied, including that the defendant understood the difficulties and disadvantages of self-representation. Because the circuit court found that Wegener's testimony at the evidentiary hearing established his awareness of the disadvantages of self-representation, we need not resolve this dispute. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on the narrowest possible grounds).

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 to pleading for an OWI case. However, as the circuit court found at the evidentiary hearing, Wegener's testimony indicated his awareness of both his right to counsel and the role counsel could play in the proceeding. The circuit court ultimately determined that the State had met its burden of proving that Wegener's waiver of his constitutional right to counsel was knowing, intelligent and voluntary. Whether the State did so involves the application of constitutional principles to facts, which we review independently of the circuit court. ***Klessig***, 211 Wis. 2d at 204. However, we will uphold the circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2).

¶14 The transcript of Wegener's 2002 plea hearing provides in relevant part:

> THE COURT: Do you understand that while the State has made a recommendation, I don't have to follow that recommendation and you could be facing a fine of not less than $350.00, no more than $1,100.00; imprisonment for not less than five days, no more than six months and revocation of your operating privileges for not less than one year, no more than eighteen months?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Because of this charge, you have the right to have a lawyer represent you and if you cannot afford one, one can be appointed to represent you at public expense; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you want a lawyer to represent you?
>
> THE DEFENDANT: No.

> THE COURT: Has anyone made any threats or promises to you so that you wouldn't ask for a lawyer?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you understand what a lawyer does in a criminal case as I explained earlier?
>
> THE DEFENDANT: Yes, I do.
>
> ….
>
> THE COURT: Do you have any questions about your right to have a lawyer represent you in this case?
>
> THE DEFENDANT: No.

¶15 After considering the record of the 2002 plea hearing and Wegener's testimony at the evidentiary hearing, the circuit court discussed its findings at length in a thorough and well-reasoned decision. Consistent with ***Tovar***, the court examined Wegener's ability to make an intelligent waiver in terms of his education and sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings. ***Tovar***, 541 U.S. at 88. The court found that Wegener had completed high school and advanced schooling at a technical college, and was of above average intelligence compared to the many drunken driving defendants the court had seen. The court was satisfied that, given Wegener's level of education, Wegener was able to understand what he reads, and he knowingly, intelligently and voluntarily waived his right to counsel.

> The Court, based now upon the evidence presented, the attorneys' arguments, does conclude as a matter of law that the State has, in fact, shown by evidence which is clear and convincing that the defendant did possess the constitutionally required understanding and knowledge which underpins his allegations as to what was inadequate for the plea colloquy at hand.
>
> ….

[Wegener] is conversant with lawyers, what they do and do not do…. He understands that lawyers negotiate, they argue cases…. He understands the need to, in criminal cases, to get people off, to get deals. This is the basic understanding that lawyers are advocates. They work for your behalf to get you better outcomes.

In this case, I find that Mr. Wegener basically was convinced with the severity of the facts against him …. A .23 is a rather high BAC level. As he acknowledged, he was caught behind the car. He had no real perceived excuses or defenses. The defendant, like many in the same situation, they basically throw the towel in and they go through the system.

But this was not a[n] unfair process. Mr. Wegener did go before a commissioner. He was advised of the procedures that are set forth in the transcript of May 20th…. [H]e had constructive and actual notice of the range of penalties through the complaint. He acknowledged he read over the complaint. He's certainly a person able to read and understand what he reads.

….

[T]his record does demonstrate adequate notice of the nature of the charge, the right to counsel, the range of punishment.

….

[Wegener's] other statement here about not understanding that an attorney would be able to negotiate fines or jail time or other aspects I find is not a credible statement. His testimony on the stand today demonstrates he does understand that lawyers are advocates. They do argue for their clients. They do try to get the best deal and get people off. That is just a self-serving assertion of fact, so I find it not credible.

[Wegener] understands his shortcomings. He knew that going into this case, and he did have the sufficient knowledge that lawyers do have technicalities, they have loopholes, and he testified on the stand to that awareness and knowledge, and that's sufficient for an intelligent decision to waive counsel.

> So the motion to strike the second offense conviction for enhancement purposes in this case would be denied. This case remains a third offense case.

¶16 Wegener's challenge to the circuit court's finding is essentially that the State failed to prove that he understood the role an attorney would play in the context of an OWI proceeding, i.e., that the attorney could challenge the admissibility and accuracy of chemical test results and the administration of field sobriety testing; question the State's compliance with the Implied Consent Statute, WIS. STAT. § 343.305; examine the application of a "curve defense"; and challenge reasonable suspicion. However, the law does not require this level of specificity. The record reflects that, at the time of his 2002 plea, Wegener was aware that he had the right to an attorney. Wegener was aware of his ***Miranda***[9] rights, including the right to counsel, before going to court. He filled out a "survey of rights" form, which he acknowledged contained a constitutional right to an attorney. He agreed that he took the time he needed to feel comfortable signing the form. He was read, and he understood that there was, a range of penalties, and he understood that the judge did not have to follow the guideline recommendations when sentencing. He observed that other defendants appeared with attorneys, and he was familiar with the function of attorneys and that they "help you." His testimony supports the court's finding that Wegener understood that lawyers are advocates who work on their client's behalf for better outcomes, in both civil and criminal cases. In the end, the circuit court found that Wegener's suggestion that he was not aware of the disadvantages of self-representation was not credible.

[9] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶17 Based on our review of the record, we conclude that the trial court's findings of fact are not clearly erroneous. We further conclude, as did the circuit court, that the State met its burden of proving by clear and convincing evidence that Wegener's waiver of counsel at his 2002 plea hearing was knowing, intelligent and voluntary. We therefore uphold the circuit court order denying his motion collaterally attacking his second offense OWI conviction.

CONCLUSION

¶18 We conclude that there was reasonable suspicion to justify the stop of Wegener's vehicle. We further conclude that the State met its burden of proving by clear and convincing evidence that Wegener's waiver of counsel at his 2002 plea hearing was knowing, intelligent, and voluntary and, therefore, his collateral attack of that prior conviction fails. Accordingly, we uphold the circuit court's denial of both Wegener's motion to suppress evidence and motion collaterally attacking his 2002 OWI conviction. We affirm the judgment.

By the Court.—Judgment affirmed.

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