COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP577-CR **Cir. Ct. No. 2011CT509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAIME M. SALOMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Jaime Salomon appeals from his conviction for operating while intoxicated (OWI) and operating with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

concentration (PAC), third offense. Salomon collaterally attacks his conviction by claiming that he did not knowingly, intelligently, and voluntarily waive his right to counsel at his second OWI conviction. Specifically, Salomon asserts that, in his 2007 case, he was not advised of the minimum penalty for the offense. We conclude that the State established by clear and convincing evidence that Salomon knowingly, intelligently, and voluntarily waived his right to counsel prior to his 2007 conviction. We therefore uphold the trial court's denial of Salomon's motion.

¶2 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, 575-76, 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).

¶3 Pursuant to ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), for a waiver of counsel to be valid, the trial 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 [or her], 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. When mounting a collateral attack, a defendant must do more than allege 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." ***Id.***, ¶25.

¶4 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.*** (citation omitted). If the defendant makes a prima facie showing, the burden then shifts to the State to show by clear and convincing evidence that the defendant in fact possessed the constitutionally required understanding and knowledge such that the defendant knowingly, intelligently, and voluntarily entered the plea. ***Id.***, ¶27. We review de novo whether a defendant has knowingly, intelligently and voluntarily waived his or her right to counsel. ***Klessig***, 211 Wis. 2d at 204.

¶5 Here, Salomon's motion challenging his second OWI conviction alleged that, at the plea hearing in 2007, he was not aware of the minimum mandatory penalty for second offense OWI. He submitted an affidavit in which he averred that had he known the charge carried a mandatory minimum penalty he would have sought counsel. At the hearing on Salomon's motion, the trial court withheld ruling whether the affidavit was sufficient to establish a prima facie case. The trial court allowed the State to proceed and put on evidence regarding the validity of Salomon's 2007 waiver of counsel. Because the trial court afforded Salomon a hearing, and because the parties' arguments focus on the evidence and testimony presented at that hearing, we will assume without deciding that Salomon's affidavit was sufficient to establish a prima facie case.

¶6 At the hearing on Salomon's collateral attack motion, the trial court and the parties referred to the transcript from the 2007 plea hearing. At that 2007 hearing, when questioned by the court if he had read the complaint, Salomon said, "I did." The complaint was two pages long and recited the maximum and

minimum penalties for the charged offenses. Salomon acknowledges that he was given the complaint, but now says that he did not read the two-page document but only checked his name and address. Salomon now claims that when he said he had read the complaint he meant "the police report." The State indicated, unchallenged, that the record contained the complaint but not the police report. In denying Salomon's motion, the trial court pointed out that the transcript showed that Salomon had indicated to the court that he had read the complaint and that it was "99 percent" true and correct. The trial court took this statement as further evidence that Salomon had in fact read the complaint. The trial court found Salomon's testimony at the hearing on collateral attack "self-serving."

¶7 ***Klessig***'s fourth requirement is that the defendant be aware of the "general range of penalties" that could be imposed. ***Id.*** at 206. Salomon argues that his alleged misunderstanding of the minimum sentence invalidates his waiver of counsel. That argument fails. The State has shown by clear and convincing evidence that Salomon was aware of the maximum and minimum penalties because he acknowledges that he received the complaint, he advised the court at the plea hearing that he had read the complaint, the complaint sets forth the maximum and minimum penalties for each count, and indeed, Salomon advised the court at the plea hearing that the complaint was ninety-nine percent accurate. The trial found his assertion that he had read the "police report" "self-serving," and we have no reason to doubt that finding. *See* WIS. STAT. § 805.17(2) (findings of fact shall not be set aside unless clearly erroneous).

By the Court.—Judgment affirmed.

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