COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP238-CR **Cir. Ct. No. 2011CF162**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GLEN G. BOWE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Reversed and cause remanded for further proceedings*.

¶1 MANGERSON, J.[1] The State appeals a judgment reflecting Glen Bowe's successful collateral attack of a 2010 operating while intoxicated

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

conviction. The State argues Bowe failed to make a prima facie showing that he was denied his right to counsel in 2010 and, therefore, the circuit court erred by shifting the burden to the State to prove Bowe validly waived his right to counsel. We agree Bowe failed to make the requisite prima facie showing. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 On April 25, 2011, Bowe was charged with fourth-offense operating while intoxicated.[2] The complaint alleged Bowe had three prior operating while intoxicated convictions, which occurred in 1989, 1991, and 2010. Bowe collaterally attacked his 1991 and 2010 convictions. He alleged he entered pleas to those charges "without having counsel present," and he asked "the Court [to] take no action on the matter until the defendant has gathered the necessary information and court records to warrant a hearing."

¶3 Approximately six months later, the State moved the court to deny Bowe's collateral attack. It asserted, in part, Bowe had not met his burden of making a prima facie showing that his right to counsel was violated in the previous cases. The State attached to its motion a judgment of conviction from the 1991 offense, which indicated Bowe had been represented by attorney Lyle J. Black, and a copy of a signed waiver of the right to counsel form that Bowe completed in the 2010 operating while intoxicated case.[3]

[2] He was also charged with fourth-offense operating with a prohibited alcohol concentration, hit and run of an attended vehicle, and operating while revoked.

[3] Bowe completed this form in 2009, at his initial appearance.

¶4 In response, Bowe's attorney filed an affidavit, averring that, at the plea hearing for the 2010 conviction, Bowe appeared in person without an attorney and no colloquy between Bowe and the court occurred regarding Bowe's waiver of counsel. Counsel provided the court with a copy of the 2010 plea hearing transcript. He also argued circuit courts have an affirmative obligation at the plea hearing to ensure a defendant has knowingly, voluntarily, and intelligently waived his or her right to an attorney. Counsel asserted the court's failure to engage Bowe in a colloquy regarding his right to counsel amounted to a prima facie showing that Bowe's right to counsel was violated.

¶5 In a written decision, the court first concluded Bowe had withdrawn his collateral attack of the 1991 conviction because the judgment of conviction indicated Bowe had counsel and Bowe did not offer anything to show his right to counsel was violated. As for the 2010 conviction, the court concluded:

> Based on this evidentiary record, the Court is of the belief that the defense has made a prima facie showing that the defendant did not knowingly, intelligently and voluntarily waive his right to counsel in the [2010] Rusk County Case. Although the defendant may ultimately not prevail in his challenge to the penalty enhancement effect of a prior conviction, this record, in the opinion of the Court, is insufficient in that the filings raise additional questions and issues for the Court, which need to be amplified more formally rather than by way of argument.
>
> Therefore, the Court having found that the defense has made a prima facie showing with regard to the defendant's "waiver of counsel" in [the 2010 case], the burden shifts to the State, and therefore, an additional evidentiary hearing will be required.

¶6 Following an evidentiary hearing, the court concluded Bowe's 2010 conviction should be disregarded for trial and disposition of the current case.

Bowe then pleaded no contest to third, instead of fourth, offense operating while intoxicated, and the court found him guilty.[4] The State appeals.

DISCUSSION

¶7 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that he or she was denied the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. To collaterally attack a prior conviction, the defendant must first make a prima facie showing that his or her constitutional right to counsel was violated. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. If the defendant makes a 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.

¶8 On appeal, the State argues Bowe failed to make a prima facie showing that his right to counsel in the 2010 case was violated. "Whether a party has met [its] burden of establishing a prima facie case [is] a question of law that we [decide] de novo." ***Id.***, ¶10.

¶9 To make a prima facie showing that a defendant's right to counsel was violated, the "defendant must do more than allege that 'the plea colloquy was defective' or 'the court failed to conform to its mandatory duties during the plea colloquy[.]'" ***Id.***, ¶25 (citing ***State v. Hampton***, 2004 WI 107, ¶57, 274 Wis. 2d 379, 683 N.W.2d 14). Rather,

[4] Bowe also pleaded no contest to an amended charge of hit and run of an unattended vehicle. The operating with a prohibited blood alcohol concentration and operating while revoked charges were dismissed outright.

> For there to be a valid collateral attack, we require 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. (quoting ***Hampton***, 274 Wis. 2d 379, ¶46). "An affidavit from the defendant setting forth such facts [is] necessary, in order to establish a prima facie case." ***Id.***, ¶33. "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***, ¶25.

¶10 In ***Ernst***, Ernst collaterally attacked his prior operating while intoxicated conviction by alleging he was "not represented by counsel and the court did not take a knowing and voluntary waiver of counsel from the defendant." ***Id.***, ¶¶5, 26. He argued, "The Court did not take a valid waiver of counsel … because the Court did not address each of the four ***Klessig***[5] factors with … Ernst in that case." ***Ernst***, 283 Wis. 2d 300, ¶26. Our supreme court concluded Ernst failed to make a prima facie showing that his right to counsel was violated because Ernst "made no mention of specific facts that show that his waiver was not a

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[5] In ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997), our supreme court created a court-based procedural rule regarding the colloquy a court must conduct when a defendant wishes to proceed without counsel. *See also* ***State v. Ernst***, 2005 WI 107, ¶21, 283 Wis. 2d 300, 699 N.W.2d 92 (holding ***Klessig*** colloquy requirement is a court-based procedural rule). Specifically, when a defendant wishes to proceed without counsel:

> [T]he circuit court must conduct a colloquy designed 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.

Klessig, 211 Wis. 2d at 206 (internal citation omitted). The court must also ensure the defendant is competent to represent him or herself. ***Id.***

knowing, intelligent, and voluntary one. Instead, Ernst simply relied on the transcript and asserted that the court's colloquy was not sufficient to satisfy ***Klessig***." ***Ernst***, 283 Wis. 2d 300, ¶26. The court reversed the circuit court's decision that Ernst had made a prima facie showing. ***Id.***

¶11 In this case, the State argues that, similar to Ernst, Bowe did nothing more than assert the court failed to engage him in a proper waiver of counsel colloquy at the plea hearing. The State emphasizes Bowe's trial counsel simply averred the court had failed to engage Bowe in a colloquy and then provided the court with the 2010 plea hearing transcript. The State explains Bowe never pointed to any facts that demonstrated he did not know or understand the information that should have been provided. Finally, the State argues that, pursuant to ***Ernst***, the court's failure to engage Bowe in a colloquy cannot, by itself, amount to a prima facie showing that Bowe's right to counsel was violated.

¶12 Bowe argues ***Ernst*** is distinguishable because, in ***Ernst***, the court attempted to conduct a proper waiver of counsel colloquy and, in this case, the court conducted no waiver of counsel colloquy at the plea hearing. Bowe argues the lack of colloquy, by itself, amounts to a prima facie showing that Bowe's right to counsel was violated.

¶13 We reject Bowe's arguments. First, the lack of a waiver of counsel colloquy does not, by itself, amount to a prima facie showing that a defendant's right to counsel was violated. *See* ***Ernst***, 283 Wis. 2d 300, ¶25 (defendant must do more than allege court failed in its mandatory duties). Rather, as previously stated,

> To make a prima facie showing a defendant is required to point to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her

> constitutional right to counsel. An affidavit from the defendant setting forth such facts would be necessary, in order to establish a prima facie case.

Id., ¶33.

¶14 Here, Bowe's prima facie showing consisted of nothing more than an allegation that the circuit court failed to perform its mandatory duties. Bowe did not aver that he did not know or understand the information that should have been provided in the previous proceeding. Because Bowe made no specific averments regarding what he did not know or understand, we are left to assume that, despite the court's failure to engage Bowe in a proper colloquy, Bowe knew and understood all of the information that should have been provided regarding his right to counsel. Accordingly, we conclude Bowe failed to make a prima facie showing that his Sixth Amendment right to counsel was violated in the 2010 case. We therefore reverse and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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