COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1555-CR **Cir. Ct. No. 2012CT59**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT J. STELZER,

DEFENDANT-APPELLANT.

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

¶1 NEUBAUER, P.J.[1] Scott J. Stelzer appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

(OWI), third offense. Stelzer moved the circuit court to exclude his second OWI when calculating prior convictions. Stelzer asserted that in his second OWI conviction he did not knowingly, intelligently, and voluntarily waive his right to counsel when he pled guilty. Specifically, Stelzer asserts that in his 1996 case he was not advised of his right to an attorney nor was he advised of the benefits of representation and the dangers of self-representation. The circuit court denied Stelzer's motion, and Stelzer pled no contest to OWI, third offense. On appeal, Stelzer argues that the State failed to prove by clear and convincing evidence that Stelzer's waiver of the right to counsel in the 1996 case was valid.

¶2 A defendant who faces an enhanced sentence based on 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).

¶3 Pursuant to ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), in order to establish a valid waiver of counsel, the circuit 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, and (4) was aware of the general range of penalties that could have been imposed.

¶4 When mounting a collateral attack, a defendant must do more than allege a defective 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." ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. 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 shifts to the State to show by clear and convincing evidence that the defendant in fact possessed the constitutionally required understanding and knowledge and that the defendant knowingly, intelligently, and voluntarily entered the plea. ***Id.***, ¶27. Whether a defendant knowingly, intelligently, and voluntarily waived his or her constitutional right to counsel requires the application of constitutional principles to the facts, which involves a question of law we review de novo. *See* ***Klessig***, 211 Wis. 2d at 204.

¶5 Stelzer contends that his guilty plea in the 1996 case failed on ***Klessig*** factor number two; that is, he claims he was not "aware of the difficulties and disadvantages of self-representation." ***Id.*** at 206. In support of his motion collaterally attacking his prior conviction, Stelzer submitted an affidavit stating that when he entered his guilty plea in his second OWI conviction, he was not advised of his right to an attorney nor was he advised of the benefits of an attorney or the dangers of self-representation. Stelzer specified that he was not aware that an attorney might be able to identify defenses and negotiate fines, jail time, revocation time, reporting date and other aspects of a potential sentence. Additionally, Stelzer stated he did not understand that an attorney would have been able to file motions challenging the evidence in his case, could have attacked the allegations in the case, and may have found other potential issues in the case.

Ultimately, Stelzer stated: "Had I known these things, I would have sought counsel to assist me." Because Stelzer's case was over ten years old, the transcript of the plea hearing in the 1996 case was unavailable. *See, generally,* SCR 72.01 (regarding retention of court records).

¶6 The circuit court held a hearing on Stelzer's motion, at which the State conceded that Stelzer's affidavit supported a prima facie case to attack his previous conviction. That being so, we will assume without deciding that Stelzer's affidavit was sufficient to establish a prima facie case.

¶7 Stelzer testified that he recalled that in the 1996 case, "They had asked me if I was going to get an attorney." Stelzer admitted he knew that an attorney would represent his interests. Stelzer testified that he had been involved in previous court proceedings—a divorce and a battery case—in which he had been represented by an attorney. Stelzer acknowledged that his attorney had helped him get a "pretty good deal" in the battery case. On the other hand, Stelzer chose to represent himself when seeking a restraining order against his ex-wife. Stelzer testified that he knew that he was guilty of drunk driving. Although Stelzer could not recall the actual amount, he knew that he could face jail time. Stelzer agreed that he considered the cost of an attorney and that his decision was "a cost-benefit analysis." Stelzer testified that he did not think he would have been eligible for a public defender because he had a job.[2] Stelzer testified that,

[2] Stelzer argues on appeal that "the cost-benefit analysis that Stelzer made was without knowing that he could have had an attorney appointed to him for free or at a reduced cost," and that if he had known of the possibility of the reduced cost, "perhaps" his cost-benefit analysis would have been different. Stelzer does not support the assertion that he might have been eligible for appointed counsel, and Stelzer's own testimony belies the credibility of any claim that he thought he was eligible.

throughout the 1996 case, he made a conscious decision to proceed without a lawyer.

¶8 The circuit court denied Stelzer's collateral attack motion, concluding that Stelzer had understood the role of an attorney in the previous court proceedings but had knowingly decided not to retain an attorney due to the cost. The circuit court noted that Stelzer had used an attorney in his battery case "within a reasonably short period of time" of the drunk driving case and had used an attorney in his divorce case. Significantly, the circuit court found:

> The defendant's testimony is, essentially, he didn't want to pay an attorney. He indulged, or engaged, in a cost benefit analysis. Why pay an attorney if the facts are—at least as I infer from his testimony—if the facts are going to be so complete that I'm not going to have a chance. I don't want to waste money on that. And, consequently, he entered a plea.

¶9 The circuit court relied on ***State v. Gracia***, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, in which the supreme court upheld the denial of a collateral attack in a case much like Stelzer's. Gracia did not hire an attorney because he was guilty. ***Id.***, ¶37. "This demonstrates a calculated decision on Gracia's part not to spend the money to hire an attorney in such a situation." ***Id.*** Stelzer testified that he did not hire an attorney because he knew he was guilty. The circuit court in ***Gracia*** found that Gracia's testimony was "'somewhat self-serving when indicating that he had no idea what an attorney could do,' pointing to the fact that Gracia had no educational deficiencies and he had completed high school and attended college briefly." ***Id.*** Stelzer testified that at the time of the plea in the 1996 case he had completed high school. Furthermore, Gracia, like Stelzer, did not challenge his waiver until years later and not until he faced an enhanced penalty due to the previous conviction. ***Id.***

¶10 Stelzer attempts to distinguish ***Gracia***, arguing that Stelzer was not aware that he had the right to an attorney. This argument was undermined by Stelzer's testimony that he had used attorneys in previous cases, that he knew an attorney would represent his interests and that he performed a cost-benefit analysis regarding whether to engage an attorney. Stelzer's use of attorneys in his other cases suggests a deliberate choice to proceed without counsel in this one, including the awareness of the disadvantages of proceeding pro se. The circuit court implicitly rejected Stelzer's argument that he was not aware he had a right to a lawyer. The circuit court found that Stelzer "didn't want to pay for an attorney" and "understood the role of an attorney." The circuit court is the arbiter of witness credibility. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (circuit court is ultimate arbiter of witness credibility; when more than one reasonable inference can be drawn from the credible evidence, we accept the inference drawn by the circuit court).

¶11 Finally, Stelzer contends he was not aware of what an attorney could do for him in this OWI case. The requirement that the defendant be aware of the difficulties and disadvantages of self-representation does not mean that the circuit court must brainstorm from the bench and advise the defendant of every imaginable defense. Rather, the defendant must understand the role counsel could play in the proceeding. ***Gracia***, 345 Wis. 2d 488, ¶36; ***Pickens v. State***, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980) (defendant must understand there are technical rules governing conduct of trial and presenting a defense is not simply telling one's story), *overruled in part on other grounds by* ***Klessig***, 211 Wis. 2d at 206.

¶12 We agree with the circuit court's determination that Stelzer made a cost-benefit decision when he waived his right to counsel, that he knew he had the

right to counsel and that he was aware of the role of an attorney. We also agree that the State met its burden to show by clear and convincing evidence that Stelzer's waiver of his right to counsel was made knowingly, intelligently and voluntarily. We affirm the circuit court's denial of Stelzer's collateral attack and Stelzer's subsequent conviction for OWI, third offense.

By the Court.—Judgment affirmed.

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