COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0979-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN P. BERTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

NETTESHEIM, J. Steven P. Berth appeals from the enhanced sentencing provisions of a judgment of conviction for disorderly conduct and from a postconviction order rejecting his challenge to the enhanced portion of the sentence. Berth contends that the prior convictions are constitutionally infirm because he did not validly waive counsel. In addition, he contends that his trial counsel was ineffective for failing to investigate and pursue a challenge to the

prior convictions. We hold that Berth knowingly and strategically waived the potential defects in the prior convictions when he expressly instructed his trial counsel to not pursue any challenge to those convictions. We therefore affirm the judgment and the postconviction order.

The State charged Berth with disorderly conduct as a repeater. The criminal complaint set forth Berth's prior convictions in cases 97-CM-433, 96-CM-1696,[1] 94-CM-1119 and 91-CM-714, in which Berth had been convicted of various misdemeanors.

Thereafter, Berth pleaded no contest to the disorderly conduct charge before Judge John Mickiewicz. Apparently the State presented Judge Mickiewicz with certified copies of convictions in cases 91-CM-714, 96-CM-1696 and 97-CM-433 because the appellate record reflects these documents.[2] However, neither the State nor Judge Mickiewicz specifically alluded to them by any exhibit number, file number or date of conviction. Judge Mickiewicz determined that Berth was a repeat offender and sentenced Berth to eighteen months in prison.

Following his sentencing, Berth filed two separate pro se motions for postconviction relief contending that he was improperly sentenced as a repeater. He challenges his convictions in cases 91-CM-714 and 97-CM-433. These matters were heard by Judge Robert Haase. As to case 91-CM-714, Berth argued, inter alia, that the conviction was beyond the five-year period set out in § 939.62(2), STATS. Judge Haase agreed. As to case 97-CM-433, Berth argued,

[1] Actually, the complaint recites case number 96-CM-1695. However, the certified judgment of conviction submitted at the sentencing hearing identifies the case number as 96-CM-1696.

[2] No certified judgment of conviction was filed as to 94-CM-1119.

inter alia, that his pleas to the three charges in that case were constitutionally infirm because he had not waived the right to counsel. Judge Haase did not address the merits of this argument, ruling instead that Berth could not collaterally attack his prior convictions in the instant case. Later, Judge Haase correctly withdrew this ruling in light of the case law which holds that a defendant may collaterally attack a prior conviction used for penalty enhancement purposes if the guilty plea resulting in the conviction was the result of a constitutional violation. *See* ***State v. Baker***, 169 Wis.2d 49, 71, 485 N.W.2d 237, 245-46 (1992). Judge Haase's order also permitted Berth to pursue additional postconviction relief.

Thereafter, Berth, now represented by appointed counsel, brought a further motion renewing his challenge to the three repeater convictions in case 97-CM-433.[3] In this motion, Berth renewed his argument that he had been convicted of these misdemeanors "without the benefit of counsel, and without a valid waiver of counsel." The motion also raised a claim of ineffective assistance of counsel in this case because Berth's trial counsel had not investigated the validity of the prior convictions prior to entering the no contest plea.

After hearing testimony from both Berth and his trial counsel, Judge Haase held that Berth's counsel was not ineffective. Based on trial counsel's testimony, Judge Haase found that Berth had directed his trial counsel to "cut this deal" and to not investigate the validity of the prior convictions, despite Berth's knowledge that the prior pleas were suspect. Based on this finding, Judge Haase

[3] Berth did not challenge the single conviction in case 96-CM-1696. However, if successful in his challenge to the three convictions in 97-CM-433, Berth would not have been a repeat offender for purposes of the repeater statute since § 939.62(2), STATS., requires three misdemeanor convictions within a five-year period.

determined that Berth had waived his right to challenge the repeater allegation. Berth appeals.

Berth first argues that his sentence cannot legally include the repeater enhancement because he did not validly waive counsel in the prior proceeding in 97-CM-433. The State devotes much of its brief to arguing that Berth waived his right to counsel in that case by his actions. Specifically, the State points to Berth's dismissal of two appointed attorneys and his failure to retain other counsel. However, a defendant's right to counsel is consitutionally guaranteed and nonwaiver of counsel is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary. *See* ***State v. Klessig***, 211 Wis.2d 194, 204, 564 N.W.2d 716, 720-21 (1997).

At Berth's initial appearance in 97-CM-433, his attorney, Leonard Kachinsky, requested permission to withdraw upon Berth's request. The court agreed to the withdrawal and stated that another attorney would be appointed. When asked whether there would be any proceedings that day, Berth responded, "I don't have any of the papers. I don't even know what I am charged with." The court proceeded to read the charged offenses from the criminal complaint and then requested Berth's plea. Kachinsky interjected that he was the second appointed attorney and that, pursuant to state regulations, a third would not be appointed. The court responded, "Then Mr. Berth will be representing himself." Berth entered a plea of not guilty.

On March 5, 1997, Berth appeared without counsel for a plea and sentencing hearing at which he changed his plea to guilty. Berth was not represented by counsel and no mention was made regarding his pro se status.

The State cites to ***State v. Woods***, 144 Wis.2d 710, 715-16, 424 N.W.2d 730, 732 (Ct. App. 1988), in support of its contention that Berth waived his right to counsel by his actions. The State's reliance on ***Woods*** is misplaced. At the time of Berth's hearing, the law clearly required that the record reflect the defendant's deliberate choice to proceed without counsel.[4] *See* ***Pickens v. State***, 96 Wis.2d 549, 563-64, 292 N.W.2d 601, 609 (1980), *overruled by* ***State v. Klessig***, 211 Wis.2d 194, 564 N.W.2d 716 (1997). The record in 97-CM-433 does not reflect that Berth made such a choice. Although the ***Woods*** court concluded that the defendant in that case had waived his right to counsel by his actions, it did so only because the defendant refused to waive his right to counsel while at the same time refusing to proceed with appointed counsel. *See* ***Woods***, 144 Wis.2d at 715, 424 N.W.2d at 732. That was not the situation in this case. We reject the State's contention that Berth waived his right to counsel in case 97-CM-433 by his actions.[5]

Next we address Judge Haase's holding in this case that Berth waived his right to challenge the validity of the prior convictions.

Whether counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Ludwig***, 124 Wis.2d 600, 606, 369 N.W.2d 722, 725

[4] We note that in ***State v. Klessig***, 211 Wis.2d 194, 206, 564 N.W.2d 716, 721 (1997), our supreme court overruled ***Pickens v. State***, 96 Wis.2d 549, 292 N.W.2d 601 (1980), to the extent that ***Klessig*** now mandates the court to engage in a colloquy in every case where the defendant seeks to proceed pro se.

[5] We additionally reject the State's argument that Berth failed to prove that he was prejudiced by the trial court's failure to obtain a valid waiver. In so arguing, the State relies upon the harmless error analysis in ***State v. Klessig***, 199 Wis.2d 397, 403-04, 544 N.W.2d 605, 608 (Ct. App. 1996). However, following the filing of the State's brief, that case was reversed by ***State v. Klessig***, 211 Wis.2d 194, 564 N.W.2d 716 (1997), which does not require a showing of prejudice.

(1985). "The trial court's determination of what the parties did, or did not do, and the basis for the attorney's challenged conduct are factual and will ordinarily be upheld unless they are against the great weight and clear preponderance of the evidence." ***Id***. at 606-07, 369 N.W.2d at 725. However, the ultimate conclusion of whether the attorney's assistance was ineffective is one of law which we will decide de novo. *See* ***id***. at 607, 369 N.W.2d at 725.

At the hearing on Berth's postconviction motion, Berth's trial counsel, Casey Schneider, testified that he did not investigate Berth's prior convictions because Berth did not want him to. Schneider gave the following account of his first meeting with Berth:

> [Berth] instructed me in the meeting … that he had already mailed a letter to the DA's office saying that what he wanted to negotiate which was I believe 18 months of prison. When I met with him, he informed me that he had done that and said that this is what I want you to do. Just go negotiate me there … I just want you to go negotiate me this deal so I can get out of the Winnebago jail and get sentenced to prison.

Schneider also testified that Berth informed him at that meeting that "he didn't believe that [his prior convictions] would be valid." Schneider further testified that he offered to "look into" the prior convictions but Berth refused, stating essentially that he could appeal that later. Berth instructed Schneider to simply negotiate an eighteen-month sentence. Schneider did so. In addition, Schneider obtained the State's further agreement that any confinement time which Berth would receive on a pending revocation of probation would be served concurrently with the sentence in this case.[6]

[6] Schneider also testified that when he conveyed this further provision of the agreement, Schneider spurned it. The parties' briefs do not advise as to the results of the probation revocation process.

Judge Haase found Schneider's testimony to be credible and relied on it in determining that Schneider was not ineffective in following Berth's instructions to simply enter the plea. The judge stated: "[I]t was [Berth's] plan, and we cannot now go back and blame counsel who offers to look into such things and is told not to."

In order for a defendant to succeed in a claim of ineffective assistance of counsel, he or she must prove that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *See* ***id***. Berth has failed to satisfy this test.

In support of his contention that Schneider's performance was deficient, Berth relies on ***State v. Pitsch***, 124 Wis.2d 628, 369 N.W.2d 711 (1985). There the court stated that in order for counsel to adequately represent a defendant before and during trial, counsel should obtain and review a defendant's prior judgments of conviction. *See* ***id***. at 638, 369 N.W.2d at 716. Although ***Pitsch*** does not expressly so state, it is obvious that the reason for such a requirement is to assure that the defendant can make his or her decisions with a full understanding of the prior record and whether the prior convictions are valid. In ***Ludwig***, our supreme court found ineffective assistance of counsel because counsel had failed to clearly inform the defendant she held the right to accept or reject a plea offer made by the State. *See* ***Ludwig***, 124 Wis.2d at 601, 369 N.W.2d at 722. The court stated that while a defendant is "generally dependent upon the attorney to effectively inform the defendant of the legal options and ramifications of those options, the dependence is particularly strong when the defendant is a novice to the criminal justice system." ***Id***. at 610, 369 N.W.2d at 726. Thus, at the core of the holdings in ***Ludwig*** and ***Pitsch*** is the client's need to be informed

and provided with all necessary information pertinent to his or her case prior to making significant legal decisions.

The principles underpinning ***Pitsch*** and ***Ludwig*** do not apply in Berth's case. Schneider's testimony demonstrated that when he came on board as Berth's counsel, Berth already was in negotiations with the State regarding a plea agreement. Most importantly, Berth was already aware of potential defects in his prior pleas and so informed Schneider. In response, Schneider told Berth that he would investigate that question. But Berth instructed Schenider to not pursue that matter and instead pursue the plea negotiations which Berth himself had already undertaken. We know of no law which holds that a lawyer is required to pursue a defense of which the defendant is aware but has rejected. Given the circumstances in this case, we agree with Judge Haase that Berth's trial counsel was not ineffective.

On this same basis, we further conclude that Berth waived his right to challenge the prior convictions. Berth was already involved in plea negotiations directly with the district attorney when Schneider was appointed as counsel. Knowing of the potential defects in the prior pleas, Berth spurned Schneider's offer to investigate the matter further. Instead, Berth instructed Schneider to pursue the plea negotiations. Berth provided Schneider with a plausible reason for wanting to do so—he wanted out of the Winnebago county jail. Just as the defendant made a strategic choice to stipulate to the prior conviction during the trial in ***State v. Dye***, 215 Wis.2d 280, 292, 572 N.W.2d 524, 529 (Ct. App. 1997), *cert. denied*, 118 S. Ct. 1825 (1998), and thereby waive any constitutional defects to the prior conviction, here also Berth made a strategic decision to forego any constitutional challenges to the prior conviction.

We affirm the judgment and the order denying postconviction relief.[7]

By the Court.—Judgment and order affirmed.

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

[7] Berth's brief also raises a veiled claim that he did not admit to the prior convictions. However, the proof in this case was via the certified judgments of conviction, not the colloquy between Berth and Judge Mickiewicz.