COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP795-CR **Cir. Ct. No. 2014CT81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON S. WITTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Jason Witte appeals a circuit court order denying his motion to exclude a prior conviction for operating under the influence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(OWI), which was used for sentencing enhancement purposes in this OWI case. Witte argues that the circuit court erred in finding that Witte failed to present sufficient evidence to make a prima facie showing that he was denied his right to counsel during the prior OWI case. We conclude that the court properly denied Witte's motion because he failed to make the requisite prima facie showing. Accordingly, we affirm the circuit court.

BACKGROUND

¶2 In February 2014, Witte was charged with OWI and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. The charging section of the criminal complaint stated for sentence enhancement purposes that Witte had been convicted of a prior OWI charge in 2004.

¶3 Witte moved to have the 2004 conviction excluded on the ground that he did not knowingly, intelligently and voluntarily waive his right to counsel in that case. The motion was supported by a sworn affidavit from Witte stating that he had not been aware of the range of penalties he faced at the time and therefore he did not validly waive his right to counsel.

¶4 The circuit court held a hearing on Witte's motion. Only oral arguments were presented. It is undisputed that Witte was not represented by counsel in the 2004 case. It is also undisputed that Witte had completed and signed a waiver of right to lawyer form and court minutes of the initial hearing reveal that the court advised Witte of his right to counsel and that Witte waived that right.

¶5 Witte argued that his affidavit established a prima facie showing that at the time of the 2004 plea hearing, he did not understand the range of penalties

for OWI, second offense. In his affidavit, Witte averred that, because he did not understand the range of penalties he faced for OWI, second offense, he was unable to reasonably assess the fairness of the plea agreement, or the seriousness of the charge.

¶6 At the conclusion of the hearing, the court rendered a decision based on Witte's affidavit, the signed waiver of right to lawyer form, the signed plea questionnaire from the 2004 case, and two pages of court minutes, one from the initial hearing and the other from the plea hearing. The court denied Witte's motion, concluding that the evidence was insufficient to make a prima facie showing that Witte had been denied his right to counsel in the 2004 OWI case. The court concluded that Witte knowingly, intelligently, and voluntarily waived his right to counsel. The court based its conclusion on the following: Witte had been provided a copy of the criminal complaint containing the possible range of penalties, advised of his right to counsel and its potential benefits, and Witte had voluntarily waived his right to counsel in the 2004 case. Witte subsequently pled no contest to OWI, fourth offense. Witte appeals.

DISCUSSION

¶7 Witte argues that the circuit court erred in denying his motion collaterally attacking the 2004 OWI conviction. Witte contends that his affidavit and plea questionnaire from the 2004 case establish a prima facie showing that he was denied his constitutional right to counsel on the ground that he was unaware of the range of penalties for the offense when he entered his plea. For that reason, Witte asserts that the burden shifts to the State to prove that there was a valid waiver of counsel.

¶8 The State argues that Witte failed to make the requisite prima facie showing for a collateral attack. The State asserts that a collateral attack requires a 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 that Witte has failed to do so in his submissions. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92 (quoted source omitted).[2]

¶9 Turning specifically to Witte's submissions, the State argues that the following documents cut against Witte's argument that he made a prima facie showing: Witte's affidavit, two pages of court minutes from two hearings, and a completed and executed waiver of right to lawyer form he submitted at the plea hearing in the 2004 case. The State also points to admissions from Witte that he waived reading of the criminal complaint at the initial plea hearing of the 2004 case and that, although he had a copy of the complaint, which set forth the range of penalties, he did not read it prior to entering his plea. We agree with the State.

¶10 The Sixth Amendment guarantees a defendant the right to counsel. *See* ***State v. Klessig***, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997). "Whether a defendant knowingly, intelligently and voluntarily waived his Sixth Amendment right to counsel requires the application of constitutional principles to the facts." ***Id.*** at 204. We review de novo whether the constitutional requirements for waiver of counsel are meet. ***Id.***

¶11 A circuit court is required to undertake a colloquy with the defendant to ensure that the defendant knowingly, intelligently, and voluntarily waived his

[2] Witte did not file a reply brief in response to the State's arguments.

right to counsel. ***Id.*** at 206. A defendant in an enhanced sentencing proceeding based on a prior conviction may collaterally attack the prior conviction only when the challenge is based on a denial of the constitutional right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶22. "For there to be a valid collateral attack," a defendant must "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 constitutional right to counsel." ***Id.***, ¶25 (quoted source omitted). Should a defendant make such a showing, the burden shifts to the state to "prove [by clear and convincing evidence] that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). Whether a party has made a prima facie showing is a question of law we review de novo. ***Id.*** at 78.

¶12 We conclude that Witte has failed to make a prima facie showing that he did not understand the range of penalties the law provided for OWI, second offense. Our conclusion is based on the following grounds.

¶13 The documents Witte submitted with his motion do more harm to him than help. In his affidavit, Witte averred that he "did not know the range of penalties the law permitted for the offense," and that he did not know of this information on his own, and that "nobody informed me before or during the hearing." However, in a separate part of his affidavit, Witte avers that he was provided a copy of the criminal complaint, which set forth the range of penalties, and that he simply failed to read it carefully before he entered his plea. In addition, the court minutes sheet of the initial hearing indicate that Witte waived the reading of the complaint. Plainly, Witte would have learned the range of penalties he faced by pleading to second offense OWI had he permitted the court

to read the complaint in open court. Witte's allegation that he did not know the range of penalties for OWI, second offense, when he entered his plea simply cannot stand up to the weight of the documents *he* submitted in support of his motion collaterally challenging his prior conviction for OWI, second offense, and his own admission that he did not read the complaint when he had an opportunity to do so.

¶14 We also point out that the record of the 2004 OWI case clearly shows that Witte knowingly, intelligently, and voluntarily waived his right to counsel.

¶15 We begin by noting that Witte does not argue that the circuit court failed to conduct a proper waiver of counsel colloquy or that the colloquy was otherwise infirm. *See* ***Klessig***, 211 Wis. 2d 194, ¶11. Fatal to Witte's claim that he was denied the right to counsel, Witte attached a waiver of right to lawyer form that he completed and signed on the day of the plea hearing in the 2004 case. In that form, Witte acknowledged that he had a right to be represented by counsel at any stage of the proceedings, that he understood the advantages of representation by counsel, that he was capable of representing himself in that case, and that he "voluntarily, freely and intelligently waive[d his] right to have a lawyer at [that] time." Witte's weak, conclusory, and self-serving averments in his affidavit fall apart in light of a record that clearly establishes that Witte was aware of the right to counsel, the advantages of having counsel, and with knowledge of this information, chose to proceed with the plea hearing without counsel.

¶16 In sum, Witte has failed to make the requisite prima facie showing that he was denied his constitutional right to counsel in the 2004 OWI case. In the words of the ***Ernst*** court, Witte failed to "point to facts that demonstrate that he …

'did not know or understand the information which should have been provided' in the [2004] proceeding." ***Ernst***, 283 Wis. 2d 300, ¶25 (quoted source omitted). Having failed to make the requisite prima facie showing, there is little room for doubt that Witte "voluntarily, freely and intelligently" waived his right to counsel during the 2004 OWI proceedings.

By the Court.—Judgment affirmed.

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