COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1195-CR **Cir. Ct. No. 2004CT626**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD R. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 SNYDER, P.J.[1] Todd R. Martin appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

intoxicant (OWI), third offense. Martin challenges the trial court's denial of his motion to collaterally attack his first OWI conviction for penalty enhancement purposes. Martin argues that during his OWI proceeding in Albany county, Wyoming, he did not knowingly, intelligently and voluntarily waive his right to counsel due to his intoxicated state. We conclude that Martin failed to meet his burden of making a prima facie showing of the deprivation of his constitutional right to counsel and affirm the trial court.

FACTS

¶2 We begin with the facts relevant to Martin's Wyoming conviction. On September 18, 2000, at approximately 2:25 a.m., Martin was involved in an accident in Albany county when he rolled his vehicle. Although two passengers within the vehicle were taken to the hospital, Martin did not report the accident. Sometime after the accident, a police officer located Martin and determined that he had been driving while under the influence of alcohol. Martin was arrested for OWI and failure to report an accident.

¶3 Martin was required to appear in Albany county court at 9:00 a.m. on the same day of his accident. His recorded blood alcohol concentration was .109%, but it is unclear at what time the test was administered. Documentation indicates that the test was administered sometime between 2:25 a.m. and 9:00 a.m. Martin pled guilty to both charges and was sentenced accordingly.

¶4 On July 28, 2004, Martin was arrested in Walworth county for a third-offense OWI. Martin filed a motion on October 22, 2004, collaterally challenging the use of his Wyoming conviction for penalty enhancement purposes, *see* WIS. STAT. § 346.65(2). Martin asserted that he was convicted in violation of his right to counsel under the Sixth and Fourteenth Amendments of the United

States Constitution. In his motion and sworn affidavit, Martin claimed that the Wyoming court failed to engage in an on-the-record colloquy concerning his competency to represent himself. At the hearing on the motion, Martin conceded that he had appeared in court on September 18, 2000, was advised of and waived his right to counsel, and entered guilty pleas to both charges. However, Martin maintained that his intoxicated state prevented him from engaging in a knowing, voluntary and intelligent waiver of his right to counsel. The trial court denied Martin's collateral attack motion, finding that Martin was advised of his constitutional rights and properly waived them. On January 12, 2005, Martin was convicted of the third-offense OWI, based in part on his Wyoming conviction.

STANDARD OF REVIEW

¶5 When a defendant chooses to collaterally attack a prior conviction, he or she has the initial burden of coming forward with evidence to make a prima facie showing of a deprivation of his or her constitutional right to counsel at the prior proceeding. *See* ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992); ***State v. Ernst***, 2005 WI 107, ¶2, 283 Wis. 2d 300, 699 N.W.2d 92. If the defendant makes such a showing, "the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." ***Baker***, 169 Wis. 2d at 77. Whether a party has met its burden of establishing a prima facie case is a question of law that we decide de novo. ***Id.*** at 78.

¶6 "Whether a defendant knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel requires the application of constitutional principles to the facts." ***Ernst***, 283 Wis. 2d 300, ¶10; s*ee also* ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). We review such a

question de novo, independent of the reasoning of the trial court. ***Ernst***, 283 Wis. 2d 300, ¶10**.**

DISCUSSION

¶7 On appeal, Martin contends only that he did not knowingly, voluntarily, and intelligently waive his right to counsel at the Wyoming proceeding because of his intoxicated state. Martin asserts that his claim of intoxication provides sufficient evidence to support a prima facie showing of the deprivation of his constitutional right to counsel.

¶8 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 right to counsel. ***Id.***, ¶25 (citation omitted). "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***

¶9 A defendant's mere allegation that he or she had alcohol in his or her system does not satisfy this standard. A waiver of constitutional rights is not per se invalid simply because the defendant is intoxicated; rather, there must be some proof that the defendant is irrational, unable to understand the questions or responses, or otherwise incapable of giving a voluntary response. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 698-99, 482 N.W.2d 364 (1992) (applying similar standard to the waiver of ***Miranda***[2] or Fifth Amendment rights); ***United States v. Teller***, 762 F.2d 569, 574 (7th Cir. 1985) (stating that a defendant is only "entitled

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

to withdraw [a] guilty plea if [he or she] can prove that [his or her] mental faculties were so impaired by drugs or alcohol at the time of the plea that [he or she] was incapable of fully understanding the charges against [him or her], comprehending [his or her] constitutional rights and realizing the consequences of [his or her] plea."); ***Cameron v. State***, 650 A.2d 1376, 1383 (Md. Ct. Spec. App. 1994) (guilty pleas made by allegedly intoxicated defendants are not presumptively involuntary). A trial judge's findings as to a defendant's mental competency at the time he or she waived these constitutional rights should be disturbed only if clearly erroneous. ***Teller***, 762 F.2d at 574.

¶10 Applying these principles to the facts of this case, we conclude that Martin's attempted collateral attack on his Wyoming conviction fails. In his motion and affidavit, Martin claimed that he was not advised of his constitutional right to counsel and he did not recall waiving his right to an attorney. However, at the motion hearing, Martin conceded that he was advised of his right to counsel and waived it during the Wyoming proceeding. Martin also offers, as proof that he must have been under the influence of alcohol at the time he waived his right to counsel, documentation from Wyoming showing that at some time between 2:25 a.m. and his 9:00 a.m. appearance he had a BAC of .109%. However, Martin does not present any information as to when the chemical test was administered and does not direct us to any other evidence showing his level of intoxication when he waived his right to counsel. Even if we assume that Martin still had alcohol in his system, he neither claims nor provides any evidence suggesting that he was so impaired by alcohol that he was incapable of comprehending the significance of his right to counsel and the consequences of his waiver. *See* ***id.***; ***State v. Beaver***, 181 Wis. 2d 959, 967, 512 N.W.2d 254 (Ct. App. 1994); ***Mitchell***, 167 Wis. 2d at

698. We cannot now engage in fact-finding as to Martin's mental competency at the time he waived his constitutional rights. *See* ***Teller***, 762 F.2d at 574.

¶11 In sum, Martin does not point to facts demonstrating that he "did not know or understand the information which should have been provided" to him in the Wyoming proceeding. *See* ***Ernst***, 283 Wis. 2d 300, ¶25 (citation omitted). Therefore, Martin failed to make a prima facie showing that he did not knowingly, voluntarily, and intelligently waive his right to counsel. The trial court properly denied his motion to collaterally attack the Wyoming conviction and the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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