COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1815-CR **Cir. Ct. No. 2003CT2628**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK L. STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Mark Stewart appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI), fourth offense, contrary

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

to WIS. STAT. § 346.63(1)(b). Stewart contends that the circuit court erred by failing to hold an evidentiary hearing on his motion to collaterally attack a prior OWI conviction used to enhance his sentence. Stewart asserts he was entitled to an evidentiary hearing on the motion because he made a prima facie showing that he did not make a valid wavier of his right to counsel in the prior proceeding. Because we conclude that Stewart failed to make the necessary prima facie showing, we affirm the order denying his motion to collaterally attack the prior conviction and the judgment of conviction.

Background

¶2 We begin with the relevant facts of the prior OWI conviction that is the target of Stewart's collaterally attack. At an October 14, 1997 hearing, Stewart entered a plea of no contest to OWI, second offense, and operating after revocation, second offense. The part of the hearing pertaining to his waiver of counsel is set forth below:

> COURT: Mr. Stewart, both of these are criminal cases, and, as such, you are entitled to be represented by counsel. If you can't afford an attorney, one would be appointed for you at public expense; do you understand that?
>
> STEWART: (Nodding.)
>
> COURT: You have to answer out loud.
>
> STEWART: Yes.
>
> COURT: And is it your desire to go ahead with this hearing unrepresented?
>
> STEWART: Yes.

The court then detailed the specific charges to which Stewart was pleading no contest and the maximum penalties associated with each. Stewart also completed and signed a "Plea Questionnaire and Waiver of Rights," which explained the

rights he waived by pleading no contest to the charges and the range of penalties associated with the charges. The plea questionnaire contained a section entitled "Right to Attorney and Waiver," which Stewart signed. This section explained the advantages of representation by counsel and stated "I have read and I do understand my right to an attorney and I hereby voluntarily, freely, and intelligently waive that right at this time." The circuit court referred to the plea questionnaire:

> COURT: Is that your signature on the plea questionnaire?
>
> STEWART: Yes.
>
> COURT: Did you have an opportunity to go over the information on the plea questionnaire?
>
> STEWART: Yes.
>
> COURT: Was there anything in the plea questionnaire you didn't understand that you want to ask me about?
>
> STEWART: No.

¶3 On July 18, 2003, Stewart was arrested for OWI, fourth offense. He moved to collaterally attack his second-offense OWI conviction and thereby remove it as a prior offense for sentencing purposes. He contended the conviction was obtained in violation of his Sixth Amendment right to counsel. He asserted that his waiver of counsel in that proceeding was invalid because the court did not advise him of the difficulties and disadvantages of self-representation, the seriousness of the charges and the general range of penalties. Stewart appended a copy of the October 14, 1997 hearing transcript to his motion. He did not allege in the motion or by affidavit that he did not understand or know of the information of which the circuit court had not informed him.

¶4 The court denied Stewart's motion and his request for an evidentiary hearing. He proceeded to trial and was found guilty of OWI, fourth offense, and operating a motor vehicle with a prohibited blood alcohol concentration contrary to WIS. STAT. §§ 346.63(1)(a) and (b). Stewart appeals.

Analysis

¶5 The right of a defendant to collaterally attack a prior conviction used for sentence enhancement is limited to circumstances in which the defendant's right to counsel under the Sixth Amendment and article I, section 7 of the Wisconsin Constitution may have been violated. *See* ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. To be constitutionally valid, a defendant's waiver of right to counsel must be entered knowingly, intelligently and voluntarily. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Whether a defendant knowingly, intelligently and voluntarily waived his or her right to counsel requires the application of constitutional principles to the facts. ***State v. Ernst***, 2005 WI 107, ¶10, 283 Wis. 2d 300, 699 N.W.2d 92. This is a question of law that we review independently of the circuit court. ***Id.***

¶6 A defendant seeking to collaterally attack a prior conviction must make a prima facie showing that his or her right to counsel was denied in the prior proceeding. ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). A prima facie showing

> require[s] 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. Any claim of a violation on a collateral attack that does not detail such facts will fail.

Ernst, 283 Wis. 2d 300, ¶25. Whether a defendant has made such a prima facie showing is a question of law subject to de novo review. ***Id.***, ¶10.

¶7 In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court held that

> [t]o prove … a valid waiver of counsel, [Wisconsin] circuit court[s] 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. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid wavier of counsel.

(Citations omitted.)

¶8 Stewart contends that the circuit court erred in denying him an evidentiary hearing to determine if he validly waived his right to counsel in the earlier proceeding because he has made a sufficient prima facie showing entitling him to such a hearing. In essence, he asserts that because he has shown that the court's colloquy at the October 14, 1997 hearing did not meet the requirements of ***Klessig***, he has made the prima facie case necessary to obtain a hearing. We disagree.

¶9 Like ***Bangert***, which mandated that circuit courts conduct a colloquy to ascertain that a defendant understands the nature of a charge prior to entering a plea of guilty or no contest, ***Klessig*** establishes rules to assist courts in safeguarding an important constitutional right. The requirements of ***Klessig*** are thus procedural, and though they ensure conformance with a constitutional standard, a court's violation of these requirements cannot, by itself, be the basis for a constitutional violation. *See* ***Ernst,*** 283 Wis. 2d 300, ¶24 (*citing* ***Bangert***,

131 Wis. 2d at 261 n.3). A defendant alleging that a plea was not validly entered must do more than show that the circuit court did not follow the various requirements of ***Klessig***; the defendant must also "point to facts that demonstrate that he or she did not know or understand the information which should have been provided." ***Ernst***, 283 Wis. 2d 300, ¶25 (citations omitted). This is Stewart's problem. He has failed to make such a showing.

¶10 In support of his motion, Stewart presented only the transcript of the colloquy at the October 14, 1997 hearing. The transcript is not evidence that demonstrates that Stewart did not know or understand the relevant information, only that the information was not provided. Because Stewart has not shown via an affidavit or other evidence that he did not know or understand the information not provided, he has not made a prima facie case.

¶11 The relevant facts of this case are indistinguishable from those of ***Ernst***. There, the supreme court reversed a circuit court order rejecting a prior conviction for purposes of sentence enhancement. ***Ernst***, 283 Wis. 2d 300, ¶9. The circuit court's order determined that the prior court failed to adhere to the requirements of ***Klessig***. ***Id.*** The ***Ernst*** court concluded that the circuit court erred in granting Ernst's motion collaterally attacking the prior conviction because he merely asserted that the court's colloquy was deficient. ***Id.***, ¶25.

¶12 Like Stewart, "Ernst made no mention of specific facts that show that his waiver was not a 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***." ***Id.***, ¶26. Stewart asserts that because he, unlike Ernst, specified the ways in which the circuit court failed to ascertain that his plea was validly entered, he has alleged specific facts sufficient to make a prima facie

showing. However, as we have already noted, evidence that the circuit court omitted information required by ***Klessig*** alone does not satisfy the ***Ernst*** requirement that the defendant show that he or she did not know or understand the information omitted by the court. ***Ernst***, 283 Wis. 2d 300, ¶25.

¶13 Because we have concluded that Stewart did not make his prima facie case, we do not reach the merits of another issue: whether the signed written waiver of right to counsel and the court's reference to it at the hearing demonstrated that Stewart's waiver was knowing, intelligent and voluntary.

¶14 In sum, because we conclude Stewart has failed to make a prima facie case that his waiver of the right to counsel in the prior proceeding was not entered knowingly, intelligently and voluntarily, we affirm the circuit court's order denying Stewart's motion to collaterally attack his prior conviction and the judgment of conviction.

By the Court.—Judgment affirmed.

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