

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

No. 01-0060-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY T. KOZLOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Timothy T. Kozlowski appeals from a judgment of conviction entered after a jury found him guilty of operating a motor vehicle while under the influence of an intoxicant or other drug, as a third offense,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

contrary to WIS. STAT. § 346.63(1)(a) (1999-2000).² Kozlowski claims that the trial court erroneously exercised its discretion when it denied his motion to exclude a prior OWI conviction. Because the trial court did not erroneously exercise its discretion when it denied the motion to exclude the prior conviction, this court affirms.

I. BACKGROUND

¶2 On September 8, 1999, Kozlowski was charged with operating a motor vehicle while intoxicated, third offense. Kozlowski filed a motion to exclude a 1997 OWI conviction in Aluchua County, Florida, asserting that his plea of no contest was not made voluntarily with the understanding of the nature of the charge and potential punishments, if convicted. After reviewing the transcript from the 1997 plea and sentencing hearing, the trial court denied the motion. The trial court, in noting that Kozlowski had the services of an attorney available to him in 1997, held that the Florida court had adequately protected Kozlowski's constitutional rights.

¶3 The case was then tried to a jury, which found Kozlowski guilty. He now appeals.

II. DISCUSSION

¶4 Kozlowski is challenging the 1997 OWI conviction on the grounds that the plea colloquy was inadequate because the Florida court failed to determine that the plea was made voluntarily with the understanding of the nature of the

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

charge and potential punishments, if convicted. Kozlowski claims that because his attorney did not speak on the record during the plea colloquy, the existence of an attorney is called into question. Further, he asserts that the plea was not entered knowingly, voluntarily and intelligently because of ineffective assistance of counsel.

¶5 This court must sustain a trial court's discretionary determination if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). "In an enhanced sentence proceeding predicated on a prior conviction, the U.S. Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." *State v. Hahn*, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. Kozlowski acknowledged that he was represented by counsel at the 1997 Florida OWI plea and sentencing. He further acknowledged during the 1997 OWI plea colloquy that he was represented by the public defender, and that he was satisfied with those services. Accordingly, the assertion that Kozlowski was denied any counsel is baseless.

¶6 Kozlowski next claims that the plea was not entered knowingly, voluntarily and intelligently because his attorney did not speak at the plea colloquy. The Supreme Court has rejected this as a valid constitutional claim in a collateral attack. In *Custis v. United States*, 511 U.S. 485 (1994), Custis attacked previous convictions claiming the denial of effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights. *Id.* at 496. "None of these alleged constitutional violations

risers to the level of a jurisdictional defect resulting from the failure to appoint counsel at all.” *Id.* Because Kozlowski did not allege a violation to the constitutional right to a lawyer in the Florida case, the trial court in this case correctly declined to determine the validity of the Florida conviction. Accordingly, the trial court’s decision to deny Kozlowski’s motion to exclude the prior OWI conviction did not constitute an erroneous exercise of discretion.

By the Court—Judgment affirmed.

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

