COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0183-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NEIL E. WAKERSHAUSER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Neil Wakershauser appeals a judgment of conviction and sentence for operating a motor vehicle while intoxicated (OWI) as

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f)(1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

a fourth offense, in violation of WIS. STAT. § 346.63(1). On appeal, he originally challenged the validity of both his second and third prior convictions, claiming that he did not knowingly, voluntarily, and intelligently waive his right to counsel with respect to the second conviction and did not knowingly, voluntarily, and intelligently waive other constitutional rights with respect to both convictions. However, he now concedes, and we agree, that under ***State v. Hahn,*** 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, he may collaterally attack a prior conviction in a subsequent criminal case only on the basis of a denial of his constitutional right to assistance by counsel. Therefore, we address only his challenge on this basis to his second prior conviction. We conclude Wakershauser validly waived his right to counsel with respect to that conviction. We therefore affirm.

BACKGROUND

¶2 The complaint charged Wakershauser with OWI and operating with a prohibited alcohol concentration (PAC) in violation of WIS. STAT. § 346.63(1). It alleged three prior convictions for OWI or PAC: October 8, 1989; February 7, 1990; and March 3, 1994.[2] Wakershauser pleaded no contest to the OWI charge and the PAC charge was dismissed. Before sentencing, he challenged the validity of his prior convictions. As noted above, we confine our discussion to the February 7, 1990 conviction. Wakershauser asserted that in that case he did not have counsel and did not knowingly, voluntarily, and intelligently waive that right.

¶3 The trial court considered the transcript of the February 7, 1990 proceeding at which Wakershauser entered a plea of no contest to OWI and the

[2] The penalties for OWI and PAC are enhanced by prior convictions. WIS. STAT. § 343.307.

"Guilty Plea Questionnaire and Waiver of Rights" form he signed on that date. The transcript shows the prosecutor recommended a thirty-day jail sentence on the OWI charge, to be served consecutively to a thirty-day jail sentence on another charge to which he also pleaded no contest on that date, along with costs and fines of $780, a sixteen-month revocation of his driver's license and alcohol assessment. The court asked Wakershauser if he agreed with the prosecutor's recitation of her recommendations and he answered yes. The court then engaged in the following colloquy with Wakershauser:

> THE COURT: And, had you ever been represented by an attorney in these matters?
>
> THE DEFENDANT: No.
>
> THE COURT: Did you ever talk to the Public Defender's office?
>
> THE DEFENDANT: I didn't – I make too much money to.
>
> THE COURT: All right. Did you talk to them?
>
> THE DEFENDANT: Ya; once.
>
> THE COURT: Yes, or no.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And, when did you talk to them?
>
> THE DEFENDANT: Well, when I got the first ticket.
>
> THE COURT: All right. All of these matters took place in October, so I assume that you would have talked to them sometime in October.
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And they told you that you make too much money, is that right?
>
> THE DEFENDANT: Yes.

THE COURT: All right. And, is your financial situation now about the same as it was then?

THE DEFENDANT: Yes.

THE COURT: All right. Then you have your choice, Mr. Wakershauser, of either proceeding today with your pleas, or requesting an adjournment to give you a chance to talk to an attorney of your own choice, but it's entirely up to you what you wish to do.

THE DEFENDANT: Go on.

THE COURT: You wish to proceed today without the assistance of an attorney?

THE DEFENDANT: Yes.

THE COURT: All right. Then, as to the charges of operating while intoxicated, second offense; operating without a valid driver's, first offense; operating without a valid driver's license, second offense and disorderly conduct, is it correct that you're now entering pleas of no contest?

THE DEFENDANT: Yes.

THE COURT: And, do you understand that with respect to the operating while intoxicated charge that your driving privileges will be revoked as a result of that conviction?

THE DEFENDANT: Yes.

THE COURT: Now, did you go over the information in several forms, one entitled Waiver of Rights, and three forms, each entitled Elements of Offense?

THE DEFENDANT: Yes, I did.

THE COURT: And, did you sign all these forms today, February 7th?

THE DEFENDANT: Yes.

THE COURT: Now, first of all, do you understand the rights that you're giving up here?

THE DEFENDANT: Yes.

THE COURT: And, do you have any questions concerning those rights?

THE DEFENDANT: No.

¶4 The waiver form Wakershauser signed declared he was twenty-five years old, had completed the eleventh grade in school, could read and write English, was in possession of all his faculties and was not using drugs or alcohol so that it interfered with his understanding of the proceeding. Paragraphs 7-9, 10B, and 12 were each preceded by a check, indicating that Wakershauser declared as follows:

> 7. I understand that the Judge is not bound to follow any plea bargain or any recommendation made by the District Attorney; I understand that the Judge is free to sentence me to the maximum possible penalties in this case, which I understand are: OWI—up to 6 ms jail, up to $1000 fines. OWL—up to $300, up to 30 days jail. Disorderly—up to $1000, up to 90 days jail.
>
> 8. I understand that I have a right to an attorney.
>
> 9. I understand that if I am unable to hire my own attorney due to poverty, the court would appoint me a lawyer at no expense to me.
>
> 10B. I understand that a lawyer may discover defenses or mitigating circumstances which would not be apparent to me, however I still wish not to have an attorney and wish to continue to represent myself. No one has made any threats or promises to me to get me to waive my right to an attorney.
>
> 12. I have read (or have had read to me) this entire form and I understand its contents.

¶5 Based on the transcript of the February 7, 1990 proceeding and the waiver form, the trial court in this case concluded that Wakershauser knowingly, voluntarily, and intelligently waived his right to counsel and that conviction was therefore valid for purposes of sentencing in this case.

DISCUSSION

¶6 The State agrees Wakershauser may collaterally attack his February 7, 1990 conviction on the ground that he did not have counsel and did not knowingly, voluntarily, and intelligently waive that right. However, the State contends that he did validly waive that right. Resolution of this issue requires the application of a constitutional standard to undisputed facts, and that is a question of law, which we review de novo. ***State v. Foust,*** 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶7 In ***State v. Peters***, 2001 WI 74, ___ Wis. 2d ___, 628 N.W.2d 797, the supreme court affirmed its recent holding in ***Hahn*** that a defendant may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence, except where the attack is based on an alleged violation of the defendant's right to counsel. It then addressed whether Peters had established that he did not knowingly, voluntarily, and intelligently waive his right to counsel in the prior proceeding. In doing so, the court explained that it would not evaluate Peters' claim under the standard set forth in ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), because that case had not been decided when Peters entered his plea in the prior proceeding. ***Peters***, 2001 WI 74 at ¶21. Instead, the court evaluated Peters' claim under ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980) (overruled by ***Klessig***), because that was the prevailing law at the time Peters entered that plea. ***Peters***, 2001 WI 74 at ¶21.

¶8 We conclude that the standard in ***Pickens***, not ***Klessig***, is the proper one to apply to Wakershauser's February 7, 1990 waiver of counsel. Under ***Pickens*** the court held:

> [I]n order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge of charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver [of counsel] will not be found.

Pickens, 96 Wis. 2d at 563-64. The trial court need not specifically question the defendant as to each of the critical factors, because it is the "defendant's apprehension, not the trial court's examination," that determines if the waiver is valid. ***Id.*** at 564. If the defendant's understanding of the necessary facts appear in the record other than in response to specific questions, a knowing waiver can be found. ***Id.*** In this inquiry, the court may consider documents given the defendant ***Id.*** The ***Pickens*** standard, the ***Peters*** court noted, requires an examination of the totality of the record to determine the validity of the waiver of counsel. ***Peters***, 2001 WI 74 at ¶21.

¶9 Applying the ***Pickens*** standard to the February 7, 1990 proceeding, we conclude that the totality of the record shows Wakershauser knowingly, voluntarily, and intelligently waived his right to counsel. The transcript together with the waiver form show that Wakershauser made a deliberate choice to proceed without counsel. They also show Wakershauser was aware of and understood the

disadvantages of self-representation, the OWI charge he was facing,[3] and the maximum penalty, including the revocation of his driving privileges and the fact that the court was not bound by the district attorney's recommendation.

¶10 Because we conclude Wakershauser's waiver of counsel in the proceeding resulting in his second prior conviction was valid, the trial court properly considered that conviction as a penalty enhancer in sentencing Wakershauser. And, as we have held above, the court properly considered the third prior conviction for purposes of sentencing because his challenge to that conviction was not based on a claim of invalid waiver of the right to counsel.

By the Court.—Order affirmed.

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

[3] The February 7, 1990 transcript indicates there was a separate form stating the elements of each of the three offenses to which Wakershauser pled on that date, and that he signed each form on that date. The form relating to the OWI charge contained three elements, which Wakershauser said he understood and had no questions about. However, these three forms are not contained in this record. Since Wakershauser requested that his second prior conviction be considered for purposes of sentencing, it was his responsibility to file in the trial court every document from the prior proceeding that supported his claim, and, since he is the appellant, it is his obligation to provide us with everything in the trial court record that supports his position on appeal. *See* ***State Bank of Hartland v. Arndt,*** 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Thus, whether or not the OWI elements form was filed in the trial court, (it does not appear it was), we conclude it is reasonable and appropriate to infer that the OWI elements form accurately stated the elements of that offense.