COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2148-CR **Cir. Ct. No. 2011CT623**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSEPH L. HERNANDEZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] The State appeals from Joseph L. Hernandez's successful collateral attack of a 2000 OWI conviction. The State argues that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

trial court erred by basing its decision on the defendant's lack of memory of what happened in 2000 and a corresponding lack of evidence in the record of what occurred in the 2000 case. We disagree with the State's interpretation of the trial court's decision. Although the trial court acknowledged that the defendant's memory as to certain details was unclear, it relied on the defendant's memory of not receiving information regarding his right to counsel, which was corroborated by a record that lacked any evidence that the information was in fact given. We affirm.

¶2 On August 29, 2011, Hernandez was charged with operating while under the influence of an intoxicant as a third offense. The complaint alleged two prior convictions, the second of which occurred in Kenosha county on February 7, 2000. Hernandez collaterally attacked that conviction, asserting that he had not knowingly, intelligently, and voluntarily waived his right to counsel. *See* ***State v. Ernst***, 2005 WI 107, ¶22, 283 Wis. 2d 300, 699 N.W.2d 92.

¶3 The circuit court held an evidentiary hearing on Hernandez's motion on June 6, 2012. At the hearing, Hernandez testified. As his brief acknowledges, Hernandez's testimony revealed that his recollection of the dates differed from the record and from his affidavit. In addition, he was confused as to the meaning of certain terms like "impaired driving" and "arrest," and his testimony was unclear and inconsistent with his affidavit in other respects. Importantly, though, Hernandez testified that several key events *did not* occur in the 2000 case. In particular, he testified that he was never taken through a colloquy where his rights were explained and that no one explained the range of penalties that might be imposed. Regarding his decision not to hire an attorney, he testified that he "couldn't afford one." When asked whether he wanted one, he stated, "No, I just—I just say to myself, well, I got what's coming to me; so I left it at that."

¶4 After the evidentiary hearing, the trial court found that Hernandez had made a prima facie showing and further found that the State had not met its burden to prove that he knowingly, intelligently, and voluntarily waived his right to counsel. The trial court acknowledged that many of Hernandez's recollections regarding the 2000 proceedings were not reliable. Nonetheless, it found that his testimony as to the lack of information given to him regarding his right to counsel was credible, largely because it was corroborated by a lack of any indication that the information was given in the record available from the 2000 proceedings.

¶5 In deciding this case, we first point out that collateral attacks are generally disfavored because "they disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶13, 318 Wis. 2d 216, 768 N.W.2d 53 (citation omitted). Our supreme court has recognized a small window, however, where defendants may collaterally attack prior convictions being used as predicate offenses for enhancing sentencing on the basis that they did not validly waive the right to counsel. *See* ***Ernst***, 283 Wis. 2d 300, ¶22.

¶6 Our supreme court outlined the requirements for a valid waiver of counsel in ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997):

> To prove such a valid waiver of counsel, the circuit court 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.

In a collateral attack, a defendant must first make a prima facie showing that a violation of these colloquy requirements occurred by "point[ing] 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." ***Ernst***, 283 Wis. 2d 300, ¶25 (citation omitted). We review de novo whether a party has met its burden of establishing a prima facie case. ***Id.***

¶7 Once a party establishes a prima facie case, the burden shifts to the State to prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his or her right to counsel. ***Id.***, ¶27. Whether a defendant knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel is a question of constitutional fact that we review de novo. ***Id.***, ¶10. In that review, we will uphold the trial court's findings of evidentiary or historical fact unless they are clearly erroneous and apply constitutional principles to those facts. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. Of particular relevance to this case, credibility findings are for the trial court to make and we will not reverse them unless they are clearly erroneous. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980); WIS. STAT. § 805.17(2).

¶8 The State first argues that Hernandez has failed to make a prima facie showing that his rights were violated because he relies only on conclusory allegations in his affidavit and because testimony at the evidentiary hearing revealed that his recollection of various details of the 2000 proceedings was poor to nonexistent. The State points out that in ***State v. Hammill***, 2006 WI App 128, ¶11, 293 Wis. 2d 654, 718 N.W.2d 747, we stated that "a defendant who 'simply

does not remember what occurred at his plea hearing' does not make a prima facie showing. *See* ***id.***

¶9 After reading the transcript of the evidentiary hearing and the trial court's decision in this case, we disagree that this case is analogous to ***Hammill***. The ***Hammill*** court explicitly noted that Hammill had relied solely on the lack of transcript and lack of memory of the earlier proceedings. ***Id.***, ¶¶8-9. It also quoted portions from the transcript of Hammill's testimony where Hammill stated that he did not remember certain information being given to him, rather than denying that it was given to him. ***Id.***, ¶9. In other words, instead of presenting affirmative evidence that Hammill had not validly waived his right to counsel, Hammill relied on a lack of evidence that he had validly waived his right to counsel. The ***Hammill*** court held that this lack of evidence was insufficient to constitute a prima facie case.

¶10 Although this case somewhat resembles ***Hammill*** in that it involves a defendant's less than perfect memory of the earlier proceedings and a sparse record, Hernandez has done what Hammill did not: he has affirmatively asserted that he did not knowingly, intelligently, and voluntarily waive his right to counsel. First, he submitted an affidavit stating that "[he] was neither advised, nor was [he], in fact, aware that a lawyer may have been able to discern matters beyond [his] capacity such as defenses, objections or constitutional arguments." He also averred that he was not advised of or aware of various other constitutional rights.

¶11 Next, in addition to his affidavit, Hernandez testified at the evidentiary hearing that he had not filled out any paperwork or signed any documents before pleading no contest. He described the plea hearing as follows: "[The judge] asked me what I plead. I said, 'No contest.' And then he says,

'Well, then you got 30 days in Huber.'" Hernandez repeatedly denied having an understanding of the range of possible punishment, and he denied that the trial court addressed his decision not to obtain counsel prior to his no contest plea. Based on Hernandez's affirmative denials that he either understood his rights or had them explained to him before the no contest plea, we agree with the trial court that he made a prima facie case that his waiver of the right to counsel was not knowing, intelligent and voluntary.

¶12 We now move to the issue of whether, once Hernandez made a prima facie case, the State was able to prove that his waiver of counsel was in fact knowing, intelligent and voluntary. At the evidentiary hearing, the State called Hernandez adversely as the only witness. As we already explained, he testified that he was not given the information required by ***Klessig*** regarding the range of possible punishment or the disadvantages of self-representation. The trial court found that while aspects of Hernandez's testimony were unreliable, the relevant portion was credible because it was corroborated by a lack of any evidence in the 2000 court record that the information had been given.[2] Those findings of fact and credibility determinations are supported by the record so we will not disturb them. *See* WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). And based on those findings, the State

[2] The State argues that this reliance on a lack of information in the trial court record incorrectly applies a presumption that Hernandez's waiver of his right to counsel was improper. *See* ***State v. Ernst***, 2005 WI 107, ¶31 n.9, 283 Wis. 2d 300, 699 N.W.2d 92. We disagree. The trial court stated that it was "absolutely convinced that this defendant did not get the rights that he is supposed to get." It based its finding in part on the presence of notes in the court file by a trained court reporter that contained no reference to a colloquy or the defendant's waiver of counsel. In other words, it appropriately relied on the information available.

has not met its burden to prove by clear and convincing evidence that Hernandez's right to counsel was validly waived.

By the Court.—Order affirmed.

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