

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2004

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.

Appeal No. 04-0507-CR

Cir. Ct. No. 02CF000279

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL D. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Thompson appeals from a judgment convicting him of a fifth offense of operating a motor vehicle while intoxicated (OWI-5th) and two orders denying his motions for postconviction relief. Thompson claims the trial court erred in refusing to disregard one of his prior

OWI convictions on the grounds that he had not validly waived his right to counsel in that case. We agree, and therefore reverse the judgment of conviction and remand to have the trial court enter an amended judgment and sentence for OWI-4th.

¶2 It is undisputed that Thompson entered a no contest plea to an OWI charge in 1996 without counsel. Prior to giving his plea to a court commissioner, Thompson signed a plea questionnaire indicating that he understood the nature of the charges against him and the constitutional rights he would be waiving by entering the plea. Before accepting the plea first given to the court commissioner, the trial court asked Thompson if he understood that he had a right to an attorney and that one would be appointed for him if he could not afford counsel; if he wished for more time to be able to consult with an attorney; and if anyone had forced or threatened him to give up his right to a lawyer. Based upon Thompson's responses, the court found that Thompson had freely and voluntarily waived his right to counsel.

¶3 The parties agree that a defendant may collaterally attack a prior conviction to prevent its use as a penalty enhancer when the prior conviction was obtained in violation of the defendant's right to counsel. *State v. Hahn*, 2000 WI 118, ¶¶28-29, 238 Wis. 2d 889, 618 N.W.2d 528. They further agree that, because the prior conviction at issue here was entered in 1996, the applicable standard for determining whether Thompson validly waived his right to counsel is set forth in *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980).

¶4 *Pickens* held that:

[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 or 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 will not be found.

Id. at 563.

¶5 Here, neither the plea questionnaire nor the trial court's colloquy show that Thompson was ever advised of the difficulties of self-representation.

¶6 The State first argues that we should assume that the court commissioner properly warned Thompson of the difficulties of self-representation before Thompson entered his plea because Thompson did not provide the trial court with a transcript of that proceeding. However, it was the State that bore the burden of demonstrating that Thompson had validly waived his right to counsel. If the proceeding before the court commissioner was recorded and would support its position, the State should have presented the transcript to the trial court itself. Since the transcript was not presented to the trial court, we decline to make adverse inferences against Thompson based on its absence from the record.

¶7 The State next argues that Thompson's awareness of the difficulties of self-representation may be inferred from such facts as his general educational level and prior experiences with the court system. We are not persuaded, however, that such facts affirmatively demonstrate that Thompson understood that an attorney might have been able to advise him about potential defenses to the charge or to identify mitigating facts to reduce his penalty. *See Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

¶8 In sum, we conclude that the record was insufficient to establish that Thompson had validly waived his right to counsel in his prior OWI case.

Therefore, the trial court erred in sentencing Thompson for OWI-5th. Accordingly, we remand to have the trial court resentence Thompson for OWI-4th.

By the Court.—Judgment and orders reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

