COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP539-CR

Cir. Ct. No. 2008CF41

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONSUELO EHMKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed and cause remanded*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Consuelo Ehmke appeals from a judgment, entered upon her guilty plea, convicting her of operating while intoxicated, fifth or subsequent offense. Before pleading guilty, she attempted to collaterally attack a

prior conviction. We agree with Ehmke that she has made a prima facie showing that she was denied the right to counsel. We reverse.

¶2 In January 2008 while on extended supervision, Ehmke was charged with fifth-offense OWI, operating with a prohibited alcohol concentration (.294), and obstructing an officer. She pled guilty to the OWI charge; the other two were dismissed and read in for sentencing. She was sentenced to twenty-two months' initial confinement, followed by thirty-six months' extended supervision, consecutive to the sentence she currently was serving in a Waukesha county case.

¶3 Before pleading guilty, Ehmke moved to collaterally attack her second OWI conviction, a 1994 Waushara county case, asserting that she did not knowingly, intelligently and voluntarily waive the right to counsel. In support of her motion, Ehmke provided clerk's minutes and the record from the 1994 case, except for the transcript which no longer is available. Ehmke also supplied an affidavit averring, *inter alia*, that she informed the court at the bail hearing that she wanted an attorney; that the court did not inform her she might qualify for a public defender or refer her to that office; and that the court did not address the difficulties or disadvantages of self-representation, ask whether she wanted to proceed without counsel, or ascertain whether she was competent to do so.

¶4 The circuit court inferred from the record that Ehmke simply changed her mind after being fully admonished about her right to counsel and properly waived it: "[T]here is no way a Judge could proceed if a person is saying I still want a lawyer. I still want a lawyer. There is just no other way to look at it." The court concluded that without a transcript indicating otherwise, a "self-serving affidavit" is insufficient to defeat the "presumption of regularity." *See*

State v. Baker, 169 Wis. 2d 49, 76, 485 N.W.2d 237 (1992). The court denied the motion.

¶5 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only on the ground that he or she was denied the constitutional right to counsel. *See* ***State v. Peters***, 2001 WI 74, ¶14, 244 Wis. 2d 470, 628 N.W.2d 797. To succeed, the defendant must bring forth evidence to make a prima facie showing that he or she was deprived of the constitutional right to counsel. ***State v. Ernst***, 2005 WI 107, ¶2, 283 Wis. 2d 300, 699 N.W.2d 92. General allegations that "the plea colloquy was defective," or that the "court failed to conform to its mandatory duties during the plea colloquy" are insufficient; the defendant must allege specific facts. ***Id.***, ¶25 (citations omitted). If the defendant makes a prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant knowingly, voluntarily and intelligently waived the right to counsel in the prior proceeding. ***Id.***, ¶2; ***State v. Klessig***, 211 Wis. 2d 194, 207, 564 N.W.2d 716 (1997). Whether the defendant made the prima facie showing is a question of law that we review independently. ***Ernst***, 283 Wis. 2d 300, ¶10.

¶6 The March 9, 1994, bond hearing minutes Ehmke provided indicate that she appeared in custody; the "with attorney" box is blank. The minutes also state that the court advised her "of the offense, penalty & right to an attorney," and "Def. wants to have an attorney." After a recess, the assistant district attorney immediately pretried the case, and the court set a $500 bond. The minutes finish with, "Due to incarceration in penalty provision def. wants to see an atty."

¶7 When her check for the bond bounced, Ehmke had to remain in jail, and she lost her job. The April 11, 1994, initial appearance minutes reflect that

Ehmke again appeared in court without counsel, was unable to post bond, and that she "[u]nderstands plea & waives right to trial. Jail sentence to begin today." Ehmke's affidavit informed the circuit court that the Waushara county court did not inform her she might qualify for a public defender or refer her to that office.

¶8 As the law now stands, to prove a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant deliberately chose to proceed without counsel and was aware of the difficulties and disadvantages of doing so, the seriousness of the charges against him or her, and the general range of potential penalties. ***Klessig***, 211 Wis. 2d at 206. The State argues, however, that the supreme court imposed the colloquy requirement in 1997, three years *after* the conviction Ehmke collaterally challenges. In 1994, a valid waiver of the right to counsel was governed by ***Pickens v. State***, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980), *overruled in part*, ***Klessig***, 211 Wis. 2d at 206. ***Pickens*** required that the record reflect the same underlying factors as did ***Klessig***, but did not require a formal colloquy in every case. ***Pickens***, 96 Wis. 2d at 563-64. The State asserts that the lack of a colloquy therefore does not entitle Ehmke to an evidentiary hearing. Ehmke contends that it is not just the absence of a colloquy, but that nothing in the record reflects either that she deliberately chose to proceed without counsel or was aware of the other factors—indeed, she argues, the record as a whole suggests the opposite.

¶9 We agree with Ehmke. Even if the ***Pickens*** court did not mandate a colloquy, it emphasized that a valid waiver "must affirmatively appear on the record" and recognized that "the best way to accomplish this is for the trial court to conduct a thorough and comprehensive examination of the defendant as to each of the factors mentioned" because "it is the accused's apprehension, not the trial court's examination, that determines whether the waiver is valid." ***Id.*** at 564. We

cannot say with confidence that a valid waiver affirmatively appears on the record of the 1994 matter. Ehmke has done more than launch bare-bones allegations. *See* ***Ernst***, 283 Wis. 2d 300, ¶¶24-25 (citations omitted). Through her affidavit and the 1994 record she has pointed to facts that demonstrate that she "did not know or understand the information which should have been provided" in the previous proceeding. *See* ***id.***, ¶25 (citations omitted). The record twice indicates that Ehmke expressed a desire for counsel but was unrepresented throughout the proceedings. Her affidavit asserts that the court did not ask whether she wanted to proceed without counsel, and the record contains no written waiver and no documentation that the court ascertained in any fashion that Ehmke intended to waive her right to counsel.

¶10 We recognize that a collateral attack introduces a tension between two presumptions: that a judgment carries with it a presumption of regularity, and that we must indulge in every reasonable presumption against waiver of counsel. ***Baker***, 169 Wis. 2d at 76. Waiver will not be presumed from a silent record, however. ***Id.*** The absence of the transcript does not defeat her claim. *See* ***State v. Drexler***, 2003 WI App 169, ¶10, 266 Wis. 2d 438, 669 N.W.2d 182 (stating that under Wisconsin law, when transcripts are unavailable, a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel). We conclude that Ehmke pointed to specific facts sufficient to make a prima facie showing. The burden now shifts to the State to prove that Ehmke knowingly, voluntarily and intelligently waived the right to counsel in the 1994 case. *See* ***Ernst***, 283 Wis. 2d 300, ¶2. We reverse and remand for an evidentiary hearing. *See* ***Klessig***, 211 Wis. 2d at 206.

By the Court.—Judgment reversed and cause remanded.

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