COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2115-CR **Cir. Ct. No. 2010CT443**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACI L. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 REILLY, J.[1] Traci L. Scott appeals from a judgment of conviction, finding her guilty of third offense operating while intoxicated (OWI). Scott made

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a collateral attack on this conviction, arguing that she did not make a valid waiver of her right to counsel at her 1999 conviction for second offense OWI, for which a transcript was never produced. The circuit court found that the State proved by clear and convincing evidence that Scott knowingly, intelligently and voluntarily waived her right to counsel in that 1999 proceeding. We affirm.

¶2 A defendant facing an enhanced sentence based on a prior conviction may only collaterally attack that prior conviction based on the denial of the constitutional right to counsel. *See* ***State v. Hahn***, 2000 WI 188, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528. Thus, a person charged with violating WIS. STAT. § 346.63 may collaterally attack a prior OWI conviction that is being used as a sentence enhancer under WIS. STAT. § 346.65. *See* ***State v. Foust***, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997).

¶3 Under ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the circuit court must engage in a four-part colloquy with the defendant regarding the decision to waive the right to counsel. Through this colloquy, the circuit court must ascertain that the defendant: 1) has made a deliberate choice to proceed without counsel, 2) is aware of the difficulties and disadvantages of self-representation, 3) is aware of the seriousness of the charges against him or her, and 4) is aware of the general range of possible punishments. When mounting a collateral attack, the defendant must do more than allege a defective plea colloquy. "[T]he defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated." ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. A valid attack requires that the defendant set forth facts demonstrating that he or she "did not know or understand the information which should have been provided." ***Id.*** If the defendant makes a prima facie showing, the burden shifts to the State to show, by clear and

convincing evidence, that the defendant's plea was knowing, intelligent and voluntary. ***Id.***, ¶27. Whether a party has met the burden of proof is a question of law. *See* ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992); ***Spindler v. Spindler***, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996).

¶4 Scott argues that her plea colloquy was defective in several respects, but focuses mainly on not being aware of the possible penalties. Scott claims that she was unaware of the advantages of an attorney and the difficulties or disadvantages of proceeding without one. She states she was never advised of the elements of the crime the State would have to prove and could not recall ever reading the complaint. She says she believed that the maximum penalty she faced was ten days in jail, and that such would be her automatic sentence if she entered a plea. Scott indicates she never consulted with an attorney, nor had she ever before appeared with the assistance of counsel. Finally, Scott states that had she known she faced a possible six months of jail time, she would have retained an attorney.

¶5 The circuit court found that Scott made a prima facie case that her right to counsel had been violated and shifted the burden to the State to show by clear and convincing evidence that Scott's waiver was knowing, intelligent and voluntary. Because the circuit court afforded Scott an evidentiary hearing, we will assume, without deciding, that Scott's affidavit was sufficient to establish a prima facie case. We turn, then, to the State's case, addressing the evidence presented in order of the ***Klessig*** prongs.

¶6 First, was Scott's choice to proceed without counsel deliberate? Scott testified that she was advised of her right to an attorney at her initial appearance. The minutes from that appearance and from the sentencing hearing both indicate that Scott was advised of her rights. Scott testified that she did not

think an attorney could have done anything to get her a better deal and that she was in a hurry to be done with her case. Finally, thirteen days passed between the initial appearance and the sentencing hearing, in which time Scott had the opportunity to consider her decision to proceed without counsel. These facts demonstrate that Scott made a deliberate decision to proceed pro se.

¶7 Second, was Scott aware of the difficulties and disadvantages of self-representation? As noted above, Scott was aware of her right to an attorney. Scott testified that while she was not aware of what attorneys do in particular cases, she did know that attorneys help people. Scott was also aware that attorneys receive specialized training in their field. Scott's knowledge that attorneys help their clients demonstrates her understanding that a defendant is disadvantaged by proceeding pro se.

¶8 Third, was Scott aware of the seriousness of the charges against her? The minutes from the initial appearance indicate that the complaint was read, which, according to the circuit court, "[a]t a minimum … the charge is read along with the maximum penalties." Scott testified that she thought she would be serving ten days in jail if she entered a plea. Scott told the court that "10 days scared the crap out of me." Scott understood she faced criminal charges and that she might go to jail. Scott was aware of the seriousness of the charges against her.

¶9 Fourth, was Scott aware of the general range of penalties that could be imposed against her? As already noted, the minutes from the initial appearance indicate that the complaint was read. In her testimony, Scott admitted that "he read something, but I don't remember what exactly it was." The focus of Scott's appeal is on her alleged misunderstanding that she was only exposed to ten days in jail, while in reality she could have been sentenced to six months. However, we

note that ***Klessig*** does not require precise knowledge of possible penalties, but rather an awareness of "the general range of penalties that could have been imposed." ***Klessig***, 211 Wis. 2d at 206. Here, Scott's testimony shows she knew she was exposed to jail time and that she considered the penalty "scary."

¶10 We agree with the circuit court that the State met its burden to show by clear and convincing evidence that Scott's waiver of her right to counsel was made knowingly, intelligently and voluntarily.

¶11 Finally, we address Scott's argument that the State's and circuit court's approach "impermissibly shifts the burden of proof back to the defendant." In addition to reiterating her argument that the State failed to meet its burden to show a knowing, intelligent and voluntary waiver, Scott argues that the State's reliance on Scott's inability to recall events from twelve years earlier "shifts the burden back to Scott." We note, however, that our analysis of the State's case has not relied on Scott's testimony that she does not recall details from her 1999 case. There is enough in the record, aside from Scott's lack of recollection, to carry the State's burden and show that Scott's waiver was knowing, intelligent and voluntary.

By the Court.—Judgment affirmed.

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