COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2301-CR **Cir. Ct. No. 2009CT121**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASEY D. SCHWANDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: BRIAN A. PFITZINGER, Judge. *Reversed and cause remanded with directions.*

¶1 NEUBAUER, P.J.[1] Casey D. Schwandt appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI), third

[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.

offense. He challenges an order denying his collateral attack on a 1997 conviction for operating while intoxicated, second offense. Schwandt alleges that, during the 1997 OWI proceedings, his waiver of his right to counsel was not knowing, voluntary and intelligent. We conclude that Schwandt made a prima facie showing that he did not knowingly, voluntarily and intelligently waive the right to counsel. We reverse the judgment and remand for further proceedings.

BACKGROUND

¶2 In 2009, the State charged Schwandt with third-offense OWI. The complaint set forth two prior Wisconsin OWI convictions for sentence enhancement purposes, one dating from 1994 and the other from 1997. Schwandt moved to collaterally attack the prior conviction from 1997, and the circuit court denied his motion. After the jury found Schwandt guilty as charged, he was convicted and sentenced.

¶3 Schwandt argues that the circuit court erred in denying his collateral attack on his 1997 conviction, in which he pled no contest to second-offense OWI. A transcript from that plea hearing was never produced, and the court reporter's notes have been destroyed. We do, however, have the clerk's minutes. These minutes indicate: (1) Schwandt received a copy of the complaint and waived a reading of the complaint, (2) the circuit court advised Schwandt of his right to an attorney, (3) Schwandt "does not want an attorney," and (4) "Court goes over rights with [Schwandt]. [Schwandt] waives all rights." Nothing in the minutes suggests Schwandt requested an attorney or questioned his sentence.

¶4 In the 2009 proceedings, Schwandt mounted his collateral attack on the above-described plea, arguing that he did not knowingly, voluntarily and intelligently waive his right to an attorney. Prior to deciding whether Schwandt

had made a prima facie case that his plea was not knowing, voluntary and intelligent, the circuit court asked the parties for briefs addressing which standard should be applied to Schwandt's waiver: ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980), *overruled by* ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997); ***Klessig***, 211 Wis. 2d 194; or ***Iowa v. Tovar***, 541 U.S. 77 (2004). The circuit court, citing ***Tovar***, denied Schwandt's motion, finding that "no prima facie showing [that Schwandt's waiver was invalid] has been made." Schwandt appeals.

ANALYSIS

¶5 A defendant may collaterally attack a prior conviction on the ground that his or her constitutional right to counsel was violated because he or she did not knowingly, voluntarily and intelligently waive that right. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. When collaterally attacking a prior conviction, the defendant has the initial burden to make a prima facie showing that his or her constitutional right to counsel was violated. ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992); ***Ernst***, 283 Wis. 2d 300, ¶25. If the defendant makes a prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was constitutionally valid. ***Baker***, 169 Wis. 2d at 77; ***Ernst***, 283 Wis. 2d 300, ¶27. Whether the defendant has made a prima facie showing is a question of law we review de novo. ***Baker***, 169 Wis. 2d at 78; ***Ernst***, 283 Wis. 2d 300, ¶26.

¶6 We first turn our attention to the standard applicable to Schwandt's challenge to his 1997 waiver of right to counsel. Schwandt argues that, while he did waive his right to counsel, he did not understand the role counsel could have played in the proceeding. He argues that he was not aware of the difficulties and

disadvantages of self-representation. The State argues that, under ***Tovar***, a lack of understanding of the difficulties and disadvantages of self-representation may not form the basis for this collateral attack on a pre-***Klessig*** 1997 waiver. The State urges us to affirm the circuit court's denial of the collateral attack motion and find that Schwandt failed to allege a constitutionally recognized deprivation of his right to counsel.

¶7 Under ***State v. Peters***, 2001 WI 74, ¶¶20-22, 244 Wis. 2d 470, 628 N.W.2d 797, we apply the law in effect at the time of the 1997 plea hearing, which was ***Pickens***. In ***Pickens***, the supreme 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 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 [of counsel] will not be found.

Peters, 244 Wis. 2d 470, ¶21 (quoting ***Pickens***, 96 Wis. 2d at 563-64) (alteration in original). The ***Pickens*** court held that the defendant's understanding of these facts did not need to be demonstrated by a specific colloquy, but could appear elsewhere in the record. ***Pickens***, 96 Wis. 2d at 564.

¶8 ***Klessig*** overruled ***Pickens*** to the extent ***Pickens*** did not mandate the use of a colloquy to demonstrate the defendant's waiver is knowing, voluntary and intelligent. ***Ernst***, 283 Wis. 2d 300, ¶14. The ***Klessig*** court held that for a waiver of counsel to be valid, the circuit court must conduct a colloquy to ensure 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 … against him, and (4) was aware of the general range of penalties that could have been imposed on him." ***Klessig***, 211 Wis. 2d at 206. "The court adopted such requirements in order to insure that the defendant validly waived his right to counsel and to preserve appellate resources by making the standard clear." ***Ernst***, 283 Wis. 2d 300, ¶14.

¶9 In ***Tovar***, the United States Supreme Court, as regards the waiver of counsel analysis, held that "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." ***Tovar***, 541 U.S. at 81. The Court emphasized that the central component for a valid waiver is that the defendant "knows what he is doing." ***Id.*** at 89 (citation omitted). Whether the defendant's choice is informed and deliberate "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." ***Id.*** at 88.

¶10 After ***Tovar***, ***Ernst*** clarified that the ***Klessig*** colloquy elements, including the "difficulties and disadvantages," ***Klessig***, 211 Wis. 2d at 206, were not constitutionally required. "In ***Klessig***, we never suggested that the colloquy requirements were based on either the United States Constitution or Article I, Section 7 of our State Constitution. Instead, we made it clear that the requirements were a court-made procedural rule." ***Ernst***, 283 Wis. 2d 300, ¶18. Because the ***Klessig*** colloquy is not constitutionally required, but rather a "valid use of the court's superintending and administrative authority," it "does not conflict in any way with the United States Supreme Court's decision in ***Tovar***, but rather receives endorsement from the Supreme Court's language in that decision." ***Ernst***, 283 Wis. 2d 300, ¶21.

¶11 Under ***Pickens***, ***Klessig*** and ***Tovar***, the circuit court must ascertain if the defendant's waiver of counsel is knowing, voluntary and intelligent. ***Pickens***, 96 Wis. 2d at 562-64; ***Klessig***, 211Wis. 2d at 206-07; ***Tovar***, 541 U.S. at 88. The "difficulties and disadvantages" prong of ***Klessig***, while not constitutionally required for a valid waiver of counsel, *see* ***Ernst***, 283 Wis. 2d 300, ¶18, is part of the circuit court's inquiry into whether waiver is deliberate and knowing. Similarly, while a colloquy on this prong may not have been either procedurally or constitutionally required under ***Pickens***, the determination as to whether a waiver was knowing, voluntary and intelligent included consideration of the accused's awareness of the difficulties and disadvantages of proceeding pro se. ***Peters***, 244 Wis. 2d 470, ¶21 (citing ***Pickens***, 96 Wis. 2d at 563-64) (unless the record reveals the defendant's deliberate choice and his awareness of the difficulties and disadvantages of self-representation, a knowing and voluntary waiver of counsel will not be found).

¶12 To make a prima facie case, a defendant must do more than allege that the colloquy was defective. *See* ***Ernst***, 283 Wis. 2d 300, ¶25. To make a valid collateral attack, the defendant must point to specific facts that demonstrate that he or she did not knowingly, intelligently and voluntarily waive his or her constitutional right to counsel. ***Id.*** A collateral attack that does not detail such facts will fail. ***Id.***

¶13 In his affidavit, Schwandt avers the following:

> 3. Although I may have been told at my initial appearance I had the right to consult with an attorney, I was not advised of, and did not understand, the dangers of self-representation, nor that an attorney might be able to identify potential defenses of which I may not have been aware. At no time during the proceedings was I represented by an attorney.…

> 4. I also did not understand that an attorney would have been able to negotiate the fines, jail time, revocation time, reporting date and other aspects of a potential sentence; could file motions challenging the evidence in my case; and could argue I had a different alcohol concentration at the time I was driving compared with the time that the chemical test was performed and that this difference could have provided either a defense or a lesser sentence. Had I known these things, I would have sought counsel to assist me.

¶14 As discussed above, in order to show that a waiver was valid, the record must reflect a deliberate choice to proceed without counsel, including an awareness of the difficulties of proceeding pro se, of the seriousness of the charges and of the range of possible penalties. ***Peters***, 244 Wis. 2d 470, ¶21 (citing ***Pickens***, 96 Wis. 2d at 563-64). Schwandt does not allege any deficiency in the court's colloquy concerning the severity of the charges or the range of possible sentences. That leaves us with the deliberate choice to proceed without counsel, including the awareness of the disadvantages of proceeding pro se. The requirement the defendant be aware of the difficulties and disadvantages of self-representation does not mean that the circuit court accepting the waiver must brainstorm from the bench and advise the defendant of any imaginable defense; the law does not require that a defendant understand every possible type of defense. Rather, the defendant must understand the role counsel could play in the proceeding. ***Pickens***, 96 Wis. 2d at 563 (defendant must understand "that there are technical rules governing the conduct of a trial, and that presenting a defense is not a simple matter of telling one's story") (quoting ***Maynard v. Meachum***, 545 F.2d 273, 279 (1st Cir. 1976)).

¶15 Schwandt does not claim to have been unaware of his right to an attorney before entering a plea, and neither does he deny making a deliberate choice to proceed pro se. He does aver that he was not aware of certain specific

actions that an attorney might have taken on his behalf and further that he was not aware of the possible advantages of seeking representation prior to pleading in an OWI case. Schwandt cites several examples of ways in which an attorney might have helped him and concludes that had he been aware of these advantages of representation, he would have engaged a lawyer. Schwandt sufficiently alleges that he was not aware of how an attorney could have helped him, and, had he been so aware, he would have engaged counsel. Schwandt sets forth a prima facie case that his waiver of the right to counsel in the prior proceeding was not knowing, voluntary and intelligent. We remand for the State to attempt to prove that, despite Schwandt's averments, his waiver was knowing, voluntary and intelligent.

¶16 This case is an example of a recurring dilemma faced by the courts with collateral attacks on drunk driving convictions that are more than ten years old. The drunk driving penalty scheme under WIS. STAT. § 346.65 looks back at the offender's lifetime for prior violations. At the same time, the record retention rules allow for destruction of documents as early as five years after the case is closed. *See generally*, SCR ch. 72.01. The interplay produces collateral attacks for which the court has no transcript from the prior proceeding. *See* ***State v. Drexler***, 2003 WI App 169, ¶11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182.

¶17 Because Schwandt has set forth a prima facie case that his constitutional right to counsel was violated in the 1997 proceeding, we conclude that circuit court erred in denying Schwandt's collateral attack. We reverse the judgment and remand the case for the State to attempt to establish that Schwandt knowingly, voluntarily and intelligently waived his constitutional right to counsel in the 1997 OWI proceedings.

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

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