COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1248-CR **Cir. Ct. No. 2016CT334**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. SEWARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] In 2016, Matthew Seward was charged with his third offense of operating a motor vehicle while intoxicated (OWI). In order to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

avoid the enhanced penalty, Seward moved to collaterally attack his second-offense 2006 conviction for OWI in which he represented himself and pled no contest. Seward's collateral attack motion argued he did not knowingly, intelligently, and voluntarily waive his right to counsel in the 2006 proceeding.

¶2 A few years earlier, Seward had also been charged with a third-offense OWI and similarly attacked the 2006 OWI conviction on the same grounds. The court in that case saw no defect in the 2006 colloquy and denied relief. Seward then sought leave to appeal, which we denied. However, at trial, Seward was found not guilty on the merits, obviating any challenge to or appeal of the circuit court's ruling on his collateral attack.

¶3 The circuit court in this case suggested it saw the 2006 colloquy differently; it pointed out what it believed were some real deficiencies. However, the court concluded that Seward's current collateral attack on his 2006 conviction was barred by collateral estoppel (now more commonly called issue preclusion) because of the previous ruling on the issue. Seward sought leave to appeal, which we have now granted.

¶4 The sole issue we address is whether Seward has made a prima facie case that he did not knowingly, intelligently, and voluntarily waive his right to counsel, thus shifting the burden to the State to prove in an evidentiary hearing that his waiver was constitutionally valid. Seward has not, in our judgment, made a prima facie case. Therefore, he was not entitled to an evidentiary hearing. Because we reject the substance of Seward's claim, we need not address the circuit court's conclusion that issue preclusion barred Seward's motion. Additional facts will be discussed as relevant below.

DISCUSSION

¶5 Seward is collaterally attacking his previous OWI conviction, and the burden is on him to present a prima facie case that his constitutional right to counsel was violated. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. If he makes a prima facie case, then the burden shifts to the State to prove that Seward's waiver of counsel was constitutionally valid. ***Id.***, ¶27. Whether Seward has made a prima facie showing is a question of law we review de novo. ***Id.***, ¶26.

¶6 The Sixth Amendment to the United States Constitution grants defendants the right to counsel.[2] In order to ensure that right is protected, case law has established certain minimum safeguards to effectuate a valid waiver of the right to assistance of counsel. Above and beyond constitutional requirements, Wisconsin has adopted certain procedural mandates to govern such a waiver.

¶7 In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court announced new procedures to govern the colloquy. The court held as follows:

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[2] The Sixth Amendment provides the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

> 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. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

Id. (citation omitted).

¶8 In ***Iowa v. Tovar***, 541 U.S. 77 (2004), the United States Supreme Court rejected the notion that similar warnings imposed by the Iowa Supreme Court were required by the Constitution. ***Id.*** at 81. Specifically, Iowa required that the defendant be informed that "waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked" and that "by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." ***Id.*** (citation omitted; alteration in original). The court held that a valid waiver must be knowing, intelligent, and voluntary, and that the Sixth Amendment's requirements are "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." ***Id.*** at 81, 88. An "intelligent" waiver is one where the defendant makes the choice with "eyes open" and knowledge of what he or she is doing. ***Id.*** at 88 (citation omitted). But precisely what information is necessary to render a waiver knowing, intelligent, and voluntary is case specific. ***Id.*** The supreme court suggested that prescribed formularies may be helpful or even good, but they are neither inherently sufficient to constitute a valid waiver, nor are they per se insufficient when not followed. *See* ***id.*** at 90-93.

¶9 Following ***Tovar***, our supreme court had an opportunity to reexamine the ***Klessig*** requirements in light of ***Tovar*** and in the somewhat different context of a collateral attack—the issue here. In ***Ernst***, the supreme court, consistent with ***Tovar***, made clear that the ***Klessig*** requirements were not mandated by the Sixth Amendment, but were rather an expression of the court's superintending and administrative authority. ***Ernst***, 283 Wis. 2d 300, ¶18. A collateral attack on an earlier conviction, however, rests on the notion that waiver of the right to counsel was *constitutionally* infirm. ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. Thus, ***Ernst*** addressed whether a violation of the ***Klessig*** requirements can constitute a basis for a collateral attack on an earlier conviction. *See* ***Ernst***, 283 Wis. 2d 300, ¶2.

¶10 In part, the answer is no; the court made clear that a defective plea colloquy is not enough. ***Id.***, ¶25 ("We agree that a defendant must do more than allege that 'the plea colloquy was defective' or the 'court failed to conform to its mandatory duties during the plea colloquy' to satisfy the standard for collateral attacks ….'). In other words, even if ***Klessig*** was not followed, that is insufficient. "[T]he defendant must make a prima facie showing that his or her *constitutional* right to counsel in a prior proceeding was violated." ***Ernst***, 283 Wis. 2d 300, ¶25 (emphasis added). The court held:

> For there to be a valid collateral attack, we require the defendant to point 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. Any claim of a violation on a collateral attack that does not detail such facts will fail.

Id. (citation omitted). Despite a clear allegation that ***Klessig*** was not followed, the court ultimately concluded that Ernst did not allege such sufficient facts to "show

that his waiver was not a knowing, intelligent, and voluntary one." ***Ernst***, 283 Wis. 2d 300, ¶26.

¶11 However, the court also stated it was holding "that an alleged violation of the requirements of ***Klessig*** can form the basis of a collateral attack, as long as the defendant makes a prima facie showing, pointing to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her constitutional right to counsel." ***Ernst***, 283 Wis. 2d 300, ¶2. Thus, the court seems to say that ***Klessig*** deficiencies *could* rise to level of constitutional dimension if certain facts are alleged showing the underlying waiver was not *constitutionally* deficient.

¶12 This prompted a partial dissent from Justice Wilcox (incidentally, the author of ***Klessig***). Justice Wilcox pointed out that the U.S. Supreme Court in ***Tovar*** held that a requirement "strikingly similar" to the ***Klessig*** requirement that the defendant be informed of the "difficulties and disadvantages of self-representation" was not required by the constitution. ***Ernst***, 283 Wis. 2d 300, ¶52 (Wilcox, J., concurring in part; dissenting in part). Justice Wilcox deduced that since such a colloquy is not constitutionally required, a priori its absence cannot by itself form the basis for collateral attack on the waiver as constitutionally problematic. ***Id.***, ¶¶53, 56. Because the majority was unclear on this point, Justice Wilcox stated that he dissented "*to the extent [the majority] suggests* that the failure … to inform a defendant of the dangers and disadvantages of self-representation may form the basis of a collateral attack on his conviction or has any relevance in determining whether the defendant was denied the constitutional right to counsel." ***Id.***, ¶56. This issue has particular pertinence in this case because Seward's collateral attack is premised entirely on a claim that he was not

informed of and did not know the dangers and disadvantages of self-representation.[3]

¶13 Seward seems aware that he must do more than just make conclusory allegations that he did not knowingly, intelligently, and voluntarily waive his right to counsel—that he must point to specific facts demonstrating what he should have, but did not know. He argues his affidavit does just that. The affidavit makes the following relevant statements regarding the 2006 proceeding:

(1) "I was never advised of and I did not know or understand the difficulty or disadvantage of proceeding without counsel."

(2) Prior to his 2006 court proceeding, "I had never been involved in the court system."

(3) "The court never advised me that there might be an advantage to having an attorney, nor did the court advise me that it might be difficult to proceed without counsel."

(4) "Because I had never been involved in the criminal system before, I did not know or understand the difficulty or disadvantage of proceeding without an attorney."

¶14 These brief statements boil down to two complaints. First, Seward alleges he was not advised by the circuit court of the advantages of counsel and the corresponding disadvantages of proceeding without counsel. This is nothing

[3] Seward makes no argument (likely because no real argument can be made) that he did not understand the charge against him, was not informed of his right to assistance of counsel, or that he did not understand the possible punishments. *See* ***Iowa v. Tovar***, 541 U.S. 77, 88 (2004).

more than an allegation that ***Klessig*** was not followed and, per ***Tovar*** and ***Ernst***, it is not enough to make a prima facie case. The operative question is whether Seward knowingly, intelligently, and voluntarily waived his right to counsel, not whether the court's colloquy was technically defective. The circuit court's failure to properly advise Seward could render his waiver invalid, but it is not enough by itself.

¶15 Separate from the court's failure to properly advise him, Seward also alleges that he personally did not understand the "difficulty or disadvantage of proceeding without counsel." This factual averment is headed in the right direction, but is still not enough to trigger a Sixth Amendment violation. Seward can arguably make a prima facie showing by averring that he did not "understand the role counsel could play in the proceeding." ***State v. Gracia***, 2013 WI 15, ¶36, 345 Wis. 2d 488, 826 N.W.2d 87 (quoting ***State v. Schwandt***, No. 2011AP2301-CR, unpublished slip op. ¶14 (WI App May 16, 2012)). However, the lesson of ***Ernst*** is that bare assertions of ***Klessig*** deficiencies are not enough. There must be factual connections made between the deficiencies in the colloquy and why that rendered the waiver unknowing, unintelligent, or involuntary. Seward still must point to "specific facts" indicating he did not knowingly, intelligently, and voluntarily waive his right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶26. A conclusory statement that Seward did not understand the advantages of counsel and the disadvantages of proceeding pro se—without identifying what he did not know or understand—is not enough. *See* ***State v. McGee***, No. 2010AP3040-CR, unpublished slip op. ¶¶9-10 (WI App Apr. 26, 2011) (holding that the assertion a defendant "did not understand the difficulties and disadvantages of self-representation" without the support of "specific facts or examples" did not state a prima facie case); *see also* ***State v. Reggs***,

No. 2013AP2367-CR, unpublished slip op. ¶¶11-12 (WI App July 3, 2014) (holding a defendant failed to make a prima facie showing because his affidavit was "not sufficiently specific"); ***State v. Bowe***, No. 2013AP238-CR, unpublished slip op. ¶14 (WI App Sept. 17, 2013) (concluding that a defendant failed to make a prima facie showing because he "made no specific averments regarding what he did not know or understand").[4]

¶16 It is worth emphasizing that whether Seward's constitutional rights have been violated must be made based upon the specific facts and circumstances of his particular case. *See* ***Tovar***, 541 U.S. at 93. Seward's 2006 conviction was a simple and straightforward charge—OWI. This followed his first OWI offense just two years before. Like the defendant in ***Tovar***, Seward has not "'articulate[d] with precision' the additional information counsel could have provided." ***Id.*** at 93 (citation omitted; alteration in original). He has not made any factual claim of what exactly he wanted to know—other than generic "difficulties and disadvantages" of proceeding pro se—such that his waiver became unknowing or unintelligent. He has not even specified how a proper understanding would have changed his approach. Nor does he explain why he chose to waive counsel despite the strong warning from the court commissioner to obtain counsel.[5]

[4] Unpublished authored opinions "issued on or after July 1, 2009," may be cited for persuasive value. WIS. STAT. § 809.23(3).

[5] The commissioner emphatically warned Seward as follows:

> You're appearing without a lawyer. You have the right to be represented by a lawyer. This is your first appearance. And I'm asking you because operating while intoxicated second carries mandatory jail time. *You need to hire yourself a lawyer*.

¶17 The bar to establishing a prima facie case should not be terribly high. But it does require more than alleging ***Klessig*** was not followed. We read Seward's affidavit as too bare and too generalized to meet his burden of establishing a prima facie case that his Sixth Amendment rights were violated in his 2006 conviction. Therefore, he is not entitled to an evidentiary hearing, and the circuit court's denial of his collateral attack—albeit on different grounds—must be affirmed.

By the Court.—Order affirmed.

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