

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2003

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. 02-2757-CR

Cir. Ct. No. 00-CF-1175

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY DOMBROWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rodney Dombrowski appeals a judgment convicting him of fifth offense drunk driving.¹ He argues that three of his prior

¹ He also appeals an order denying his postconviction motion relating to restitution, but raises no issues regarding that order.

convictions should not have been used to enhance his sentence because his waiver of counsel in each of those cases was not knowing, intelligent and voluntary. Specifically, he argues that he was not adequately informed of the potential penalties when he waived counsel and pled no contest to two offenses in 1993. He also argues as to all three prior offenses that he was not adequately made aware of the difficulties and disadvantages of self-representation. We reject these arguments and affirm the judgment and order.

¶2 For purposes of enhancing a subsequent sentence, an earlier conviction is invalid if the waiver of counsel was not knowing and voluntary. *See State v. Peters*, 2001 WI 74, ¶22, 244 Wis. 2d 470, 628 N.W.2d 797. Because the three convictions at issue in this appeal occurred before new rules enunciated in *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), this case is governed by the test set out in *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980). Therefore, no colloquy was required and this court may examine the totality of the record to determine whether Dombrowski's waiver of counsel was the result of a deliberate choice made with awareness of the difficulties and disadvantages of self-representation, the seriousness of the charges and the general range of possible penalties. *Peters*, 244 Wis. 2d 470, ¶21.

¶3 The record establishes that Dombrowski was aware of the general range of penalties for his 1993 convictions. In No. 93-CT-138, he stated on the record at his initial appearance that he understood the minimum and maximum penalties. In No. 93-CT-302, Dombrowski signed a plea questionnaire and waiver of rights form that stated, "I understand what I am charged with, what the penalties are and why I have been charged." Had he stated otherwise, the court would have informed him of the penalties. Dombrowski is judicially estopped from

disavowing those representations merely because it now serves his purposes. *See State v. Petty*, 201 Wis. 2d 337, 346-51, 548 N.W.2d 817 (1996).

¶4 The record also establishes that Dombrowski adequately understood that representation by counsel might be advantageous. The two 1993 convictions were disposed of at a single plea hearing. Before the hearing, Dombrowski indicated that he desired an opportunity to talk with an attorney before proceeding any further. The court agreed that it would be wise to consult with counsel and noted that it would be necessary to look at a number of different factors to determine the possible penalties:

And I think under all those circumstances, it would be well for you to at least seek the advice of a lawyer—and I am not insisting that you have a lawyer with you. That’s your choice, but I think you ought to seek the advice of an attorney before we proceed.

Taken as a whole, the court’s statements clearly implied that representation by counsel might be advantageous. The court then adjourned the matter to allow Dombrowski an opportunity to consult an attorney. At the plea hearing, Dombrowski indicated that he sought the advice of an attorney: “I went and talked to him and he said that there’s really not much, you know, that he could do to help.”

¶5 The best way to assure a knowing waiver of the right to counsel is to have a defendant discuss the matter with an attorney. *See WIS JI—CRIMINAL SM-30*, Cmt. 20 n.8 (1998). Dombrowski’s statement that the attorney indicated that there was not much he could do to help suggests that the plea decision was made after counsel determined that there were no defenses or mitigating circumstances that required representation.

¶6 In the third conviction at issue, No. 95-CT-1266, Dombrowski was initially represented by a state public defender. After his attorney negotiated a plea agreement, Dombrowski absconded. When he was returned for trial thirteen months later, he was no longer eligible for state public defender representation. The court refused to accept Dombrowski's plea if he wanted an attorney. Dombrowski responded, "I guess I don't need an attorney then." When the court offered to delay proceedings, Dombrowski responded, "maybe I should talk to an attorney." The court then adjourned the matter to allow Dombrowski an opportunity to speak with counsel. When he again appeared without counsel, the trial court summarized the situation: "You consulted with someone and after doing that you're satisfied that its reasonable to go forward." Dombrowski then proceeded to plead no contest, receiving the full benefit of the plea agreement that had been negotiated by his attorney before he absconded. The decision to plead no contest and the details of the plea agreement were negotiated while Dombrowski was represented by counsel. Again, there was little more for counsel to do, and the record establishes that Dombrowski understood he had already received the benefits of representation by counsel.

By the Court.—Judgment and order affirmed.

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

