COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP421-CR **Cir. Ct. No. 2005CF170**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY M. EGLESTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Larry Egleston appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI), third offense, contrary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

to WIS. STAT. § 346.63(1)(a). Egleston contends that his second OWI conviction cannot be used to enhance his sentence because he did not validly waive his constitutional right to an attorney in that prior conviction. Because we conclude that Egleston knowingly and voluntarily waived his right to counsel, we affirm the order denying his motion to collaterally attack the prior conviction and the judgment of conviction.

Background

¶2 In January 2005, Egleston was charged with operating a motor vehicle while intoxicated, third offense. Egleston's first OWI conviction occurred in September 1994 and his second in July 1998. Egleston moved to collaterally attack his second OWI conviction and exclude it as a prior offense for sentencing purposes. He asserted that this prior conviction was obtained in violation of his Sixth Amendment right to counsel because he did not knowingly and intelligently waive his right to an attorney. Egleston filed an affidavit in support of his motion in which he claimed that he did not understand his right to an attorney or the advantages of having an attorney.

¶3 In June 2005, the circuit court heard testimony from Egleston and arguments on his collateral attack motion. The court concluded that Egleston's second conviction could not be used to enhance his OWI to a third offense because the plea taken in this prior conviction was inadequate. The court could not find sufficient information in the transcript demonstrating that Egleston understood his right to an attorney. Consequently, in September 2005, Egleston entered a plea to operating while intoxicated, second.

¶4 One month later, the State submitted a letter brief asking the court to reconsider its decision in light of ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300,

699 N.W.2d 92. The supreme court decided ***Ernst*** in July 2005, after the circuit court ruled on Egleston's collateral attack motion, but prior to his sentencing. The State asserted that because ***Ernst*** increased the defendant's burden for collaterally attacking prior convictions, Egleston had not made a prima facie showing of a Sixth Amendment violation. Egleston filed a response, contending that he had met his burden under ***Ernst*** and that the State had failed to establish by clear and convincing evidence that he validly waived his right to counsel.

¶5 After a hearing on the request for reconsideration, the circuit court issued an order denying the defendant's motion to attack his previous conviction. The court found that Egleston's motion was sufficient to make a prima facie case. However, the court concluded that the State proved by clear and convincing evidence that Egleston's waiver of counsel was knowingly, intelligently, and voluntarily entered. The court reconsidered and denied Egleston's motion based on the 1998 plea hearing and Egleston's testimony at the 2005 motion hearing. The court was satisfied that Egleston knew of his right to an attorney and voluntarily waived that right. The court sentenced Egleston for operating while intoxicated, third. Egleston appeals.

Analysis

¶6 The right to collaterally attack a prior conviction used for sentencing enhancement is limited to an alleged violation of the defendant's right to counsel under the Sixth Amendment and article I, section 7 of the Wisconsin Constitution. ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. A defendant's waiver of the right to counsel is constitutionally valid if it is knowingly, intelligently, and voluntarily entered. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). "Whether a defendant knowingly, intelligently,

and voluntarily waived his Sixth Amendment right to counsel requires the application of constitutional principles to the facts." ***Ernst***, 283 Wis. 2d 300, ¶10. This is a question of law that we review de novo. ***Id.***

¶7 To collaterally attack a prior conviction, the defendant must first make a prima facie showing that his or her constitutional right to counsel was violated. ***Ernst***, 283 Wis. 2d 300, ¶25. A prima facie showing requires that the defendant point to specific facts demonstrating that the defendant "'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."[2] ***Id***. (quoting ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14). Whether the defendant has made a prima facie showing is a question of law subject to de novo review. ***Id.***, ¶10. If the defendant

[2] In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (citation omitted), the court established colloquy requirements to ensure the constitutional validity of waivers:

> 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.

However, in ***State v. Ernst***, 2005 WI 107, ¶21, 283 Wis. 2d 300, 699 N.W.2d 92, the court concluded that these colloquy requirements were procedural rules mandated under the court's supervisory power. Therefore, although the ***Klessig*** requirements ensure constitutional compliance, they do not form the basis for a constitutional violation. ***Id.***, ¶¶24-25. Furthermore, while the burden shifting procedure of ***Ernst*** is similar to ***Klessig***, ***Ernst*** requires that the defendant "do more than allege that 'the plea colloquy was defective' or the 'court failed to conform to its mandatory duties during the plea colloquy.'" ***Id.***, ¶25 (quoting ***State v. Hampton***, 2004 WI 107, ¶57, 274 Wis. 2d 379, 683 N.W.2d 14). The defendant must demonstrate that his waiver was not constitutionally valid. ***Id.***

makes a prima facie case, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was constitutionally valid. ***Id.***, ¶27.

¶8 Egleston contends that he made a prima facie case that he did not knowingly, intelligently, and voluntarily waive the right to counsel. First, Egleston points to his collateral attack motion, in which he alleged that the court did not inform him of his right to an attorney or the disadvantages of self-representation. Egleston also relies on his affidavit, in which he states that he did not "fully understand his right to an attorney or the advantages of having an attorney." Lastly, Egleston points to the record of the 1998 plea hearing where the court does not directly address Egleston's right to an attorney.

¶9 We conclude that Egleston made a prima facie showing that he did not knowingly, intelligently, and voluntarily waive his right to counsel. Egleston goes beyond merely asserting that the plea colloquy was defective. He points to specific facts indicating he did not know or understand information, and therefore, that his waiver was not constitutionally valid.

¶10 Having established that Egleston made a prima facie showing, we must consider whether the State has met its burden of coming forward with clear and convincing evidence that Egleston's waiver was knowing and voluntary. ***Id.***, ¶27. We conclude that the State has met this burden by producing the transcript from the June 2005 evidentiary hearing, which supplements the 1998 plea hearing. We agree with the State that Egleston's testimony from the evidentiary hearing successfully rebuts any Sixth Amendment violation.

¶11 At the June 2005 hearing, Egleston's attorney called him to testify and the following exchange occurred:

Q: At the time of the plea and sentencing, did you know that you had a right to have an attorney?

A: I didn't fully understand my rights at that time.

Q: Okay. You had previously attempted to get a public defender?

A: Yes, I did.

Q: Did they turn you down because of your income level?

A: Yes.

….

Q: At that point, did you think you had an option to further pursue an attorney other than hiring a private attorney?

A: No, I didn't.

Q: Okay. And did you understand that in a criminal case, you have the right to have an attorney?

A: I didn't totally understand the situation at the time—

Q: Okay.

A: —that I had a right.

….

Q: Did anybody tell you anything about getting an attorney other than the Public Defender?

A: They said my options were open to try to get an attorney somewhere else or, I believe—I'm not sure exactly.

On cross-examination, the Assistant District Attorney (ADA) elicited Egleston's testimony regarding the Plea Questionnaire and the Waiver of Rights Form that Egleston signed prior to his 1998 conviction:

> Q: Did you fill [the Plea Questionnaire and Waiver of Rights form] out in the OWI second case that's at issue here today?
>
> A: Did I fill this out?
>
> Q: Yes.
>
> A: I signed it. I did not fill it out, sir.
>
> Q: Did Mr.—
>
> A: It looks like my signature there, yes.
>
> ….
>
> Q: Isn't it reasonable to conclude that by you signing and dating this, it indicated at the time that you signed and dated it you had read and understood that information?
>
> A: That could be correct, sir.
>
> Q: That's a reasonable conclusion to reach, correct?
>
> A: It could be a conclusion, yes, sir.
>
> Q: Normally, when you sign a document, do you understand what it is you're signing and what it is you're attesting to?
>
> A: Yes.

Finally, the ADA questioned Egleston about his visit to the public defender's office prior to the plea hearing:

> Q: Okay. Let me ask you this question, and I want to make sure you understand it. You went to the Public Defender to get an attorney, correct?
>
> A: I went to get paperwork along the lines of trying to get an attorney.
>
> Q: So you went there to get an attorney, correct?
>
> A: To get information, sir, to get paperwork.
>
> ….

The Court:	Mr. Egleston, let me—this is not this complicated.
A:	I know. I'm just saying—he's asking me a specific question.
The Court:	Just listen to the question. He wants to know why you went to the Public Defender's Office.
A:	To try to obtain an attorney.
The Court:	There you go. There you go. Thank you.

¶12 At the conclusion of the hearing, the court found that Egleston's testimony was "evasive and self-serving and at times not credible." We accept the court's conclusion that Egleston's testimony lacked credibility. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (noting that "[i]t is the function of the trier of fact, and not this court, to resolve questions as to the weight of testimony and the credibility of witnesses"). We also agree with the State that Egleston's testimony and actions leading up to his 1998 conviction demonstrate that he understood his right to an attorney and voluntarily waived that right. Egleston was evasive when asked whether he understood his rights. Furthermore, he acknowledged signing the waiver form, which details a defendant's right to an attorney in criminal proceedings. Perhaps most tellingly, Egleston's attempt to seek counsel from the public defender's office reveals his understanding of his right to counsel and the benefits of retaining an attorney.

¶13 Egleston also asserts that the trial court wrongly informed him that he would have to hire his own attorney to appeal the public defender's decision. He contends that without being properly informed of his right to ask the court to examine his income level and determine whether he qualified for court-appointed counsel, his waiver was not knowing and voluntary. At the 1998 plea hearing the court engaged in the following colloquy with Egleston:

The Court:	Do you want to have a lawyer?
A:	No.
The Court:	Do you want to go to the Public Defender's Office and see if you qualify for a state lawyer?
A:	I already did and I got denied.
The Court:	Okay. Do you understand you could appeal that to the court if you want to?
A:	Um-hum.
The Court:	You need to answer yes or no for the record.
A:	Yes.
The Court:	Do you want time to go out and hire a lawyer to appeal that?
A:	No.
The Court:	You want to go ahead today?
A:	Yes.

¶14 First, we reiterate that ***Ernst*** requires a defendant to do more than merely allege that the plea colloquy was inadequate. ***Ernst***, 283 Wis. 2d 300, ¶25. He must point to specific facts demonstrating that the waiver was not knowing, intelligent, and voluntary. ***Id***. Based on the transcript, we do not agree that the court's alleged misinformation about Egleston's right to appeal the Public Defender's decision shows that Egleston's waiver was not valid. While the colloquy is sparse, we disagree with Egleston's reading of the transcript. The trial court did not state that Egleston would "*have to hire an attorney to appeal that decision*." This is not a situation where the trial court misinformed the defendant, but rather an example of the court not fully informing the defendant of the procedure to obtain court-appointed counsel.

¶15 We addressed a similar issue in ***State v. Drexler***, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182. Drexler argued that the trial court failed to advise him that he had the right to court-appointed counsel, paid for by the county, even though he did not qualify for counsel provided by the state public defender. ***Id.***, ¶1. Like Egleston, Drexler contended that this failure precluded him from entering a knowing and voluntary waiver of his right to counsel. ***Id.*** We disagreed and held:

> a trial court does not err if it does not advise the defendant of the variety of sources for appointed counsel and the variety of sources for reimbursement of counsel. A trial court is only obligated to advise a defendant of the right to counsel; it is not required to conduct a colloquy before accepting a waiver of counsel that includes specific advice to a defendant that the right to appointed counsel includes the right to counsel appointed by the court and paid for by the county.

Id., ¶17

¶16 Based on the circuit court's credibility findings and Egleston's statements at the 1998 plea hearing and the 2005 motion hearing, we agree with the circuit court's conclusion that Egleston knowingly, intelligently, and voluntarily waived his right to counsel. We affirm the circuit court's order denying Egleston's motion to collaterally attack his prior conviction and the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.