COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP512-CR **Cir. Ct. No. 2009CT365**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN M. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Jonathan Reynolds appeals a judgment of the circuit court convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a), and

[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.

an order of the court denying his motion collaterally attacking, for sentencing purposes, his second offense OWI conviction. He argues that his current OWI conviction should not have been treated as his third offense because his waiver of counsel with respect to his second offense OWI conviction was not knowing, intelligent and voluntary in that he was not aware of the potential range of penalties for that offense. I conclude that Reynolds knowingly, voluntarily, and intelligently waived his right to counsel, and therefore affirm.

BACKGROUND

¶2 In August 2009, Reynolds was charged with OWI, third offense. In November 2009, Reynolds filed a motion to collaterally attack a 1997 second offense OWI conviction on the basis that he "did not know the penalties involved for an OWI 2nd offense when he purportedly waived his rights to counsel." In support of his motion, Reynolds submitted his own affidavit in which he claimed that at the time he pled guilty to his second offense, he did not know the minimum or maximum penalties to which he was subject.

¶3 It is undisputed that the transcripts from Reynolds' 1997 appearance are unavailable. The only documents available from Reynolds' 1997 conviction are the judgment, waiver of counsel questionnaire, guilty plea questionnaire and waiver of rights form, minutes from his appearance, and the complaint. The waiver of counsel questionnaire has spaces for the maximum penalties for the charged offense to be specified; however, those spaces were left blank. The guilty plea questionnaire and waiver of rights form, and minutes, also contain no reference to the penalties Reynolds faced. However, the complaint set forth the maximum penalties Reynolds faced for a third offense OWI.

¶4 At the December 2010 hearing on his motion, Reynolds testified that he was given a copy of the complaint when he appeared before the circuit court, but that he did not read the complaint and was not aware that he faced potential jail time. He further testified that he filled out the waiver of counsel questionnaire after he pled guilty to OWI, second offense.

¶5 The circuit court denied Reynolds' motion. It found that, based on the affidavit and the documents available from the 1997 hearing, Reynolds had made a prima facie showing that he was not aware of the maximum penalties. However, the court further found that the State had met its burden of establishing that Reynolds' waiver of counsel was knowing, intelligent, and voluntary. The court observed that although Reynolds admitted that he had received the complaint, which the court stated "clearly set[] forth" the minimum and maximum penalties for his offense, he claimed that he had not read the document when he waived counsel and had not otherwise been informed of the penalties. The court, did not believe Reynolds' claim. The court stated:

> It would be a heck of a leap for the court to believe that at an initial appearance where one is handed a complaint, a judge, particularly one with the experience of Judge Montabon, I believe he started his judicial career in 1976, only recently retired, wouldn't have asked if somebody had read the complaint and understands the charges. Or waived the reading when that's Judging 101, one of the very first things a judge learns.
>
> And with the passage of time I believe the credible evidence would establish that Mr. Reynolds did have the complaint and an understanding of the penalties, and I'm denying the motion.

¶6 Following the denial of his motion, Reynolds pled guilty to OWI, third offense. Reynolds appeals.

DISCUSSION

¶7 Reynolds contends that the circuit court erred when it determined that the State established that his waiver of counsel with respect to his second offense OWI conviction was knowing and intelligent. Reynolds claims that his waiver of counsel was not knowing, intelligent and voluntary because he was not aware of the penalties of that offense at the time he waived his right to counsel.

¶8 A defendant who faces an enhanced sentence based upon an earlier conviction may challenge the earlier conviction upon the claim that his or her constitutional right to an attorney was violated. ***State v. Hahn***, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528. The defendant must first make a prima facie showing that his or her waiver of counsel was not knowing, intelligent and voluntary. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. If the defendant satisfies his or her initial burden, the burden then shifts to the State to prove by clear and convincing evidence that the waiver was knowing, intelligent and voluntary. ***Id.***, ¶27. A waiver of counsel is knowing, intelligent, and voluntary if it reflects a deliberate choice to proceed without counsel, an awareness of the difficulties and disadvantages of self-representation, and an awareness of the charges and penalties. ***State v. Klessig***, 211 Wis. 2d 194, 205, 564 N.W.2d 716 (1997). "Whether a defendant has knowingly, intelligently and voluntarily waived his right to counsel requires the application of constitutional principles to the facts of the case, which we review independent of the circuit court." ***Id.*** at 204.

¶9 Assuming for the sake of argument that Reynolds made a prima facie showing, I conclude that the State satisfied its burden of proving that

Reynolds was made aware of the penalties of second offense OWI and that this waiver of counsel was therefore knowing, intelligent and voluntary.

¶10 The transcript of the 1997 proceeding at which Reynolds waived his right to counsel for his second offense OWI conviction is no longer available. Retention of those records was only required for ten years. Consequently, the only available evidence of whether Reynolds was aware of the penalties of second offense OWI at the time he waived his right to counsel would have to come from Reynolds in the form of new testimony and affidavits, and documents still available from that proceeding.[2]

¶11 Reynolds testified that although he received a copy of the complaint, which set forth the maximum penalties faced for second offense OWI, he did not read the document. He also testified that he was not otherwise informed by the court of those penalties. The circuit court, when acting as the fact finder, is the ultimate arbiter of a witness's credibility. ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). The circuit court had an opportunity to assess Reynolds' credibility and made a factual determination, based upon the circumstances, that he did not believe Reynolds' testimony, in particular Reynolds' testimony that the circuit court judge at the 1997 proceeding did not advise him of the penalties for OWI, second offense. The court did not have an obligation to believe Reynolds' testimony simply because there was no testimony to the contrary. Accordingly, I conclude that the circuit court's credibility

[2] Arguably, evidence may also have come from the circuit court judge who oversaw the proceeding at which Reynolds waived his right to counsel. However, it is unreasonable to expect that the judge would have recalled the specifics of a proceeding which took place approximately thirteen years prior.

determination was not clearly erroneous and that Reynolds was aware of the penalties of second offense OWI when he waived his right to counsel. I, therefore, affirm the order of the court denying Reynolds' motion collaterally attacking his prior OWI conviction and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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