COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP157-CR **Cir. Ct. No. 2012CF128**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY A. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Randy Davis appeals a judgment of conviction for operating while intoxicated as a fifth offense. Davis argues that the circuit court erred by denying his collateral attacks on his 1995 and 1996 operating while intoxicated convictions, which he contends are invalid because he was denied his

constitutional right to counsel in each prior case. The circuit court denied Davis's collateral attacks as barred by issue preclusion. Because Davis does not challenge the circuit court's application of issue preclusion to his collateral attacks, we affirm.

BACKGROUND

¶2 In a 2010 criminal prosecution separate from the case on appeal, Davis was charged with sixth offense operating while intoxicated and sixth offense operating with a prohibited alcohol concentration. The 2010 complaint set forth five prior operating while intoxicated convictions dating from 1990, 1993, 1995, 1996, and 2001. Davis moved for an order prohibiting the use of the prior convictions from 1993, 1995, and 1996 for sentencing purposes. Davis argued that the convictions were invalid because he did not have counsel and did not knowingly, intelligently, and voluntarily waive his right to counsel in those cases.

¶3 In an affidavit attached to his motion, Davis averred that he was not represented by a lawyer in the 1993, 1995, or 1996 cases, and pointed to facts that show that he did not understand his right to counsel in each of those cases.

¶4 The circuit court found that Davis made a prima facie showing that he was denied his right to counsel in the 1993, 1995, and 1996 cases. The circuit court then held an evidentiary hearing to allow the State to show that Davis knowingly, intelligently, and voluntarily waived his right to counsel. At the close of the evidentiary hearing, the circuit court granted Davis's motion regarding the 1993 conviction. However, the circuit court found that Davis knowingly, intelligently, and voluntarily waived his right to counsel in the 1995 and 1996 cases, and denied Davis's collateral attacks on those convictions.

¶5 On February 28, 2012, the State moved to dismiss the complaint, and the circuit court granted the motion.[1] That same day, the State issued a new complaint, initiating the case now on appeal, charging Davis with fifth offense operating while intoxicated and fifth offense operating with a prohibited alcohol concentration. The 2012 complaint in the instant case set forth four prior operating while intoxicated convictions dating from 1990, 1995, 1996, and 2001. It was assigned to a judge different from the judge who had presided over the 2010 case.

¶6 In this new 2012 case, Davis again collaterally attacked the 1995 and 1996 convictions. At the final pretrial hearing, the parties argued various aspects of the merits of Davis's collateral attacks. However, the circuit court, acting sua sponte, informed the parties that it believed that under the doctrine of issue preclusion, the court was "bound to accept the prior decision" and prevented from "revisiting" Davis's collateral attacks. Therefore, the circuit court determined that Davis's collateral attacks were precluded by the order in the 2010 case denying Davis's collateral attacks on the 1995 and 1996 convictions. The case proceeded to trial, at which Davis was convicted of fifth offense operating while intoxicated. Davis now appeals.

DISCUSSION

¶7 As noted above, the circuit court denied Davis's collateral attacks on the basis of issue preclusion, because the circuit court in the 2010 case held a hearing and denied Davis's collateral attacks on his 1995 and 1996 convictions.

[1] While the record in the 2012 case does not contain any direct reference to dismissal by the State of the 2010 case, the parties agree that this happened and therefore we proceed on this basis.

On appeal in the 2012 case, Davis ignores the issue preclusion topic and expressly asks us to review the circuit court's decisions on his collateral attacks in the 2010 case. Davis asks that we overturn those prior decisions, invalidate the 1995 and 1996 convictions, and remand to the circuit court for a new trial. While acknowledging that the circuit court's decision in the instant case rested on issue preclusion, the State also fails to address issue preclusion. Instead the State addresses the merits of Davis's collateral attacks, and asks us to affirm because the circuit court in the prior case "properly concluded that Davis did not meet his burden of proving that he did not waive his right to counsel knowingly, intelligently, and voluntarily." That is, both parties address the merits of Davis's collateral attacks, and base their arguments on the hearing and decisions of the circuit court on Davis's collateral attacks in the 2010 case.

¶8 Neither party explains how, on appeal of the 2012 case, we can reach back and review the hearing and decision of the circuit court on Davis's collateral attacks in the 2010 case, and disregard the decision of the circuit court denying Davis's collateral attacks as barred by issue preclusion in the 2012 case before us on appeal. Because the circuit court denied Davis's collateral attacks on the basis of issue preclusion, and Davis does not argue that the circuit court erroneously denied his collateral attacks on that basis, we affirm.

By the Court.—Judgment affirmed.

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