COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2263-CR **Cir. Ct. No. 2012CT670**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIEANN BAEHNI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Julieann Baehni appeals from a judgment of conviction for third offense operating a motor vehicle while intoxicated (OWI). Baehni argues that the circuit court erred in denying her motion to suppress the

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

results of her blood test because the implied consent law was violated when she was not provided an alternative test. Baehni also argues that the court erred in denying her collateral challenges to two underlying OWI convictions.[2] For the reasons stated below, I affirm.

BACKGROUND

¶2 In September 2012, Wisconsin State Trooper Andrew Rau stopped Baehni on Interstate Highway 90-94 for suspicion of OWI. Trooper Rau arrested Baehni and Baehni was transported to the Sauk County Jail where her blood was drawn.

¶3 Baehni was charged with OWI and with Operating with a Prohibited Alcohol Concentration (PAC), both as fourth offenses, along with other charges not relevant to this appeal. Baehni moved the circuit court to suppress the results of her blood draw on the basis that she was not afforded an alternative chemical test in violation of Wisconsin's implied consent law. *See* WIS. STAT. § 343.305. The court denied Baehni's motion.

¶4 The circuit court found that at the jail, Baehni was read the informing the accused form and asked if she would submit to a chemical test. The court found that Baehni stated that she disliked needles and expressed a preference for a breath test. The court found that Trooper Rau informed Baehni that if she submitted to blood test, she could then have a breath test. The court further found

[2] Baehni originally raised a fourth issue, that the results of her blood test should have been suppressed because the blood test was not administered in accordance with established standards for reasonableness. However, Baehni withdrew that issue following our supreme court's decision in ***State v. Kozel,*** 2017 WI 3, 373 Wis. 2d 1, 889 NW 2d 423.

that Baehni's intent in seeking the breath test was to avoid having a blood draw, and that Baehni did not request an alternative chemical test after her blood was drawn.

¶5 Baehni also filed motions to collaterally attack two of the three prior offenses underlying Baehni's fourth offense OWI and PAC charges. One of the charges was a 1990 conviction for OWI in Illinois, which Baehni challenged on the basis that she did not knowingly, intelligently, and voluntarily waive her right to counsel in that proceeding. The second offense Baehni challenged was a 1992 OWI conviction. The court denied Baehni's motions collaterally attacking both of those convictions.

¶6 Additional facts will be included in the discussion section as appropriate.

DISCUSSION

A. Suppression of Baehni's Blood Draw

¶7 Baehni argues that the blood draw results should have been suppressed because she was not given an alternative test as requested, contrary to WIS. STAT. § 343.305, Wisconsin's implied consent law.

¶8 WISCONSIN STAT. § 343.305, permits an arrestee, upon submitting to a police agency's chemical test, the right to request an alternative chemical test at the police agency's expense. ***State v. Fahey***, 2005 WI App 171, ¶6, 285 Wis. 2d 679, 702 N.W.2d 400. Section 343.305(5)(a) provides in relevant part:

> If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified

> person of his or her own choosing administer a chemical test for the purpose specified in sub. (2).

¶9 We have explained that "[t]he requirements regarding an alternative test at agency expense are twofold: the accused must be told of the alternative test and, if the accused makes a 'request' for an alternative test at agency expense, police must make a 'diligent effort … to comply with the demand.'" ***Fahey***, 285 Wis. 2d 679, ¶6 (quoted source omitted).

¶10 Baehni does not claim that she was not informed of her right to an alternative test free of charge. Rather, the dispute is whether Baehni requested such a test. The circuit court found as follows:

> The record establishes that [Baehni] did not request an additional or alternative test after the blood draw. Her intent during the conversation [about additional testing] was to avoid having the blood test although [Baehni] eventually did submit to it. [Baehni's] discussions with Trooper Rau were to attempt to have [her] breath [tested] as the sole and primary test. When she discovered that blood would be the primary test [Baehni] asked that it be taken in the hospital. Thereafter no mention of a breath test followed.

¶11 On review, this court accepts the circuit court's findings of fact if not clearly erroneous. ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). However, we review the application of those facts to the law de novo. ***Smith v. Dodgeville Mut. Ins. Co.,*** 212 Wis. 2d 226, 233, 568 N.W.2d 31 (Ct. App. 1997).

¶12 Baehni challenges both the circuit court's factual findings and the court's application of those facts to the applicable law.

¶13 With respect to the circuit court's findings of fact, Baehni argues that there are facts in the record that Baehni asked for an alternative test after the blood draw, which differs from the court's finding that she did not. As stated above, a circuit court's findings may not be overturned unless they are clearly erroneous, and findings are not clearly erroneous if they are supported by any credible evidence.

¶14 The circuit court found that Baehni "did not request an additional or alternative test after the blood draw." In addition, the court found that the "record reflects that [Baehni's] request for a breath test was to avoid the needle intrusion. The conversation centered around her taking a breath test as she disliked needles and had given breath in the past." Baehni does not argue that there is not credible evidence in the record to support these findings by the court, only that there are other facts which she prefers. Baehni has, therefore, failed to establish that the court's findings are clearly erroneous.

¶15 Turning to Baehni's legal challenge, Baehni contends that the circuit court erred by concluding that she did not request an alternative test because she did not make that request after her blood was drawn. Baehni cites this court to ***State v. Schmidt,*** 2004 WI App 235, ¶2, 277 Wis. 2d 561, 691 N.W.2d 379, for the proposition that it is not necessary that the request for an alternative test be made after the primary test is over. While we did hold in ***Schmidt*** that timing of a request for an alternative chemical test is not determinative, we specifically also stated that "the timing of the request is [not] irrelevant." ***Id.***, ¶30.

¶16 The issue is whether Baehni requested an additional test, "to verify or challenge the results of the first test," or an alternate test to avoid having a blood draw. *See* ***id.***, ¶¶27, 30. Thus, the consideration of Baehni not having

renewed her request after having blood drawn is not precluded by ***Schmidt***, but is rather one of the considerations that we said in ***Schmidt*** was relevant to a circuit court's determination of whether a defendant requested an alternative test. *See* ***id.***, ¶30. Thus, whether Baehni made her request after the blood draw, rather than representing an error of law, is an appropriate consideration that reinforces the other matters in the record relied upon by the circuit court in reaching its finding that Baehni did not request an alternative test pursuant to WIS. STAT. § 343.305(5)(a), but instead requested a test different than the blood draw. The timing of the request further demonstrates that the circuit court's finding was not clearly erroneous.

B. Baehni did not Make a Prima Facie Showing Regarding the 1990 Prior Conviction

¶17 Before the circuit court, Baehni attempted unsuccessfully to collaterally attack a 1990 conviction for OWI in Illinois on the basis that she did not knowingly, intelligently, and voluntarily waive her right to counsel during that case. Baehni argues that the circuit court erred when it concluded that Baehni failed to make a prima facie showing that counsel was not knowingly, intelligently, and voluntarily waived.

¶18 Whether a party has made a prima facie case in attempting to collaterally attack a prior conviction is a question of law that I review de novo. ***State v. Ernst,*** 2005 WI 107, ¶10, 283 Wis. 2d 300, 699 N.W.2d 92. Likewise, whether Baehni knowingly, intelligently and voluntarily waived her right to counsel in the prior conviction is a question of law that I review de novo. ***Id.***

¶19 Our supreme court has held that "[i]n an enhanced sentence proceeding predicated on a prior conviction, the U. S. Constitution requires a [circuit] court to consider an offender's allegations that the prior conviction is

invalid only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." ***Id.***, ¶22. To require this consideration by the circuit court in the current proceeding, Baehni must have done more than allege that the prior "'court failed to conform to its mandatory duties during the plea colloquy.'" ***Id.***, ¶25 (quoted source omitted). Instead, Baehni must have made a prima facie showing that her constitutional right to counsel in the prior proceeding was violated. ***Id.*** To make this prima facie showing, Baehni must have pointed to facts which demonstrate that she "'did not know or understand the information which should have been provided'" by the court in the previous proceeding. ***Id.*** (quoted source omitted).

¶20 Baehni first attempts to rely upon the colloquy requirements imposed by our supreme court in ***State v. Klessig***, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997). However, as our supreme court makes clear in ***Ernst***, the colloquy requirements in ***Klessig*** are imposed under the supreme court's superintending and administrative authority, and are not intended to create a remedy for a violation of the constitutional right to counsel under either state or U.S. constitutions. ***Ernst***, 283 Wis. 2d 300, ¶¶18-19. Thus, it could hardly be the standard to be applied to an Illinois proceeding that took place prior to either ***Klessig*** or ***Ernst***. Baehni recognizes this, while attempting not to concede the point.

¶21 Baehni recognizes that the appropriate constitutional standard is found in ***Iowa v. Tovar,*** 541 U.S. 77, 81 (2004). *See* ***Ernst***, 283 Wis. 2d 300, ¶15. Under ***Tovar***, a circuit court satisfies its burden of determining whether a defendant's waiver of counsel is knowing, intelligent and voluntary when the circuit court "informs the accused of the nature of the charges against him [or her], of his [or her] right to be counseled regarding his [or her] plea, and of the range of

allowable punishments attendant upon the entry of a guilty plea." ***Id.*** Baehni argues that in the 1990 OWI case, she: (1) was not told of the range of penalties she could have faced and mistakenly believed that her exposure was limited to the 30-day administrative suspension of her driving privilege that she had received written notice of in the mail; (2) did not know if she was facing a felony or misdemeanor; and (3) was not sure of the precise charge she was facing.

¶22 In support of her motion collaterally attacking her 1990 OWI conviction, Baehni filed an affidavit and testified at a hearing on her motion. In denying Baehni's motion, the circuit court determined that the record did not establish a prima facie case, taking into account both Baehni's affidavit and her testimony at the hearing. The court determined that Baehni had not "pointed to specific facts to show that she did not know or understand the information about the right to counsel," and the court stated that Baehni's "testimony and memory were selective." This determination of the credibility of Baehni's testimony and the weight given her affidavit in light of that testimony is the exclusive province of the circuit court. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990) ("The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding.").

¶23 This case is similar to ***State v. Hammill***, 2006 WI App 128, 293 Wis. 2d 654, 718 NW 2d 747. In ***Hammill***, the defendant testified that he could not specifically remember the details of his court appearance because it was too long ago. This court held that the defendant's testimony did not make a prima facie case because it did not "contain facts demonstrating he did not know or understand information that should have been provided to him. Rather, [the

defendant] simply does not remember what occurred at his plea hearing." ***Id.***, ¶11 (citation omitted). Here, Baehni testified:

> Q. Did the judge tell you about how severe your case was?
> A. I just remember him asking me if I was pleading guilty or not guilty.
> Q. So you don't remember him having any discussion [with] you about anything else?
> A. No.
> Q. Did he tell you what you were charged with?
> A. Well, DUI or reckless driving or—this was a long time ago. I think it was DUI.
> Q. But it might have been reckless driving at that time?
> A. Right.

Later, when asked about the other people present in the courtroom, Baehni replied that she couldn't say for certain. "That was 20 years ago."

¶24 As in ***Hammill***, I can only conclude, as did the circuit court below, that Baehni simply does not remember. Failure to remember is not the provision of specific facts that demonstrate a prima facie case that Baehni did not understand the appropriate information at the time she pled guilty in 1990. Accordingly, I conclude the court did not err in denying Baehni's motion collaterally attacking her 1990 OWI conviction.

C. Baehni's Guilty Plea Waives Issue of Whether Information Regarding 1992 Conviction Should Have Been Allowed to be Presented to Jury

¶25 Baehni also challenges the court's denial of her motion collaterally attacking a 1992 conviction for OWI. The circuit court initially granted her motion attacking the 1992 conviction, concluding that the records before the court showed that the 1992 conviction had been dismissed. The State subsequently moved the court for reconsideration, attaching an Illinois abstract of Baehni's driving record that showed a conviction for the 1992 offense. On reconsideration,

the court denied Baehni's motion collaterally attacking that conviction. In the absence of a stipulation by the parties as to the number of prior convictions, the court ruled that the proof of prior convictions is a jury issue. Therefore, the existence of the 1992 conviction remained an issue for the jury. However, because Baehni pled guilty to the OWI offense at issue here, the existence of the 1992 conviction was not tried before a jury.

¶26 Baehni argues on appeal that any evidence of her prior 1992 conviction is inadmissible. She does not challenge the decision of the court on reconsideration directly. Consequently, this is an evidence issue. Issues of the admissibility of evidence are waived when a defendant pleads guilty or no contest. ***State v. Nelson***, 108 Wis. 2d 698, 701, 324 N.W.2d 292 (Ct. App. 1982.) Baehni argues that we should interpret WIS. STAT. § 971.31(10) as an exception to the guilty plea waiver rule that covers this situation. However, this court concluded in ***Nelson***: "From the unambiguous language of [§ 971.31(1)], this court concludes that [§] 971.31(10) is applicable only in suppression situations. In addition, our supreme court made this clear when it stated: 'Under the rule of statutory construction of *expressio unius est exclusio alterius,* this statute stops with the single exception it creates.'" ***Id***. (quoted source omitted).

¶27 As we did in ***Nelson***, I conclude that Baehni cannot now challenge the admissibility of evidence of her 1992 conviction. Baehni waived her right to appeal the admissibility of that evidence when she pled guilty to OWI third offense.

CONCLUSION

¶28 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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