COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2438-CR **Cir. Ct. No. 2015CT264**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOT ALAN KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Reversed and cause remanded for further proceedings*.

¶1 LUNDSTEN, J.[1] Scot Krueger appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant as a third

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

offense. Krueger seeks to collaterally attack one of the alleged underlying prior offenses, a 1993 conviction. The issue is whether Krueger made a prima facie showing, under ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, that he did not validly waive the right to counsel in the 1993 proceedings. I agree with Krueger that he made this showing, thus shifting the burden to the State to prove that Krueger validly waived the right to counsel.

¶2 The trial judge's decision denying relief does not appear to be based on the notion that Krueger's factual assertions were insufficient on their face to provide a prima facie showing. Rather, the judge relied on his finding that Krueger's assertions were not credible. After explaining why I conclude that Krueger sufficiently asserted facts for purposes of a prima facie showing, I address the trial judge's reasoning. I question whether Krueger's credibility is an appropriate issue at the prima-facie-showing stage. Perhaps more significantly, I conclude that the trial judge erred by relying on the judge's personal experience as a practicing attorney in 1993 in Dodge County as a basis for finding Krueger not credible.[2]

¶3 Accordingly, I reverse the judgment and remand for further proceedings consistent with this opinion.

Background

¶4 When Krueger moved to bar consideration of the 1993 conviction, he attached two supporting affidavits. In one affidavit, Krueger's attorney

[2] In this opinion, I deviate from normal practice and refer to the circuit court as the "trial judge" or simply the "judge" to avoid the awkwardness of speaking in terms of the circuit court and the judge's personal experience as a private attorney.

averred, with supporting facts, that no transcript was available for Krueger's plea and sentencing hearing for the 1993 conviction. The State does not dispute that the transcripts of the 1993 proceedings are unavailable. The State asserts that the 1993 conviction was for a violation committed on August 30, 1992. For ease of reference, I refer simply to the "1993 conviction" or the "1993 proceedings," recognizing the possibility that part of the proceedings occurred in 1992.

¶5 In the second affidavit, Krueger averred that, during the 1993 proceedings, he was not advised of, and did not understand, the difficulties and disadvantages of proceeding without an attorney or that an attorney could be appointed to represent him if he could not afford one.

¶6 The trial judge held a hearing during which the judge allowed Krueger to testify to supplement his affidavit. After hearing that testimony, the judge concluded that Krueger failed to make a prima facie showing that he did not validly waive the right to counsel in the 1993 proceedings. Consequently, the judge denied Krueger's motion to bar consideration of the 1993 conviction.

Discussion

¶7 "[A] defendant generally may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence." ***State v. Peters***, 2001 WI 74, ¶1, 244 Wis. 2d 470, 628 N.W.2d 797. "There is an exception, however, for a collateral attack based upon an alleged violation of the defendant's right to counsel." ***Id.***

¶8 In this type of collateral attack, the defendant must first "make[] a prima facie showing, pointing to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her constitutional right to

counsel." ***Ernst***, 283 Wis. 2d 300, ¶2. If a defendant makes a prima facie showing, "the burden to prove that the defendant validly waived his or her right to counsel shifts to the State." ***Id.*** Whether the defendant made a prima facie showing is a question of law for de novo review. ***Id.***, ¶26.

¶9 Krueger argues that he made the requisite prima facie showing and, therefore, the trial judge erred in not requiring the State to prove a valid waiver. For the reasons explained below, I agree with Krueger that he made a prima facie showing.

¶10 Before a criminal defendant may be permitted to proceed without counsel, the circuit court must conduct a colloquy to ensure that the defendant knowingly and voluntarily waived the right to counsel. *See* ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) ("[W]e mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel."). The colloquy must be designed to ensure that the defendant made a "deliberate choice" to proceed without counsel and that the defendant was aware of certain information:

> 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.

Id.

¶11 In ***Ernst***, the supreme court explained that, for purposes of a collateral attack like the one here, the defendant cannot simply assert that the court failed to properly conduct a ***Klessig*** colloquy. ***Ernst***, 283 Wis. 2d 300, ¶¶20-25.

The defendant must point to facts showing a *lack of knowledge or understanding* of the information the colloquy requires. ***Id.***, ¶25. As the ***Ernst*** court stated: "[W]e require the defendant to point to facts that demonstrate that he or she '*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." ***Id.*** (emphasis added; quoted sources omitted).

¶12 Applying these standards to the facts here, Krueger argues that he made a prima facie showing based on his affidavit and supporting testimony. As already noted, Krueger averred that, at the time of the 1993 proceedings, he was not advised of, and did not understand, the difficulties and disadvantages of proceeding without an attorney. Specifically, Krueger averred:

> 3. I recall being charged and convicted of an operating while intoxicated offense in Dodge County Circuit Court on April 21, 1993. I was not represented by an attorney at any time in the proceedings.
>
> 4. At the time of the above conviction, I did not understand the difficulties and disadvantages of proceeding without an attorney ….
>
> 5. At no time during the above mentioned case was I advised by the judge, or anyone else in the proceeding, of the difficulties and disadvantages of proceeding without an attorney ….

¶13 Krueger's supporting testimony included the following additional assertions, among others:

- In 1993, Krueger was a 29-year-old factory worker, and had never consulted with an attorney for any reason.
- During the 1993 proceedings, it was never explained to Krueger that he had a constitutional right to have an attorney, and Krueger was not aware that he had the right to talk to an attorney.

- Krueger did not at the time of the 1993 proceedings make contact with the public defender's office, and did not speak with an attorney before going to court.
- Krueger remembered that the 1993 proceedings involved "coming to court, being read the charges, asking how I pled and that was it."
- If Krueger had been told at the time of the 1993 proceedings that he had the right to talk to an attorney, he "probably" would have done so, and he probably would have pled not guilty and hired an attorney.
- Krueger would have asked an attorney about what his options were and what the attorney would have thought best.

¶14 Krueger argues that his affidavit alone was sufficient to establish a prima facie showing, and that his testimony "solidified" that showing. I conclude that, regardless whether the affidavit alone was sufficient, the affidavit and testimony together make the prima facie showing required by ***Ernst***.

¶15 Krueger not only averred that he was not advised of, and did not understand, the difficulties and disadvantages of proceeding without an attorney, but his testimony, if believed, provided specific supporting facts indicating that Krueger had no experience with attorneys and little concept of how an attorney might help him. That is, Krueger's testimony provided additional facts supporting his affidavit claim that he did not understand that an attorney might be able to assist him in criminal proceedings. Further, Krueger's testimony, if believed, showed that Krueger did not know that he had the right to an attorney. Finally, Krueger testified that, had he understood that he had the right to talk to an attorney, he probably would have talked to or retained an attorney to assist him in understanding his options. Taken as a whole, Krueger's affidavit and testimony, if believed, support a determination that Krueger did not understand all of the necessary information he should have been provided and that he did not make a "deliberate choice" to proceed without counsel. *See* ***Klessig***, 211 Wis. 2d at 206.

¶16 The State appears to rely on ***State v. Hammill***, 2006 WI App 128, ¶11, 293 Wis. 2d 654, 718 N.W.2d 747, for the proposition that a defendant who "simply does not remember what occurred at his plea hearing" fails to make an ***Ernst*** prima facie showing. However, Krueger claims he does remember pertinent details as to what occurred during the 1993 proceedings. He averred that he was never advised of the disadvantages and difficulties of self-representation during those proceedings, and his testimony similarly indicates that his memory is that there simply was no waiver-of-counsel colloquy during the proceedings. To repeat, Krueger testified that he remembered "coming to court, being read the charges, asking how I pled and that was it."

¶17 The State relies on a recent unpublished case, ***State v. Seward***, No. 2016AP1248-CR, unpublished slip op. (WI App Mar. 22, 2017). In particular, the State relies on the following passage:

> Separate from the court's failure to properly advise him, Seward also alleges that he personally did not understand the "difficulty or disadvantage of proceeding without counsel." This factual averment is headed in the right direction, but is still not enough to trigger a Sixth Amendment violation. Seward can arguably make a prima facie showing by averring that he did not "understand the role counsel could play in the proceeding." ***State v. Gracia***, 2013 WI 15, ¶36, 345 Wis. 2d 488, 826 N.W.2d 87 (quoting ***State v. Schwandt***, No. 2011AP2301-CR, unpublished slip op. ¶14 (WI App May 16, 2012)). However, the lesson of ***Ernst*** is that bare assertions of ***Klessig*** deficiencies are not enough. There must be factual connections made between the deficiencies in the colloquy and why that rendered the waiver unknowing, unintelligent, or involuntary. Seward still must point to "specific facts" indicating he did not knowingly, intelligently, and voluntarily waive his right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶26. *A conclusory statement that Seward did not understand the advantages of counsel and the disadvantages of proceeding pro se—without identifying what he did not know or understand—is not enough.* ***See State v. McGee***, No. 2010AP3040-CR, unpublished slip op. ¶¶9-10 (WI App Apr. 26, 2011) (holding that the assertion

> a defendant "did not understand the difficulties and disadvantages of self-representation" without the support of "specific facts or examples" did not state a prima facie case); *see also* ***State v. Reggs***, No. 2013AP2367-CR, unpublished slip op. ¶¶11-12 (WI App July 3, 2014) (holding a defendant failed to make a prima facie showing because his affidavit was "not sufficiently specific"); ***State v. Bowe***, No. 2013AP238-CR, unpublished slip op. ¶14 (WI App Sept. 17, 2013) (concluding that a defendant failed to make a prima facie showing because he "made no specific averments regarding what he did not know or understand").

Id., ¶15 (emphasis added); *see also* ***id.***, ¶16 ("[Seward] has not made any factual claim of what exactly he wanted to know—other than generic 'difficulties and disadvantages' of proceeding pro se—such that his waiver became unknowing or unintelligent.").

¶18 The State, in relying on this passage from ***Seward***, apparently means to argue that Krueger needed to point to specific facts showing at least one particular difficulty or disadvantage of self-representation that Krueger did not understand, or to specific facts showing what it was *about* a difficulty or disadvantage that he did not understand. I am not persuaded by the State's reliance on ***Seward*** for two reasons.

¶19 First, in concluding that a prima facie showing was absent, both ***Seward*** and a case ***Seward*** relies on, ***State v. McGee***, No. 2010AP3040-CR (WI App Apr. 26, 2011), point to factors not present here. The court in ***Seward*** faulted the defendant for failing to state whether he would have done anything differently had he understood the difficulties and disadvantages of self-representation. *See* ***Seward***, No. 2016AP1248-CR, ¶13; ***id.***, ¶16 ("[Seward] has not even specified how a proper understanding would have changed his approach."). And the court in ***McGee*** faulted the defendant for failing to specify with detail what occurred

during his plea colloquy even though a transcript was apparently available. *See* ***McGee***, No. 2010AP3040-CR, ¶3; ***id.***, ¶9.

¶20 Second and more to the point, I am unable to discern the level of specificity that ***Seward*** assumes is required by ***Ernst***. It is true, as ***Seward*** states, that ***Ernst*** speaks in terms of requiring "*specific facts* that show that [the] waiver was not a knowing, intelligent, and voluntary one." *See* ***Ernst***, 283 Wis. 2d 300, ¶26 (emphasis added). But what does this mean in terms of the type of factual allegations that might suffice?

¶21 It seems apparent that defendants need not tie any alleged misunderstanding regarding the "difficulties and disadvantages of self-representation" to the particular facts surrounding the alleged crime. Apart from the particular charges and applicable penalties, even ***Klessig*** itself does not appear to require a waiver colloquy tied to the particulars of the case at hand. *See* ***Klessig***, 211 Wis. 2d at 206. It follows, I think, that the factual allegations the ***Ernst*** court had in mind with respect to "difficulties and disadvantages" need not be case specific.

¶22 So what then? ***Seward***, aptly looking to ***State v. Gracia***, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, suggests that it may be sufficient for a defendant to aver that the defendant did not understand the role counsel could play in the proceeding. *See* ***Seward***, No. 2016AP1248-CR, ¶15. I do not understand why this averment is meaningfully more fact specific than a defendant's averment that the defendant did not understand the "difficulties and disadvantages of proceeding without an attorney."

¶23 Would it be sufficient for a defendant to allege that he or she did not understand that lawyers know more about the law? That the defendant did not

understand that a lawyer would be in a better position to negotiate with a prosecutor?

¶24 Because it appears that the waiver colloquy required by ***Klessig*** can be satisfied by providing general information regarding the difficulties and disadvantages of self-representation, I am unable to understand why a general factual assertion about a lack of understanding of the difficulties or disadvantages of self-representation does not support a prima facie showing. That is, I see nothing in ***Ernst*** to suggest that the defendant's prima facie showing must include *which* difficulties or disadvantages of self-representation the defendant did not understand, or what it was *about* those difficulties and disadvantages that he or she did not understand.

¶25 I acknowledge that ***Seward*** and ***McGee*** appear to reflect the common-sense notion that there should be a meaningful pleading burden placed on defendants who attempt to collaterally attack a prior conviction. If prefacing boilerplate colloquy language from ***Klessig*** with the spare factual assertion "I did not understand" is sufficient, then it is reasonable to think that the pleading burden is too low. I share this concern. But at the same time I am unable to discern from ***Ernst*** what more is required.

¶26 Regardless, as I have explained, Krueger's affidavit and testimony, taken together, did more than simply assert that Krueger did not know or understand the difficulties and disadvantages of proceeding without counsel. Rather, Krueger's testimony added some additional specific facts, including assertions about Krueger's lack of experience in legal matters and the assertion that Krueger did not know that he had a right to counsel.

¶27 Accordingly, the State's reliance on ***Seward*** does not alter my conclusion that Krueger made a prima facie showing, such that the burden should have shifted to the State.

¶28 I now turn my attention to the trial judge's credibility finding and the judge's erroneous reliance on his own personal experience.

¶29 In concluding that Krueger failed to make a prima facie showing, the trial judge found Krueger not credible based on the judge's personal knowledge of how Dodge County criminal proceedings normally transpired in 1993, when the judge was a practicing attorney. Several statements the judge made illustrate the judge's reliance on this personal knowledge, including the following:

> I don't even know how to deal with this and I'll tell you why, because I've been kicking around this courthouse since 1988. I know that the initial appearances … were handled by a court commissioner….
>
> So I know that all of the criminal initial appearances took place in front of Commissioner Olson. I know for a fact since I sat in front of Commissioner Olson for many years, I know that Commissioner Olson had a colloquy with them, advised them of the charge, made sure that they had a complaint and went through their constitutional rights. I can tell you that because as I said … I sat through that.
>
> I also know that Court Commissioner Olson did not, if you pled not—or guilty in front of Commissioner Olson, he took a waiver of your right to have an attorney ….
>
> I also know that … since 1988 every single judge in Dodge County has conducted a thorough plea colloquy with … defendants. I know that because I sat through a zillion and a half of them.

¶30 I agree with Krueger that the judge's reliance on the judge's own personal knowledge stemming from his private practice observations was erroneous. Given the judge's personal experience, it might be that he would be an

excellent fact witness, but the legal question here is whether the judge may take judicial notice of factual information gleaned from the judge's observations as a private attorney.

¶31 To begin, as noted, I question whether credibility is an appropriate issue at the prima-facie-showing stage of an ***Ernst*** collateral attack. Testimony is not required to make such a showing. *See* ***State v. Drexler***, 2003 WI App 169, ¶10, 266 Wis. 2d 438, 669 N.W.2d 182 (stating in the context of a collateral attack that "a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel"). While it is true that the judge allowed Krueger to testify for purposes of this initial prima-facie-showing stage, the judge seemingly treated the proceeding as a hearing at which Krueger had the burden of persuasion. Still, I am uncertain whether credibility should come into play at this initial stage. ***Ernst*** does require an affidavit from a defendant, *see* ***Ernst***, 283 Wis. 2d 300, ¶33, and under some circumstances courts may assess the credibility of affidavits. So for now, I simply suggest that the safer course for circuit courts is to not make credibility findings until and if the burden of proof shifts to the State.

¶32 Accordingly, assuming without deciding that the trial judge did not err as a general matter by assessing Krueger's credibility, I agree with Krueger that the judge here erred by finding Krueger not credible based on the judge's own personal knowledge of criminal proceedings in Dodge County in 1993 when the judge was a practicing attorney.

¶33 While circuit courts may take judicial notice of certain matters, "[o]ur supreme court stated long ago that matters of which the trial court has knowledge as an individual are not the kind of matters of which it may take judicial notice." ***Hoeft v. Friedli***, 164 Wis. 2d 178, 189, 473 N.W.2d 604 (Ct.

App. 1991); *see also* ***State v. Peterson***, 222 Wis. 2d 449, 457-58, 588 N.W.2d 84 (Ct. App. 1998) ("A trial court sitting as fact-finder may derive inferences from the testimony and take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual." (footnotes omitted)).

¶34 I note that the trial judge here sensibly questioned whether he could take judicial notice when the source of the information is personal knowledge, in this instance knowledge that was acquired before he was a judge. For reasons that are not clear, however, the judge nonetheless relied on that knowledge.

¶35 I also note that the judge in some instances appeared to base his credibility findings, at least in part, on other, permissible factors, such as Krueger's seemingly selective memory of events. But even in those instances, the judge consistently returned to his personal recollections. For example, the judge stated:

> [The defendant] doesn't remember that he would have had at a minimum two appearances. Very likely what would have happened is he would have had a pretrial with the D.A., that's what we did back then, but I can't, I can't, I don't remember when that started, when that stopped or even if it was continuing in '93 because I was at that point in private practice as a defense attorney in Dodge County ….

¶36 In defending the judge's approach, the State fails to address the judicial notice cases that Krueger discusses, relying instead on ***Hammill***. As the State acknowledges, however, in ***Hammill*** a circuit court judge's clerk testified regarding the judge's plea colloquy practices. *See* ***Hammill***, 293 Wis. 2d 654, ¶3. That situation is obviously different and does not raise a judicial notice concern.

¶37 In sum, I conclude that Krueger's assertions were sufficient to make a prima facie showing under ***Ernst***. I further conclude that the judge erred when he relied on his personal experience as a private attorney to find Krueger not credible with respect to Krueger's assertions as to what did or did not occur during the 1993 proceedings. At the same time, if there is an additional evidentiary proceeding on remand, which may again include testimony from Krueger—because the State has the right to call Krueger as a witness at such a hearing—nothing in this opinion prevents a new assessment of Krueger's credibility in light of any evidence offered by the State and based on a normal assessment of Krueger's credibility. What the trial judge may not do is rely on the judge's own memory of how such matters were handled in 1993.

Conclusion

¶38 For the reasons stated, I reverse the judgment and remand for further proceedings consistent with this opinion. It would appear that, short of the parties reaching some agreement, there is a need to hold an evidentiary hearing at which the State will have the opportunity to prove by clear and convincing evidence that Krueger's waiver of counsel in the 1993 proceedings was knowingly, intelligently, and voluntarily entered.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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