COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1379-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHANE R. BARTHOLOMEW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

DYKMAN, P.J.[1] Shane R. Bartholomew appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), contrary to § 346.63(1)(a), STATS. Bartholomew argues that the trial court erred in considering one of his prior convictions in sentencing him as a fourth-time

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

offender within a ten-year period because the prior conviction was obtained in violation of his constitutional right to counsel. Although Bartholomew may collaterally attack his prior conviction here for sentencing purposes, we conclude that he has not made a prima facie showing that the prior conviction was obtained in violation of his constitutional rights. Accordingly, we affirm.

BACKGROUND

On November 30, 1995, Bartholomew was arrested for OMVWI. He was charged with OMVWI, fourth offense. Bartholomew moved the trial court to exclude two of his prior OMVWI convictions from consideration during sentencing on the grounds that the prior convictions were obtained in violation of his constitutional rights. The trial court denied Bartholomew's motion. After a jury trial, Bartholomew was convicted of OMVWI, fourth offense. The court sentenced him to one year in jail, fined him $600, ordered him to forfeit his vehicle, and revoked his driver's license for thirty-six months. Bartholomew appeals.

DISCUSSION

Bartholomew argues that the trial court erred in considering his September 6, 1995 OMVWI conviction in sentencing him as a fourth-time offender within a ten-year period. Under § 346.65(2)(d), STATS., a defendant found guilty of OMVWI for the fourth time within a ten-year period "shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year in the county jail." A defendant may collaterally attack prior OMVWI convictions when such convictions are used for penalty enhancement purposes under § 346.65(2), STATS. ***State v. Foust***, No. 97-0499-CR, slip op. at 8 (Wis. Ct. App. Oct. 30, 1997, ordered published Nov. 20, 1997).

Bartholomew argues that the 1995 conviction was constitutionally infirm because it was obtained in violation of his right to counsel.

The trial court determined that Bartholomew's 1995 conviction was not obtained in violation of his right to counsel. The State argues that we should treat this as a finding of fact reviewable under the clearly erroneous standard. However, we agree with Bartholomew that the question of whether his 1995 OMVWI conviction was constitutionally infirm is a question subject to de novo review. In ***State v. Klessig***, 211 Wis.2d 194, 204, 564 N.W.2d 716, 720-21 (1997), the court set forth the appropriate standard of review:

> 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. Whether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law.

(Citations omitted.)

When collaterally attacking a prior conviction, the defendant has the initial burden of coming forward with evidence to make a prima facie that he was deprived of a constitutional right at the prior proceeding. *See* ***State v. Baker***, 169 Wis.2d 49, 77, 485 N.W.2d 237, 248 (1992). If the defendant makes a prima facie showing, "the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." ***Id.***

In ***Klessig***, the Wisconsin Supreme Court set forth the test for determining whether a criminal defendant has knowingly, voluntarily and intelligently waived the right to counsel. The court stated:

> 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.

Klessig, 211 Wis.2d at 206, 564 N.W.2d at 721-22 (citation omitted).

Before accepting Bartholomew's no contest plea to OMVWI in 1995, the trial court engaged Bartholomew in the following colloquy:

THE COURT:	Mr. Bartholomew, the first thing I want to take up with you is the fact that you are here without an attorney. Was it your intention to go forward today without hiring an attorney?
MR. BARTHOLOMEW:	Yeah.
THE COURT:	You do so freely and voluntarily?
MR. BARTHOLOMEW:	Yes, sir.
THE COURT:	You knew you had the right to have an attorney or to have one appointed at public expense if you couldn't afford one?
MR. BARTHOLOMEW:	Yes.
THE COURT:	Any questions about your right to counsel?
MR. BARTHOLOMEW:	No.

This exchange satisfied the first ***Klessig*** requirement, that the defendant made a deliberate choice to proceed without counsel.

After Bartholomew pleaded no contest, the colloquy continued:

THE COURT:	You have been over this form which explains the rights you are giving up?
MR. BARTHOLOMEW:	Yes.
THE COURT:	Any questions about the rights you are giving up?
MR. BARTHOLOMEW:	No.

A completed plea questionnaire is competent evidence that the plea was entered voluntarily, knowingly and intelligently. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 826-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). Before Bartholomew pleaded no contest in 1995, he completed and signed a plea questionnaire, and the trial court referenced this questionnaire during the plea colloquy. The questionnaire provides: "Do you understand the Judge is not bound to follow any plea recommendation and is free to sentence you to the maximum penalty of $1,000, or to prison or jail for one year or both?" Bartholomew placed an "x" in the box for "yes" next to this question. Bartholomew's affirmative answer to this question satisfies the fourth ***Klessig*** requirement, that the defendant was aware of the general range of penalties that could have been imposed.

Bartholomew also signed and dated the plea questionnaire under the following paragraph:

> RIGHT TO ATTORNEY AND WAIVER
>
> This is a CRIMINAL case. Therefore, you have the RIGHT TO HAVE AN ATTORNEY at any and all stages of the criminal justice process. An attorney can advise you as to your legal rights and options, explain procedures to you, assist you in negotiating a settlement of the case, investigate and explore possible defenses, prepare for and conduct your defense at trial, file motions and appeals, and assist you at sentencing if you are convicted….
>
> I have read and I do understand my right to an attorney and I hereby voluntarily, freely, and intelligently waive that right at this time.

This paragraph further establishes that Bartholomew made a deliberate choice to proceed without counsel. And although the paragraph does not specifically state the difficulties of proceeding *pro se*, it clearly implies what the disadvantages of self-representation are by providing the advantages of proceeding with an attorney. If Bartholomew knew that an attorney could advise him of his rights, explain procedures, explore possible defenses, conduct his defense, and assist him at sentencing, then he should have known that he might experience difficulties in these areas while proceeding *pro se*. Therefore, we believe that this paragraph satisfies the second ***Klessig*** requirement, that the defendant was made aware of the difficulties and disadvantages of self-representation.

Bartholomew was also made aware of the seriousness of the charge. At the plea colloquy, the following exchange took place:

THE COURT:	And are you willing to acknowledge that on May 7th of last year in the Village of Waunakee you were operating a motor vehicle and at that time you were under the influence of an intoxicant?
MR. BARTHOLOMEW:	Yes.
THE COURT:	And is this your third offense within the last five years?
MR. BARTHOLOMEW:	Yes.

Bartholomew had previously acknowledged that he was facing both a possible jail or prison term of one year and a penalty of $1,000. Bartholomew knew that he was pleading guilty to OMVWI and would be sentenced as a third-time offender within a five-year period. Because Bartholomew was aware of the seriousness of the charge against him, the third ***Klessig*** requirement was satisfied.

The plea colloquy for Bartholomew's 1995 OMVWI conviction satisfies all four ***Klessig*** requirements and therefore shows that he knowingly, voluntarily and intelligently waived his right to counsel. Because Bartholomew has not made a prima facie showing that he was deprived of a constitutional right, the trial court properly considered his 1995 OMVWI conviction in sentencing him as a fourth-time OMVWI offender. Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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