

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3121-CR

Cir. Ct. No. 2004CM7

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAWN M. HERFEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, P.J.¹ Dawn M. Herfel appeals a judgment of the circuit court convicting her of operating a motor vehicle while intoxicated (OWI),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

third offense, contrary to WIS. STAT. § 346.63(1)(a) (2001-02). Herfel argued below that her current conviction should not be treated as a third offense because her second conviction was unconstitutionally obtained. She alleged that in the prior proceeding she was denied, and did not waive, her constitutional right to an attorney. Herfel's motion to collaterally attack her prior OWI conviction was denied by the circuit court because the court concluded that Herfel had failed to make a *prima facie* case that her right to counsel had been violated. After the circuit court denied the motion, Herfel proceeded to a stipulated trial. The court found her guilty and she was convicted of OWI, third offense. Sentence was imposed and stayed pending this appeal. We conclude that Herfel made a *prima facie* showing of a constitutional violation of her right to counsel and remand for further proceedings.

Background

¶2 On January 2, 2004, Herfel was charged with OWI, third offense, and possession of THC.² On March 11, 2004, Herfel filed a motion to collaterally attack a 1993 La Crosse County OWI conviction. In support of her motion, Herfel submitted her own affidavit claiming that she appeared unrepresented by counsel, and never waived her right to an attorney, at both her December 3, 1992 initial appearance and her January 7, 1993 plea hearing. It is undisputed that transcripts of Herfel's 1992 and 1993 appearances are unavailable.

¶3 The only records available from Herfel's 1993 conviction are a guilty plea questionnaire and waiver of rights form, and minutes from both of the

² Herfel's charge for possession of THC was amended to a county ordinance forfeiture, and no issues regarding that charge are presented here.

appearances. The plea questionnaire and waiver of rights form does not include any reference to the right to counsel or Herfel's waiver of that right. The minutes indicate that Herfel was not represented and that the first proceeding was continued to give Herfel an opportunity to find representation. The entry for December 17, 1992, reads: "P, comp to def, Cont to see atty 01-07-93 @ 10:30." The next entry indicates that Herfel spoke with an attorney, but she remained unrepresented. The entry for January 7, 1993, reads, in part: "P, spoke with atty, Guilty to OWI-2nd all other charges were dismissed." Nothing in the minutes indicates that Herfel actually waived her right to counsel.

¶4 In deciding Herfel's motion, the circuit court in this case stated: "The court minutes establish that [Herfel] was advised of her right to an attorney, however, there is no information contained in the minutes that [Herfel] ever waived her constitutional right to counsel or that she made a deliberate choice to proceed without counsel." The court then focused its attention on various cases dealing with the requirements of taking a valid waiver. The circuit court concluded that, under *Pickens v. State*, 96 Wis. 2d 549, 564, 292 N.W.2d 601 (1980), "Ms. Herfel's waiver may be found to be valid." The court also concluded that Herfel's waiver was valid under reasoning employed in *State v. Woods*, 144 Wis. 2d 710, 714-15, 424 N.W.2d 730 (Ct. App. 1988). Finally, the court seemed to say that Herfel's waiver was valid under the United States Supreme Court's recent decision in *Iowa v. Tovar*, 541 U.S. 77 (2004).

¶5 Herfel was found guilty of OWI, third offense, following a stipulated bench trial.

Discussion

¶6 Herfel argues that she made the requisite *prima facie* showing for a collateral attack on a previous conviction by submitting an affidavit that asserts she was not represented by counsel and “did not waive [her] rights to an attorney.” Despite asserting that she did not waive counsel, Herfel then spends time discussing what a judge must do to take a valid waiver of counsel. Herfel, however, returns to her main argument at the end of her brief, asserting: “[T]he adequacy of the information conveyed has never been questioned. What is questioned is the conveyance of any counsel waiver at all.” We interpret this to mean that Herfel is asserting that she was never asked if she wanted to proceed without counsel and, therefore, she never indicated that she wanted to proceed without counsel.

¶7 The State briefly acknowledges that Herfel does not really contest whether the circuit court in Herfel’s prior OWI case conveyed the appropriate information, but instead whether Herfel waived her right to counsel at all. But the State’s only response to this assertion is that the “minutes make quite clear that Herfel knew what she was doing in proceeding without an attorney, in fact the initial date was adjourned so she could see an attorney.” That is, the State simply asserts that Herfel waived her right to counsel. But the minutes do not show with any clarity that Herfel waived her right to counsel, or that she did so knowingly. At best, the minutes suggest that whether Herfel was represented by counsel was discussed.

¶8 We conclude that the circuit court’s written decision addresses the wrong topic. This is understandable because the parties muddy the waters with needless discussions and comparisons of *Pickens* and *Tovar*. Herfel started this

ball rolling with her discussion of *Pickens* and *State v. Peters*, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797. Rather than address Herfel’s assertion that she did not waive counsel at all, the circuit court reviewed the case law and concluded that Herfel’s waiver of counsel was valid. In effect, the circuit court assumed waiver without resolving whether *any* waiver took place.

¶9 With respect to the single claim made in Herfel’s circuit court pleadings—that she did not waive counsel at all—we conclude that Herfel made a *prima facie* showing. Her affidavit alleges a fact that Herfel was in a position to know firsthand, namely, whether she waived her right to counsel. In a collateral attack on a prior conviction for which the transcripts have been lost or destroyed, a party may meet its burden of production solely by submitting an affidavit that establishes a *prima facie* case of a constitutional violation of one’s right to counsel. *State v. Baker*, 169 Wis. 2d 49, 76-78, 485 N.W.2d 237 (1992).

¶10 We stress that the issue on remand is narrow: The only question is whether Herfel waived her right to counsel. This should not be difficult to resolve. Our review of the record supports the circuit court’s statement that the “court minutes establish that [Herfel] was advised of her right to an attorney, however, there is no information contained in the minutes that [Herfel] ever waived her constitutional right to counsel or that she made a deliberate choice to proceed without counsel.” Since the parties agree that transcripts of the proceedings are unavailable, the only apparent evidence would have to come from Herfel, the State’s attorney who handled the second La Crosse County appearance, and the La Crosse County judge. It is unreasonable to expect that either the State’s attorney or the La Crosse County judge will recall the hearing. Accordingly, that leaves the circumstances, the minutes, and any new testimony from Herfel.

¶11 Since the first proceeding was continued so that Herfel could obtain counsel, it is reasonable to infer that the circuit court at the second hearing inquired whether Herfel wished to proceed without counsel. At a hearing on remand, Herfel may give testimony asserting that no waiver discussion took place and that she did not waive counsel.³ The circuit court will simply have to assess Herfel's credibility and make a factual finding on the topic. The court need not believe Herfel just because there is no contrary testimony. The circuit court must assess the circumstances and Herfel's testimony and decide. Of course, if there is any other relevant admissible evidence, that may also be considered.

¶12 If the circuit court finds that Herfel did not waive counsel, then she is entitled to relief. Her latest OWI conviction must be amended from a third offense to a second offense, and Herfel must be resentenced.

¶13 If the circuit court finds that Herfel did waive counsel, then the court should enter a final order containing that finding.

By the Court.—Judgment reversed and cause remanded with directions.

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

³ We note that a defendant who collaterally attacks a prior conviction can be forced to testify at an evidentiary hearing, and the refusal to do so may lead to an inference of waiver. *State v. Ernst*, 2005 WI 107, ¶¶30, 35, No. 2003AP1728-CR.

