COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1386-CR **Cir. Ct. No. 2004CT153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD E. LAMBERIES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Chad Lamberies appeals an order denying his motion collaterally attacking a judgment of conviction for operating a motor

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

vehicle while intoxicated. Lamberies asserts that he did not validly waive his constitutional right to an attorney in that case. We disagree and affirm.

FACTS

¶2 On May 19, 2004, Lamberies was charged with operating a motor vehicle while intoxicated (third offense) and operating a motor vehicle with a prohibited alcohol concentration (third offense). On November 1, he filed a motion collaterally attacking a 1997 conviction for operating while intoxicated, which was his second offense. The motion asserted that Lamberies did not knowingly, intelligently, and voluntarily waive his right to counsel in the 1997 case. Based upon the 1997 plea hearing transcript, Lamberies asserted that the court did not adequately explain the difficulties and disadvantages of self-representation. At a hearing on his motion, Lamberies testified that he was not aware of the advantages of having an attorney in 1997, and he also stated that he did not know what attorneys do.

¶3 At the motion hearing, the parties debated the correct standard of review in a collateral attack. Lamberies argued that he need only show that the plea hearing colloquy in 1997 did not comply with our supreme court's decision in ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). The State argued that the colloquy requirements of ***Klessig*** were overruled by the United States Supreme Court's decision in ***Iowa v. Tovar***, 541 U.S. 77 (2004), which concluded that plea colloquy requirements similar to those in ***Klessig*** were not constitutionally required. The circuit court ultimately agreed with the State. The court denied Lamberies' motion based upon the 1997 hearing transcript and Lamberies' testimony at the motion hearing, which the court believed lacked credibility. In

the alternative, the court concluded that the 1997 colloquy satisfied the requirements of ***Klessig***. Lamberies appeals.

DISCUSSION

¶4 As we explain below, the circuit court was incorrect in concluding that ***Tovar*** overruled ***Klessig***'s colloquy requirements. The court did not have the benefit of our supreme court's analysis in ***State v. Ernst***, 2005 WI 107, 699 N.W.2d 92, which was decided after the circuit court's decision. Nevertheless, the court ultimately applied the correct standard—whether Lamberies' waiver of counsel was knowing, intelligent, and voluntary. We agree with the court's application of that standard.

¶5 In ***Klessig***, our supreme court held that in order for an accused's waiver of counsel to be valid, the record must reflect: (1) a deliberate choice to proceed without counsel; (2) an awareness of the difficulties and disadvantages of self-representation; (3) an awareness of the seriousness of the charge or charges; and (4) an awareness of the general range of possible penalties. ***Klessig***, 211 Wis. 2d at 206. ***Klessig*** also required that courts determine whether a defendant is competent to represent oneself. ***Id.*** at 212.

¶6 Lamberies first argues that the 1997 court failed to adequately explain the difficulties and disadvantages of self-representation. He also contends that the record does not indicate that he was aware of the penalties he faced. Finally, Lamberies argues that the court did not determine whether he was competent to represent himself.

¶7 The State argues the court's colloquy satisfied the requirements of ***Klessig***. The State also argues that Lamberies' motion failed to make a prima

facie showing that he was entitled to relief and, therefore, the burden of proof never shifted to the State, citing ***Ernst***, 699 N.W.2d 92, ¶27.

¶8 A defendant who faces an enhanced sentence based upon a prior conviction may only collaterally attack the prior conviction based upon a denial of the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. The right to counsel under the federal and state constitutions is identical. ***Klessig***, 211 Wis. 2d at 202-03. To pursue a collateral attack, the defendant must first make a prima facie showing that he or she did not know or understand the information that should have been provided in the previous proceeding and, as a result, did not knowingly, intelligently, and voluntarily waive the right to counsel. ***Ernst***, 699 N.W.2d 92, ¶25. In the collateral attack in ***Ernst***, the defendant alleged that the circuit court's colloquy failed to comply with ***Klessig***. ***Id.***, ¶26. Our supreme court concluded that alleging a ***Klessig*** violation was not sufficient to make a prima facie showing that waiver of counsel was invalid. ***Id.*** Instead, the court required that a defendant allege specific facts showing that the waiver was not, in fact, knowing, voluntary, and intelligent. ***Id.*** If a prima facie showing is made, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowing, intelligent, and voluntary. ***Id.***, ¶27.[2]

[2] This burden shifting procedure is similar to that applied on direct appeal under ***Klessig***. The main difference is that, on direct appeal, a defendant can make a prima facie showing and shift the burden of proof to the State by merely alleging a violation of ***Klessig***'s colloquy requirements. ***State v. Klessig***, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997). Once a prima facie showing is made, however, the burden on the State is the same on direct appeal and collateral attack; the State must prove that the defendant's waiver was knowing, intelligent, and voluntary. ***Id.***; ***State v. Ernst***, 2005 WI 107, ¶¶27, 31 699 N.W.2d 92.

¶9 Because this burden shifting procedure was promulgated in ***Ernst***, which was decided after the circuit court ruled on Lamberies' motion, we do not base our decision on Lamberies' failure to make a prima facie showing by affidavit. The circuit court allowed Lamberies to testify, and his testimony made a prima facie showing because he stated that he did not know what lawyers do or how an attorney could help him. Thus, our review focuses on the circuit court's finding that the State proved that Lamberies knowingly, intelligently, and voluntarily waived his right to counsel.

¶10 In devising the burden shifting procedure in ***Ernst***, our supreme court was determining the correct standard in light of ***Hahn*** and ***Tovar***. ***Hahn*** only permits a collateral attack where a defendant's constitutional right to counsel was violated. ***Hahn***, 238 Wis. 2d 889, ¶17. In ***Tovar***, the United States Supreme Court held that colloquy requirements similar to ***Klessig***'s were not constitutionally required. *See* ***Tovar***, 541 U.S. at 81; *see* ***Ernst***, 699 N.W.2d 92, ¶¶15, 22. In ***Ernst***, our supreme court concluded that ***Tovar*** did not eliminate ***Klessig***'s requirements because those requirements comprise a court-made procedural rule, promulgated under the court's superintending and administrative authority, rather than constitutional requirements.[3] ***Id.***, ¶18. The court in ***Ernst*** then determined what role, if any, noncompliance with ***Klessig*** should play in a collateral attack:

> [a]n alleged violation of the requirements of ***Klessig*** can form the basis of a collateral attack, as long as the defendant makes a prima facie showing, pointing to facts

[3] If our supreme court had concluded otherwise, the colloquy requirements of ***Klessig*** might have been overruled by ***Tovar***, just as the circuit court believed in this case. *See* ***Iowa v. Tovar***, 541 U.S. 77, 88 (2004) (stating "We have not ... prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.").

> that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her right to counsel. … [W]hen the defendant successfully 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., ¶37.

¶11 The parties seemingly read this language to mean that once a defendant makes a prima facie showing, the State, as part of its burden of proof, must prove that the court's colloquy satisfied the ***Klessig*** requirements. We disagree with this interpretation and conclude that the State must only prove that Lamberies knowingly, intelligently, and voluntarily waived his constitutional right to counsel.

¶12 Whether there has been a valid waiver of a defendant's constitutional right to counsel will "depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). This is the standard our supreme court envisioned in ***Ernst***, where it adopted from ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), the proposition that the State may use any evidence which substantiates that a waiver was knowingly and voluntarily made. ***Ernst***, 699 N.W.2d 92, ¶31. This standard does not require showing compliance with ***Klessig***'s colloquy requirements.

¶13 Further, to require proof of compliance with ***Klessig*** in a collateral attack would be to interpret ***Ernst*** as overruling ***Hahn***. ***Hahn*** held that a defendant can only collaterally attack a prior conviction where the defendant's constitutional right to counsel, *not* ***Klessig***'s court-made procedural rule, is violated. There is no indication in ***Ernst*** that our supreme court intended to overrule ***Hahn***.

¶14 We also reject Lamberies' argument that the State must prove the higher standard of competency outlined in ***Klessig***. In ***Klessig***, our supreme court stated that "In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." ***Klessig***, 211 Wis. 2d at 212. "This higher standard is not based on the requirements of the Sixth Amendment, but stems from the independent adoption of the higher standard by the State as allowed under ***Godinez***." ***Id.*** In ***Godinez v. Moran***, 509 U.S. 389, 397-98 (1993), the United States Supreme Court concluded that competency to waive one's constitutional right to counsel is not measured by a higher standard than for determining competency to stand trial. Because ***Klessig***'s requirement that courts determine that a defendant is competent to waive counsel exceeds what is constitutionally required, it would be contrary to ***Hahn*** to require the State to prove the higher standard of competency in a collateral attack.

¶15 Again, the question on review is whether the State proved by clear and convincing evidence that Lamberies knowingly, intelligently, and voluntarily waived his constitutional right to counsel. This involves application of constitutional principles to facts, which we review independent of the circuit court. ***Klessig***, 211 Wis. 2d at 204. We will uphold findings of historic facts unless clearly erroneous. WIS. STAT. § 805.17. Unlike on direct appeal, there is no presumption against the defendant's waiver of counsel in a collateral attack. ***Ernst***, 699 N.W.2d 92, ¶31, n.9.

¶16 The circuit court found Lamberies' statements at his motion hearing lacked credibility. The court gave more weight to Lamberies' statements recorded when he entered his plea in 1997. At the 1997 hearing, the court informed Lamberies that he may qualify for a public defender and that an attorney might

help him with defenses of which he was not aware. The court told Lamberies that if he wanted an attorney, the court would take steps to help him get one. Then, when asked whether he wanted an attorney, Lamberies declined.

¶17 In response to other questions, Lamberies indicated that he was twenty-four years old, completed high school, could read and write, and understood the charges. Lamberies affirmed that he read the complaint and understood the penalties. Lamberies declined the court's offer to read the complaint aloud.

¶18 After the court explained Lamberies' right to a jury trial and what the State would be required to prove, along with other rights Lamberies would be waiving, the court confirmed that Lamberies had not been treated for mental, alcohol, or drug problems, and that he had not been coerced into waiving his rights. The court accepted Lamberies' waiver of rights and accepted his no contest plea.

¶19 While Lamberies testified at his motion hearing that he was not "mainstreamed" in high school, he also admitted that he had not been diagnosed with any type of learning disability. Lamberies further testified that at his prior employment where he delivered building materials, he was able to keep track of records, deliver the correct things to the correct places, and read instructions specifying which and how many items to deliver. Finally, Lamberies admitted that he was not under the influence of alcohol or drugs at the 1997 hearing.

¶20 Based upon the circuit court's credibility determinations and Lamberies' statements at the 1997 plea hearing and at his motion hearing, we agree with the court's conclusion that Lamberies validly waived his constitutional right to counsel.

By the Court.—Order affirmed.

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