COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2642-CR **Cir. Ct. No. 2005CT95**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MATTHEW S. OLSEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

¶1 PETERSON, J.[1] The State appeals an order precluding the use of prior drunk driving convictions to enhance Matthew Olsen's pending charge for operating a motor vehicle while intoxicated. The State contends that Olsen failed

[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.

to make a prima facie showing that he was denied his constitutional right to counsel in the prior proceedings and that the record otherwise indicates that he made a valid waiver of counsel. We affirm the order.

¶2 Olsen was charged with OWI, second offense, and operating with a prohibited alcohol concentration, second offense. Olsen filed a motion to preclude the use of a prior Minnesota drunk driving conviction to enhance his sentence if he were convicted of the pending charges. His motion was supported by an affidavit stating that the Minnesota court did not follow Wisconsin's colloquy requirements, as outlined by our supreme court in ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). Specifically, he averred that he was not advised of the difficulties and disadvantages of proceeding without an attorney.

¶3 A motion hearing was held, and the State called Olsen to testify. During the State's questioning of Olsen, the following exchange occurred:

> [Prosecutor]: And did you understand at that time that an attorney may have been able to go through the case with you and look at the weaknesses of the case?
>
> [Olsen]: No.
>
> [Prosecutor]: You didn't understand that at all?
>
> [Olsen]: Well, I didn't think about it.
>
> [Prosecutor]: Okay. But you are aware, in general, that, obviously, that's what an attorney is, correct?
>
> [Olsen]: Yes.

The court concluded that Olsen's waiver of counsel was not knowing, voluntary, and intelligent, and it entered an order precluding the use of the prior conviction to enhance the pending charges.

¶4 A defendant who faces an enhanced sentence based upon prior convictions may only collaterally attack those convictions if he or she was denied the constitutional right to counsel in the prior proceedings. ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. In ***State v. Ernst***, 2005 WI 107, ¶¶25-27, 283 Wis. 2d 300, 699 N.W.2d 92, our supreme court adopted a burden shifting procedure for evaluating collateral attacks. The initial burden rests with the defendant to make a prima facie showing that he or she did not knowingly, voluntarily, and intelligently waive the right to counsel. ***Id.***, ¶25. The ***Ernst*** court concluded that a violation of the ***Klessig*** colloquy requirements could form the basis of a collateral attack, but only if the defendant alleged that he or she did not understand the information that should have been provided. ***Id.***, ¶¶22, 25-26. Therefore, defendant must do more than allege that the plea colloquy was defective or that the court failed to conform to its mandatory duties during the plea colloquy. ***Id.***, ¶¶25-26. If the defendant makes a prima facie showing, the burden shifts to the State to prove, by clear and convincing evidence, that the defendant's plea was knowingly, voluntarily, and intelligently entered. ***Id.***, ¶27.

¶5 The State argues that Olsen failed to make a prima facie showing and that it otherwise met its burden of proof. The State further argues that the ***Ernst*** decision makes it impossible to use prior convictions from other states to enhance OWI convictions in Wisconsin, since other states do not require the defendant to be advised of the difficulties and disadvantages of self-representation.[2] The State argues that the ***Ernst*** decision should be revisited in

[2] Wisconsin statutes explicitly permit the use of prior convictions from other states. *See* WIS. STAT. §§ 346.65(2) and 343.307(1)(d).

light of Justice Wilcox's concurring and dissenting opinion in that case.[3] Olsen counters that the record clearly shows that the colloquy requirements of ***Klessig*** were not followed in Minnesota, and the court's order was therefore correct.

¶6 We agree with the State that Olsen's affidavit, by itself, was insufficient to make a prima facie showing that he did not make a valid waiver of counsel. While the affidavit alleges that Minnesota did not follow Wisconsin's colloquy requirements, it fails to allege that Olsen did not know or understand the information not provided. *See* ***Ernst***, 283 Wis. 2d 300, ¶25. However, we also conclude that Olsen effectively made his prima facie showing at the motion hearing, when he testified that he did not understand an attorney could help him evaluate the weaknesses in his case. The State fails to address this testimony.

¶7 Having concluded that Olsen made a prima facie showing, we cannot conclude the court erred when determining that the State failed to prove Olsen's waiver of counsel was knowing, voluntary, and intelligent. While the court could have found Olsen's testimony incredible, it did not, and this court cannot overturn that determination. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (It is the function of the trier of fact, and not appellate courts, to resolve questions as to the weight of testimony and the credibility of witnesses).

¶8 We do not address the State's argument that the ***Ernst*** decision should be revisited, since we are in no position to revise supreme court precedent.

[3] Justice Wilcox's concurrence and dissent questioned the majority's opinion insofar as it implied that the constitution requires defendants to be advised of the difficulties and disadvantages of self-representation. ***State v. Ernst***, 2005 WI 107, ¶56, 283 Wis. 2d 300, 699 N.W.2d 92 (Wilcox, J., concurring in part and dissenting in part).

See ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We nevertheless note that both parties misapprehend, in some ways, the implications of the ***Ernst*** decision. Contrary to the arguments in Olsen's brief, it is clear, from ***Ernst***, that a violation of the ***Klessig*** colloquy requirements is not, by itself, sufficient to sustain a collateral attack. *See* ***Ernst***, 283 Wis. 2d 300, ¶25. Further, contrary to the State's belief, the ***Ernst*** decision does not universally make out-of-state convictions unavailable to enhance Wisconsin OWI sentences. If a prima facie showing is made based on a failure to advise of the difficulties and disadvantages of self-representation, the State may still question the defendant about his or her understanding of those difficulties and disadvantages. *See* ***id.***, ¶30. Ultimately, the resolution of the issue will typically be determined by whether the court believes the defendant is as unaware as he or she claims to be.[4]

By the Court.—Order affirmed.

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

[4] Moreover, it is not entirely clear that that the ***Ernst*** decision requires the State to prove that the defendant was aware of the difficulties and disadvantages of self-representation once the burden of proof shifts. While the majority in ***Ernst*** stated that a violation of ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), combined with the appropriate averments, are sufficient to make a prima facie case, it made no such reference to the ***Klessig*** requirements when describing the State's burden of proof. The ***Ernst*** court only stated that the State must prove that the waiver of counsel was knowing, voluntary, and intelligent. As Justice Wilcox pointed out, ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528, only permits collateral attacks based on a violation of a person's *constitutional* right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶¶54, 56 (Wilcox, J., concurring in part and dissenting in part). As the majority in ***Ernst*** acknowledged, the colloquy requirements of ***Klessig*** are procedural requirements, developed under the court's "superintending and administrative authority," and are not required by the constitution. ***Ernst***, 283 Wis. 2d 300, ¶18.