COURT OF APPEALS DECISION DATED AND FILED

July 20, 2006

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. 2005AP2060-CR

Cir. Ct. No. 2004CT2031

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GALE D. NELSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Reversed and cause remanded.*

¶1 HIGGINBOTHAM, J.[1] Gale D. Nelson, who has been charged with his fourth offense of operating a motor vehicle under the influence of alcohol, asks for review of a non-final order of the circuit court. The order denied Nelson's motion to exclude two prior OWI convictions which would affect sentencing on the current charge. In the motion to exclude, Nelson argued the convictions should be excluded from evidence because he was denied his constitutional right to counsel during the pendency of those cases. Nelson argues that he made a prima facie showing that he had been denied his right to counsel and that the State failed to prove by clear and convincing evidence that Nelson properly waived the right to counsel. We agree with Nelson and reverse the circuit court's order and remand to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

¶2 On July 27, 2004, Nelson was charged with operating under the influence and operating with a prohibited alcohol concentration, fourth offense. Nelson moved to exclude two prior OWI convictions, and testified by affidavit that he did not waive his right to counsel. Also included with Nelson's motion were the circuit court files for the cases at issue and a statement from the court reporter indicating that transcripts were not available for these cases. At the motion hearing, the court reviewed minute sheets of the proceedings, noting that they state "rights were read" at the time of the plea, and concluded this meant that those rights included the right to counsel. The court further noted that there was no testimony as to Nelson's level of education, that Nelson argued neither that he

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

could not read or write nor that he did not receive copies of the criminal complaints indicating the severity of the charges against him, and that virtually every member of the public is familiar with ***Miranda***[2] rights and one's right to an attorney. The court denied the motion, concluding that Nelson failed to make a prima facie case that he had been denied his right to counsel. Nelson appeals.

STANDARD OF REVIEW

¶3 "Whether a defendant knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel requires the application of constitutional principles to the facts." ***State v. Ernst***, 2005 WI 107, ¶10, 283 Wis. 2d 300; 699 N.W.2d 92 (2005); *see also* ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). "We review such a question de novo, independently of the reasoning of the circuit court," although we benefit from that court's analysis. ***Ernst***, 283 Wis. 2d 300, ¶10. "Whether a party has met the burden of establishing a prima facie case presents a question of law which we review de novo." ***Id.***; *see also* ***State v. Baker***, 169 Wis. 2d 49, 78, 485 N.W.2d 237 (1992). Whether the State rebuts this prima facie case by proving by clear and convincing evidence that a defendant's waiver of counsel was knowing, intelligent, and voluntary is also a question of law we review de novo. *See* ***State v. Drexler***, 2003 WI App 169, ¶¶9-11, 266 Wis. 2d 438; 669 N.W.2d 182.

DISCUSSION

¶4 In ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, the supreme court affirmed that the U.S. Constitution requires states to allow a

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

defendant to collaterally attack a prior conviction obtained in violation of the defendant's constitutional right to counsel if the prior conviction is used in a subsequent proceeding to support guilt or enhance punishment for another offense. ***Id.***, ¶17 (citing ***Custis v. United States***, 511 U.S. 485 (1994)).[3] The right to representation extends to all critical stages of the criminal process, including plea hearings. ***Iowa v. Tovar***, 541 U.S. 77, 80-81 (2004). In the context of plea hearings, the constitutional requirement is satisfied when the trial court (1) gives the defendant an opportunity to meet with counsel prior to the plea hearing and to receive assistance from counsel during the hearing, and (2) at the hearing "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." ***Id.*** at 81.

¶5 To pursue a collateral attack, the defendant must first make a prima facie showing that he "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***, 283 Wis. 2d 300, ¶25 (quotations omitted).[4] If a prima facie showing is made, the

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[3] While ***Custis v. United States***, 511 U.S. 485 (1994), and ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, spoke only of the federal, not state, constitution, right to counsel, we note that both the U.S. and the Wisconsin Constitutions guarantee rights to counsel. The U.S. Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Similarly, the Wisconsin Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel …." WIS. CONST. art. I, § 7.

[4] We note that the supreme court has outlined colloquy requirements to ensure that waivers of counsel are valid:

> 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,

(continued)

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

¶6 Nelson provides the following evidence to make a prima facie showing that he did not understand the information that should have been given him in the previous proceedings, and thus did not knowingly, intelligently, and voluntarily waive the right to counsel. First, he sets forth the prima facie case in his own affidavit stating that he was not informed of his right to be represented, that he did not know of this right, that the judge never asked if he wanted an attorney in either proceeding, that Nelson never waived his right to an attorney, and that he was not aware of the advantages an attorney could offer. Second, he provides relevant court records and a letter from the court reporter stating that transcripts were not available, together reflecting a lack of evidence establishing any waiver on his part.

> (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.

State v. Klessig, 211 Wis. 2d 194, ¶14, 206, 564 N.W.2d 716 (1997) (citation omitted).

However, in ***State v. Ernst***, 2005 WI 107, ¶18, 283 Wis. 2d 300, 699 N.W.2d 92 (2005), the court concluded the colloquy requirement was mandated through the court's supervisory power rather than by the federal or Wisconsin constitutions. Thus, in order to prevail on a collateral attack on the grounds that the defendant was denied his constitutional right to counsel, a defendant must do more than merely allege that "'the plea colloquy was defective'" or the "'court failed to conform to its mandatory duties during the plea colloquy'" to satisfy the ***Hahn*** standard for collateral attacks. ***Ernst***, 283 Wis. 2d 300, ¶25 (quoting ***State v. Hampton***, 2004 WI 107, ¶57, 274 Wis. 2d 379, 683 N.W.2d 14). Instead, the defendant must make the prima facie showing that his constitutional right to counsel in a prior proceeding was violated. ***Ernst***, 283 Wis. 2d 300, ¶25. Here, Nelson's affidavit contains such allegations more substantive than mere technical violations of the ***Klessig*** colloquy requirements.

¶7 We conclude that the materials Nelson provides are sufficient to make a prima facie showing that he did not knowingly, intelligently, and voluntarily waive the right to counsel. ***State v. Baker***, 169 Wis. 2d 49, 76-78, 485 N.W.2d 237 (1992), establishes that when a defendant mounts a collateral attack on a prior conviction challenging a denial of the right to counsel and there are no transcripts available, a defendant's affidavit may be sufficient to establish a prima facie case of being denied the right to counsel. *See also* ***Drexler***, 266 Wis. 2d 438, ¶10. Consequently, the proof brought forth by Nelson, albeit in the form of a self-serving affidavit, adequately sets forth the facts and the reasonable inferences from those facts that establish a prima facie case that he did not know of his right to be counseled regarding his plea and represented at his plea hearing, and thus did not knowingly, intelligently, and voluntarily waive his right to counsel.

¶8 We further conclude that, given the dearth of evidence available in the absence of a hearing transcript,[5] the State fails to meet the burden of proving

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[5] We have previously voiced concern regarding the problems inherent in the ***State v. Baker***, 169 Wis. 2d 49, 76-78, 485 N.W.2d 237 (1992), approach, whereby it becomes virtually impossible for the State, once transcripts of a previous hearing have been destroyed, to prove by clear and convincing evidence that a defendant's right to counsel was knowingly, intelligently, and voluntarily waived. In ***Drexler***, we said:

> Because the supreme court is the only court with the power to overrule, modify or withdraw language from a previous case, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), it is necessary for the supreme court to re-examine ***Baker*** in light of the practical difficulties—demonstrated by this case—that ensue when a defendant can meet his or her burden of establishing a prima facie case simply by filing an affidavit providing a self-serving rendition of events that transpired in court five, ten or even twenty years earlier. Moreover, only the supreme court has the rule-making authority necessary to reconcile SCR ch. 72, "Retention and Maintenance of Court Records," with the statutes governing the use of prior convictions to enhance the sentence for subsequent crimes. WIS. CONST. art. VII, § 3; WIS. STAT. § 751.12.

(continued)

by clear and convincing evidence that Nelson knew of his right to be counseled regarding his plea. The State points to the following factors to support its case: (1) the absence of transcripts not occurring due to any fault of the State (2) the minute sheets stating "rights were read"; (3) the absence of testimony regarding Nelson's education or questioning his literacy; and 4) the trial court's belief that a criminal defendant in 1992 would have some awareness of a right to counsel. The reason for the absence of transcripts here does not affect the State's burden, and the remaining items simply do not constitute clear and convincing evidence that Nelson knew of his right to be counseled regarding his plea.

¶9 The State's reasoning essentially tracks that of the circuit court, which stated:

> I'm going to find … that the minutes sheet indicating that the defendant's rights were read to him, I would conclude that those rights that were read would be that he, appearing without counsel, would have been advised, and that relates to the fact that he had a right to counsel and that if he could not afford counsel, one would be appointed for him at state expense. That he was advised of the advantages and disadvantages to which a lawyer could provide him. There has been no testimony here as to what his level of education is. I would indicate that the ***Miranda*** decision predated 1992, and that there would hardly be a person in this state who would not know that ***Miranda***, you have a right to remain silent, you have a right to an attorney, and I realize those are custodial questions, but clearly one realizes that they have a right to an attorney with respect to any case.
>
> I would further find, even though you do not question it, that with respect to the seriousness of the charges, that they are identified in the complaints in each of these matters. That in fact you do not raise that he did not receive copies of those complaints. You have not raised

State v. Drexler, 2003 WI App 169, ¶11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. We reiterate that concern here.

> the fact that he could not read and write, and I would assume that he could read and write; and therefore he is aware of the fine potential.… That in fact he was advised of the seriousness of the charges, the penalties of these charges.

¶10 We first agree with the State that Nelson's education and literacy bears on the ***Tovar*** elements of the nature of the charges facing a defendant and the defendant's understanding of the range of punishments. However, the crux of Nelson's claim is that he was not informed of his right to be counseled regarding his plea, and the State does not explain how one's literacy bears on this point. Furthermore, we cannot agree with the State or the circuit court that the existence of ***Miranda***, a case acknowledged by the circuit court not to be a case about the right to counsel while making a plea, is sufficient to show that Nelson was informed of his right to counsel regarding his plea. The most concrete evidence the State brings to bear on whether Nelson knowingly, intelligently and voluntarily waived his right to counsel is through the minute sheets stating that "rights were read." The State argues that this statement is "[a] clear indication that Nelson's rights were read to him, with no evidence provided by Nelson to dispute the trial court's belief that this would have included the right to counsel." We disagree.

¶11 As we concluded above, Nelson has indeed provided evidence, in the form of an affidavit, stating that he was not informed of his right to counsel. In addition, and more importantly, we disagree that the minute sheets are a clear indication that Nelson was informed of his right to counsel, because in the context of a plea hearing, the "rights read" could have been those constitutional rights waived when entering a plea, such as the right to a jury trial, the right to present evidence at trial, the right to remain silent at trial, and the right to make the State prove the charges beyond a reasonable doubt. *See* ***State v. Bangert***, 131 Wis. 2d 246, 271-72, 389 N.W.2d 12 (1986). In fact, this appears likely given the

statement in the minute sheets that the "Court finds plea knowing and voluntary …."

¶12 Unlike a case such as ***Drexler***, where partial transcripts contradicted the defendant's affidavit and overcame his prima facie case, *see* ***id.***, ¶11, the State here has presented essentially no evidence indicating precisely what occurred at Nelson's previous hearing. We therefore conclude that the State fails to meet its burden of showing by clear and convincing evidence that Nelson waived counsel knowingly, voluntarily, and intelligently at that hearing. We reverse the circuit court's order denying Nelson's motion to exclude the two prior convictions and we remand to the circuit court for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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