COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1483-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

WILLIAM M. SCHLECK,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] William M. Schleck appeals his conviction for operating a motor vehicle while intoxicated (OMVWI). He claims that the circuit court erred in considering a 1995 OMVWI conviction for the purpose of sentencing because he successfully collaterally attacked the earlier conviction. The State cross-appeals, claiming that the circuit court erred in allowing the collateral attack on the 1995 conviction because Schleck's waiver of right to counsel was knowing, intelligent, and voluntary. Because we conclude that the circuit court correctly exercised its discretion in sentencing Schleck and correctly determined that Schleck's waiver of his right to counsel was not knowing or voluntary, we affirm the decisions of the circuit court.

BACKGROUND

¶2 Based on a blood test that revealed a blood alcohol content of 0.196 percent, Schleck was charged with OMVWI and driving with a prohibited alcohol content (PAC), both as a fourth offender, under WIS. STAT. § 346.63(1)(a).[2] Schleck pled no contest to the OMVWI (fourth offense) charge, and the driving with a PAC charge was dismissed. At sentencing, Schleck collaterally attacked his 1995 OMVWI conviction, arguing that the circuit court in that case had erred in accepting his plea because his waiver of his right to counsel was not knowing,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 346.63. **Operating under influence of intoxicant or other drug.**

> **(1)** No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or
>
> (b) The person has a prohibited alcohol concentration.

intelligent and voluntary. The court agreed that the 1995 conviction had been obtained in violation of Schleck's right to counsel and sentenced him as a third offender, although it considered the conduct that led to the 1995 conviction in its sentence. Schleck appeals; the State cross-appeals, arguing that the circuit court erred in allowing Schleck to collaterally attack the 1995 conviction.

DISCUSSION

Standard of Review.

¶3 Sentencing is within the discretion of the circuit court, and our review is limited to whether the circuit court erroneously exercised its discretion. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984). Because the circuit court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with the sentencing discretion of the circuit court, and we presume that the court acted reasonably. ***Id.***

¶4 However, as with all acts of discretion, "the term contemplates a process of reasoning." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971). There should be evidence in the record that discretion was in fact exercised, and the basis of that exercise of discretion should be set forth. ***Id.*** Therefore, when we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Id.***; ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

¶5 Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel involves questions of historic fact applied to a

constitutional standard. ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716, 720-21 (1997). We will uphold a circuit court's findings of historic fact unless they are clearly erroneous. WISCONSIN STAT. § 805.17. However, whether the circuit court's findings of fact satisfy a constitutional standard is a question of law that we review *de novo*. ***Klessig***, 211 Wis. 2d at 204, 564 N.W.2d at 721.

Consideration of Prior Conduct.

¶6 Schleck claims that the circuit court erred in imposing sentence because it considered conduct that led to a prior conviction, even though it concluded that the conviction itself was obtained in violation of Schleck's right to counsel.[3] We disagree.

¶7 In imposing sentence, a circuit court may consider a wide range of factors. It may, for example, consider conduct for which the defendant has been acquitted. ***State v. Damaske***, 212 Wis. 2d 169, 195, 567 N.W.2d 905, 917 (Ct. App. 1997). Furthermore, it may "consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." ***Id***. at 195-96, 567 N.W.2d at 917. All that is required is that the defendant have the opportunity to rebut the evidence. ***Id.*** at 196, 567 N.W.2d at 917, *citing* ***Williams v. New York***, 337 U.S. 241, 250 (1949).

[3] Schleck initially argued that seizure of his blood was unreasonable under the Fourth Amendment based on ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998). However, his reply brief recognized that the argument was abrogated by our decision in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, where we declined to follow ***Nelson***. Accordingly, we do not address that argument.

¶8 The circuit court considered the conduct underlying the 1995 conviction in imposing sentence on the 1999 conviction, stating "I also think you deserve to be bumped up a bit on the third offense category because of the other conduct in 1995." During the 1999 sentencing hearing, the prosecutor had stated that the 1995 police reports indicated that the police had found Schleck sitting in his car and his blood alcohol content was at least 0.177 percent. Schleck's attorney questioned the admissibility of the prior conviction and its underlying factual basis. Although she had the opportunity, she never attempted to rebut this assertion. Schleck, who briefly discussed his experience in treatment after the 1995 conviction, did not attempt to rebut the prosecutor either. Furthermore, the court had received the transcript from the 1995 plea hearing, in which the prosecutor had stated as the factual basis for the plea that Schleck's breath test had revealed a 0.17 percent blood alcohol content.

¶9 We conclude that the circuit court did not erroneously exercise its discretion in considering the conduct underlying Schleck's 1995 OMVWI conviction when sentencing him. The prosecutor introduced the facts underlying that conviction; both Schleck and his attorney had an opportunity to rebut them but did not do so. The circuit court interpreted these facts to mean that Schleck had exhibited a pattern of conduct that made him more deserving of punishment than the average OMVWI third offender, and it sentenced him accordingly. This is a conclusion that a reasonable judge could reach.

Collateral Attack.

¶10 The State cross-appeals, arguing that the circuit court erred by not counting Schelck's 1995 OMVWI conviction as a prior conviction for the purpose of sentencing. Because Schleck did not establish a *prima facie* case that his right

to counsel had been violated, the State argues the circuit court should not have permitted him to collaterally attack the 1995 conviction. We disagree.

¶11 In an enhanced sentence proceeding based on a prior conviction, a defendant may attack the validity of the previous conviction only by alleging that his or her right to counsel was violated in the previous conviction. ***State v. Hahn***, 2000 WI 118, ¶¶ 28-29, 238 Wis. 2d 889, 903-04, 618 N.W.2d 528, 535. We presume that the right to counsel was not waived unless the State proves by clear and convincing evidence that the waiver was knowing, intelligent, and voluntary. ***Klessig***, 211 Wis. 2d at 207, 564 N.W.2d at 722. To prove a valid waiver of the right to counsel, the State must demonstrate that:

> [T]he circuit court … conduct[ed] 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 [conclude], based on the record, that there was a valid waiver of counsel.

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

¶12 In the sentencing portion of the 1999 case, Schleck attempted to collaterally attack his 1995 conviction, claiming that his right to counsel was violated and that the 1995 conviction should not count against him as an enhancer. Schleck appeared for his 1995 plea hearing without a lawyer. The following exchange then took place:

> THE COURT: Sir, I note you appear today without a lawyer. One of the parts of the form you've given me is entitled Right to Attorney and Waiver. Is that your signature?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Have you had enough time to go over that information?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you wish to proceed today without a lawyer?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you making that decision knowingly, voluntarily, and intelligently?
>
> THE DEFENDANT: Yes.

The prosecutor recited the plea agreement and the circuit court asked Schleck for his plea. Schleck responded, "I don't feel I was, but there's no way around it, they said." After he discussed the ramifications of a plea with the court for a few minutes, the following exchange took place:

> THE COURT: … What I need to know, do you wish to have a trial, or do you wish to enter a plea?
>
> THE DEFENDANT: I wish to have a trial, I guess. I just don't feel –
>
> THE COURT: Do you wish to have a jury trial?
>
> THE DEFENDANT: Not necessarily.
>
> THE COURT: Either you're going to have a jury trial or a court trial, and for planning purposes, I have to know which one you want.
>
> Have you talked this over with an attorney?
>
> THE DEFENDANT: Yeah, he sort of advised me to plead guilty.
>
> THE COURT: Well, do you want to have an attorney represent you for the purposes of trial?

> THE DEFENDANT: Well, I should get out of here. I have 20 days to think this over or try and get my advice or—
>
> THE COURT: Not unless I give you that. Today we're set for either a plea or jury selection. I'm prepared to go; the State's prepared to go. It was my expectation that you would be prepared to go.
>
> Now, what I'm going to do, I'll give you some time to think about this. If you have any questions about the potential plea agreement, you can discuss those with [the prosecutor], and I'll call your matter in a little while, but at that point in time I'm going to need to know what you want to do.

Schleck spoke briefly with the prosecutor, then confirmed that he wished to proceed without a lawyer. He then pled no contest to the charge of OMVWI third offense. Schleck indicated that he understood that he was giving up his constitutional right to an attorney.

¶13 We conclude that the State failed to prove by clear and convincing evidence that Schleck's waiver of counsel in the 1995 plea hearing was knowing, intelligent and voluntary. Although the circuit court's colloquy informed Schleck of the seriousness of the charge against him and the range of penalties that he faced, the court made no attempt to confirm that he was aware of the difficulties and disadvantages of self-representation. Beyond asking Schleck a conclusory question—whether his waiver was knowing, intelligent and voluntary—the court did not try to determine whether Schleck had made a deliberate choice to proceed without counsel. Because the State failed to prove by clear and convincing evidence that Schleck knowingly, intelligently and voluntarily waived his right to counsel in the 1995 plea hearing, we conclude in the 1999 case that the circuit court did not err in refusing to count the 1995 conviction as a previous offense for sentencing purposes.

CONCLUSION

¶14 Because we conclude that the circuit court correctly exercised its discretion in sentencing Schleck and correctly determined that Schleck's waiver of his right to counsel was not knowing and voluntary, we affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

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