COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1005-CR **Cir. Ct. No. 2005CT172**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW G. DEVINNEY,

DEFENDANT-APPELLANT.

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

¶1 CANE, C.J.[1] Matthew G. Devinney appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense. He also appeals an order denying his motion to collaterally attack his prior OWI

[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.

conviction in Minnesota. Because Devinney failed to make a prima facie showing that he did not knowingly, voluntarily, and intelligently waive the right to counsel, this court affirms the judgment and order.

BACKGROUND

¶2 On November 7, 2000, Devinney was arrested in Olmsted County, Minnesota for driving while intoxicated. On November 20, 2000, Devinney appeared for his court hearing, where he spoke with William F. Young, a public defender, in advance of the hearing. In his affidavit, Devinney stated Young explained the rights he would give up by pleading guilty and what his likely sentence would be.

¶3 Devinney told Young he planned to plead guilty. Young assisted Devinney in filling out the proper form. Devinney's plea form indicated he waived his right to counsel. Before Devinney entered his plea, the Judge asked Devinney whether he met with the public defender and saw the video about his constitutional rights. Devinney responded that he had. He was then asked if he had any questions about his rights or the charges against him. Devinney replied "[n]o I don't." The Judge also told Devinney that by pleading guilty "you're giving up your right to have a trial, as well as the other rights that were explained to you earlier." When asked if anybody was forcing him to give up his rights, Devinney responded "[n]o." Devinney then pled guilty.

¶4 On November 20, 2005, Devinney received a citation for operating while intoxicated in Pierce County, Wisconsin. On December 12, 2005, the State filed charges against Devinney for operating while intoxicated, second offense, and operating a motor vehicle with a prohibited alcohol concentration, second offense.

¶5 Devinney filed a motion to collaterally attack the Minnesota conviction and the court held a hearing on January 23, 2006. After reviewing the transcript and plea petition from Minnesota and considering counsel's arguments, the trial court concluded that Devinney's plea was counseled and denied the motion. The court permitted Devinney to supplement the record with an affidavit. Devinney's affidavit stated Young did not represent him and Young never "discussed … the dangers or disadvantages of representation."

¶6 On March 29, 2006, the court found Devinney guilty of operating while intoxicated, second offense. Devinney was sentenced as a second-time OWI offender.

DISCUSSION

¶7 A defendant who faces an enhanced sentence based upon prior convictions may collaterally attack the conviction if he or she was denied the constitutional right to counsel in the prior proceeding. ***State v. Hahn***, 2000 WI 118, ¶17, 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 these 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 defendant must do more than allege the plea colloquy was defective or the court failed to conform to its mandatory duties during the plea colloquy. ***Id.***, ¶¶25-26. The defendant must "point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided'…." ***Id.***, ¶25 (citation omitted). 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. Whether the defendant has met the burden of establishing a prima facie case is a question of law which this court reviews without deference. ***Id.***, ¶10.

¶8 Here, the record demonstrates Devinney had an opportunity to meet with an attorney before his hearing and discuss his rights. In addition, Devinney had an opportunity to view a video about his constitutional rights. Devinney's affidavit makes no mention of this video or whether the video addressed his right to counsel. Devinney fails to allege specific facts showing that he did not knowingly, voluntarily, and intelligently waive counsel. *See* ***id.***, ¶¶25-26. While Devinney's affidavit claims the public defender did not explain to him "the dangers or disadvantages of representation," he fails to claim he was actually ignorant of these facts. Therefore, Devinney fails to make a prima facie case.

By the Court.—Judgment and order affirmed.

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