COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP161-CR **Cir. Ct. No. 2004CF328**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY L. HALVORSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gregory Halvorson appeals a judgment of conviction for operating a motor vehicle while intoxicated, fifth offense, and an order denying his postconviction motion for resentencing. Halvorson asserts various reasons why his prior convictions should not be used to enhance the

present charge to a fifth offense. We conclude Halvorson has no basis for his collateral attacks and affirm the judgment and order.

¶2 In May 1990, Halvorson was convicted of OWI, first offense. In October 1990, he was convicted of an implied consent violation. In March 1994, he was convicted of OWI, third offense.[1] On April 21, 2004, he was convicted of another first offense OWI following a plea before a court commissioner. In the present case, Halvorson was charged with OWI, fifth offense, on April 29, 2004. The four prior convictions formed the basis for the enhancement. Prior to trial, Halvorson admitted and stipulated to the four prior offenses. The jury convicted him of OWI, and he was sentenced for his fifth offense.

¶3 Halvorson then filed a postconviction motion for resentencing on multiple grounds. First, he asserted the April 21 conviction could not be counted because the plea was entered without counsel. Second, he asserted the April 21 conviction was void because it should have been charged as a criminal fourth offense OWI, not a first offense. Finally, he asserted that none of his prior convictions could be used against him because they were not submitted to the jury, as Halvorson claims is required by ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000).

¶4 The court denied the motion, holding (1) Halvorson had no attorney because the April 21 offense was prosecuted as a civil forfeiture; (2) the court

[1] *See* WIS. STAT. § 343.307(1), which lists types of convictions that can be counted when determining enhanced OWI penalties under WIS. STAT. § 346.65(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

commissioner had jurisdiction; and (3) public policy allows civil judgments to be used as penalty enhancers. Halvorson appeals.

¶5 This case involves the application of constitutional standards to undisputed facts. We therefore face a question of law that we review de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶6 A collateral attack on a prior conviction is "an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it." ***State v. Sorenson***, 2002 WI 78, ¶35, 254 Wis. 2d 54, 646 N.W.2d 354 (citation omitted). However, "a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction." ***State v. Hahn***, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528. To prevail, a defendant must provide sufficient evidence to make a prima facie case that he or she was deprived of the right to counsel. ***State v. Ernst***, 2005 WI 107, ¶2, 283 Wis. 2d 300, 699 N.W.2d 92. Whether the defendant has made a prima facie showing is a question of law. ***Id.***, ¶10.

¶7 Halvorson asserts he was denied the right to counsel in his April 21 "fourth offense" OWI case. However, Halvorson fails to demonstrate he was even entitled to counsel. It is true that the offense in the April 21 case was his fourth relevant traffic offense. It is also true that fourth offense OWI is a criminal offense implicating the right to counsel. However, Halvorson was neither charged with nor convicted of fourth offense OWI. Rather, the charge was prosecuted as a

first offense OWI, punishable by forfeiture only. It was therefore treated as a civil case, proceeding before a court commissioner.[2]

¶8 There is no constitutional right to counsel in a civil forfeiture matter. In Wisconsin, defendants are entitled to counsel only for offenses punishable by imprisonment. ***State ex rel. Winnie v. Harris***, 75 Wis. 2d 547, 554-56, 249 N.W.2d 791 (1977). Where a defendant's conviction is not punishable by imprisonment, the fact that he or she was not represented by counsel does not invalidate the conviction. *See* ***id.***

¶9 Moreover, Halvorson offers no authority for the proposition that counsel must be made available not based on what charge is brought but, rather, based on the possible future use of a conviction as a penalty enhancer. Simply showing that a defendant had no attorney in a case is not the same as a prima facie showing of a deprivation of the right to counsel. Halvorson's challenge in this respect fails.

¶10 Halvorson also challenges the April 21 conviction as void. He argues that because it should have been charged as a fourth offense OWI, it should have been tried in criminal court and the court commissioner therefore lacked jurisdiction.[3] This issue is controlled by ***State v. Hammill***, 2006 WI App 128, 718 N.W.2d 747.

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[2] We note that Halvorson actually received a benefit from this charging error because he was punished only with a forfeiture. Fourth offense OWI is normally punishable by sixty days to a year in jail and between $600 and $2,000 in fines. WIS. STAT. § 346.65(2)(d).

[3] The parties refer to a municipal court in their briefs, but the City of Eau Claire, which charged Halvorson, does not have a separate municipal court. Rather, ordinance violations are prosecuted in the circuit court.

¶11 In ***Hammill***, the defendant was charged twice with first offense OWI, once in Eau Claire County and once in Barron County. His pleas were coincidentally scheduled on the same day. He entered a plea in Eau Claire County first, then entered his Barron County plea in a town municipal court. When Hammill was later charged with third offense OWI, he collaterally challenged the Barron County judgment as a nullity, arguing it should have been second offense OWI and was therefore not subject to the municipal court's jurisdiction. ***Id.***, ¶15.

¶12 We rejected this collateral attack because it was not based on a violation of the right to counsel. Accordingly, we held the challenge was barred by the bright-line rule of ***Hahn***. ***Hammill***, 718 N.W.2d 747, ¶17. We reject Halvorson's claim for the same reason.[4]

¶13 Finally, Halvorson asserts there was a violation of ***Apprendi***. The Supreme Court held there that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490. Halvorson asserts that his prior civil judgments are not the type of convictions to which ***Apprendi*** refers. He contends that for sentence enhancement purposes, the only prior convictions that need not be proven to a jury are those where the defendant's guilt had to be proven beyond a reasonable doubt at trial. Civil adjudications do not have that inherent constitutional protection.

[4] Hammill also had a challenge based on a violation of the right to counsel. ***State v. Hammill***, 2006 WI App 128, ¶7, 718 N.W.2d 747. Halvorson attempts to limit ***Hammill*** to only that discussion of the prima facie burden. He ignores outright ¶¶15-17, which deal specifically with a challenge to the validity of a prior judgment based on a jurisdictional dispute.

¶14 Here, however, Halvorson admitted to the existence of his four underlying convictions. He further stipulated that they could be used as penalty enhancers. Nothing prevents a defendant from waiving his or her ***Apprendi*** rights. ***Blakely v. Washington***, 542 U.S. 296, 310 (2004). Indeed, one form of waiver that frees the State to seek penalty enhancement is the defendant's stipulation to relevant facts. ***Id.*** Moreover, a defendant's admission of prior convictions is an alternative to proving them to the jury. ***United States v. Booker***, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict *must be admitted by the defendant or proved to a jury* beyond a reasonable doubt." (Emphasis added.))

¶15 Halvorson argues that we should not consider his stipulation because doing so will allow him to claim ineffective assistance of counsel.[5] He asserts that if he "is correct that prior civil adjudications or convictions do not fit within the exception [and therefore must be proved to a jury], then counsel's advice to Halvorson that he could not contest the number of priors was both deficient and prejudicial."

¶16 This is not necessarily the case. Even if we were to hold that prior civil judgments or convictions are not "prior convictions" under ***Apprendi***, the question to be resolved by an ineffective assistance of counsel hearing in this case would be whether the State would have been able to prove those prior convictions

[5] He also cursorily argues that his stipulation was not knowing and voluntary. Our review of the record convinces us that it was a valid stipulation and, in any event, the argument is underdeveloped. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider underdeveloped arguments).

to a jury beyond a reasonable doubt. Although this is often tedious, it is not usually difficult. If the State would have been able to prove the prior convictions, counsel's performance would not have been prejudicial, although it might have been deficient. An ineffective assistance of counsel claim would therefore be meritless.[6]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Halvorson further claims the State concedes his prior civil convictions are not exempt from submission to the jury because rather than refuting his claims, it simply argues he stipulated to the facts. This argument is irrelevant because any assertion that we should consider the stipulation necessarily assumes the State would have had to prove the prior convictions to a jury. Moreover, the State acknowledged the argument but chose not to address it further because it perceived Halvorson's argument as an invitation for this court to attempt to overrule the United States Supreme Court.

Halvorson also asserts that we should decide if uncounseled prior civil adjudications can be used as penalty enhancers. He asks us to make this decision in the interests of justice, even though it is raised for the first time on appeal. Halvorson does not simply make this request for the first time on appeal, but he raises it for the first time in his reply brief and as the very last paragraph. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). We decline to address this argument.