COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2915-CR **Cir. Ct. No. 2006CT855**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL G. HAUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Michael G. Hauck contends that his current conviction for operating a motor vehicle while intoxicated (OWI) cannot be

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

enhanced by a prior conviction that is invalid because he did not knowingly, voluntarily and intelligently waive his right to counsel in the prior proceeding. However, Hauck is unable to make a prima facie case that he did not knowingly, voluntarily and intelligently waive his right to counsel and therefore we affirm.

¶2 Hauck was charged in Fond du Lac county with his third offense OWI in violation of WIS. STAT. § 346.63(1)(a). The criminal complaint alleged two prior convictions for OWI. Hauck filed a motion collaterally challenging his second conviction, which occurred in 1991, claiming that the Fond du Lac circuit court failed to conduct a colloquy with him that made him aware of the disadvantages of proceeding without counsel; therefore, he did not knowingly, intelligently and voluntarily waive his right to counsel. The transcripts of the 1991 trial were destroyed pursuant to Wisconsin Supreme Court Rules, which state that notes and other records of in-court proceedings only need to be maintained for a period of ten years. *See* SCR 72.01(47) (2008). The trial court denied Hauck's motion. On October 8, 2007, Hauck pled no contest to the charge of OWI and was sentenced by the court.

¶3 Hauck now appeals the denial of his collateral challenge to his second OWI conviction.

¶4 The State agrees that Hauck may collaterally attack his 1991 conviction on the ground that he did not have counsel and did not knowingly, voluntarily and intelligently waive that right. Resolution of this issue requires the application of a constitutional standard to undisputed facts and that is a question of law which we review de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-572, 570 N.W.2d 905 (Ct. App. 1997).

¶5 In ***State v. Peters***, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, the supreme court affirmed its holding in ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, that a defendant may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence, except where the attack is based on an alleged violation of the defendant's right to counsel. The court then addressed whether Peters had established that he did not knowingly, voluntarily and intelligently waive his right to counsel in the prior proceeding. The ***Peters*** court explained that it would not evaluate Peters' claim under the standard set forth in ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), because that case had not been decided when Peters entered his plea in the prior proceeding. ***Peters***, 244 Wis. 2d 470, ¶20. Instead, the court directed that Peters' claim be evaluated under ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980), *overruled by* ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), because that was the prevailing law at the time Peters entered that plea. ***Peters***, 244 Wis. 2d 470, ¶¶20-22.

¶6 Like the ***Peters*** court, we too look to the prevailing law at the time defendant entered his plea. Because ***Pickens*** was the prevailing law at the time Hauck entered his 1991 plea, we conclude, as did the ***Peters*** court, that the standard in ***Pickens***, not ***Klessig***, is the proper one to apply to Hauck's 1991 waiver of counsel.

¶7 When collaterally attacking a prior conviction under this exception, the defendant has the initial burden of presenting evidence to make a prima facie showing of a deprivation of his or her constitutional right at the prior proceeding. ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). If the defendant makes a prima facie showing, "the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and

intelligently waived the right to counsel in the prior proceeding." ***Id.*** Whether a party has met its burden of establishing a prima facie case is a question of law that we decide de novo. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). The ***Pickens*** standard, the ***Peters*** court noted, requires an examination of the totality of the record to determine the validity of the waiver of counsel. ***Peters***, 244 Wis. 2d 470, ¶21.

¶8 Hauck has not filed a transcript showing the trial court did not conduct a proper colloquy. Where there is a missing transcript we must assume the trial court conducted a proper colloquy. *See* ***Duhame ex rel. Corrigal v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989).

¶9 The mere absence of a transcript does not defeat a collateral attack, but the defendant still carries the burden of making a prima facie showing. ***State v. Hammill***, 2006 WI App 128, ¶8, 293 Wis. 2d 654, 718 N.W.2d 747. In order to make a prima facie case a defendant "must do more than allege that 'the plea colloquy was defective.'" ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. For a collateral attack to be valid, a defendant is required to point to facts that demonstrate that he did not knowingly, intelligently and voluntarily waive his right to counsel. ***Id.*** The defendant's affidavits are simply the formal expression of allegations and as such require him to point to additional facts in order to make a prima facie case. No additional facts have been presented.

¶10 We affirm because Hauck has failed to carry his initial burden of presenting evidence to make a prima facie case for deprivation of his constitutional right to counsel in a prior proceeding. For this reason we do not address whether ***Iowa v. Tovar***, 541 U.S. 77 (2004), is applicable to the facts in this case.

By the Court.—Judgment affirmed.

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