COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2008

David R. Schanker
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. 2007AP2981-CR **Cir. Ct. No. 2006CT2482**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BENJAMIN SHANKS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] The State appeals from the trial court's order granting Benjamin Shanks' motion to exclude a prior Illinois driving under the

[1] This appeal is decided by one judge 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.

influence conviction for penalty purposes in a pending Wisconsin operating while intoxicated prosecution. Shanks argues that the prior conviction was properly excluded because his constitutional right to counsel was violated in the Illinois proceeding, which precluded that conviction from raising his OWI-1st to an OWI-2nd. *See* WIS. STAT. § 346.65(2)(am). The State argues that Shanks' prior conviction is valid for two reasons. First, Shanks had no constitutional right to counsel in the Illinois DUI proceeding. Second, even if Shanks had a right to counsel, he validly waived that right. We conclude that Shanks was denied his constitutional right to counsel during his Illinois DUI proceeding. Accordingly, we affirm.

Background

¶2 On September 16, 2006, a Deerfield police officer arrested Benjamin Shanks for operating a motor vehicle while intoxicated. The State charged Shanks with OWI, second offense. Shanks' prior conviction was in Illinois, for driving under the influence. That offense resulted in a conviction in February 2006. Shanks pled guilty to the Illinois DUI, paid a fine, and was placed under court supervision through Illinois' "Dri-Roads Program." The Illinois court later extended the supervision in February 2007, because Shanks failed to meet the conditions of his supervision.

¶3 In December 2006, Shanks filed a motion collaterally attacking his Illinois conviction, seeking to reduce his OWI-2nd to OWI-1st. Shanks' motion asserted that his first conviction in Illinois was invalid because it was obtained in violation of his constitutional right to counsel.

¶4 The court held a motion hearing on whether Shanks validly waived his right to counsel in the Illinois case. The trial court found that there was a

prima facie showing that the Illinois court did not afford Shanks his constitutional right to counsel, and that the evidentiary hearing should proceed.

¶5 The State established that Shanks is literate and has no learning disabilities. Shanks also testified that he went to court three separate times on the Illinois OWI charge. The first time, he agreed to plead guilty, pay a fine, and be placed on court supervision. Shanks then paid part of his fine and signed papers, including a plea of guilty form. The guilty plea form states that a defendant has a right to counsel. At his second appearance in court, Shanks also signed a form titled "Admission to Violation of Probation, Conditional Discharge or Supervision." That form also states Shanks' right to counsel. Immediately above the signature line, the form also includes the statement "[u]nderstanding all the above, it is my free and voluntary choice to admit to the allegations …." Shanks stated that on both occasions he was "in a hurry" and did not read the papers closely. Shanks also stated that no one orally informed him of his right to a lawyer; the disadvantages of proceeding without one; or the minimum and maximum penalties he faced.

¶6 The trial court held that the State did not meet its burden of proof to show that Shanks' waiver of his right to counsel was knowing and voluntary. The court then granted Shanks' motion to bar the State from using that conviction as a first offense for penalty purposes. The State appeals.

Standard of Review

¶7 Whether a prior conviction may be collaterally attacked is a question of law, which we review de novo. ***State v. Peters***, 2001 WI 74, ¶13, 244 Wis. 2d 470, 628 N.W.2d 797. Whether a waiver is knowing, intelligent, and voluntary requires applying constitutional principles to the facts, which we review de novo.

State v. Ernst, 2005 WI 107, ¶10, 283 Wis. 2d 300, 699 N.W.2d 92. However, we defer to the trial court's factual and credibility findings. ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621.

Analysis

¶8 The State argues that Shanks may not collaterally attack his prior DUI conviction in Illinois because he cannot assert a constitutional violation based on not being informed of his right to counsel. *See* ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528 (stating that a collateral attack may be brought only when the defendant alleges the court denied his or her constitutional right to counsel). The State argues that there was no constitutional requirement to inform Shanks of his right to counsel because Shanks was not sentenced to jail. Thus, the State argues, because Shanks did not have a right to counsel during the Illinois conviction, there was no constitutional right to violate. We disagree.

¶9 The State argues that Shanks did not have the right to counsel because "he was not sentenced to an actual term of imprisonment." The State cites a federal case, ***Schindler v. Clerk of Circuit Court***, 715 F. 2d 341 (7th Cir. 1983), for the proposition that Shanks did not have a right to counsel because he was not ultimately imprisoned. However, ***Schindler***'s facts are different from the facts here. ***Schindler*** involved a collateral attack on a civil forfeiture conviction. Shanks, however, is attacking a criminal conviction.[2]

[2] Similarly, in ***State v. Baker***, 169 Wis. 2d 49, 69, 485 N.W.2d 237 (1992), the State asked the Wisconsin Supreme Court to review whether the defendant could collaterally attack a prior conviction for operating a vehicle after a revocation (OAR) where the defendant argued the conviction was obtained in violation of his constitutional rights. The State in that case also cited ***Schindler v. Clerk of Circuit Court***, 715 F. 2d 341 (7th Cir. 1983). The ***Baker*** court found ***Schindler*** irrelevant, stating that "***Schindler*** does not govern this case. ***Schindler***'s holding is (continued)

¶10 While Shanks was not sentenced to jail for his first DUI conviction in Illinois, he faced imprisonment.[3] Illinois treats a DUI-1st as a class "A" misdemeanor, a criminal offense, which is punishable by imprisonment. 625 ILCS § 5/11-501 (b)(b-2) (2006); 720 ILCS § 5/2-11 (2006).

¶11 Thus, Shanks faced a criminal penalty for his offense and, therefore, had a constitutional right to counsel.[4] *See* ***State ex rel. Winnie v. Harris***, 75 Wis. 2d 547, 556, 249 N.W.2d 791 (1977) ("Whenever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration, he must be advised of his right to counsel … unless he knowingly and intelligently waives such right to counsel."). Because Shanks had a

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limited to a collateral attack on an uncounseled civil forfeiture conviction for a first offense in which counsel was not constitutionally required. In this case [the defendant] does not challenge the first civil forfeiture offense; he alleges that two of his prior OAR criminal convictions were not constitutionally obtained." ***Baker***, 169 Wis. 2d at 69. Likewise, ***Schindler*** does not govern Shanks' case. Shanks is challenging a criminal conviction, not a civil forfeiture.

[3] Had Shanks committed an OWI-1st offense in Wisconsin, he would have faced a civil forfeiture. *See* WIS. STAT. § 346.65(1)(a). As such, he would not have had a constitutional right to counsel. *See* ***State ex rel. Winnie v. Harris***, 75 Wis. 2d 547, 554-56, 249 N.W.2d 791 (1977); WIS. STAT. § 970.02(6). And because there would be no constitutional right to counsel, such a conviction could not be collaterally attacked. *See* ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528.

[4] The Illinois court's placement of Shanks under court supervision is a "conviction" that would be counted as a prior offense when charging an OWI in Wisconsin. While this is not a point at issue in this case, we note that we addressed this question in ***State v. List***, 2004 WI App. 230, 277 Wis. 2d 836, 691 N.W.2d 366. In that case, the defendant challenged whether a previous DUI charge in Illinois could be used to enhance the sentencing of a charge in Wisconsin. We found that court supervision is within the traffic code's definition of conviction. ***Id.***, ¶10. Like the defendant in ***List***, Shanks was placed under court supervision because an Illinois court determined that he "violated or failed to comply with the law in a court of original jurisdiction." *See* WIS. STAT. § 340.01(9r). Accordingly, as this court held in ***List***, Shanks' Illinois sentence is a conviction under Wisconsin law, and is counted to determine the number of convictions a defendant has and the corresponding penalty. ***List***, 277 Wis. 2d 836, ¶10.

constitutional right to counsel,[5] a collateral attack on the prior conviction is procedurally proper. *See* ***Hahn***, 238 Wis. 2d 889, ¶17.

¶12 The State next argues that Shanks validly waived his right to counsel in a plea of guilty form. We turn, then, to whether the Illinois court obtained a valid waiver of Shanks' constitutional right to counsel before accepting his guilty plea.

¶13 A defendant must knowingly, intelligently, and voluntarily waive his or her right to counsel in order for a guilty plea to be valid. ***Ernst***, 283 Wis. 2d 300, ¶25; WIS. STAT. § 971.08. The defendant must first make a prima facie case that the waiver did not meet that criteria. ***Ernst***, 283 Wis. 2d 300, ¶25. To make a prima facie showing, the defendant must provide specific facts that support a claim of a violation. ***Id***.

¶14 If a defendant can make a prima facie showing, the trial court then holds an evidentiary hearing in which the burden switches to the State. ***Id***., ¶27. The purpose of that hearing is to assess the defendant's actual understanding and give the State an opportunity to meet its burden of proof. ***Id.***

¶15 The State argues that Shanks was informed of his right to counsel through a plea of guilty form, which he signed. The State contends that the signed form establishes that Shanks knowingly waived his right to counsel. The State

[5] The Sixth Amendment 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. "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process. The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." ***Iowa v. Tovar***, 541 U.S. 77, 80-81 (2004) (citations omitted).

then argues that Shanks' claim that he did not read the form and did not understand the charges against him is "self-serving" and "disingenuous" because Shanks does not point to specific facts showing that he did not understand the right he was waiving.[6]

¶16 Shanks replies that because the trial court found that he had made a prima facie showing, the burden was on the State to show that Shanks made a deliberate choice to enter his plea without counsel and that he was aware of the implications of that choice. While the State also provided a "Final Order" form, which makes reference to "full admonishment of [Shanks'] rights," Shanks argues that there is no evidence in the record or presented by the State that establishes exactly what that "full admonishment" included.

¶17 We must look not only to the plea of guilty form, but the substance of that form. As the supreme court has reiterated, "[t]he record must show, or there must be allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." ***State v. Baker***, 169 Wis. 2d 49, 77 485 N.W.2d 237 (1992) (citation omitted). In Wisconsin, there are several administrative means of obtaining a conscientious waiver of the right to counsel.[7] WIS. STAT. § 971.08. A verbal

[6] The State concedes, however, that Shanks has made a prima facie showing that he was denied his constitutional right to counsel. The question we address is whether the State has met its burden to show that Shanks did, in fact, understand the right he waived.

[7] WISCONSIN STAT. § 971.08 provides in part: "(1) Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted."

colloquy with the defendant is not required.[8] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 826-27, 416 N.W.2d 627 (Ct. App. 1987). A court may use its discretion to tailor the plea hearing to serve its purposes as long as the record establishes that the defendant entered his or her plea knowingly, voluntarily, and intelligently. *See* ***State v. Brandt***, 226 Wis. 2d 610, 620-22, 594 N.W.2d 759 (1999). Thus, a form can be sufficient to obtain a valid waiver, but the record must show an understanding by the defendant of the implications of signing the form. *See* ***Moederndorfer***, 141 Wis. 2d 823, 826-27.

¶18 The State argues, however, that Shanks' testimony is incredible as a matter of law because it is self-serving and disingenuous. However, whether Shanks' testimony is self-serving and disingenuous is not a matter for this court to determine. "It is the function of the trier of fact, and not this court, to resolve questions as to the weight of testimony and the credibility of witnesses." ***Hughes***, 233 Wis. 2d 280, ¶2 n.1. Although it could have found otherwise, the trial court in this case found as a matter of fact that Shanks did not understand.[9]

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[8] In ***State v. Moederndorfer***, 141 Wis. 2d 823, 825-27, 416 N.W.2d 627 (Ct. App. 1987), the defendant attempted to withdraw his plea of guilty to a burglary charge. The defendant asserted that he did not understand that he was giving up certain constitutional rights when he agreed to plead guilty. ***Id.*** at 826-27. He alleged that he did not understand because the court communicated the waiver of his rights through a signed "waiver of rights" form rather than a verbal colloquy. ***Id.*** We rejected the assertion that such a form is insufficient for assessing the defendant's understanding of the waiver of his rights. ***Id.*** at 828. Rather, such a form may even be superior to an oral colloquy. ***Id.*** "People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting." ***Id***. Therefore, ***Moederndorfer*** establishes that the questionnaire can satisfy the court's duty to personally address the defendant and assess his understanding under WIS. STAT. § 971.08.

[9] The transcript from the November 9, 2007 motion hearing sets forth the following:

> Q. Okay, so you agreed to the advisory about your lawyer …?

(continued)

¶19 Based on the trial court's finding that Shanks did not, in fact, understand his right to counsel at the Illinois proceeding, we agree that Shanks' waiver of his right to counsel was not knowing, voluntary, and intelligent. The State does not show by clear and convincing evidence that there was not a constitutional violation of the right to counsel and that Shanks waived his right to

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> ….
>
> A. I signed the papers. I didn't—I was in a hurry. I didn't really—I had a stack of papers in front of me and he said, sign these, and that's what I did.
>
> Q. Okay.
>
> A. People were antsy and angry.
>
> ….
>
> Q. Is there anything about that form that you didn't understand that day?
>
> A. I didn't read the form.
>
> Q. But is there anything, is there anything about it that you did not understand that day?
>
> A. I didn't read the form that day so there was nothing for me to understand. I signed it.
>
> Q. Did anything happen in Court that day that you didn't understand?
>
> A. No; no.
>
> Q. Okay. Did you proceed voluntarily that day to take this Court supervision on that OWI?
>
> A. Yes, I did, I did take it. The gentleman told me if I take that Court supervision and don't get in any trouble, than (sic) my DUI is completely dropped so I thought it was a good deal.

counsel knowingly, intelligently, and voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶20 The U.S. Supreme Court has succinctly stated that the essence of a valid waiver is that the defendant "knows what he is doing and his choice is made with eyes open." ***Iowa v. Tovar***, 541 U.S. 77, 88 (2004) (citation omitted). The State does not establish that Shanks entered his plea with his "eyes open." Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.