

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2009

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. 2008AP2670-CR

Cir. Ct. No. 2007CT1808

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUSTIN S. BUCHHOLZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Justin Buchholz appeals a circuit court judgment convicting him of operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant, as a third offense. The only issue is whether Buchholz's collateral attack on one of his prior convictions should have succeeded. I conclude that the circuit court properly rejected Buchholz's collateral attack, and affirm the judgment.

Background

¶2 The State charged Buchholz with a third drunk driving offense based on two prior convictions, one in 1996 and one in 2004. Buchholz moved to collaterally attack the 2004 conviction, arguing that it had been obtained without a valid waiver of his right to counsel. The circuit court denied the motion after holding an evidentiary hearing, and Buchholz was found guilty of and sentenced for a third offense. Additional facts will be referenced as needed below.

Discussion

¶3 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that the defendant was denied the constitutional right to counsel in the prior proceeding. *State v. Hahn*, 2000 WI 118, ¶25, 238 Wis. 2d 889, 618 N.W.2d 528. Buchholz contends that the circuit court misinterpreted the law relating to collateral attacks directed at waiver of counsel in a prior proceeding and, therefore, applied a wrong legal standard. I need not further explain Buchholz's legal argument in this respect because, even assuming that the circuit court misinterpreted the law as Buchholz suggests, the court independently rejected Buchholz's collateral attack on the ground that Buchholz's underlying factual assertions lacked credibility. Specifically, the court stated:

[T]his court concludes, based upon the demeanor of [Buchholz] in the [hearing on the collateral attack] as well

as his prior experience in being convicted of OWI as a first offense and the self-serving nature of the claim, that the defendant's assertion that [had he] been advised that there could be advantages to representation he would have sought counsel lacks credibility.

The circuit court made its credibility finding after an evidentiary hearing at which Buchholz admitted that the primary reason he did not obtain counsel in 2004 was because he was guilty and wanted to resolve the matter as quickly as possible. Buchholz also testified that, because he wanted to resolve the 2004 matter as quickly as possible, he was just "going through the motions" when the judge asked him certain questions.

¶4 Buchholz does not challenge the circuit court's credibility finding. *See Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980) ("The trial court is the ultimate arbiter of the credibility of witnesses and a reviewing court will accept the inference drawn by the trier of fact."). Rather, he argues for the first time in his reply brief that the circuit court's finding does not address the question that is ultimately dispositive: whether the State met its burden to show that Buchholz's waiver of counsel in 2004 was a knowing one.² Putting aside whether this argument is timely or sufficiently developed, I reject it on its merits. Although Buchholz testified that he did not understand at the relevant time in 2004 what a lawyer could do for him, it is apparent that the circuit court disbelieved that testimony. Implicit in the circuit court's credibility finding

² The usual procedure for a collateral attack like the one here is that the defendant must bring forth evidence to make a prima facie showing that he or she was deprived of the constitutional right to counsel in the prior proceeding. *State v. Hammill*, 2006 WI App 128, ¶6, 293 Wis. 2d 654, 718 N.W.2d 747. If the defendant makes a prima facie showing, the burden then shifts to the State to prove the defendant knowingly, voluntarily, and intelligently waived the right to counsel. *Id.* Here, the circuit court and the State apparently agreed with Buchholz that Buchholz made a prima facie showing that he did not know or understand the benefits of having an attorney.

is a finding that Buchholz's waiver of counsel in 2004 was knowing and that Buchholz simply chose not to obtain counsel for reasons of expediency.

¶5 Buchholz also argues that his collateral attack should have succeeded on an alternative basis. Under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), the colloquy a defendant receives must inform the defendant of the range of penalties he or she faces, *see id.* at 206, and there is no dispute here that the circuit court judge in Buchholz's 2004 case failed to give him this information at the plea hearing.

¶6 Buchholz's alternative basis for his collateral attack fails, however, because he has not alleged, testified, or even argued that he did not actually know or understand the range of penalties at the time of his plea.³ Under *State v. Ernst*, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92, in order to satisfy the standard for collateral attacks, a defendant must do more than simply allege that the plea colloquy was defective. The defendant must also "point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding." *Id.* (citation omitted).

¶7 In sum, the circuit court properly rejected Buchholz's collateral attack on his 2004 conviction. The court's judgment is affirmed.

By the Court.—Judgment affirmed.

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

³ Buchholz does not dispute that he was informed of the range of penalties at his initial appearance, five weeks before his plea hearing for the 2004 charge.

