COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0533-CR **Cir. Ct. No. 00-CT-90**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. KIDD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

¶1 DYKMAN, J.[1] This is an appeal from a judgment convicting Michael Kidd of operating a motor vehicle while intoxicated, contrary to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STAT. § 346.63(1)(a) and operating a motor vehicle with a prohibited blood alcohol content, contrary to § 346.63(1)(b).[2] Because Kidd had three prior convictions, he was subject to more severe penalties under WIS. STAT. § 346.65(2)(d) than for his first, second or third convictions. The trial court denied Kidd's motion to invalidate two of his prior convictions, and sentenced him as a fourth offender. We conclude that Kidd has made a *prima facie* showing that two of his prior convictions were obtained without an adequate inquiry into whether Kidd's waiver of his Sixth Amendment right to counsel was knowing and voluntary. We therefore reverse and remand with instructions to hold an evidentiary hearing at which the State will be required to prove that Kidd knowingly, intelligently and voluntarily waived his right to counsel.

¶2 Kidd and the State agree that Kidd has a limited right to collaterally attack prior convictions if he asserts that the convictions were obtained through a violation of his constitutional right to counsel. ***State v. Peters***, 2001 WI 74, ¶14, 244 Wis. 2d 470, 476, 628 N.W.2d 797. Kidd has done so. He argues that his right to counsel was violated because he did not waive it knowingly, intelligently, and voluntarily. The parties also agree that because Kidd was convicted of two counts of operating a motor vehicle while intoxicated in 1991, the standard we are to use to determine whether this right was violated is found in ***Pickens v. State***, 96 Wis. 2d 549, 292 N.W.2d 601 (1980). Under ***Pickens***, for a waiver of the right to counsel to be valid, "the record must reflect" that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the

[2] WISCONSIN STAT. § 346.63(1)(c) provides that for the purposes of sentencing and counting convictions, there shall be only one conviction of § 346.63(1). Whether the judgment showing two convictions should be amended is not a matter we need decide today.

charge or charges against him or her, and (4) was aware of the general range of penalties that could have been imposed on him or her. ***Id.*** at 563-64.[3] Kidd focuses on the second element, arguing that his right to counsel was violated in two previous drunk driving cases because the record does not reflect that he was aware of the difficulties and disadvantages of self-representation.

¶3 Nonwaiver of the right to counsel is presumed, and waiver must be affirmatively shown to be knowing and voluntary. ***Pickens***, 96 Wis. 2d at 555. However, the initial burden is on the defendant to make a *prima facie* showing that the trial court accepted his plea without determining that the plea was knowing, intelligent and voluntary. *See* ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). If a defendant makes this showing, and:

> [A]lleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Id.

¶4 Kidd's two 1991 pleas to operating while intoxicated took place in Dane and Richland counties. In both instances, waiver of counsel questionnaires had not yet come into use. In Dane County, Kidd was told of his right to an attorney and that if he could not afford one, an attorney would be appointed at

[3] This standard was modified in ***State v. Klessig***, 211 Wis. 2d 194, 205-06, 564 N.W.2d 716 (1997), which held that it is insufficient simply to show that the record reflects the defendant's understanding of these four elements. Rather, ***Klessig*** expressly requires circuit courts to engage in a colloquy "in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." ***Id.*** at 206. Because the convictions Kidd is attacking occurred in 1991, six years before ***Klessig*** was decided, we follow the standard as it was articulated in ***Pickens v. State***, 96 Wis. 2d 549, 292 N.W.2d 601 (1980).

county expense. Kidd replied that he understood that, and did not want an attorney. In Richland County, Kidd was told the same information.[4] But, telling a defendant of his or her right to an attorney without explaining that an attorney might help him does not convey much information. If a defendant is not aware of the difficulties and disadvantages of self-representation, he or she is without the information with which to make a knowing, intelligent and voluntary choice to obtain an attorney or forego one.

¶5 The State observes that, under ***Pickens***, the circuit court is not required to engage in a colloquy in each instance and argues that the totality of the record demonstrates that Kidd knew the disadvantages of self-representation. It argues that Kidd must have known quite a bit about criminal court, since his Dane and Richland County convictions were less than two months apart. And it notes that in Dane County, Kidd signed a plea questionnaire. But the plea questionnaire does not mention Kidd's right to an attorney, or what an attorney might do for him. It does not explain the disadvantages and difficulties of self-representation. Kidd could have had an excellent knowledge of the constitutional rights he was waiving. But this is unhelpful if he did not know that an attorney might be able to assist him. This case is an example of that proposition. Kidd is now aware that his prior convictions might not provide a basis for sentence enhancement. But when he pled guilty in Richland County, it is unlikely that Kidd knew that an attorney might have helped him by, for example, attacking the earlier Dane County conviction on the same basis that his attorney is attacking it here. Although the record does not need to reflect that Kidd understood every potential

[4] In both Dane and Richland counties, Kidd was told of several constitutional rights, other than the right to counsel, that he would give up by pleading guilty. Kidd acknowledged that he understood these rights and was willing to relinquish them. But ***Pickens*** makes clear that the right to counsel, and its waiver, is a separate matter.

way that an attorney could assist him, it must at least "affirmatively appear" that he knew that an attorney could present arguments or defenses of which Kidd was not aware. *See* ***Pickens***, 96 Wis. 2d at 564. In our view, it is insufficient to make this affirmative showing through an inference that because Kidd may have been knowledgeable regarding some of his rights, he must also have known the disadvantages of self-representation.

¶6 We conclude that for both the Dane County and Richland County cases, the totality of the records show that the State has not met its burden of showing that Kidd waived his right to counsel. Kidd has made a *prima facie* case of nonwaiver. Accordingly, pursuant to ***Baker***, the burden now shifts to the State to show at an evidentiary hearing by clear and convincing evidence that, despite the inadequacy of the records at the time Kidd entered his pleas, the pleas were knowingly, voluntarily and intelligently entered.

By the Court.—Judgment reversed and cause remanded with directions.

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