

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP2577-CR

Cir. Ct. No. 2008CF2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL A. SWEENEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Paul Sweeney appeals a judgment convicting him of a fifth or subsequent offense of operating while under the influence of an intoxicant (OWI-5th), plus a count of operating after revocation. He challenges the

circuit court's denial of his collateral attack on a prior OWI conviction. We affirm for the following reasons.

¶2 A defendant may collaterally attack a prior conviction to prevent its use as a penalty enhancer when the prior conviction was obtained in violation of the defendant's right to counsel. *See State v. Hahn*, 2000 WI 118, ¶¶28-29, 238 Wis. 2d 889, 618 N.W.2d 528. The defendant has the initial burden of making a prima facie showing by affidavit and citation to any relevant portions of the record that he or she did not know or understand some aspect of the right to counsel or the information that should have been provided, and thus did not knowingly, intelligently and voluntarily waive that right. *State v. Ernst*, 2005 WI 107, ¶¶25, 33, 283 Wis. 2d 300, 699 N.W.2d 92. A mere allegation that the plea colloquy was defective or that the court failed to perform some duty imposed under the supervisory authority of the Wisconsin Supreme Court is insufficient to satisfy this standard. *Id.*

¶3 Once a prima facie case has been made, the burden shifts to the State to prove by clear and convincing evidence at an evidentiary hearing that the defendant in fact possessed the constitutionally required understanding and knowledge for a valid waiver of counsel. *Id.*, ¶¶27, 31. The central component of a constitutionally valid waiver is that the defendant knew what he was doing and made a choice to proceed pro se "with his eyes open," taking into account his education or sophistication, the complexity of the charge and the stage of the proceeding. *Id.*, ¶16. The State may examine the defendant or defense counsel in order to satisfy its burden, and the circuit court may draw an inference that the waiver was valid if the defendant refuses to testify. *Id.*, ¶¶33-36. We independently review whether a prima facie case has been made and, if so, whether the established facts show a violation of the right to counsel. *Id.*, ¶10.

¶4 Here, Sweeney’s motion alleged that there was nothing in the record of the prior OWI case that showed he was aware of the difficulties and disadvantages of self-representation before waiving counsel. The motion was accompanied by an affidavit averring that Sweeney was not, in fact, aware of the difficulties and disadvantages of self-representation, but the affidavit did not contain any more specific facts (aside from the deficient colloquy) to support that general assertion or explain how certain additional information would have affected his decision. Nor did the motion allege that Sweeney lacked a reasonable understanding of the charge and penalty he was facing or the nature of the proceeding.

¶5 The circuit court ruled that the affidavit itself was insufficient to make a prima facie case because it contained a mere self-serving statement of the conclusion that Sweeney did not understand the difficulties and disadvantages of self-representation without pointing to any facts demonstrating the defendant did not understand what he was doing in proceeding without counsel. We agree. Again, under *Ernst*, allegations that the *colloquy* regarding a waiver of counsel was deficient do not establish a prima facie case for a collateral attack; there must be particularized facts showing that the defendant’s *actual understanding* of his right to counsel was deficient in some manner.

¶6 Despite the court’s ruling that the affidavit was insufficient, it proceeded to hold an evidentiary hearing, apparently with the idea of allowing Sweeney to bolster his prima facie case. Sweeney testified that he had not hired a lawyer in his prior OWI case because he “just thought lawyers were out to get your money” and had no idea that a lawyer might be able to find defenses to the charges against him. He thought he would just have to pay the fine and the lawyer, too. He acknowledged that he would probably have gotten a lawyer if he

had been charged with something like homicide or robbery, but did not think that the OWI was that serious. The trial court concluded that Sweeney's testimony was still insufficient to establish a prima facie case, because it showed that he knowingly chose not to retain counsel to avoid the extra cost when he was only going to enter a plea and because his consciousness of guilt led him to believe an attorney could not do anything for him anyway. We agree that a conscious decision to proceed without representation based on a cost/benefit analysis of the cost of an attorney weighed against the seriousness of the penalty constitutes a constitutionally valid waiver.

¶7 Sweeney complains that the trial court inappropriately shifted the burden of proof to him at the hearing. However, given the trial court's conclusion that Sweeney had failed to make a prima facie case, the burden of proof never shifted to the State in the first place.

By the Court.—Judgment affirmed.

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

