COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP833-CR **Cir. Ct. No. 2006CF1023**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. BUCKNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] David J. Bucknell appeals from a judgment of conviction for fourth offense operating a motor vehicle while under the influence of an intoxicant (OWI). He challenges an order denying his motion collaterally

[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.

attacking prior convictions for second and third offense OWI. Bucknell contends that his constitutional right to counsel was violated with respect to those prior convictions because his waiver of counsel was not knowing, intelligent, and voluntary. We disagree and affirm.

BACKGROUND

¶2 In 2006, Bucknell was charged with fifth offense OWI, contrary to WIS. STAT. § 346.63(1)(a), which was subsequently amended to a fourth offense after a prior conviction as adjudicated void. Bucknell filed a motion with the circuit court seeking to collaterally attack his prior second and third offense OWI convictions in order to reduce the penalty enhancement in the pending case. Bucknell alleged that he had not validly waived his Sixth Amendment[2] right to counsel when, appearing pro se, he pled guilty to those two prior OWI charges.

¶3 At the initial hearing on his motion, Bucknell argued that his waiver of counsel was not knowing, intelligent, and voluntary because the circuit court judge did not engage in a plea colloquy with him or "ask[] the proper questions whether he waived his right to an attorney." The circuit court determined that Bucknell made a prima facie showing that his waiver of counsel was not knowing, intelligent and voluntary, and an evidentiary hearing was subsequently held. Following the evidentiary hearing, at which much evidence was presented on whether Bucknell was pressured into waiving his right to an attorney, the court concluded that the State had proven that Bucknell's waiver of counsel was in fact

[2] "The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process," which includes plea hearings. ***Iowa v. Tovar***, 541 U.S. 77, 87 (2004) (citation omitted).

knowing, intelligent, and voluntary. The court found that Bucknell knew he had a right to an attorney, knew what an attorney did, and that he was not pressured into giving up his right to an attorney.

¶4 Following the denial of his motion, Bucknell plead no contest to fourth offense OWI and a judgment of conviction was entered by the court. Bucknell appeals.

STANDARD OF REVIEW

¶5 Whether a defendant knowingly, intelligently, and voluntarily waives his or her Sixth Amendment right to counsel presents a mixed question of fact and law. We will uphold the circuit court's factual findings unless they are clearly erroneous, but we will independently decide whether those facts satisfy the constitutional standard. ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423.

DISCUSSION

¶6 A defendant may collaterally attack the validity of a prior conviction upon which a later sentence is predicated "only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. The defendant seeking to collaterally attack the prior conviction bears the initial burden of making a prima facie showing that his or her constitutional right to counsel in the prior proceeding was violated. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. To meet this burden, the defendant must "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 and, thus, did not

knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.*** (internal quotation omitted). General allegations that the plea colloquy was defective or that the court failed to conform to its mandatory obligations during the plea colloquy are insufficient. ***Id.***

¶7 If the defendant makes a prima facie showing, the burden shifts to the State to prove by clear and convincing evidence at an evidentiary hearing that the defendant's waiver of counsel was nevertheless knowingly, intelligently, and voluntarily entered. ***Id.***, ¶27. The State will in essence "be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him [or her]." ***Id.***, ¶31. To satisfy its burden, the State may examine the defendant "to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." ***Id.***, ¶31. If the State is unable to meet its burden, the defendant will be entitled to "attack, successfully and collaterally, his or her previous conviction." ***Id.***, ¶27.

¶8 Bucknell argues that his waiver of counsel was not knowing and intelligent because the circuit court failed to discuss with him his Sixth Amendment right to counsel prior to accepting his pleas.

¶9 In ***Iowa v. Tovar***, 541 U.S. 77, 81-88 (2004), the United States Supreme Court clarified that specific state mandated warnings as to the disadvantages of self-representation are not required for a waiver of counsel to be constitutional under the Sixth Amendment. Bucknell acknowledges this holding, but argues that the circuit court must engage in at least some discussion with the defendant regarding his or her waiver of counsel. In making this argument he relies on ***Tovar***, wherein the court stated: "The constitutional requirement is

satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." ***Id***. at 81. We note, however, that the court did not hold that these advisements are the basic minimum a court must give in order for a defendant's waiver of counsel to be constitutionally valid, and Bucknell cites to no other authority which so holds.

¶10 It is undisputed that the circuit court judge who oversaw Bucknell's pleas to second and third offense OWI did not engage Bucknell in any type of colloquy or ask him any question regarding his waiver of his right to an attorney. It is also undisputed that the files for those cases no longer contain a waiver of right to an attorney form, nor a plea questionnaire form, though it appears that Bucknell provided a written plea advisement prior to entering his pleas.[3] Nevertheless, it is clear from Bucknell's testimony at the hearings on his motion that he was aware of his right to be represented by an attorney at the prior proceeding and that he knowingly and intelligently relinquished that right.

¶11 Bucknell testified at the hearing that he had been represented by counsel in prior proceedings and was aware of what an attorney could do for him. His testimony also indicates that he was aware that there were risks in not being represented by an attorney—that an attorney might be able to negotiate a better

[3] The judge who accepted Bucknell's pleas to second and third offense OWI found that Bucknell enters his pleas knowingly, intelligently, and voluntarily based in part on a written plea advisement. Bucknell testified that he did not recall whether he received this advisement or not.

plea agreement for him.[4] Bucknell testified that following his arrest on a bench warrant for failing to appear in those cases, he spoke with the Public Defender's office to see if he qualified for appointed counsel, but learned that he did not. He testified that he then inquired into hiring a private attorney, but was unable to afford an attorney at that time and decided not to hire an attorney at that point. He testified at the final pretrial proceeding that it was not his desire to have an attorney and that "[a]t that point [he] just wanted … to get the thing over with" and he "knew that [he] couldn't come up with the money that [he] needed for the retainer fee." He also testified that approximately one month prior to his sentencing in those cases, he decided he wanted to hire an attorney and in fact spoke with one, but upon learning that he did not have the funds for a retainer, he decided to enter his pleas pro se.

¶12 Although the court did not engage in a discussion with Bucknell regarding his right to an attorney, it is clear from Bucknell's testimony that he was aware of this right but made a conscious decision to waive that right due to financial constraints. Accordingly, we conclude that Bucknell's waiver of his right to counsel prior to his guilty pleas to second and third offense OWI was knowing and intelligent.

¶13 Bucknell next argues that his waiver of counsel was not voluntary because he was pressured into entering his pleas without an attorney. He claims that he wished to have an attorney at the plea hearing, but following a

[4] Bucknell testified that prior to entering his pleas, he spoke with a friend who had been convicted of fourth offense OWI and had not been given probation, which Bucknell thought was "a better disposition" than having probation. Bucknell's friend had been represented by an attorney at the time of his conviction and Bucknell testified that he believed that if he was represented by an attorney, he might not have been sentenced to probation.

conversation with Nicholas Bolz, who was an Assistant District Attorney at the time, he believed that if he prolonged the cases by requesting an attorney, the judge would have been upset with him and would have given him a harsher sentence.

¶14 At the hearing on Bucknell's motion, Bucknell testified that on the morning his pleas and sentencing were supposed to take place, he spoke with Attorney Bolz about his desire to hire an attorney. He testified that Attorney Bolz informed him that "it was kind of late, because [he] was scheduled for a plea and sentencing that date, and it would only upset the judge." He testified that it was his understanding that Attorney Bolz "was telling [him] it was a little late in the process for [him] to start thinking about an attorney" and based upon what Attorney Bolz had said to him, he was afraid that if he sought to delay the proceeding further to hire an attorney, the judge would be mad and impose a worse sentence.

¶15 Attorney Bolz testified at the hearing that he did not recollect Bucknell or the factual details of his cases. He further testified, however, that he would never tell a defendant that he or she could not have an attorney, that there would never be an occasion that he would tell a defendant it was too late to have an attorney, that he would never tell a defendant that it would upset a judge or make a judge mad if the defendant requested an attorney, and that he would never have a discussion with a defendant about whether or not a plea offer would get better if the defendant was represented by an attorney.

¶16 The circuit court found Attorney Bolz's testimony to be more credible than Bucknell's. That circuit court is the ultimate arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274

N.W.2d 647 (1979). We will uphold the court's findings of facts, including credibility determinations, unless they are clearly erroneous. *See* ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305; WIS. STAT. § 805.17(2). Here, the circuit court's choice to believe Attorney Bolz's testimony over Bucknell's was a credibility choice that is not clearly erroneous. Because Attorney Bolz's more credible testimony refutes Bucknell's claim that he was in essence coerced into waiving his right to counsel, we conclude that Bucknell's waiver of counsel was not involuntary.

¶17 Having concluded that Bucknell's waiver of counsel was knowing, intelligent, and voluntary, we conclude, as did the circuit court, that this waiver of counsel was constitutionally valid. We therefore determine that the circuit court's judgment denying Bucknell's motion to collaterally attack his pleas to second and third offense OWI was proper and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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