

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2010

A. John Voelker
Acting 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. 2010AP480-CR

Cir. Ct. No. 2008CF162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS D. REESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
D. TODD EHLERS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Douglas Reese appeals a judgment convicting him of fifth-offense driving while intoxicated. He pled no contest after the circuit court denied his motion to void a prior conviction in Calumet County for the

purposes of penalty enhancement. Reese contends he was not represented by counsel during his guilty plea in the Calumet County case and his waiver of counsel was not knowing, voluntary and intelligent. Because the State met its burden of showing by clear and convincing evidence that Reese knowingly, voluntarily and intelligently waived his right to counsel in the Calumet County case, we affirm the judgment.

¶2 A defendant who faces an enhanced sentence based on a prior conviction may collaterally attack the earlier conviction only upon a claim of denial of his constitutional right to counsel. *State v. Hahn*, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. The defendant must initially make a prima facie showing that he did not know or understand the information that should have been provided in the previous proceeding and, as a result, did not knowingly, voluntarily and intelligently waive his right to counsel. *State v. Ernst*, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. Once a prima facie showing is made, the burden shifts to the State to prove by clear and convincing evidence that his waiver of counsel was knowing, voluntary and intelligent. *Id.* at ¶27. A waiver of counsel is valid if it reflects a deliberate choice to proceed without counsel as well as the defendant's awareness of the difficulties and disadvantages of self-representation, the charges and the penalties. *State v. Klessig*, 211 Wis. 2d 194, 205, 564 N.W.2d 716 (1997).

¶3 Reese was the only witness at the motion hearing at which he challenged the Calumet County conviction. He testified he attempted to hire an attorney, but was unable to do so due to financial constraints. He accepted the plea bargain offered by the State because the prosecutor informed him there would

be no plea bargains at a later date. He testified the Calumet County court did not ask him if he was sure he wanted to proceed without an attorney and did not tell him he had a constitutional right to representation. He further testified he was not informed of the penalties. He signed a plea questionnaire and waiver of rights form, but testified he signed the document without reading it. He testified the Calumet County court only asked if he signed the plea questionnaire, but not whether he read it.

¶4 Reese also testified regarding a Brown County conviction for driving while intoxicated that resulted from a no contest plea entered three days before the Calumet County plea hearing. He admitted to having counsel at that time and understanding the legal services provided by an attorney. He testified his Brown County attorney went over the plea questionnaire and waiver of rights form with him. Based on Reese's testimony, the circuit court found the State met its burden of proving by clear and convincing evidence that Reese knowingly, voluntarily and intelligently waived his right to counsel in the Calumet County case. The court found incredible Reese's testimony regarding lack of knowledge of his right to counsel, counsel's functions and the potential penalties.

¶5 The record supports the circuit court's finding that Reese properly waived his right to counsel in the Calumet County case. Reese acknowledged his awareness of his right to an attorney and what an attorney could do for him. He acknowledged reviewing the elements of driving while intoxicated with an attorney three days earlier in the Brown County case. He chose to waive representation by counsel in order to take advantage of the State's time-sensitive plea offer. The decision to waive counsel demonstrated a deliberate, knowing, voluntary and intelligent choice.

¶6 Citing *State v. Nicholson*, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), Reese argues the State did not meet its burden because the circuit court's finding was based on a "negative inference" from its finding that Reese's testimony was not credible. The circuit court's finding was not based solely on a negative inference. Rather, Reese's own testimony regarding the totality of the circumstances, particularly his concessions regarding the Brown County conviction, support the circuit court's finding. Unlike *Nicholson*, Reese's own testimony provides positive evidence of his valid waiver of his right to counsel.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

