COURT OF APPEALS DECISION DATED AND FILED

October 23, 2003

Cornelia G. Clark
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. 02-3136-CR

Cir. Ct. No. 01-CM-129

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAAS P.J. LIGTENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded with directions*.

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Nicholaas P.J. Ligtenberg appeals a judgment convicting him of fifth offense operating while intoxicated (OWI), and an order denying postconviction relief. The issue is whether Ligtenberg received effective

assistance from trial counsel. We conclude that trial counsel did not effectively represent Ligtenberg. We therefore reverse.

¶2 The State charged Ligtenberg with fourth offense OWI, and several other offenses. This case was subsequently consolidated with another OWI prosecution, making that one his fourth offense and causing the State to amend the charge to felony fifth offense OWI in this case. After plea negotiations Ligtenberg agreed to enter a no contest plea to fourth and fifth offense OWI on the consolidated charges. In exchange for the plea, the State dismissed all other pending charges. At the plea hearing, Ligtenberg admitted to three prior OWI convictions, including one entered in July 1996. Upon conviction, Ligtenberg received a five-year sentence, with three years of initial confinement followed by two years of extended supervision.

¶3 A defendant may collaterally attack a prior conviction the State uses as a penalty enhancer, if the defendant was unrepresented in the prior proceeding without a valid waiver of counsel. ***State v. Stockland***, 2003 WI App 177, ¶¶12-13, ___ Wis. 2d ___, 668 N.W.2d 810. The examining court tests whether the defendant validly waived counsel under the law prevailing at the time of the prior conviction. ***Id.***, ¶14. In July 1996, the rule on waiver provided:

> [I]n order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver [of counsel] will not be found.

Id., *quoting* ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980), *overruled by* ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997).

¶4 In his postconviction pleading, Ligtenberg alleged that his July 1996 OWI conviction was subject to a collateral attack under the ***Pickens*** rule, and that counsel was ineffective for failing to investigate or raise that issue. Counsel admitted that he never looked at the record of the 1996 conviction. However, the trial court concluded that Ligtenberg validly waived counsel during the 1996 proceeding, such that counsel's omission did not prejudice him. On appeal, Ligtenberg challenges the trial court's determination that he validly waived counsel during the 1996 proceeding. He further contends that because he did not validly waive counsel, counsel's failure to investigate or raise the issue was ineffective and prejudicial. Finally, he contends that the remedy, should this court rule in his favor, is a remand for resentencing him on the reduced charge of fourth offense OWI.

¶5 To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), *quoted in* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. ***Id.*** at 690, *quoted in* ***Pitsch*** at 636-37. Prejudice results when there is a reasonable probability that "but for counsel's error the result of the proceeding would have been different." ***Id.*** at 694, *quoted in* ***Pitsch*** at 642. Whether counsel's behavior was deficient and whether it prejudiced the defendant are questions of law. ***Pitsch***, 124 Wis. 2d at 634.

¶6 We conclude that Ligtenberg did not validly waive counsel during the 1996 OWI prosecution. In that proceeding Ligtenberg appeared before the court and said he wished to plead guilty. The entire colloquy on the waiver of counsel issue is as follows:

> THE COURT: Okay, you're going to waive or give up your right to counsel?
>
> MR. LIGTENBERG: Yes.
>
> THE COURT: Do you understand that if you are unable to afford an attorney, the Public Defender's office might be able [to] represent you free of charge?
>
> MR. LIGTENBERG: Yes.
>
> THE COURT: Do you understand an attorney is trained in the law and that you are not a lawyer?
>
> MR. LIGTENBERG: Yes.

That brief colloquy did not provide the assurance of a knowing and voluntary waiver that ***Pickens*** requires. *See also* ***Klessig***, 211 Wis. 2d at 206 (mandating the use of a colloquy designed to ensure defendant was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges, and the general range of penalties that could be imposed). Because Ligtenberg waived counsel and entered his plea at his initial appearance, no other facts of record reflect a knowing and voluntary waiver. Consequently, Ligtenberg could have successfully challenged the 1996 conviction as a penalty enhancer in this proceeding. Failure to do so was prejudicial.

¶7 There is no evidence of record to show that trial counsel here made a deliberate, reasonable decision to forgo challenging the 1996 waiver. In postconviction testimony counsel opined that the 1996 waiver was valid. However, he also admitted that he had not reviewed the transcript of the waiver

colloquy. Although the State suggests that counsel made a sound, strategic decision to forgo a challenge in order to preserve a favorable plea bargain, nothing in counsel's testimony nor anything else in the record supports that assertion. We find no indication of why a challenge to the number of prior offenses would have jeopardized the plea bargain. It appears from his own testimony that counsel simply reached a decision without adequate investigation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 691. Counsel did not fulfill that duty here.

¶8 Ligtenberg contends that a remand for resentencing on misdemeanor fourth offense OWI is the remedy that this court should grant him. We disagree. When a defendant successfully challenges a conviction resulting from a plea bargain, ordinarily the remedy is to reverse the conviction, vacate the plea agreement, and reinstate the original charges, so that the parties are restored to their position before the negotiated plea agreement. *See* ***State v. Robinson***, 2002 WI 9, ¶57, 249 Wis. 2d 553, 638 N.W.2d 564. There are exceptions to this rule if such a remedy adversely affects the ability to prosecute or defend the original counts or exposes the defendant to the risk of a greater sentence. *See* ***id.***, ¶49. Nothing in the record suggests the former, and Ligtenberg faces substantially lesser penalties under the original misdemeanor charges if the 1996 prior offense is removed from consideration.

¶9 We are aware that Ligtenberg stated in the trial court that he did not want this remedy, although it is not clear why since he would appear to substantially benefit from it. If Ligtenberg does not want the only remedy that is available to him, he may move for reconsideration of our decision to reverse his conviction.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).