COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3040-CR **Cir. Ct. No. 2010CT7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE MCGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

¶1 PETERSON, J.[1] George McGee appeals a judgment convicting him of operating while intoxicated (OWI), fourth offense, and an order denying his motion to collaterally attack one of his prior OWI convictions. Specifically,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

McGee contends his second OWI conviction cannot be used to enhance his sentence because he did not validly waive his constitutional right to an attorney in that case. We disagree and affirm.

BACKGROUND

¶2 A criminal complaint charged McGee with OWI and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. The complaint set forth three prior OWI convictions for sentence enhancement purposes—a 1996 Brown County conviction, and Manitowoc County convictions from 2000 and 2001.

¶3 McGee moved to collaterally attack the 2000 conviction on the ground that he was not represented by counsel in that case and did not knowingly, voluntarily, and intelligently waive his right to counsel.[2] Based on the plea hearing transcript from the 2000 case, McGee asserted the Manitowoc County circuit court did not adequately explain the difficulties and disadvantages of self-representation before allowing him to proceed without counsel. He also contended that "the transcript is void of any information regarding [McGee's] knowledge of [the] difficulties and disadvantages of self-representation." He further alleged, "There is no information contained in the transcript that [McGee] ever waived his constitutional right to counsel or that he made a deliberate choice to proceed without counsel." In an affidavit accompanying the motion, McGee stated:

> I do recall being asked whether I waived my right to an attorney, or whether I wished to proceed without an attorney in [the 2000 case]. I did not understand the

[2] McGee also filed a separate motion to collaterally attack his 2001 conviction. That motion was later withdrawn, and the 2001 conviction is not at issue in this appeal.

> difficulties and disadvantages of self-representation when I proceeded without counsel. I didn't understand that … an attorney might be able to find a defense to the charges.

¶4 The circuit court held an evidentiary hearing on May 26, 2010. McGee testified, and the initial appearance transcript from the 2000 case was introduced into evidence. The court denied McGee's motion, concluding McGee did not make a prima facie showing that his right to counsel was violated. The court reasoned:

> [A]t the initial appearance [in the 2000 case] [the judge] inquired, "An attorney might be able to point out defenses to these cases that you might not recognize yourself. Do you understand that?" [McGee] responded, "Yes, I do." … No evidence of the May 26th evidentiary hearing contradicted his stated understanding that a lawyer could be helpful, by any type of specific facts or examples. Mr. McGee simply stated he wasn't aware he might have defenses.

McGee subsequently pled no contest to OWI, fourth offense, and the PAC charge was dismissed and read in. McGee now appeals.

DISCUSSION

¶5 A defendant who faces an enhanced sentence due to a prior conviction may only collaterally attack the prior conviction based on a denial of the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. To be constitutionally valid, a defendant's waiver of the right to counsel must be entered knowingly, intelligently, and voluntarily. ***State v. Klessig***, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997).

¶6 In ***State v. Ernst***, 2005 WI 107, ¶¶25-27, 283 Wis. 2d 300, 699 N.W.2d 92, our supreme court adopted a burden shifting procedure for evaluating collateral attacks. The initial burden rests with the defendant to make a prima

facie showing that he or she did not knowingly, voluntarily, and intelligently waive the right to counsel. ***Id.***, ¶25. The defendant must point to specific facts demonstrating 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.*** (quoting ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14). "Any claim of a violation [of the right to counsel] on a collateral attack that does not detail such facts will fail." ***Id.*** Accordingly, a defendant cannot make a prima facie showing merely by alleging that the court's colloquy did not meet the requirements set forth in ***Klessig***.[3] *See* ***Ernst***, 283 Wis. 2d 300, ¶¶25-26. Whether the defendant has made a prima facie showing is a question of law subject to independent review. ***Id.***, ¶10. If the defendant makes a prima facie case, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was constitutionally valid. ***Id.***, ¶27.

[3] In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (citation omitted), the court established colloquy requirements to ensure the constitutional validity of waivers of counsel:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure 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 charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

However, in ***State v. Ernst***, 2005 WI 107, ¶¶18, 21, 283 Wis. 2d 300, 699 N.W.2d 92, the court concluded that these colloquy requirements were procedural rules promulgated under the court's supervisory power and were not constitutionally mandated. Therefore, although the ***Klessig*** requirements ensure constitutional compliance, failure to conduct a proper colloquy does not by itself give rise to a constitutional violation. ***Id.***, ¶¶25-26.

¶7 McGee argues the circuit court erred by denying his motion to collaterally attack the 2000 conviction because: (1) he made a prima facie showing that he did not knowingly, voluntarily, and intelligently waive the right to counsel by demonstrating that he did not understand the difficulties and disadvantages of self-representation;[4] and (2) the State did not prove his waiver was constitutionally valid. We affirm the circuit court for two reasons.

¶8 First, McGee's brief does not conform to the rules of appellate procedure. Specifically, WIS. STAT. RULE 809.19(1)(d) requires an appellant's brief to contain "[a] statement of the case, which must include: … a statement of facts relevant to the issues presented for review, with appropriate references to the record." McGee's brief fails to provide an adequate statement of facts relevant to the issues raised. For instance, he does not tell us what evidence was presented at the motion hearing, nor does he inform us of the findings and rationale underlying the circuit court's decision. Moreover, he does not provide record citations directing us to this information. We could affirm the circuit court on this basis alone. *See* WIS. STAT. RULE 809.83(2). "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (quoting

[4] McGee also suggests his waiver of counsel was invalid because the Manitowoc County court never determined that he was competent to represent himself in the 2000 case. However, the circuit court found there was no evidence McGee was incompetent to represent himself, noting, "[T]he testimony reveals [McGee] has a 12th grade education and has worked at jobs requiring a degree of sophistication in reading blueprints. Mr. McGee appeared an intelligent, honest person, both in the transcripts … and his May 26th testimony." On appeal, McGee asserts the circuit court's competence finding was "misguided." However, he does not present a developed argument as to how the circuit court erred, nor does he argue that he was actually incompetent to represent himself. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Keplin v. Hardware Mut. Cas. Co., 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964)).

¶9 Second, McGee failed to make a prima facie showing that his right to counsel was violated in the 2000 case. ***Ernst*** dictates that, to make a prima facie showing, a defendant must set forth specific facts demonstrating that he or she did not knowingly, intelligently, and voluntarily waive the right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶25. McGee's motion to collaterally attack the 2000 conviction claimed that his right to counsel was violated in that case because the court's colloquy did not adequately address one of the ***Klessig*** factors—the difficulties and disadvantages of self-representation. However, the motion did not identify specific facts supporting that conclusion. McGee should have described what was said and done during the colloquy, rather than simply asserting the colloquy was deficient.

¶10 Additionally, while the affidavit attached to McGee's motion stated that McGee "did not understand the difficulties and disadvantages of self-representation" when he waived his right to counsel, McGee did not support this bare assertion with any specific facts or examples. Nor did McGee offer any specific facts to support this assertion during his testimony at the motion hearing. Moreover, while McGee's affidavit stated he did not understand an attorney might be able to find defenses to the charges against him, the initial appearance transcript from the 2000 case contradicts that assertion. At the initial appearance, McGee stated he understood that an attorney might be able to point out defenses that McGee himself did not recognize. Again, neither McGee's affidavit nor his motion hearing testimony offered specific facts or examples to contradict his prior statement that he understood a lawyer might be able to identify defenses. Because McGee failed to point to specific facts demonstrating that he "'did not know or

understand the information which should have been provided' in the previous proceeding," he failed to make a prima facie showing that his right to counsel was violated. *See* ***Ernst***, 283 Wis. 2d 300, ¶25 (quoting ***Hampton***, 274 Wis. 2d 379, ¶46).

By the Court.—Judgment and order affirmed.

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