

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 3, 2011**

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. 2010AP2223-CR**

**Cir. Ct. No. 2009CT2223**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRIAN M. JOSKI,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
SUE E. BISCHEL, Judge. *Affirmed.*

¶1 BRUNNER, J.<sup>1</sup> Brian Joski appeals an order denying his motion to collaterally attack a prior operating while intoxicated conviction. Joski asserts the circuit court failed to properly analyze the issue. We affirm.

### BACKGROUND

¶2 In 2006, Joski was convicted of operating while intoxicated, second offense, in Washington County. Joski represented himself, completed a waiver of counsel form and plea questionnaire, and entered a plea of guilty. He did not appeal.

¶3 In 2009, Joski was stopped, arrested, and subsequently charged with operating while intoxicated, third offense. He brought a motion collaterally attacking his prior operating while intoxicated conviction. Joski alleged his constitutional right to counsel was violated because the Washington County court failed to conduct a proper waiver of counsel colloquy as mandated by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). He asserted the court failed to inform him of the advantages and disadvantages of self-representation as well as the general range of penalties—specifically, that his driver’s license would be revoked. Joski attached an affidavit in support of his motion, contending he was not aware an attorney could identify defenses, negotiate aspects of the sentence—including revocation time—and file motions on his behalf.

¶4 The court held an evidentiary hearing regarding Joski’s waiver of counsel.<sup>2</sup> At the hearing, the State called Joski as a witness. The court ruled on

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<sup>1</sup> 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.

<sup>2</sup> Joski did not provide us with a transcript from this hearing.

Joski's motion at a subsequent hearing, and determined that, based on the evidentiary hearing and its review of supplementary materials, Joski understood both the advantages and disadvantages of representation and that his driver's license would be revoked. The court concluded Joski's right to counsel was not violated.

¶5 Following the court's ruling, Joski argued that the Washington County court "did not make any reference to revocation time and then subsequently revoked his driving privileges for 20 months." The circuit court interpreted this argument as an allegation that the plea colloquy was deficient. The circuit court noted that a collateral attack does not extend to "alleged deficiencies in the plea colloquy"—it only extends to one's right to an attorney. The court rejected Joski's argument, and found that when combined with the plea questionnaire, "there was not a deficiency in the plea colloquy." Joski pled no contest to operating while intoxicated as a third offense.

## DISCUSSION

¶6 On appeal, Joski asserts the circuit court erred when denying his collateral attack motion because it "failed to administer the proper analysis ... [and thus] could not adequately conclude that Joski freely, knowingly, and voluntarily waived his right to an attorney." A criminal defendant has a constitutional right to counsel. *Klessig*, 211 Wis. 2d at 201. A defendant is presumed to retain this right unless he knowingly, intelligently, and voluntarily waives it. *Id.* at 204. A defendant who faces an enhanced sentence because of a prior conviction may collaterally attack the prior conviction based on a violation of the right to counsel. *State v. Hahn*, 2000 WI 118, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528.

¶7 To determine whether a defendant has validly waived the right to counsel, the circuit court must engage the defendant in a colloquy which shows 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.” *Klessig*, 211 Wis. 2d at 206. If the circuit court fails to conduct such a colloquy, we may not find, based on the record, that there was a valid waiver of counsel. *Id.*

¶8 An alleged violation of the *Klessig* requirements can form the basis of a collateral attack. *State v. Ernst*, 2005 WI 107, ¶2, 283 Wis. 2d 300, 699 N.W.2d 92. To make a collateral attack, the defendant must make a prima facie showing that a *Klessig* violation occurred, and thus, the waiver of counsel colloquy was inadequate. *Ernst*, 283 Wis. 2d 300, ¶2. If the defendant is able to make a prima facie showing, the circuit court must hold an evidentiary hearing where the State must prove by clear and convincing evidence that the waiver of counsel was knowing, intelligent, and voluntary. *Id.*, ¶27. If the State is unable to meet its burden, the defendant will be entitled to collaterally attack his or her previous conviction. *Id.*

¶9 Here, the proper collateral attack procedures were followed. We assume, without deciding, that Joski successfully made a prima facie showing that he did not knowingly, intelligently, and voluntarily waive his right to counsel. Pursuant to *Ernst*, the court then held an evidentiary hearing to determine whether the waiver was knowing, intelligent, and voluntary. At the evidentiary hearing,

Joski was called by the State, showing the State had the burden of proof.<sup>3</sup> Following the evidentiary hearing and after reviewing Joski's waiver of counsel form and plea questionnaire, the circuit court ruled that it was satisfied Joski knowingly, intelligently, and voluntarily waived his right to counsel in the Washington County case.

¶10 We see nothing wrong with the circuit court's procedure or analysis—it is exactly what *Ernst* requires for a collateral attack. See *id.*, ¶¶25, 27. Further, because Joski failed to provide the transcript from the evidentiary hearing, we assume that Joski's testimony supports the court's determination that his waiver of counsel was knowing, intelligent, and voluntary. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (It is the appellant's responsibility to ensure the record is complete, and a reviewing court assumes missing materials support the circuit court's ruling.).

¶11 Although Joski argued before the circuit court that he should be permitted to collaterally attack his prior conviction because the waiver colloquy was inadequate, his argument is incorrect. As previously explained, if the circuit court does not conduct a proper *Klessig* colloquy, the remedy is not a collateral attack—it is an evidentiary hearing where the State must prove the waiver was knowing, intelligent, and voluntary. Joski received an evidentiary hearing, and the court determined the waiver was knowing, intelligent, and voluntary.

¶12 Finally, Joski briefly references that the Washington County court revoked his driver's license for longer than statutorily permissible. Any argument

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<sup>3</sup> We do not have the transcripts from this proceeding. However, the court's minutes indicate the State called Joski as a witness and Joski's attorney cross-examined him.

as to how this affects the waiver of his right to counsel is undeveloped, and we will not consider it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

*By the Court.*—Order affirmed.

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

