**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 2, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2107** **Cir. Ct. No. 2006CF216**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDREJS SICS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Andrejs Sics appeals a judgment convicting him of operating while intoxicated, fifth offense, and an order denying postconviction relief. Sics claims his trial counsel was ineffective. He argues counsel improperly failed to collaterally attack a prior OWI conviction because he did not validly

waive his right to counsel when he entered a pro se plea to that charge. We reject Sics' arguments and affirm.

¶2 In the fall of 2006, Sics was charged with OWI, fifth offense. He ultimately pled no contest and the circuit court imposed a three-year term of probation. Sics filed a WIS. STAT. § 974.06[1] motion claiming that his trial counsel was ineffective for failing to collaterally attack his second OWI conviction from May 1993.

¶3 In support of his claim that he did not validly waive counsel, Sics included with his postconviction motion an affidavit from his postconviction counsel's paralegal averring that the transcript of Sics' 1993 OWI plea hearing was no longer available. Sics also executed an affidavit in which he averred:

> 2. That on May 13, 1993, I entered into a plea of no-contest in Outagamie County case No. 1993-CT-228 without an attorney.
>
> 3. That at the time of this Plea Hearing on May 13, 1993, I was not made aware by the presiding Judge of the advantages or disadvantages of having counsel on a matter such as this, such as the fact that an attorney could file Motions in the Court challenging the stop and arrest of my person, the admissibility of any and all chemical tests and possibly discover other defenses regarding my case leading to a possible acquittal or amendment of charges.
>
> 4. That had I known the advantages of having an attorney on a matter such as this, I would not have proceeded pro se when entering a plea before the Outagamie County case No. 1993-CT-228.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Sics also included with his postconviction motion a copy of the court minutes from his 1993 OWI plea hearing. These minutes, in pertinent part, stated:

> 1:32 pm
>
> Complaint was read
>
> Court explains rights and options
>
> No contest plea entered.
>
> 1:50 pm
>
> Deft enters plea of no contest
>
> Deft completed plea questionnaire
>
> Court explains rights and options deft will be giving up
>
> Court finds deft understands proceedings and rights given up
>
> State offers as factual basis the criminal complaint
>
> Court finds sufficient factual basis exists to support plea
>
> Court finds deft entered plea freely, voluntarily, and intelligently
>
> Court accepts plea of no contest

¶5 At an evidentiary hearing, Sics' counsel testified that he did not look at the record of the 1993 conviction before Sics entered his plea to OWI, fifth offense. He testified that he had

> asked Mr. Sics if he had been represented in his previous criminal OWI cases. He told me he was not represented in one of those cases and he told me that he did not believe an attorney would have done him any good in that case because there was an accident, and there was no way that he would have gotten out of it.

¶6 The prosecutor asked counsel if it was his understanding that Sics "understood that he had had a right to an attorney in [the 1993 OWI] case."

Counsel answered, "That's what I understood him to be telling me. Yes." Although Sics testified that he could not recall "filling out anything" that waived any of his rights, the record contains a completed May 13, 1993 plea questionnaire and waiver of rights form, signed by Sics.

¶7 On cross-examination, the prosecutor confirmed Sics' inability to recall his 1993 plea hearing:

> Q: If the minutes from the … court file … said that the court explained your rights and options to you, you can't say that that didn't happen, can you?
>
> A: No.
>
> Q: You just don't remember that day?
>
> A: Well, I don't know specifically if they did or not.
>
> Q: But you can't say that they did not?
>
> A: No, I can't say they didn't.

¶8 The circuit court denied the postconviction motion and a motion for reconsideration. Sics now appeals.

¶9 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, 266 Wis. 2d 549, 668 N.W.2d 810 (*citing* ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528). The examining court tests whether the defendant validly waived counsel under the law in effect at the time of the prior conviction.[2]

[2] The rule on waiver in effect in May 1993 provided:

(continued)

***Id.***, ¶14. The defendant seeking to collaterally attack the prior conviction bears the initial burden of making a prima facie showing that his 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.

¶10 Here, Sics failed to make a prima facie showing that his constitutional right to counsel in the 1993 OWI was violated. To carry his burden of making a prima facie showing, Sics must point to facts that demonstrate that he "'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 … right to counsel." ***Id.*** (citation omitted). General allegations that the court failed to conform to its mandatory obligations during the plea colloquy are insufficient. ***Id.***

¶11 Sics insists that his affidavit "serves as a prima facie case that he did not knowingly, intelligently, and voluntarily waive his constitutional right to counsel." However, Sics' affidavit contains general statements that he did not understand the advantages of having counsel. He does not point to any specific facts demonstrating that he actually did not understand. *See* ***id.*** Sics' averment that "I was not made aware by the presiding Judge" of various advantages of

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> In 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.

***State v. Stockland***, 2003 WI App 177, ¶14, 266 Wis. 2d 549, 668 N.W.2d 810 (citations omitted).

having counsel is simply the formal expression of a conclusory allegation that the court failed to conform to its mandatory obligations during the plea colloquy.

¶12 We note that Sics has not filed a transcript of the court's colloquy. Missing material is assumed to support a proper colloquy. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989). Moreover, the court minutes from the 1993 OWI plea hearing state that the court explained Sics' "rights and options" to him. In addition, Sics' counsel testified that he believed Sics understood he had the right to an attorney in the 1993 OWI case.

¶13 Most significantly, Sics' testimony at the postconviction hearing critically undercuts his affidavit. When asked about his recollection of the court's explanation of his rights, Sics testified, "I don't know specifically." He also admitted he "can't say" that the court failed to explain his rights. Sics' testimony confirmed that he did "not really" have a specific recollection of the plea hearing, and that "it's hard for [him] to remember exactly what happened."

¶14 A defendant who "simply does not remember what occurred at his plea hearing" does not make a prima facie showing. *See* ***State v. Hammill***, 2006 WI App 128, ¶11, 293 Wis. 2d 654, 718 N.W.2d 747. Sics has failed to making a prima facie showing that his constitutional right to counsel in the 1993 proceeding

was violated, and therefore cannot claim that his trial counsel was ineffective for failing to raise a collateral attack.[3]

*By the Court.*—Judgment and order affirmed.

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

[3] Sics also suggests that if his collateral attack was meritorious, a remand for resentencing on misdemeanor fourth-offense OWI would be the correct remedy. Sics does not develop an argument, nor discuss why his remedy would not be a return to pre-plea status with the original charges restored. *See, e.g.*, ***State v. Robinson***, 2002 WI 9, ¶¶48-55, 249 Wis. 2d 553, 638 N.W.2d 564, *overruled on other grounds by* ***State v. Kelty***, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886. Regardless, we not reach this issue as only dispositive issues need be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).