COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 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. 2011AP1360-CR **Cir. Ct. No. 2009CT897**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY ROBERT STEINHORST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded.*

¶1 BLANCHARD, J.[1] Jeffrey Robert Steinhorst appeals a judgment convicting him of operating with a prohibited alcohol concentration (PAC), third

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

offense, after the circuit court denied his motion to collaterally attack one of his prior operating-while-intoxicated (OWI) convictions. Specifically, Steinhorst contends that the circuit court erred in concluding that Steinhorst failed to make a prima facie showing that he did not validly waive his right to counsel under the Sixth Amendment and article I, section 7 of the Wisconsin Constitution in the prior OWI case. This court agrees that the circuit court erred, reverses the judgment, and remands for further proceedings.

BACKGROUND

¶2 A criminal complaint charged Steinhorst with OWI and PAC, both as third offenses. The complaint set forth two prior Wisconsin OWI convictions for sentence enhancement purposes, one dating from 1994 and the other from 1997.

¶3 Steinhorst filed a short written motion to exclude the 1997 conviction, stating that he had not knowingly, voluntarily, or intelligently waived his right to counsel in that case. This motion was accompanied by an affidavit from Steinhorst, relevant aspects of which are discussed below in the Discussion section of this opinion.

¶4 It is uncontested that Steinhorst was not represented by counsel in the 1997 case. It is also uncontested that, unfortunately, no transcript is now available reflecting what was said at the plea hearing in that case.

¶5 The circuit court held a hearing on Steinhorst's motion on February 22, 2011. There was no live testimony. The parties argued their respective positions, and the court ruled, based on Steinhorst's affidavit and the following documents from the 1997 case: the Washington County Circuit Court

plea questionnaire received by the court; two pages of "compilation of minutes" or "data sheets," which reflect court events on November 13, 1997, and December 1, 1997; and the judgment of conviction.

¶6 Steinhorst argued that his affidavit made a prima facie showing that at the time of the 1997 plea hearing: (1) Steinhorst inaccurately believed that the court could give him a probation disposition, which was not in fact a sentencing option at that time,[2] and therefore he had a false idea about the general range of penalties that could be imposed on him, and (2) Steinhorst did not understand the potential disadvantages of self-representation, and the court did not raise that topic. The State argued that the affidavit, particularly when considered in light of the contents of the plea questionnaire and court record notations that Steinhorst affirmatively waived his right to an attorney on two separate occasions, did not constitute a showing sufficient to shift the burden to the State on the waiver-of-counsel issue.

¶7 The court denied Steinhorst's motion, concluding that he had not met his burden to make a prima facie showing on either of his two contentions. For this reason, the court did not consider the second step of the burden-shifting procedure, under which the State is required to show by clear and convincing evidence that Steinhorst's rights were not violated in the ways he asserts.

¶8 Steinhorst subsequently pled no contest to PAC, third offense. Steinhorst now appeals.

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[2] Steinhorst asserted that probation was not an option upon a conviction for second offense OWI in 1997, and the State did not contest this point before the trial court and does not contest it now.

DISCUSSION

¶9 "The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process," including a change of plea hearing. ***Iowa v. Tovar***, 541 U.S. 77, 87 (2004) (citation omitted). A defendant who faces an enhanced sentence due to a prior conviction may collaterally attack the prior conviction based on a denial of the defendant's 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).

¶10 In ***Klessig***, 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.

Id. at 206 (citation omitted).

¶11 This rule was refined in ***State v. Ernst***, 2005 WI 107, ¶¶18, 21, 283 Wis. 2d 300, 699 N.W.2d 92, to explain that these colloquy requirements are procedural rules promulgated under the court's supervisory power and are not constitutionally mandated. For this reason, although the ***Klessig*** requirements ensure constitutional compliance, failure to conduct a proper colloquy does not by itself give rise to a constitutional violation. ***Ernst***, 283 Wis. 2d 300, ¶¶25-26.

¶12 As the court further explained in ***Ernst***, "an alleged violation of the requirements of ***Klessig*** can form the basis of a collateral attack, as long as the defendant makes a prima facie showing, pointing to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her constitutional right to counsel." ***Ernst***, 283 Wis. 2d 300, ¶37. Under the first step of the burden shifting procedure, the defendant carries the initial burden 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.*** (citation omitted). That is, it is not enough for a defendant merely to generally allege that the court's colloquy on this issue did not meet the ***Klessig*** standard. ***Id.***, ¶25. Whether the defendant has made a prima facie showing is a question of law subject to independent review. *See* ***id.***, ¶10.

¶13 If there is a prima facie showing, then under the second step of the procedure the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was constitutionally valid. ***Id.***, ¶27.

¶14 Steinhorst argues that the circuit court erred in denying his motion to collaterally attack the 1997 conviction because he made prima facie showings on the awareness-of-penalties issue and on the awareness-of-advantages-of-counsel issue.

¶15 This court begins its analysis by acknowledging that Steinhorst's affidavit is not a model of clarity, as explained in the footnotes that follow.

However, when fairly read as a whole, the affidavit includes the following factual assertions regarding the 1997 case:

- Steinhorst believed at the time of the plea hearing that the court had the option of placing him on probation, and that the court might do so, despite the State's recommendation for 20 days jail. Steinhorst initialed the box on the plea questionnaire "where it said or implied that probation was an option."[3]

- At the time of the plea hearing, Steinhorst was 24, "not experienced in legal matters," had never been represented by an attorney ("never … consulted with one at any time"), "was not knowledgeable about the role and advantages of having an attorney," and more specifically, did not know "how an attorney could have helped" him in the 1997 case.[4]

- For example, only now does Steinhorst "understand that defenses can be based on seemingly minor details, or errors of the police."

- "Neither the judge or prosecutor ever explained the advantages of having an attorney."[5]

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[3] The affidavit introduces this idea by stating that Steinhorst avers that he "was apparently not fully aware of the seriousness of the crime or the possible ranges of penalties." The meaning of the phrase *apparently not fully aware* is unclear, but could be narrowly read to undermine Steinhorst's factual position. However, in evaluating the question of whether Steinhorst has made a prima facie showing, it would be inappropriate to seize on this ambiguous qualifying phrase, in light of the unambiguous statements that follow, asserting that Steinhorst believed that the court had the option of using a probation disposition and that this understanding was reinforced by the plea questionnaire.

[4] The final paragraph of the affidavit contains a peculiar qualifying word, italicized here but not in the original: "If I had understood *more* about the significant advantages that a lawyer could provide, I would have hired one at the time." "More" implies *some* knowledge. Again, however, it would be inappropriate to focus in a hypertechnical manner on this adjective, in light of the unambiguous averment that Steinhorst did not know how an attorney could have helped him.

[5] This assertion is immediately followed by the phrase, "or gave me stern enough warnings for me to consider the matter seriously." Again, attempting to read the affidavit as a whole in a fair manner, the first and not the second of the following possible interpretations appears to have been intended: (1) the court made no references at all to the advantages an attorney could provide, the colloquy as a whole was lacking in "stern warnings" of any kind, and

(continued)

¶16 Addressing the question of law as to whether Steinhorst made a prima facie showing, this court concludes that he averred specific facts sufficient to support a conclusion 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.***, ¶25. The relevant assertions in the affidavit are not general allegations that the plea colloquy was defective or that the court failed to conform to its mandatory obligations during the plea colloquy. *See* ***id.*** A common-sense, realistic reading of the affidavit is that Steinhorst has alleged with sufficient specificity both that he was ignorant going into the plea hearing regarding the penalties and the advantages of counsel, and also that he was not provided the relevant information at the plea hearing on either topic.

¶17 It is true that a defendant who "simply does not remember what occurred at his plea hearing" does not make a prima facie showing. ***State v. Hammill***, 2006 WI App 128, ¶11, 293 Wis. 2d 654, 718 N.W.2d 747. However, that is not the situation here. It is not true, as the State argues, that Steinhorst's affidavit "does not cite a single fact about the colloquy the Court in 1997 made to the defendant at his initial appearance or at his plea." Steinhorst avers as fact that he initialed the probation-related box on the plea questionnaire with a misunderstanding that the judge could place him on probation, and that the court never "explained the advantages of having an attorney."

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for these reasons it did not occur to Steinhorst that an attorney might help him; or (2) the court did warn Steinhorst about the advantages that an attorney could provide, but these warnings were not stern enough.

¶18 The State does not address the awareness-of-penalties issue on appeal. Before the circuit court the State argued that, while Steinhorst initialed a box on the plea questionnaire form acknowledging that if he were placed on probation violation of the conditions of probation would result in revocation and sentencing after revocation, the form as a whole makes clear to any reader that probation was not part of the plea agreement being presented to the court. However, the State is not persuasive in arguing that its reading of the questionnaire was necessarily Steinhorst's understanding at the time of the plea, contrary to his averments.

¶19 Regarding the awareness-of-advantages-of-counsel issue, the State is correct in arguing on appeal that circuit courts are not required "to explain every single nuance about representation to a [d]efendant" and that courts should not "forc[e] someone to accept counsel." However, Steinhorst does not argue to the contrary on either point. Instead, his assertion is that he was without any idea that attorneys can provide significant advantages to criminal defendants, and entered a plea with both misunderstandings.

¶20 The State cites ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989), for the general proposition that when the appellate record is incomplete in connection with an issue raised by the appellant, this court assumes that the missing material supports a circuit court's ruling. However, the State's reliance on ***Duhame*** is not persuasive in light of more specific case law providing that, when a defendant collaterally attacks a prior conviction based on denial of the right to counsel, and the pertinent transcripts are not available, the defendant's affidavit can alone be sufficient to establish a prima facie case. *See* ***State v. Drexler***, 2003 WI App 169, ¶10, 266 Wis. 2d 438, 669 N.W.2d 182 (citing ***State v. Baker***, 169 Wis. 2d 49, 77–78, 485 N.W.2d 237 (1992)).

¶21 This court has noted the problems created by the procedure under which "a defendant can meet his or her burden of establishing a prima facie case simply by filing an affidavit providing a self-serving rendition of events that transpired in court five, ten or even twenty years earlier." *See* ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. The relevant transcript retention rules and the legal standards have long been identified as a problem for consideration by the supreme court and the legislature. *See* ***id.*** At this juncture, it is beyond the authority of this error-correcting court to do anything other than to apply the law.

¶22 Because Steinhorst has pointed to specific facts supporting his contentions, the burden shifts on remand to the State to prove by clear and convincing evidence at an evidentiary hearing that Steinhorst's waiver of counsel was knowingly, intelligently, and voluntarily entered. ***Ernst***, 283 Wis. 2d 300, ¶27. The State will in essence "be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges" he did not have, due to what he claims was an inadequate plea colloquy. ***Id.***, ¶31. To satisfy its burden, the State may examine the defendant "to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." ***Id.***, ¶31. If the State is unable to meet its burden, the defendant will be entitled to "attack, successfully and collaterally, his or her previous conviction." ***Id.***, ¶27.

¶23 For the reasons stated, this court reverses the circuit court's judgment and remands for further proceedings.

By the Court—Judgment reversed and cause remanded.

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