COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP662-CR **Cir. Ct. No. 2009CF1854**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JASON L. DECORAH,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS MC NAMARA, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] The State of Wisconsin appeals the sentence imposed by the circuit court after Jason Decorah pled no contest to operating

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

under the influence as a fourth offense.[2] The State had charged the OWI as a fifth offense. However, before the circuit court, Decorah collaterally attacked a prior OWI conviction, alleging that he did not validly waive his right to counsel in that prior case. The circuit court agreed. The State argues that the circuit court erred when the court ruled that the prior conviction could not be used for sentencing purposes. I reject the State's arguments, and affirm.

Background

¶2 Jason Decorah was arrested and charged with two counts, operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b), both as fifth offenses. Before the circuit court, Decorah sought to collaterally attack a prior driving under the influence conviction, Decorah's second OWI conviction, seeking to prevent the prior conviction's use for sentencing purposes in this case. In particular, Decorah contended that he did not validly waive his right to counsel in his second OWI case because he did not know the applicable range of penalties when waiving counsel. After a hearing, the circuit court agreed that Decorah did not validly waive his right to counsel in the second OWI case. Decorah then pled no contest to the present OWI charge. The circuit court dismissed the second count, and sentenced Decorah for OWI as a fourth offense. The State appeals.

[2] The State explains that it appeals pursuant to WIS. STAT. § 974.05(1), which permits the State to appeal from a final order or judgment adverse to the State "if the appeal would not be prohibited by constitutional protections against double jeopardy." *See* § 974.05(1)(a). Decorah does not argue that this appeal implicates double jeopardy or that the State's appeal is otherwise improper.

Discussion

A. Basis For The Collateral Attack

¶3 Decorah's collateral attack is based on his contention that, at the time he waived his right to counsel in the second OWI case, he did not know the range of penalties he faced. The State argues that ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, teaches that Decorah may not collaterally attack on this basis. Specifically, the State asserts that "***Ernst*** does not allow collateral attack for a penalties violation, only for Constitutional Right to Counsel." The State misreads ***Ernst***.

¶4 In ***Ernst***, the supreme court explained that, in the context of sentencing based on prior convictions, a collateral attack may be based on a defendant's having not known or understood information that should have been provided when waiving the right to counsel in the prior proceeding:

> [To collaterally attack,] the defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated…. For there to be a valid collateral attack, *we require the defendant to point to facts that demonstrate 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., ¶25 (emphasis added). As pointed out in ***Ernst***, the constitutionally required information is set out in ***Iowa v. Tovar***, 541 U.S. 77, 81 (2004). *See* ***Ernst***, 283 Wis. 2d 300, ¶15. ***Tovar*** explains that a waiver of the Sixth Amendment right to counsel is valid "'when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, *and of the range of allowable punishments attendant upon the entry of a guilty plea*.'" *See*

Ernst, 283 Wis. 2d 300, ¶15 (quoting ***Tovar***, 541 U.S. at 81). Thus, ***Ernst***, contrary to the State's position, teaches that not knowing or understanding the range of punishments is a basis for a collateral attack because it results in an invalid waiver of counsel.

¶5 Moving on, the State also seemingly believes that this court may credit a version of events that the circuit court rejected. To this end, the State asserts that, in the second OWI case, Decorah "generally knew the penalties," that it matters that Decorah "was given the complaint containing the penalty range," and that Decorah "read the penalties regarding revocation." This line of argument misses the mark. After taking testimony at a hearing on this topic, the circuit court credited Decorah's testimony that, in the circuit court's words, Decorah "was not even given time to read the complaint" and that Decorah "was not aware of the general range of penalties that could have been imposed on him." *See* ***Ernst***, 283 Wis. 2d 300, ¶27 & n.6 (describing evidentiary hearing procedure for resolving a collateral attack based on invalid waiver of counsel). I may not second-guess the circuit court's credibility determination.

B. The State's Remaining Arguments

¶6 The State also argues that Decorah should be barred from making his collateral attack based on three preclusion doctrines: judicial estoppel, issue preclusion, and claim preclusion. These arguments are based on the fact that, in two previous OWI cases, Decorah did not collaterally challenge his waiver of counsel in the second OWI case. Specifically, the State highlights that, when charged with a third OWI, Decorah at first moved to collaterally attack his second OWI conviction, but then voluntarily withdrew the motion. The State also points out that, when charged with a fourth OWI, Decorah again did not collaterally

attack the waiver of his right to counsel. The State argues that, under any of its three preclusion theories, Decorah should not be allowed to now collaterally attack the second OWI.

¶7 I need not address the merits of the State's judicial estoppel and issue preclusion arguments because they are raised for the first time on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (generally, to preserve arguments for appeal, a party must raise the arguments before the circuit court). More specifically, judicial estoppel is a discretionary matter for circuit courts. *See* ***State v. Miller***, 2004 WI App 117, ¶31, 274 Wis. 2d 471, 683 N.W.2d 485. The State points to no place in the record where it asked the circuit court to apply judicial estoppel, and I find no such request. As to issue preclusion, the State expressly denied, at least twice before the circuit court, that its legal theory was based on that doctrine. I perceive no reason to ignore the forfeiture of these preclusion arguments.

¶8 Turning to the State's claim preclusion argument, the requirements for claim preclusion are as follows:

> The doctrine of claim preclusion, formerly called res judicata, bars claims that were or could have been litigated in a prior proceeding when these requirements are met: (1) an identity between the parties or their privies in the prior and present actions; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction.

Id., ¶25. "The burden of proving claim preclusion is upon the party asserting its applicability." ***State ex rel. Barksdale v. Litscher***, 2004 WI App 130, ¶13, 275 Wis. 2d 493, 685 N.W.2d 801.

¶9 I will assume, without deciding, that claim preclusion may apply in the present context and that the first and third requirements are met. The State's argument nonetheless falls short as to the second requirement—identity between the causes of action in the two suits. Regarding that element, the State asserts: "The issue or cause of action is … the same: whether or not that prior 2001 OWI conviction can be used to enhance the penalties for the current case." This assertion, however, points out an issue, not a cause of action. Focusing on the pertinent inquiry, the causes of action in the two cases are different.

¶10 We have explained that, for purposes of claim preclusion, "Wisconsin applies a transactional approach to the determination of whether two suits involve the same cause of action." ***Id.***, ¶15. The pertinent inquiry is whether "'*both suits* arise from the same transaction, incident or factual situation.'" ***Id.*** (emphasis added; citation omitted). The present case does not arise from the same incident as any of the prior OWI cases. Thus, the cause of action in this case is different.

¶11 Finally, I note that the State weaves a guilty plea waiver rule argument into its preclusion argument. The State's argument lacks clarity. The State seems to suggest that Decorah's prior pleas to OWI convictions should be treated for all time as a waiver of any collateral attack on his 2001 OWI conviction for purposes of counting prior convictions. The State points to two cases, but neither case supports the State's broad proposition. *See* ***State v. Deilke***, 2004 WI 104, ¶¶2, 13-24, 31, 274 Wis. 2d 595, 682 N.W.2d 945 (following a successful collateral attack, the court discussed whether that attack breached prior plea agreements); ***State v. Bembenek***, 2006 WI App 198, ¶¶12, 16-19, 296 Wis. 2d 422, 724 N.W.2d 685 (where a plea agreement expressly waived collateral attacks, the court concluded that the agreement prevented a later collateral attack under the

specific circumstances of that case). Lacking more from the State, I do not address the topic further.

Conclusion

¶12 For the reasons discussed, I affirm the circuit court.

By the Court.—Judgment affirmed.

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