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DISTRICT IV

July 26, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1569-CR State of Wisconsin v. Wayne Laverne Johnson (L.C. # 2014CF206)

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Wayne Johnson appeals a circuit court order that denied his postconviction motion for plea withdrawal on a conviction for a seventh offense of operating a motor vehicle while under the influence of an intoxicant (OWI-7th). After reviewing the record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm for the reasons discussed below.

The primary ground for Johnson's plea withdrawal motion was a claim that trial counsel in the present case provided ineffective assistance by failing to raise a collateral attack on prior OWI convictions.[2] *See generally* ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992) (authorizing collateral attacks on prior uncounseled OWI convictions for sentencing purposes). Specifically, Johnson claimed that he was not informed about, and never affirmatively waived, his right to counsel during proceedings that led to OWI convictions in a South Carolina case in 1990, and a Rock County case in 1996. A successful collateral attack would have significantly reduced the penalties that Johnson was facing for a seventh offense, to those associated with fifth or sixth offenses.

In response, along with other arguments, the State raised the defense of laches, which the circuit court relied on as one basis to deny the postconviction motion.

Laches is an equitable defense based upon a litigant's unreasonable delay in bringing a claim under circumstances in which such delay is prejudicial to the opposing party. ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999) (citation omitted). A party asserting the affirmative defense of laches has the burden of showing that: (1) the claimant unreasonably delayed in bringing the challenged claim; (2) the party asserting the defense of laches lacked

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The motion identified four prior cases for collateral attack, but additional investigation revealed that Johnson was represented in two of them. Johnson also initially raised an ex post facto claim, but subsequently acknowledged that it was defeated by controlling case law.

knowledge that the claimant would assert the claim; and (3) the party asserting the defense of laches was prejudiced by the claimant's delay in bringing the claim. ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶¶20, 27, 29, 290 Wis. 2d 352, 714 N.W.2d 900 (citation omitted). Reasonableness and prejudice are both questions of law (which we review de novo) based upon factual findings (which we will uphold unless they are clearly erroneous). ***Coleman***, 290 Wis. 2d 352, ¶17. If the proponent meets the burden of showing that the elements of laches have been satisfied, the ultimate decision whether to apply laches to dismiss a claim lies within the discretion of the court. ***Id.***

As a threshold matter, we note that we are aware of no prior published Wisconsin cases that have applied the defense of laches in the context of a collateral attack on prior OWI convictions. Nor are we are aware of any Wisconsin cases rejecting a laches defense in this context. Because neither of the parties has developed an argument on that point on appeal, we will presume, as the parties appear to have done, that the defense is generally available in such cases and proceed to consider whether it was properly applied here.

Johnson filed the postconviction motion in this case in 2016, approximately twenty-six years after his 1990 OWI conviction in South Carolina, and twenty years after his 1996 OWI conviction in Rock County. Johnson was subsequently convicted of OWI-4th in 1997, OWI-5th in 1998, and OWI-6th in 2000.[3] The parties agree that Johnson was represented by counsel

[3] According to the complaint and statements made at the postconviction hearing, Johnson was also convicted of OWI in 1994, between the two challenged convictions, even though the 1996 conviction was for OWI-2nd because the look-back period at the time was only five years.

throughout the proceedings in the 1997 and 2000 cases, and validly waived counsel in the 1998 case.

As to the first element of laches, Johnson asserts that it was not unreasonable for him to wait twenty and twenty-six years before challenging his uncounseled OWI convictions because his delay can be attributed to prior counsel's ineffectiveness. We reject that contention for several reasons.

To begin, the focus is on the entire length of time Johnson waited, not merely on whether he should have raised the issue in a particular prior proceeding, although his opportunity to raise the issue on multiple prior occasions is certainly a significant part of the totality of the circumstances that we consider. Twenty-plus years is unquestionably a long time to wait to challenge a conviction, particularly when the conviction has been subsequently used to enhance the penalties for other convictions. Next, Johnson cannot attribute his failure to raise the issue in 1998 to counsel, since he represented himself in that case. Nor can Johnson plausibly contend that he was unaware in 1998 that he could have had a lawyer for his 1990 and 1996 cases, since Johnson was represented by counsel in another OWI case in 1994, and was initially assigned an attorney in the 1998 case before waiving the right to counsel. Finally, neither of the attorneys from the 1997 or 2000 cases testified at the postconviction hearing, and Johnson himself did not testify about those cases. Since we do not know what if anything Johnson told his attorneys in 1997 and 2000 about his representation on the 1990 and 1996 cases, we have no basis in the record to conclude that either of them performed deficiently. We conclude that Johnson's delay in challenging his 1990 and 1996 OWI convictions was unreasonable.

As to the second element of laches, Johnson asserts that the State must have been aware that Johnson could raise the issue of having been unrepresented in 1996, because the State was represented by a prosecutor during that case and docket entries and court minutes show that Johnson was not represented. We note that Johnson does not address the State's basis for knowledge about Johnson's representation during the 1990 South Carolina case. In any event, we emphasize that the issue is not merely whether Johnson was represented in 1990 and 1996, but whether he validly waived his right to counsel in those cases. Given that there was no information available for the 1990 case from South Carolina and the minute sheets were silent on whether there was any discussion about Johnson representing himself in the 1996 case, and furthermore given that Johnson had not challenged his prior convictions in his fourth, fifth, or sixth OWI cases, we are not persuaded that the State had knowledge that Johnson would assert the claim in the most recent case.

As to the third element of laches, the State's ability to defend the collateral attacks in this case was plainly prejudiced by the delay because transcripts and other records from the 1990 and 1996 cases had long since been discarded under applicable retention policies. Johnson's argument that "it is more likely that [Johnson] has been prejudiced by the destruction of transcripts" ignores the fact that it would ultimately be the State's burden to show that Johnson made a knowing and voluntary decision to represent himself in the 1990 and 1996 cases.[4]

[4] We agree with Johnson that his affidavit asserting that he did not validly waive his right to counsel, in conjunction with the minute sheets showing that he was unrepresented, was sufficient to establish a prima facie case for a collateral attack under ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992).

In sum, we conclude that the State has established all three elements for laches, and that the circuit court acted within its discretion when it applied the doctrine here.

IT IS ORDERED that the circuit court order dismissing Wayne Johnson's postconviction motion for plea withdrawal is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals