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DISTRICT IV

August 12, 2021

To:

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Electronic Notice

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

2020AP1136-CR State of Wisconsin v. Steven J. Lauritz, Jr. (L.C. # 2018CF99)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Steven Lauritz appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration as a fifth or sixth offense. Lauritz contends that the circuit court erred in rejecting his collateral attack on one of the prior underlying offenses. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

When the State charged Lauritz, the allegations included that Lauritz was convicted of an intoxicated driving offense in Arkansas in 1990. Lauritz moved to collaterally attack the 1990 conviction, asserting that the conviction was obtained in violation of his right to counsel. The circuit court denied the motion. Lauritz then pled no contest to and was convicted of the charge here for operating a motor vehicle with a prohibited alcohol concentration as a fifth or sixth offense.

Lauritz argues that the circuit court erred in denying his collateral attack motion by concluding that he failed to make a prima facie showing of a violation of his right to counsel in the Arkansas proceeding. We agree with the circuit court that Lauritz failed to make the required prima facie showing, and we affirm on that basis.

As an initial matter, the parties dispute whether Lauritz had a right to counsel in the 1990 Arkansas proceeding. We assume, without deciding, that he did.

In ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, our supreme court adopted a burden-shifting approach for the type of collateral attack that Lauritz makes here. *See* ***id.***, ¶¶2, 25-27. The defendant must first "make[ ] 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." ***Id.***, ¶2. If a defendant makes a prima facie showing, "the burden to prove that the defendant validly waived his or her right to counsel shifts to the State." ***Id.*** Whether the defendant made a prima facie showing is a question of law for de novo review. ***Id.***, ¶26.

To make the required prima facie showing under ***Ernst***, it is not enough for the defendant to allege that the court in the previous proceeding failed to conduct an adequate colloquy

informing the defendant of the right to counsel.[2] ***Id.***, ¶25. The defendant must point to facts showing a lack of knowledge or understanding of the right. The ***Ernst*** court stated: "[W]e 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.*** (quoted sources omitted).

Lauritz argues that he made the prima facie showing required by ***Ernst***. We disagree because we conclude that Lauritz failed to allege "facts that demonstrate" that he did not "'know or understand'" his right to counsel. *See* ***id.***

An affidavit that Lauritz submitted alleged the following facts:

> 3. I appeared in court in Crittenden County Arkansas on March 16, 1990[,] and was convicted of OWI Second Offense and sentenced to six months in jail and was later released early.
>
> 4. Prior to my appearance in court, and, in connection with the case, I was in a car accident and injured my head.
>
> 5. As a result of the car accident I was hospitalized and then was taken to court approximately four days later.
>
> 6. When I appeared in court on March l6th, 1990[,] I had stitches in my head from the injuries sustained in the car accident.
>
> 7. I had just one court appearance in this matter and it occurred approximately four days after the incident.
>
> 8. The judge proceeded to sentencing at the one court appearance.

[2] We assume, without deciding, that a colloquy was required in the 1990 Arkansas proceeding.

> 10.[3] I remember the judge asking me "do you have anything to say?"
>
> 11. I do remember making statements to the judge about the facts of the case but I do not remember whether this occurred as part of the sentencing portion or as part of an evidentiary hearing.
>
> 12. I was not assisted by an attorney.
>
> 13. I did not knowingly, intelligently and voluntarily waive my right to an attorney.
>
> 14. According to my recollection, I do not believe that I was not [sic] told about the availability of a public defender nor offered the opportunity to delay the proceeding to hire an attorney.

Although Lauritz's affidavit contains an allegation that he did not knowingly, intelligently and voluntarily waive his right to an attorney, that allegation is conclusory. As to the remaining allegations, they too are not sufficient as to Lauritz's knowledge or understanding of the right to counsel. As noted above, a prima facie showing under ***Ernst*** requires more than an allegation that the court failed to inform the defendant of the right to counsel. ***Ernst*** requires that the defendant "*point to facts that demonstrate* that he or she '*did not know or understand the information*' … *and, thus,* did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Ernst***, 283 Wis. 2d 300, ¶25 (emphasis added; quoted sources omitted). The closest that Lauritz's affidavit comes to alleging facts about his knowledge or understanding is paragraph 14, which states: "According to my recollection, I do not believe that I was not [sic] told about the availability of a public defender nor offered the opportunity to delay the proceeding to hire an attorney." Putting aside the double negative, which we presume is a typo, Lauritz's allegation is equivocal as to what he was told and does not speak directly to what he

[3] The affidavit does not contain a paragraph 9.

knew or understood. Notably, Lauritz did not allege that he was unaware of the right to counsel or that he did not understand that right.

In addition to relying on his affidavit, Lauritz relies on court minutes from the Arkansas proceeding. The minutes were left blank in the sections of the minutes that contain spaces for indicating whether Lauritz had counsel, whether he was "Advised of Rights," and whether he "Waived Rights." As with Lauritz's affidavit, the minutes do not provide a sufficient showing as to Lauritz's knowledge or understanding.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals