STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015-AP-000795-CR
Lower Court Case No. 2014 CT 81(Sauk County)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON S. WITTE,

Defendant-Appellant,

ON APPEAL FROM THE JUDGEMENT OF CONVICTION AND SENTENCE
IN THE CIRCUIT COURT FOR SAUK COUNTY,
THE HONORABLE RICHARD O. WRIGHT PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Steven M. Cohen
WI Bar 1026188
30 W. Mifflin St. #1001
Madison, WI 53703
(608) 255-9000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN CASES

OTHER

STATEMENT OF THE ISSUE

DID DEFENDANT MAKE A PRIMA FACIE CASE THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL FOR A PREVIOUS CONVICTION WHEN HE SUBMITTED THE RELEVANT COURT RECORDS, PROOF THAT NO RELEVANT TRANSCRIPTS EXIST, AND A SWORN AFFIDAVIT?

The trial court answered NO.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument or publication is not necessary as the issues are not complex and sufficiently addressed in the existing case law.

STATEMENT OF THE CASE

Mr. Jason S. Witte was charged with Operating Under The Influence and Operating With A Prohibited Alcohol Concentration (4th offense) in a criminal complaint filed 2/17/14. (1:1-4). On 11/11/14, Mr. Witte, by his Attorney Steven Cohen, filed a motion "To Exclude Prior Conviction For Determining Sentence." (29:1). The motion sought to exclude one prior conviction from Sauk County. Id. The motion included a sworn affidavit by Mr. Witte indicating that he did not knowingly, voluntarily and intelligently waive his right to counsel. (14:1). Also included with the motion were the relevant court minutes, Plea Questionnaire, Waiver Of Right To Lawyer, and a statement from the relevant court reporter that no transcripts were available. (29:1-8).

A hearing on Mr. Witte's motion was had on 1/21/15. (25:1-30). The State objected that defendant did not make a prima facie case. The Honorable Patrick Taggart decided, based on the submitted materials, that Mr. Witte failed to make a prima facie case, and denied the motion. (25:27). Mr. Witte entered a plea and was sentenced on 4/17/15; on the same date he filed a timely Notice Of

Intent To Pursue Post Conviction Relief. (18:1). Mr. Witte filed a Notice Of Appeal on 4/20/15. (20:1).

STATEMENT OF FACTS

On 10/11/04, Mr. Jason Witte appeared before the Honorable Guy Reynolds, Circuit Court Judge for Sauk County, Wisconsin. (29:2-8). Mr. Witte was convicted of 2nd offense drunk driving at that time, without the benefit of counsel. Id.

On 2/17/14, Mr. Witte was charged with drunk driving 4th offense in Sauk County. (1:1). The 2004 Sauk County conviction was used to enhance the 2014 Sauk County charges. Id. By motion, Mr. Witte sought to exclude the earlier conviction on the grounds of constitutional violation of his right to counsel. (29:1). In support of his motion, Mr. Witte filed an affidavit, swearing that at the time of the 2004 plea hearing, he was unfamiliar with the possible penalties applicable to the offense. (14:1).

At the hearing on the motion, Judge Taggart blamed the defendant for lack of diligence in discovering what the penalties were:

> THE COURT: Well, they served [defendant] with a copy of the complaint. He knew he had it. He waived the reading of it. He doesn't read it. Why should he be able to collaterally attack it when he had all the documentation in front of him and he just chose not to read it? (25:17).

At the conclusion of the hearing, Judge Taggart reasoned:

> [Defendant] does agree that he filled out the plea questionnaire, but he intentionally left the penalty portion blank because he didn't know it. He didn't know what it was...
>
> Obviously, he had the opportunity to read the criminal complaint; in fact, he waived a reading of the criminal complaint and proceeded without doing that. I don't believe at this time that the–even though we don't have a transcript, which obviously could have told us exactly what happened at that plea agreement, but I believe a person that decides to proceed without a lawyer and does so after explaining all the benefits that a lawyer might entail to him decides to proceed without a lawyer and then comes back at this stage of the game, ten years later, and said, gee, I should have had a lawyer at that time, probably should not have proceeded without a lawyer. Well, I guess I agree with him. He probably shouldn't have done that, but is that enough to collaterally attack the conviction on that basis ten years later when there's no transcript available of the proceeding. (25:25-27).

ARGUMENT

MR WITTE MADE A PRIMA FACIE CASE THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL FOR A PREVIOUS CONVICTION WHEN HE SUBMITTED THE RELEVANT COURT RECORDS, PROOF THAT NO RELEVANT TRANSCRIPTS EXIST, AND A SWORN AFFIDAVIT.

There is no question that a prior conviction can be attacked in a collateral proceeding. In State v. Hahn, 618 N.W.2d 528, 238 Wis.2d 889, 2000 WI 118, the Supreme Court of Wisconsin specifically decided this question. They said "We conclude that an offender does not have a federal constitutional right to use the enhanced sentence proceeding predicated on a prior state conviction as the forum in which to challenge the prior conviction, ***except*** when the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior state conviction" (emphasis added). Id.

In the case of State v. Peters, 615 N.W.2d 655, 237 Wis.2d 741, 2001 WI 74, the constitutional right to use an enhanced criminal proceeding as the forum to collaterally challenge the earlier conviction was asserted. That court reaffirmed Hahn, when it said: "...we followed Custis v. United States, 511 U.S. 485 (1994) and

held that a defendant generally may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence. There is an exception, however, for a collateral attack based upon an alleged violation of the defendant's right to counsel..."

The standard for deciding whether the constitutional right to a lawyer was satisfied was set forth in Pickens v. State, 96 Wis.2d 549, 292 N.W.2d 601 (1980). Pickens starts with the presumption that a defendant did **not** waive counsel; waiver must be affirmatively shown from the record. Id. Pickens requires that an intelligent waiver of counsel consist of four points that must be affirmatively shown to be understood by the defendant: 1) deliberate choice to proceed without counsel; 2) awareness of the advantages of counsel or disadvantages of self representation; 3) awareness of the seriousness of the charges; and 4) knowledge of the range of penalties that may be imposed.

Once a defendant makes a prima facie showing that one or more of the four Pickens factors was not fulfilled, the burden shifts to the state to overcome the presumption of non waiver. State v. Baker,

169 Wis.2d 49, 485 N.W.2d 237 (1992). The State may compel the defendant to answer questions under oath at an evidentiary hearing. Ernst, supra.

In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997) the Wisconsin Supreme Court clarified the Pickens standard. Klessig warned that unless a full colloquy was done on the record at the time of the plea, a later reviewing court can't find a valid waiver based on the record. Id.

The Wisconsin Supreme Court says producing transcripts from the challenged proceeding is not required. State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992). Baker said:

> Baker attempted to meet his burden of making a prima facie showing of a constitutional violation...by submitting two sworn affidavits, one stating that his attorneys made a good faith effort to find records of the prior proceeding but could not and the other stating that he at no time waived his right to counsel...We conclude that Baker met his burden of production under the circumstances of this case.

In State v. Ernst, 699 N.W.2d 92, 283 Wis.2d. 300, 2005 WI 107 defendant failed to make a prima facie case in a collateral challenge, because defendant relied *solely on a transcript* that merely showed the court did not follow correct waiver of counsel procedure. He did not provide any

documents or other evidence (such as an affidavit) alleging specific facts that demonstrated that he didn't know or understand the information which should have been provided. Id.

On appeal, the reviewing court applies, de novo, constitutional principles to the facts to determine whether a defendant has made a prima facie case that he did not knowingly, intelligently and voluntarily waive his Sixth Amendment right to counsel. Id.

In Mr. Witte's case, a prima facie showing of a constitutional violation of right to counsel was made. Specifically, he was not aware of the penalties applicable to the drunk driving offense he was pleading "no contest" to. Mr. Witte provided an affidavit attesting that he was not informed of the penalty structure for drunk driving as a second offense, and that he did not discover that information on his own, or otherwise know the penalties. (14:1). Standing alone, the assertion is believable. Unsophisticated defendants routinely do not know this type of information, and that is one reason why Klessig requires a colloquy. In this case, the circumstances surrounding the plea corroborate Mr. Witte's assertion. Mr. Witte produced a copy of the plea questionnaire that was used in the 2004 plea hearing. (29:3-4). The form is substantially completed except for a few portions. He filled in his name, the specific offenses he was pleading

to, his age, education level, and he checked numerous boxes indicating his understanding of varied information. However, the blanks on the form where the maximum, minimum, and presumptive minimum penalties are to be filled in were left blank. Id. Mr. Witte attested in his affidavit the reason for leaving those parts blank: he didn't know the information. (14:1). In fact, that is the most reasonable explanation.

There was also submitted a copy of the court minutes from both the initial appearance, and the plea hearing. (29:5-6). The minutes from the initial appearance indicate the reading of the criminal complaint was waived. Nothing indicates that the penalties were read to Mr. Witte on either minute sheet.

Finally, a note from the relevant court reporter was submitted, showing that Mr. Witte attempted to obtain a transcript, but none was available. (29:8). The transcript was unavailable due to the age of the proceeding.

The totality of the circumstances indicate that Mr. Witte satisfied his burden to make a prima facie showing.

CONCLUSION AND REMEDY

Because Mr. Witte submitted a sufficient affidavit along with all available and relevant court records, he has made out a prima facie case under Baker and Pickens. The case should therefore be remanded and the burden shifts to the State to prove that there was a valid waiver of counsel in the two previous cases.

Respectfully submitted this 12th day of August, 2015 by:

Steven M. Cohen
WI Bar 1026188
30 W. Mifflin St. #1001
Madison, WI 53703
(608) 255-9000

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1651 words.

Steven M. Cohen

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

1) a table of contents;
2) the findings or opinion of the circuit court;
3) a copy of any unpublished opinion cited under 809.23(3)(a) or (b); and
4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Steven M. Cohen