COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2223-CR **Cir. Ct. No. 2007CF310**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. DEAVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Michael A. Deaver appeals from a judgment of conviction for a third offense of operating a motor vehicle while under the

influence of an intoxicant (OWI). He contends that his second OWI, which occurred in 1998, should not be available for sentence enhancement because the circuit court did not ascertain that his waiver of counsel at that time was knowing and voluntary. We agree. We reverse and remand with directions that Deaver be sentenced without consideration of the 1998 OWI conviction for sentence enhancement purposes.

BACKGROUND

¶2 On March 24, 2007, Oshkosh police officer Deana Krueger arrested Deaver for a third OWI offense. The criminal complaint listed two prior Fond du Lac county convictions in support of charging the OWI as a third offense. Deaver's second OWI arrest resulted in a misdemeanor conviction on September 1, 1998. Deaver did not retain counsel to represent him on the 1998 misdemeanor charge. At the initial appearance in that case, the court asked him, "Is it your wish to be represented by an attorney in this matter?" Deaver answered, "No." The court responded, "At this time the Court is going to enter a plea of not guilty on your behalf." From the record, it appears that the court then made a general announcement to the gallery that if anyone wished to seek representation by a public defender, they could do so, and that if the public defender could "undertake your representation, fine. If not, then you will be responsible for … getting your own representation in this matter."

¶3 Deaver subsequently entered a plea of no contest and the court referenced a Waiver of Rights form during Deaver's plea colloquy. The form does not contain any reference to the right to counsel.

¶4 At a November 6, 2007 motion hearing on his third OWI offense, Deaver mounted a collateral attack on the 1998 conviction. He argued that his

waiver of counsel was not knowingly, voluntarily and intelligently made. Deaver indicated that one of the reasons he did not seek an attorney for his 1998 offense was that he had believed it was a "straightforward case." He stated that he "thought it was a plea and you talk to the DA." Deaver acknowledged that he did not know a lawyer might be able to identify defenses to the case that Deaver, as a lay person, would not be able to identify.

¶5 The State questioned Deaver regarding his decision to hire an attorney in a prior divorce, making the point that Deaver understood that attorneys may be helpful advocates in court cases. The State asked Deaver if he had ever heard about "attorneys getting people out of things on technicalities," to which Deaver responded that this would not apply to his misdemeanor case because "it was like a clear-cut case." Deaver acknowledged hearing about the public defender, but believed he would not qualify for their services because he was employed. He assumed a lawyer would be able to give advice about whether the plea bargain was a "good deal."

¶6 The trial court, relying on ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), held that the State proved by clear and convincing evidence that Deaver had knowingly, voluntarily and intelligently waived his right to counsel in the 1998 case. The 2007 case involving Deaver's third OWI offense then proceeded to a jury trial and he was convicted. He now appeals.

DISCUSSION

¶7 Deaver presents one issue on appeal. He contends that the State did not meet its burden to show by clear and convincing evidence that Deaver knowingly, voluntarily and intelligently waived his right to counsel in the 1998 case. A defendant may collaterally attack a prior conviction obtained in violation

of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense." ***State v. Foust***, 214 Wis. 2d 568, 575-76, 570 N.W.2d 905 (Ct. App. 1997) (citing ***State v. Baker***, 169 Wis. 2d 49, 59, 485 N.W.2d 237 (1992)). When a defendant makes a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated, then the burden shifts to the State to show by clear and convincing evidence that the defendant's waiver of counsel was knowingly, intelligently and voluntarily entered. ***State v. Ernst***, 2005 WI 107, ¶¶25, 27, 283 Wis. 2d 300, 699 N.W.2d 92.

¶8 A criminal defendant in Wisconsin is guaranteed the right to assistance of counsel by article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *See* ***Klessig***, 211 Wis. 2d at 201-02. Those provisions also give a defendant the right to proceed without counsel. *See* ***id.*** at 203. Whether a defendant has knowingly, intelligently and voluntarily waived his or her right to counsel requires the application of constitutional principles to the facts of the case, which we review de novo. ***Id.*** at 204. "Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." ***Id.*** The State bears the burden of overcoming the presumption of nonwaiver. ***Id.***

¶9 When a defendant requests to proceed pro se, ***Klessig*** directs a circuit court to conduct a colloquy ensuring 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." ***Id.*** at 206. The State concedes Deaver made a prima facie showing that the waiver of counsel colloquy at the 1998 plea hearing was inadequate. The circuit court simply asked Deaver if he "wish[ed] to

be represented by an attorney" and Deaver indicated he did not. Therefore, the only unresolved question is whether the State has met its burden to show that Deaver's waiver of counsel was nonetheless knowingly, voluntarily and intelligently made. To show a defendant's knowing, intelligent and voluntary waiver, "the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty." ***State v. Ruszkiewicz***, 2000 WI App 125, ¶28, 237 Wis. 2d 441, 613 N.W.2d 893 (citation omitted).

¶10 Deaver concedes he made a deliberate choice to forego counsel in 1998. Furthermore, the record confirms that the circuit court informed Deaver of the seriousness of the charge and range of penalties he faced with a second offense OWI conviction. Accordingly, we focus our analysis on whether Deaver understood the dangers and disadvantages of self-representation. ***Klessig***, 211 Wis. 2d at 206; ***Ruszkiewicz***, 237 Wis. 2d 441, ¶28.

¶11 Deaver contends that the trial court never advised him of his right to counsel, only asking him if it was his wish to be represented by an attorney, and that the circuit court made no further efforts to discuss the advantages of having counsel or the disadvantages of proceeding pro se. Deaver emphasizes that he was not informed that a lawyer might be able to raise possible defenses that he otherwise could not have recognized.[1] He disputes any suggestion that hiring a

[1] At the time of the 1998 case, Deaver was approximately forty years old, worked as a self-employed upholsterer, and had a high school education. At that time, his only encounter with the criminal justice system was that very misdemeanor OWI case.

lawyer in a previous divorce proceeding would have informed him of the disadvantages of self-representation in a criminal case. He correctly points out that the State must rely entirely on the 2007 motion hearing testimony to establish a knowing waiver because the 1998 transcript lacks any discussion of the advantages of legal counsel or the pitfalls of self-representation.

¶12 Deaver asserts that, at a minimum, a circuit court faced with a self-representation situation should admonish the defendant that a lawyer can identify defenses to the case or facts in mitigation that the defendant may not be able to identify. He directs us to ***Ruszkiewicz*** for the proposition that while a court should advise the defendant of the right to counsel, it is "[e]qually important" to advise the defendant about the difficulties and disadvantages of self-representation. *See* ***Ruszkiewicz***, 237 Wis. 2d 441, ¶31-32. There, we stated that "lawyers are able to determine defenses for [defendants] that [they] may not be aware of based … upon their education and their experience and their training." ***Id.*** At oral argument, Deaver noted that only a layperson would consider an OWI case "straightforward" or "clear-cut." Defense attorneys recognize the complexities of OWI law, including: implied consent procedures, sobriety test reliability issues, constitutional issues regarding search and seizure, and other factors affecting the strength of the State's case against a particular defendant. Deaver's characterization of the 1998 OWI as straightforward reveals he did not know the disadvantages of self-representation; on the contrary, his testimony shows that he presumed his guilt. As Deaver apparently understood things, there were no defenses or mitigating circumstances in an OWI case, one simply entered a plea after talking to the district attorney.

¶13 The State counters that Deaver understood that an attorney would have a better understanding of both legal substance and procedure than he did. In

discussing his divorce, Deaver acknowledged that attorneys would have a better grasp of legal process than him and that his divorce attorney made arguments for him in court. With regard to the 1998 misdemeanor case, Deaver indicated that he would not have felt comfortable going to trial pro se, that he knew sometimes lawyers got people "out of things on technicalities," and that an attorney could have given him advice on whether a plea offer was a good deal. The State directs us to the circuit court's holding that Deaver "expressed the advantages in his divorce about why he got an attorney and he also expressed the advantages of having an attorney if he was unsatisfied about what the plea negotiations were." The court therefore attributed "some sophistication" to Deaver's decision to waive his right to counsel.

¶14 As we consider the circumstances of Deaver's waiver, we take guidance from ***United States v. Bell***, 901 F.2d 574 (7th Cir. 1990). Bell was arrested for robbing the First Wisconsin Bank of Waukesha on January 8, 1988. ***Id.*** at 575-76. He moved for self-representation and the appointment of stand-by counsel. ***Id.*** at 576. The following exchange occurred at the hearing on Bell's self-representation motion:

> THE COURT: I believe you're able to assist someone in your defense. But I think you need legal assistance.
>
> BELL: There's no question about that, sir.
>
> THE COURT: Okay. Now let's talk about that.
>
> BELL: All right.
>
> ….
>
> THE COURT: You filed a motion for self[-]representation, but in that motion recognized that you needed legal assistance.
>
> BELL: I did.

> THE COURT: [Defense counsel] filed a motion to withdraw.
>
> BELL: He did.
>
> THE COURT: Basically stating that there's a conflict in the way he views this case and the way that you view it. That sometimes happens ... [defense counsel], you believe that matters exist or conflicts exist that you, in good conscience, could not continue to represent Mr. Bell or even present his defense the way that he wishes it presented?
>
> [DEFENSE COUNSEL]: I think there's a real problem there, your Honor.
>
> THE COURT: Another possibility, Mr. Bell, is of course to have you represent yourself with the assistance of what we call stand-by counsel.
>
> ….
>
> BELL: This is what I was going to ask, sir, would be the leave to self-represent, assisted by stand-by counsel.
>
> THE COURT: [T]he reason we appoint stand-by counsel is to protect and insure the continuity of the proceedings and the integrity of the proceedings. And obviously, you can't draw up a lot of papers on your own behalf, and stand-by counsel does that and can assist in the investigation in making contacts.
>
> ….
>
> BELL: That's it. I think I can do it, sir.
>
> THE COURT: Okay. That's the question we have to deal with. Do you wish to waive your right to representation by counsel and invoke your right to self-representation with the assistance of standby counsel? Is that what you wish to do, Mr. Bell?
>
> BELL: Yes Sir.

Id. at 577-78.

¶15 The ***Bell*** court held that the colloquy was inadequate to inform Bell of the dangers and disadvantages of self-representation, but noted that Bell

admitted he would be disadvantaged proceeding without counsel and recognized the importance of having the assistance of counsel. ***Id.*** at 578. "The record indicates that Bell was no stranger to the criminal justice system. In fact, Bell represented himself during several proceedings before a district court on a prior charge of bank robbery." ***Id.*** (footnote omitted). The court concluded, "This case *is a close one* due to the inadequacy of the magistrate's warnings to Bell. However … we conclude that Bell knowingly and intelligently waived his right to counsel." ***Id.*** at 579 (emphasis added). Unlike Deaver, Bell appreciated the advantage of having counsel and he requested stand-by counsel in his case. He had experience in the criminal justice system, having represented himself against a serious criminal charge in court before. Bell clearly knew more about the system and the benefits of counsel than Deaver, yet the ***Bell*** court considered it to be a close call. By comparison, the State has not shown that Deaver had the level of understanding and experience that the ***Bell*** court only barely accepted as evidence of a knowing waiver.

¶16 We acknowledge that there are circumstances in which the absence of a formal colloquy under ***Klessig*** is not fatal. *See* ***Ruszkiewicz***, 237 Wis. 2d 441, ¶30. However, it must be evident from the exchanges between the defendant and the circuit court that the defendant was made aware of the difficulties of proceeding without counsel. *See* ***id.***, ¶32. Although the circuit court in ***Ruszkiewicz*** did not engage in a formal colloquy with the defendant, during the course of several exchanges with him, it urged him to obtain an attorney so as to avoid "legal missteps" and advised him that "lawyers are able to determine defenses for you that you may not be aware of based ... upon their education and their experience and their training." ***Id.***, ¶¶13, 18. No such cautions were provided to Deaver.

¶17 In ***Ruszkiewicz***, we directed circuit courts to WIS JI—CRIMINAL SM-30, which sets forth a suggested colloquy to ensure a defendant understands the right to counsel and the benefits of legal representation. ***Ruszkiewicz***, 237 Wis. 2d 441, ¶29. The instruction advises in relevant part:

> If you are represented by a lawyer, he or she may discover information or facts which would be helpful in your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty. I want you to take this into consideration in deciding whether or not you want a lawyer to represent you.

WIS JI—CRIMINAL SM-30.

¶18 At the collateral attack hearing, the circuit court indicated some concern about how much detail a court must provide to ensure that a defendant understands valid defenses or mitigating facts may be present. As Deaver points out, a court is not to give legal advice to a defendant; however, the WIS JI—CRIMINAL SM-30 advisory may prompt the defendant to reflect more meaningfully on the benefits of legal representation. Compliance with SM-30 would, at the very least, establish on the record that the defendant was advised of the potential advantages of legal counsel.[2] Furthermore, the court's concern about its responsibility to advise a defendant about specific defenses has been put to rest by the United States Supreme Court. '"[T]he law ordinarily considers a waiver

[2] Both the circuit court and the State had a responsibility to ensure Deaver knowingly waived his right to counsel in 1998. The court's responsibility derives from ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), which mandates the complete colloquy. The State's responsibility stems from knowing the law and anticipating its burden to show a knowing waiver if the colloquy was inadequate. *See* ***United States v. Bell***, 901 F.2d 574, 578 (7th Cir. 1990) ("As an officer of the court, the [prosecutor] has some responsibility to ensure, as far as may be reasonably possible, the integrity of the proceedings. To this end, the [prosecutor] should have assisted the magistrate by calling to his attention the possible inadequacy of these warnings.").

knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."' ***Iowa v. Tovar***, 541 U.S. 77 (2004) (citation omitted). The circuit court is not required to brainstorm from the bench about specific defenses available to a particular defendant.

¶19 Given the circumstances here, we conclude that the State has not shown by clear and convincing evidence that Deaver was aware of the disadvantages of self-representation or the potential advantages to obtaining legal counsel in a criminal case. To hold otherwise would render this mandatory prong of ***Klessig*** superfluous. *See* ***Klessig***, 211 Wis. 2d at 206.

CONCLUSION

¶20 Absent evidence that the court advised Deaver that a lawyer may be able to identify possible defenses or mitigating facts to assist with his case, or evidence that Deaver possessed this knowledge independently, the State's burden to demonstrate a knowing, voluntary and intelligent waiver of the right to counsel is not met. Accordingly, Deaver's 1998 OWI conviction was obtained without a valid waiver of his right to counsel and cannot be used for sentence enhancement purposes now. We therefore reverse the judgment of conviction and remand the matter to the circuit court to recalculate Deaver's sentence accordingly.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶21 BROWN, C.J. (*dissenting*). I fully understand the purpose of ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). It is to establish an approach to waivers of assistance of counsel that disfavors pro se representation and implements a preference for representation of counsel. As the Supreme Court stated in ***Faretta v. California***, 422. U.S. 806, 835 (1975):

> When an accused manages his [or her] own defense, he [or she] relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself [or herself], the accused must "knowingly and intelligently" forego those relinquished benefits. Although a defendant need not himself [or herself] have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he [or she] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he [or she] knows what he [or she] is doing and his [or her] choice is made with eyes open." (Citations omitted.)

¶22 I also recognize that the trial court failed to provide a ***Klessig*** inquiry. And it would have taken only about ten seconds for the trial court to ask Deaver if he was aware of the "dangers and disadvantages of self-representation." *See* ***Faretta***, 422 U.S. at 835.

¶23 But, in this state, the determination of whether the defendant was aware of the disadvantages of proceeding pro se is established from the record as a whole, even if the formalistic statement first announced in ***Faretta*** is missing from the colloquy between the court and the defendant. As our supreme court stated in ***State v. Ernst***, 2005 WI 107 ¶18, 283 Wis. 2d 300, 699 N.W.2d 92, the colloquy requirements under ***Klessig*** are not constitutionally required for a valid waiver of

counsel. Rather, pursuant to ***Iowa v. Tovar***, 541 U.S. 77 (2004), "[T]he information a defendant must have to waive counsel intelligently will "'depend, in each case, upon the particular facts and circumstances surrounding that case.'" ***Id.*** at 93 (citing ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938)).

¶24 Unlike the majority, I am satisfied that the record, taken as a whole, shows how Deaver made the decision to waive counsel with his "eyes open." *See* ***Faretta***, 422 U.S. at 835; *see also* ***Adams v. United States ex rel. McCann***, 317 U.S. 269, 279 (1942). First, he was aware of the seriousness of the repeat OWI charge and the possible penalties. The court had cautioned him at his initial appearance in the 1998 case, immediately before asking if he wanted to be represented by an attorney, that "as this is a second offense, the penalties are not less than [$]300 nor more than $1,000, imprisonment [of] not less than five days nor more than six months, license revocation of not less than 12 months nor more than 18 months." So, Deaver knew full well that, regardless of this being a traffic-related offense, he stood to be deprived of his liberty.

¶25 Second, at the collateral attack hearing, Deaver testified that he was 40 years old at the time of his 1998 no contest plea, was self-employed, was a high school graduate, and had been involved in three previous court proceedings. In particular, he testified that he retained a lawyer for his 1995 divorce case, one of the three prior court proceedings, because he was fighting for custody of his children and wanted an attorney to inform him and make arguments for him. He allowed that he "originally" had the impression that his attorney had a "little better grasp of the process" than he did and he was aware at the time that some attorneys would have a better grasp of the legal process than he did.

¶26 He testified that he did not think about getting a lawyer for the 1998 OWI case because he did not "know if it would help." He was aware that attorneys sometimes "[got] people out of things on technicalities" in some cases, but did not consider whether that might happen for him because it was a "clear-cut" case. While he said he would not have been comfortable going to a jury trial without a lawyer, he knew that a lawyer could have offered him advice and knew also that an attorney would have been able to counsel him on whether the plea bargain was a good deal for him.

¶27 With this record in hand, a cite from ***United States v. Pinkey***, 548 F.2d 305, 311 (10th Cir. 1977), comes to mind: "The hazards which beset a layman when he seeks to represent himself are obvious." Here, having been through divorce proceedings, having hired a lawyer to represent his interests in a custody dispute because that lawyer had the expertise to advise him and to argue on his behalf, he had to understand the risks of giving up his right to counsel for this OWI charge. He well knew that a lawyer would help him through the trial thicket and chose, with "eyes open," not to hire a lawyer. Based on his past experience, the hazards of doing so were obvious. Once he made that choice and having understood the risks associated with that choice, he had no greater rights than a litigant represented by a lawyer. *See* ***id.***

¶28 The majority asserts that representation in a divorce action is not the same as representation in a criminal action. But I cannot buy into that proposition. What more information would he have gained had the trial court asked him whether he was "aware of the dangers and disadvantages of self-representation"? In his divorce, he knew that representing himself in the custody fight was dangerous to his cause and would put him at serious disadvantage. That is why he hired a lawyer. He knew from the divorce experience that his lawyer could obtain

witnesses on his behalf, cross-examine hostile witnesses, make arguments to the court and file legal briefs in support of his case. Thus, he knew more about the "dangers and disadvantages of self-representation" than those OWI defendants who never had an attorney litigate on their behalf. So, again I ask: What more would he have learned from the colloquy question that he did not already know?

¶29 For whatever reasons, Deaver decided not to have an attorney for his 1998 OWI. That was his choice and he should not now be allowed to collaterally attack a conviction that was over and done with ten years ago.

¶30 At paragraph 17, the majority quotes ***State v. Ruszkiewicz***, 2000 WI App 125, ¶29, 237 Wis. 2d 441, 613 N.W.2d 893, where this court encouraged trial courts to use the suggested colloquy set forth in WIS JI—CRIMINAL SM-30. I agree with this advice. Simply asking a defendant whether he or she is aware of the "difficulties and disadvantages of self-representation" is, I submit, a meaningless exercise. The statement, standing by itself, is so abstruse, so vague, that it conveys nothing of substance which would help the defendant better understand why representation by counsel should be the preferred choice. The suggested instruction goes much further. It informs the defendant that counsel may be able to find information helpful to the defense that might otherwise not be discovered, may see a legal defense to the charge that the defendant is unable to see, and may be able to more cogently assert a lesser penalty. Giving such an instruction would take less than a minute of the court's time so as not to hamper judicial efficiency. The problem with the case before this court is, however, that we are asked to measure the giving of the abstract statement about the advantages and disadvantages of self-representation against Deaver's actual experience. By this measurement, I am convinced that no reversible error occurred. I dissent.