

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2892-CR

Cir. Ct. No. 2005CF232

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRADLEY A. BRANDSMA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Bradley A. Brandsma appeals the judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration (OWI) in violation of WIS. STAT. § 346.65(2)(b)2., fourth offense.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

He contends the circuit court erred in denying his motion to exclude from consideration a 1991 conviction for operating while under the influence of alcohol in violation of WIS. STAT. § 346.63.

¶2 Brandsma was charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, both as a fifth offense. He moved to collaterally attack two prior OWI convictions, one entered in 1990 and one entered in 1991. The circuit court granted his motion with respect to the 1990 conviction and that is not at issue on this appeal.

¶3 With respect to the 1991 conviction, Brandsma submitted an affidavit in support of his motion stating:

I entered a plea and was sentenced on a drunk driving charge in Columbia County, WI on 7/17/91 for an offense occurring on 5/9/91. At no time during these proceedings, did any Judge inform me that a public defender might be available to help me. I was asked if I wanted to have an attorney represent me, and I said no, partly because I could not afford one.

Accompanying the affidavit was a certification by the person who was a court reporter in 1991, who apparently covered the hearing at which Brandsma entered a plea to the 1991 charge, stating that she had made an effort to locate the court reporter's note and had been unable to do so. Also accompanying the affidavit was a traffic minute sheet for the 7/17/91 proceeding, which states in part: "Court questions def as to atty. and plea."

¶4 The circuit court concluded that Brandsma had not made a prima facie showing that his waiver of his right to counsel on the 1991 charge was not knowing and voluntary. The court stated that Brandsma's affidavit essentially states that he knew he had a right to an attorney and he went ahead without one.

The court also concluded it was a reasonable inference from the minutes that “there was regularity to the proceedings,” that he was “advised fully of his right to an attorney . . . , including notice concerning his right to have an attorney appointed at public expense.” The court reasoned that a sitting circuit judge in 1990 [sic] would “have covered that thoroughly.”

¶5 Brandsma stipulated to a trial based on proposed stipulated findings, and based on those, the court found him guilty of operating with PAC of .240%, fourth offense. The court sentenced Brandsma to 210 days confinement in the county jail, plus forfeitures, costs, and other sanctions.

¶6 On appeal, Brandsma contends that the court erred in concluding he did not establish a prima facie case that his waiver of the right to counsel was not knowingly and voluntarily made. He asserts that the court should have assumed non-waiver and the record did not show a waiver because, given the absence of a transcript and the brevity of the minutes, the record was inadequate to satisfy the standards of *Pickens v. State*, 96 Wis. 2d 549, 555, 292 N.W.2d 601 (1980).

¶7 A person that is charged criminally with a violation of WIS. STAT. § 346.63 may collaterally attack prior convictions that are being used as predicate offenses for enhancing sentencing under WIS. STAT. § 346.65. *State v. Foust*, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997). The only ground upon which a defendant may collaterally attack a prior conviction is a denial of the constitutional right to counsel in the prior case. *State v. Ernst*, 2005 WI 107, ¶22, 283 Wis. 2d 300, 699 N.W.2d 92. A defendant moving to collaterally attack a prior conviction has the burden of proving that he or she did not knowingly, intelligently, and voluntarily waive the constitutional right to counsel. *Id.*, ¶25. The defendant must make a prima facie showing that he or she was denied the

right to counsel by “point[ing] 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.* (citation omitted). If the defendant meets that burden, the State is then required to “show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him.” *Id.*, ¶31 (citation omitted).

¶8 When a defendant challenges a court’s determination that he or she did not make a prima facie case, this court reviews that determination de novo. *Id.*, ¶10.

¶9 In its brief, the State contends that the presumption of non-waiver in *Pickens* does not apply in this case because *Pickens* concerned a direct appeal whereas the issue of the waiver of counsel is raised in this case in the context of a collateral attack on a prior conviction. As the State points out, the supreme court in *Ernst* declined to apply a presumption against waiver of the right to counsel in a collateral attack because that would ignore the presumption of regularity that attaches to final judgments. *Id.*, ¶31 n.9. Brandsma did not file a reply brief and so did not dispute the State’s contention that there is no presumption of non-waiver in this case. We take this as a concession by Brandsma that the State is correct on this point. See *Charolais Breeding Ranches Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (that which is not refuted is deemed conceded).

¶10 Turning to Brandsma’s submissions to determine whether he made a prima facie showing, we conclude he did not. The only reasonable reading of his

affidavit is that he understood he could have an attorney represent him and one reason he said no was that he could not afford one, but there were other reasons that he said no. Brandsma argues that his averment and the minutes do not show that the court explained to him that he could have a public defender appointed if he could not afford an attorney. The State responds that, when a circuit court accepts a waiver of counsel, it is required only to inform a defendant of the right to counsel, but not of the right to appointed counsel. *State v. Drexler*, 2003 WI App 169, ¶¶16, 17, 266 Wis. 2d 438, 669 N.W.2d 182. Again, we take the absence of a reply brief and refutation of the State’s contention as a concession by Brandsma that the State is correct. Therefore it is not necessary to decide whether the circuit court reasonably inferred from the minutes that the 1991 presiding judge informed Brandsma of his right to have an attorney appointed at public expense. However, the circuit court’s inference that the 1991 proceeding was conducted with regularity is a reasonable inference; indeed that is the presumption the law attaches to a prior judgment. See *Ernst*, 283 Wis. 2d 300, ¶31 n.9.

¶11 Rather than making a prima facie showing that he did not knowingly and intelligently waive his right to counsel in the 1991 proceeding, Brandsma’s submissions show that he knew he could have an attorney, that he was asked if he wanted to have an attorney, and he said no “partly” because he could not afford one, and for other unspecified reasons. Therefore the circuit court correctly concluded that Brandsma failed to make a prima facie showing that his right to counsel was violated and his collateral attack of the 1991 conviction on that ground therefore fails.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

