STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0065

State of Minnesota,
Respondent,

vs.

John David Skerjance,
Appellant.

Filed March 3, 2009
Affirmed
Johnson, Judge

Ramsey County District Court
File No. K2-07-427

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Minge, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

John David Skerjance was convicted of first-degree driving while impaired (DWI). The charge was enhanced in part because of his conviction of DWI in Alaska in

1999 and the resulting revocation of his Alaska driver's license. Before trial, Skerjance challenged the enhancement of his offense by arguing that (1) his 1999 Alaska plea of nolo contendere was entered in violation of his constitutional right to counsel, (2) his 1999 Alaska plea of nolo contendere lacked a proper factual basis, and (3) the 1999 revocation of his Alaska driver's license violated his asserted right to consult with an attorney before submitting to an alcohol-concentration test. The district court rejected the first argument on the merits and declined to consider the second and third arguments on the ground that they are improper collateral attacks on a prior foreign conviction. For the reasons stated below, we affirm.

FACTS

On February 1, 2007, Skerjance's vehicle was stopped by members of the Mounds View Police Department after they observed him speeding. While speaking to Skerjance, the officers noted indicia of intoxication, including watery and red eyes, a strong odor of alcoholic beverage, a flushed face, and slurred speech. After Skerjance failed three field-sobriety tests, he was transported to the police station, where he consented to a breath test, which registered an alcohol concentration of .12.

Skerjance was charged with first-degree DWI because he had three qualified prior impaired-driving incidents within the previous 10 years. *See* Minn. Stat. § 169A.20, subds. 1(5), 2 (2006). The complaint reflects that Skerjance had a prior DWI conviction and license revocation in Alaska in 1999 and two convictions and revocations in Minnesota in 2000 and 2005.

Before trial, Skerjance sought an order from the district court prohibiting the state from using the 1999 Alaska conviction to enhance his charge. He first argued that his Alaska conviction should not be used to enhance his offense because he was not represented by counsel during those proceedings and did not validly waive his constitutional right to counsel. He also argued that his Alaska conviction should not be used to enhance his offense because there was not a proper factual basis for the plea of nolo contendere. Lastly, he argued that the revocation of his Alaska driver's license should not be used to enhance his offense because he was not given the opportunity to consult with an attorney before submitting to a breath test.

After a hearing, the district court denied Skerjance's challenges to the Alaska conviction and revocation. The district court ruled that Skerjance validly waived his constitutional right to counsel before entering his plea of nolo contendere. The district court declined to consider Skerjance's remaining arguments on the ground that they are impermissible collateral attacks on his prior conviction and license revocation.

In August 2007, Skerjance waived his right to a jury trial. The case was submitted to the district court on stipulated facts pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found Skerjance guilty. In October 2007, the district court sentenced Skerjance to 42 months of imprisonment but stayed execution of the sentence, placed Skerjance on probation for seven years, and ordered him to spend one year in the workhouse. Skerjance appeals the district court's pre-trial order denying his challenges to the enhancement of his offense.

D E C I S I O N

As a general rule, a criminal defendant's prior convictions are presumptively valid such that a district court "need not review the procedures that led to [the] prior conviction." *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988). Because collateral attacks on prior convictions "weaken the finality of judgments," they are "allowed only in 'unique cases.'" *Id.* (quotation omitted). More specifically, a criminal defendant may collaterally attack the validity of a prior conviction in only two circumstances: first, if the court in which he or she previously was convicted lacked jurisdiction over the charges, or, second, if recognizing the validity of the prior conviction would violate a strong public policy interest of the state of Minnesota. *State v. Schmidt*, 712 N.W.2d 530, 534-37 (Minn. 2006).

I. Offense Enhancement Due to Prior Conviction in Alaska

Skerjance's first two arguments pertain to the use of his Alaska conviction to enhance the present charge to first-degree DWI.

A. Challenge to Validity of Uncounseled Plea

Skerjance first argues that the district court erred by relying on his uncounseled plea of nolo contendere in Alaska in 1999 to enhance his DWI charge. Skerjance contends that the conviction should not be used because he was denied his constitutional right to counsel in the Alaska proceedings. The district court considered Skerjance's argument but determined that he validly waived his constitutional right to counsel prior to his plea.

In *Schmidt*, the supreme court reiterated the central holding of *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983), that a criminal defendant may collaterally attack a prior Minnesota conviction on the ground that it arose from an uncounseled plea of guilty. *Schmidt*, 712 N.W.2d at 533 (citing *Nordstrom*, 331 N.W.2d at 905). The *Nordstrom* rule applies only if the uncounseled guilty plea was obtained in violation of a person's constitutional rights. *State v. Dumas*, 587 N.W.2d 299, 302 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999).[1] The *Schmidt* court reasoned that the unconstitutional "'failure to appoint counsel [is] a unique constitutional defect' that presents a jurisdictional issue that can always be raised by collateral challenge." *Schmidt*, 712 N.W.2d at 534 (quoting *Custis v. United States*, 511 U.S. 485, 493-96, 114 S. Ct. 1732, 1737-38 (1994)).

Consistent with this caselaw, the district court properly proceeded to consider the substance of Skerjance's argument that his Alaska plea of nolo contendere was obtained in violation of his constitutional right to counsel. Accordingly, we will review the district court's ruling that Skerjance validly waived his constitutional right to counsel. In doing so, we will apply federal law and Alaska law. *See Schmidt*, 712 N.W.2d at 537 (holding that law of prior forum applies to collateral attack on prior conviction).

[1]As this court previously has noted, the doctrinal underpinnings of the *Nordstrom* opinion were called into doubt when the United States Supreme Court issued its opinion in *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921 (1994), which overruled *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585 (1980), which was one of the bases of *Nordstrom*. *See Dumas*, 587 N.W.2d at 302. In *Schmidt*, the supreme court did not expressly consider the impact of *Nichols* on *Nordstrom*. *See Schmidt*, 712 N.W.2d at 533-34.

A criminal defendant in an Alaska court has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Alaska art. I, § 11. A criminal defendant also may waive the right to counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2541 (1975); *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974). In accepting a defendant's guilty plea and waiver of the constitutional right to counsel, "a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 2687 (1993); *see also Gregory v. State*, 550 P.2d 374, 379 (Alaska 1976).

As a procedural matter, the defendant has the burden of establishing that a prior conviction is constitutionally invalid because the constitutional right to counsel was not validly waived. *Nordstrom*, 331 N.W.2d at 905. The burden of production is satisfied if the defendant submits an affidavit showing that he was not represented by counsel and that he did not validly waive his right to counsel. *State v. Otto*, 451 N.W.2d 659, 661 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990). If the burden of production is satisfied, the state bears the burden of proving that the conviction was obtained consistent with constitutional requirements. *Nordstrom*, 331 N.W.2d at 905. This court will reverse a district court's finding of a valid waiver of the right to counsel only if that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168-69 (Minn. 1997).

Skerjance submitted an affidavit in which he states that he was not represented by counsel when he entered his plea in the Alaska court and that he did not waive his right to counsel. Thus, Skerjance satisfied his initial burden. In response, the state introduced a

transcript of Skerjance's plea hearing in the Alaska court. The transcript reveals the following exchange between Skerjance and the court concerning his right to counsel:

> JUDGE: And are you going to have an attorney represent you in this matter?
>
> [SKERJANCE]: I don't think so. (Inaudible)
>
> JUDGE: Okay. You understand that you have the right to have a lawyer? You have a right to have an attorney appointed for you if you want a lawyer and you can't afford to hire one. You understand that?
>
> [SKERJANCE]: (Inaudible). I mean I just like to confer with (loud noise) for two minutes before I make a decision.
>
> JUDGE: Well, that would have been possible about two minutes ago, but since they all just left.
>
> [SKERJANCE]: Hmm. Can I ask you a question?
>
> JUDGE: I am not your attorney. You can ask me a question about the charges but I can't give you any legal advice. Or I won't give you any legal advice; I'm not allowed to give you any legal advice.
>
> [SKERJANCE]: Is there anyone that I can ask?
>
> JUDGE: Yes. There's the public defenders agency if you wish to apply for public defender if you qualify for one, one would be appointed to represent you. If there if you're asking if there is someone on staff here to advise you there is no, is none.
>
> [SKERJANCE]: So what's the question that you're asking me now?
>
> JUDGE: My last question was do you want a lawyer?
>
> [SKERJANCE]: No. There ain't one here so (inaudible).

> JUDGE: Alright, do you understand that your right to have a lawyer?
>
> [SKERJANCE]: Yes.
>
> JUDGE: And your right to have a court appointed attorney if you wanted one and couldn't afford to hire one?
>
> [SKERJANCE]: Yes.

Skerjance then entered a plea of nolo contendere.

Skerjance contends that his waiver of counsel was not voluntary. But the Alaska judge repeatedly told Skerjance that he had the opportunity and right to consult with an attorney if he wished to do so. Skerjance elected to proceed with his nolo plea without taking the opportunity to consult with an attorney. Thus, Skerjance's waiver of his constitutional right to counsel was voluntary, and the district court's finding that Skerjance validly waived his right to counsel is not clearly erroneous. *See Godinez*, 509 U.S. at 400, 113 S. Ct. at 2687; *Gregory*, 550 P.2d at 379.

B. Challenge to Factual Basis of Plea

Skerjance also argues that the district court erred by refusing to consider his argument that his Alaska plea of nolo contendere lacked a factual basis. Skerjance's argument requires us to determine whether this type of challenge to his nolo plea is a permissible collateral attack on a prior conviction. *See Schmidt*, 712 N.W.2d at 534.

We first consider whether Skerjance's argument is within the first category of permissible collateral attacks, which is concerned with constitutional violations that "rise to the level of a jurisdictional defect." *Id.* As stated above, a violation of a defendant's constitutional right to counsel is a jurisdictional defect that "can always be raised by

collateral challenge." *Id.* But the caselaw limits the category of jurisdictional defects to that one type of constitutional violation:

> [O]utside the right to appointed counsel . . . lesser violations of the federal Constitution (specifically, ineffective assistance of counsel, entry of a plea that was not knowing and intelligent, or agreement to a stipulated facts trial without being adequately advised of trial rights) [do] not rise to the level of a jurisdictional defect that could be raised by collateral challenge when the conviction was used to enhance the defendant's sentence.

Id. (citing *Custis*, 511 U.S. at 496, 114 S. Ct. at 1738).

Skerjance relies heavily on *Warren*, in which the supreme court considered an argument that a prior uncounseled guilty plea lacked a factual basis. 419 N.W.2d at 797. The challenge considered by the *Warren* court was not one that went to the jurisdiction of the court in which the prior conviction was obtained. As the court noted, Warren argued merely "that Rule 15.02 was violated." *Id.* at 798. Furthermore, the supreme court subsequently emphasized the fact that Warren's prior conviction arose from a Minnesota court and questioned whether that decision "should be extended . . . to apply to convictions rendered in another state." *Schmidt*, 712 N.W.2d at 534. In *Schmidt*, the supreme court considered a foreign prior conviction but declined to consider an argument that asserted a right broader than the constitutional right to counsel. *Id.* at 539. We interpret these supreme court opinions to not permit Skerjance to argue in this case that his plea of nolo contendere in the Alaska court lacked a factual basis.

Skerjance has not cited any other caselaw holding that the lack of a factual basis for a plea of nolo contendere rises to the level of a jurisdictional defect such that it is a permissible collateral attack on a prior conviction. Skerjance's challenge to the accuracy

of his plea is similar to the argument that a plea is not knowing or intelligent, which the United States Supreme Court has held is not a defect in a federal court's jurisdiction. *See Custis*, 511 U.S. at 496, 114 S. Ct. at 1738. The Minnesota caselaw is based in part on, and is consistent with, *Custis*. *See Schmidt*, 712 N.W.2d at 534. Thus, we conclude that Skerjance's second challenge to his prior Alaska conviction does not state a claim of a jurisdictional defect such that it is a permissible collateral attack on his foreign prior conviction.

We next consider whether Skerjance's argument is within the second category of permissible collateral attacks. *See id.* at 534-37. In some circumstances, "strong public policy interests of [Minnesota] provide sufficient reason to override the general rule of recognition" of other states' convictions. *Id.* at 537. The public-policy exception is "a very narrow exception." *Id.*

Skerjance has not identified a strong public policy interest of the state of Minnesota that might justify a collateral attack on his plea on the ground that it lacked a factual basis. It appears that the Minnesota Supreme Court never has permitted a collateral attack on a foreign prior conviction under the public-policy exception to the general rule of recognizing such convictions. This court did so in *State v. Friedrich*, 436 N.W.2d 475 (Minn. App. 1989), in which we held that an uncounseled Wisconsin guilty plea could not be used to enhance a subsequent offense because Minnesota law would have required counsel in the equivalent situation. *Id.* at 478. The supreme court has declined to either endorse or reject *Friedrich*'s holding. *Schmidt*, 712 N.W.2d at 537-38.

As stated above, Skerjance entered a plea of nolo contendere in Alaska. Under Alaska law, it is impermissible for a trial court to inquire into the factual basis of a plea of nolo contendere. Alaska R. Crim. P. 11; *Miller v. State*, 617 P.2d 516, 518 (Alaska 1980). A plea of nolo contendere is not available to defendants in Minnesota courts. Minn. R. Crim. P. 14.01 (providing for pleas of guilty, not guilty, and not guilty by reason of mental illness or mental deficiency). In light of the fact that Minnesota has no experience with a plea of nolo contendere, the manner in which Skerjance's nolo plea was tendered and accepted does not contradict any strong public policy interest of the state of Minnesota.[2] Thus, the district court correctly concluded that Skerjance may not collaterally attack his Alaska plea of nolo contendere on the ground that there was no factual basis for the plea.

II. Offense Enhancement Due to Alaska License Revocation

Finally, Skerjance argues that the district court erred by relying on the 1999 revocation of his Alaska driver's license to enhance his DWI charge. More specifically,

[2]It perhaps could be argued that Minnesota provides for the equivalent of a nolo contendere plea because it has adopted the procedure endorsed in *North Carolina v. Alford*, 400 U.S. 25, 38-39, 91 S. Ct. 160, 167-68 (1970), which allows a defendant to plead guilty but maintain innocence by acknowledging that the state has evidence that is likely to result in conviction. *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). But it is far from clear that a plea of nolo contendere is equivalent to a guilty plea. The *Alford* Court noted that "the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." 400 U.S. at 35 n.8, 91 S. Ct. at 166 n.8. In the wake of *Alford*, state courts have taken divergent views as to whether the two pleas are equivalent. *Compare State v. Crowe*, 168 S.W.3d 731, 746 (Tenn. 2005) (holding that *Alford* plea and nolo contendere plea are different and that factual basis is not required for nolo contendere plea) *with State v. Irish*, 394 N.W.2d 879, 883 (Neb. 1986) (holding that guilty plea and nolo contendere plea have similar requirements). For purposes of this case, it is significant that the Alaska Supreme Court regards its version of the nolo contendere plea as being different from an *Alford* plea. *Miller*, 617 P.2d at 518-19.

he argues that he should be allowed to collaterally attack the license revocation on the ground that he was not given the opportunity to consult with an attorney before he submitted to an alcohol-concentration test.

The district court relied on *Schmidt* in concluding that Skerjance could not collaterally attack the revocation of his Alaska driver's license on the asserted grounds. After Skerjance filed his brief, this court issued an opinion in *State v. Loeffel*, 749 N.W.2d 115 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008), in which we held that a DWI charge may be enhanced based on a foreign state's revocation of a driver's license, even if the defendant was not given the opportunity to consult with an attorney before he submitted to an alcohol-concentration test. *Id*. at 117. The *Loeffel* court reasoned that the supreme court rejected such an argument in *Schmidt* in a criminal case. *Id*. The *Loeffel* court then reasoned that the analysis should be no different in a civil case involving license revocation. *Id.* The *Loeffel* court concluded that *State v. Bergh*, 679 N.W.2d 734 (Minn. App. 2004) (holding that foreign conviction based on uncounseled alcohol test may not be used to enhance), was effectively overruled by the supreme court's subsequent decision in *Schmidt*. *Id.* The *Loeffel* opinion controls our resolution of Skerjance's third argument. Thus, Skerjance may not collaterally attack his Alaska license revocation based on the fact that he did not have an opportunity to consult with counsel before deciding whether to submit to an alcohol-concentration test.

In sum, the district court properly rejected Skerjance's challenge to the enhancement of his offense from second-degree DWI to first-degree DWI.

Affirmed.