STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2012 AP 000307CR

v.

NELY B. ROBLES,

Fond du Lac County Case
No. 10 CF 160

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT BRANCH II, THE HONORABLE PETER GRIMM PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

PETIT & DOMMERSHAUSEN, S.C.
By: Brian P. Dimmer
State Bar No. 1073944
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

Attorneys for the
Defendant-Appellant

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ISSUES PRESENTED

WHETHER THE COURT PROPERLY DENIED ROBLES' REQUEST FOR AN EVIDENTIARY HEARING REGARDING HER BANGERT CHALLENGE?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant (hereinafter "Robles") anticipates that the

briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF FACTS

On June 8, 2010, the State filed a complaint charging Robles with two counts—(1) Misdemeanor Theft – Party to a Crime and (2) Identity Theft – Financial Gain – Party to a Crime. (R. 2:1; A – 101). On June 15, 2010, Robles appeared before Branch 3, Fond du Lac County, for her initial appearance, and the court indicated that "[t]his is a two-count criminal complaint for misdemeanor theft, party to a crime, Class A Misdemeanor, $10,000 fine, nine months jail or both max, and identity theft financial gain, party to a crime, a Class H Felony, with a $10,000 fine and six years in prison or both." (R. 48:2; A – 104). Assistant State Public Defender Mary Wolfe acknowledged that she and Robles had reviewed the complaint, and she waived a further reading. Id. The court warned Robles that she would expose herself to a felony bail jumping

charge if she violated the conditions of her signature bond. (R. 48:3; A – 105).

On July 22, 2010, Robles appeared with Attorney Michael D. Peterson, who assumed responsibility over Robles' case pursuant to a private-bar appointment by the State Public Defender's Office. (R. 7:1; A – 108) Attorney Peterson informed the court that he reviewed with Robles the purpose of a preliminary examination hearing and that she was willing to waive the hearing. (R. 49:3; A – 112). The court inquired the following of Robles: (1) whether she understood the advantages of having a preliminary examination hearing, (2) whether anybody promised her anything or forced her to give up her right to a preliminary examination hearing, and (3) whether she had any questions for her attorney regarding her rights. (R. 49:3-4; A – 111-112). The court was satisfied with Robles' answers and found that she knowingly, voluntarily and intelligently waived her right to a preliminary examination hearing. (R. 49:4; A – 112).

At the end of the preliminary examination hearing, the court proceeded to arraign the defendant. (R.

49:4-5; A – 112-113). The State filed an Information containing the same charges as the Criminal Complaint. (R. 9:1; A – 115). Attorney Peterson entered not guilty pleas to the two counts contained in the Information. (R. 49:5; A – 113). The court inquired whether Robles understood what she was charged with, but the court did not reiterate that she was charged formally with a felony. Id. at 5.

On August 30, 2010, Attorney Kevin D. Musolf, appearing on behalf of Attorney Peterson, requested that the court adjourn the case to allow the parties to continue negotiating a resolution to the case. (R. 50:1-3; A – 116-118). The court granted Attorney Musolf's request and later granted a final adjournment on October 26, 2010, as the parties were contemplating resolving an uncharged referral with the pending case. Id. While the parties were negotiating an offer to resolve the case without trial, Robles recalls Attorney Peterson suggesting that he hoped to resolve the case with a misdemeanor rather than a felony. (R. 26:15; A – 134). Robles believed that a felony conviction would affect her ability to pursue a career in law

enforcement at Moraine Park Technical College. (R. 26:16; A – 135).

On December 2, 2010, Robles briefly met with Attorney Peterson to review the plea questionnaire/waiver of rights form. (R. 26:16; A – 135). She recalls that their discussion about the form took only a matter of five (5) minutes. Id. Robles recalls that Attorney Peterson did not indicate that she would be entering a no contest plea to a felony charge. Id. She believed she would be entering a plea to a non-felony charge, as the previous discussions had included the possibility of resolving the case with a misdemeanor. Id. Attorney Peterson did not advise Robles of the nature of the plea offer in any mail correspondence in advance of the December 2, 2010, hearing. (R. 26:16; A – 135).

Later, on December 2, 2010, Robles entered her plea before the Honorable Peter L. Grimm, Fond du Lac County. (R. 52:1-7; A – 140-146). Attorney Peterson began the plea hearing by informing the court that Robles would be entering a "plea of no contest to Count 2." (R. 52:2; A – 141). He indicated that "Count 1

would then be dismissed and read-in." Id. The court confirmed that Robles and Attorney Peterson had reviewed the plea questionnaire/waive of rights form in advance of the plea hearing. (R. 52:3; A – 142). The court continued by inquiring whether Robles had sufficient education and requisite capacity to understand the issues. Id. The court ensured that nobody had made any other promises, agreements, or threats to induce Robles' plea. Id. The court confirmed that Robles' plea would result in her conviction just as a guilty plea would. (R. 52:3-4; A – 142-143). The court reviewed the elements of Count 2 – Identity Theft, and the parties stipulated to the complaint serving as a factual basis for Robles' no contest plea. (R. 52:4-5; A – 143-144). The court reiterated the maximum penalty, which was a fine not to exceed $10,000.00 and imprisonment not to exceed six (6) years, or both. (R. 52:5; A – 144). The court informed Robles that the court was not bound by either party's recommendation. Id. The court discussed Robles' constitutional rights. (R. 52:5-7; A – 144-146). After discussing the defendant's constitutional

rights, the court accepted the defendant's plea and found that it was made freely, knowingly, voluntarily, and intelligently. (R. 52:7; A – 146). At no time during the actual plea colloquy did the parties, the defendant, or the court acknowledge that Count 2 was, in fact, a felony charge. (R. 52:1-7; A – 140-146). The parties proceeded to sentencing, and the court ordered that Robles serve two (2) years' probation and seventy-five (75) days of conditional jail time. (R. 52:7-17; A – 146-156); (R. 20:1; A – 159).

On or about December 15, 2010, Robles discovered that she pled to a felony charge when she met with her probation agent, Jennifer Hlinak. (R. 26:16; A – 135). Ms. Hlinak recalls that she informed Robles that she was now a felon, and Robles became hysterical. (R. 26:19; A – 138). Ms. Hlinak recalls that Robles lamented that she would have never entered a plea if she knew that she was pleading to a felony. Id.

On December 22, 2010, Robles filed a timely Notice of Intent to Seek Post-Conviction Relief, as the Judgment of Conviction was filed December 3, 2012. (R. 17:1; A – 158); (R. 20:1-2; A – 159-160). On

August 15, 2011, the undersigned counsel filed a timely Post-Conviction Motion, along with supporting affidavits and other documents, requesting that Robles be allowed to withdraw her no-contest plea pursuant to both the Bangert and Bentley challenges. State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The State filed a response to request for evidentiary hearing on August 16, 2011. (R. 27:1-2; A – 161-162). The court scheduled the matter for a motion hearing. (R. 28:1; A – 163).

On September 27, 2012, the court heard arguments on whether the court should summarily deny Robles' Post-Conviction Motion without further evidentiary hearing. (R. 53:1-19; A – 164-182). The court denied Robles an evidentiary hearing based on her Bangert challenge, but reluctantly granted Robles an evidentiary hearing based on her Bentley challenge. Id.

On October 7, 2011, and again on January 18, 2012, the court heard testimony and arguments regarding the issue of whether Attorney Peterson rendered ineffective

assistance of counsel by failing to properly advise Robles that she would be entering a plea to a felony charge. (R. 54:1-78; A – 183-260); (R. 55:1-97; A – 261-357). At the conclusion of testimony, the court determined that Robles had not met her burden of proof and denied her request to withdraw her plea on Bentley grounds. (R. 55:89-96; A – 349-356).

Robles filed a timely Notice of Appeal on February 7, 2012. (R. 41:1; A – 359). Although she abandons her Bentley challenge, she alleges that the circuit court improperly denied her an evidentiary hearing on the Bangert challenge to her plea; namely, that (a) the plea colloquy was defective for failing to advise her that she was pleading to a felony and that (b) she did not know that she was pleading to a felony.

STANDARD OF REVIEW

"Whether a defendant has established a *prima facie* case presents a question of law, which [the appellate court] review[s] without deference to the trial court's determination." State v. Hampton, 2002 WI App 293, ¶ 8, 259 Wis. 2d 455, 655 N.W.2d 131 (citing State v.

Hansen, 168 Wis. 2d 749, 754-55, 485 N.W.2d 74 (Ct. App. 1992)).

ARGUMENT

I. The circuit court must advise a defendant of whether she is pleading to a felony or misdemeanor as part of the plea colloquy.

A. Applicable Legal Standards regarding Bangert challenges to the plea colloquy.

Pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Wisconsin trial courts must ensure that a defendant knowingly, voluntarily, and intelligently enters a guilty or no contest plea. State v. Cross, 2010 WI 70, ¶ 16, 326 Wis. 2d 492, 786 N.W.2d 64. (citing State v. Brown, 2006 WI 100, ¶ 25, 293 Wis. 2d 594, 716 N.W.2d 906). "In Wis. Stat. § 971.08, the legislature established certain requirements for ensuring a guilty plea is knowing, voluntary, and intelligent." Id. Specifically, Wis. Stat. § 971.08(1)(a) provides: "Before the court accepts a plea of guilty or no contest, it shall . . . [a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the *nature of the*

charge and the potential punishment if convicted." (Emphasis Added).

The Wisconsin Supreme Court has supplemented Wis. Stat. § 971.08 with additional plea colloquy requirements. In particular, trial courts must now do all of the following during a plea hearing:

1. Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;

2. Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, her appearance at the hearing, or any decision to forgo an attorney;

3. Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;

4. Ensure the defendant understands that if she is indigent and cannot afford an attorney, an attorney will be provided at no expense to her;

5. Establish the defendant's understanding of the nature of the crime with which she is charged and the range of punishments to which she is subjecting herself by entering a plea;

6. Ascertain personally whether a factual basis exists to support the plea;

7. Inform the defendant of the constitutional rights she waives by entering a plea and verify that the defendant understands she is giving up these rights;

8. Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

9. Notify the defendant of the direct consequences of his plea; and

10. Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

Cross, 2010 WI 70, ¶ 18, 326 Wis. 2d 492, 786 N.W.2d 64 (citing Brown, 293 Wis. 2d 594, ¶ 35, 716 N.W.2d 906 (footnotes omitted)).

As mentioned above, trial courts are constitutionally required to notify defendants of the "direct consequences" of their pleas. State v. Bollig, 2000 WI 6, ¶ 16, 232 Wis. 2d 561, 605 N.W.2d 199 (citing Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); State v. James, 176

Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). Id. (citing State v. Santos, 136 Wis. 2d 528, 531, 401 N.W.2d 856 (Ct. App. 1987)). A direct consequence has a definite, immediate, and largely automatic effect on the range of defendant's punishment. Id. (citing State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998)). In contrast, defendants do not have a due process right to be informed of the collateral consequences of their pleas.

A defendant may be entitled to withdraw her plea if the trial court fails at one of these duties, which is commonly called a "Bangert Violation." Id. at ¶ 19. A defendant establishes that the trial court failed at one of its duties by filing a Post-Conviction Motion alleging both (1) a violation of Wis. Stat. § 971.08(1) or other court-mandated duties; and (2) that "the defendant did not know or understand the information that should have been provided at the plea hearing." Id. A defendant attempting to make this *prima facie* showing must point to deficiencies in the plea hearing transcript; conclusory allegations are not sufficient. Id.

Upon making this showing, the defendant is entitled to an evidentiary hearing where the State must prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing. Id. at ¶ 20. If the State cannot meet its burden, the defendant is entitled to withdraw her plea as a matter of right. Id. (citing State v. Van Camp, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997)). However, if a defendant seeking to withdraw her guilty plea cannot show that the circuit court failed in its duties during the plea hearing, or if the State meets its burden of proving the plea was knowing, voluntary, and intelligent, then withdrawal of the plea is left to the discretion of the circuit court and will not be disturbed unless the defendant demonstrates a manifest injustice will result from the court's refusal to allow the plea to be withdrawn. Id. (citing State v. Trochinski, 2002 WI 56, ¶ 15, 253 Wis. 2d 38, 644 N.W.2d 891 and State v. Thomas, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836).

B. The "felony" versus "misdemeanor" distinction is part of the nature of the offense.

At the September 27, 2011, motion hearing, the trial court agreed with the State and held that "the law does not require the Court to use the magic words – the felony." (R. 53:9; A – 172).

By contrast, Robles contends that the trial court had a duty to inform her that she was pleading to a "felony" offense, as part of the plea colloquy. Robles is unaware of Wisconsin case law that has specifically addressed whether the circuit court must inform a defendant that she is pleading to a felony versus a misdemeanor. Nonetheless, Robles believes that Wisconsin courts have determined that the "felony" versus "misdemeanor" distinction is part of the "nature of the offense," at other criminal proceedings and thus falls under the requirements of Wis. Stat. § 971.08(1)(a) and the supplemental requirements stated in Brown and its case progeny. Cross, 2010 WI 70, ¶ 18, 326 Wis. 2d 492, 786 N.W.2d 64 (citing Brown, 293 Wis. 2d 594, ¶ 35, 716 N.W.2d 906 (footnotes omitted)).

First, in State v. Watkins, the Wisconsin Supreme Court addressed whether "a repeater allegation against

one charged with a misdemeanor change[d] the charge to a felony for purposes of requiring a preliminary hearing." 40 Wis. 2d 398, 401, 162 N.W.2d 48, 49 (1968). Answering the question in the negative, the court reaffirmed State v. Harms, 36 Wis. 2d 282, 153 N.W.2d 78 (1967), which stated, "The habitual criminality statutes increase the penalty for a particular misdemeanor or felony involved, but in no way change the *nature of the crime*." Id. (emphasis added). The Court reiterated this holding in State v. Denter, where the court held that Wis. Stat. § 939.63(1)(a)1, which increases the penalty for misdemeanor battery to more than one year, does not "convert the misdemeanor to a felony." 121 Wis. 2d 118, 125-26, 357 N.W.2d 555, 559 (1984).

Second, the Court of Appeals acknowledged that the "felony" versus "misdemeanor" distinction is part of the "nature of the offense" in terms of assessing whether a criminal Information properly alleges a repeater enhancer. See, e.g., State v. Squires, 211 Wis. 2d 876, 565 N.W.2d 309 (Ct. App. 1997). Specifically, the court held that the following

provided adequate notice for repeater enhancer purposes:

> In such a circumstance, the information will identify the repeater offense, the date of conviction for that offense, *and the nature of the offense—whether for a felony or misdemeanor conviction*. The totality of information provided in the information will allow a defendant to determine the length of the enhanced penalty to which he is exposed.

Id. at 882 (citations omitted) (emphasis added). The Court of Appeals reiterated this understanding in State v. Fields, 2001 WI App 297, 249 Wis. 2d 292, 638 N.W.2d 897.

These cases confirm that the "felony" versus "misdemeanor" distinction is a fundamental component of the "nature of the offense." Robles contends that the trial court erred in holding that the court was not required to affirmatively ensure that Robles understood that she was pleading to a felony as opposed to a misdemeanor.

II. Robles has established a *prima facie* case alleging a defective plea colloquy, thus requiring an evidentiary hearing.

A. Circuit court's analysis.

The circuit court held that, even if it had a duty to ensure, via the plea colloquy, that Robles

understood that she was pleading to a felony, the transcript did not show a deficiency in that regard. (R. 53:9; A – 172). First, the court reasoned that because the court reviewed the maximum penalties and the length of incarceration, that Robles had "constructive knowledge and knowledge in fact." Id. Second, the court noted that the word "felony" was used at the plea and sentencing hearing, although the undersigned counsel corrected the court that the word "felony" was used during sentencing arguments, not the plea colloquy. (R. 53:9, 11; A – 172, 174). Third, the court distinguished State v. Cross, 2010 WI 70, ¶ 16, 326 Wis. 2d 492, 786 N.W.2d 64, and State v. Denter, 121 Wis. 2d 118, 357 N.W.2d 555 (1984), as inapplicable to the Bangert challenge. (R. 53:10, 11; A – 173).

B. The court should follow State v. Hampton and hold that Robles has established a *prima facie* case.

Although State v. Hampton addressed a different plea colloquy deficiency, the duty to inform a defendant that the court is not bound by the plea negotiations, the court should apply its reasoning to

find that Robles has met her *prima facie* burden and the court erroneously denied her an evidentiary hearing on her Bangert claim. 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14.

In Hampton, the Court clarified that a defendant is entitled to an evidentiary hearing when she alleges (1) a deficiency in the plea colloquy and (2) that the defendant did not know or understand the information that should have been provided at the plea hearing. 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14. In holding that Hampton had sufficiently alleged facts to meet his *prima facie* burden entitling him to an evidentiary hearing, the court rejected the State's range of arguments contending that statements and words less than an express statement were sufficient to comply with the colloquy requirements. Id. at ¶¶ 66-72.

First, the court rejected the State's argument that the court's plea colloquy duties can be satisfied by ensuring that the defendant was properly advised prior to the plea colloquy—rather, the defendant must be advised by the court in person. Id. at ¶ 67.

Second, the court rejected the State's argument that the court had met its plea colloquy obligations by asking Hampton whether he had reviewed the plea questionnaire form. Id. at ¶ 68. The court clarified, "The circuit court cannot satisfy its duty by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement." Id. at ¶ 69.

Finally, the court rejected the State's argument that "the circuit court's repeated use of the word 'recommendation' and the reference to the maximum penalty as fulfilling the court's duty to advise the defendant." Id. at ¶ 70. The court agreed that a "plausible inference may be drawn from the repeated reference to 'recommendation' . . . . But contrary inferences may be drawn from other parts of the record." Therefore, the court held:

> In every instance where the requisite showing is made that the defendant was not properly advised at the plea hearing, and the defendant asserts he was unaware that the court could exceed the negotiated sentencing recommendation, there is a genuine issue of material fact which must be resolved at an evidentiary hearing.

Id. As a result, the Court remanded the case to the circuit court for an evidentiary hearing on Hampton's Bangert claim. Id. at ¶ 73.

Here, the court should find that the trial court's reasoning is similar to the State's rejected arguments in Hampton—and remand Robles' case for an evidentiary hearing on her Bangert claim. First, the court should compare the trial court's reasoning that Robles had "constructive knowledge" because the court reviewed the maximum penalties and length of incarceration to the State's rejected argument, in Hampton, that "repeated use of the word 'recommendation' and the reference to the maximum penalty fulfill[ed] the court's duty . . . ." (R. 53:9; A – 172) and 2004 WI 107, ¶ 70. Both are "plausible inferences," but create "a genuine issue of material fact which must be resolved at an evidentiary hearing." Id.

Second, the court should reject the trial court's reliance on the post-plea colloquy use of the word "felony" as salvaging the plea colloquy. The court should compare this reasoning to the State's rejected argument, again in Hampton, that the court had

fulfilled its plea colloquy duty "by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands . . . ." Id. at ¶¶ 68-69. The use of the word "felony" after the plea colloquy does not obviate the court's duty to inform Robles that she was pleading to a felony.

Finally, although the court distinguished Robles' case from State v. Cross, 2010 WI 70, ¶ 16, 326 Wis. 2d 492, 786 N.W.2d 64, and State v. Denter, 121 Wis. 2d 118, 357 N.W.2d 555 (1984), she believes that the court should follow the case law mentioned above and hold that the court has an affirmative duty, pursuant to Wis. Stat. § 971.08(1)(a) and the supplemental requirements stated in Brown and its case progeny, to inform her that she was pleading to a felony. Cross, 2010 WI 70, ¶ 18, 326 Wis. 2d 492, 786 N.W.2d 64 (citing Brown, 293 Wis. 2d 594, ¶ 35, 716 N.W.2d 906 (footnotes omitted)).

Robles again concedes that if the court holds that the trial court need not say the specific word "felony" as part of complying with the plea colloquy

obligations, then she has not met her *prima facie* case to justify an evidentiary hearing. (R. 53:7; A – 170). However, as shown by the cases cited above, the distinction between "felony" and "misdemeanor" is more than the difference between potential penalties. State v. Watkins, 40 Wis. 2d 398, 401, 162 N.W.2d 48, 49 (1968); State v. Denter, 121 Wis. 2d 118,125-26, 357 N.W.2d 555, 559 (1984); and State v. Squires, 211 Wis. 2d 876, 565 N.W.2d 309 (Ct. App. 1997). Accordingly, Robles contends that the trial court can only meet its obligation to fully advise defendants of the nature of the charge by stating, during the plea colloquy, whether the charge is a misdemeanor or felony.

CONCLUSION

The court must decide whether the circuit court wrongly denied Robles an evidentiary hearing pursuant to her Bangert challenge. The circuit court held that (1) it had no duty to inform Robles that she was pleading to a "felony" or use the magic word "felony," and (2) that if the court had such a duty, Robles was constructively informed that she was pleading to a felony because of the circuit court's discussion of the

maximum penalties and length of imprisonment, as well as the post-plea colloquy use of the word "felony" during sentencing arguments. Robles contends that the distinction between "felony" and "misdemeanor" is part of the nature of the offense. Robles further contends that "constructive notice" was insufficient to fulfill the court's duty to advise her, by using the word "felony," that she was, in fact, pleading to a felony. She requests that the court remand her case with instructions that the circuit court hold an evidentiary hearing on this issue.

Dated this _____ day of May, 2012.

PETIT & DOMMERSHAUSEN, S.C.
By: Brian P. Dimmer
Attorneys for the Defendant-Appellant
State Bar No. 1073944
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a

table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 or 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.

Dated this _____ day of May, 2012.

_____
Brian P. Dimmer

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has twenty-six (26) pages.

Dated this _____ day of May, 2012.

Brian P. Dimmer

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of May, 2012.

Brian P. Dimmer