STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2013AP1108 CR

Trial Case No. 11-CF-453

JESSE J. DELEBREAU,

Defendant-Appellant.

Reply Brief of Jesse J. Delebreau Concerning the Judgment of Conviction Entered in the Brown County Circuit Court, The Honorable Thomas J Walsh, presiding.

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ARGUMENT

I. MR. DELEBREAU MAINTAINS THAT WAIVER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT THE CUSTODIAL INTERVIEWS MUST MEET THE MORE COMPREHENSIVE STANDARD SET IN **FARETTA V. CALIFORNIA.**

The right to counsel afforded under the Fifth and Sixth Amendments are based on different underpinnings.

The Fifth Amendment protects against forced or coerced self-incrimination. The Amendment itself does not specifically refer to the right to counsel. Through cases such as **Miranda v. Arizona**, 384 U.S. 436 (1966), and others, the US Supreme Court has prescribed a right to counsel as a protection against forced, custodial confessions. See also **Edwards v. Arizona**, 451 U.S. 477 (1981).

On the other hand, the right to counsel under the Sixth Amendment is a substantive right that appears within the Amendment, which provides: "the accused … to have the Assistance of Counsel for his defence." US Constitution, Sixth Amendment.

The legal basis for this right is much broader and more fundamental to the judicial process. It is to assure a fair and balanced adversarial process. **United States v. Wade**, 388 U.S. 218 (1967).

Given the Sixth Amendment right to counsel is a cornerstone to criminal jurisprudence, the US Supreme Court has imposed an exacting standard for trial courts to use if a defendant wishes to waive the right to counsel at any point after a criminal prosecution has been initiated. So much has been made clear in cases such as **Faretta v. California**, 422 U.S. 806 (1975). As in integral part of the waiver, the defendant must be made aware of the disadvantages of proceeding without counsel.

As stated in Mr. Delebreau's initial brief, this standard was not met when Deputy Aronstein interrogated Mr. Delebreau.

Contrary to the State's assertion in its brief (state's brief, Pages 9-10), the **Montejo** holding does not directly address or specifically consider the more comprehensive

standard described in **Faretta v. California**, supra, for accepting a waiver of counsel. In short, the **Montejo** Court does not explain why the standard for waiver of counsel by a defendant (after a prosecution has begun) would be subject to one standard if the waiver occurs before the trial judge (i.e., the **Faretta** standard) and a more lenient standard if the waiver occurs before an investigating officer (as in **Montejo**).

Mr. Delebreau believes the more comprehensive standard for the waiver of counsel as described in **Faretta** should apply as it better assures a knowing and voluntary waiver. Both in and out of court, the role of counsel is vital to fair and balanced criminal proceedings. As such, the standard for waiver of counsel should be the same regardless of who accepts the waiver.

The State mentions that Mr. Delebreau initially requested a meeting with the police between April 7-9, 2011 as a further basis of admitting Mr. Delebreau's statements obtained on April 15 & 18, 2011.

However, it should be noted that Mr. Delebreau's request was made before criminal proceedings were commenced against him. The Criminal Complaint was filed on April 14, 2011. Mr. Delebreau appeared in court later that same day and the process for appointing counsel was initiated. Finally, and perhaps most importantly, some time before Mr. Delebreau submitted the request, Deputy Aronstein had made a referral for charges against Mr. Delebreau. One can undoubtedly conclude that when Deputy Aronstein interviewed Mr. Delebreau, it was quite possible criminal charges against Mr. Delebreau were pending. And yet at no time during either interview did Deputy Aronstein ask Mr. Delebreau if charges had been filed or an attorney appointed.

According to **State v. Dagnall**, 2000 WI 82, 236 Wis. 2d 339, 612 N.W. 2d 680, when this criminal prosecution was filed, Mr. Delebreau's Sixth Amendment right to counsel was triggered. Therefore, Mr. Delebreau argues these subsequent and intervening events which invoked his right to counsel require a legally sufficient waiver of counsel – one meeting the standard set in **Faretta** - before Mr. Delebreau could be interrogated.

Mr. Delebreau maintains that a proper waiver of his right to counsel was not secured before he made the statements, and , therefore, the statements should have been suppressed.

II. ADMISSION OF MR. DELEBREAU'S STATEMENT WAS NOT HARMLESS ERROR.

If evidence is improperly admitted, the wrongful admission of the evidence is only harmless if there is no reasonable possibility that the error contributed to the conviction. **State v. Elim**, 2007 WI App 162, 303 Wis. 2d 746, 735 N.W. 2d 192.

In the broad spectrum of evidence the State may have at its disposal to secure a conviction, there can be little evidence more compelling than a confession.

It is Mr. Delebreau's contention no reasonable jury would likely dismiss entirely a confession. It is both reasonable and expected that a jury would both consider and rely on a confession in coming to a guilty verdict.

As such, Mr. Delebreau cannot imagine that the admission of his inculpatory statements would have been ignored by this jury. Rather, the jury would certainly have considered and relied on these statements in reaching its guilty verdict.

The State clearly invited the jury to do so, referring during closing argument to Mr. Delebreau's statement and the video tape of the interview during closing argument, (122, Pages 195-196).

Consequently, Mr. Delebreau believes the wrongful admission of his statements could not have been harmless.

CONCLUSION

Based on the errors alleged above, and set forth in his initial brief, Mr. Delebreau believes he did not receive a fair trial. He believes substantial errors occurred during the trial, ones that would have affected the jury's verdict. He should be granted a new trial.

Dated this 22nd day, October, 2013.

_____

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SPD Appointed Appellate Counsel for
Jesse J. Delebreau

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 1,353 words.

Dated this 22nd day of October, 2013.

_____
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ELECTRONIC FILING CERTIFICATION

I, Attorney Daniel R. Goggin, II, hereby certify that (1) the electronic copy of this brief or no merit report is identical to the text of the paper copy of the brief or no merit report, and an electronic copy of the brief has been filed.

Dated this 22nd day of October, 2013.

_____
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