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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2013AP1555 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

SCOTT J. STELZER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court for Manitowoc, the Honorable Jerome L. Fox Presiding
Trial Court Case Nos. 12 CT 59

Respectfully Submitted:

Melowski & Associates, LLC
524 South Pier Drive
Sheboygan, WI 53081
Telephone: (920) 208-3800
Facsimile: (920) 395-2443

By: **Matthew M. Murray**
State Bar No. 1070827
Attorneys for Defendant-Appellant

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STATEMENT OF THE ISSUE

I. **WHETHER THE STATE MET ITS BURDEN OF SHOWING, BY CLEAR AND CONVINCING EVIDENCE, THAT THE DEFENDANT'S WAIVER OF COUNSEL WAS KNOWING, INTELLIGENT, AND VOLUNTARY?**

Trial Court Answered: **Yes.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

Defendant-Appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT OF FACTS AND CASE

This is an appeal from a Judgment of Conviction adjudicating the defendant-appellant, Scott J. Stelzer, guilty of Operating while Intoxicated (OWI) – Third Offense. (R. 15, p. 1.) On February 14, 2012, the plaintiff-respondent, State of Wisconsin, filed a criminal complaint charging Stelzer with OWI and Operating with a Prohibited Alcohol Concentration – Third Offense. (R. 3, p. 1-7.) The complaint alleged that Stelzer had been convicted of previous OWI offenses on two previous occasions: June 21, 1994 and March 24, 1997 (R. 3, p. 6-7.)

On August 28, 2012, Stelzer filed a Motion Collaterally Attacking Prior Conviction for Operating a Motor Vehicle While Under the Influence of an Intoxicant in Calumet County Case Number 96 CT 219. (R. 7, p. 1-6.) The subject of the attack was his 1997 conviction for OWI – Second Offense. (*Id.*)

Stelzer also filed a supporting affidavit. (R. 7, p. 7-8.) The affidavit stated the following: that Stelzer was never advised of the right to an attorney or the benefits of an attorney and the dangers of self-representation. (*Id.*) Furthermore, Stelzer's affidavit stated that while he was asked if he was going to get an attorney, he did not know that he had an absolute right to a lawyer, now was he aware of what methods could be employed by an attorney including: the ability of an attorney to identify defenses, pursue negotiations, file motions, and the ability to attack allegations. (*Id.*) Moreover, Stelzer stated that he did not know the dangers of self-representation and the potential issues that may have been up rooted had an attorney handled his case, and had he known these things he would have sought counsel. (*Id.*)

On February 19, 2013, the trial court conducted an evidentiary hearing on the motion. (R. 16, p. 1-35.) In an effort to meet its burden at the hearing, the State called Stelzer to testify. (R. 16, p. 3-4.) Stelzer's testimony is summarized as follows:

1. That he initially pled not guilty and then went to a pretrial conference without a lawyer, where he met with a DA, talked about the case, and obtained a plea agreement. (R. 16 pp. 6-7, 9)

2. That he received a plea offer from the State

3. That he recalled certain facts about the case. Specifically, that he was sleeping, told the officer that he was driving to his girlfriend's residence, that he was driving from one city to the next, and that his blood test ended up being pretty high. (R. 16 pp. 4, 8)

4. That he knew he was guilty of the drunk driving, thought a lawyer probably can't help that much, and decided not to fight the case. (R. 16 pp. 8-9, 17)

5. That at the time he had a high school diploma. (R. 16 p. 9)

6. That the court asked him if he was going to have an attorney. (R. 16 p. 5)

7. That he did not know he had a right to an attorney and did not know an attorney could help him on a drunk driving case (R. 16 pp. 11, 19).

8. That he entered a guilty plea without the assistance of a lawyer. (R. 16 p. 7)

9. That he filled out a plea questionnaire and plead guilty to his 1996 second OWI offense. (R. 16, pp. 5-6)

10. That prior to that case he had an attorney for a divorce because his ex-wife had obtained a lawyer and knew that lawyers represent you. (R. 16 p. 10)

11. That prior to that case his parents had hired a lawyer in a misdemeanor battery case while he was in custody, that he talked to that attorney about the case, and that it was amended to an ordinance violation. (R. 16 pp. 15-16) This attorney took over that case because he was handling the divorce. (R. 16 p. 20)

12. That around the same time he decided to represent himself in reference to a restraining order. (R. 16 pp. 17-18)

13. That he believed drunk driving cases were different than other cases, that he did not understand what a lawyer could have done for him in that capacity, and that he did not know a lawyer could assist him in that context. (R. 16, pp. 19-20)

At the conclusion of the hearing, the trial court denied the motion. (R. 16, p. 33.) The trial court reasoned that Stelzer understood the role of an attorney, he knowingly decided it was going to be far less expensive for him to not have an attorney, and he negotiated his own deal with the District Attorney's Office. (R. 16, p. 32-33.) On February 20,

2013, the trial court issued a written order denying the motion. (R. 11, p. 1.)

On May 3, 2013 Stelzer entered into a plea agreement, pleading no contest to the OWI – Third. (R. 12, p. 1-2.) Thereafter, the trial court stayed the sentence pending an appeal of the collateral attack issue. (R. 14, p. 1.)

ARGUMENT

I. THE STATE FAILED TO MEET ITS BURDEN SHOWING THAT STELZER KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.

A. Standards Of Review And Applicable Legal Standards.

Whether a defendant knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel requires the application of constitutional principles to the facts. *State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997); *See also State v. Woods*, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984). This court will review such a question de novo, independently of the reasoning of the circuit court. *Klessig*, 211 Wis.2d at 204.

Thirty-three years ago the Wisconsin Supreme Court held that:

> [I]n order for an accused's waiver of his right to counsel to be valid, 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. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found.

Pickens v. State, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980) (overruled on other grounds). More recently, in *State v. Klessig*, the Wisconsin Supreme Court went further and

held that:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that 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. If the circuit court fails to conduct such a colloquy, a reviewing court may ***not*** find, based on the record, that there was a valid waiver of counsel.

(emphasis added) (internal citations omitted) 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721-22 (1997). *See also State v. Hoppe*, 2009 WI 41, ¶ 18, 317 Wis. 2d 161, 765 N.W.2d 794. *Hoppe* went on to rule that a circuit court may not rely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. *Id*. at ¶ 31.

The defendant, in establishing a prima facie case must be able to point to facts demonstrating they "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 right to counsel. *State v. Ernst*, 2005 WI 107, ¶ 25, 283 Wis. 2d 300, 699 N.W.2d 92.

After a prima facie showing, the burden is on the State to prove by clear and convincing evidence the defendant knowingly, intelligently, and voluntarily waived the right to counsel. *Klessig*, 211 Wis. 2d at 207.

B. The State Failed To Show, By Clear And Convincing Evidence, That Stelzer Knowingly, Intelligently, And Voluntarily Waited The Right To Counsel.

In the present case, the record reflects that Stelzer appeared without counsel and entered a plea to OWI Second Offense in Calumet County Case No. 96 CT 219. (R. 16 p. 5-6.) Stelzer was never advised that he had a right to an attorney, nor was he advised of the dangers of self-representation, or that an attorney would be able to identify potential defenses in a drunk driving case. Instead the judge simply inquired if Stelzer was going to get an attorney. (R. 16 p. 5.)

The State, during the motion hearing, conceded that the defendant, through presenting his affidavit, was able to establish a prima facie case. (R. 16 p. 3.) Because the prima facie burden was met, the burden shifted to the State to show that Stelzer waived his right to an attorney knowingly, intelligently, and voluntarily.

Stelzer did not validly waive his right to counsel because, as affirmed in the affidavit, he did not know that he had a right to a lawyer. (R. 7 p. 7.) The court asked him if he was going to get one and that was the only reference to a lawyer during the plea colloquy. There was no effort to ensure that Stelzer knew he had a right to a lawyer either verbally or in writing on the plea form.

The validity of the waiver is further compromised because, during the colloquy, there was no discussion about the benefits that a lawyer could present Stelzer. (*Id*.) While Stelzer had an attorney in a divorce case and a battery case, Stelzer believed that there was a difference between those cases and his drunk driving case. (R. 16, p. 19.) Specifically,

Stelzer felt that obtaining a lawyer in his drunk driving case would not be of any benefit to him. (R. 16, p. 20.) There is nothing on the record to indicate that Stelzer gave any thought to an attorney other than an uninformed and uneducated passing thought when asked by the judge if he was going to get a lawyer.

In its decision, the circuit court reasoned that Stelzer had engaged in a cost-benefit analysis, had a high school education, and that he understood the role of an attorney. (R. 16 p. 32-33.) Specifically the court referenced the recent decision of *State v. Gracia*. (R. 16, p. 32.) That case can be easily distinguished from this case because in *Gracia* the court engaged in a question-answer colloquy with the defendant including explaining to him that he had a right to an attorney, that he may qualify for the appointment of an attorney and if he did not qualify he could get an appointed lawyer. 2013 WI 15 ¶ 32, 345 Wis. 2d 488, 826 N.W.2d 87.

Additionally, the circuit court's belief that Stelzer engaged in a cost-benefit analysis (*Id*) does not give sufficient weight to Stelzer's ignorance regarding the defenses a lawyer can present. If Stelzer did engage in a cost benefit analysis it was without adequate understanding of how a lawyer could help him with the OWI charge.

Thus, it is made clear both through testimony and the affidavit that Stelzer was not told that he had a right to a lawyer. Additionally, the court failed to engage in any sort of discussion regarding the benefits that a lawyer could have on the case. Therefore, the prosecution failed to prove Stelzer made a knowing, voluntary and intelligent waiver of counsel.

CONCLUSION

WHEREFOR, Mr. Stelzer respectfully requests this Court to reverse the decision of the circuit court and remand this matter with directions that Mr. Stelzer be re-sentenced without the enhancement allowed by consideration of the prior conviction arising in Calumet County in case number 96 CT 219.

Dated this ___ day of September, 2013.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By:_____

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

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APPENDIX

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I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 1,985 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 of 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 16, 2013. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of _____, 2013.

Respectfully submitted,

MELOWSKI & ASSOCIATES L.L.C.

By:_____

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant