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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No: 2013AP1555 CR
Manitowoc County Case No. 2012CT000059

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

SCOTT J. STELZER,
Defendant-Appellant.

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

APPEALED FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MANITOWOC, THE HONORABLE JEROME L. FOX PRESIDING

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STATEMENT OF THE ISSUE

DID THE DEFENDANT KNOW THE BENEFITS OF HAVING AN ATTORNEY AND THE DANGERS OF SELF-REPRESENTATION WHEN HE ENETERED A GUILTY PLEA IN HIS PRIOR OWI CASE?

THE TRIAL COURT ANSWERED: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The issues in this appeal can be resolved through the application of established law, and the arguments contained in the written briefs will adequately address the arguments, so the State is not requesting oral argument or publication.

ARGUMENT

I. DESPITE THE UNAVAILABILITY OF A TRANSCRIPT FROM THE PLEA HEARING CONDUCTED SEVENTEEN YEARS AGO, THERE IS AMPLE EVIDENCE THAT THE DEFENDANT KNEW THE BENEFITS OF HAVING AN ATTORNEY AND THE DANGERS OF SELF-REPRESENTATION.

In this third offense OWI case, the defendant has filed a motion to "collaterally attack" his conviction for second offense OWI in Calumet County, Case Number 96CT219. He claims that he did not knowingly, intelligently, and voluntarily waive his right to counsel in that case because he was not aware of the benefits of having an attorney and the dangers of self-representation. The trial court denied his motion. Since the sixth amendment right to counsel requires the application of constitutional principles to the facts, this Court is now to review that decision *de novo*. *State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997).

It should be noted at the outset there is no credible evidence that the first, third, and fourth factors required for a valid waiver of the right to counsel under the *Klessig* case were not met in the prior OWI case. In other words, it's clear

that the defendant made a deliberate choice to proceed without counsel, was aware of the seriousness of the charges against him, and was aware of the general range of penalties if convicted. *Klessig*, 211 Wis. 2d at 206. The defendant's argument rests instead upon the second *Klessig* factor; that is, whether he understood the benefits of retaining counsel and the dangers of self-representation.

The state concedes that it can't prove that the circuit judge's colloquy in the defendant's 1996 OWI case was sufficient to show a valid waiver of right to counsel because the court reporter, as authorized by statute, disposed of her file in 2007, ten years after the hearing in question was held. (R. 7, p. 8) (App. 108) As a result, this Court is left with the defendant's recollections as expressed at the February 19, 2013 motion hearing about what occurred at the plea hearing in the Calumet County case some seventeen years earlier. (R.16, pp.1-35) (App. 109-143)

Nevertheless, and notwithstanding his claim to the contrary, it is clear from his own testimony and the other evidence adduced at the motion hearing that the defendant understood the benefits of retaining counsel and the dangers of self-representation. It wasn't for lack of understanding

what a lawyer could do for him that caused the defendant to proceed *pro se*. Rather, as in *State v. Gracia*, 345 Wis. 2d 488, 826 N.W.2d 87 - where a transcript of the waiver of rights colloquy was also unavailable - the defendant conducted a cost-benefit analysis as to whether he should retain an attorney, and then made a conscious decision not to do so. That was sufficient for the Court in *Gracia* to conclude that Mr. Gracia knowingly, intelligently, and voluntarily waived his right to counsel, and it should be sufficient for this Court as well.

Indeed, the facts in this case are even stronger than those in *Gracia*. The defendant testified at the February 19, 2013 motion hearing that he thought about getting an attorney but decided not to because he knew he was guilty, and because retaining an attorney costs a great deal of money. (R.16, pp. 8-9, 12-13) (App.116-117, 120-121) When asked specifically whether he reached this decision after engaging in a cost-benefit analysis, he answered in the affirmative. (R. 16, pp. 12-13) (App. 120-121) And like the defendant in *Gracia*, having decided to proceed without counsel, the defendant negotiated his own plea agreement and resolved the case,

apparently to his satisfaction. (R. 16, pp. 6-7, 9) (App. 114-115, 117)

The defendant's assertion that he did not understand the benefits of retaining an attorney are belied by his testimony at the motion hearing. For he had retained an attorney in a misdemeanor battery charge at around the same time. (R.16, pp. 15-16) (App. 123-124) He recalled meeting with his attorney to discuss that case and appeared with his attorney in court - he believed prior to being convicted of the OWI charge. (R.16, p.15) (App. 123) Pointedly, he specifically recalled that his attorney was able to reach an agreement with the district attorney to amend the battery charge to an ordinance violation, which the defendant agreed was a pretty good deal. (R. 16, P. 17) (App. 125) Having had this experience, the defendant certainly knew that an attorney could assist him in facing criminal charges.

The defendant testified - unconvincingly in the State's view - that while he knew an attorney could help him on the misdemeanor battery case, he thought a drunk driving case was different, that a lawyer couldn't help him on that kind of case. (R. 16, pp. 19-20) (App. 127-128) But having just received significant help from an attorney on another criminal

case, his claim that he didn't know an attorney could help him on an OWI criminal case is simply not believable.

Moreover, as trial courts frequently instruct jurors, one factor in assessing a witness' credibility is whether the witness has an interest in the proceeding; in other words, whether he stands to gain or lose from the results of the hearing. The defendant stood to gain from a positive result of his collateral attack motion since the penalties for an OWI second offense are significantly lower than those for a third offense.

An accused's Sixth Amendment right to counsel should never be taken lightly. But an overly strict, hyper-technical reading of the "Klessig" factors in the context of a collateral attack motion carries with it unforeseen negative consequences. The danger lies in its temptation for some defendants to misrepresent what was said at prior hearings, which often occurred ten or more years earlier without an available transcript to test their recollection. At the least, a hyper-technical reading of *Klessig* encourages selective memory; at its worst, perjury. The end product is a reduced respect for testifying truthfully and an unnecessary

diminishing of the public's interest in keeping the roads safe from drunken drivers.

CONCLUSION

For all of the above stated reasons, the State respectfully requests that the Court affirm the lower court's ruling denying the defendant's motion to collaterally attack his prior OWI conviction.

Dated this 16th day of October, 2013.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8)(b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 1,036; words.

Dated this 16th day of October, 2013.

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CERTIFICATION OF COMPLIANE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s.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 16th day of October, 2013.

Respectfully submitted,

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APPENDIX 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 s. 8-9.19(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 this appeal is taken from a circuit court order or a 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 of persons, specifically including juveniles and parents of juveniles, with a notation that the

portions of the record have be so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of October, 2013.

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