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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2013AP1555-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT J. STELZER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court for Manitowoc County, the Honorable Jerome L. Fox Presiding
Trial Court Case No. 12 CT 59

Respectfully Submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. THE STATE HAS FAILED TO OVERCOME THE PRESUMPTION THAT STELZER DID NOT MAKE A DELIBERATE CHOICE TO PROCEED WITHOUT COUNSEL.

Since a prima facie case has been made,[1] and since the State concedes that it cannot prove the colloquy in this case was sufficient,[2] "a reviewing court may *not* find, based on the record [in the case being collaterally attacked], that there was a valid waiver of counsel." *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (emphasis added). Regardless of the State's attempt to point out the public policy reasons against Stelzer or that the testimony of all defendants in collateral attacks is suspect because they have something to gain (*See Brief of Respondent* p. 5), "[t]he State has the burden of overcoming the *presumption* of nonwaiver." *Klessig*, 211 Wis. 2d at 204 (emphasis added). Stated another way, "[n]onwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." *Id*.

In the present case, the State has not affirmatively shown that Stelzer knowingly, intelligently and voluntarily made a deliberate choice to proceed without counsel. *See Id*. Indeed, the State says nothing more on

[1] The State concedes that a prima facie case has been met. ((R. 16 p. 3.).
[2] *See Brief of Respondent* p. 2.

this issue than: there is no credible evidence that the first *Klessig* factor was not met in the prior OWI case and that the defendant made a deliberate choice to proceed without counsel. *See Brief of Respondent* p. 1-2.

This is puzzling since the prima facie case that the State conceded was based on Stelzer's affidavit. That affidavit provided that he was not advised of the right to an attorney, the benefits of an attorney, the dangers of self-representation, and that he did not know he had an absolute right to a lawyer. (R. 7 p. 6.) In addition, Stelzer's affidavit also indicated that had he known these things he would have sought counsel to assist him. (R. 7 p. 7.) Moreover, Stelzer testified at the motion hearing that he did not know that he had an absolute right to an attorney. (R. 16 p. 11.) Finally, the State conceded that the defense had made a prima facie case and that it cannot show the colloquy was sufficient. (R. 16 p. 3.) *See also Brief of Respondent* p. 2.

The only tangential argument offered by the State is the fact that Stelzer's parents had previously retained an attorney to represent him in divorce proceedings and a misdemeanor battery case. *See Brief of Respondent* p. 4. (R. 16, pp. 10, 15-16, 20.) However, the State has provided no information, and indeed there is nothing in the record, affirmatively showing that Stelzer knew he had a constitutional right to an

appointed attorney at the time he entered a plea *pro se* in Calumet County case number 96 CT 219.

The State also focuses on *State v. Garcia*, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, which differs greatly from the present case. In *Garcia*, the trial judge informed Garcia that he had a right to an attorney, that he may qualify for appointment of an attorney or a county appointed attorney, but explained that he may earn enough money to hire an attorney. *Id*. at ¶ 32. Thus, when the defendant made a cost-benefit analysis in that case it was knowing and voluntary because the court properly informed him of his options.

In this case, the cost-benefit analysis that Stelzer made was without knowing that he could have had an attorney appointed to him for free or at a reduced cost. Had he known of the possibility that the "cost" could be dramatically reduced, perhaps the benefit of representing himself would not have been outweighed.

CONCLUSION

For the reasons stated above, Stelzer respectfully requests this Court reverse the decision of the circuit court and remand this matter with directions that Stelzer be re-sentenced without the enhancement allowed by

consideration of the prior conviction arising in Calumet County case number 96 CT 219.

Dated this _____ day of November, 2013.

Respectfully submitted,

MELOWSKI & ASSOCIATES, L.L.C.

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CERTIFICATIONS

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 675 words.

Further, 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.

Finally, I certify that this brief or 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 November 2, 2013. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of November, 2013

Respectfully submitted,

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