COURT OF APPEALS

DISTRICT III

Case No. 2014AP730-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SHERWOOD A. LEBO,

Defendant-Respondent.

ON APPEAL FROM A NON-FINAL ORDER GRANTING A MOTION COLLATERALLY ATTACKING TWO PRIOR CONVICTIONS AND A MOTION FOR RECONSIDERATION, BOTH ENTERED IN THE CIRCUIT COURT FOR KEWAUNEE COUNTY, THE HONORABLE DENNIS J. MLEZIVA, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. When collaterally attacking a prior conviction, if a defendant makes a prima facie showing of a denial of the right to counsel, the burden shifts to the State to prove a valid waiver of counsel. When directly attacking a conviction by seeking plea withdrawal, a defendant can make a prima facie showing of a violation of a constitutional right only by pointing to evidence demonstrating a defect in the trial court's waiver colloquy. Must a defendant satisfy

the same prima facie showing standard in a collateral attack as in a direct attack?

2. When a defendant's direct attack seeking plea withdrawal fails to make a prima facie showing, the defendant retains the burden of proving a violation of a constitutional right. Should a defendant collaterally attacking a prior conviction who fails to make a prima facie showing similarly retain the burden of proving a violation of the right to counsel?

3. In his affidavit, Lebo alleged that he did not have counsel in his prior convictions. But he presented no evidence demonstrating a defect in the trial court's waiver of counsel colloquy. At the hearing on his motion, Lebo testified that he remembered virtually nothing about the hearings in his prior convictions, and he presented no evidence that he was incapable of validly waiving counsel.

   a. Did Lebo make a prima facie showing that his right to counsel was violated in his prior convictions?

   b. If Lebo retained the burden of proving a violation of the right to counsel, did he satisfy that burden?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication will likely be warranted because this case is an opportunity for the court to determine the procedure for deciding collateral attacks on prior convictions when the defendant produces no evidence

demonstrating that the trial court in the prior case failed to conduct an adequate waiver of counsel colloquy.

STATEMENT OF THE CASE

The defendant-respondent, Sherwood A. Lebo, was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC) (2; 7). The State alleged that he had six prior OWI-related offenses (2:1; 7).

Before trial, Lebo moved to collaterally attack three of his prior convictions, in Shawano County Case Nos. 98CT234 and 99CT187, and Brown County Case No. 00CT190, so that they may not be used to enhance the sentence for his current offenses (10; A-Ap. 101-12). Lebo and his counsel filed affidavits in support of his motion (11; 12; A-Ap. 113-16).

The circuit court, the Honorable Dennis J. Mleziva, denied Lebo's collateral attack on his Brown County conviction, but concluded that Lebo made a prima facie showing that his right to counsel was violated in the Shawano County cases, and shifted the burden to the State to prove that he waived the right to counsel knowingly, intelligently, and voluntarily in those cases (16; 17; A-Ap. 117-25; 126).

After a hearing and briefing, the circuit court issued a written decision and order granting Lebo's motion collaterally attacking the two Shawano County cases (23; 24; A-Ap. 165-68; 169).

The State moved for reconsideration, asserting that Lebo failed to make a prima facie showing that his right to counsel was violated in his prior cases, so the burden should not have shifted to the State (25; A-Ap. 170-78).

After additional briefing, the court issued a written order affirming its decision and denying the State's motion for reconsideration (29).

This court then granted the State's petition for leave to appeal the court's non-final order.

STATEMENT OF FACTS

Because this case is on appeal before trial, the background facts are taken from the criminal complaint. Lebo was arrested in the Village of Casco on September 5, 2012 after a citizen reported seeing a vehicle crossing the centerline and varying its speed (2:1-2). A police officer was dispatched and he made contact with Lebo, who was driving a pickup truck that was towing a trailer (2:2). The officer informed Lebo that the lights on the trailer were not working (2:3). The officer noted an odor of intoxicants coming from Lebo's vehicle (2:3). He ran Lebo's identification, and learned that there was an active warrant for Lebo out of Brown County, and that Lebo had six prior convictions for OWI, so he could not legally operate a motor vehicle with an alcohol concentration exceeding 0.02 (2:3).

The officer administered field sobriety tests and attempted to administer a preliminary breath test, but was unable to do so because Lebo did not provide an adequate sample of breath (2:3-4). The officer arrested Lebo for OWI (2:4). The officer read the informing the accused form to Lebo, and Lebo agreed to submit to a blood test (2:5). Testing revealed a blood alcohol concentration of .061 grams per 100 milliliters of blood (2:5).

Lebo was charged with OWI and PAC, both as seventh offenses (2:1-2; 7). He moved to collaterally attack three of his prior offenses, two from Shawano County and one from Brown County, to prevent the State from using them to enhance the sentence for his current offenses (10; A-Ap. 101-12).

Lebo and his counsel filed affidavits in support of his motion (11; 12; A-Ap. 113-16). Lebo asserted in his

affidavit that he was not represented by an attorney in the three cases, that he is unable to read, and that he has problems with his memory (12:1; A-Ap. 115). He further asserted that in all three cases, he "cannot remember the circumstances of each hearing," he "just agreed with everything the Judge said, because I didn't know what to do," and "I did what 'they' told me, meaning, I went with what 'they' were going to give me for the charge" (12:2; A-Ap. 116).

Lebo's counsel asserted in her affidavit that the record of the Brown County case contains a plea questionnaire and waiver of rights form, but that neither plea questionnaires nor waiver of rights forms are in the records for the two Shawano County cases (11:1-2; A-Ap. 113-14). Counsel further asserted that there were no transcripts for the plea hearings in any of the cases. She said the court reporter's notes in two of the cases were destroyed after ten years, and she presumed that the notes in the third case were also destroyed after ten years (11:1-2; A-Ap. 113-14).

The parties submitted letter briefs to the circuit court. The court then issued a written decision denying Lebo's motion collaterally attacking his Brown County conviction, but concluding that Lebo made a prima facie showing that his right to counsel was violated in the two Shawano County cases (16; 17; A-Ap. 117-25, 26).

The court noted that in regard to the Brown County case, "Mr. Lebo does not recite facts to assert he was never told of his right to counsel or that he was never given an opportunity to get counsel. He basically just states in his Affidavit that he does not remember the details of the prior Court hearings" (16:6; A-Ap. 122).

The court noted that in regard to the two Shawano County cases, "the only meaningful Court record that this case has is a single-page minute sheet in each case" (16:7; A-Ap. 123). The court concluded that nothing in the minute sheet indicated that the trial courts knew that Lebo

could not read, and that Lebo entered his pleas at a single proceeding in each case (16:7; A-Ap. 123). The court noted that notations on the minute sheets in the two cases stated that "defendant advised of rights. Those rights waived." The court also noted that in Case No. 99CT187, the minute sheet contains a notion "will represent [him]self" (16:7; A-Ap. 123).

The court concluded that Lebo's affidavit was sufficient to make a prima facie showing that his right to counsel was violated in the two Shawano County cases (16:8-9; A-Ap. 124-25). The court therefore concluded that the burden shifted to the State to prove that Lebo waived the right to counsel knowingly, intelligently, and voluntarily in those cases (16:8-9; A-Ap. 124-26).

At the motion hearing (43; A-Ap. 127-64), Lebo testified that he did not have an attorney in the two Shawano County cases (43:19-20; A-Ap. 145-46). He said he "probably did sign some papers," in court. He added "I don't know what, but I'm sure I signed something" (43:19; A-Ap. 145). He said the judge talked to him, for "[p]robably about five minutes or so," but that he did not remember "at all anymore," what they talked about (43:19; A-Ap. 145).

Lebo testified that he had been in court before the Shawano County cases, and he sometimes had a public defender, but for his prior OWI case, he said "I don't think I had any in Shawano" (43:20; A-Ap. 146). Lebo was asked what the judge and he had talked about at the hearings in the Shawano County cases, and he testified "I can't remember anymore" (43:21; A-Ap. 147). Lebo testified that he was "pretty sure" he signed papers in court (43:23; A-Ap. 149). He was asked if he and the judge talked about his getting a public defender, and he answered "I don't remember" (43:23; A-Ap. 149). He was asked if he requested a lawyer, and he answered "No, because I can't afford it, so I just told them I will just take it the way it is. And I don't know if I have to have a lawyer or not. I don't know" (43:23; A-Ap. 149). Lebo

was asked if he made a financial decision not to hire a lawyer, and he answered "I guess, yeah. I'm not sure" (43:24; A-Ap. 150). Lebo also testified that when he went to court on the Shawano cases, he knew that he could go to jail (43:25; A-Ap. 151).

Lebo was asked if he knew what the penalties were when he went to court in the Shawano County cases. He answered "When I went to court, yeah, but I don't remember what they were anymore. I couldn't remember anything, how much time I got or anything on it" (43:29-30; A-Ap. 155-56).

Lebo was asked if the judge talked to him about a lawyer, and he answered "I don't remember" (43:30; A-Ap. 156). He was asked if the judge told him about the charges he faced, and he answered "I think so, have talked about it, but I don't remember it" (43:30; A-Ap. 156). Lebo then testified that he did not remember if the judge talked to him about getting a lawyer, about what a lawyer could do for him, or if he went to court more than one time in either the 1998 or 1999 case (43:30-31; A-Ap. 156-57). Lebo testified that "[w]hatever the judge offered me, I just took it, did it. He just gave me the time. Whatever the time was, I just went and did it" (43:33-34; A-Ap. 159-60). He explained "I just thought I was guilty, so I just did whatever they said to do" (43:34; A-Ap. 160). He was asked if he did not have a lawyer, and he answered, "Probably, yeah" (43:34; A-Ap. 160).

After briefing, the circuit court issued a written decision and an order granting Lebo's motion collaterally attacking the two Shawano County cases (23; 24; A-Ap. 165-68; 169). The court concluded that the State failed to meet its burden of proving, by clear and convincing evidence, that Lebo waived counsel knowingly, intelligently, and voluntarily in his Shawano County cases (23:4; A-Ap. 168).

The State moved for reconsideration, asserting that the circuit court erred in concluding that Lebo made a

prima facie showing that his constitutional right to counsel was violated in the two Shawano County cases (25; A-Ap. 170-78). The State asserted that the court's conclusion was incorrect because Lebo did not present any evidence demonstrating that the trial court in either Shawano County case failed to conduct an adequate colloquy to ensure that he validly waived his constitutional right to counsel, and because Lebo failed to allege that he did not know or understand any information that the courts failed to give him (25:8; A-Ap. 177).

The State further asserted that in the absence of a prima facie showing of a denial of the constitutional right to counsel, the burden-shifting procedure set forth in *State v. Bangert*, 131Wis. 2d 246, 389 N.W.2d 12 (1986) and adopted in *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, does not apply (25:2-7; A-Ap. 171-76). Instead, as the Wisconsin Supreme Court set forth in *State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14, and *State v. Negrete*, 2012 WI 92, ¶ 32, 343 Wis. 2d 1, 819 N.W.2d 749, if the defendant does not point to facts demonstrating that the trial court erred in its waiver colloquy, *Bentley*[1] applies, and the burden should not shift to the State, but should remain on the defendant to prove that he did not validly waive counsel (25:4-7; A-Ap. 173-76).

The circuit court denied the motion for reconsideration after briefing (27; 28; 29). It concluded that "the State's position has arguable merit," but also concluded that Lebo's position—that *Bentley* does not apply because it is a plea withdrawal case rather than a collateral attack case—also has arguable merit (29:4; A-Ap. 182). The court stated that "until there is an appellate ruling that a Bentley case analysis should be applied instead of an Ernst case analysis in a collateral attack case, this Court will apply the law in the Ernst case to collateral attacks of an OWI conviction, such as the one in this case" (29:4; A-Ap. 182).

[1] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

The court then concluded that even if it had applied *Bentley*, it would have granted the collateral attack motion (29:4-6; A-Ap. 182-84). It noted that in the Shawano County cases there is no transcript, and the minutes did not contain a notation indicating that Lebo could not read (29:4; A-Ap. 182). The court stated that "If the Defendant could not read, there is an inference to be drawn that he did not fully understand the charges against him and maximum penalties which would affect his ability to knowingly, intelligently, and voluntarily waive counsel" (29:4; A-Ap. 182). It therefore concluded that "the presumption of regularity asserted by the State in the Shawano County cases is overcome by the Defendant's inability to read and his other intellectual limitations" (29:5; A-Ap. 183).

The court stated that it was "not even certain that the Defendant fully understood the nature of the charges against him and maximum penalties because he could not read the criminal complaint in each Shawano County file" (29:6; A-Ap. 184). The court added that the records "do not provide the Court with sufficient facts to know if the right to counsel was meaningfully addressed with the Defendant," and it concluded that "even if the Defendant continued to have the burden of proof, that burden has been met by the evidence in the record before this Court as addressed above" (29:6; A-Ap. 184). The court then issued a written order granting the defense motion collaterally attacking the two prior convictions, and denying the State's motion for reconsideration (30; A-Ap. 185).

SUMMARY OF ARGUMENT

This case presents two related issues concerning the standards that apply to collateral attacks on prior convictions. In *Ernst*, 283 Wis. 2d 300, ¶¶ 25, 27, the Wisconsin Supreme Court adopted the *Bangert* standard for deciding collateral attacks, in a case in which there was a transcript of the hearing at which the trial court

accepted Ernst's waiver of counsel, and the transcript demonstrated the court did not conduct an adequate waiver colloquy. Under *Bangert*, a defendant makes a prima facie showing of a violation of the right to counsel by pointing to evidence demonstrating a defect in the trial court's required colloquy, and alleging that he or she did not understand information that the court failed to give him. *Id.* ¶ 25 (citing *Hampton*, 274 Wis. 2d 379, ¶ 46; (in turn citing *Bangert*, 131 Wis. 2d at 274-75)). Once the defendant makes a prima facie showing, the burden shifts to the State to prove a knowing, intelligent, and voluntary waiver of counsel. *Id.* ¶ 27 (citing *State v. Klessig*, 211 Wis. 2d 194, 207, 564 N.W.2d 716 (1997)).

The Wisconsin Supreme Court in *Ernst* did not explain what standard applies in collateral attacks when the defendant does not point to a transcript demonstrating a defect in the waiver of counsel colloquy, and therefore cannot make a prima facie showing of a violation of the right to counsel.

In *Negrete*, 343 Wis. 2d 1, the supreme court explained that in plea withdrawal motions, when a defendant cannot point to a transcript demonstrating a defect in a court's plea colloquy, "*Bangert's* burden-shifting procedure is not applicable." *Id.* ¶ 20.

Instead, the court analyzes the motion under *Bentley*. If the motion alleges facts that if true would entitle the defendant to relief, the trial court must hold a hearing on the motion. At that hearing, the defendant retains the burden of proving that his or her rights were violated. *Id.* ¶¶ 17, 20.

The State maintains that just like in a plea withdrawal motion, the *Bangert* burden-shifting standard does not apply in a collateral attack when a defendant does not point to evidence demonstrating a defect in a court's colloquy. Just like in a plea withdrawal case, the defendant has the initial burden, and that burden does not shift unless the defendant makes a prima facie showing.

And just like in a plea withdrawal case, the prima facie showing requires that the defendant point to evidence demonstrating a defect in a required colloquy. The defendant cannot make a prima facie showing that his right to counsel was violated simply by alleging that he did not know or understand information that the court supposedly failed to give him. He or she must point to evidence proving that the court failed to give the required information. If the defendant cannot do so, the *Bangert* burden-shifting procedure does not apply.

The State further maintains that, just like in plea withdrawal cases, a collateral attack motion not supported by evidence demonstrating a defect in a required colloquy should be analyzed under *Bentley*. A defendant is entitled to a hearing if he or she sufficiently alleges a violation of his or her right to counsel in the prior case, but the defendant retains the burden.

In this case, the trial court concluded that "the State's position has arguable merit," but stated that "until there is an appellate ruling that a Bentley case analysis should be applied instead of an Ernst case analysis in a collateral attack case, this Court will apply the law in the Ernst case to collateral attacks of an OWI conviction, such as the one in this case" (29:4; A-Ap. 182).

This court should provide that appellate opinion, and hold that in a collateral attack in which the defendant cannot point to evidence demonstrating a defect in a required colloquy, the *Bentley* standard, rather than the *Bangert* standard, applies.

This case also presents an issue concerning the circuit court's application of the law to the facts. The circuit court concluded that Lebo made a prima facie showing of a violation of his right to counsel, shifted the burden to the State, and concluded that the State failed to meet its burden (16:8; A-Ap. 124).

The State maintains that Lebo did not make a prima facie showing because he pointed to no evidence demonstrating any defect in the trial courts' required colloquies. The burden therefore should not have shifted to the State to prove a valid waiver of counsel.

The circuit court also concluded that even if Lebo retained the burden, his inability to read or write and his intellectual limitations overcame the presumption of regularity that attaches to final judgments of conviction, and he therefore proved that he did not waive counsel knowingly, intelligently, and voluntarily (29:5-6; A-Ap. 183-84). As the State will explain, Lebo failed to present any evidence sufficient to overcome the presumption of regularity that attaches to his final judgments of conviction, and therefore did not prove that his waiver of counsel was invalid in his prior cases.

ARGUMENT

I. WHEN A DEFENDANT COLLATERALLY ATTACKING A PRIOR CONVICTION DOES NOT PRESENT EVIDENCE DEMONSTRATING A DEFECT IN A TRIAL COURT'S WAIVER OF COUNSEL COLLOQUY, THE BURDEN SHOULD NOT SHIFT TO THE STATE TO PROVE A VALID WAIVER OF COUNSEL.

A. Introduction.

A collateral attack on a prior conviction is 'an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it. *State v. Ernst*, 283 Wis. 2d 300, ¶ 22 n.5 (quoting *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d

354 (internal quotation marks and quoted source omitted)).

When the State proposes to use the fact of a prior conviction to enhance a sentence for a subsequent offense, a defendant may collaterally attack the conviction. *State v. Hahn*, 2000 WI 118, ¶¶ 17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. A collateral attack may be based only on the ground of a violation of the constitutional right to counsel. *Ernst*, 283 Wis. 2d 300, ¶ 22 (citing *Hahn*, 238 Wis. 2d 889, ¶ 17).

In accepting a defendant's waiver of counsel, a trial court is required to conduct a personal colloquy to ensure that the waiver is knowing and voluntary. *Klessig*, 211 Wis. 2d at 206. Before *Klessig*, the Wisconsin Supreme Court had held that a colloquy was not required, but that

> in 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.

Pickens v. State, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980).

In *Klessig*, the supreme court overruled *Pickens* "to the extent that we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." *Klessig*, 211 Wis. 2d at 206. The court 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.

Id. at 206 (citation omitted). In *Ernst*, the supreme court affirmed that the waiver colloquy mandated in *Klessig* is required under the supreme court's superintending and administrative authority. *Ernst*, 283 Wis. 2d 300, ¶¶ 19-20.

In *Ernst*, the supreme court also concluded that the same procedure used in deciding motions for plea withdrawal also applies in collateral attack motions. The court noted that under this procedure, set forth in *Bangert*, a "defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated." *Id.* ¶ 25. The court explained that:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she "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 or her right to counsel.

Ernst, 283 Wis. 2d 300, ¶ 25 (citing *Hampton*, 274 Wis. 2d 379, ¶ 46 (in turn citing *Bangert*, 131 Wis. 2d at 274-75)). The court added that "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Id.* Once the defendant makes a prima facie showing, the burden shifts to the State to prove that the defendant waived counsel knowingly, intelligently, and voluntarily. *Id.* ¶ 27 (citing *Klessig*, 211 Wis. 2d at 207).

The supreme court in *Ernst* did not explicitly state that to make a prima facie showing under *Bangert* and *Hampton* a defendant is required to present evidence demonstrating that the trial court failed to advise the defendant of the right to counsel and ensure that the waiver of counsel was knowing, intelligent, and voluntary. However, in *Negrete*, 343 Wis. 2d 1, ¶¶ 30-33, the supreme court explained that the *Bangert* burden-shifting

procedure applies only when the defendant makes a prima facie showing of a denial of a constitutional right, and that to make a prima facie showing, the defendant must point to evidence demonstrating that the trial court failed to conduct a colloquy sufficient to ensure that the defendant waived his or her rights knowingly, intelligently, and voluntarily.

B. The *Bangert* burden-shifting procedure applies only when the defendant presents to evidence demonstrating a defect in a court's required colloquy.

The *Bangert* procedure that the supreme court adopted in *Ernst* is also the standard for addressing motions to withdraw guilty pleas on the basis of an inadequate plea colloquy under Wis. Stat. § 971.08. In *Bangert* the court stated:

> The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of Section 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274 (citations omitted).

In *Hampton*, 274 Wis. 2d 379, the supreme court explained that under *Bangert*, "[t]he initial burden rests with the defendant to make a pointed showing that the plea was accepted without the trial court's conformity

with § 971.08 or other mandatory procedures." *Id.* ¶ 46 (citing *Bangert*, 131 Wis. 2d at 274). The court added,

> When the defendant's motion shows a violation of § 971.08(1)(a) or (b) or other mandatory duties *and* alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden shifts to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered.

Id. (citing *Bangert*, 131 Wis. 2d at 274-75).

The supreme court made clear that a defendant's motion must do more than *allege* that the court failed to conform with required duties. It must *show* that the court failed to do so by pointing to evidence of that failure in the record. The court stated that:

> To obtain an evidentiary hearing based upon defects in the plea colloquy, the defendant will rely on the plea hearing record. To rebut the defendant's motion to withdraw his plea because the plea was allegedly not knowing, voluntary, and intelligent, the state will likely rely on the totality of the evidence, much of which will be found outside the plea hearing record.

Id. ¶ 47. The court added that "*Bangert*-type violations should be apparent from the record," *id.* ¶ 61, and are "confined to alleged defects in the record of the plea colloquy." *Id.* ¶ 51.

In *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, the supreme court again confirmed that the *Bangert* standard applies only when the defendant can point to evidence demonstrating a defect in a court's required colloquy, stating,

> In a *Bangert*-type case, the defendant points to a specific deficiency in the plea colloquy and asserts that he lacked the requisite understanding to make a knowing, intelligent, and voluntary plea.

> Because evidence to support the defendant's motion is contained in the court transcript, the State bears the burden of proof in any *Bangert* hearing.

Id. ¶ 55.

In *Negrete*, the supreme court again explained that the *Bangert* burden-shifting procedure applies only when the defendant points to evidence demonstrating a defect in a court's required colloquy. The defendant in *Negrete* moved to withdraw his plea, alleging that the trial court failed to inform him about possible deportation upon conviction of a felony. *Negrete*, 343 Wis. 2d 1, ¶ 5. There was no transcript of the plea hearing. *Id.* ¶ 7. The supreme court concluded that because the defendant was unable to point to a defect in the plea colloquy, the *Bangert* burden-shifting procedure did not apply. *Id.* ¶ 20.

In making this determination, the supreme court cited *Hampton* and *Ernst*. *Id.* ¶¶ 30-31. The court explained that

> Under *Bangert*, we established an approach for plea withdrawals whereby a defendant may shift the burden of proof to the State when: (1) the defendant can point to a plea colloquy deficiency evident in the plea colloquy transcript, and (2) the defendant alleges that he did not know or understand the information that should have been provided in the colloquy.

Id. ¶ 19 (citing *Bangert*, 131 Wis. 2d at 274-75; *Hampton*, 274 Wis. 2d 379, ¶ 46).

The court stated that with no transcript showing a defect in a required colloquy, "*Bangert*'s burden-shifting procedure is not applicable," reasoning that "the *Bangert* procedure is predicated on a defendant making 'a pointed showing' of an error in the plea colloquy by reference to the plea colloquy transcript." *Id.* ¶ 20 (citing *Hampton*, 274 Wis. 2d 379, ¶ 46).

The supreme court noted that "*Bangert* contemplated a shift in the burden of proof from the

defendant to the State based upon a showing of a deficiency in the plea colloquy transcript." *Id.* ¶ 30 (citing *Bangert*, 131 Wis. 2d at 274–75). The court added that "the necessary showing requires a defendant to point to specific deficiencies evident on the face of the plea colloquy transcript." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 51).

The court then explained in detail why *Bangert* does not apply in cases in which no transcript demonstrates a defect in a required colloquy, stating that

> the rationale underlying *Bangert's* burden-shifting rule does not support extending that rule to situations where a violation is not evident from the transcript. Instead, the policy of finality counsels that a party seeking to disrupt a final judgment by withdrawing his plea must first allege facts which, if true, demonstrate that manifest injustice has occurred and that relief is therefore warranted.

Id. ¶ 31 (citing *Balliette*, 336 Wis. 2d 358, ¶¶ 57-58; *Ernst*, 283 Wis. 2d 300, ¶ 25 ("Any claim of a violation on a collateral attack that does not detail such facts will fail.").

C. The standards for deciding collateral attacks are the same as for direct attacks.

In its motion for reconsideration in this case, the State asserted that the *Bangert* standard that the Wisconsin Supreme Court adopted for collateral attacks in *Ernst* is the same *Bangert* standard that the supreme court clarified in *Hampton* and *Negrete* (25:8; A-Ap. 177). The State asserted that, just like in *Hampton* and *Negrete*, the *Bangert* burden-shifting procedure applies in collateral attacks only when the defendant makes a prima facie showing of a denial of the right to counsel, by pointing to evidence demonstrating a defect in a trial court's required colloquy (25:8; A-Ap. 177).

The circuit court denied the State's motion, on the ground that no appellate case "right on point" has held that the same procedures that apply in plea withdrawals also apply in collateral attacks (29:3-4; A-Ap. 181-82). The State maintains that the circuit court was incorrect, because in *Ernst*, 283 Wis. 2d 300, the supreme court adopted the same procedures for deciding collateral attacks as are used in deciding direct attacks on convictions.

The supreme court in *Ernst* adopted the *Bangert* standard for a collateral attack on a prior conviction when the defendant made a prima facie showing that his or her right to counsel was violated in the prior case. *Id.* ¶¶ 25, 27. The court explained that to meet his or her burden under *Bangert*, a defendant must make a prima facie showing as set forth in *Hampton*. *Id.* ¶ 25. The court concluded that under *Hampton*, "For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she '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 or her right to counsel." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 46 (in turn citing *Bangert*, 131 Wis. 2d at 274-75)). The supreme court added that "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Id.*

The supreme court in *Ernst* concluded that the defendant in that case failed to make a prima facie showing. *Id.* ¶ 26. It therefore reversed the decision of the circuit court. *Id.* The court went on to determine what procedures are proper "when the defendant makes a sufficient prima facie showing on a collateral attack." *Id.* ¶ 27. The court set forth that when the defendant has made a prima facie showing, "then the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered. *Id.* (citing *Klessig*, 211 Wis. 2d at 207).

The supreme court has since explained that in plea withdrawal motions, the *Bangert* burden-shifting procedure—the same procedure it adopted in *Ernst*—applies only when the defendant meets his or her initial burden of showing a defect in the trial court's required colloquy, on the face of a transcript. *Negrete*, 343 Wis. 2d 1, ¶ 31. The supreme court has further explained that the defendant's burden of making a prima facie showing of a violation of a constitutional right—which it set forth in *Hampton* and adopted for collateral attacks in *Ernst*—requires the defendant to show, not merely to allege, that the trial court did not comply with its colloquy requirements. *Id.* ¶ 32 (citing *Hampton*, 274 Wis. 2d 379, ¶ 51).

There is no logical reason that the *Bangert* procedure that the court adopted in *Ernst* for collateral attacks is somehow different than the *Bangert* procedure that applies to direct attacks. There is similarly no logical reason that the *Hampton* standard for making a prima facie showing in a collateral attack, that the supreme court adopted in *Ernst*, is somehow different than the *Hampton* standard that applies to direct attacks. The supreme court in *Ernst* adopted the same procedure and standards, and it has now explained when the procedure and standards apply, and how a defendant meets his or her initial burden.

The supreme court made clear in *Negrete* that the standards and procedures are the same in direct attacks and collateral attacks, when it stated that "the rationale underlying *Bangert*'s burden-shifting rule does not support extending that rule to situations where a violation is not evident from the transcript," and noted that under *Ernst*, "'Any claim of a violation on a collateral attack that does not detail such facts will fail.'" *Negrete*, 343 Wis. 2d 1, ¶ 31 (quoting *Ernst*, 283 Wis. 2d 300, ¶ 25).

The State acknowledges that in *State v. Drexler*, 2003 WI App 169, ¶ 10, 266 Wis. 2d 438, 669 N.W.2d 182, this court stated that "under Wisconsin law, a defendant's affidavit is sufficient to establish a prima facie

case of being denied the right to counsel." This court stated that under *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), "when a defendant mounts a collateral attack on a prior conviction challenging a denial of the right to counsel and there are no transcripts available, a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." *Drexler*, 266 Wis. 2d 438, ¶ 10 (citing *Baker*, 169 Wis. 2d at 77-78).

In *Baker*, the Wisconsin Supreme Court applied the *Bangert* standard in a collateral attack on two prior convictions. Baker produced a transcript of the waiver hearing in the first prior case, demonstrating that the trial court's colloquy in accepting his guilty plea "facially violated sec. 971.08(1)." *Baker*, 169 Wis. 2d at 75. The court concluded that Baker therefore made a prima facie showing that his constitutional rights were violated in the prior case. *Id.*

The transcript of the guilty plea hearing in Baker's second prior conviction was lost. *Id.* at 76. Baker submitted three documents in support of his collateral attack motion:

> (1) A printed form entitled "Minutes for Trial" which states that Baker appeared in person and pleaded guilty. The deputy clerk did not alter the line printed on the form stating "All rights explained by the Court." (2) An affidavit submitted by a legal secretary employed by the law firm representing Baker in this proceeding, stating that the Brown County Clerk of Courts told her that the circuit court did not have any transcript or transcript notes of the proceeding and that the court reporter of the second proceeding (who now lives in Minnesota) told her that the transcript notes "were probably destroyed." (3) Baker's affidavit stating that at the April 28, 1986, hearing "he was unrepresented by counsel, and did not at any time affirmatively waive his right to counsel."

Id.

The supreme court applied the *Bangert* procedure, stating:

> Because the defendant must overcome the presumption of regularity attached to the prior conviction, the defendant bears the initial burden of coming forward with evidence to make a prima facie showing of a constitutional deprivation in the prior proceeding. If the defendant makes a prima facie showing of a violation of the right to counsel, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding.

Id. at 77.

The supreme court noted that Baker had submitted two affidavits, and that the transcript of the guilty plea hearing was lost. *Id.* The court further noted that the circuit court had suggested that Baker was required to make a prima facie showing "from the record," and that the court of appeals suggested that Baker "should have attempted to reconstruct the trial record" *Id.* The court concluded that "Baker met his burden of production under the circumstances of this case," reasoning that "Nothing in the record shows that the court of appeals' suggestions are practicable in this case." *Id.* at 78.

In *Drexler*, this court read *Baker* as establishing that "when a defendant mounts a collateral attack on a prior conviction challenging a denial of the right to counsel and there are no transcripts available, a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." *Drexler*, 266 Wis. 2d 438, ¶ 10 (citing *Baker*, 169 Wis. 2d at 77-78).

The State respectfully asserts that in *Drexler* this court interpreted *Baker* too broadly. *Baker* did not provide that in the absence of a transcript, a defendant can *always* make a prima facie showing of a denial of his or her right to counsel simply with an affidavit. The court stated that "under the circumstances of this case," Baker

was not required to point to a transcript showing a defective colloquy. *Baker*, 169 Wis. 2d at 78. The "circumstance" in *Baker* was that the transcript of colloquy was lost. *Id.* at 76. The supreme court concluded that when the transcript was lost, presumably by the State, and the court reporter's notes were destroyed, it was not "practicable" for Baker to recreate the record. *Id.* at 78.

Baker did not determine that in cases in which a transcript or a court reporter's notes are unavailable or destroyed, but not because of the State's mistake or misconduct, the defendant should be relieved of his burden. Instead, the supreme court's decision in *Baker* can reasonably be limited to that case's facts—the State lost a transcript it should have been able to produce and the defendant should not bear the burden of fixing the State's mistake.

This court's interpretation of *Baker* in *Drexler*, as providing that any time transcripts are unavailable "a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel," *Drexler*, 266 Wis. 2d 438, ¶ 10, is not consistent with *Baker*.

Alternatively, if this court concludes that in *Drexler* it correctly interpreted *Baker*, and if *Baker* stands for the proposition that whenever a transcript is unavailable a defendant can make a prima facie showing with an affidavit, this court should decline to follow *Baker* or *Drexler*, because subsequent decisions of the Wisconsin Supreme Court have made clear that *Baker* is no longer good law.

As detailed above, *Baker* applied the *Bangert* procedure. The supreme court has now made clear that the *Bangert* procedure applies only when there is evidence demonstrating a defect in a court's required colloquy, and stating that under *Ernst*, "Any claim of a violation on a collateral attack that does not detail such facts will fail."

Negrete, 343 Wis. 2d 1, ¶ 31 (quoting *Ernst*, 283 Wis. 2d 300, ¶ 25).

If this court concludes that *Baker* cannot be limited to its facts, and recognizes that *Baker* is inconsistent with subsequent supreme court decisions including *Hampton*, *Ernst*, and *Negrete*, it is bound to follow the more recent supreme court decisions. *See State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, ¶ 15, 776 N.W.2d 602; *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) ("When decisions of our supreme court appear to be inconsistent, we follow the court's most recent pronouncement.").

The State also acknowledges that in *State v. Hammill*, 2006 WI App 128, ¶ 8, 293 Wis. 2d 654, 718 N.W.2d 747, the court of appeals concluded that "the mere absence" of a transcript of the waiver colloquy did not defeat Hammill's collateral attack.

However, *Hammill* is consistent with *Hampton*, *Ernst*, and *Negrete*. The absence of a transcript does not necessarily defeat a defendant's direct attack or collateral attack. As the State will explain, it simply means that the defendant retains the burden of showing that his or her right to counsel was violated in the prior case.

The State further acknowledges that no Wisconsin appellate court has applied the standard proposed by the State in a collateral attack case. But the State is not asking this court to apply a novel standard for collateral attacks. It is asking only that this court recognize that the *Bangert* burden-shifting procedure that the supreme court adopted in *Ernst* applies only when the defendant makes a prima facie showing of the denial of the right to counsel, and that as the Wisconsin Supreme Court recognized in *Negrete*, under *Ernst*, "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Negrete*, 343 Wis. 2d 1, ¶ 31 (citing *Ernst*, 283 Wis. 2d 300, ¶ 25).

The supreme court's reasoning for applying the *Bangert* burden-shifting procedure in plea withdrawal motions only when a transcript demonstrates a deficiency in a required colloquy applies with even greater force in the context of a collateral attack. In a collateral attack on a prior conviction, there is no reason to presume that the right to counsel in the prior case was not waived knowingly, intelligently, and voluntarily. To the contrary, the fact of a final, unreversed conviction carries a '"presumption of regularity."' *Parke v. Raley*, 506 U.S. 20, 29 (1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938)). The Supreme Court in *Parke* determined that even if a reviewing court is not presented with a transcript showing a valid waiver, there is still no reason to presume, on collateral attack, that the waiver was invalid, stating "[I]t defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Id*. at 30. In *Ernst*, the supreme court "decline[d] to apply a 'presumption against waiver,'" stating that "there is no reason to presume the defendant did not properly waive his right to counsel in a collateral attack." *Ernst*, 283 Wis. 2d 300, ¶ 31 n.9 (citing *Parke*, 506 U.S. at 29) (citation omitted).

In summary, the *Bangert* burden-shifting procedure that the supreme court adopted in *Ernst* is the same procedure that applies to plea withdrawal motions, and under that procedure, the burden shifts to the State only when the defendant makes a prima facie showing of a violation of the right to counsel in the prior case by pointing to evidence of a defect in the trial court's required colloquy.

The State will next address the procedure that applies when a defendant does not make a prima facie showing of a violation of the right to counsel.

D. When a defendant cannot make a prima facie showing of a violation of the right to counsel, and shift the burden under *Bangert*, the defendant's collateral attack motion should be analyzed under *Bentley*.

In *Hampton* and *Negrete*, the Wisconsin Supreme Court determined that when a defendant cannot point to evidence demonstrating a defect in the trial court's required colloquy, the defendant cannot meet his or her burden under *Bangert* by making a prima facie showing of a violation of a constitutional right. *Hampton*, 274 Wis. 2d 379, ¶ 51; *Negrete*, 343 Wis. 2d 1, ¶ 30. The supreme court did not hold in either case that this necessarily means that the defendant cannot prevail on his or her motion. Instead, the supreme court set forth an alternative standard that applies when a defendant is unable to make a prima facie showing and shift the burden to the State. In such a case, the court analyzes the motion under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d50 (1996).

Bentley provides that when a defendant moves to withdraw a plea but cannot produce evidence demonstrating a defect in the trial court's required colloquy, a court applies a two-part test to determine whether to hold a hearing on the motion. '"If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing."' *Hampton*, 274 Wis. 2d 379, ¶ 55 (quoting *Bentley*, 201 Wis. 2d at 310). "'However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing'" *Id.* A reviewing court has discretion to deny a motion without a hearing '"[1] if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or [2] presents only conclusionary allegations, or [3] if the record conclusively demonstrates that the defendant

is not entitled to relief."' *Id.* ¶ 52 (quoting *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)).

The court in *Hampton* concluded that in a *Bentley*-type case the burden of proof is on the defendant and does not shift to the State if the defendant makes a sufficient prima facie showing. The court stated: "In *Bentley*-type cases, the defendant has the burden of making a *prima facie* case for an evidentiary hearing, and if he succeeds, he still has the burden of proving all the elements of the alleged error. *Id.* ¶ 63.

In *Negrete*, the supreme court concluded that "where a defendant is unable to point to a defect evident on the face of a plea colloquy transcript because such transcript is unavailable, the more appropriate review of a motion to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that set forth in *Bentley*." Negrete, 343 Wis. 2d 1, ¶ 33. The court added that "Allegations that are 'less susceptible to objective confirmation in the record' are particularly suited to a *Bentley*-type analysis, because the defendant is required to allege particular facts that would entitle the defendant to relief before the court is obligated to hold an evidentiary hearing on the motion." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 51) (footnote omitted).

The State maintains that just as the *Bangert* standard applies to both plea withdrawal motions and collateral attack motions when the defendant makes a prima facie showing of a violation of a constitutional right, the *Bentley* standard, which applies when the defendant cannot make such a showing in a plea withdrawal motion, should also apply when the defendant cannot make a prima facie showing in a collateral attack.

The issue in a collateral attack is whether the defendant has alleged facts which would entitle him or her to relief. "'If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing."'

Hampton, 274 Wis. 2d 379, ¶ 55 (quoting *Bentley*, 201 Wis. 2d at 310). If not, the circuit court has the discretion to deny a postconviction motion without a hearing '"[1] if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or [2] presents only conclusionary allegations, or [3] if the record conclusively demonstrates that the defendant is not entitled to relief."' *Id.* ¶ 52 (quoting *Nelson*, 54 Wis. 2d at 497-98).

At the hearing, just like in a direct attack seeking plea withdrawal, the defendant retains the burden of proving a violation of the right to counsel.

II. THE CIRCUIT COURT ERRED IN GRANTING LEBO'S MOTION COLLATERALLY ATTACKING HIS TWO PRIOR SHAWANO COUNTY OWI CONVICTIONS.

A. The circuit court erred in concluding that Lebo made a prima facie showing that his right to counsel was violated in his prior cases, and shifting the burden to the State.

The circuit court concluded that Lebo made a prima facie showing that his right to counsel was violated in his Shawano county OWI cases, and shifted the burden to the State to prove that he waived his right to counsel knowingly, intelligently, and voluntarily (16:8-9; A-Ap. 124-25). Whether a party has met its burden of establishing a prima facie case is a question of law that a reviewing court decides de novo. *Ernst*, 283 Wis. 2d 300, ¶ 26 (citing *Baker*, 169 Wis. 2d at 78).

In support of his motion to collaterally attack his prior Shawano County convictions, Lebo did not include a transcript of the hearings which would have demonstrated whether and how he waived the right to counsel. His attorney filed an affidavit explaining that she had

contacted the court reporters for the two Shawano County cases, but had not received transcripts from the relevant hearings, and that she assumed the reporters' notes had been destroyed after ten years (11; A-Ap. 113-14).

Lebo also filed his own affidavit, in which he asserted that he was not represented by counsel in the two Shawano County cases, but that he cannot remember the circumstances of the two cases (12; A-Ap. 115-16). Lebo further asserted that "I just agreed with everything the Judge said because I didn't know what to do," and that "I did what 'they' told me, meaning, I went with what 'they' were going to give me for the charge" (12:2; A-Ap. 116).

The circuit court concluded that Lebo made a prima facie showing that his right to counsel was violated in his Shawano county OWI cases, and shifted the burden to the State to prove that he waived his right to counsel knowingly, intelligently, and voluntarily (16:8-0; A-Ap. 124-25). The court noted that in his affidavit, Lebo asserted that he cannot read or write, and that he was in special education classes while in school, but that he graduated from high school. But the court found that "just because Mr. Lebo can't read and write, it doesn't mean that he can't understand and waive his rights, including his right to counsel" (16:5; A-Ap. 121).

The court noted that, in regard to his Shawano County cases, there are Minute Sheets including the notation "defendant advised of rights. Those rights waived," but neither transcripts nor plea questionnaire/waiver of rights forms (16:7; A-Ap. 123). The court concluded that because of the lack of these forms, "this Court has no factual basis to infer what rights were included in the rights referenced in the Minute Sheets" (16:8; A-Ap. 124). The court further noted that it appeared that Lebo pled guilty at his initial appearances, and that there was no indication that the trial court knew that Lebo could not read. The court concluded that Lebo made a prima facie showing that his right to counsel was violated, and shifted the burden to the State (16:8-9; A-Ap. 124-25).

The State maintains that the circuit court's decision was incorrect. To make a prima facie showing that his right to counsel was violated in the prior cases, under *Bangert* and *Ernst*, Lebo had to point to evidence demonstrating that his right to counsel was violated.

Under *Bangert*, a defendant must do more than allege that he does not remember waiving counsel, or that he does not remember what happened in court. He must "point to a plea colloquy deficiency evident in the plea colloquy transcript," and "allege[s] that he did not know or understand the information that should have been provided in the colloquy." *Negrete*, 343 Wis. 2d 1, ¶ 19 (citing *Bangert*, 131 Wis. 2d at 274-75; *Hampton*, 274 Wis. 2d 379, ¶ 46).

To make a prima facie showing of a denial of the right to counsel under *Bangert*, Lebo had to point to facts demonstrating that the trial courts in those cases failed to conduct an adequate waiver of counsel colloquy. *See Hampton*, 274 Wis. 2d 379, ¶ 46 (citing *Bangert*, 131 Wis. 2d at 274).

Lebo's motion and affidavit do not come close to making the required showing. He provided no transcript demonstrating that the courts in the Shawano County cases failed to conduct adequate colloquies to ensure that he validly waived his right to counsel, and he did not even allege that he did not understand information that the courts supposedly failed to give him. Lebo asserted that he cannot read, that he has memory problems, and that he took special education classes (12:1; A-Ap. 115). In regards to the Shawano County cases, he asserted that "I cannot remember the circumstances of each hearing," "I just agreed with everything the Judge said, because "I didn't know what to do," and "I did what 'they' told me, meaning, I went with what 'they' were going to give me for the charge" (12:2; A-Ap. 116).

The supreme court has explained why assertions like Lebo's are insufficient to make a prima facie showing of a denial of the right to counsel, stating in *Negrete* that "First, practically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." *Negrete*, 343 Wis. 2d 1, ¶ 32 (citing *Balliette*, 336 Wis. 2d 358, ¶ 57). The supreme court added, "Second, and more fundamentally, the rationale underlying *Bangert's* low standard for burden-shifting—that the State can avoid such burden by ensuring that the circuit court complies with the colloquy requirements—rings hollow, because there is no evidence in the record that the court did not comply." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 51). Finally, the court explained that "Without linking the shift of the burden of proof to a showing of error evident on the face of the transcript, we would ignore the general rule that a defendant seeking to withdraw his plea retains the burden of proving his claim by clear and convincing evidence." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶¶ 60, 63–64).

When it concluded that Lebo made a prima facie showing of a denial of his right to counsel, the circuit court shifted the burden to the State without requiring Lebo to show that the trial court in the prior cases erred in any way. The circuit court seemingly presumed, with no supporting evidence, that neither trial court conducted an adequate colloquy. As the United States Supreme Court has stated, "[I]t defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Parke*, 506 U.S. at 30.

Lebo did not meet his burden of making a prima facie showing that his right to counsel was violated, and the burden should not have shifted to the State to prove that he validly waived counsel.

B. The circuit court erred in concluding that Lebo met his burden under *Bentley* of showing that his right to counsel was violated in the prior cases.

After concluding that Lebo made a prima facie showing that his right to counsel was violated, the circuit court held a hearing at which it shifted the burden to the State to prove that Lebo waived counsel knowingly, intelligently, and voluntarily (43; A-Ap. 127-64). After the hearing, the circuit court concluded that the State failed to meet its burden, and granted Lebo's motion collaterally attacking his two prior convictions (23; 24).

The court then denied the State's motion for reconsideration, concluding that although "the State's position has arguable merit," "until there is an appellate ruling that a Bentley case analysis should be applied instead of an Ernst case analysis in a collateral attack case, this Court will apply the law in the Ernst case to collateral attacks of an OWI conviction" (29:4; A-Ap. 182).

Although it rejected the State's argument that Lebo failed to make a prima facie showing under *Bangert*, *Hampton*, and *Ernst*, and that the case should be analyzed under *Bentley*, the circuit court explained that it also concluded that Lebo would have met his burden under *Bentley*.

The court first determined that Lebo's "allegations of his inability to read English and his learning disabilities evidenced by special education schooling raise sufficient questions of fact regarding his waiver of counsel in the Shawano County cases," to warrant a hearing (29:4; A-Ap. 182).

The State acknowledges that the court could properly hold a hearing, because while a circuit court has discretion to deny a motion without a hearing if the

motion does not allege facts upon which relief can be granted, it also has discretion to hold a hearing even without a sufficient showing by the defendant. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

The circuit court noted in its order denying the State's motion for reconsideration that the State had argued that Lebo did not meet his burden of proving that his right to counsel was violated, and that he did not even testify that his right to counsel was violated (29:5; A-Ap. 183).

The court concluded that "the Defendant's undisputed intellectual limitations and the passage of time do not make Defendant's lack of recollection unreasonable or questionable" (29:5; A-Ap. 183). The court noted that unlike in the Brown County cases, it appeared that in the Shawano County cases, Lebo pled guilty at the initial appearance (29:5; A-Ap. 183). The court concluded that it "can infer that multiple cases were scheduled along with the Defendant, and that there was less time spent on the Defendant's cases in Shawano County than in Brown County where the plea was taken as a second Court hearing" (29:5; A-Ap. 183). The court also noted that there was no written plea questionnaire form in the record for the Shawano County cases, and nothing "which recognizes that the Defendant cannot read and has learning disabilities" (29:5; A-Ap. 183).

The court concluded that

> the presumption of regularity asserted by the State in the Shawano County cases is overcome by the Defendant's inability to read and his other intellectual limitations. This Court has seen the Defendant testify in Court, and he clearly is not a sophisticated individual. It the Defendant could read and write English and was of normal intelligence and functioning, this Court would likely find that the Defendant could not meet his burden and could not overcome the presumption of regularity. But the Defendant's inability to read English and his other

> limitations are not in factual dispute. Yet, the State wants this Court to presume that the knowingly, voluntarily, and intelligently waived his right to counsel when this Court is not even certain that the Defendant fully understood the nature of the charges against him and maximum penalties because he could not read the criminal complaint in each Shawano County file. The cursory minutes kept by the Clerk of Court do not provide the Court with sufficient facts to know if the right to counsel was meaningfully addressed with the Defendant. So, this Court finds and concludes that even if the Defendant continued to have the burden of proof, that burden has been met by the evidence in the record before this Court as addressed above.

(29:5-6; A-Ap. 183-84).

Whether a defendant establishes the violation of a constitutional right is reviewed de novo. *See State v. Cain*, 2012 WI 68, ¶ 21, 342 Wis. 2d 1, 816 N.W.2d 177.

The State respectfully maintains that the circuit court misapplied both the presumption of regularity that attaches to final judgments, and the burden of proof.

The court noted that the record was insufficient for it "to know if the right to counsel was meaningfully addressed with the Defendant" (29:6; A-Ap. 184).

However, Lebo pled guilty in the two Shawano County cases in 1997 and 1998, after the Wisconsin Supreme Court issued its decision in *Klessig*, requiring that trial courts conduct a personal colloquy with a defendant in order to accept a waiver of counsel. *See Klessig*, 211 Wis. 2d at 204, 206. The presumption of a regular proceeding should therefore mean a presumption that the trial courts in the prior cases followed the law, and addressed Lebo's right to counsel with him. As the United States Supreme Court has stated, "[I]t defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to

governmental misconduct) that the defendant was not advised of his rights." *Parke*, 506 U.S. at 30.

Lebo presented no evidence that the trial courts failed to follow the law in his prior cases. He did not even allege that the trial court failed to do so. Lebo candidly admitted that he remembered virtually nothing about the hearings in the Shawano County cases. He did not even remember how many times he went to court in either case (43:31; A-Ap. 157).

Lebo acknowledged that the judge talked to him in court, for "[p]robably about five minutes or so." He said "I don't remember at all anymore" what the judge said (43:19; A-Ap. 145). He was asked if he and the judge talked about his getting an attorney, and he answered "I can't remember anymore" (43:21; A-Ap. 147). Lebo reiterated that "I can't remember it anymore, what we talked about" (43:22; A-Ap. 148). He said he and the judge talked for "[f]ive, ten minutes, you were in and out. It could have been longer, but I am just guessing five, ten minutes" (43:22; A-Ap. 148).

Lebo was asked if he had signed a form, and he said that he "[p]robably signed papers, yeah" (43:22; A-Ap. 148). He explained that "[u]sually every time you sign papers when you are in court. I'm pretty sure I did. Maybe I didn't, but I'm pretty sure I did" (43:23; A-Ap. 149).

Lebo testified that he did not remember what the potential penalties were for his OWI case, but when asked if he knew the penalties when he went to court, he answered, "When I went to court, yeah" (43:30; A-Ap. 156). He testified that he did not remember if the judge talked to him about a lawyer (43:30; A-Ap. 156). When asked if the judge talked to him about the charge he answered, "I think so, have talked about it, but I don't remember it" (43:30; A-Ap. 156). Lebo further acknowledged that he was "not sure" if the judge in either

case told him what a lawyer could do for him in an OWI case (43:30; A-Ap. 156).

Lebo also acknowledged that in his Shawano County cases, he chose not to have a lawyer because he thought he could not afford one (43:23; A-Ap. 149).

Lebo did not even allege, much less prove, that the trial courts in the Shawano County cases did not advise him of his right to counsel. He provided nothing overcoming the presumption of regularity that attaches to a final judgment of conviction.

The circuit court concluded that Lebo's inability to read and his other intellectual limitations overcome the presumption of regularity (29:5; A-Ap. 183). It noted that Lebo could not read the criminal complaint (29:6; A-Ap. 184), and concluded that if Lebo "could read and write English and was of normal intelligence and functioning," it "would likely find" that he "could not meet his burden and could not overcome the presumption of regularity" (29:5-6; A-Ap. 183-84).

But the State is not asserting that Lebo knew of his right to counsel because he read the complaint. It is asserting that the circuit court and this court should presume that the trial courts in the prior cases properly advised Lebo of his right to counsel and conducted adequate colloquies with him. Lebo has not even alleged that they did not do so.

The circuit court seemingly concluded that even with Lebo's inability to read and write and his intellectual limitations, he would not have proved a violation of the right to counsel if evidence in the record showed that the trial courts had "meaningfully addressed" the right to counsel with him (29:6; A-Ap. 184).

Again, the court's conclusion overlooks the presumption that the trial courts did meaningfully address Lebo's rights with him.

The circuit court did not find that Lebo's inability to read and write and his intellectual limitations mean that he could not have waived his right to counsel knowingly, intelligently, and voluntarily. The court concluded that he validly waived his right to counsel in the Brown County cases, and it implied that if there were a transcript showing a proper colloquy in the Shawano County cases it would have reached the same conclusion in those cases (16:5-6; 29:5-6; A-Ap. 121-22, 183-84). The court should have presumed that the Shawano County trial courts held proper colloquies, and it should have concluded that just like in the Brown County cases, Lebo's inability to read and write and his intellectual limitations did not mean that his waivers of counsel were invalid.

Lebo failed to prove that he did not validly waive counsel in his Shawano County convictions, and the circuit court therefore should have denied his motion collaterally attacking those convictions.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court reverse the non-final order granting the motion filed by the defendant Sherwoood A. Lebo, collaterally attacking his two prior Shawano County OWI convictions so that they are not used to enhance the sentence if he is convicted in this case.

Dated this 9th day of December, 2014

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,990 words.

Dated this 9th day of December, 2014.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 9th day of December, 2014.

_____
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