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OF WISCONSIN**

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP730-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SHERWOOD A. LEBO,

Defendant-Respondent.

On Petition for Leave to Appeal a Non-Final Order
Entered in the Kewaunee County Circuit Court,
the Honorable Dennis J. Mleziva, Presiding

RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary as the issue can be adequately presented in the briefs. Publication is also unwarranted as this case requires only a straightforward application of established law.

ARGUMENT

The State's Legal Theory is Directly Contrary to Both *State v. Drexler* and *State v. Bohlinger*.

As the state acknowledges, the supreme court, in *State v. Ernst*, established a burden-shifting procedure for collateral attacks on prior OWI convictions. 2005 WI 107, ¶27, 283 Wis. 2d 300, 699 N.W.2d 92; Appellant's Brief at 14. That is, where a defendant makes a prima facie showing of a violation of the right to counsel, the burden shifts to the state to prove a knowing, voluntary and intelligent waiver. *Ernst*, 283 Wis. 2d 300, ¶25.

The state's appeal consists of a request for this court to substitute a different procedure for that laid out in *Ernst* under certain circumstances. Exactly what circumstances is somewhat unclear. At some points in the brief, its argument appears to be that a prima facie showing always requires "evidence" of a defective colloquy. Appellant's Brief at 10-11 (burden shifting "does not apply in a collateral attack when a defendant does not point to evidence demonstrating a defect in a court's colloquy"). At other times, it seems to be further arguing that this evidence must come in the form of a transcript. Appellant's Brief at 10 (stating that *Ernst* left open the proper standard "when the defendant does not point to a

transcript”), 20 (arguing that the rule in collateral attacks ought to be that of *State v. Bangert*, 131 Wis. 2d 246, 260-262, 389 N.W.2d 12 (1986), in which defendant must show “a defect in the court’s required colloquy, on the face of a transcript”), 20-23 (arguing that *Drexler* court erred in holding that a defendant’s affidavit can support a prima facie showing in the absence of a transcript).

Whatever position the state is ultimately advocating, its thrust is that, in this case, the absence of a transcript precludes Mr. Lebo from making a prima facie showing, and that the burden to show a violation of his right to counsel should therefore have remained with him rather than shifting to the state.

In the course of its argument in favor of this new rule, the state acknowledges that one published case, *State v. Drexler*, has adopted a contrary rule. 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182. In *Drexler*, this court expressly stated that “a defendant’s affidavit is sufficient to establish a prima facie case of being denied the right to counsel” in a collateral attack. *Id.*, ¶10. *Drexler* relied on *State v. Baker*, 169 Wis. 2d 49, 78, 485 N.W.2d 237 (1992), in which the supreme court held that a defendant’s affidavit had made such a showing. The state argues that subsequent cases have undermined *Drexler* so that it no longer binds this court. Appellant’s Brief at 20-24. The state’s argument depends on an analogy to the law governing plea withdrawals. None of the cases to which it points have anything to do with collateral attacks. None of the cases to which it points rejects or modifies the rule of *Baker* and *Drexler*. Though the state may disapprove of *Baker* and *Drexler*, they remain law.

Moreover, the state neglects entirely to mention a more recent case, *State v. Bohlinger*. 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900. In *Bohlinger*, this court expressly rejected the notion advanced by the state here: that a prima facie showing for a collateral attack requires the defendant to demonstrate a defective colloquy. *Id.*, ¶18.

In sum, the entirety of the state's legal argument runs squarely against the binding case law. Even were this not so, and had Mr. Lebo failed to make a prima facie showing, the state admits that it was within the circuit court's discretion to hold an evidentiary hearing. Respondent's Brief at 33; *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. At that hearing, Mr. Lebo, who cannot read, has memory problems, and was in special education programs all the way through school, testified that at the time of his 1998 OWI pleas he "didn't even know what a lawyer would do for you," and "didn't know that you could fight [drunk driving charges]." (12:1; 43:8-9, 11); *see also* WCCA record of Brown County Case No. 2000CF858 (noting Owen Monfils as defense attorney after the pleas in question). Further, as the circuit court noted, the records in the Shawano County cases contain no plea forms, and the minutes do not reflect that Mr. Lebo was informed of his right to counsel. (16:7). All of the available evidence, in short, supports Mr. Lebo's claim that he did not understand his right to an attorney and thus could not validly waive it. Thus the state is asking this court to disregard binding precedent in order to shift to Mr. Lebo a burden that he has successfully met. The circuit court was correct on both the facts and the law, and must therefore be affirmed.

CONCLUSION

For the foregoing reasons, Mr. Lebo respectfully requests that this court affirm the circuit court's order and remand for further proceedings accordingly.

Dated this 12th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 838 words.

CERTIFICATE OF COMPLIANCE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of January, 2015.

Signed:

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