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 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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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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.

In his brief, Lebo expresses confusion with the State's argument (Lebo's Br. at 1-2). The State's position is that the same procedures apply in a collateral attack on a prior conviction as in a plea withdrawal motion. In both, when a defendant makes a prima facie showing of a defect in the trial court's required colloquy, and alleges that he or she did not understand the information the court failed to give, the burden shifts to the State to prove that the waiver or plea was valid. But if the defendant does not make a prima facie showing, the burden does not shift to the State.

To make the required prima facie showing in a plea withdrawal motion, the defendant must point to evidence demonstrating a defect in the trial court's colloquy. The State's position is that the same is true in collateral attacks.

When a defendant moves to withdraw a plea, "[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." *State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14 (citing *State v. Bangert*, 131 Wis. 2d

246, 274, 389 N.W.2d 12 (1986). The Wisconsin Supreme Court explained in *Hampton* that:

> 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).

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 a defect in the court's colloquy. The supreme court explained 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. Negrete*, 2012 WI 92, ¶¶ 30-33, 343 Wis. 2d 1, 819 N.W.2d 749, the supreme court again explained that in plea withdrawal cases, the *Bangert* burden-shifting procedure applies only when a defendant makes a prima facie showing that his or her guilty plea was not knowing, intelligent, and voluntary, and that a defendant can make this showing only by pointing to evidence demonstrating a defect in the taking of the plea. The supreme court explained that when the defendant cannot demonstrate a defect in the trial court's required colloquy, and therefore cannot make a prima facie showing under *Bangert*, the motion should be analyzed under

State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *Negrete*, 343 Wis. 2d 1, ¶ 33.

Under *Bentley*, 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 does not shift to the State. 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." *Hampton*, 274 Wis. 2d 379, ¶ 63.

In *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, the supreme court adopted the same *Bangert* procedure for collateral attacks on prior convictions. 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 "[f]or 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, "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Id.*

The State's position is that the *Bangert* procedure that the supreme court adopted in *Ernst* for deciding collateral attacks is exactly the same *Bangert* procedure that is used in deciding plea withdrawal motions, and that the *Hampton* requirements for making a prima facie showing in collateral attacks are exactly the same *Hampton* requirements for making a prima facie showing in plea withdrawal motions.

The supreme court has made clear that the *Bangert* procedure applies in plea withdrawals only when the defendant can make a prima facie showing by pointing to evidence demonstrating a defect in the trial court's required colloquy. The same standard logically applies in a collateral attack. Just like in a plea withdrawal motion, if a defendant collaterally attacking a prior conviction cannot make a prima facie showing by pointing to evidence demonstrating a defect in the trial court's required colloquy, the *Bangert* burden-shifting procedure does not apply.

And just like in plea withdrawals, if the defendant collaterally attacking a prior conviction cannot meet his or her burden of making a prima facie showing under *Bangert*, the motion should be analyzed under *Bentley*. If the motion alleges sufficient facts, the court is required to hold a hearing. But at the hearing, the defendant retains the burden of proving a violation of the right to counsel.

Lebo dismisses the State's reliance on plea withdrawal cases that explain what is required to make a prima facie showing of a denial of a constitutional right, and shift the burden to the State. He asserts that "[n]one of the cases to which [the State] points have anything to do with collateral attacks" (Lebo's Br. at 2).

He does not, however, address the crux of the State's argument. He does not explain why the *Bangert* burden-shifting procedure that the supreme court adopted for collateral attacks is somehow different than the *Bangert* burden-shifting procedure for plea withdrawals. He does not explain how the requirements under *Hampton* for making a prima facie showing in a collateral attack are somehow different than the requirements under *Hampton* for making a prima facie showing in a motion for plea withdrawal.

Lebo argues that the State's position is contrary to this court's decision in *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182, which stated that "a defendant's affidavit is sufficient to establish a prima face case of being denied the right to counsel" for the purposes of a collateral attack (Lebo's Br. at 2; *Drexler*, 266 Wis. 2d 438, ¶ 10).

In its initial brief, the State addressed *Drexler*, and explained that *Drexler* relied on *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992) (State's Br. at 20-23). As the State explained, in *Baker*, the supreme court concluded that "under the circumstances of this case," the defendant was not required to point to a transcript showing a defective colloquy in order to make a prima facie showing. *Baker*, 169 Wis. 2d at 78. The "circumstance" in *Baker* was that the transcript of the 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.

The State also argued that this court should not follow *Drexler* because the supreme court has now made clear that the *Bangert* burden-shifting procedure applies only when the defendant makes a prima facie showing by pointing to evidence demonstrating a defect in the trial court's required waiver colloquy (State's Br. at 23).

Lebo points out that in its initial brief, the State failed to address this court's decision in *State v. Bohlinger*, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900 (Lebo's Br. at 3). The State

regrets its oversight in not addressing *Bohlinger*, particularly because *Bohlinger* is a perfect example of a case that should be analyzed under *Bentley* rather than *Bangert*.

In *Bohlinger*, the defendant collaterally attacked two prior convictions, but "did not allege that the colloquies conducted in those cases were deficient in any way." *Bohlinger*, 346 Wis. 2d 549, ¶ 5. The defendant presented an affidavit claiming that due to a learning disability he did not understand the information that the trial courts gave him in the prior cases. *Id.* He also submitted a report from a psychologist stating that in the prior cases the defendant "did not have the mental capacity to waive his right to an attorney." *Id.*

The circuit court held a hearing on the defendant's motion, and the psychologist testified that Bohlinger was mentally incapable of waiving his right to counsel in the prior cases. *Id.* ¶¶ 6-11. The circuit court then found, "The evidence establishes that [Bohlinger] did not have the cognitive capability to waive counsel at the time that he did." *Id.* ¶ 13.

However, the circuit court concluded that the defendant failed to make a prima facie showing under *Ernst*, and shift the burden to the State, because he did not allege that the trial courts' waiver colloquies in the prior cases were in some way deficient. *Id.* ¶ 13. This court disagreed, stating,

> Neither the circuit court nor the State has pointed to any authority for the proposition that a defendant must allege a defective waiver colloquy in order to make a prima facie showing that his or her right to

> counsel was violated in an earlier case. No such requirement is set forth in *Ernst*. Instead, *Ernst* states that a defendant must point to "specific facts" showing that he or she did not actually know or understand the information that should have been provided in the earlier proceeding, and therefore did not execute a knowing, intelligent, and voluntary waiver of counsel. While *Ernst* states that a defective colloquy "can form the basis for a collateral attack" when supported by additional evidence, it does not hold that a defendant must allege a defective colloquy in order to state a prima facie case. The circuit court therefore erred by determining, as a matter of law, that Bohlinger could not make a prima facie showing that his right to counsel was violated without alleging that the waiver colloquies in the 2008 and 2009 cases were deficient.

Id. ¶ 18.

This court concluded that the defendant "made a prima facie showing that his waivers of counsel in the 2008 and 2009 cases were invalid." *Id.* ¶ 20. It therefore remanded the case to the circuit court to give the State the opportunity to meet its burden of proving that the defendant waived counsel knowingly, intelligently, and voluntarily. *Id.* ¶ 21.

The State respectfully maintains that like in *Drexler*, in *Bohlinger* this court incorrectly applied the *Bangert* burden-shifting procedure when the defendant did not present evidence demonstrating a defect in the trial court's waiver colloquy.

In *Ernst*, the supreme court adopted the *Bangert* burden-shifting procedure in a case in which there was a transcript demonstrating a defect in the trial court's colloquy. *Ernst*, 283

Wis. 2d 300, ¶ 6. The supreme court has now explained that the *Bangert* burden-shifting procedure applies only when the defendant makes a prima facie showing by pointing to evidence demonstrating a defect in the court's colloquy. *Negrete*, 343 Wis. 2d 1, ¶ 30 (citing *Bangert*, 131 Wis. 2d at 274-75; *Hampton*, 274 Wis. 2d 379, ¶ 51). In the absence of evidence demonstrating a defect in the trial court's waiver colloquy, Bohlinger did not make a prima facie showing, and the burden should not have shifted to the State.

The State respectfully asserts that *Bohlinger* illustrates why a collateral attack in which a defendant cannot point to evidence demonstrating a defect in a waiver colloquy should be analyzed under *Bentley*.

In *Bohlinger*, 346 Wis. 2d 549, this court applied the *Bangert* burden-shifting procedure even though the defendant did not show that the trial courts' colloquies were in any way deficient. Even though the defendant's waiver of counsel should be presumed valid, and even though the defendant had not proved his wavier was invalid, this court concluded that the burden should have shifted to the State to prove a valid waiver. Then, after evidence was presented that convinced the circuit court that the defendant "did not have the cognitive ability to waive his right to counsel," *id.* ¶ 13, this court remanded the case to the circuit court to give the State the opportunity to prove that the defendant somehow waived counsel knowingly, intelligently, and voluntarily. *Id.* ¶¶ 20-21.

The State maintains that the collateral attack in *Bohlinger* should have been decided

under *Bentley*. The motion was sufficient to require a hearing under *Bentley* because the defendant presented an affidavit in which he averred that he did not understand his right to counsel, and a report from a psychologist who concluded that he was mentally incapable of waiving his right to counsel in his prior cases. *Id.* ¶ 5. But it should have remained the defendant's burden to show that he did not waive his right to counsel knowingly, intelligently, and voluntarily. *See Hampton*, 274 Wis. 2d 379, ¶ 63.

At the hearing, the defendant presented evidence of his mental deficiencies, and the circuit court found that he "did not have the cognitive capability to waive counsel." *Bohlinger*, 346 Wis. 2d 549, ¶ 13. He met his burden of proving that his waivers of counsel were invalid, and his collateral attack motion should have been granted.

As the State explained in its initial brief, this court should conclude that like in plea withdrawals, the *Bangert* burden-shifting procedure applies in collateral attacks only when a defendant makes a prima facie showing by pointing to evidence demonstrating a defect in the trial court's colloquy. A motion that does not make that should be analyzed under *Bentley*, and the defendant retains the burden.

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

Lebo argues that even if the State is correct in asserting that he should have retained the

burden of proving that he did not waive his right to counsel knowingly, intelligently, and voluntarily, he met that burden because he alleged that at the time he entered his pleas in 1998, he "'didn't even know what a lawyer would do for you,' and 'didn't know that you could fight [drunk driving charges]'" (Lebo's Br. at 3).

But as the State pointed out in its initial brief, the circuit court did not conclude that Lebo was incapable of understanding the right to counsel when he entered guilty pleas in the two Shawano County cases (State's Br. at 32-37).

The court concluded that Lebo 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 about those cases (16:5-6; 29:5-6; A-Ap. 121-22, 183-84).

As the State explained in its initial brief, in the absence of evidence that the trial courts did not explain Lebo's right to counsel to him in the Shawano County cases, it should be presumed that the courts did so (State's Br. at 34-35). The circuit court concluded that when Lebo's rights were explained to him in Brown County he validly waived the right to counsel. Lebo acknowledged that he remembered almost nothing about the hearings in the Shawano County case, and he presented no evidence that the courts did not explain his rights to him. He did not overcome the presumption that the trial courts informed him of his right to counsel, and he did not meet his burden of proving that he was denied the right to counsel.

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.

Dated this 3rd day of February, 2015

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 2,974 words.

Dated this 3rd day of February, 2015.

_____

Michael C. Sanders
Assistant Attorney General

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 3rd day of February, 2015.

_____
Michael C. Sanders
Assistant Attorney General