STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15 AP 795 CR
Circuit Court Case No. 14 CT 81

vs.

JASON S. WITTE,

Defendant-Appellant.

ON APPEAL FROM THE JUDGEMENT OF CONVICTION AND SENTENCE IN THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE RICHARD O. WRIGHT PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Sue Mueller
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1013430

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

Jason Witte, Defendant-Appellant, filed a motion to "exclude prior conviction for determining sentence," otherwise known as a collateral attack motion, asking the Court not to consider his 2nd offense Prohibited Alcohol Concentration (PAC) conviction from Sauk County case 04 CT 593. (29:1.) As grounds for this motion, Witte filed an affidavit which stated he did not know the minimum and maximum penalties of the charge at the time of his plea, and no one told him before or during the plea hearing. (14:1; 29:2.) Attached to the motion were several relevant documents: a plea questionnaire/waiver of rights document, minutes from the initial appearance and plea hearings, waiver of right to lawyer form, and a letter from the court reporter stating that transcripts were unavailable as notes from 2004 had been destroyed. (29:3-8.)

In his affidavit, Witte further asserted that he left the penalty portion of the plea questionnaire blank because he did not know the penalties. (14:1; 29:2.) Witte stated he received a copy of the criminal complaint "at one time," but "did not read it carefully, or see that the penalties were on it." (14:1; 29:2.) The minutes of the initial appearance on 9/23/04 indicate that Witte received a copy of the criminal complaint and waived a reading of that complaint. (29:6.) At the motion hearing, the circuit court noted that the criminal complaint would have had

the penalties listed on it. (25:23, 27.)[1] The circuit court denied Witte's motion for collateral attack, stating that he failed to make a prima facie showing that his right to counsel was violated. (25:27.)

ARGUMENT

Witte appeals the circuit court's determination that he failed to make a prima facie showing necessary to shift the burden to the State. The State maintains that, upon review of Witte's motion in its entirety, the documents submitted do not arise to a prima facie showing that Witte's right to counsel was violated in the 2004 case that he seeks to collaterally attack.

Criminal defendants in Wisconsin have both the constitutional right to counsel and the constitutional right to self-representation. State v. Klessig, 211 Wis.2d 194, ¶ 7-8, 564 N.W.2d 716 (1997). If a defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to represent himself. Id. ¶ 9. Before accepting a waiver of the right to counsel, the circuit court must conduct a colloquy designed to ensure 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.

Id. ¶ 14.

[1] There seems to be no dispute that the criminal complaint did, in fact, have the appropriate minimum and maximum penalties listed.

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only when the challenge is based on the grounds that he was denied the constitutional right to a lawyer. State v. Hahn, 2000 WI 118, ¶ 17, 238 Wis.2d 889, 618 N.W.2d 528. As a preliminary matter, a defendant must make a prima facie showing that his constitutional right to counsel in a prior proceeding was violated. State v. Ernst, 2005 WI 107, ¶ 25, 283 Wis.2d 300, 699 N.W.2d 92. The defendant must "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. (citation omitted). A motion that does not detail such facts will fail. Id. If the defendant makes a prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was knowing, intelligent, and voluntary. Id. ¶ 27.

Whether a party has met its burden of establishing a prima facie case is a question of law that an appellate court reviews independently. State v. Baker, 169 Wis.2d 49, 78, 485 N.W.2d 237 (1992).

I. The Documents Attached to Witte's Motion Directly Undermine His Affidavit to a Degree Which Renders His Motion Insufficient to Reach His Prima Facie Burden.

Witte's motion only challenges his conviction based upon the third and fourth Klessig factors: 3) whether he was aware of the seriousness of the charge or charges against him, and 4) whether he was aware of the general range of penalties

that could have been imposed on him. Because he did not know the minimum and maximum penalties, Witte argues neither Klessig factor is satisfied.

Attached to Witte's motion were supplemental documents from the case in Sauk 04CT593 that directly undermine the veracity of the claims in his affidavit. One document, entitled "Waiver of Right to Lawyer" was signed and initialed by Witte. The first line initialed states "I understand that I am charged with a crime and that I may be incarcerated or required to pay a fine, or both, if I am convicted." (29:7.) The final line initialed states "I do understand my right to an attorney and I hereby voluntarily, freely and intelligently waive my right to have a lawyer at this time." (29:7.) This document, on its own, should signal to a criminal defendant the seriousness of the charge against him – he is charged with a crime for which he can be incarcerated and/or fined.

The minutes sheet of the initial appearance in Sauk 04CT593 further calls the affidavit into question. At that appearance on 9/23/04, Witte received a copy of the criminal complaint and waived a reading of the criminal complaint. (29:6.) The irony of this document being attached to the motion and affidavit is almost impossible to overemphasize. Witte was provided with a document that outlined the minimum and maximum penalties and specifically told the circuit court that those minimum and maximum penalties need not be read aloud to him in open court.

In his affidavit, Witte states that no one told him the minimum and maximum penalties, but then goes on to contradict himself by saying that he was provided

with the criminal complaint – which had those penalties listed on it – and that he simply failed to read it. (14:1; 29:2.) "Should" is the operative word in the Ernst requirement that a defendant must "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." 2005 WI 107, ¶ 25, 283 Wis.2d 300 (emphasis added). Witte does not allege that the information was not provided, he alleges that he did not pay attention to the information that was provided.

Given this information, the question then becomes: by failing to pay attention to the information that was provided to him, can Witte make a prima facie case for collateral attack simply by saying, in effect, "I wasn't listening" or "I wasn't paying attention" to what the circuit court told me?

A defendant's collateral attack motion need not allege a defective plea colloquy. State v. Bohlinger, 2013 WI App 39, ¶ 18, 346 Wis.2d 549, 828 N.W.2d 900 (defendant made a prima facie showing by alleging that his cognitive incapacity precluded him from understanding the information provided by the court). However, unlike the defendant in Bohlinger, Witte does not claim an inability to understand what was said at the plea hearing. Witte's motion is entirely silent on what was said at the plea hearing, other than saying he was never told the penalties (which is directly contradicted in the next paragraph of his affidavit and the accompanying court documents).

Upon collateral attack, a judgment carries with it a presumption of regularity. Baker, 169 Wis.2d at 76, 485 N.W.2d 237. In fact, "[o]n collateral review, … it

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 v. Raley, 506 U.S. 20, 30, 113 S.Ct. 517 (1992). Here, Witte does not allege the Court withheld information from him in the colloquy, he just says he was not paying attention to the information the court did give him. And although there is a requirement that courts indulge in every reasonable presumption against waiver of counsel, and that waiver will not be presumed from a silent record, Baker, 169 Wis.2d at 76, 485 N.W.2d 237, this record is anything but silent. Minutes, the waiver form, and the plea questionnaire all speak very loudly that Witte was appropriately advised of his rights.

At a certain point, we can only take a person at their word. Witte advised the court that he was 27 years old and completed 13 years of schooling. (29:3.) He said he had a high school diploma, said he understood the English language, and said "I do understand the charge(s) to which I am pleading." (29:3.) Everything in the record points to the conclusion that Witte went into the plea hearing with "eyes open." And because this record was provided with Witte's motion, the circuit court was justified in denying the motion without an evidentiary hearing. The burden need not be shifted to the State if all the documentation that the State would have otherwise submitted are in the defendant's motion, and directly undermine the allegations contained in the defendant's affidavit.

Witte's affidavit is contradictory within itself and self-serving. The documents attached to the motion affirmatively demonstrate that Witte did know the seriousness of the charges against him and that he was provided with the general range of penalties by the circuit court. The documents were sufficient to meet the State's burden of clear and convincing evidence of waiver, had the Defendant shifted the burden in the first place. But given that the documents were attached to the motion, and that they directly undermined the affidavit, they must be used by the Court to weigh whether Witte was entitled to a hearing. Although there is no transcript, the record otherwise undeniably suggests Witte knowingly, intelligently, and voluntarily waived his right to an attorney, and thus was not denied his constitutional right to counsel.

CONCLUSION

In this case, the circuit court appropriately weighed the record, taking into account the affidavit and the supplemental documents provided by the defense, and found that Witte failed to meet his burden. It was clear that that information on the seriousness of the charge and the penalties were, at the very least, provided at Witte's 2004 initial appearance in the form of the criminal complaint. Witte chose to ignore the information that the court provided him, and thus his claim that he did not know that information fails to have any traction. The court documents submitted with Witte's motion, and the accompanying presumptions of regularity to which they are entitled, undermines Witte's already weak affidavit such that he

fails to make a prima facie showing. For all the foregoing reasons, the trial court's decision must be affirmed.

Respectfully submitted this 11th day of September, 2015

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Sue Mueller
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1013430

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,832 words.

Signed:

_____
Sue Mueller
State Bar No. 1013430

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

_____
Sue Mueller
State Bar No. 1013430