STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP001487

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

MARK G. MCCASKILL,

Defendant-Appellant.

APPEAL FROM THE DECISION OF THE CIRCUIT COURT
FOR PORTAGE COUNTY

The Honorable John V. Finn, Presiding

Trial Court Case No. 11 CT 380

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

David R. Knaapen
State Bar No. 1010529
Assistant District Attorney
Attorney for Plaintiff-Respondent

Portage County
District Attorney's Office
1516 Church Street
Stevens Point, WI 54481
Tel: (715) 346-1300
Fax: (715) 346-1236

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STATEMENT OF THE ISSUES

1. **DID MARK McCASKILL OPERATE A MOTOR VEHICLE AND IS THERE SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S VERDICT?**

The Trial Court and a Jury Answered "Yes" as to the issue of McCaskill operating a motor vehicle.

2. **DID THE TRIAL COURT PROPERLY REJECT McCASKILL'S COLLATERAL ATTACK OF THE 2005 OWI CONVICTION?**

The Trial Court denied the motion to exclude a 2005 OWI conviction for purposes of enhancing the sentence in this case.

3. **IS A NEW TRIAL NECESSARY IN THE INTERESTS OF JUSTICE?**

This issue was not addressed by the Trial Court.

STATEMENT ON ORAL ARGUMENT

The State does not believe oral argument is necessary in this case. The briefs will fully develop the issues and the law.

STATEMENT ON PUBLICATION

The State does not believe publication of this is case is necessary as the case involves the application of well-settled rules of law to a common fact situation.

STATEMENT OF FACTS AND CASE

The State agrees this appeal centers around an incident that occurred on August 31, 2011 at approximately 12:30 a.m. as recited in McCaskill's brief. The State also agrees with the statement of the case as set forth in McCaskill's brief.

ARGUMENT

1. McCASKILL DID OPERATE A VEHICLE AND THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

The arrest of McCaskill in this case did not initially stem from operation of a vehicle. Law enforcement officers were contacted by a resident who was concerned that a car had been parked out in the street with its headlights on for over an hour. Law enforcement's contact with McCaskill was initially out of a community caretaker function. When a citizen calls to express concern over a parked vehicle, law enforcement has an obligation to investigate that situation to determine if the driver is injured or lost or has car problems in order to render aid or assistance. Upon making contact with McCaskill, however, law enforcement found him unresponsive, sitting in the driver's seat with no evidence of anyone else in the car or having been in the car.

As the officers investigated further, they detected an odor of intoxicants, which became stronger after McCaskill vomited on himself. It was at that point that the officers had reasonable suspicion to believe a crime was being committed or had been committed - the crime of operating while intoxicated.

Appellate counsel argues that "it is easy to imagine numerous scenarios where the defendant was driven to the scene and got in the driver's seat after the other driver left." (McCaskill's Brief, pg. 17.) However, that ignores

well-settled case law that law enforcement is not required to rule out the possibility of innocent behavior before initiating a brief stop. State v. Waldner, 206 Wis.2d 51, 60, 556 N.W.2d 681, 686 (1996).

What the officers found was a vehicle with its headlights on, McCaskill sitting in the driver's seat, documentation indicating McCaskill rented the vehicle and no signs or indications that anyone else had been with the vehicle. The officers were not required to rule out the possibility of innocent behavior and had grounds to suspect that McCaskill had driven the car there and that he was under the influence.

Appellate counsel analogizes this case to Village of Cross Plains v. Haanstad, 288 Wis.2d 573, 709 N.W.2d 447 (2006). The clear distinction between this case and Haanstad is that in Haanstad there were witnesses who unequivocally testified to the fact that the defendant took absolutely no part in the vehicle being operated and she did not manipulate any of the controls after the vehicle was parked where officers found them. In this case, there is no evidence nor were there any witnesses to absolve McCaskill of having driven the vehicle.

As it relates to the sufficiency of the evidence to support the verdict, the standard of review is that this Court is not to substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to

the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 758 (1990). If more than one reasonable inference can be drawn from the evidence, the Court must adopt the inference that supports the verdict. Id.

This case is analogous to State v. Mertes, 315 Wis.2d 756, 762 N.W.2d 813 (Ct.App. 2008). Here, as in Mertes, the defendant is arguing that there was not sufficient evidence to support the conclusion that the defendant operated a motor vehicle. As the Court in Mertes found, McCaskill's argument "misses the mark. The issue is not whether Mertes was operating the vehicle at the moment the police approached him, but rather whether there was enough circumstantial evidence to prove that he drove the car to the gas station." Id. at 763. Similarly, the issue in this case is not whether there was evidence to prove operation at the time the officers arrived at Plover Springs Drive, but whether there is sufficient circumstantial evidence to prove that McCaskill drove to that location.

The one fact missing from this case that was present in Mertes, is evidence about the keys for the vehicle. In Mertes, the evidence was that the keys were found in the ignition. However, in Mertes, the engine for the vehicle was not running but the parking lights were on, the interior

dome light was on and the defendant and a passenger were found passed out inside the car, with the defendant sitting in the driver's seat. Id. at 759. In our case, the car's headlights were on and McCaskill was found passed out in the driver's seat. (Appendix, pp. 102-103.) While the vehicle was determined to be a rental vehicle, the officers found evidence that it was rented to McCaskill. (App. pp. 104-106.) There was no evidence to suggest anyone else was in the vehicle or had driven the vehicle, nor did anyone ever step forward claiming to have been with McCaskill that day. (App. pg. 108.) There was evidence, however, that after this incident, the rental vehicle was returned to the rental agency. (App. pg. 107.)

As stated above, the standard of review is that this Court "must accept the inference drawn by the trier of fact unless the evidence the inference is based on is incredible as a matter of law." State v. Wilson, 149 Wis.2d 878 (1989). Further, "if more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed." State v. Witkowski, 143 Wis.2d 216 (Ct.App. 1988).

2. THE TRIAL COURT PROPERLY REJECTED McCASKILL'S ATTACK OF THE 2005 OWI CONVICTION.

Whether McCaskill made a prima facie showing in a collateral attack motion is a question of law that this Court reviews independently. State v. Hammill, 293 Wis.2d

654, 661, 718 N.W.2d 747, 750 (Ct.App. 2006), quoting State v. Ernst, 283 Wis.2d 300, 311, 699 N.W.2d 92, 97 (2005). For there to be a valid collateral attack, 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 and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." Id. at 662.

A review of McCaskill's affidavit shows that it failed to meet the standard set forth in Ernst. After setting forth his date of birth, ability to read and employment status, the first paragraph that has any relevance to the collateral attack issues is ¶5, which reads, in pertinent part, "At my first appearance in that case on September 19, 2005, I entered a plea of guilty." (App. pg. 109.)

At the motion hearing held on November 2, 2012, the State pointed out, that McCaskill's affidavit was false. September 19, 2005 was not his first appearance on that case. The transcripts showed that McCaskill made his initial appearance on August 30, 2005 and at that hearing McCaskill entered a not guilty plea. (App. pg. 112.) Further, that transcript shows that McCaskill informed the Court, "I already got an attorney." (App. pp. 111-112.)

That admission in the record would also indicate that ¶6 of McCaskill's affidavit was false as it reads, "I was not represented by a lawyer at any time in the Portage

County case." (App. pg. 110.) As quoted above, McCaskill told the Court at the initial appearance, "I already got an attorney."

McCaskill's affidavit in ¶7 states, "At the time I entered the guilty plea, I was not advised of the maximum penalties I faced." (App. pg. 110.) While that is true, the transcript from the initial appearance shows the Court did inform McCaskill of the minimum and maximum possible penalties for the offense charged in that case and that the defendant understood those penalties. (App. pg. 111.)

Lastly, ¶8 of McCaskill's affidavit states, "At no time in the case (and not at the time of the guilty plea) was I examined as to whether I was competent to proceed, either with or without an attorney."

All of McCaskill's statements in his affidavit in support of his collateral attack are conclusory statements. There are no statements in that affidavit that speak to specific facts to show his waiver was not a knowing, intelligent and voluntary one. If you compare McCaskill's affidavit to that in State v. Ernst, the two are similar enough for this Court to rule the same as the Ernst Court did - that McCaskill did not make a sufficient prima facie showing to warrant an evidentiary hearing.

In Ernst the defendant's affidavit stated that he was "not represented by counsel and the court did not take a knowing and voluntary waiver of counsel from the defendant".

Id. at 319. The Supreme Court held, "the lack of specific facts resulted in a failure to establish a prima facie case. . . ". Id. The affidavit at question in this appeal is essentially the same. There are no specific facts that show McCaskill's waiver was not a knowing, intelligent and voluntary one.

As noted in Appellate Counsel's brief, the Trial Court reviewed the transcripts from McCaskill's prior case. While not a full-fledged evidentiary hearing, the Trial Court conducted enough of a review to see if there was a basis for the collateral attack. As noted, the Trial Court found that McCaskill asserted at his initial appearance that he had an attorney and his attorney told him the type of bond he should ask for. While the plea colloquy on September 19, 2005 did not specifically address the advantages and disadvantages of self-representation, the Trial Court did again inquire of Mr. McCaskill whether he wanted to give up his right to be represented by an attorney. (App. pp. 114-115.) As the Court stated in Ernst, "the record must show, or there must be an allegation and evidence which show, that the accused was offered counsel but intelligently and understandingly rejected the offer." Id. at 318. It is clear from the record that McCaskill did this at his plea and sentencing hearing. Especially in light of his statements to the Court at his initial appearance that he

had an attorney and had consulted with his attorney about the kind of bond to ask for. (App. pg. 113.)

Appellate counsel's argument (Brief pp. 26-top of 28) regarding other deficiencies in the plea colloquy from the 2005 case is not relevant to this case. If McCaskill wants to challenge the plea colloquy in the 2005 case, it needs to be done through that case. Deficiencies in the plea colloquy are not a basis for a collateral attack but are the basis for a direct attack. That direct attack needs to be taken in that underlying case and not in this appeal. State v. Hahn, 238 Wis.2d 889,903-4, 618 N.W.2d 528, 535 (2000). See also, State v. Hammill, Id., pg. 666.

3. THE REAL CONTROVERSY WAS FULLY AND FAIRLY TRIED AND A NEW TRIAL IS NOT NECESSARY.

McCaskill argues a new trial is necessary due to inconsistent verdicts. There is nothing inconsistent in the verdicts. McCaskill was charged with operating while intoxicated and operating with a prohibited alcohol concentration.

For the offense of operating while intoxicated, the State must prove the defendant drove/operated a motor vehicle on a highway and the defendant was under the influence of an intoxicant at the time of the driving/operation. WIS JI-CRIMINAL 2663. (App. pp. 116-117.) "Under the influence" is defined as "to be less able

to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." Id.

For the offense of operating with a prohibited alcohol concentration, the State must prove the defendant drove/operated a motor vehicle on a highway and at the time of the driving/operation the defendant had a prohibited alcohol concentration. WIS JI-CRIMINAL 2660C. (App. pg. 118.)

The issue, in terms of the jury's verdict, is not just whether McCaskill was driving the vehicle, but, for the operating while intoxicated charge, whether McCaskill's ability to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle was impaired. As there was no evidence or testimony regarding observed driving by McCaskill, it would be plausible the jury could find the State had not proven that element beyond a reasonable doubt. For the charge of operating with a prohibited alcohol concentration, all that is needed, beyond the operation, is proof of the alcohol concentration. The jury could easily have concluded that McCaskill drove the vehicle, as he and his car had to get to that location somehow. While there may not have been evidence, to the jury's satisfaction, as to impairment, there clearly was evidence of the prohibited alcohol concentration. Those verdicts are not inconsistent.

The standard of review on this issue is for the appellate court to view "facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial . . . to accept the inference drawn by the jury." State v. Forster, 260 Wis.2d 149, 153, 659 N.W.2d 144, 146 (Ct.App. 2003). Further, the United States Supreme Court and Wisconsin's courts have consistently held that logical consistency between several counts is not required in order to accept a jury's verdict. See Dunn v. U.S., 284 US 390 (1932); State v. Mills, 62 Wis.2d 186, 214 N.W.2d 456 (1974); Nabbefeld v. State, 83 Wis.2d 515, 266 N.W.2d 292 (1978); State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct.App. 1991); State v. Johnson, 184 Wis.2d 324, 516 N.W.2d 463 (Ct.App. 1994); and, State v. Thomas, 274 Wis.2d 513,683 N.W.2d 497 (Ct.App. 2004).

CONCLUSION

For the reasons set forth above, the State asks the Court to affirm the Trial Court's ruling and uphold the jury's verdict.

Dated: 2/12/16

David R. Knaapen

DAVID R. KNAAPEN
State Bar No. 1010529
Assistant District Attorney
Attorney for Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this Brief is 11 pages.

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief and conforms to the rules contained in s. 809.19(12)(f).

DAVID R. KNAAPEN
State Bar No. 1010529

APPENDIX CERTIFICATION

I hereby certify that this appendix conforms to the rules contained in s. 809.19(2)(a) for an appendix produced with a monospaced font.

David R. Knaapen

DAVID R. KNAAPEN
State Bar No. 1010529