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STATE OF WISCONSIN **11-08-2016**

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

DISTRICT II

Appeal No. 2015AP001824-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BRUCE T. HENNINGFIELD,

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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ON APPEAL FROM A JUDGMENT OF CONVICTION  
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF  
ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY,  
THE HONORABLE ALLAN B. TORHORST PRESIDING

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TABLE OF CONTENTS

Table of Contents.....i  
Table of Authorities.....i  
Statement of the Issues.....ii  
Necessity of Oral Argument & Publication.....ii  
Argument.....1

I. THE STATUTORY PENALTY SCHEME FOR  
OWI CASES WHICH EXPRESSLY  
SPECIFIES PENALTIES TO BE IMPOSED  
CANNOT BE INTERPRETED AS  
EXTINGUISHING A DEFENDANT’S RIGHT  
TO RAISE COMMON LAW EQUITABLE  
DEFENSES SUCH AS ISSUE PRECLUSION.....1

Conclusion.....4  
Certifications.....4-5

TABLE OF AUTHORITIES

Cases Cited

***State v. Engler,***  
80 Wis. 2d 402,  
259 N.W.2d 97 (1977).....2

***Whitaker v. State,***  
83 Wis. 2d 368,  
265 N.W.2d 575 (1978)).....2

***Wisconsin Patients  
Compensation Fund***

**v. Wisconsin Health Care  
Liability Insurance Plan,**  
200 Wis. 2d 599,  
547 N.W.2d 578 (1996).....1-2

Statutes Cited

Wis. Stat. § 346.65(2).....2-3

STATEMENT OF THE ISSUES

The issues are stated in the Defendant's Brief-In-Chief. This reply brief deals solely with an assertion made by the State in connection with the claim preclusion issue.

The issue dealt with in this reply brief is whether, when the legislature enacted Wis. Stat. § 346.65(2), the legislature intended to extinguish any rights a defendant may have to raise the common law defense of issue preclusion.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication. This case can be decided on the basis of the briefs and the record.

ARGUMENT

I. THE STATUTORY PENALTY SCHEME FOR OWI CASES WHICH EXPRESSLY SPECIFIES PENALTIES TO BE IMPOSED CANNOT BE INTERPRETED AS EXTINGUISHING A DEFENDANT'S RIGHT TO RAISE COMMON LAW EQUITABLE DEFENSES SUCH AS ISSUE PRECLUSION

In its brief the State argues that the legislature's use of "shall" in Wisconsin's OWI penalty scheme is mandatory and that "[t]his Court should not allow a principle arising out of common law equity to defeat a legislatively mandated sentencing scheme." Further, "[t]he statutory sentencing scheme forecloses arguments such as issue preclusion and estoppel." State's Brief at pp. 14-15.

The State appears to be relying on the canon of statutory construction *expressio unius est exclusion alterius*, which instructs that when a statute expressly mentions one matter, all matters not mentioned are thereby excluded. **Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Insurance Plan**, 200 Wis. 2d 599, 609, 547 N.W.2d 578,

581 (1996). Both this Court and the Wisconsin Supreme Court have in several cases used the *expressio unius* canon as a guide to interpreting statutes. **Id.** But in numerous other cases, the Wisconsin Supreme Court has warned that the *expressio unius* canon "requires caution in application." **Id.** at 609-10 (citing **Whitaker v. State**, 83 Wis. 2d 368, 374, 265 N.W.2d 575 (1978)).

Before the canon is deployed, "[t]here must be some factual evidence that the legislature intended the application of the *expressio unius* rule." **Id.** at 610 (citing **State v. Engler**, 80 Wis. 2d 402, 408, 259 N.W.2d 97 (1977)). Although the canon may be based upon "logic and the working of the human mind," it is not a "Procrustean standard" to which all statutory language must be made to conform. **Id.** (citations omitted).

Wis. Stat. § 346.65(2) does not directly address the question of whether the penalty scheme was intended to extinguish any rights a

defendant may have under the common law equitable doctrine of issue preclusion. Counsel can find no factual evidence that when the legislature enacted Wis. Stat. § 346.65(2), it intended to extinguish any and all common law equitable defenses/remedies a defendant might assert, such as issue preclusion. Consequently, this court should decline the State's invitation to find the legislature intended to extinguish a defendant's right to raise equitable defenses, such as issue preclusion.

Moreover, as the defendant has previously pointed out, it would be fundamentally unfair to Henningfield to allow the State to charge him with anything more than an OWI-6<sup>th</sup> in this case. In Henningfield's previous OWI case, he was told by a circuit court judge that "this is your fifth offense." Any defendant walking out of that courtroom would legitimately think, "Okay, that was my fifth OWI, the next one will be my sixth."

CONCLUSION

For all of the foregoing reasons, Sato asks that his judgment of conviction and the order denying his postconviction motion be reversed, and that his case be remanded to the Racine County Circuit Court for further proceedings with directions.

Dated this 6th day of November, 2015.

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Hans P. Koesser, Bar #1010219

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a monospaced font. The brief is 5 pages and contains 832 words.

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Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply

brief filed with the court and served on all opposing parties.

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Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

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