STATE OF WISCONSIN

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

DISTRICT I

Appeal Case No. 2016AP000729-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PETER J. LONG,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A POST-CONVICTION MOTION, ENTERED ON MARCH 24, 2016, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Is Long's Appeal Moot?

The Trial Court did not address this issue.

II. Does Long's assertion that predicate OWI conviction was obtained in violation of his right to counsel constitute a new factor, which justifies relief 16 years after he completed his sentence?

Trial Court answered: Because Long had completed his sentence, it lacked jurisdiction over the motion.

III. Were Long entitled to relief on appeal, would that relief be an order directing the court to grant the motion, or a remand to the circuit court for a determination of whether the "new factor" warranted resentencing?

The issue of relief on appeal was not presented in the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On August 25, 1998, Peter Long was arrested for Operating a Motor Vehicle while under the Influence of an Intoxicant (OWI) and Operating a Motor vehicle while having a Prohibited Alcohol Concentration (BAC). (R3; R4) As a result of that arrest, a criminal complaint was filed the same day, charging Long with fourth offense OWI and fourth offense BAC. (R2) The complaint alleged that an officer had stopped Long while Long was driving a 1998 Dodge Truck; that Long evidenced signs of impairment due to intoxication and had submitted to a breath test which resulted in a BAC reading of .17; and that Long had three previous convictions for OWI related offenses (R2:2). Those predicate offenses occurred in May of 1989, December of 1990, and January of 1995. (R41:15)

Long made his initial appearance on those charges in Milwaukee County case number 98CT005997 on September 3, 1998. (R1) The case initially was assigned to the Honorable Jeffrey Conen; it was later transferred to the calendar of the

Honorable John Siefert. *Id.* During the pendency of the case, Long was represented by attorney Jeffrey Jensen. *Id.*

On November 11, 1999, Long appeared with Attorney Jensen before Judge Siefert and pled guilty to the charge of OWI 4th. The associated PAC charge, and an unrelated charge of Disorderly Conduct in case 98CM00596, were dismissed. (R41:3,4,11) As part of the factual basis for the plea, Attorney Jensen stipulated that Long had three prior OWI convictions. (R41:11) When the plea colloquy was complete, Judge Siefert found Long guilty of OWI 4th. *Id.*

At sentencing, Judge Siefert order that Long pay a fine of $600 plus costs; serve 11 months in the House of Corrections, with Huber release for work and treatment; and suffer a 36 month driver's license revocation. (R41:22-24; R25) Judge Siefert found that seizure of Long's vehicle was mandatory and ordered it's seizure (R41:23; R25) A stop title transfer notice was prepared and signed that same day. A written order was entered on December 2, 1999 that the Greenfield Police Department seize Long's 1998 Dodge pick-up truck, which he was driving at the time of the offense, as it was subject to forfeiture. (R21; R26:1)

Before seizure was effectuated, the title for the pick-up truck had been transferred to another owner. (R26). As a consequence of that transfer, District Attorney's Office paralegal Michaelann Murphy advised the court that her office was unable to proceed with the court's order for seizure. *Id.*

In October of 2000, Murphy wrote the court again. (R30) She advised that the seizure order for the 1998 Dodge Truck was not on file at DOT, and she asked the court's help in having the order lodged. (R30:1) The documents accompanying her letter showed that Long had applied for the title to that vehicle on December 5, 1998, that vehicle was retitled and registered in the name of J.M.C, on March 20, 2000, and that as of October 6, 2000, J.M.C remained the titled owner of that truck. (R30:3-4) A teletype of the truck's VIN from October 5 (R30:5), a copy of J.M.C's application for title and registration (R30:9), and a copy of the title assignment signed by Long and J.M.C (R30:10), confirmed that J.M.C was the new owner.

On February 24, 2016, Long filed a motion for post-conviction relief under Wis. Stat. § 974.06. (R34) The motion was essentially a collateral attack on one of his predicate OWI convictions. He alleged that he had not been represented by counsel in a May 14, 1991 conviction in Marathon County, which arose from an incident on December 1, 1990, which was used to enhance his Milwaukee case from a 3rd offense to a 4th. (R34:3) In support of his claim that he did not knowingly and intelligently waive his right to counsel, Long submitted an affidavit sworn to on August 7, 2006, in conjunction with the OWI case in Waukesha County. In that, he asserted,

> At no time during the plea hearing on May 14, 1991, in Marathon County Case No. 90-CT-526, was I advised by the trial court of the dangers and disadvantages of proceeding without an attorney. I did not knowingly, intelligently and voluntarily waive my right to an attorney in Marathon County Case No. 90-CT-526.

(R34:un-numbered page 21 [labeled Attachment 4, p. 2])

Long also acknowledged that the court offered him an adjournment, so that he could obtain counsel, but that he declined and decided to proceed *pro se*. (R34:un-numbered page 22 [labeled Attachment 4, p. 3])

Long asserted that because the predicate conviction had been obtained in violation of his right to counsel, he was entitled to commutation of the sentence to a sentence which would not exceed the maximum for an OWI 3rd and an order that Greenfield Police Department reimburse him $14,600 for the Dodge pick-up truck. (R34:1) Long alleged that he had purchased the truck new in 1997 for $36,000, that it was seized by the Greenfield Police Department, and that he (Long) had purchased it back for $14,600 when it was sold at public auction in June of 2003. (R34:2) He submitted multiple attachments, but nothing supporting his claims that the vehicle had been seized or forfeited, that he had been the owner at the time, or that he had purchased the vehicle back. He did not request an *Ernst* hearing on his allegations, and none was held. (R34; R1)

Judge Siefert denied that motion by written order on February 25, 2016, on the grounds that the court lacked

competency to rule on a § 974.06 motion because Long had completed his sentence. (R35)

On March 17 2016, Long refiled his claim for relief, in a filing he titled "Motion to Reopen, Motion to Commute Sentence, Motion For Reimbursement." (R36) This was, essentially a motion to modify sentence based on a new factor: that new factor being that the predicate offense was obtained in violation of his right to counsel. The relief he sought, again, was commutation of the sentence to a sentence which would not exceed the maximum for an OWI 3rd and an order that Greenfield Police Department reimburse him $14,600 for the Dodge pick-up truck. (R36:1) Long submitted attachments identical to those in his first motion, none of which supported his assertions that the vehicle had been seized or forfeited, that he had been the owner at the time, or that he had purchased the vehicle back. (R36) Again, he did not request an Ernst hearing on his allegations, and none was held. (R36; R1)

Judge Siefert denied that motion by written order on March 24, finding both that the motion was untimely and the court lacked jurisdiction over the motion. (R37)

This appeal follows.

SUMMARY OF ARGUMENT

On appeal, Long brings a collateral attack to a predicate OWI conviction which underlay a conviction entered in Milwaukee County approximately 17 years ago, under the guise of a motion to modify his sentence.

It is the State's position that,

1. Assuming, *arguendo*, that Long's factual statements are true, his claims are moot, and the appeal should be dismissed.

    a. Because Long has completed his sentence, an order modifying the sentence to that permitted for an OWI 3rd would have no practical effect.

b. Because the penalties imposed in this case did not exceed the penalty permissible for OWI 3rd, a modification could have no practical effect.

c. Because the court is without authority to order reimbursement for the vehicle, that issue is moot.

2. Long has not established a new factor which justifies a resentencing.

3. Were Long entitled to relief on appeal, that relief would be a remand to the circuit court, for a determination of whether the "new factor" warranted resentencing.

ARGUMENT

I. BECAUSE LONG HAS COMPLETED HIS SENTENCE, THIS APPEAL IS MOOT AND SHOULD BE DISMISSED

STANDARD OF REVIEW

An issue is moot when "a determination is sought which, when made, cannot have any practical effect upon an existing controversy." *Racine v. J-T Enterprises of America, Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974) (citation omitted); *see also Riley v. Lawson*, 210 Wis. 2d 478, 490, 565 N.W.2d 266 (Ct. App. 1997).

Generally, moot issues will not be considered by an appellate court. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 688, 608 N.W.2d 425, 427. However, a court may choose to address a moot issue for matters of great public importance or constitutional magnitude, where a decision is needed to guide the trial courts, or where the situation is likely to be repeated yet will consistently evade review due to delays inherent in the appellate process. *Id.*; *Fond du Lac Cnty. v. Elizabeth M.P.*, 2003 WI App 232, ¶ 28 n.4, 267 Wis. 2d 739, 672 N.W.2d 88.

Whether a case is moot presents a question of law that is decided *de novo*. *McFarland Bank v. Sherry*, 2012 WI App 4, ¶9, 338 Wis. 2d 462, 809 N.W.2d 58. The question of mootness should be determined without reference to the merits

of the appellant's contentions on appeal. *Treat v. Puckett*, 2002 WI App 58, ¶ 19, 252 Wis. 2d 404, 643 N.W.2d 515.

Here, Long asks this court for an order directing the trial court to reopen his 1999 conviction and to modify his sentence to one which would not exceed the maximum penalty for OWI 3rd, and to order the City of Greenfield or the Greenfield Police Department to reimburse him for his costs associated with buying his truck back at auction. (Brief of Defendant-Appellant, p. 19: R36) It is the State's position that the issue is moot.

A. Because Long has completed his sentence, an order modifying the sentence to that permitted for an OWI 3rd would have no practical effect

The general rule is a motion to amend a completed sentence is moot. *See*, e.g., *State v. Hungerford*, 76 Wis. 2d 171, 251 N.W.2d 9 (1977), ("We conclude that Hungerford's sentence for escape commenced on June 13, 1974. This sentence was completed on June 13, 1975. The order of July 25, 1975, amending the sentence could not affect the sentence imposed because it had been fully served.")

In *State v. Theoharopoulos*, 72 Wis. 2d 327, 240 N.W.2d 635 (1976), the Court reviewed mootness in the context of a motion challenging a conviction filed two years after the defendant had completed his sentence.

Theoharopoulos was convicted in state court of a drug offense. He served his sentence, and was discharged from supervision. Two years later, while being held on a federal detainer to face possible deportation because of that state conviction, Theoharopoulos filed a motion under § 974.06, seeking to have the conviction overturned. The trial court denied the motion, and Theoharopoulos appealed. *Theoharopoulos*, 72 Wis. 2d at 329-330, 240 N.W. at 636-37.

In its decision, the Court addressed both its jurisdiction and whether the appeal was moot. The Court wrote,

> The federal courts have noted that a defendant who wishes to challenge a sentence already served faced two hurdles-mootness and jurisdiction-before the court will proceed to a decision. Mootness and jurisdiction are separate issues, and both must be overcome by a convicted person seeking relief under a statutory postconviction remedy

Theoharopoulos, 72 Wis. 2d at 332, 240 N.W.2nd at 637 (internal citations omitted).

Reviewing mootness, the Court wrote,

> The federal cases demonstrate that defendants are allowed to attack sentences already served only where they are currently serving a sentence which is directly affected by the previous convictions. On the other hand, where the present confinement is unrelated to the sentence already served, the federal courts hold that the case is either moot or that no jurisdiction is afforded under sec. 2255.

Theoharopoulos, 72 Wis. 2d at 332-33, 240 N.W. 2nd at 638 (internal citations omitted).

Finding that Theoharopoulos was subject to additional potential penalty because of the state conviction, the Court found that the issue was not moot. It found, on the other hand, that it was without jurisdiction over the motion, because the custody requirement of § 974.06 had not been met. *Id*.

Here, Long completed his sentence; given the length of sentence imposed, he probably completed it in 2000, approximately 16 years ago. Unlike in *Theoharopoulos*, he does not face any new potential penalty as a result of the prior conviction and sentence. As in *Hungerford*, amending the sentence can have no effect on the time he served. Long's claims, therefore, are moot.

B. Because the penalties imposed in this case did not exceed the penalty permissible for OWI 3rd, The modification Long requests could have no practical effect

Long asks that his OWI 4th sentence be commuted "to that which could have been imposed for a (sic) OWI 3rd offense." (R36) Because the sentence Judge Siefert imposed

was within the maximum penalty for an OWI 3rd, an order granting his motion could have no practical effect on him.

Wis. Stats. §§ 346.65(2)(c) and (d) establish the penalties upon conviction for 3rd and 4th offense OWI. In 1998, that statue provided,

> 346.65 Penalty for violating sections 346.62 to 346.64.
>
> ***
> (2) Any person violating s. 346.63 (1):
>
> ***
> (c) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343,307 (1) equals 3, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
>
> (d) Except as provided in par, (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 4, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

Wis. Stat. § 346.65 (1997-1998)

Thus, at the time of Long's conviction, the maximum penalty for a 3rd offense was the same as that for a 4th; the difference was only in the minimum penalty which the court was required to impose.

Similarly, under the law in effect in 1998, seizure of a vehicle was permitted upon conviction for a 3rd offense OWI, and mandatory for a 4th. Wis. Stat. § 346.65(6) provided,

> (a) 1. Except as provided in this paragraph, the court may order a law enforcement officer to seize a motor vehicle, or, if the motor vehicle is not ordered seized, shall order a law enforcement officer to equip the motor vehicle with an ignition interlock device or immobilize any motor vehicle owned by the person whose operating privilege is revoked

> under s. 343.305 (10) or who com mitted a violation of s. 346.63 (1) (a), (b) or (2) (a) 1.or 2., 940.09 (l) (a) , (b), (c) or (d) or 940.25 (1) (a), (b), (c) or (d) if the person whose operating privilege is revoked under s. 343.305 (10) or who is convicted of the violation has 2 prior suspensions, revocations or convictions that would be counted under s. 343.307 (1).
>
> 2. The court shall order a law enforcement officer to seize a motor vehicle owned by a person whose operating privilege is revoked under s. 343.305 (10) or who commits a violation of s. 346.63 (1) (a) or (b) or (2) (a) 1. or 2., 940.09 (1) (a), (b), (c) or (d) or 940.25 (1) (a), (b), (c) or (d) if the person whose operating privilege is revoked under s. 343.305 (10) or who is convicted of the violation has 3 or more prior suspensions, revocations or convictions that would be counted under s. 343.307 (1).

Wis. Stat. § 346.65 (1997-1998)

Here, Judge Siefert sentenced Long to pay a fine of $600 plus costs and serve 11 months in the House of Corrections. This sentence was within the maximum penalty for either a 3rd or a 4th OWI conviction. Judge Siefert also ordered seizure of a vehicle, which similarly was authorized for either a 3rd or 4th OWI conviction. Because the sentence imposed was within the permissible limits of an OWI 3rd sentence, Long's request for commutation of his sentence would have no effect on the sentence, and the issue is moot.

C. Because the court is without authority to order reimbursement for the vehicle, that issue is moot

It appears that—because he has long since served his incarceration sentence—what Long really wants is an order declaring the forfeiture of his vehicle improper and an order for reimbursement of money he claims expended on the vehicle. Even if there were merit to the underlying claim that the seizure order should be vacated—and it is the State's position that there is none—the court is without authority to grant those remedies.

First, the State notes that although the order for seizure of a vehicle upon conviction for OWI arises from the criminal

conviction, the forfeiture itself is a civil in nature. *State v. Konrath*, 218 Wis. 2d 290, 296, 577 N.W.2d 601, 604 (1998). It is a separate, *in rem*, proceeding against the property. *Id*. Under § 346.65, the court ordered seizure of a vehicle, on a finding that it was subject to forfeiture. *See* Wis. Stat. § 345.65(6) The sentencing court did not order the vehicle forfeited; any forfeiture which occurred would have occurred in a separate civil proceeding.[1] The sentencing court's order simply made the vehicle available for that potential forfeiture action.

Therefore, State disputes that Long can attack the forfeiture of the truck in this proceeding. But even if he could, he offers no authority for his position that reimbursement can be ordered for a vehicle which is improperly disposed of; and the State is aware of none. The City of Greenfield and the Greenfield Police Department were not parties to any of the proceedings at issue—either the initial prosecution or a subsequent forfeiture action. While the circuit court had jurisdiction over the seized property, it has never had personal jurisdiction over the City or the Police Department. *See*, *City of Milwaukee v. Glass (In re the Return of Property in State v. Sammie L. Glass), 243 Wis. 2d 636, 628 N.W.2d 343 (2001).* Without that jurisdiction, the circuit court lacked the authority to order any payment to Long.

As a corollary to the argument that the issue is moot, the State points out that Long has not established that he was aggrieved by the seizure of the truck. Long complains that the truck was seized and sold at public auction, and that he had to pay $14,600 to buy it back.[2] The record, however, establishes

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[1] The record in this appeal does not establish that a forfeiture occurred, but the State does not contest that it did.

[2] The State notes that Long's brief-in-chief is out of compliance with the rules of appellate procedure, in that it contains two items in the appendix (Appendix E and Appendix F) which are not in the appellate record. Rules of appellate procedure require an appellant to include "portions of the record essential to an understanding of the issues raised" in his appendix. Wis. Stat. §(Rule) 809.19(2). However, a party may not include non-record items in appendices in an effort to supplement the record. *See, e.g. Forman v. McPherson*, 2004 WI App 145, ¶6, n.4, 275 Wis. 2d 604, 685 N.W.2d 603. Appellate review is limited to the record before the appellate court. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct.

that Long was not the owner of the truck: he sold it to J.M.C. March 20, 2000. (R30:10)

Long owned the truck at the time of the offense. (R30:3,16) He purchased it on November 19, 1997 for $28,927 (R30:6) Four month later—knowing it was subject to seizure, as the oral seizure order had been issued in his presence (R41:23)—Long sold it to a friend, J.M.C for $1150 (R30:19, 10), approximately 6% of its original value. J.M.C. then relocated out-of-state, leaving the truck with Long. (R30:19) This has every appearance of sham transaction, designed to defeat a seizure order.[3] The fact remains, however, that the truck was titled in J.M.C.'s name as of March of 2000, and Long has not established that he was the lawful owner at the time of any forfeiture. To do so, he would have to admit attempting to commit a fraud on the court.

While Long was the titled owner of the truck when the seizure order was entered, he has not established that he was the titled owner at the time of any seizure or forfeiture. He, therefore, has not established that he was aggrieved by the court's order. Accordingly, he is not entitled to relief.

II. LONG'S ASSERTION THAT THE PREDICATE OWI CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL DOES NOT CONSTITUTE A NEW FACTOR, WHICH WOULD JUSTIFY RELIEF 16 YEARS AFTER HE COMPLETED HIS SENTENCE

Were this matter to be decided on the merits, rather than on procedural grounds, the appeal still should be denied.

App. 1992). Accordingly, the State would urge the court to disregard those items. Were the court to review those non-record items however, they would not support his claims. "Appendix E" is a letter from The Greenfield Police Department indicating that it has no record of the sales of vehicles at public auction; Appendix F reflects that Long regained ownership of the truck in 2009–some ten years after seizure was ordered. (Brief of Defendant-Appellant, Appendices E and F)

[3] Particularly in light of the fact that Long asserted in both motions below that he bought the truck at auction for $14,600. (R34; R36). It is hard to discern why the truck would have gained such significant value after it was sold to J.M.C.

Long contends that the fact that he did not have counsel for one of the predicate OWI offenses constitutes a new factor, and that the trial court relied on inaccurate information when sentencing him. (Brief of Defendant-Appellant, p. 9) He is mistaken.

STANDARDS OF REVIEW

To be resentenced based on a new factor, a defendant must establish by clear and convincing evidence that there was a fact or set of facts highly relevant to the imposition of sentence that was not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *State v. Harbor*, 2011 WI 28, ¶¶ 40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (reaffirming *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). A defendant seeking modification because of a new factor must show both that the new factor exists and that the new factor justifies modification of the sentence. *See State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

Whether a particular set of facts constitutes a new factor and whether a defendant has been denied due process are questions of law which the appellate court reviews *de novo*. *Harbor*, 333 Wis. 2d 53, ¶ 33; *State v. Groth*, 2002 WI App 299, ¶ 21, 258 Wis. 2d 889, 655 N.W.2d 163. Whether a new factor warrants a modification of sentence rests within the trial court's discretion. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989) That determination is reviewed under the erroneous exercise of discretion standard. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

To establish a due process violation based upon inaccurate sentencing information, a defendant must establish by clear and convincing evidence both that information before the court was inaccurate and that the court relied upon the misinformation in reaching its determination. *State v. Tiepelman*, 2006 WI 66, ¶¶ 9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied the constitutionally protected due process right to be sentenced upon accurate information is a constitutional issue that an appellate court reviews *de novo*. *State v. Tiepelman*, 291 Wis. 2d 179, ¶ 9, 717 N.W.2d 1.

A. Long's claim fails on the merits, as he has not stablished that a new factor exists

1. Long has not established that the predicate conviction was obtained in violation of his right to counsel

Long stakes his complaints on the claim that the Marathon County OWI conviction was obtained in violation of his right to counsel. That assertion however, is simply that: a conclusory assertion.

Long establishes that two other counties—Waukesha and Winnebago—"set aside" that conviction in prosecutions in those counties. It is not clear whether those courts held an *Ernst* hearing, whether the State conceded or did not to contest the issue, what specific findings were made, or how those courts' determinations were made. What is clear, though, is that the decisions of those courts are not binding on the Milwaukee County courts.

The doctrines of judicial estoppel and issue preclusion in some instances limit relitigation of issues previously raised. Neither is applicable here.

The doctrine of judicial estoppel,

> as traditionally applied in this state, is intended "to protect against a litigant playing `fast and loose with the courts' by asserting inconsistent positions." *Fleming*, 181 Wis.2d at 557 (quoting *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993)). The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position. *Coconate v. Schwanz*, 165 Wis.2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991).

State v. Petty, 201 Wis.2d 337, 347, 548 N.W.2d 817 (1996). It is intended to protect the judiciary as an institution from the perversion of judicial machinery. *Petty*, 201 Wis.2d at 346 (citation omitted)

Issue preclusion "is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties." *Michelle T. v.*

Crozier, 173 Wis. 2d 681, 687, 495 N.W.2d 327, 329 (1993). It may limit subsequent litigation if the question of fact or law was actually litigated in a previous action and is necessary to the judgment. *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶17, 281 Wis. 2d 448, 463–464, 699 N.W.2d 54, 61. If the issue actually has been litigated and is necessary to the judgment, the circuit court must conducts a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." *Id.*, 2005 WI 73, ¶17, 281 Wis. 2d at 464, 699 N.W.2d at 61. To determine whether it would be fundamentally fair to apply issue preclusion, courts consider the following factors:

> could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Paige K.B. v. Steven G.B., 226 Wis. 2d 210, 220–221, 594 N.W.2d 370, 375 (1999) (citation omitted).

Here, the State was not the litigant urging the courts to find a 6th amendment violation relative to the Marathon County conviction; neither is this case part of the same proceedings in which the other courts acted. Judicial estoppel, is therefore inapplicable. Neither could the State in the Milwaukee County case have sought review of the decisions of circuit courts in other counties; and had the Milwaukee County court been aware of those decisions, it would have had no standing to intervene.

Moreover, the information Long presented to the trial court was not sufficient to warrant an *Ernst* hearing (a remedy Long never requested). The Supreme Court revisited the law of

collateral attacks in *State v. Gracia*, 2013 WI 15, 345 Wis.2d 488, 826 N.W.2d 87. To prove a valid waiver of counsel,

> The circuit court must conduct a colloquy designed to ensure that 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." A defendant makes a prima facie showing by showing a violation of these colloquy requirements and can then attempt to collaterally attack that prior conviction.

Gracia, 345 Wis. 488, ¶35, 826 N.W.2d 87. (Internal citations omitted)

But a valid collateral attack also requires that the defendant,

> 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. Any claim of a violation on a collateral attack that does not detail such facts will fail.

State v. Ernst, 2005 WI 107, ¶ 25, 283 Wis. 2d 300, 318–19, 699 N.W.2d 92, 101 (Internal citations omitted)

In his submissions, Long did not establish a prima facie case that a violation had occurred. Other than the fact that out-of-county courts had granted him relief, Long presented limited information in support of his claim that his Marathon County conviction was obtained in violation of his right to counsel. He asserted only,

- He was about to complete his college education;
- He was unfamiliar with the criminal justice system;
- He was particularly concerned about his potential jail sentence;
- The prosecutor offered a plea agreement which called for the minimum amount of jail time;
- He was motivated to accept that offer so that he could start his new job;

- The court did not advise him of the dangers and disadvantages of proceeding without an attorney at that hearing;
- The court offered him an opportunity to have the case adjourned so he could get an attorney;
- He chose to proceed pro se, so that he wouldn't have to come back to court.

Significantly, Long has not asserted that he was unaware of the dangers and disadvantages of proceeding without an attorney—only that he was not informed of such at the plea hearing itself. That fails to meet the *Ernst* standard, which defeats his claim that the predicate Marathon County conviction was obtained in violation of his right to counsel and that such constitutes a new factor.

Ultimately, it is the State's position that this court cannot find, on this record, that a 6th amendment violation occurred. That conclusion could be reached only if an *Ernst* hearing were held, and if the State failed to prove by clear and convincing evidence that the plea was made knowingly, intelligently, and voluntarily. *Ernst*, 283 Wis.2d 300, ¶ 25, 699 N.W.2d 92. Given that no such hearing has been held, the claim that a new factor exists must fail.

2. Assuming arguendo that the predicate offense was obtained in violation of his right to counsel, Long has not established that such is highly relevant to the imposition of sentence, because the court would still have considered the conduct and the conviction

Judges at sentencing are to consider all relevant and available information about the offense, the character of the defendant, and public safety. *State v. Carter*, 208 Wis. 2d 142, 157, 560 N.W.2d 256, 262 (1997). Thus a sentencing court may consider charges pending against the defendant; *see, State v. Reed*, 2013 WI App 132, ¶ 9, 351 Wis. 2d 517, 523, 839 N.W.2d 877; *State v. Ziegler*, 2006 WI App 49, ¶ 32 n. 7, 289 Wis. 2d 594, 609 n. 7, 712 N.W.2d 76; charges against the defendant that have been dismissed, *State v. Frey*, 2012 WI 99, ¶ 5, 343 Wis. 2d 358, 365, 817 N.W. 436, 440; and, potentially,

evidence which was ordered suppressed, *State v. Marhal*, 172 Wis. 2d 491, 502-04, 493 N.W.2d 758 (Ct. App. 1992); *State v. Rush*, 147 Wis. 2d 225, 432 N.W.2d 688 (Ct. App. 1988). Clearly, nothing would have prohibited Judge Siefert from considering the Marathon County conduct and conviction, even if it had been proscribed as a predicate offense.

As demonstrated above, Judge Siefert's sentence was within the maximum sentence for an OWI 3rd. Thus a successful collateral attack would have changed neither the maximum penalty Long faced nor the information the court was bound to consider. Accordingly, Long has not established that even a potentially successful collateral attack was highly relevant to the sentence imposed.

B. Long's claim fails on the merits, as he has not established that he was sentenced on inaccurate information

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 291 Wis. 2d 179, ¶ 9, 717 N.W.2d 1. To obtain relief on the grounds that this right was denied him, a defendant must show both that information before the sentencing court was inaccurate and that the sentencing court relied on the misinformation in passing sentence. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 9, 26, 17 N.W.2d 1. (Internal quotation marks and citations omitted)

Here Long has presented nothing to show that the information the court relied on at sentencing was inaccurate. Nothing was presented to Judge Siefert as to whether Long had counsel at the time of his prior convictions; accordingly, there was nothing for Judge Siefert to rely on in that regard. Judge Siefert would properly have considered the fact and dates of Long's prior OWI cases, even if a collateral attack motion had been successfully brought against the Marathon County conviction. There is simply nothing to suggest that the court was presented with or relied on inaccurate information at sentencing in this matter.

III. WERE LONG ENTITLED TO RELIEF ON APPEAL, THAT RELIEF WOULD BE AN ORDER REMANDING THE MATTER TO THE CIRCUIT COURT FOR A DETERMINATION OF WHETHER THE NEW FACTOR WARRANTED RESENTENCING

Were this court to decide—without an *Ernst* hearing—that the Marathon County OWI conviction was entered in violation of Long's right to counsel, and that that constituted a new factor as a matter of law, the remedy would be to remand this matter for a resentencing hearing.

The trial court denied Long's motion as untimely, finding that it was subject to requirement in Wis. Stat. § 973.19 that it be filed within 90 days. That determination is in error. A motion to modify sentence based on a new factor is addressed to the court's inherent authority, which may be exercised as a matter of discretion and is not governed by a time limitation. *See State v. Noll*, 2002 WI App 273, ¶ 12, 58 Wis. 2d 573, 580, 653 N.W.2d 895, 898.

It is the State's position that, under the curious posture of this case, this court should uphold the trial court's decision, notwithstanding its failure to exercise the appropriate discretion. *See, State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (if circuit court's decision is supportable by the record, court of appeals will not reverse even if circuit court gave the wrong reason — or no reason at all — for its decision); *State v. Horn*, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987) ("if the holding is correct, it should be sustained, and this court may do so on a theory or on reasoning not presented to the lower courts"). Because the issue Long raises is moot, and because the fact Long submits cannot and does not constitute a new factor for the purposes of resentencing, a remand is unwarranted. Instead, this court should dismiss, or in the alternative, deny the appeal.

Were the court to determine that denial or dismissal were not appropriate, however, the remedy under *Noll* is not that the motion be granted, as Long asks, but that the matter be remanded to the trial court to hold a hearing. *See Noll*, 58 Wis. 2d 573, ¶7 653 N.W.2d 895.

CONCLUSION

For the reasons herein, the State requests that this court affirm the trial court's denial of Long's motion and dismiss, or deny, the appeal.

Dated this_____day of September, 2016.

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 word count of this brief is 6,288.

_____ _____
Date Karen A. Loebel
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I hereby certify that:

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_____ _____

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