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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP001248 CR
Racine County Circuit Court Case No. 2016CT000334

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. SEWARD,

Defendant-Appellant.

AN APPEAL OF A NON-FINAL ORDER OF THE COURT DENYING THE DEFENDANT'S MOTION COLLATERALLY CHALLENGING HIS PRIOR OWI CONVICTION, BEFORE THE HONORABLE CHARLES H. CONSTANTINE, JUDGE, RACINE COUNTY CIRCUIT COURT

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT MATTHEW A. SEWARD

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

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STATEMENT OF THE ISSUES

Whether the defendant's motion collaterally challenging his prior operating while under the influence of an intoxicant conviction with a violation date of January 17, 2006 should have been granted because the court failed to conduct an adequate colloquy to insure Mr. Seward was waived his right to counsel and understood the difficulty and disadvantage of proceeding without counsel?

The trial court answered: No

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE FACTS

The defendant, Matthew A. Seward (Mr. Seward) was charged in Racine County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration in violation of Wis. Stat. §346.63(1)(a) and (b), respectively on February 6, 2016. The criminal complaint charges the violation as a third offense alleging prior convictions from February 27, 2006 and November 12, 2004.

On May 6, 2016, the defendant filed a motion and affidavit in support of said motion collaterally challenging his prior conviction from February 27, 2006. The defendant alleged that the plea colloquy in the February, 2006 case was woefully inadequate. In support of the motion, the defendant included copies of the transcript from both the initial appearance on January 17, 2006 and the plea and sentencing hearing on February 27, 2006. (R.9:1-16/ A.App. 2-17).

Attached to said motion, the defendant submitted a signed affidavit indicating that he was not advised of the "difficulty and disadvantages of proceeding without counsel" on either of the above dates. ***Id.*** (R.9:4/ A.App. 5). Furthermore, the defendant averred that because he had never been involved in the criminal

justice system before, he did not know or understand the difficulty or disadvantages of proceeding without counsel. ***Id.***

Mr. Seward had previously filed the same motion in Racine County Circuit Court case 2013CM000429. In that case he was also charged with OWI third offense. A motion hearing in that case was held on October 1, 2013. The court denied Mr. Mr. Seward's motion without an evidentiary hearing. Mr. Seward sought appeal of the non-final order in that case, but that appeal was denied.

Mr. Seward was found not guilty at trial in case no. 2013CM00429, so he did not appeal Judge Flancher's ruling denying his collateral attack motion.

Subsequently, he was charged with OWI-3rd in the captioned matter on February 6, 2016. Once again he filed a motion collaterally challenging his prior conviction from February 27, 2006. A motion hearing was held on May 25, 2016, the Honorable Charles H. Constantine, judge, presiding. The trial court denied Mr. Seward's motion on collateral estoppel grounds. (R.10:1/ A.App. 1). The court indicated it was not an appellate court, so he could not reverse the ruling of Judge Flancher in Racine County Circuit Court case number

2013CM000429, denying Mr. Seward's similar motion on October 1, 2013. (R.12:1-14/ A.App. 18-24).

Despite denying the defendant's motion, Judge Constantine, indicated that he had reviewed all of the submitted motion, transcripts and affidavit, and stated that Mr. Seward makes a "very compelling argument" that the trial court in the collaterally challenged case failed to conduct a proper colloquy to assure that Mr. Seward understood the disadvantages and difficulties of self-representation. (R.12:9/ A.App. 22). An Order denying Mr. Seward's motion was signed on June 9, 2016. The defendant seeks leave to appeal that non-final order. The defendant timely filed a Notice of Appeal on July 22, 2016.

ARGUMENT

STANDARD OF REVIEW

In determining if there was a knowing, intelligent and voluntary waiver of the Sixth Amendment right to counsel, a reviewing court applies constitutional principles to the facts. ***State v. Ernst,*** 2005 WI 107, ¶10 283 Wis.2d 300, 699 N.W.2d 92 *citing* ***State v. Klessig,*** 211 Wis.2d 194 at 204, 564 N.W.2d 716 (1997). The court review is de novo, independent of the reasoning of the circuit court. ***Id.*** Additionally, "whether a party has met the burden of establishing a prima facie case

presents a question of law which we review de novo." ***Ernst*** at ¶10 *citing* ***State v. Baker***, 169 Wis.2d 49, 78, 485 N.W.2d 237 (1992).

A. THE TRIAL COURT ERRED IN DENYING MR. SEWARD'S MOTION COLLATERALLY CHALLENGING HIS PRIOR CONVICTION

Mr. Seward made a prima facie showing that he did not knowingly, voluntarily and intelligently waive his right to counsel, thus the trial court erred in denying his motion collaterally challenging his prior conviction.

A criminal defendant is guaranteed the right to assistance of counsel by both Article I, §7 of the Wisconsin Constitution, and the Sixth Amendment of the United States Constitution. "Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntarily." ***State v. Klessig,*** 211 Wis.2d 194 at 204, 564 N.W.2d 716 (1997).

In ***Klessig,*** the court mandated the trial court to conduct a colloquy to ensure that the defendant:

> (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties an 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.

Klessig at 206.

In ***State v. Ernst,*** 2005 WI 107, ¶10 283 Wis.2d 300, the court upheld the requirements of ***Klessig,*** thus requiring the above colloquy in every criminal case where a defendant appears without counsel. The ***Ernst*** court explained that the above requirements were not mandated by the Sixth Amendment of the United States Constitution, or the Article I, §7 of the Wisconsin Constitution, but were in fact a "court-made procedural rule." ***Ernst*** at ¶18. Thus, ***Ernst*** held that the mandates of ***Klessig*** survived the United States Supreme Court's ruling in ***Iowa v. Tovar***¸ 541 U.S. 77, 124 S.Ct. 1379, 158 L.#d.2d 209 (2004). The ***Ernst*** court found that a violation of the mandates of ***Klessig*** could form the basis of a collateral attack. ***Ernst*** at ¶37.

The ***Ernst*** court held that a defendant "must do more than allege that 'his plea colloquy was defective' or the 'court failed to conform to its mandatory duties during the colloquy.'" ***Id.*** at ¶25. "Instead, the defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated." ***Id.*** The ***Ernst*** court held that "for 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…Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***

In ***Ernst*** the defendant failed to meet his prima facie burden. Ernst asked the court to set aside the prior conviction "because he was not represented by counsel and the court did not take a knowing and voluntary waiver of counsel from the defendant." ***Ernst*** at ¶26. The court found that "Ernst made no mention of specific facts that show that his waiver was not a knowing, intelligent and voluntary one. Instead, Ernst simply relied on the transcript and asserted that the colloquy was not sufficient to satisfy ***Klessig.***" ***Ernst*** at ¶26.

Unlike, ***Ernst,*** Mr. Seward did meet his prima facie burden in establishing a violation of the ***Klessig*** requirements. Not only did Mr. Seward establish that the plea colloquy was woefully inadequate, (R.9:4-16/ A.App. 5-17), but Mr. Seward submitted a signed affidavit averring that at the time of the offense, not only did the court not explain that there could be disadvantages and difficulties with self-representation, but that because of his age, he did not know or understand that that there could be disadvantages or difficulties in proceeding without

counsel. Mr. Seward's affidavit specifically establishes that prior to 2005 he had never been involved in the criminal justice system. Mr. Seward further averred that because of this, he did not know or understand the disadvantage or difficulty of proceeding without counsel. ***Id.*** at A.App. 5**.**

Thus, unlike the defendant in ***Ernst***, Mr. Seward's motion and affidavit for collateral attack established more than a bare conclusion that the court failed to conduct a proper colloquy. In addition to showing that the plea colloquy was woefully inadequate, Mr. Seward alleged specific facts that he did not know or understand the difficulty or disadvantage of proceeding without counsel. Thus, Mr. Seward met the prima facie burden. Because of this the court erred in denying Mr. Seward's collateral attack motion.

Finally, the ***Ernst*** court set forth the procedures that should be applied when the defendant satisfies his prima facie burden. If the defendant makes the prima facie showing, the "burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered." ***Id.*** at ¶27. The court must hold an evidentiary hearing to allow the State an opportunity to meet its burden. If the state fails to satisfy its

burden, the prior conviction cannot be used to enhance the penalties. ***Id.***

CONCLUSION

Because Mr. Seward's motion and affidavit satisfied his prima facie burden of proof, the trial court erred in denying his motion collaterally challenging his prior conviction. The order should be reversed, and the Court should remand the matter back to the trial court for an evidentiary hearing consistent with the requirements of ***Ernst.***

Dated this 26th day of October, 2016.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 17 pages. The word count is 2850.

Dated this 26th day of October, 2016.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

CERTIFICATION OF COMPLIANCE WITH 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 s. 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 26th day of October, 2016.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of October, 2016.

Respectfully submitted,

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Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

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