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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

State of Wisconsin,
Plaintiff-Respondent
v.

Case No. 2016AP1248 CR
Trial Court Case No. 16CT000334
Racine County Circuit Court

Matthew Seward,
Defendant-Appellant.

REPLY BRIEF OF PLAINTIFF-RESPONDENT

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

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STATEMENT OF ISSUES

The Defendant-Appellant, Mr. Seward, petitions the Court of Appeals, District II, on appeal from a non-final order in Racine County Circuit Court case #16CT334 entered on June 10, 2016 by the Honorable Charles Constantine in which the court denied Defendant-Appellant's collateral attack motion. The State, through Racine County Assistant District Attorney Lillian V. Lewis, responds to the interlocutory appeal below.

A. STATEMENT OF THE ISSUES PRESENTED:

1. Is Mr. Seward barred from re-litigating the same issue, facts and circumstances previously litigated before the trial court and Court of Appeals in October 28, 2013?

2. Should the court allow the re-litigation of the previously litigated matter, was there a sufficient plea colloquy in Mr. Seward's second operating while intoxicated conviction, barring Mr. Seward from collaterally attacking the conviction?

STATEMENT OF FACTS

B. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUE

i. PROCEDURAL HISTORY

There have been two prior convictions of the Defendant-Appellant, Matthew Seward, for operating a motor vehicle while intoxicated. These convictions occurred on February 27, 2006 (see Racine County Circuit Court case #16CT7058) and November 12, 2004, respectively. In 2012, the State charged Mr. Seward with operating while intoxicated for a third time (see Racine County Circuit Court case #13CM429). In response, Mr. Seward filed a motion collaterally attacking his 2006 conviction (R-App pg. 28). Mr. Seward included transcript copies from his initial appearance as well as the plea and sentencing hearing in the 2006 case. (R- App. pg.'s 2-13) The court, by the Honorable Racine County Circuit Court Judge Faye Flancher, denied Mr. Seward's collateral attack motion on October 1, 2013. (R- App. pg.'s 2-13) On October 28, 2013, Mr. Seward filed essentially the same interlocutory appeal currently filed with the court. The Appellate Court denied Mr. Seward's petition for review and the case proceeded to trial. Mr. Seward was subsequently found not guilty of his third operating while intoxicated offense.

On February 6, 2016, in Racine County Circuit Court file #16CT334, the State charged Mr. Seward with a third operating while intoxicated offense after he operated his vehicle on February 5, 2016 with a .22 blood alcohol content. (R-App. pg. 26-27) In response, Mr. Seward filed the same collateral attack motion previously filed in his 2013 case. Following a hearing, because the motion had previously been heard, Racine County Circuit Court Judge Charles Constantine denied the collateral attack motion in written form June 10, 2016 pursuant to collateral estoppel. (R-App. pg. 1) Mr. Seward filed his interlocutory appeal.

ii. FACTS OF THE CASE

On February 5, 2015, Officer Demarasse was on patrol for the Town of Waterford, County of Racine, State of Wisconsin. On that date at approximately 12:33 AM, Officer Demarasse was traveling northbound on Hwy164 when she observed a vehicle that appeared to be traveling above the posted speed limit. Officer Demarasse determined the speed of the vehicle to be 67 mph in a 50 mph zone. Officer Demarasse let the vehicle pass her location and then turned her squad around to stop the vehicle.

The vehicle turned right onto Poplar Circle and then into the driveway of 7314 Big Bend Road in the Town of Waterford. Officer Demarasse pulled her

squad behind the vehicle and observed the driver of the vehicle, later identified as Matthew Seward, exit his car. Seward had his arms in the air and was yelling. Officer Demarasse noticed that Seward appeared to be looking around for a place to run. Seward also stated, "I'm home! You can't do anything! What did I do?" Seward was informed he was stopped for speeding and he then stated, "I'm sorry, don't take me to jail, I know I'm drunk."

Officer Demarasse noticed that Seward was stumbling as he walked, smelled of alcohol, had bloodshot eyes and spoke with a thick tongue. Officer Demarasse transported Seward to the police department for the purpose of administering field sobriety tests due to the wintery conditions. Seward repeatedly refused to perform the tests saying, "No, you got me!" Seward did agree to provide a PBT sample. The sample provided by Seward had a reported value of .21.

Seward was placed under arrest, read the informing the accused and asked to provide a sample of his blood. Seward refused. Officers obtained a search warrant signed by Judge Boyle. Blood was drawn and mailed to the State Lab of Hygiene for further analysis. The lab reported that Seward’s BAC was .225 g/100mL.

iii. TRIAL COURT'S DECISION

Following initial appearance, Mr. Seward filed his collateral attack motion. The trial court heard argument from counsel and as the matter had been previously decided, denied Mr. Seward's motion in written form on June 10, 2016. (R-App. pg.'s 32-38, 1)

ARGUMENT

iv. 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; *State v. Klessing*, 211 Wis.2d at 204, 564 N.W.2d 716 (1997). The court review is de novo. *Id.*

v. ARGUMENT

CLAIM AND ISSUE PRECLUSION BAR MR. SEWARD FROM HAVING HIS COLLATERAL ATTACK MOTION HEARD TWICE.

In Wisconsin "the term issue preclusion replaces collateral estoppel." *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550, 525 N.W.2d 723 (1995), *City of Sheboygan v. Nytsch*, 2006 WI App 191, 296 Wis. 2d 73, 79, 722 N.W.2d 626, 629, review granted, cause remanded, 2008 WI 64, 310 Wis. 2d 337, 750 N.W.2d 475. Issue preclusion (or collateral estoppel) is applicable in criminal cases only when double jeopardy is not. *State v. Henning*, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871. Issue preclusion is designed to limit the relitigation of issues that have been actually litigated in a previous action. Unlike claim preclusion, an identity of parties is not required. As explained in *Michelle T. v. Crozier*, 173 Wis.2d 681, 687–88, 495 N.W.2d 327 (1993), formalistic applications of issue preclusion have given way to a looser, equities-based application of the doctrine. Pursuant to *Michelle T.*, issue preclusion requires courts to conduct a "fundamental fairness" analysis. Under this analysis, courts consider an array of factors in deciding whether issue preclusion is equitable in a particular case. *Id.* at 688–89, 495 N.W.2d 327. *Lindas v. Cady*, 183 Wis. 2d 547, 558-59, 515 N.W.2d 458, 463 (1994). Issue preclusion requires that the issue sought to be precluded must have been actually litigated previously, and issue preclusion generally allows courts to consider a somewhat broader array of equitable factors when considering whether or not to prevent relitigation. *Id*. at 559. In a similar vein, pursuant to claim preclusion, or res judicata, "a final judgment is conclusive in all subsequent actions between the same parties as to all

matters which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mutual Insurance Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883 (1983). In order for claim preclusion or estoppel by record to apply, there must be an identity of parties or their privies and an identity of claims in the two cases. *DePratt,* 113 Wis.2d at 311, 334 N.W.2d 883.

In Mr. Seward's case, the parties and the issue are exactly the same. Mr. Seward seeks to have his second try at a previously decided motion. Even his attempt to appeal is a second try as the same facts and circumstances have already been reviewed and denied by the Appellate Court. As the matter has the same parties, the same facts, the same circumstances, and has previously been litigated, it meets Wisconsin's requirements for preclusion. Mr. Seward's petition, therefore, cannot continue.

MR. SEWARD RECEIVED AN APPROPRIATE PLEA COLLOQUY DURING HIS SECOND OPERATING WHILE INTOXICATED CONVICTION WHICH CORRECTLY FORMS THE BASIS FOR MR. SEWARD'S THIRD OPERATING WHILE INTOXICATED PENALTIES.

Collateral attacks are generally disfavored because "they disrupt the finality of prior judgments and thereby tend to undermine confidence in the

integrity of our procedures and inevitably delay and impair the orderly administration of justice." *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 13, 318 Wis.2d 216, 768 N.W.2d 53. Our supreme court has recognized a small window, however, where defendants may collaterally attack prior convictions being used as predicate offenses for enhancing sentencing on the basis that they did not validly waive the right to counsel. *State v. Ernst*, 283 Wis.2d 300, ¶ 22, 699 N.W.2d 92.

When collaterally attacking a prior conviction under this exception, the defendant has the initial burden of coming forward with evidence to make a prima facie showing of a deprivation of his or her constitutional right at the prior proceeding. *State v. Baker*, 169 Wis.2d 49, 77, 485 N.W.2d 237 (1992). If the defendant makes a prima facie showing, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding. *Id*. Whether a party has met the burden of establishing a prima facie case presents a question of law which Supreme Court reviews de novo. *State v. Ernst*, 283 Wis.2d 300, ¶ 22, 699 N.W.2d 92.

With regards to collateral attack motions based upon a voluntary waiver of counsel, the record must reflect not only a deliberate choice to proceed without

counsel but also an awareness of the difficulties and disadvantages of self-representation, the seriousness of the charges the Defendant is facing and the general range of possible penalties that may be imposed if the Defendant is found guilty. *Pickens v. State*, 96 Wis.2d 549. In *State v. Klessig*, 211 Wis.2d 194, 206, 564 N.W.2d 716 (1997), a colloquy emerged, identifying whether someone had properly waived counsel, outlining the following inquiries: 1. Whether the Defendant made a deliberate choice to proceed without counsel; 2. Whether the defendant was made aware of the nature of self-representation; 3. Whether the defendant was made aware of the seriousness of the charges against him, and; 4. Whether the defendant was aware of the general range of penalties that could be imposed against him. *Id*. This does not, however, require that the court give a rigid and detailed admonishment of the usefulness of an attorney, that an attorney may provide an independent opinion of whether or not it is wise to plead guilty, and whether an attorney could find an over-looked defense by the pro-se defendant before accepting a waiver of counsel at a plea hearing. *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379 (2004). Instead, the Defendant's 6th Amendment requirements are satisfied when the trial court informs the accused of the nature of the charges against him, the right to be counseled regarding his plea, and the range of allowable punishments attendant upon the entry of a guilty plea. *Id*.

The Defendant must do more than allege that the plea colloquy was defective or that the court failed to conform to its mandatory duties during the plea colloquy to satisfy the standard for collateral attacks concerning waiver of right to counsel. *State v. Ernst*, 2005 WI 107, 283 Wis.2d 300. Instead, the defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated. *Id*. A prima facie case does not exist with a motion and quotes from a transcript. *Id*. The Defendant must point to facts, or in other words must show the court rather than simply tell the court that there are facts demonstrating he did not know or understand information that should have been provided. *Id*.

In proving his claim, the Defendant providing partial transcripts may be insufficient and failing to provide additional relevant transcripts may be insufficient which, like the Defendant refusing to testify should the State conduct an evidentiary hearing, may be held against the Defendant. *State v. Stockland*, 2003 WI App 177 (2003) While the destruction of transcripts may not be held against the Defendant, vague, uncertain, and self-serving testimony is deficient. *State v. Hammill*, 2006 WI App 128. Further, in absence of a transcript, the court will assume every fact essential to sustain the trial judge's exercise of discretion as supported by the record. *Duhame v. Duhame*, 154 Wis.2d 258 (Ct. App. 1989), see also *State v. Benton*, 2001 WI App 81; *State v. McDowell*, 2003 WI App 168.

In Mr. Seward's case, the record is clear that he made a deliberate choice to proceed without counsel. The court inquires and explains that Mr. Seward has a Constitutional right to counsel – twice. Mr. Seward indicates he does not want an attorney, and proceeds to accept the State's offer, choosing to plea to his second operating while intoxicated charge. Mr. Seward was aware of the nature of self-representation. He represented himself for his first operating while intoxicated charge, and had no questions of the court after being told – twice – that he could have an attorney present. Further, as Mr. Seward's initial 2006 appearance was on January 17, 2006 and his plea hearing was on February 27, 2006, Mr. Seward had ample time to contemplate whether or not he wanted counsel while he was free in the community waiting for his plea hearing in his second operating while intoxicated case. Mr. Seward was made aware of the seriousness of the charges against him – again, twice – as he was provided with the nature of the charges at his initial appearance and at his plea hearing in his second operating while intoxicated case. These two notifications also encompassed the general range of penalties that could be imposed against him. In response, Mr. Seward provides vague, uncertain, and self-serving statements which are deficient in proving his collateral attack claim.

For the foregoing reasons, the State respectfully requests the Court deny the Defendant-Appellant's appeal of the non-final order entered on June 10, 2016 in the Racine County Circuit Court, the Honorable Judge Charles Constantine presiding.

Dated at Racine, Wisconsin, this November 4, 2016.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Section 809.01 of the Wisconsin Statutes for a petition and memorandum produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 12 point body text, leading of a minimum 2 points, maximum of 60 characters per full line of body text, and a 1.5 inch margin on each side pursuant to Wis. Stat. §809.81. The length of this petition and memorandum is 2,254 words, 12 pages.

Dated at Racine, Wisconsin this November 4, 2016.

Respectfully submitted,

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CERTIFICATION OF MAILING

I hereby certify that this this petition for leave to appeal a non-final order was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on the 9th day of November, 2016.

Dated at Racine, Wisconsin this 9th day of November, 2016.

Respectfully submitted,

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