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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

United States Supreme Court

Wisconsin Supreme Court

Wisconsin Court of Appeals

ARGUMENT

In its brief, the State makes two arguments. The crux of the first argument is that issue preclusion prevents Mr. Seward from arguing that his prior conviction should not be used to enhance potential. The State argues that the collateral attack advanced by Mr. Seward is exactly the same issue with the same parties and previously denied in an unrelated prior proceeding. The State incorrectly asserts that "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." Brief of the Plaintiff-Respondent at page 7. The error is that in the previous proceeding, Mr. Seward did attempt to appeal the non-final order. However, the Appellate Court denied Mr. Seward's interlocutory appeal, the Court did not rule on the rmerits.

Mr. Seward continued to defend the charges, and was eventually acquitted by a jury. Because, of the acquittal, Mr. Seward was not aggrieved by the order. "A person may not appeal from a judgment unless he or she is aggrieved by it." ***Ford Motor Credit Co. v. Mills,*** 142 Wis.2d 215, 217-18, 418 N.W.2d 14 (Ct.App. 1987). Had Mr. Seward been found guilty, Wis. Stat. §808.03 would have permitted Mr. Seward to appeal

the collateral attack ruling as a matter of right. However, because he was acquitted and the final order was a judgment of acquittal, he could not have filed an appeal.

Contrary to the State's contention, the Appellate Court did not decide the issue, the Appellate Court simply denied Mr. Seward's attempt to appeal from a non-final order. This issue can be decided by the Appellate Court.

The second argument advanced by the State is that the court's plea colloquy was sufficient to meet the standard articulated in ***State v. Ernst,*** 2005 WI 107, 283 Wis.2d 300**.** The State cites the proper standard, specifically identifying each factor required by ***State v. Klessig,*** 211 Wis.2d 194 at 204, 564 N.W.2d 716 (1997) and ***Ernst.*** However, the State ignores the fact that the trial court failed to even remotely address the second ***Klessig*** factor.

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 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.

Klessig at 206.

The ***Ernst*** court upheld the requirements of ***Klessig,*** thus requiring the above colloquy in every criminal case where a defendant appears without counsel. Here, the trial court failed to address the second factor of ***Klessig.*** The court failed to determine if Mr. Seward was aware of the difficulties and disadvantages of proceeding without counsel.

Furthermore, the State tries to bolster its argument by implying that the minimal requirements of ***Iowa v. Tovar,*** 541 U.S. 77, 124 S.Ct. 1379 (2004) should apply to Mr. Seward. Brief of the Plaintiff-Respondent page 9. However, ***Ernst*** is crystal clear 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. Compliance with ***Klessig*** is required in Wisconsin. Here, the court's colloquy was woefully inadequate, and clearly did not comply with ***Klessig.***

Finally, the State claims that Mr. Seward failed to make a *prima facie* showing. The ***Ernst*** court held that a defendant "must do more than allege that 'his plea colloquy is 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.***

Unlike, ***Ernst,*** Mr. Seward did meet his *prima facie* burden in establishing a violation of the ***Klessig*** requirements. All transcripts were attached to Mr. Seward's motion challenging the February 26, 2007 conviction. Furthermore, Mr. Seward filed a specific affidavit. Even Judge Constantine, opined that he thought the motion had merit, and would not have ruled as Judge Flancher ruled. (R.12:9/ ReplyApp. 1). This issue was adequately addressed in Mr. Seward's initial brief, no further argument are necessary here.

CONCLUSION

Because the collateral attack issue is properly before this Court, and because the trial court erred in denying his motion challenging the prior conviction, the order should be reversed,

and the Court should remand this matter back to the trial court for an evidentiary hearing as required by ***Ernst.***

Dated this 28th day of November, 2016.

Respectfully Submitted

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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 13 pages. The word count is 1827.

Dated this 28th day of November, 2016.

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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 28th day of November, 2016.

Respectfully submitted,

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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 28th day of November, 2016.

Respectfully submitted,

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APPENDIX

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