STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP2438 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SCOT ALAN KRUEGER, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE BRIAN A. PFITZINGER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did Krueger establish a prima facie case that he was denied his right to counsel in connection with a prior OWI conviction such that the prior conviction should not have been used against him for sentence enhancement purposes?

The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a specific set of facts.

STATEMENT OF THE CASE

The State charged Krueger with operating a motor vehicle while under the influence of an intoxicant. Ap.100-107. The criminal complaint alleged that Krueger had been previously been convicted of two other OWI offenses, one in 1989 and one in 1993, thereby making the offense at issue in this case an OWI 3rd. Ap.101.

Kruger filed a motion seeking to exclude the 1993 conviction for purposes of sentencing enhancement. Ap.107. The trial court denied the motion. Krueger then entered a plea of no contest to the offense as alleged. At sentencing, the trial court withheld sentence and placed Krueger on probation for a period of 18 months with conditions to include 24 days in jail, and a fine and costs totaling $3048. Ap.110-112. Krueger timely filed a notice of intent to pursue postconviction relief. Krueger also filed a motion for release on bond pending postconviction relief. The trial court denied the motion. Krueger appealed to this court the trial court's order denying release on bond pending postconviction relief. This court denied Krueger's motion. Krueger filed a notice of appeal pursuant to which these proceedings follow.

STATEMENT OF FACTS

Facts pertaining to motion and affidavits

Krueger's "Motion To Bar Consideration Of April 21, 1993 Conviction" alleged as follows:

> [i]n the case resulting in conviction, Mr. Krueger had the constitutional right to an attorney, was not represented by an attorney, and did not validly waive his right to an attorney. Ap.107.

In support of the motion, Krueger submitted two affidavits, one signed by himself and one signed by trial counsel. Krueger's affidavit asserted as follows:

1. I am the Defendant in this case.
2. I make this affidavit in support of the Defendant's Motion To Bar Consideration of Prior Conviction.
3. I recall being charged and convicted of an operating while intoxicated offense in Dodge County Circuit Court on April 21, 1993. I was not represented by an attorney at any time in the proceedings.
4. At the time of the above conviction, I did not understand the difficulties and disadvantages of proceeding without an attorney, and I was not aware that an attorney could be appointed to represent me if I could not afford one.
5. At no time during the above mentioned case was I advised by the judge or anyone else in the proceeding, of the difficulties and disadvantages of proceeding without an attorney, nor that an attorney could be appointed to represent me if I could not afford one. Ap.108.

Trial counsel's affidavit asserted as follows:

1. I am the attorney for the Defendant in this case.

2. I make this affidavit in support of the Defendant's Motion to Bar Consideration of Prior Conviction.

3. I requested a records check with the Dodge County Clerk of Courts regarding the Defendant's April 21, 1993 conviction for Operating While Intoxicated. I was informed by that office that the court records had been destroyed, and that determination of the identification of the court reporter at the time of the Plea and Sentencing could not be done. Therefore, no transcript of the plea and sentencing is available. Ap.109.

Facts pertaining to testimony in support of motion

Krueger testified in support of the motion. Krueger recalled being convicted of the 1993 offense and receiving a 30 day jail sentence. Ap.113. Krueger did not have a lawyer when he went to court. Ap.113. He recalled having the criminal complaint read to him and entering a plea of no contest. Ap.114. Prior to the 1993 case, Krueger had been charged with one other OWI case. Ap.114. Krueger did not have a lawyer for that case either. Ap.114. At the time of his 1993 case, Krueger worked in a factory. Ap.115. He was not aware that an attorney could have been appointed for him if he was not able to afford one. Ap.115. Since the 1993 case, Krueger had two other criminal OWI charges brought against him including the

present case. Ap.124. By that point, Krueger was aware of how an attorney could help him and the advantages of having one. Ap.125.

On cross-examination, Krueger testified that he did not remember getting a copy of the criminal complaint only a "criminal report". Ap.117. Krueger learned the actual penalties that he faced by looking up the statutes. Ap.117. Krueger did not remember the name of the judge or which branch the case took place, only that it happened in the old courthouse. Ap.118. Had he been told that he had the right to speak to a lawyer, he probably would have done so. Ap.119. He would have pleaded not guilty and "got an attorney." Ap.118. Krueger would have discussed with the attorney what his options were and what the attorney thought would have been best for him. Ap.120. It was five or ten years later that Krueger came to the conclusion that he would have proceeded differently. Ap.120. Krueger was 29 back in 1993. Ap.122. Prior to 1993, he had never consulted with an attorney. Ap.123. Other than the two prior OWI cases, Krueger only had received "seat belt tickets." Ap.128.

Facts pertaining to trial court's decision

The trial court concluded that Krueger had not established a prima facie case. Ap.129. In making such conclusion, the trial court found that Krueger's testimony had "no credibility." Ap.129. The trial court determined that Krueger's testimony lacked credibility because it did not comport with the trial court's recollection of how the Dodge County Circuit Court operated back in 1993. Ap.127. The trial court took judicial notice of "the court system," and stated "if I hold up (Krueger's) facts against… the facts as I know them…they're false." Ap.127. The trial court stated that it had "been kicking around this courthouse since 1988," Ap.127, and at that time, a Commissioner Olson conducted the initial appearances. Ap.126. The trial court stated that,

> I know that Commissioner Olson had a colloquy with (individuals making first appearances), advised them of the charge, made sure that they had a complaint and went through their constitutional rights. I can tell you that because as I said, I sat through that. Ap.126.

The trial court similarly stated,

> since 1988 every single judge in Dodge County has conducted a thorough plea colloquy with defendants. I know that because I sat through a zillion and a half of them. Ap.126.

The trial court further stated,

I mean I can remember it because I went to court a thousand times or more, actually more I'm sure, but, and sat through thousands of pleas in front of the three judges, Judge Schultz, Judge Wells, and I don't—actually and I think Judge Storck might have been on the bench in '93, that would make sense because—so he would have been the other judge, and but even if it was Judge Schultz, I'm pretty confident a colloquy was held. Ap.128.

The trial court further stated,

So I don't know what to do with this because he, first of all, says he didn't get a complaint, which I can assure you that Commissioner Olson, that was his marching orders from the judges, make sure they have their complaint and he reviewed it with them. And at that point I'm—I also know that he gave them their constitutional rights.

So I don't know what judge this was heard in front of but I can tell you that my experience is that all of them did a plea colloquy. Did they do one in this case? I don't know. I mean I don't have—there's no record. And this is, you know, the difficulty, but it would be the exception, not the rule. Ap.128.

The trial court denied Krueger's motion on the basis that Krueger had not established a prima facie case. Ap.133.

ARGUMENT

Krueger established a prima facie case that he was denied his right to counsel in connection with the 1993 OWI conviction.

A. Standard of review and applicable law.

Both Article I, §7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to counsel. See **State v. Klessig**, 211 Wis.2d 194, 201-202, 564 N.W.2d 716 (1997). "Whether a defendant knowingly, intelligently and voluntarily waived his right to counsel requires the application of constitutional principles to the facts." **Id.** at 204. We review de novo whether the constitutional requirements for waiver of counsel are meet. **Id**. A circuit court is required to undertake a colloquy with the defendant to ensure that the defendant knowingly, intelligently, and voluntarily waived his right to counsel. **Id**. at 206. Before accepting a waiver of the right to counsel, a circuit court must 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 against him." **Id**. at 206. A defendant in an enhanced sentencing proceeding based on a prior conviction may collaterally attack the prior conviction only when the challenge is based on a denial of the constitutional right to counsel. **State v. Ernst**, 2005 WI 107, ¶22, 283 Wis.2d 300, 699 N.W.2d 92. First, the

defendant must make a prima facie showing that his or her constitutional right to counsel was violated in the previous proceeding. **Id**. at ¶25. To do so, the defendant must point to "specific facts" demonstrating that he or she did not know or understand the information that should have been provided in the previous proceedings and, therefore, did not knowingly, intelligently and voluntarily waive his or her right to counsel. **Id**. at ¶¶25-26. If the defendant makes this prima facie showing, the burden shifts to the State to prove, by clear and convincing evidence, that the defendant's waiver of counsel was knowing, intelligent, and voluntary. **Id**. at ¶27. If the State fails to meet its burden, the defendant will be entitled to attack successfully and collaterally, his or her previous conviction. **Id**. A waiver of the right to counsel "will not be presumed from a silent record." See **State v. Baker**, 169 Wis.2d 49, 76, 485 N.W.2d 237 (1992). Courts are to "indulge in every reasonable presumption against waiver of counsel[.]'" See **id**. at 76.

B. Krueger's affidavit and motion contained sufficient allegations to establish a prima facie case.

Krueger's motion asserted that he did not, in connection with the 1993 conviction, validly waive his right to an attorney. Ap.107. In support of such assertion, Krueger attached and incorporated his affidavit. Ap.108. Krueger's affidavit alleged in relevant part as follows:

> I recall being charged and convicted of an operating while intoxicated offense in Dodge County Circuit Court on April 21, 1993. I was not represented by an attorney at any time in the proceedings.
>
> At the time of the above conviction, I did not understand the difficulties and disadvantages of proceeding without an attorney, *and I was not aware that an attorney could be appointed to represent me if I could not afford one.*
>
> At no time during the above mentioned case was I advised by the judge or anyone else in the proceeding, of the difficulties and disadvantages of proceeding without an attorney*, nor that an attorney could be appointed to represent me if I could not afford one*. Ap.108. Italics added.

Krueger's affidavit satisfied the requirements imposed under **Ernst**. In particular, the affidavit pointed to "specific facts" demonstrating that Krueger did not know or understand information which should have been provided in the previous proceeding. Specifically, the affidavit asserted that Krueger *was not aware that an attorney could be appointed to represent him if (he) could not afford one.* The affidavit similarly asserted that he was not *advised by the judge or anyone else in the proceeding that an attorney could be appointed to represent (him) if (he) could not afford one*. In order to avoid any question concerning a valid waiver, "[t]he

record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." **State v. Ernst**, 2005 WI 107 at ¶25. The record in this case fails to show that Krueger was offered counsel and that he rejected such offer. To the contrary, Krueger's affidavit sufficiently asserted that he was not aware that counsel could be appointed for him and that the trial court failed to inform him of such right. Such allegations alone sufficiently established a prima facie case under **Ernst**. The allegations however were underscored by other related allegations by Krueger. In this regard, the affidavit additionally asserted that Krueger *did not understand the difficulties and disadvantages of proceeding without an attorney.* The affidavit additionally asserted that *at no time during the above mentioned case was (he) advised by the judge or anyone else in the proceeding, of the difficulties and disadvantages of proceeding without an attorney.* While such allegations did not directly implicate the right to counsel, they did implicate the requirements imposed on trial courts by **Klessig** and support Krueger's position that the trial court did not provide to him information which should have been provided and which he otherwise did not know or understand.

While a plain reading of Krueger's affidavit demonstrates that it fell squarely within the requirements under **Ernst**, a review of relevant case law confirms that the affidavit made the requisite showing under Wisconsin law. In **State v. Baker**, 169 Wis.2d 49, 485 N.W.2d 237 (1992), the defendant moved to collaterally attack a previous conviction based on an alleged violation of his right to counsel. **Baker**, 169 Wis.2d at 76. Because the transcript of the earlier proceeding was "lost," the defendant relied on his own affidavit, in which he averred he "was unrepresented by counsel [in the earlier proceedings], and did not at any time affirmatively waive his right to counsel." **Id**. Based on these allegations, the supreme court concluded that the defendant made a prima facie showing that his right to counsel was violated. **Id**. In **State v. Drexler**, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182, the defendant averred he was not informed during prior proceedings that "he could have the court appoint counsel for him if he could not afford counsel, and the state or county could be held responsible for paying the cost of appointed counsel." **Id**. at ¶10.

This court concluded that the defendant's affidavit was sufficient to establish a prima facie case of being denied the right to counsel. **Id**. If the

affidavits at issue in **Baker** and **Drexler** were sufficient to establish a prima facie case, so too was the affidavit here.

C. Krueger's testimony supported facts made in affidavit.

At the onset of the hearing on Krueger's motion, the trial court initially stated that it would presume that Krueger's affidavit established a prima facie case. 18:3-4. The State disagreed that the affidavit did so. 18:4-6. In the context of arguing over whether Krueger's affidavit established a prima facie case, the trial court stated, "[w]ell counsel, it's your burden, call your first witness." 18:8. Trial counsel called Krueger to testify. 18:8. The salient parts of Krueger's testimony are that he received a jail sentence of 30 days on the 1993 case and that he was not aware that an attorney could have been appointed for him if he was not able to afford one. Ap.115. Krueger also testified that prior to the 1993 case, he had been charged with one other OWI case and that he did not have a lawyer for that case either. Ap.114. Such testimony supported the allegations in Krueger's affidavit that he was not aware that an attorney could be appointed for him and that the trial court failed to inform him of such right. While Krueger's

affidavit sufficiently established a prima facie case, his testimony solidified it.

D. Trial court considered improper factors in determining whether Krueger had established a prima facie case.

In concluding that Krueger had not established a prima facie case, the trial court found that Krueger's testimony had "no credibility." Ap.129. The trial court determined that Krueger's testimony lacked credibility because it did not comport with the trial court's recollection of how the Dodge County Circuit Court operated back in 1993. Ap.127. The trial court took judicial notice of "the court system," and stated "if I hold up (Krueger's) facts against… the facts as I know them…they're false." Ap.127. This manner of evaluating whether Krueger had established a prima facie was erroneous in two respects. First, as part of the prima facie showing, Krueger needed only point to "specific facts" demonstrating that he did not know or understand the information that should have been provided in the previous proceedings and, therefore, did not knowingly, intelligently and voluntarily waive his right to counsel. **State v. Ernst**, 2005 WI 107 at ¶¶25-26. As discussed earlier in this brief, Krueger did just this. He made the proper allegations. The trial court however rejected such allegations not because

they were somehow deficient in their content but because the trial court did not believe them to be true. But Krueger's credibility and the veracity of his allegations did not factor into the prima facie inquiry. All that was necessary was for Krueger to make the requisite allegations. Once he did, the burden shifted to the State to prove by clear and convincing evidence that Krueger's waiver of counsel was knowing, intelligent, and voluntary, notwithstanding Krueger's allegations to the contrary. At such juncture, the trial court then could have properly made credibility determinations as part of its evaluation of whether the State had met its own burden. In essence, the trial court improperly placed upon Krueger a burden that should not have existed, one of persuasion, and relieved the State of its own burden, one both of persuasion and production of evidence. This was error. Equally if not more problematic was the mechanism employed by the trial court in summarily rejecting Krueger's allegations. The trial relied not on evidence produced by the State, indeed there was no such evidence, but upon its own, personal recollection of how the Dodge County court system functioned back in 1993. While acknowledging that it did not know whether a colloquy regarding the waiver of counsel took place or not, Ap.128, the trial court presumed that it did because the trial judge knew the

judicial officials who would have proceeded over Krueger's plea and knew how they would have conducted colloquys with defendants. Ap.125-129. The trial court further presumed that the colloquy would have been "thorough" because "since 1988 every single judge in Dodge County has conducted a thorough plea colloquy with defendants." Ap.126. This was improper. A trial court sitting as a fact-finder may not establish as an adjudicative fact that which is known to the judge as an individual. See **State v. Peterson**, 222 Wis.2d 449, 458, 588 N.W.2d 84 (Ct. App. 1998), citing **Hoeft v. Friedli**, 164 Wis.2d 178, 179, 473 N.W.2d 604 (Ct. App. 1991). In **Peterson**, the defendant was charged with various offenses after a boat he was operating collided with another boat killing one person and injuring another four. **State v. Peterson**, 222 Wis.2d at 452. Prior to trial, the defendant filed a motion to admit a videotape for the purpose of demonstrating to the jury the approximate conditions at the site of the collision immediately prior to the accident, including the visibility on the river at the time. **Id**. at 453. In denying the motion to admit the videotape, the trial court concluded in part that based on its own personal experience of being on the river at night, the videotape was not an accurate representation of what one could see on the river. **Id**. at 453. In particular,

the trial court reasoned that based on his own personal experience on the river at night, "you can certainly see a lot more than that video represents." **Id**. at 457. Although there was no evidence offered to counter testimony offered by the defense that the videotape was an accurate representation, the trial court found the defense testimony to be incredible based on the judge's own experience. **Id**. The defendant argued that it was improper for the court to rely on its own experiences over that of a witness who was present during the creation of the videotape. **Id**. This court agreed and reversed the conviction. **Id**. at 457 and 460. In doing so, the court stated that "the trial judge's opinion of what one can see on the river at night is neither part of the record nor a generally known fact suitable for judicial notice." **Id**. at 458. In **Hoeft**, the trial judge knew, from personal experience, that the author of a particular letter in evidence had a sense of humor. **Hoeft v. Friedli,** 164 Wis.2d at 189. Based on that knowledge, the trial court discounted the letter's evidentiary value. **Id**. In reversing the case, this court stated as follows:

> [t]he trial judge thereby established as an adjudicative fact that which was known to him as an individual; it was not an inference derived from testimony-documentary or otherwise. The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses….If particular facts are outside the area of reasonable controversy, this procedure is dispensed with as unnecessary….A high degree of indisputability is the essential prerequisite of judicial notice….Although the trial court did not state that it was taking judicial notice of

Dillman's sense of humor, we conclude that this is exactly what the trial court did. **Id**. at 608. Internal citations omitted.

The court further stated,

[o]ur supreme court stated long ago that matters of which the trial court has knowledge as an individual are not the kind of matters of which it may take judicial notice….We recognize that the trial judge's opinion was guided by good faith reliance upon past experience and personal knowledge. However, the court's duty was to find all facts adjudicative of the dispute between the immediate parties-who did what, where, when, how and with what motive or intent. Dillman's sense of humor was neither part of the evidence nor a fact generally known within the "territorial jurisdiction of the trial court;" and it was not capable of ready determination by resort to sources whose accuracy cannot be reasonably questioned….Rather, the trial court's statement was more a rumination based upon individual experience that an observation about which the general truth is well-known. Yet, the rumination became not only a fact, but a decisive one. A fact must be fairly well-known and obvious before judicial notice of it can be taken. **Id**. at 189-190. Internal citations omitted.

Finally, **Kuder v. Washington County**, 172 Wis. 141 (1920) involved a trial judge's knowledge, as an individual, of facts as to a road being a county or state rather than a town highway. **Id**. at 144-145. The supreme court stated as follows:

…[w]e entertain very serious doubts as to its being a matter of which a trial court might take judicial notice so suggested by respondent That the trial court as an individual might have knowledge of facts as to its being a county or state rather than a town highway would not be the kind of knowledge that is included within the broad field of subjects of general knowledge of which a court as such may take judicial knowledge. Were this a trial by jury the court would have no right to instruct the jury from his individual knowledge of such a local situation that such highway was or was not of such particular kind any more than he might as to the physical condition of a particular portion of the highway. **Id**. at 144-145.

The trial court made its finding that "since 1988 every single judge in Dodge County has conducted a thorough plea colloquy with defendants" on the basis of its personal experience: "I know that because I sat through a zillion and a half of them." Ap.126. The trial court further stated, "I think I can take judicial notice of the court system since I am the court system theoretically. I don't know. Can I take judicial notice of that." Ap.127. Krueger maintains that the record as such reflects that the trial court did indeed take judicial notice of "the court system" and that since 1988 all judges within it engaged in a "thorough colloquy" with all defendants. Ap.126. To the extent however that this court may conclude that the court did not formally state that it was "taking judicial notice," like the trial court in **Hoeft v. Friedli,** this is exactly what it did. It took judicial notice of a particular fact even if it did not expressly say that it was doing so. **Hoeft v. Friedli,** 164 Wis.2d at 189. The trial court's establishment of the fact was improper under Wis. R. Evid. 902.01. Such rule provides in relevant part as follows:

> **(2)** KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following:
> (a) A fact generally known within the territorial jurisdiction of the trial court.
> (b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Wis. R. Evid. 902.01(2).

The trial court's finding that since 1988 all judges within Dodge County engaged in a "thorough colloquy" with all defendants was a "fact" that was subject to reasonable dispute. It is likely, if not probable, that if one were to review a transcript of every colloquy done by a criminal court in Dodge County since 1988, one would discover colloquys that were not "thorough." Moreover, the "fact" established by the court was not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In this regard, there is no way to "accurately and readily" determine whether all colloquys done in Dodge County since 1988, including Kruger's, were thorough. Even if it were theoretically possible to do so, in actuality it is impossible since the transcripts for many of the hearings have apparently been destroyed. Ap.109 Judicial notice of such "fact" was therefore improper.

CONCLUSION

Krueger sufficiently established a prima facie case that he was denied his right to counsel in connection with the 1993 OWI conviction. This court should remand the case to the trial court with instructions that the burden now shifts, and that unless the State can prove, by clear and convincing

evidence, that Krueger's waiver of counsel was knowing, intelligent, and voluntary, Krueger will be entitled to attack successfully and collaterally, the 1993 conviction.

Respectfully submitted,
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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) the findings or opinion of the circuit court; (3) 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 judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the 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 _____day of January 2017.

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CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 4564 words.

Dated this _____day of January 2017.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition 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 upon all opposing parties.

Dated this ____day of January 2017.

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