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 REPLY BRIEF

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Argument

State's reliance on *State v. Baker*, 169 Wis.2d 49, 485 N.W.2d (1992), *Custis v. United States*, 511 U.S. 485 (1994), and *State v. Hahn*, 238 Wis.2d 889, 618 N.W.2d 528 (2000) is misplaced.

Hahn and *Custis* affected *Baker* only to the extent that *Baker* provided that a defendant could collaterally challenge a prior conviction on grounds other than a deprivation of the right to counsel such as whether a plea was knowingly and voluntarily entered. See *Baker*, 169 Wis.2d at 71. In this case, Krueger makes no such argument. Krueger's collateral challenge is based only on a deprivation of counsel claim. *Hahn* and *Custis* did not affect *Baker* to the extent that such case dealt with collateral challenges based on a deprivation of the right to counsel. See *id*. at 76. As such, the State's use of *Hahn*, *Custis* and *Baker* is not informative or persuasive.

State v. Drexler, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182 helps Krueger not the State.

Drexler involved whether a trial court had to inform a defendant of the variety of sources for appointed counsel and the variety of sources for the reimbursement of counsel. See *Drexler*, 2003 WI 169 at ¶17. In that case, the record demonstrated that the trial court advised Drexler that he had the

right to counsel but did not explain the various sources for the appointment of counsel. Id. at ¶7. This Court determined that the trial court had properly advised Drexler of his right to counsel and that it did not have to provide the type of detailed information regarding the sources of appointed counsel and sources for reimbursement of counsel as urged by Drexler. Id. at ¶17. In this case, Krueger did not allege that the trial court should have informed him that counsel could have been appointed by the trial court and paid for by the county, or that counsel could have been appointed by the State Public Defender and paid for by the state. Krueger alleged simply that the trial court did not inform him that he had right to *appointed counsel*. *Drexler* indicates that a trial court has the obligation to provide such information. See *Drexler*, 2013 WI App 169 at ¶9 and ¶17.

State v. Hammill, 293 Wis.2d 654, 718 N.W.2d 747 (Ct. App. 1996) helps Krueger not the State.

Hammill is a case where a clerk testified regarding the "judge's plea colloquy practices" as part of the state's effort to defeat the defendant's prima facie case. The State believes the trial court's taking judicial notice of "the court system" in this case is similar to the testimony of the clerk in *Hammill*. See State's brief at p.8. In drawing such comparison, the State

ignores that the defendant in *Hammill* had the opportunity to confront his accuser and cross-examine the witness, the clerk. Krueger had no such opportunity here as Krueger obviously could not cross-examine the judge as to the judge's recollections and observations. Moreover, the defendant lost in *Hammill* not because of the clerk's testimony, which is not described in the decision, but because the defendant did not allege that he did not know or understand information that should have been provided to him by the trial court. *Hammill*, 293 Wis.2d 654 at ¶11. The defendant instead offered only that he did not "remember." Id. This Court determined that the defendant's affirmation that he did not "remember" what happened at his plea hearing defeated his prima facie case. Id. This case is quite different as Krueger both in his affidavit and in his testimony clarified that the trial court did not inform him that an attorney could be appointed to represent him, and that he was not aware of such information. Ap.108 and 115. The fatal deficiency in *Hammill* is simply not present in this case.

***State v. Bowe,* No. 2013AP238-CR (WI App., Sept. 17, 2013), *State v. McGee*, No. 2010AP3040-CR (WI App, Apr. 26, 2011); *State v. Reggs*, No. 2013AP2367-CR (WI App, July3, 2014); and *State v. Seward*, No. 2016AP1248-CR (Wis. Ct. App., Mar. 22, 2017) are distinguishable.**

Bowe, *McGee*, *Reggs*, and *Seward* are all cases where the defendant's affidavit failed to allege that he or she did not know or understand that he or she had the right to counsel. See *Bowe* at ¶11 and ¶14; *McGee* at ¶10; *Reggs* at ¶10; and *Seward* at ¶13, n.3. Krueger's affidavit is unlike the affidavits in those cases. Krueger's affidavit specifically alleged that he "was not aware that an attorney could be appointed to represent (him) if (he) could not afford one." Ap.108. In this regard, Krueger's affidavit, unlike the ones in *Bowe*, *McGee*, *Reggs*, and *Seward,* properly set forth that he did not know or understand information which should have been provided by the trial court regarding the right to counsel.

***State v. Schwandt*, No. 2011AP2301-CR (WI App, May 16, 2012) helps Krueger not the State.**

The State refers this Court to *Schwandt* on page five of the State's brief without making any particular argument. But when one reads *Schwandt*, it is clear that such case actually helps Krueger rather than the State. In *Schwandt*, this Court determined that the law that should be applied in analyzing whether there was a valid waiver of counsel is the law in effect at

the time of the plea hearing. See *Schwandt* at ¶7 citing *State v. Peters*, 2001 WI 74,¶¶20-22, 244 Wis.2d 470, 628 N.W.2d 797. In *Schwandt*, this Court stated that the law in effect at the time of the 1997 plea hearing was *Pickens v. State*, 96 Wis.2d 549, 563-64, 292 N.W2d 601 (1980) which provided as follows:

> [I]n order for an accused's waiver of his right to counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver [of counsel] will not be found. *Schwandt* at ¶7 citing *Pickens*, 96 Wis.2d at 563-564.

The plea hearing for the conviction at issue in this case occurred in 1993. Under *Peters* and *Schwandt*, the applicable law in this case would therefore be *Pickens* since *Iowa v. Tovar,* 541 U.S.77 (2004*)* was not decided until long after the plea hearing. As such, in order for Krueger's waiver of counsel to have been valid, the record would have to demonstrate that Krueger had an "awareness of the difficulties and disadvantages of self-representation." The record of course fails to do that. Moreover, Krueger's affidavit specifically alleged that he "did not understand the difficulties and disadvantages of proceeding without an attorney," and that at no time did the judge or anyone else in the proceeding advise him of the "difficulties

and disadvantages of proceeding without an attorney." Ap.108. Krueger's affidavit, like that of the defendant in *Schwandt*, sufficiently set forth a prima facie case that his right to counsel was violated in the prior proceeding. Like it did in *Schwandt*, this Court must here remand the case to the trial court for the State to attempt to establish that Krueger knowingly, voluntarily, and intelligently waived his constitutional right to counsel in the 1993 proceeding.

CONCLUSION

For the reasons stated above and in Krueger's brief-in-chief, the Court should remand the case to the trial court for further proceedings.

Respectfully submitted on this __day of April 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 1359 words.

Dated this _____day of April 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 April 2017.

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