STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2017AP1111

COUNTY OF ST. CROIX,

Plaintiff-Respondent,

v.

KIMBERLY L. SEVERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE ERIC J. LUNDELL, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

SUPPLEMENTAL STATEMENT OF THE CASE

Ms. Severson challenges the circuit court's finding that she forfeited any objection to competency on an OWI-first conviction from 2001.

Throughout her brief, Ms. Severson cites to the St. Croix County Judgment of Conviction ("JOC") as "R4." (App.'s Br. 2, 3.) The Record Index, however, indicates that that the fourth record document is the Defendant's Brief, not the St. Croix County JOC. The St. Croix County JOC does not appear in the record at all, nor is it included in Ms. Severson's Appendix.[1] Likewise, she cites to the Polk County conviction as "R2." (App.'s Br. 2, 3, 4, 7, 9.) According to the index, however, "R2" is her "Notice of Motion and Motion to Vacate Judgment of Conviction." No Judgment of Conviction for the Polk County matter is included in the record, nor is it in Ms. Severson's Appendix.

Ms. Severson was charged with an OWI-first in St. Croix County on February 13, 2001.[2] (Wisconsin Consolidated Court Automation Programs ("CCAP") 2001TR000879.) Fourteen days later, on February 27, 2001, before she was convicted in St. Croix County, she was charged with and convicted of an OWI-first in Polk County.[3] (App.'s Br. 2.) She was convicted of both offenses as charged, with the St. Croix County conviction occurring on March 7, 2001, just eight days after she was convicted in Polk County. *Id.*

Ms. Severson first challenged the 2001 St. Croix County conviction in 2017, 16 years after convicted and while her seventh OWI was pending in a different county. *Id.* Ms. Severson did not challenge this conviction during any of her other OWI cases, of which there were four. Instead, she waited until 2017,

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[1] The record includes a letter from the St. Croix County Clerk of Circuit Court that documents from 2001-2005 were destroyed. (R. 14.)

[2] Ms. Severson indicates that she was charged on February 10, 2001. (App.'s Br. 2.) CCAP, however, indicates that she was in fact charged on February 13, 2001, and the date cited in her brief was the offense date. (CCAP 2001TR000879.)

[3] The Polk County case does not appear on CCAP.

when she was faced with her seventh OWI in Eau Claire county. (App.'s Br. 2.)

ARGUMENT

MS. SEVERSON HAD NO RIGHT TO COUNSEL BECAUSE THE OWI WAS CHARGED AS A FIRST OFFENSE, AND THE TRIAL COURT PROPERLY RULED THAT THE CONVICTION IS NOT VOID BECAUSE ANY COMPETENCY OBJECTION HAS BEEN FORFEITED.

I. MS. SEVERSON HAD NO RIGHT TO COUNSEL BECAUSE THE OWI WAS CHARGED AS A FIRST OFFENSE.

OWI-first offenses are civil offenses. Defendants do not have the right to counsel in civil matters. This Court explored this issue in *State v. Krause*, where the defendant was charged with a refusal violation. 2006 WI App 43, 289 Wis. 2d 573, 712 N.W.2d 67. "Case law establishes that a constitutional right to counsel does not attach in civil proceedings. . . . The general rule is that civil litigants have no constitutional right to counsel and therefore no constitutional right to effective assistance of counsel." *Id.* ¶ 11.

Additionally, under the United States Constitution, defendants have the right to counsel only when they actually serve jail time. *Nichols v. United States*, 511 U.S. 738, 748, 114 S.Ct. 1921 (1994); *Scott v. Illinois*, 440 U.S. 267, 99 S.Ct. 1158, (1979). Under the Wisconsin Constitution, a defendant has the right to counsel in any case in which he or she faces imprisonment. *State v. Novak*, 107 Wis. 2d 31, 41, 318 N.W.2d 364 (1982) (citing *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791 (1977)).

Ms. Severson, therefore, had no constitutional right to counsel in the St. Croix County proceeding. The fact that the State of Wisconsin, through St. Croix

County, did not amend the offense to a criminal OWI is of no consequence. Actually, Ms. Severson benefited from the State not amending the charge because otherwise, she would have faced jail time, a longer driver's license revocation, and a higher fine. Ms. Severson did not serve any jail time nor did she even face any jail time in the St. Croix County matter. While Ms. Severson certainly could have retained an attorney, she had no constitutional right to counsel in her St. Croix County OWI-first case.

Ms. Severson's argument that her right to counsel was violated must fail because she had no constitutional right to counsel for the reasons stated above.

II. THE PRIOR CONVICTION IS NOT VOID BECAUSE ANY OBJECTION TO COMPETENCY HAS BEEN FORFEITED.

Twenty-two years post-conviction, the defendant in *Booth* challenged an OWI-first conviction that should have been charged criminally as a second offense. *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. The Wisconsin Supreme Court held that the defendant "forfeited her challenge to the circuit court's competency when she failed to raise any objection to the first-offense OWI charge in the original 1992 action." *Booth,* 370 Wis. 2d 595, ¶ 26.

The court noted that challenges to circuit court competency may be forfeited. *Id.* It held that, because Booth did not raise the competency issue during the 1992 proceeding, she forfeited the right to raise it again later. *Id.* "Booth Britton's considerable delay in raising the issue suggests an attempt to play fast and loose with the court system, which is something this court frowns upon." *Id.* ¶ 25.

Defense counsel is correct when it notes the County will rely on the *Booth* case, just like the circuit

court was correct when it relied on *Booth* for its decision. (App.'s Br. 10); See *Booth*, 370 Wis. 2d 595; (R. 6.)

Like Ms. Severson, the defendant in *Booth* relied on *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). However, the court distinguished *Rohner*, because the defendant in *Rohner* filed his motion "in a timely manner by raising it in the original circuit court action instead of waiting 22 years and many OWI convictions later." *Booth,* 370 Wis. 2d 595, ¶ 13 n. 6. Additionally, in a footnote, the court wrote:

> [W]e note that affirming the circuit court's decision to vacate the 1992 conviction with prejudice would do nothing to further our state's policy of strictly enforcing OWI laws. Instead, affirming the circuit court's dismissal with prejudice would erase the 1992 conviction, prevent it from being counted in subsequent OWI prosecutions, and forever prohibit the State from correctly charging Booth Britton for the 1992 OWI offense.

Booth, 370 Wis. 2d 595, ¶ 15 n. 9. The court observed: "The fact she should have been charged with a second-offense OWI, which would have increased the penalty imposed when convicted in 1992, does not make her 1992 drunk-driving offense lawful conduct." *Booth,* 370 Wis. 2d 595, ¶ 16.

Here, the circuit court noted the striking similarities in this case to the facts of *Booth* when it denied Ms. Severson's motion. (R. 6 at 2.) The court concluded that, like the defendant in *Booth*, Ms. Severson forfeited her objection to the court's competency "because the objection was filed too late and under circumstances that speak for themselves." *Id.* ¶ 2.

While a 16-year delay is not a 22-year delay, it is still a significant delay. Ms. Severson had many years and opportunities to raise this issue, but instead, she waited 16 years and when faced with her seventh

offense. Some of Ms. Severson's opportunities to challenge the conviction occurred when she was represented by counsel in other matters, like in her criminal OWIs. The State cannot fault this defense counsel for its zealous advocacy, but perhaps this is the exact situation the *Booth* court warned about when it admonished attempts to "play fast and loose with the court system." *Booth*, 370 Wis. 2d 595, ¶ 25. There is one person who was involved in all of Ms. Severson's OWI cases: Ms. Severson.

The trial court properly concluded that Ms. Severson forfeited any objection to competency, given the lengthy delay and failure to do so when she had the opportunity. This Court should likewise deny her motion.

CONCLUSION

Ms. Severson had no constitutional right to counsel in her OWI-first case because it was civil in nature; she was not subjected to the penalties that accompany criminal convictions. Furthermore, challenging her OWI-first for the first time 16 years after conviction, with multiple OWIs in between, should fail: she forfeited any objection to the court's competency and the circuit court was right to deny her motion. This Court should do the same.

Dated this 16th day of April, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,383 words.

Dated this 16th day of April, 2018.

Signed:

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CERTIFICATE 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 Wis. Stat. § (Rule) 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 16th day of April, 2018.

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