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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP1111

ST. CROIX COUNTY,

Plaintiff-Respondent,

-vs-

KIMBERLY L. SEVERSON,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT
ENTERED IN THE CIRCUIT COURT FOR
ST. CROIX COUNTY, BRANCH I,
THE HONORABLE ERIC J. LUNDELL PRESIDING,
TRIAL COURT CASE NO. 2001-TR-879

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Wisconsin Supreme Court

Secondary Sources

RESTATEMENT OF FACTS

From the first instant, the County casts aspersions on Ms. Severson's Initial Brief by making it seem as though there was some "error" or "misstatement" on her part when, during her recitation of the facts of the case, she refers to Record entries R4 and R2 for purposes of identifying that she had been convicted, respectively, for Operating a Motor Vehicle While Under the Influence of an Intoxicant in St. Croix County and had a prior conviction for the same offense in Polk County. State's Brief at 2. With some condescension, the County identifies Record entry No. 4 as Ms. Severson's Notice of Motion and Motion to Vacate her St. Croix County conviction and identifies Record entry No. 2 as another of Ms. Severson's motions to vacate her Polk County conviction for the same type of offense.

In so doing, the County implies that Ms. Severson was using the above-identified record entries as the actual Judgments of Conviction themselves. Nothing could be further from the truth. Ms. Severson's reference to the motions at R4 and R2 was made so that she could acknowledge the existence of the convictions at issue by solemn judicial admission. Had the County taken the time to actually read the Record entries at R4 and R2, it would have observed that in Record entry R4, Ms. Severson averred that she was "convict[ed] for Operating While Intoxicated (OWI)-First Offense in the above-captioned matter [Case No. 01 TR 879]." R4 at 1; Appellant's Initial Brief at 2. It would also have noted that Record entry R2 contained an admission that "Ms. Severson had previously been convicted of an operating while intoxicated offense on February 27, 2001, in Polk County. (Case No. 01-TR-156.)" R2 at 2; Appellant's Initial Brief at 2.

The County has no basis to engage in the role play of "Chicken Little" because the sky has *not* fallen. At no time whatsoever did Ms. Severson aver that either Record entry 4 or Record entry 2 were, in fact, Judgments of Conviction. Ms. Severson cited these respective Record entries in support of her statements of fact that she had been convicted of operating while

intoxicated offenses in St. Croix and Polk Counties because both pleadings indicated as much. A statement of legal status, made by an attorney in a court pleading, constitutes a "solemn judicial admission" of the same and stands as proof thereof.

As the Wisconsin Supreme Court noted in *Fletcher v. Eagle River Memorial Hospital, Inc*., 156 Wis. 2d 165, 456 N.W.2d 788 (1990), a solemn judicial admission "is, in truth, a substitute for evidence, in that it does away with the need for evidence." *Id*. at 175, quoting 9 Wigmore, *Evidence*, § 2588 (Chadbourne rev. 1981). The *Fletcher* court went on to observe that a judicial admission is "conclusive on the party making it." *Fletcher*, 156 Wis. 2d at 177. Thus, Ms. Severson's admission in the pleadings identified at R4 and R2—that she was convicted in St. Croix and Polk Counties respectively in Case Nos. 01 TR 879 and 01 TR 156 of operating while intoxicated violations—constituted "conclusive proof" of the same and were referenced by Ms. Severson in her Initial Brief as evidence of the same. Given the County's concession that the St. Croix records from 2001 were destroyed, it is perfectly understandable why Ms. Severson had to make this concession in her Initial Brief. *See* State's Brief at 2, n.1.

For the County to mischaracterize Ms. Severson's references in her Brief as some kind of disguised deception that she was referring to an actual Judgment of Conviction when she *never even used the term "Judgment of Conviction,"* but rather was simply referring to her judicial admissions regarding these convictions, is either a "straw-man" argument set up to make Ms. Severson look bad or, alternatively, a digression which could have been avoided altogether had the County simply taken the time to read the Record entries to discover on its own that the references were being made for the purpose of establishing the prior convictions.

ARGUMENT

I. MS. SEVERSON WAS ENTITLED TO COUNSEL HAD THE MATTER BEEN PROPERLY CHARGED.

In a remarkable, if not curious twist of events, the County argues that Ms. Severson was not entitled to assistance by counsel in her St. Croix County case because she was not charged with a crime. Pursuant to Wis. Stat. § 346.65(2)(b), had the St. Croix County matter been charged correctly, Ms. Severson should have been arraigned on a *second*-offense OWI. Taking this fact into consideration, the County is arguing that it should benefit from the State's mistake. In other words, she should have been denied the right to counsel—a right which she possessed had everything been done as it should have—but since the State erred in failing to charge her, that error should be compounded by denying that she should have had the assistance of counsel. The County's argument is, basically, that "two wrongs *do* make a right."

The County posits that since Ms. Severson was not facing criminal consequences as a result of the mischarged offense, she benefitted as well. What this Machiavellian "ends justify the means" argument overlooks, however, is the fact that she may very well have had a defensible case which, had she the right to counsel, may have resulted in no conviction for any offense. That is, if she had been able to exercise her Sixth Amendment right to counsel, her attorney may very well have discovered pre-trial motion issues or trial defenses which, once expressed, could have resulted in an amendment or dismissal of the charge prior to trial or a not guilty verdict at trial. The County's "be happy you were convicted of a fist offense" attitude not only diminishes the value of legal counsel in the adversarial system, but is offensive to the very notion that the system should not merely "settle" for what happened, but rather, strive to achieve what is right.

If Ms. Severson had properly been charged with an OWI–Second Offense, she would have been *constitutionally* afforded the right to counsel; the right to put the prosecution to a more stringent burden of proof; the right to be tried by a jury of twelve peers; the

right to a unanimous verdict; *et al*.. These are not mere platitudes robbed of any relevance today because they are more than 229 years old. They should be respected rather than disregarded. For the County to decide on Ms. Severson's behalf that since she was only convicted of a first offense without having been given the opportunity to exercise those rights she "came out ahead," or "won the benefit of the mistake," or somehow "should be happier for not having had the opportunity to exercise those rights," is neither a legally virtuous nor philosophically respectable position for the government to advocate.

II. MS. SEVERSON'S CHALLENGE SHOULD NOT BE BARRED AS UNTIMELY.

In making its argument that this Court ought to reject Ms. Severson's position because she is "play[ing] fast and loose with the court system,"[1] the County proffered that "[t]here is one person who was involved in all of Ms. Severson's OWI cases: Ms. Severson." County's Brief at 6. Without intending to be redundant because Ms. Severson addressed this in her Initial Brief, it is extraordinarily unlikely that Ms. Severson would ever have divined that such an issue exists in her case. This simple fact is a *res ipsa loquitor* in that in the intervening cases for which she did have counsel, it seems that not even the attorneys knew to examine her prior record to determine whether the issue in the instant appeal existed. Ms. Severson should not be expected to know more than those trained attorneys who were representing her.

The other problem with imposing the burden of "knowledge" of the issue upon Ms. Severson is the scale or rule which would have to be implemented to determine when it is appropriately applied. In other words, should Ms. Severson have known to raise the issue during a third prosecution? The fourth? The second? Precisely when does one assume she is now "playing fast and loose" with the system. Likewise, if the prevailing standard is to be what the County claims, namely "Ms. Severson was the one constant," does her level of education or acumen now

[1]County's Brief at 6, quoting *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 25, 370 Wis. 2d 595, 882 N.W.2d 738.

play a role in implementing this as a defense for the County? That is, if the County claims that upon a prosecution for her third offense, one can safely conclude that this would be the moment when she began "playing fast and loose" with the system, but the defense then presents evidence that she only had a high school education—or, perhaps, did not even graduate high school—does that now become a relevant inquiry into whether one waits until the fourth offense to argue that she is "playing fast and loose" with the system? Should college educated individuals be treated differently than high school educated persons when it comes to determining whether there is some type of legal subterfuge going on with the person's failure to raise an attack on a prior conviction during the prosecution for one particular offense over another? These inquiries will surely come about if this Court elects to adopt the County's position with respect to rejecting Ms. Severson's claim simply because she was the "common denominator" among all of the prosecutions.

CONCLUSION

Because the St. Croix County Circuit Court lacked competency to enter a judgment against Ms. Severson, the lower court in this case should have vacated that judgment.

Dated this _____ day of April, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby 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. The text is 13 point type and the length of the brief is 1,617 words. I further certify that the electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief 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 April 30, 2018. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of April, 2018.

MELOWSKI & ASSOCIATES, LLC

_____

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