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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2018AP1070-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JESSY A. RIVARD.

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BARRON COUNTY, BRANCH II, THE HONORABLE J.M BITNEY PRESIDING, TRIAL COURT CASE NO. 2015-CT-61

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Sarvan Singh, Jr.
State Bar No. 1049920

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
sarvan@melowskilaw.com

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STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT ERRED IN DENYING MR. RIVARD'S MOTION COLLATERALLY ATTACKING HIS PRIOR CONVICTION IN ST. CROIX COUNTY FOR OPERATING WHILE INTOXICATED WHEN IT "INFERRED" MR. RIVARD HAD PROPERLY BEEN INFORMED OF THE RANGE OF POTENTIAL PENALTIES HE WAS FACING?

> Trial Court Answered: NO. The circuit court concluded that because the record revealed that Mr. Rivard had been provided a copy of the Criminal Complaint in court prior to appearing for his plea hearing, "that [it] could certainly be inferred from the transcript . . . that Mr. Rivard knew . . . in a general sense what the potential penalties are . . . ." (R47 at 31:12-16.)

STATEMENT ON ORAL ARGUMENT

Mr. Rivard will NOT REQUEST oral argument as this appeal presents a single question regarding whether a set of averred facts meets a particular legal standard. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Rivard believes publication of this Court's decision is NOT WARRANTED because numerous published cases already exist related to the issue at bar, *see, e.g.*, *State v. Klessig*, 211 Wis. 2d 194 564 N.W.2d 715 (1997); *State v. Hahn* 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528; *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92; and moreover, this case merely presents a question as to whether a particular set of facts rise to the level of meeting the well-established legal standard.

STATEMENT OF THE CASE AND THE FACTS

On April 26, 2006, while operating his motor vehicle in St. Croix County, Wisconsin, the Defendant-Appellant, Jessy A. Rivard, was detained and arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense [hereinafter "OWI-2nd"], contrary to Wis. Stat. § 346.63(1)(a). Ultimately, Mr. Rivard returned to court on July 20, 2006, at which time he changed his initial plea of not guilty to one of no contest. (R14 at 6.)

Subsequent to his St. Croix County conviction, Mr. Rivard was detained and arrested in Barron County and charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense [hereinafter "OWI-3d"], contrary to Wis. Stat. § 346.63(1)(a).

After reviewing the circumstances of his prior St. Croix County conviction with counsel, Mr. Rivard filed a motion collaterally attacking the St. Croix County case, alleging that his Sixth Amendment Right to Counsel was not knowingly, voluntarily, or intelligently waived because the St. Croix County Circuit Court, the Honorable Scott Needham presiding, failed to engage him in an adequate plea colloquy regarding the same. (R14.) In support of his motion, Mr. Rivard submitted an affidavit in which he alleged that he had not been properly informed about the advantages and disadvantages of negotiating a settlement without the advice of counsel. (R14 at 6-7.) More specifically at the hearing held on his motion collaterally attacking the prior conviction, Mr. Rivard averred that the extent and breadth of the penalties to which he was exposed was never explained to him. (R47 at14:18 to 15:20.) He further testified that because he had a commercial driver's license, had it been explained to him what consequences would ensue as a result of his conviction for OWI-2nd, he would not have accepted the resolution proposed by the State. (R47 at 15:17 to 16:6.)

The State replied to Mr. Rivard's motion by obtaining a copy of the transcript from his plea and sentencing which the parties thought had been previously lost or destroyed. (R47 at 3:13 to 4:23.)

After taking the testimony of Mr. Rivard and reviewing the transcript of the prior plea and sentencing. The Barron County Court, the Honorable J.M. Bitney presiding, denied Mr. Rivard's motion on the ground "that [it] could certainly be inferred from the transcript . . . that Mr. Rivard knew . . . in a general sense what the potential penalties are . . . ." (R47 at 31:12-16.) The court further stated as a matter of fact that "Mr. Rivard . . . had been given a copy of the Complaint; . . . . " (R47 at 31:8-9.) Contrary to the Barron County Court's assertion, however, Mr. Rivard *never* stated that he recalled having received a copy of the Criminal Complaint. (R47 at 8:21 to 10:15.) Throughout the entire course of his testimony, Mr. Rivard consistently maintained that the range of penalties to which he was exposed, including jail time, license revocation, fines, and CDL consequences, had never fully been explained to him. (R47 at 10-16.)

Mr. Rivard thereafter entered a plea of no contest to the Barron County charge. (R35 at 1; D-App at 101.) It is from the adverse decision of the circuit court denying Mr. Rivard's motion collaterally attacking his prior St. Croix County conviction for OWI that he now appeals to this Court.

ARGUMENT

I. STANDARD OF REVIEW.

This appeal presents a question of whether Mr. Rivard made a knowing, voluntary, and intelligent waiver of his right to counsel in a prior criminal case. As such, this Court applies constitutional principles to the facts of the case, and in so doing, reviews the facts below independent of the circuit court. *See State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997); *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

II. MR. RIVARD ESTABLISHED THAT THERE HAD NOT BEEN A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL IN ST. CROIX COUNTY CASE NO. 06 CT 167, AND THEREFORE HIS PRIOR CONVICTION

SHOULD HAVE BEEN STRUCK FROM CONSIDERATION IN THIS MATTER.

A. Statement of the Law As It Relates to Establishing a Prima Facie *Case for Collaterally Attacking a Prior Conviction on Sixth Amendment Grounds*.

The leading case which establishes the legal standard upon which a prior conviction in a criminal case may be collaterally attacked is *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). In *Klessig*, the Wisconsin Supreme Court held that in order for an accused's waiver of counsel to be valid, the record must reflect:

(a) A deliberate choice to proceed without counsel;

(b) An awareness of the difficulties and disadvantages of self-representation;

(c) An awareness of the seriousness of the charge or charges; and

(d) An awareness of the general range of possible penalties.

Id. at 201.

If a circuit court fails to conduct a colloquy regarding these matters, a reviewing court may not find, based on the record, that there was a valid waiver of counsel. *Id.* The notion that a personal and direct colloquy is an essential part of a valid waiver of the right to counsel has been reaffirmed in cases subsequent to *Klessig*, such as *State v. Imani*, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40, in which the court applied the *Klessig* test to find that the defendant had not properly waived his right to counsel. *Id.* ¶¶ 3; 23.

Prior to the *Klessig* decision, *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), provided the necessary guidance for conducting a waiver of counsel colloquy, and although the same four factors were to be considered by the court, it was not necessary to conduct a complete colloquy on each of the factors. However, *Klessig* specifically overruled *Pickens* as follows:

> We now overrule *Pickens* to the extent that we 1mandate the use of a colloquy in every case where a defendant seeks to proceed *pro se* to prove knowing and voluntary waiver of the right to counsel. Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and post-conviction motions. Thus, a properly conducted colloquy serves the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources. We hope that our affirmation of the importance of such a colloquy will encourage the circuit courts to continue their vigilance in employing such examination.

Klessig, 211 Wis. 2d at 206.

A defendant who faces an enhanced sentence based upon a prior conviction may only collaterally attack the prior conviction based upon a denial of the constitutional right to counsel. *See, State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528. In this instance, the right to counsel analysis under the Federal and State Constitutions is identical. *Klessig*, 211 Wis. 2d at 202-03. To pursue a collateral attack, the defendant must first make a *prima facie* showing that he or she did not know or understand the information that should have been provided in the previous proceeding and, as a result, did not knowingly, intelligently, and voluntarily waive the right to counsel. *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92.

In *Ernst*, the Wisconsin Supreme Court concluded that simply alleging a *Klessig* violation was not sufficient to make a *prima facie* showing that a waiver of counsel was invalid. The court required more, namely: alleging specific facts which demonstrated that the waiver was not knowing, voluntary, and intelligent based upon the trial court's failure to address the *Klessig* factors. *Ernst*, 2005 WI 107, ¶ 26.

Once the *prima facie* showing is made, however, the burden shifts to the State to show by clear and convincing evidence that the

defendant's waiver of counsel was, in fact, knowing, voluntary, and intelligent. *Id.* ¶ 27.

B. The Circuit Court Failed to Properly Apply the Klessig *Holding to the Facts of the Instant Case.*

There is little doubt that one of the most fundamental of all legal canons is that a conclusion of law must be supported by the facts of the case. *See, e.g., Milwaukee Bd. of Sch. Dirs. V. Labor & Industry Review Comm'n.*, 2001 WI App. 66, 246 Wis. 2d 988, 632 N.W.2d 123; *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334. If a finding of a circuit court goes unsupported by the facts, it is not a legally cognizable judgment. *Id*. The instant case provides a clear and unequivocal example of a conclusion of law which is unsupported by the facts adduced at the hearing thereon.

In an attempt to bolster its findings in support of its summary denial of Mr. Rivard's motion collaterally attacking his prior St. Croix County conviction, the circuit court found that Mr. Rivard was given a copy of the Criminal Complaint at an earlier hearing in his case when, in fact, the record indicates no such basis for this finding. The Barron County Circuit Court judge stated, as a seeming matter of fact, that "Mr. Rivard . . . had been given a copy of the Complaint; . . . . " (R47 at 31:8-9.) Contrary to the Barron County Court's assertion, however, Mr. Rivard *never* stated that he recalled having received a copy of the Criminal Complaint. (R47 at 8:21 to 10:15.) Thus, there is no basis for the circuit court to have found the foregoing fact. In the absence of this fact, the only testimony which was clearly given was that Mr. Rivard was never told what the range of penalties was to which he was exposed.

In support of this fact is the absence of any discussion of the range of penalties by the St. Croix County Court in the transcript of Mr. Rivard's plea and sentencing. The verbatim transcript of those proceedings nowhere within its four corners sets forth any colloquy about the fact that there is a minimum jail sentence associated with the OWI-2nd; there is no description of the maximum jail time which the court had the authority to impose; there is likewise no explanation of what penalties may befall Mr. Rivard regarding his

commercial license; additionally, there is no discussion of the range of possible fines; *et al*. In essence, the *Klessig* requirement that there be an "awareness of the general range of penalties" is completely and utterly absent. This is entirely consistent with Mr. Rivard's testimony that he did not understand the full panoply of consequences, penalty-wise, which he faced. One cannot reasonably posit or proffer that under such circumstances there has been even the most basic and fundamental compliance with *Klessig*.

The St. Croix County Circuit court, therefore, went too far afield of where it should have when it held "that Mr. Rivard knew . . . in a general sense what the potential penalties are . . . ." (R47 at 31:12-16.) How can a defendant know what the "potential penalties" are when they have not been set forth for him, and when, on the record, the defendant testifies as much? The Barron County Circuit Court's finding is thus so unsupported and unfounded by the record in this matter, this Court has but one option available to it, and that is to reverse Mr. Rivard's conviction under *Klessig* and remand with further directions consistent therewith.

III. CONCLUSION.

Because the lower court failed to acknowledge that the transcript from his earlier plea and sentencing in the OWI-2nd offense was devoid of any support for the notion that the range of penalties had been explained to Mr. Rivard, it lacked sufficient support for its denial of Mr. Rivard's motion to collaterally attack his prior conviction. This Court, however, engaging in a *de novo* review of the matter in order to determine whether the constitutional standard for proper waiver of the right to counsel has been met under *State v. Klessig*, has a sufficient basis upon which to reverse the decision of the lower court and grant Mr. Rivard his remedy. Mr. Rivard respectfully prays that the Court reverses his conviction and remands this case consistent with such a finding.

Dated this 10th day of August, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

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Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Defendant-Appellant

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 2,279 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 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 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix 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 August 10, 2018. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 10th day of August, 2018.

MELOWSKI & ASSOCIATES, LLC

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Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Defendant-Appellant

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APPENDIX
