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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Circuit Court Case No. 2016CT000164

-vs-

JESSY A RIVARD,

Appeal Case No. 2018AP001070-CR

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BARRON COUNTY, BRANCH II, THE HONORABLE J.M. BITNEY, PRESIDING

BRIEF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

DID MR. RIVARD'S PLEA COLLOQUY IN A PRIOR OWI CASE IN ST. CROIX COUNTY, WISCONSIN, VIOLATE THE KLESSIG REQUIREMENTS?

Trial Court Answered: NO. The Circuit Court concluded that based on the evidence presented to it, the plea colloquy in his St. Croix County case met the requirements of *Klessig.*

STATEMENT ON ORAL ARGUMENT

The State 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

The State 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 as to whether a particular set of facts rise to the level of meeting the well-established legal standard.

STATEMENT OF FACTS

On August 20, 2016, Mr. Rivard was arrested for an OWI by Chetek police Officer Eric Sedani. He was subsequently charged with an OWI 3rd offense in Barron County case number 2016 CT 164 by way of a criminal complaint dated September 28, 2016, which alleged 2 prior OWI convictions with the most recent one being from July 20, 2006. (R at 1-3).

Mr. Rivard subsequently filed a Motion to Exclude the prior conviction from July 20, 2006, for sentence enhancement purposes under *State v. Klessig*. (R14). In the Affidavit that he filed in support of his Motion, Mr. Rivard alleged that he was arrested on April 26, 2006, in St. Croix County, Wisconsin, and returned to Court in that jurisdiction on July 20, 2016, at which time he entered a plea and was sentenced. (R14, 24 and 25).

A hearing was held on August 31, 2017, concerning his Motion to Exclude the 2006 conviction from St. Croix County before the Hon. J. M. Bitney, Circuit Court Judge for Barron County. At that hearing, Mr. Rivard testified, and the State put into evidence a transcript of his plea and sentencing hearing in the St. Croix County case from 2006. (R45 and 25).

During his testimony, Mr. Rivard clarified that he made more than one court appearance in his St. Croix County case as opposed to just a single appearance on July 20, 2006, that he alleged in his Affidavit. He also testified that the other court appearance was on May 17, 2006, when he was questioned as to whether or not it was his initial court appearance. (R45 7-9). When he was questioned as to what transpired at the initial court appearance, Mr. Rivard testified that he just remembered doing a no contest and just accepting the fines and penalties. (R45 at page 9). When he was pressed for details, Mr. Rivard claimed to not recall what transpired at the May 17, 2006, hearing. (R45 at page 9). He further

testified that he did not recall appearing on May 17, 2006, and being asked if he understood the charges and penalties or being given the return court date of July 20, 2006. (R45 at page 9). He also testified that he did not know how and why he ended up returning to court on July 20, 2006. (R45 at page 10).

Mr. Rivard further testified that he did not recall meeting with the prosecutor prior to entering his plea on July 20, 2006. (R45 at page 11). He also testified that when he entered his plea, he knew there was a possibility he could go to jail, a fine could happen and he could lose his license for a period of time. (R45 at page 12). He further testified that he simply didn't recall the minimum or maximum penalties for the offense he pled guilty to and was sentenced on when he appeared in court on July 20, 2006. (R45 at page 14).

After taking testimony, and reviewing the transcript of the plea and sentencing hearing that took place in the St. Croix County case, Barron County Circuit Court Judge J.M. Bitney denied Mr. Rivard's motion on the grounds that the plea colloquy engaged in by St. Croix County Circuit Court Judge Scott Needham was sufficient under the *Klessig* requirements. The Court also made a specific finding that it didn't find the testimony of Mr. Rivard to be compelling or credible because the Court felt that he had what appeared to the court, to be a limited memory in terms of

being able to remember a lot of what happened in the St. Croix County case, and other times hardly anything. (R47 at pages 32-33).

ARGUMENT

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 the St. Croix County criminal case. As such, this Court applies constitutional principles to the facts of the case, and in doing so, reviews the facts below independent of the Circuit Court. *State v. Klessig*, 211 Wis. 2d 194, 564 N.W. 2d 716 (1997); *State v. Woods*, 117 Wis. 2d 701, 345 N. W. 2d 457 (1984).

I. The State established that Mr. Rivard knowingly, voluntarily and intelligently waived his right to counsel in St. Croix County case number 06 CT 167 and therefore the circuit court properly denied his motion to exclude that conviction for sentence enhancement purposes in his pending case in Barron County.

LAW

A collateral attack on a prior conviction is 'an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it. *State v. Ernst*, 283 Wis. 2d 300, ¶ 22 n.5 (quoting *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354 (internal quotation marks and quoted source omitted)).

When the State proposes to use the fact of a prior conviction to enhance a sentence for a subsequent offense, a defendant may collaterally attack the conviction. *State v. Hahn*, 2000 WI 118, ¶¶ 17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. A collateral attack may be based only on the ground of a violation of the constitutional right to counsel. *Ernst,* 283 Wis. 2d 300, ¶ 22 (citing *Hahn*, 238 Wis. 2d 889, ¶ 17).

In accepting a defendant's waiver of counsel, a trial court is required to conduct a personal colloquy to ensure that the waiver is knowing and voluntary. *Klessig*, 211 Wis. 2d at 206. Before *Klessig*, the Wisconsin Supreme Court had held that a colloquy was not required, but that in 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. *Pickens v. State*, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980).

In *Klessig*, the supreme court overruled *Pickens* "to the extent that we mandate 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." *Klessig*, 211 Wis. 2d at 206. The court held that:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed 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 on him. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

Id. at 206 (citation omitted). In *Ernst*, the Supreme Court affirmed that the waiver colloquy mandated in *Klessig* is required under the Supreme Court's superintending and administrative authority. *Ernst*, 283 Wis. 2d 300, ¶¶ 19-20.

In *Ernst*, the Supreme Court also concluded that the same procedure used in deciding motions for plea withdrawal also applies in collateral attack motions. The Court noted that under this procedure, set forth in *Bangert*, a "defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated." *Id.* ¶ 25. The Court explained that:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she "did not know or understand the information which should have been provided" in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel.

Ernst, 283 Wis. 2d 300, ¶ 25 (citing *Hampton*, 274 Wis. 2d 379, ¶ 46 (in turn citing *Bangert*, 131 Wis. 2d at 274-75)). The Court added that "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Id.* Once the defendant makes a prima facie showing, the burden shifts to the State to prove that the defendant waived counsel knowingly, intelligently, and voluntarily. *Id.* ¶ 27 (citing *Klessig*, 211 Wis. 2d at 207).

It is clear from the plea transcript in Mr. Rivard's St. Croix County case that he negotiated a settlement with the prosecutor and that he understood the terms of the agreement. (R45 at pages 3, 6, and 11). It is also clear from that transcript that even before the Court engaged him in any discussion, that he was aware of the possible range of penalties that he was facing, and that this included a fine of $957 to $1020, a revocation of 12 to 14 months and jail time of at least 10 days. (R45 at pages 3-4).

It is also clear from this plea transcript that the Court in the St. Croix County case discussed with Mr. Rivard the disadvantages of self-representation and his right to an attorney. (R25 at pages 4-6). The Court also discussed with Mr. Rivard that the charge he was pleading to was a 2nd offense OWI. (R25 at page 90). Given Mr. Rivard's discussion with the prosecutor prior to his discussion with the Court, it cannot be said that Mr. Rivard did not understand the seriousness of a 2nd offense OWI. He had to be well aware of the consequences since he spoke to the prosecutor not only about the terms of his sentence, but also about the details of the offense that would have been outlined in a criminal complaint, which would have contained a description of the maximum penalty he was facing along with any applicable minimum. (R25 at page 11). If Mr. Rivard discussed the details of the offense with the prosecutor, it stands to reason he was aware of the criminal complaint and the general range of penalties he would have faced that would have been outlined in that document.

In addition, Mr. Rivard's testimony at the motion hearing was that he appeared on May 17, 2006, in the St. Croix County case as an initial appearance. (R45 at page 9). When pressed about what transpired at that hearing he then claimed to not recall. (R45 at page 9). It was a fair inference for Judge Bitney to infer that Courts generally review the charges and penalties at initial appearances.

Klessig does not require a Court to specifically review the maximum and minimum amounts of jail, a revocation or a fine when conducting a plea colloquy on an OWI offense. It only requires that the record reflect an awareness on the part of the defendant of the general range of possible penalties regarding the offense that they are pleading to.

It is important to note that while Mr. Rivard's Motion initially alleged that he wasn't aware of and advised of the disadvantages of representing himself or advised of the advantages or benefits of an attorney, once the transcript of the plea and sentencing hearing was produced, his argument shifted solely on the 4th prong of the *Klessig* requirements. That is, whether the record reflects an awareness on his part of the general range of possible penalties.

The defense ignores the initial discussion at the plea hearing in the St. Croix County case regarding the range of penalties that were discussed in relation to the sentencing guidelines and the subsequent deviation from those guidelines that Mr. Rivard and the prosecutor negotiated. That

discussion clearly indicates an awareness on the part of Mr. Rivard of the range of possible penalties he was facing prior to entering his plea before the Hon. Judge Needham.

Finally, much of Mr. Rivard's arguments are based upon what his testimony was at the motion hearing and what he did or did not recall from the plea hearing in the St. Croix County case. The Circuit Court clearly rejected his testimony and did not find it credible since most of his responses were that he didn't recall what had transpired in any of the Court hearings conducted in his St. Croix County case. What he alleged in his Affidavit clearly was contradicted by what actually transpired at the plea and sentencing hearing in his St. Croix County case.

When there is conflicting testimony, the Circuit Court is the ultimate arbiter of the witnesses' credibility. *Bank of Sun Prairie v. Opstein,* 86 Wis.2d 669, 676, 273 N.W.2d 279 (1979). Such deference is appropriate because the Court has the opportunity to observe firsthand the demeanor of the witnesses and gauge the persuasiveness of their testimony. *State v. McCallum,* 208 Wis.2d 463, 488, 561 N.W.2d 707 (1997)

(Abrahamson, CJ., concurring) ("[T]he Circuit Court is in a much better position than an Appellate Court to resolve whether the witness is inherently incredible."). In short, we defer to the Circuit Court's credibility determinations and we affirm a Circuit Court's findings of fact unless they are clearly erroneous. Wis. Stat. § 805.17(2).

Welytok v. Ziolkowski, 2008 WI App 67, ¶ 28, 312 Wis. 2d 435, 454, 752 N.W.2d 359, 368

We defer to the credibility assessments of a Circuit Court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *State v. Carnemolla,* 229 Wis.2d 648, 661, 600 N.W.2d 236 (Ct.App.1999). Therefore, we will not disturb a Circuit Court's credibility assessments unless they are clearly erroneous. *See State v. Thiel,* 2003 WI 111, ¶ 23, 264 Wis.2d 571, 665 N.W.2d 305.

State v. Love, 2014 WI App 90, ¶ 8, 356 Wis. 2d 326, 855 N.W.2d 491.

While this Court may engage in a de novo review of the facts, the Circuit Court's determination of the credibility of Mr. Rivard's testimony should be given deference. The essence of Mr. Rivard's testimony relative to the 4th prong of *Klessig* was that he didn't recall the penalties being discussed in any of his court hearings in St. Croix County, not that they were never discussed with him. They in fact were discussed with the prosecutor prior to his plea.

CONCLUSION

The State met its burden under *Klessig* of establishing that Mr. Rivard's plea in the St. Croix County case was knowing, voluntary and intelligently entered when he pled guilty on July 20, 2006, to an OWI 2nd

offense. The transcript of the plea and sentencing that the State presented to the Court in the Barron County case clearly shows that Mr. Rivard knew exactly what he was doing when he entered his plea in the St. Croix County case. Particularly, when he negotiated a settlement with the prosecutor prior to entering his plea, which he conveniently left out of his affidavit in support of his motion to exclude that conviction from being used in the Barron County case. The Circuit Court properly denied Mr. Rivard's motion and this Court should affirm that decision.

For the foregoing reasons, the State respectfully requests that this Court affirmed the Trial Court's decision regarding the post-conviction motion.

Dated at Barron, Wisconsin, this 7th day of September 2018.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,335 words.

Dated this 7th day of September, 2018.

John M. O'Boyle
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of September, 2018.

Signed:

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