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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE FAILS TO RECOGNIZE THAT THE COLLOQUY REGARDING THE RANGE OF PENALTIES MUST OCCUR AT THE TIME OF THE PLEA AND NOT BE "INFERRED" FROM EARLIER COURT ACTIVITY.

In its response, the State expends a significant amount of effort proffering that Mr. Rivard's position on appeal ought to be rejected on the ground that the criminal complaint in Rivard's St. Croix County case "would have contained a description of the maximum penalty." State's Brief at 8. The State then speculates that "it stands to reason" that Mr. Rivard was aware of the general range of penalties. *Id*. The State further postulates that "[i]t was a fair inference" for the judge in the instant case to believe that Mr. Rivard knew the range of penalties because courts "generally review" penalties at initial appearances. *Id*. at 9.

What all of the foregoing arguments have in common is one compelling, common quality: they are all equivocal. The State does *not* argue that the complaint "had properly set forth" the range of penalties. Nor does the State claim that Mr. Rivard was, in fact, aware of the same. Likewise, the State also does not proffer that the lower court's judgment was based upon more than an "inference," but upon established fact. Finally, the State does not argue that all courts review penalties at initial appearances—only that they "generally" do.

The entire point of the standard set forth in *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), is to ensure that at the *time of the plea*—not at an earlier initial appearance—the accused is advised of the general range of penalties. Pretending that inferences built upon "general" practice is an argument built upon a house of saltines. Had a proper colloquy occurred in the instant matter, there would be no need for "inferences," "generally" accepted practices, or any other speculation. Mr. Rivard's position is simply this: a proper plea colloquy is what *Klessig* requires, and not something far removed therefrom.

If the foregoing is true, the next question becomes whether the plea colloquy in this case was defective. Despite the State's assertions to the contrary, Mr. Rivard posits that it was. First, the transcript of the St. Croix County plea colloquy reveals that the judge *never* made Mr. Rivard aware of the "general *range*" of penalties to which he was exposed. R45 at 3-11. The sole and only discussion of possible penalties was not even engaged in between the court and Mr. Rivard, but rather was simply a recitation by the prosecutor of what the sentencing guidelines called for in terms of penalties. R45 at 3.

Second, and far more importantly, the judge *never* informed Mr. Rivard that the court need not accept the prosecutor's guideline recommendation, but rather could sentence Mr. Rivard to a lengthier time in jail, a higher fine, a longer license revocation, *etc*. R45 at 3-11. The failure of the court to do so, *especially in the context of the fact that the general range of penalties had not been explained*, must certainly be considered a failure to comply with the rigors of *Klessig*.[1] If it is not, then the fourth prong of the *Klessig* test regarding proper plea colloquies would be eviscerated and might as well be read out of the court's holding because it would be rendered mere surplusage. This is not an outcome the *Klessig* court could have intended.

Based upon the above and foregoing, Mr. Rivard respectfully requests that this Court reverse his conviction and remand this case to the circuit court with directions to so order.

Dated this 26th day of September, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

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[1]In *Klessig*, the Wisconsin Supreme Court held that in order for an accused's waiver of counsel to be valid, the record must reflect "(d) an awareness of the general range of possible penalties." *Klessig*, 211 Wis. 2d at 201.

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 663 words.

I hereby certify that I have submitted an electronic copy of this brief, 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 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 September 26, 2018. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 26th day of September, 2018.

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