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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT IV

Case No. 2018AP2124-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

KENNETH J. HEINRICH,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN THE
CIRCUIT COURT FOR DODGE COUNTY,
HONORABLE STEVEN G. BAUER, CIRCUIT
COURT JUDGE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. Mr. Heinrich Preserved his Double Jeopardy Claim.

A. Mr. Heinrich preserved the issue by raising it in a motion for postconviction relief claiming ineffective assistance of counsel.

The State argues that Mr. Heinrich waived his double jeopardy claim by pleading guilty. State Br. 5. However, Mr. Heinrich raised the issue in his motion for postconviction relief claiming that the plea was the result of ineffective assistance of counsel. Counsel's failure to raise a meritorious motion to dismiss the multiplicitous counts was ineffective assistance of counsel.

State v. Kelty, 2006 WI 886, ¶3, 294 Wis.2d 62, 716 N.W.2d 886, did not “render guilty pleas impervious to double jeopardy challenges ... A defendant retains the right ... to claim the ineffective assistance of counsel ...)”

B. Mr. Heinrich preserved the issue by moving to withdraw his guilty plea.

“A defendant [also] retains the right ... to challenge

whether a plea is knowing, intelligent and voluntary.” *Kelty*, 2006 WI 886 at ¶3. Mr. Heinrich did so in his motion for postconviction relief by his meritorious claim that the bail jumping counts lacked a proper factual basis.

C. It is obvious from this record that these counts violated double jeopardy.

Among the exceptions to bars on post-plea attacks under double jeopardy is the right “to challenge the authority of the state to prosecute ... and the power of a court to enter the conviction or impose the sentence when the existing record allows the court to determine whether the defendant’s double jeopardy rights have been violated.” *Kelty*, 2006 WI 886 at ¶3.

Under the facts evident at the time of the guilty plea, it is obvious that the multiple bail jumping counts violated double jeopardy. The judge asked the State, “What are the bases for the misdemeanor bail jumpings?” to which the parties agreed that the only bond in question was that in

2016CM247, and that Mr. Heinrich had violated the law while on that bond. R85:13-14.

Based on this record, the Court should reach the merits of the double jeopardy claim, and, as Mr. Heinrich argued in his brief-in-chief, it is a meritorious claim.

II. That Bail Had Been Revoked by Operation of Law Prior to the Instant Offense Means That Mr. Heinrich Was Not “On Bond” at the Time of the Instant Offense.

“Bail” and “bond” mean largely the same thing under Wis. Stat. § 969.13(1) (Bail Forfeiture) and § 946.49 (Bail Jumping). If the legislature intended these things to be different, the legislature could have named 946.49 “Bond Jumping,” but it did not. *Bail* forfeiture is mandated for any *bond* condition violation. Wisconsin Stat. § 969.13(1) applies to bonds and bails. The expression “bail bond” refers to a “bond executed by a defendant who has been arrested.” Blacks Law Dictionary at 177 (Revised 4th Ed.). Further, bond is revoked under Wis. Stat. § 969.13, whether a cash bail has been posted or not. *See also State v. Tucker*,

2012 WI App 67, ¶¶5,7,8,9,10,11, 342 Wis.2d 224, 816 N.W.2d 325 (“bail compliance” used interchangeably with “bond compliance”).

Conclusion

For the reasons stated above, as well as those reasons stated in Mr. Heinrich’s brief-in-chief, the Court should reverse the judgment below.

Respectfully submitted this 11th day of December, 2019.

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SECTION 809.19(8) CERTIFICATE

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 862 words.

Signed,

David R. Karpe

CERTIFICATE OF COMPLIANCE: RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 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.

Signed,

David R. Karpe

