STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP997

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY R. LINDAHL,

Defendant-Appellant.

ON APPEAL OF A CONVICTION AND JUDGMENT ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE EDWARD F. VLACK, III, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the court err as a matter of law when it denied Lindahl's collateral attack on a prior judgment used to enhance his sentence, where Lindahl had never appealed to that judgment before and has no other possible remedy?

   The trial court applied ***State v. Hahn***, which itself left open the possibility of collateral challenges to prior convictions used to enhance sentences when the defendant has no other way to appeal the prior conviction, to deny Lindahl's motion challenging a prior conviction.

2. Can a defendant collaterally attack a prior conviction in an enhanced sentencing proceeding based on a denial of the Sixth Amendment right to effective counsel?

   The trial court denied this issue based on its reading of ***Hahn.***

STATEMENT ON ORAL ARGUMENT/PUBLICATION

Mr. Lindahl requests oral argument only if it would assist the court. Publication is warranted as this case presents issues of first impression one of which this court has previously certified to the Wisconsin Supreme Court. *See* ***State v. Grovogel***, 2001 WL1224745, No. 00-2170-CR, October 16, 2001, *granted* 2002 WI 2, 249 Wis. 2d 584, 638 N.W.2d 593. In that case, the court asked the Wisconsin Supreme Court to clarify what the exception created in ***Hahn*** meant and what procedures should apply. The exception in ***Hahn*** reads:

> If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence.

State v. Hahn, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2dd 528, *clarified upon reconsideration,* 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902. Although the Wisconsin Supreme Court accepted review, the Court entered no decision but instead granted Grovogel's motion for voluntary dismissal.

STATEMENT OF FACTS

The State charged Lindahl with Operating a Motor Vehicle While Intoxicated—3rd Offense and Operating with a Prohibited Alcohol Concentration—3rd offense, by way of an Amended Criminal Complaint filed March 2, 2018. The Complaint alleged that on January 27, 2018, Mr. Lindahl drove with a blood alcohol content of 0.145 percent. The police received a report that his car side-swiped another car. An officer was at Lindahl's house when he pulled up in front of his home. When asked if he had been driving, he said, "You saw me pull in front of my house didn't you." There was a black scrape on his car and "a large scrape" on the other car.

Prior to trial, Lindahl filed a "Motion to Collaterally Attack Prior OWI Conviction." Along with it, he filed an affidavit from Lindahl in which Lindahl averred:

> I was a defendant in a previous OWI case: State of Wisconsin v. Jeffrey R. Lindahl, St. Croix County case number 05CT343.
>
> Had I been aware of any grounds or arguments for the suppression of evidence, including the grounds described in the foregoing motion, I would not have entered a plea of other than not guilty. Rather, I would have insisted that counsel continue to litigate and try my case, given that no standardized field sobriety test evidence

> or test result would have been admitted, and I would have been better poised to prevail at jury trial. (14:6)

Attached to his Motion was an exhibit, Exhibit A (14:7-9), which was a police report created by Deputy Brandi L. Hart of the St. Croix County Sheriff's Department regarding the prior stop. According to the report, Officer Hart approached two motorcyclists stopped at a stop sign with what looked like a disabled motorcycle. She activated her emergency lights and approached Lindahl who said his motorcycle had died. She detected the "strong odor of an intoxicating beverage." (14:7) She reported that Lindahl was very evasive when answering her questions, and finally got his motorcycle started. She asked for his license which he had, but he had no motorcycle endorsement. His companion drove off, and he wheeled his motorcycle off the road. The officer "asked" Lindahl to comply with field sobriety tests. (14:8) Following the field sobriety tests, the officer arrested Lindahl for operating while intoxicated.

Lindahl's motion argued that in the prior case, the Officer "lacked reasonable suspicion to justify expanding the scope of the traffic stop by requesting that Mr. Lindahl perform [standardized field sobriety tests.]" (14:3) Even assuming arguendo that the Officer pulled over Mr. Lindahl legally in the prior stop, the motion alleged that the Officer had no reason to conduct a sobriety test on him as the officer had observed no driving at all let alone "bad driving." *Citing* ***County of Sauk v. Leon***, 2011 WI App 1, ¶20, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished) ("[O]ther factors suggesting impairment must be more substantial" in the absence of true "bad driving.")[1]

In addition, the officer:

> based her decision to expand the scope of the stop primarily upon subjective, unreliable indicators of intoxication. She reported that she detected an odor of intoxicants, but …the odor of intoxicants, even when combined with other minor factors, does not give rise to reasonable suspicion. ***State v. Gonzalez***, 2014 WI App

[1] Cited pursuant to Wis. Stat. §809.23(a).

> 71, 354 Wis. 2d 625, 848 N.W.2d 905 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)); ***Leon,*** 211 WI App 1. Not every person who has consumed alcoholic beverages **is** '"under the influence.'" ***Gonzalez,*** 2014 WI App 71, ¶13.

(14:3) Lindahl's motion also argued that breath odor detection is unreliable, citing Herbert Moskowitz et al, *Police Officers' Detection of Breath Odors from Alcohol Ingestion,* 31 Accident Analysis & Prevention 175 (1999) and *The Detection of DWI at BACs Below .10, U. S. Department of Transportation, NHTSAF Final Report,* Jack Stuster (Sept. 1997). The motion also argued that glossy eyes are also unreliable indicators of intoxication and the officer's belief that Mr. Lindahl had "somewhat slurred" speech was weakened by the fact that she had never met Lindahl before the stop. The officer therefore had de minimis evidence of impairment which was slight at best and of questionable reliability." The motion also alleged that detaining an individual for a field sobriety test is not a minor intrusion as even brief on-the-spot intrusions constitute a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." ***Dunaway v. New York***, 442 U.S. 200, 209 (1979). Because of these deficiencies, Lindahl's motion argued that counsel should have moved to suppress all evidence from the prior stop, including the field sobriety tests, and had counsel done so, the refusal should have been dismissed.

The motion alleged that counsel was ineffective in the prior case for failing to move to suppress the fruits of the unlawful detention and therefore the court was required to hold a hearing to determine if Lindahl's Sixth Amendment rights were violated and he requested a hearing to determine whether the prior conviction could be used to enhance his punishment.

The court entered a written decision in which it listed considerable law regarding collateral challenges, did very little—if any—legal analysis, and denied Lindahl a hearing on his motion because:

> In summary, both ***Custis*** and ***Hahn*** both hold "that an offender does not have a federal constitutional right to use an enhanced sentence proceeding predicated on

> a prior conviction as the forum in which to challenge the prior conviction except when the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction.
>
> Therefore, this Court concludes that Mr. Lindahl cannot collaterally attack, in this forum, his 2006 conviction based on alleged ineffective assistance (sic) trial counsel. (21:14)

Mr. Lindahl has not previously appealed his conviction in Case No. 05CT343, and he is not presently incarcerated or on probation.

ARGUMENT

I. The court's failure to consider Lindahl's collateral challenge was error as a defendant may challenge a prior conviction based on a denial of the Sixth Amendment right to counsel.

This Court should also reverse because the trial court erred as a matter of law when it ruled that Lindahl could not collaterally challenge a prior conviction used to enhance his current sentence unless he was entirely without counsel in the prior proceeding. On the contrary, the law allows a challenge based on the denial of the Sixth Amendment right to counsel, and ineffective assistance can constitute a denial of the right to counsel. It does so here.

Article I, Section 7 of the Wisconsin Constitution, and the Sixth Amendment of the United States Constitution, made applicable to the states via the Fourteenth Amendment, entitle every criminal defendant in Wisconsin to the effective assistance of counsel. ***State v. Domke***, 2011 WI 95, ¶ 34, 337 Wis.2d 268, 805 N.W.2d 364; ***Evitts v. Lucey,*** 469 U.S. 387, 394–95, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). This right applies to both a defendant's trial as well as his direct appeal. ***Evitts***, 469 U.S. at 396, 105 S.Ct. 830. The Sixth Amendment guarantees every defendant the right "to have the assistance of counsel for his defense." Sixth Amendment to the United States Constitution. In ***Hahn,*** 238 Wis. 2d at 892, the

Wisconsin Supreme Court concluded "that an offender does not have a federal constitutional right to use the enhanced sentence proceeding predicated on a prior state conviction as the forum in which to challenge the prior conviction, except when the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior state conviction." In ***United States v. Cronic***, 466 U.S. 648, 659 (1984), which was decided the same day as ***Strickland v. Washington,*** 466 U.S. 668 (1984), the Supreme Court said that:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

There exist multiple issues where the failure to put the prosecution's case to adversarial testing is so severe that counsel's ineffective assistance of counsel has been found to be constitutionally defective. These include, for example, where counsel fell asleep during a trial, ***Burdine v. Johnson***, 262 F.3d 336, 349 (5th Cir. 2001)(en banc); where counsel was not present during cross-examination of a government witness, ***Green v. Arn***, 809 F.2d 1257, 1263, (6th Cir.); when counsel failed to file a brief, ***Smith v. Robbins***, 120 S. Ct. 746 (2000); when counsel failed to file an appeal as requested to do so, ***Restrepo v. Kelly***, 178 F.3d 634 (2nd Cir. 1999); when counsel was not present to request that the jury be polled following return of a verdict, ***State v. Behnke***, 155 Wis. 2d 796, 803, 456 N.W.2d 610 (State conceded that failure to be present could be constructive denial of the right to counsel); or when counsel fails to advise a defendant of the risks of deportation, ***Padilla v. Kentucky***, 559 U.S. 356, 374-75 (2010)("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation," based in part on, "[o]ur longstanding Sixth Amendment precedents….") In short, counsel's ineffective assistance of counsel can amount to a denial of the Sixth Amendment right to counsel.

Once a claim of the denial of the Sixth Amendment Right to Counsel has been raised on a collateral challenge, the issue becomes not whether there existed counsel in the prior case but whether counsel was so ineffective as to fail to entirely subject the prosecution's case to meaningful adversarial testing. *See* ***Cronic***, *supra***.** That is what occurred in the prior case that Lindahl has collaterally challenged. Counsel failed to raise any of the possible challenges to the stop and search, and counsel's failure caused Lindahl to enter a plea without knowing that there existed valid challenges. Rather than denying the challenge as a matter of law, the trial court had a duty to consider Lindahl's collateral challenge.

The trial court was required to consider Lindahl's claims because he alleged that he was denied the Sixth Amendment right to counsel because prior counsel was ineffective when he failed to raise legitimate and warranted challenges to the stop and subsequent search of himself. In addition, he alleged that counsel was ineffective because he would not have entered a plea had he known of these possible challenges. Failure to litigate dispositive issues constitutes the ineffective assistance of counsel. *See,* ***State v. Dalton***, 2016 WI App 67, ¶13, 371 Wis. 2d 566, 884 N.W.2d 535 (requiring the movant only to allege facts from which a court could conclude that there exists a *reasonable probability* that the motion would be successful) (unpublished but citable and attached pursuant to Wis. Stat. (Rule) 809.23(3)), *rev'd on other grounds* 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. Similarly, the failure to give due consideration of all possible defenses can constitute the ineffective assistance of counsel, *see e.g.* ***State v. Felton,*** 110 Wis. 2d 485, 504, 329 N.W.2d 161 (1983) (Experienced counsel was ineffective for failing to recognize a defense and for failing to investigate the facts in respect to that defense), and Lindahl cited sufficient facts that, if true, would entitle him to relief. *See also* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996)("If the motion alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing.")

Because the court erred when it erroneously ruled that no challenge was possible, this court must reverse. The trial court had to consider whether prior counsel was ineffective and whether that ineffectiveness amounted to a denial of the Sixth Amendment right to counsel.

Since the ineffective assistance of the counsel can be a denial of the Sixth Amendment right to counsel and since a defendant can collaterally challenge a prior conviction used to enhance the current sentencing based on a claim that he has been denied the Sixth Amendment Right, courts are not procedurally barred from considering Sixth Amendment challenges based on claims of ineffective assistance of counsel. Since the court had the duty to consider the challenge and since Lindahl asserted sufficient facts to require a hearing, the court erred when it denied a hearing. Therefore, this court must reverse.

II. Since Mr. Lindahl has never appealed his conviction in St. Croix County case no. 05CT343 and since he cannot appeal it now, he must be allowed to collaterally attack it in this case pursuant to the exception spelled out in *State v. Hahn.*

The trial court erred as a matter of law when it denied Lindahl's collateral challenge without a hearing based on a ruling that the law precluded a challenge such as Lindahl's. The federal law does not disallow a collateral attack in state court, and the Wisconsin Supreme Court has spelled out an exception that applies in this case. As stated by the Wisconsin Supreme Court:

> If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence.

State v. Hahn, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2dd 528, *clarified upon reconsideration,* 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902. When a prior

conviction enhances a sentence, ***Hahn*** explicitly provides for a collateral challenge to that prior sentence based upon a claim of ineffective assistance of counsel.

Since Mr. Lindahl has never appealed his prior conviction before and because there is no legal mechanism to do so now other than as provided above, he meets the conditions for allowing him to collaterally challenge the prior conviction in the present case.

A. Legal background

In ***Custis v. United States***, 511 U.S. 485 (1994), the United States Supreme Court concluded that the U.S. Constitution does not require that an offender be given an opportunity to challenge a prior state conviction in a federal enhanced sentence proceeding predicated on prior state conviction unless the offender asserts the state conviction was obtained in violation of the offender's constitutional right to a lawyer. ***Id.*** At 497. Prior to ***Custis***, Wisconsin courts had allowed a collateral attack on a prior conviction if the prior conviction was allegedly obtained in violation of a constitutional right that would affect the reliability of the prior conviction. ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992); ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, ¶15, 618 N.W.2d 528. In ***Baker***, Baker successfully challenged a prior operating after revocation conviction used for enhancement of the sentence because his plea was not knowing, intelligent, and voluntary. Because a prior conviction was predicated on a plea that was not knowing, intelligent, and voluntary, federal constitutional law prohibited its use in an enhanced sentence proceeding. ***Baker***, 169 Wis. at 71.

Following ***Custis,*** the Wisconsin Supreme Court considered whether a defendant could challenge a prior conviction in which the defendant, Hahn, alleged that prior counsel had been ineffective. The Court adopted the ruling of ***Custis*** which it said was based on two justifications: judicial administration and federalism. ***State v. Hahn***, 2000 WI 118, ¶23, 238 Wis. 2d 889, 618 N.W.2d 528.

However, the ***Hahn*** decision noted that "the U.S. Supreme Court expressly left open the possibility that an offender may challenge a prior state conviction in a state court proceeding or in a federal habeas proceeding and, if successful, apply to reopen his enhanced federal sentence." ***Id.*** at ¶21, *citing* ***Custis*** at 497. The ***Hahn*** decision adopted a bright-line rule for reasons of judicial administration saying:

> [A] circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. (fn 10) **If the offender has no means available under state law or is unsuccessful in challenging the prior conviction, the offender may nevertheless reopen the enhanced sentence.** We do not address appropriate disposition of any such application.

Id. at ¶28 (emphasis added). Footnote 10 provided in part that, "The question of whether the defendant has means available under state law to challenge the 1994 proceeding in another proceeding is not before us."

Following entry of the ***Hahn*** decision, the State moved the court to reconsider the sentence highlighted above. The Wisconsin Supreme Court declined review but clarified the sentence highlighted above to read:

> If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence.

State v. Hahn, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902 (Mem).

Soon after, this court certified to the Wisconsin Supreme Court the issue of whether an offender could collaterally challenge a prior conviction from another state that was not knowing, intelligent, and voluntary, despite the fact that he had

counsel. The Wisconsin Supreme Court granted certiorari but never decided the issue because the offender apparently moved for voluntary dismissal. [2]

B. Lindahl has no other remedy available to him under the law.

The exception to the general rule established in ***Hahn*** applies in this case because Lindahl has "no means available under state law to challenge the prior conviction on the merits." This case meets all the possible requirements for the exception in ***Hahn*** to apply. First, Lindahl is not in custody on his 2005 OWI case. He has never appealed his conviction[3] in that case and therefore a challenge is not barred by ***Escalona-Naranjo.*** In addition, there is no other mechanism, such as the writ of *coram nobis* or the court's inherent authority to act, that provides a possible other avenue to challenge the prior conviction.

A collateral challenge to the prior conviction is not barred in this case, pursuant to ***State v. Escalona-Naranjo.*** In that case, the Wisconsin Supreme Court held that "all grounds for relief under sec. 974.06 must be raised in a petitioner's original, supplemental, or amended motion. … if the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). The only exception to this rule is where an offender can establish sufficient reason for why the issue was not previously or adequately raised. ***Id***. at 184.

Mr. Lindahl has never appealed that conviction and therefore the rule of ***Escalona-Naranjo*** does not preclude a collateral challenge in this case. *See* ***Loop***

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[2] *See* ***State v. Grovogel***, 2001 WL1224745, No. 00-2170-CR, October 16, 2001, *granted* 2002 WI 2, 249 Wis. 2d 584, 638 N.W.2d 593. Lindahl is not citing this certification as authority for any position but instead to inform the court of the entire legal background.

[3] CCAP records are sufficient to prove a prior conviction by a preponderance of the evidence. ***State v. Braunschweig***, 2018 WI 113, ¶39, 384 Wis. 2d 742, 921 N.W.2d 1999. There exists no reason to review court of appeals online records by a different standard.

v. State, 65 Wis. 2d 499, 222 N.W.2d 694 (1974) (Defendant permitted to raise a constitutional issue not raised on direct appeal because no direct appeal was sought.); *see also* ***State v. Lo***, 2003 WI 107, ¶22, fn. 11, 264 Wis. 2d 1, 665 N.W.2d 756 (The ***Escalona-Naranjo*** bar to successive appeals is "only applicable in the situation where a criminal defendant actually filed a ¶974.02 motion or pursued a direct appeal.")

There are no statutes or laws that authorize a court to modify an already served judgment and sentence. As the Wisconsin Supreme Court has stated, "After a convicted criminal defendant's rights under § 974.02 have been exhausted, the primary method of challenging a conviction is § 974.06." ***State v. Henley,*** 2010 WI 97, ¶ 52, 328 Wis. 2d 544, 568, 787 N.W.2d 350, 362. This is true because courts do not have inherent authority to modify or vacate an already served sentence. As stated further in ***Henley:***

> We hold that neither Wis. Stat. § 805.15(1) nor § 806.07(1)(g) or (h) are available procedural mechanisms for a convicted criminal defendant to challenge his or her conviction or sentence. We further hold that Wisconsin circuit courts do not have the inherent authority to order a new trial in the interest of justice when a case is not before the court under a proper procedural mechanism.

Id. at ¶52.

Nor are there any other remedies possible. The writ of *habeas corpus* does not apply because a petitioner who seeks *habeas corpus* relief "must be restrained of his or her liberty." ***State v. Fuentes,*** 225 Wis. 2d 446, 451, 593 N.W.2d (1999). The writ of error *coram nobis* also provides no avenue to challenge a prior sentence. It is:

> of very limited scope. It is a discretionary writ which is addressed to the trial court. The purpose of the writ is to give the trial court an opportunity to correct its own record of an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the trial court. In order to constitute grounds for the issuance of a writ of error coram nobis there must be shown the existence of an error of fact which was

> unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment. The writ does not lie to correct errors of law and of fact appearing on the record since such errors are traditionally corrected by appeals and writs of error.

Jessen v. State, 95 Wis. 2d 207, 213–14, 290 N.W.2d 685, 688 (1980). The writ of *coram nobis* has been held to lie where, for example, a child appeared solely by attorney but the court did not know of the infancy or where an attorney's fraud caused a judgment of default, ***Ernst v. State***, 179 Wis. 646, 192 N.W. 65, 66 (1923)("When a proper remedy is afforded by appeal or ordinary writ of error, the writ of error coram nobis will not lie."), but it has never been held to apply to allow a claim of ineffective assistance of counsel to support a claim that a defendant must be allowed to withdraw an old plea.

This is so because a claim of ineffective assistance of counsel is not a claim of error due to an unknown and incorrect fact. Claims of ineffective assistance of counsel are mixed questions of fact and law. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. This means that while the appellate court upholds the trial courts findings of fact unless they are clearly erroneous, "the ultimate determination of whether counsel's assistance was ineffective is a question of law…." ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. Because questions of ineffective assistance of counsel are ultimately a question of law, a *writ of coram nobis* cannot be applied to reverse a prior conviction based on a claim of ineffective assistance of counsel.

In short, Mr. Lindahl's case squarely meets the requirements of the exception created by the Wisconsin Supreme Court in ***Hahn***. He has no means available under state law to challenge on the merits his conviction in St. Croix County case number 05CT343; a challenge is not barred by the rule prohibiting multiple appeals as listed in ***State v. Escalona-Naranjo***; and he is no longer in custody on the prior conviction. He therefore may challenge his prior conviction on the grounds that counsel was ineffective even though he did have counsel to represent him.

C. Lindahl has established a prima facie case that prior counsel provided ineffective assistance of counsel, and therefore it was an error of law to deny him a hearing on his collateral challenge to his prior conviction.

Because the trial court denied Mr. Lindahl's collateral challenge without a hearing based on the court's misreading of the law, the court erred as a matter of law. Contrary to the trial court's reasoning, ***State v. Hahn*** does not, as the trial court found, preclude a collateral challenge based on a claim of ineffective assistance of counsel. On the contrary, it expressly allows a challenge where, as here, a defendant has no alternative means to challenge the prior conviction. In ***Baker***, 169 Wis. 2d at 49, the Wisconsin Supreme Court said that:

> Because the defendant must overcome the presumption of regularity attached to the prior conviction, the defendant bears the initial burden of coming forward with evidence to make a prima facie showing of a constitutional deprivation in the prior proceeding. If the defendant makes a prima facie showing of a violation of the right to counsel, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding.

Furthermore, the law is clear that when an offender has stated facts that, if true, would entitle him to relief in challenging a prior conviction, the court must grant a hearing. "[A] prima facie case requires the defendant to submit evidence which, if credited, is sufficient to establish a fact or facts which it is adduced to prove." ***State v. Kramer***, 2001 WI 132, ¶16, 248 Wis. 2d 1009, 627 N.W.2d 35 (Defendant proved prima facie cases of prosecutorial discriminatory purpose and discriminatory effect). According to established plea withdrawal procedure, this court must grant a hearing if the facts, if true, would entitle a defendant to relief. As stated in ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing Whether a

> motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

This postconviction standard should apply here as Lindahl is seeking to withdraw a prior plea based on the ineffective assistance of counsel.

In order to prove ineffective assistance of counsel, a defendant must establish that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). This applies to claims of ineffective assistance affecting the plea process. ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). To prove prejudice, a defendant must establish that there "is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sholar,*** 2019 WI 53, ¶33, 381 Wis. 2d 560, 912 N.W.2d 89. Furthermore, "Whenever ineffective assistance of counsel results in the 'complete denial of appeal, prejudice is presumed.'" ***State ex rel Lopez-Quintero v. Dittmann,*** 2019 WI 58, ¶17, 387 Wis. 2d 50, 928 N.W.2d 480. Additionally, the Wisconsin Supreme Court has recently concluded that:

> [A] proceeding in which a court decides a disputed matter in favor of the State, before allowing the respondent the option of presenting his case-in-chief, adversely affects the very framework within which the trial is supposed to take place. Consequently, the error so permeates the proceeding that it is incapable of producing a constitutionally-sound result. The error is, therefore, structural.

In re S.M.H., 2019 WI 14, ¶ 16, 385 Wis. 2d 418, 430, 922 N.W.2d 807, 813. *See also* ***United States v. Cronic***, 466 U.S. 648, 658-59 (1984) (prejudice is presumed if counsel fails to subject the prosecution's case to meaningful adversarial testing). Although factually different than what happened in this case, the failure to allow a hearing based on a misunderstanding of the law requires a similar reversal. A trial court misuses its discretion if the court fails to exercise its discretion, the facts do not support the court's decision, or the court applied the wrong legal standard. ***Hess v. Fernandez,*** 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 622.

In this case, the court's decision failed all three prongs of the discretion standard. The court failed to exercise its discretion; the facts do not support the court's ruling; and the court failed to exercise its discretion because it applied the wrong law.

First, it was error to deny Lindahl's collateral attack without considering the merits of the claim. Contrary to the trial court's ruling, collateral attacks are explicitly permitted where, as in this case, the defendant has no other forum or procedure available to him to challenge the prior conviction.

Second, Lindahl had made a prima facie case that the prior plea was not knowing, intelligent, and voluntary. He listed that the officer observed no driving at all and therefore did not see Lindahl exhibiting any "bad driving" at all. Because she did not observe bad driving, the law requires that other facts suggesting impairment must be more substantial. There were no other facts suggesting impairment sufficient to allow a stop. Instead the officer improperly extended her stop on subjective, unreliable indicators of intoxication. She noted the odor of alcohol, but the odor of alcohol alone does not give rise to reasonable suspicion. Lindahl noted that studies show that breath odor detection is unreliable. In addition, the stop was not a *de minimus* intrusion and the officer had no reasonable suspicion justifying her decision to "ask[]" Lindahl to perform field sobriety tests. (24:3-4, 8).[4] In short, Lindahl cited facts that, if true, would entitle him to relief.

Third, the court applied no standard at all. Rather than hear his argument as the law provides, the court wrongly believed it could not even consider Lindahl's motion, and its subsequent denial of his motion was based entirely on an error of law.

Because the trial court did not follow the law, this court must remand for a hearing on the motion.

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[4] The fact that the officer reported that she "asked" Lindahl to perform field sobriety tests indicates that the officer may have doubted that she had reasonable suspicion. Lindahl has disputed that he was reasonably detained or that the stop was reasonably extended to require field sobriety test.

D. Harmless Error does not apply and is not a ground to affirm the trial court's decision.

Harmless error should not apply to so fundamental a legal error that it denied a defendant his day in court entirely. If, however, this court determines that the trial court's failure to grant a hearing on his collateral attack on a prior record could be harmless, the error in this case was not harmless. First, Mr. Lindahl has alleged facts that if true would entitle him to relief. He has stated clearly that: "Had I been aware of any grounds or arguments for the suppression of evidence, including the grounds described in the foregoing motion, I would not have entered a plea of other than not guilty." Furthermore, he has claimed multiple reasons that previous counsel was deficient in not moving to suppress the evidence that was the fruits of the extension of the previous traffic stop and the resulting field sobriety tests. These included: 1) The officer lacked reasonable suspicion to justify expanding the traffic stop which occurred because Lindahl's motorcycle was stalled at a stop sign; 2) The officer based her decision to expand the stop primarily upon subjective and unreliable factors; 3) The officer's reliance on the smell of alcohol without more does not give rise to reasonable suspicion; 4) Breath odor detection in unreliable; 5) The officer had never met Lindahl before; And 6) any evidence of impairment was slight at best and had questionable reliability.

The touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair," ***Lockhart v. Fretwell***, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993), and prior counsel's failure to advise Lindahl of possible challenges he could have made makes the prior plea unreliable and the conviction unfair. Counsel's failure to object to a violation of law can establish ineffective assistance of counsel sufficiently to make a plea not knowing, intelligent, and voluntary. In ***State v. Dillard***, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44, for example, the Wisconsin Supreme Court found that counsel was ineffective where

she failed to object to a persistent repeater enhancement that did not apply to the defendant. Dillard's resulting plea was not knowing, intelligent, and voluntary, and counsel had provided ineffective assistance of counsel because she did not object to the charge. Counsel had failed to "either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary" when she failed to know the law or investigate whether the persistent repeater enhancer applied to Dillard. ***Id.*** at ¶92.

In this case, Mr. Lindahl similarly would not have entered a plea had he known that any challenges to the evidence in the prior case were possible. Given these claims made in the Motion to Collaterally Attack his prior judgment and Lindahl's signed, sworn statement that he would not have entered a plea had he known of any possible grounds to move to suppress, if true, Lindahl is entitled to hearing on whether counsel was ineffective. Counsel's failure to tell Lindahl of the possible challenges in the prior case and his failure to challenge the admission of the State's evidence deprived Lindahl of the opportunity to make a truly knowing, intelligent, and voluntary plea. Therefore, it was error to deny a hearing.

Had the court considered the motion at all, it would have had to grant a hearing on the motion. Instead it denied a full hearing based on an error of law. This court must therefore reverse and grant Mr. Lindahl on his motion to collaterally attack his prior conviction in 05CT343.

CONCLUSION

The facts of this case fit the exception to the no-collateral-challenge-rule adopted in ***State v. Hahn*** because Mr. Lindahl has no other avenue to challenge the prior conviction used to enhance the present conviction and sentence. The trial court therefore erred as a matter of law when it denied Lindahl's collateral challenge without holding a hearing based on a finding that the law precluded a challenge such as Lindahl's. Because it was error to deny Lindahl the opportunity to present his

challenge, this court must reverse and remand with instructions for the trial court to consider Lindahl's collateral challenge.

In addition, the court erred when it concluded that it was procedurally barred from considering any Sixth Amendment claims based on the denial of the right to counsel beyond the complete denial of counsel. That is not the law and should not be the law. The law allows collateral Sixth Amendment challenges where counsel, as here, "entirely fails to subject the prosecution's case to meaningful adversarial testing." ***Cronic,*** 466 U.S. at 659.

For these reasons, Jeffrey Lindahl, the defendant-appellant, respectfully requests that this court vacate his judgment of conviction and remand to the trial court for a hearing on his collateral challenge to a prior conviction.

Dated this 27th day of September, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6342 words.

Dated this 27th day of September, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP997

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY R. LINDAHL,

Defendant-Appellant.

ON APPEAL OF A CONVICTION AND JUDGMENT ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE EDWARD F. VLACK, III, PRESIDING.

DEFENDANT-APPELLANT'S APPENDIX

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INDEX TO APPENDIX

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

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