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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2019AP000997-CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JEFFREY R. LINDAHL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A COLLATERAL
ATTACK, ENTERED IN
ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE EDWARD F. VLACK,
PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the Court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

I. THE PRIOR CASE.

The prior conviction Lindahl is attempting to collaterally attack arises from an incident that occurred on September 7, 2005, at the end of Deputy Brandie Hart's shift, with a "report/date time" of 10:09 PM. (R. 14:7.)

On that night, as the deputy approached Lindahl, she noted that "it appeared as though one or both of the motorcycles was disabled. . . . in the middle of the eastbound lane of traffic." *Id.* When Deputy Hart approached him, Lindahl stated that "he didn't know what was going on, but his motorcycle had 'died.'" *Id.* Lindahl kept trying to start his motorcycle in front of the deputy but was unsuccessful. *Id.* As the deputy spoke with Lindahl, she detected a "strong odor of an intoxicating beverage about his person." *Id.* When Deputy Hart asked Lindahl where he was coming from, he repeatedly responded with "Paradise," a location unfamiliar to the deputy. *Id.* When she asked Lindahl where he was headed he responded, "that way" and pointed. *Id.* While Lindahl moved his motorcycle to the median, the deputy "could still smell an intense odor of an intoxicating beverage about his person" and noticed that "Lindahl's speech was somewhat slurred." (R. 14:8.) Lindahl twice denied consuming alcohol. *Id.* When Deputy Hart told Lindahl that she could smell alcohol coming from him he responded that "he couldn't remember the name of the restaurant he'd been at with some friends and his daughter." *Id.* Deputy Hart then "asked Lindahl if he would perform some field sobriety tests for [her] and he said that he would." *Id.*

After additional investigation, Lindahl was arrested and subsequently charged with operating a motor vehicle while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC), both as second offenses. Lindahl was represented by counsel.

Trial counsel filed a motion to suppress evidence on October 13, 2005. (Wisconsin Consolidated Court Automation Programs ("CCAP") 2005CT000343.) A motion hearing was set but never held, CCAP indicating "no mtns to address." *Id.* Lindahl eventually pled guilty and was convicted of the OWI as a second offense. *Id.*

II. THIS CASE.

Subsequent to his OWI second conviction, Lindahl was charged with OWI and PAC third offenses. Lindahl filed a motion to "collaterally attack" the above prior conviction based on a claim of ineffective assistance of counsel. (R. 14.) He claimed that prior trial counsel was ineffective for failing to challenge reasonable suspicion for the field sobriety tests. *Id.*

The circuit court denied Lindahl's motion with a 14-page decision and order citing much of the same law the State cites below. (R. 21.) Lindahl now appeals the circuit court's decision, claiming that the court erred as a matter of law.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED LINDAHL'S COLLATERAL ATTACK.

A. STANDARD OF REVIEW.

A court abuses its discretion when the court misapplies the correct law. *State v. Gary M.B.*, 2004 WI 33, ¶ 19, 270 Wis. 2d 62, 76, 676 N.W.2d 475, 483 (2004). This Court reviews the circuit court's decision to determine whether the circuit court applied the correct standard and also whether the circuit court used a "rational process to reach a reasonable conclusion." *Id.* (citing *State v. Kruzycki*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995)).

B. COLLATERAL ATTACKS CANNOT BE BASED ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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*, 2005 WI 107, ¶ 22 n.5, 283 Wis. 2d 300, 699 N.W.2d 92, quoting *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354 (quoted source omitted).

Defendants charged criminally with OWI under Wis. Stat. § 346.63 may collaterally attack prior convictions that are being used as predicate offenses for enhancing sentencing under Wis. Stat. § 346.65, the penalty provision. *State v. Baker*, 169 Wis. 2d 49, 59, 485 N.W.2d 237 (1992); *State v. Novak*, 107 Wis. 2d 31, 318 N.W.2d 364 (1982); *State v. Foust*, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997).

The only ground upon which a defendant may collaterally attack a prior conviction is the denial of the constitutional right to counsel in the prior case. *Custis v. United States*, 511 U.S. 485, 496 (1994); *Ernst*, 283 Wis. 2d 300, ¶ 22, quoting *State v. Hahn*, 2000 WI 118, ¶ 17, 238 Wis. 2d 889, 618 N.W.2d 528. The *Custis* Court clarified that "other constitutional violations do not merit the same treatment." *Hahn*, 238 Wis. 2d 889, ¶ 16.

In *Hahn*, the Wisconsin Supreme Court established "'a bright-line rule that applies to all cases' for attacking the validity of a prior conviction during an enhanced sentence proceeding based on the prior conviction." *State v. Hammill*, 2006 WI App 128, ¶ 16, 293 Wis. 2d 654, 718 N.W.2d 747, citing *Hahn*, 238 Wis. 2d 889, ¶ 28. The court in *Hahn* stated:

> [W]e conclude that considerations of judicial administration favor a bright-line rule that applies to all cases. We therefore hold that 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.

Hahn, 238 Wis. 2d 889, ¶ 28.

The *Hahn* court adopted the standard set forth in *Custis v. United States*. 511 U.S. 485. In *Custis*, the United States Supreme Court rejected the defendant's claim that ineffective assistance is the denial of counsel, saying that ineffective counsel does not rise to the level of jurisdictional defect resulting from the failure to appoint counsel. *Id.* at 496. The Court noted that the failure to appoint counsel is "a unique constitutional defect." *Id.* Allowing a collateral attack *only* for the denial of counsel, the Court reasoned, also makes sense in light of various administrative difficulties the reviewing court may face. The *Hahn* court considered and acknowledged these difficulties as well in its examination of *Custis*, and the case before it. *Hahn*, 238 Wis. 2d 889, ¶¶ 22-28.

The court in *Hahn* noted that "concerns about finality and delay" as raised in *Custis* "carry weight in the state court context" and the current procedure "avoids delay in an enhanced sentence proceeding and prevents an offender from using the proceeding for a tangential purpose." *Id.* ¶ 27.

The *Hahn* court summarized:

> In sum, the primary holding of *Custis*, to which this court is bound as a matter of federal constitutional law, is 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.

Id. ¶ 29.

The Wisconsin Supreme Court affirmed its holding in *Hahn*: "[A] defendant generally may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances the subsequent sentence." *State v. Peters*, 2001 WI 74, ¶1, 244 Wis. 2d 470, 628 N.W.2d 797. "There is an exception, however, for a collateral attack based upon an alleged violation of the defendant's right to counsel." *Id.*

The circuit court did not err in denying Lindahl's "collateral attack" given the above-stated law. Lindahl's attempts to stretch and create new law should be denied by this Court too. Lindahl is attempting exactly what the defendant in *Custis* attempted; this Court should hold, and is bound to hold, as the U.S. Supreme Court in *Custis* held:

> Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon.* We decline to do so. . . . Custis attacks his previous convictions claiming the denial of the effective assistance of counsel . . . None of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all.

511 U.S. 485, 496.

This issue has already been decided in Wisconsin by the *Hahn* court. 238 Wis. 2d 889. This Court should follow *Custis* and *Hahn* and deny Lindahl's motion.

C. THERE IS NO "HAHN EXCEPTION" APPLICABLE HERE.

Lindahl argues that he can "collaterally attack" his prior conviction because he "has never appealed" it, "he cannot appeal it now," and an exception in *Hahn* provides for it. (App.'s Br. 8.) He bases his argument on paragraph 28, which was clarified by the Wisconsin Supreme Court. (App.'s Br. 10-11.) Lindahl notes that further clarification was sought in the Wisconsin Supreme Court but never occurred. *Id.* The Wisconsin Court of Appeals in that case questioned the exception, suggesting that more recent United States Supreme Court cases would support withdrawing any exception to the bright-line rule. *State v. Grovogel*, 2001 WL1224745, No. 00-2170-CR, October 16, 2001, *cert. granted* 2002 WI 2, 249 Wis. 2d 584, 638 N.W.2d 593.

Despite Lindahl's argument, *Hahn* did not provide a defendant with an avenue to collaterally attack a prior conviction in an enhanced sentencing proceeding on a ground other than the denial of the constitutional right to counsel. This

is evident from the supreme court's statement that it was providing a bright-line rule "that 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." *Hahn*, 238 Wis. 2d 889, ¶ 28.

Moreover, the outcome of *Hahn* makes clear that the court was not offering some other avenue of collaterally attacking a prior conviction in an enhanced sentencing proceeding. The defendant in *Hahn* was attempting to collaterally attack a 1994 conviction "on the grounds that his plea was not knowing, intelligent, and voluntary because the circuit court failed to inform him that the conviction could serve as a 'strike' offense under the 'three strikes' law." *Id.* ¶ 6. The supreme court concluded that the defendant could not collaterally attack his prior conviction on that ground. The court explained:

> We conclude 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. We further conclude, as a matter of judicial administration, that an offender may not use the 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 state conviction. Because the defendant in the present case does not allege that a violation of his constitutional right to a lawyer occurred in the prior conviction, he may not challenge his 1994 conviction during this 1997 persistent repeater proceeding.

Id. ¶ 4 (footnote omitted).

After explaining its holding that the defendant could not collaterally attack his prior conviction on the ground that his plea was not knowing, intelligent, and voluntary, the supreme court stated:

> We do not address the validity of the 1994 conviction because the defendant's challenge to the 1994 conviction cannot be raised in the enhanced sentence proceeding that is the subject of this appeal. The question of whether the defendant has means available under state law to challenge the 1994 conviction in another proceeding is not before us.

Id. ¶ 28 n. 10.

The supreme court then explained its holding again, stating:

> An offender may challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding by whatever means available under state law. If the offender succeeds, the offender may seek to reopen a sentence imposed as a persistent repeater under Wis. Stat. § 939.62(2m) if that sentence was based on the vacated conviction. Accordingly, we conclude that the defendant in this case does not have a federal constitutional right to use the 1997 enhanced sentence proceeding that was predicated on the 1994 state conviction as the forum in which to challenge the 1994 conviction because the defendant did not assert that a violation of the constitutional right to a lawyer occurred in that prior conviction.

Id. ¶ 29.

As the supreme court made abundantly clear, a person cannot collaterally attack a prior conviction in an enhanced sentencing proceeding on any ground other than a violation of the constitutional right to counsel.

Any possible question about the supreme court's holding in *Hahn* has been settled by subsequent decisions applying *Hahn*. For instance, this Court in *State v. Hammill* denied Hammill's challenge to his prior conviction, which was based on lack of subject matter jurisdiction. 293 Wis. 2d 654. This Court disagreed with Hammill, acknowledging that "*Hahn* is a broad, bright-line rule. Since Hammill's challenge to his [prior] conviction is not based on the denial of his right to counsel, the challenge is barred by *Hahn*." *Id.* ¶ 17.

And in *State v. Ernst*, the supreme court stated:

> In *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, we firmly established that "[i]n an enhanced sentence proceeding predicated on a prior conviction, the U.S. Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer."

283 Wis. 2d 300, ¶ 54 (citation omitted).

More recently, in *State v. Verhagen*, the Wisconsin court of appeals stated: "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 earlier case." *State v. Verhagen*, 2013 WI App 16, ¶ 31, 346 Wis. 2d 196, 827 N.W.2d 891 (citing *Hahn*, 238 Wis. 2d 889, ¶ 28).

The court in *Hahn* professed a "bright-line rule" for a reason. To allow an exception clearly contrary to that rule would make the rule meaningless. As outlined above, firmly established case-law provides that collateral attacks can only be based on a claim of the denial of the right to counsel. Notably, Lindahl has never filed an ineffective assistance of counsel claim in his OWI second case. Lindahl also never filed a direct appeal of his OWI second case. Instead, he is attempting to challenge it through a means not authorized by case-law.

Lindahl's attempt to challenge his 13-year-old prior conviction through the backdoor should not carry weight given the established precedent. Lindahl has never raised this issue before. A "considerable delay in raising the issue suggests an attempt to play fast and loose with the court system, which is something this court frowns upon." *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, ¶ 25, 882 N.W.2d 738.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment convicting Lindahl of his third OWI.

Dated this ___ day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND 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 2,582 words.

Dated this ____ day of December, 2019.

Signed:

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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 Wis. Stat. § (Rule) 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.

Dated this ____ day of December, 2019.

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