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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Jeffrey Lindahl, the defendant-appellant, replies to the State's brief as follows:

1) The State concedes that ineffective assistance of counsel can constitute a complete denial of the right to counsel.

The State concedes entirely, because it does not deny it, Lindahl's first argument, that "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." (Lindahl's brief at 5) *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (Arguments not refuted are deemed admitted.) Specifically, the State has conceded that "counsel's ineffective assistance of counsel can amount to a denial of the Sixth Amendment right to counsel" because it does not deny it. (Lindahl's brief at 6). The State claims that ***Hahn*** bars all collateral challenges but never addresses the Sixth Amendment nor denies Lindahl's claim that ineffective assistance of counsel can be so complete as to constitute a denial of the right to counsel. In addition, the State also has conceded because it has never refuted that "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." (Lindahl brief at 7).

2) The State concedes that the exception listed in *Hahn* applies because it does not deny it.

The State's argument is based entirely on ignoring the exception spelled out in ***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, itself. The State does

this by arguing that ***Hahn*** creates an absolute bright-line rule without exception. According to it, "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." (State's brief at 4) The State further argues that ***Hahn*** "[a]llowed a collateral attack only for the denial of counsel. (State's brief at 5) This argument is completely flawed as it relies on never discussing or refuting, in any way, Lindahl's fundamental argument that ***Hahn*** itself carefully carved out an exception. What the Court meant when it said the following, the State does not say. It merely ignores the language written by the Wisconsin Supreme Court which reads as follows:

> 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.

Id., 2001 WI 6, at ¶2. This court can no more ignore the explicit language of a decision written by the Wisconsin Supreme Court than it can ignore parts of a statute, *see e.g.* ***State ex rel Kalal,*** 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."), but that is what the State asks this court to do. By the terms of ***Hahn*** itself, there is an exception to the otherwise bright-line rule.

Contrary to the State's claims, ***Hahn*** itself also does not stand for the proposition that a bright-line rule excludes a collateral attack where there exists no other possibility of appeal. On the contrary, in ***Hahn*** itself, the Wisconsin Supreme Court said that, "The question of whether the defendant has means available under state law to challenge the 1994 conviction in another proceeding is not before us." ***Hahn,*** 238 Wis. 2d 889 at ¶28 n. 10. In other words, whether the exception spelled out in ***Hahn*** could apply to that case was not before the court. Rather than ruling that the exception could not apply, the Court did not address an issue that was not presented.

Furthermore, since the State never addresses what the exception spelled out in ***Hahn*** means, it has conceded Lindahl's claim that the exception applies to him. The State's claim that ***Hahn*** creates a bright-line, and therefore no exception can apply, would carry the day if ***Hahn*** itself did not create an exception, but that is not what ***Hahn*** says. Since the Wisconsin Supreme Court created an exception, and since the State has conceded that it applies to Mr. Lindahl, this court must reverse.

3) The *Peters* decision does not overrule *Hahn*.

The State's citation to ***State v. Peters***, 2001 WI 74 ¶1, 244 Wis. 2d 470, 628 N.W.2d 797, does not eliminate the exception created in ***Hahn.*** It is true that ***Peters*** discusses a different exception when it said, "[A] defendant generally may not collaterally attack a prior conviction in a subsequent criminal case where the prior conviction enhances a sentence. There is an exception, however, for a collateral attack based upon an alleged violation of the defendant's right to counsel." (State's brief at 5) However, the case does not mention, overrule, or limit the no-remaining-opportunity-to-appeal exception spelled out in ***Hahn.*** The Court's subsequent failure in ***Peters*** to cite to the exception that it itself created in ***Hahn*** does not overrule the exception created in ***Hahn***. In addition, this court is bound by the precedents of the Wisconsin Supreme Court and is unable to overrule those precedents even if it wished to do so. *See* ***Cook v. Cook***, 208 Wis. 2d 166, ¶45, 560 N.W.2d 246 (1997). The exception established in ***Hahn*** is the law, no matter how thoroughly the State may wish to avoid it.

4) None of the other cases cited by the State overrule, limit, or modify the exception created in *Hahn*.

The exception created in ***Hahn*** is still the law as none of the other cases cited by the State eliminate the exception created in ***Hahn***. In fact, none of them address a situation where the defendant "has no means available under state law to challenge the prior conviction on the merits." ***Hahn***, 2001 WI 6, at ¶2. This is true for ***State***

v. Hammill, 2006 WI App 128, 293 Wis. 2d 654, 718 N.W.2d 747, ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, and ***State v. Verhagen***, 2013 WI App 16, 346 Wis. 2d 196, 827 N.W.2d 891. None of them involved a situation where the court considered whether the defendant had no other means to challenge a prior conviction on the merits. Since none of these cases discuss the exception spelled out in ***Hahn***, the exception remains the law.

5) The exception created in *Hahn* does not make the general rule "meaningless."

Given the exception created in ***Hahn,*** it is irrelevant whether this court believes, as the State does, that allowing Lindahl to collaterally attack his prior conviction in this offense pursuant to the exception created in ***Hahn*** would make the otherwise bright-line rule in ***Hahn*** meaningless. The Wisconsin Supreme Court has created an exception, and this court must apply it. In addition, it is not true that the exception would make the general bright-line rule "meaningless" as argued by the State. (State's brief at 9) On the contrary, the exception is limited by its terms to only those cases where the defendant "has no means available under state law to challenge the prior conviction on the merits." The exception is very limited.

6) Judicial estoppel does not preclude Lindahl's claims.

The State's citation to cases relying on judicial estoppel is entirely misplaced. The State cites ***City of Eau Claire v. Booth***, 2016 WI 65, ¶25, 370 Wis. 2d 595, 882 N.W.2d 738, *citing* ***State v. Petty,*** 201 Wis. 2d 337, 346-47, 548 N.W.2d 817 (1996), for the quote that "considerable delay in raising the issue suggest an attempt to play fast and loose with the court system…." (State's brief at 9). However, ***Petty*** is not a laches case, but a judicial estoppel case. Judicial estoppel is intended to keep a litigant "'from playing loose and fast with the courts' by asserting inconsistent positions." ***Petty***, 201 Wis. 2d at 347. That has not occurred in this case. Lindahl has never taken an inconsistent position.

Nor does laches apply. Laches is an affirmative defense which, had the State raised it, the State would have had to prove every element. It has 3 elements, 1) unreasonable delay; 2) lack of knowledge by party suffering the delay; and 3) prejudice caused by the delay. ***State ex rel. Coleman v. McCaughtry,*** 2006 WI 49, ¶27, 290 Wis. 2d 352, 714 N.W.2d 900. It does not apply in this case because the State has not alleged it, much less proven it, and because the State has not alleged any prejudice. In fact, the State starts its brief with a thorough recitation of the facts from the prior conviction. There simply is no prejudice. The entire claim that Lindahl is playing loose and fast with the courts is invalid. He is asking this court to apply the law as established by the Wisconsin Supreme Court. That law explicitly allows a defendant to challenge a prior sentence where the appellate courts have never ruled on the merits of that prior conviction.

Conclusion

In this case, Mr. Lindahl alleged that counsel was ineffective, and that the ineffectiveness amounted to a complete denial of the Sixth Amendment Right to Counsel. The State has conceded it because it never refuted this claim, and therefore this court must reverse.

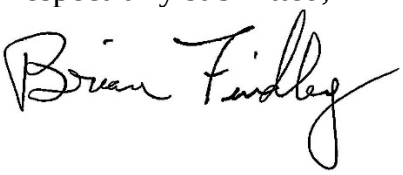
The State has also failed to apply the law as established by the Wisconsin Supreme Court which creates an exception to the otherwise bright-line rule that a defendant cannot collaterally challenge a prior conviction in an enhanced sentencing hearing. Instead, as established by the Wisconsin Supreme Court:

> 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 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.

Hahn, 2001 WI 6 at ¶2. That exception applies to Mr. Lindahl, the defendant-appellant. He therefore respectfully requests that this court vacate his judgment of conviction and remand to the trial court for a hearing on his collateral challenge to his prior conviction.

Dated this 13th day of January, 2020.

Respectfully submitted,



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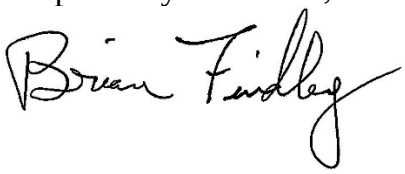
CERTIFICATION AS TO FORM/LENGTH

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 1756 words.

Dated this 13th day of January, 2020.

Respectfully submitted,



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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.

Dated this 13th day of January, 2020

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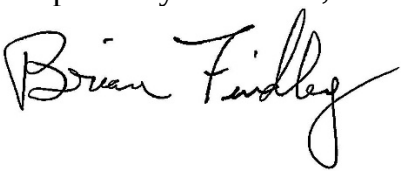

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