STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1058-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TERESA L. CLARK,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO COLLATERALLY ATTACK A PRIOR CONVICTION ENTERED IN THE ASHLAND COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ANDERSON, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The procedure courts use to decide collateral attacks on prior convictions when no transcript demonstrates that the circuit court failed to give the defendant the required information to accept a waiver of counsel, is flawed. This Court has recognized "the problem of permitting a defendant to establish a prima facie case of a constitutional deprivation simply by filing a self-serving affidavit." *State v. Drexler*, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. Yet, courts routinely shift the burden to the State based on a defendant's self-serving affidavit alleging that the prior court failed to conduct an adequate waiver colloquy, with no transcript demonstrating that the court actually erred.

When a defendant seeking plea withdrawal because of an allegedly inadequate waiver colloquy cannot point to a circuit court error evident on a transcript, she does not make a prima facie showing and shift the burden under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *State v. Negrete*, 2012 WI 92, ¶ 31, 343 Wis. 2d 1, 819 N.W.2d 749. If the defendant sufficiently alleges facts that would entitle her to relief, she is entitled to a hearing under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *Negrete*, 343 Wis. 2d 1, ¶ 33. But she still must prove that her plea was not knowing, and intelligent and voluntary. *Id.* ¶¶ 32–33.

The same procedure should apply for collateral attacks where no transcript demonstrates that the circuit court failed to ensure a valid waiver of counsel. With no evidence demonstrating a circuit court error, a defendant may be entitled to a hearing under *Bentley*. But she should retain the burden of proving that she did not waive counsel knowingly, intelligently, and voluntarily.

Here, Clark claimed that the circuit courts in two prior cases failed to give her the information required for her to validly waive counsel, but she produced no evidence

demonstrating that the circuit courts actually failed to give her that information. The circuit court concluded that Clark was entitled to a hearing, and it shifted the burden to the State to somehow prove that Clark understood the information that she alleged—but did not show—that the courts failed to give her. The court then granted Clark's motion invalidating her two prior convictions. As a result, even with no evidence demonstrating that the circuit courts in Clark's prior cases erred, her two convictions do not count for sentence enhancement. If Clark is convicted, it will be for a first offense (a civil forfeiture), rather than a fourth offense (a felony).

ARGUMENT

I. In a collateral attack on a prior conviction with no evidence showing an inadequate waiver-of-counsel colloquy, the burden should not shift from the defendant to the State.

A. Just like in a motion for plea withdrawal, a defendant who cannot point to a specific deficiency on the face of a transcript cannot make a prima facie showing and shift the burden under *Bangert*.

In its initial brief, the State explained why the same standards that apply to plea withdrawal motions where no transcript demonstrates an inadequate plea colloquy should also apply to collateral attacks where no transcript demonstrates an inadequate waiver-of-counsel colloquy. If no transcript demonstrates a circuit court error, the defendant cannot make a prima facie showing of a constitutional violation, and the *Bangert* burden-shifting procedure should not apply.

Clark's primary argument is that under current law, when no transcript is available, a defendant's affidavit alone is sufficient to shift the burden to the State to prove a valid waiver of counsel. (Clark's Br. 12–22.) Circuit courts currently decide collateral attack motion in this manner. That is why the State is seeking a rule establishing a new procedure.

Clark does not explain why the current procedure—under which the State is placed in "an untenable position" when a defendant simply files a self-serving affidavit with no evidence demonstrating a circuit court error, *Drexler*, 266 Wis. 2d 438, ¶ 11 n.6—makes sense. She opposes establishing the same procedure for collateral attacks without transcripts that applies to plea withdrawal motions without transcripts (Clark's Br. 20–21), but she provides no principled reason why the same procedure should not apply.

Clark argues that the State is wrong to rely on *Iowa v. Tovar*, 541 U.S. 77 (2004) as providing that on collateral attack, a defendant has the burden of proving a violation of her constitutional right to counsel. (Clark's Br. 28.) But it is, of course, the defendant's burden. Otherwise, the burden could not shift the State.

Clark seems to dispute that circuit courts in Wisconsin currently apply the *Bangert* burden-shifting procedure in collateral attacks. (Clark's Br. 12, 17.) She apparently believes that a different burden-shifting procedure applies for collateral attacks. (Clark's Br. 12, 17.)

But in *State v. Ernst*, 2005 WI 107, ¶ 31, 283 Wis. 2d 300, 699 N.W.2d 92, the supreme court adopted the *Bangert* procedure for collateral attacks once a defendant makes a prima facie showing of a violation of her right to counsel. The issues are what constitutes a prima facie showing in order to invoke the *Bangert* burden-shifting procedure, and what procedure applies when the defendant cannot make that showing.

Clark claims the State is contending that *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), and *State v. Drexler*, 266 Wis. 2d 438, incorrectly concluded that a defendant can make a prima facie showing with an affidavit alone. (Clark's Br. 12.)

But the State is not asserting that *Baker* was wrong, only that it should be limited. In *Baker*, the court concluded that under the circumstances of that case—where the State lost the transcript of the hearing at which the defendant entered a guilty plea, the defendant's affidavit was sufficient to shift the burden to the State to prove that he validly waived counsel. *Baker*, 169 Wis. 2d at 76–77.

In *Drexler*, this Court read *Baker* as providing that whenever a transcript is unavailable, a defendant can make a prima facie showing and shift the burden to the State with an affidavit. *Drexler*, 266 Wis. 2d 438, ¶ 10. The State believes that this is too broad a reading of *Baker*. *Baker* should be limited to circumstances like the ones in that case. When a transcript is unavailable because the defendant did not appeal her conviction and a transcript was therefore not prepared, and so much time has passed that the court reporter's notes have been destroyed by operation of law, a defendant's self-serving affidavit cannot reasonably be sufficient to overcome the presumption of regularity and shift the burden to the State.

Clark claims that the State believes a defendant cannot make a prima facie showing of a violation of her right to counsel without a transcript. (Clark's Br. 12) To the extent Clark means that a defendant cannot make a prima facie showing and shift the burden to the State without a transcript (absent negligence or misconduct), she is correct. But under *Bentley* a defendant can make a prima facie showing without a transcript, entitling her to a hearing at which she retains the burden of proving that her right to counsel was violated.

Clark claims that in *Ernst*, the supreme court held that "a defendant collaterally attacking a prior conviction can establish a prima facie case through an affidavit." (Clark's Br. 12–13). *Ernst* did say that an affidavit pointing to facts that demonstrate that 'she did not [waive counsel] knowingly, intelligently, and voluntary" is necessary to make a prima facie showing and invoke the *Bangert* burden-shifting procedure. *Ernst*, 283 Wis. 2d 300, ¶ 33. But *Ernst* did not say that an affidavit *alone* is sufficient to make a prima facie showing. In *Ernst*, a transcript evidenced the circuit court's inadequate colloquy. *Id.* ¶ 6. But the supreme court concluded that the defendant failed to make a prima facie showing because he failed to sufficiently allege that he did not understand the information that the transcript showed that the prior court failed to give him. *Id.* ¶ 26. The court did not say that the affidavit alone—without the transcript evidencing circuit court error—was enough to make a prima facie showing and shift the burden.

Clark argues that "the *Ernst* burden-shifting procedure applies to all collateral attacks no matter if transcripts exist or not." (Clark's Br. 15.) Some courts have incorrectly interpreted *Ernst* in that manner. That is why the State is seeking a new procedure, and why it has petitioned for bypass. The same procedure cannot reasonably apply to a collateral attack when there is *no* evidence demonstrating a circuit court error as when a transcript demonstrates a circuit court error. As the supreme court has explained, the *Bangert* burden-shifting procedure does not apply when the defendant does not point to evidence demonstrating circuit court error because: "(1) the defendant will not be able to make the requisite showing from the transcript that the circuit court erred in the plea colloquy, and (2) the rationale underlying *Bangert*'s burden shifting rule does not support extending that rule to situations where a violation is not evident from the transcript." *Negrete*, 343 Wis. 2d 1, ¶ 31.

Clark points out that the State made an argument similar to the one it now makes in *State v. Lebo*, No. 2014AP730-CR, 2015 WL 1525988 (Wis. Ct. App. April 7, 2015) (unpublished). (Clark's Br. 16; R-App. 201–16.) This Court did not adopt the State's argument because of "contrary case law." But this Court said the State's argument was "persuasive." *Lebo*, 2015 WL 1525988, ¶ 29 n.4 (R-App. 212–13). And this Court again discussed the problem of a defendant being able to make a prima facie showing of a violation without evidence demonstrating that the circuit court erred. *Id.* (R-App. 212–13) (citing *Drexler*, 266 Wis. 2d 438, ¶ 11 n.6). The court of appeals recognized in *Lebo* that "Adopting a *Nelson*/*Bentley*-type procedure for collateral attack motions where transcripts of the prior proceedings are unavailable would alleviate this problem because the defendant would retain the burden of proof." *Id.* [1]

Clark notes that "the State devotes numerous pages of its brief discussing plea withdrawal cases." (Clark's Br. 20.) She dismisses the "State's plea withdrawal analogy." (Clark's Br. 20–21.) But in *Ernst* the supreme court adopted the same *Bangert* burden-shifting procedure that applies in plea withdrawals. *Ernst*, 283 Wis. 2d 300, ¶ 31. And it adopted the same requirement for a prima facie showing that applies in plea withdrawals. *Id.* ¶ 25 (citing *State v. Hampton*, 2004 WI 107, ¶ 57, 274 Wis. 2d 379, 683 N.W.2d 14.)

Moreover, in collateral attacks a defendant usually claims that she did not validly waive counsel at the plea hearing. The same transcript that contains the plea colloquy will also contains the waiver colloquy. And in some cases—like this one—a defendant collaterally attacks a prior conviction on a ground that would also support a motion for

[1] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

plea withdrawal—a court's alleged failure to inform her of the maximum penalty.

Had Clark moved to withdraw her pleas on the ground that the circuit courts allegedly failed to tell her the maximum penalty, she would not have made a prima facie showing and the *Bangert* burden-shifting procedure would not have applied. *Negrete*, 343 Wis. 2d 1, ¶¶ 32–33. Yet, when Clark collaterally attacked her convictions on the same ground, alleging inadequate colloquies at the same plea hearings, the burden somehow shifted. It is the same *Bangert* burden-shifting procedure, and the same requirements for a prima facie showing. The State is unable to discern any principled reason why the same standards should apply differently. And *Clark* has offered no reason.

B. On collateral review, the presumption of regularity overcomes the presumption against waiver.

In its initial brief, the State relied on *Parke v. Raley*, 506 U.S. 20, 29 (1992), for its analysis of the dueling presumptions that exist when there is no transcript of a plea hearing—the presumption against a waiver of rights from a silent record, and the presumption of regularity that attaches to a final judgment. *Parke* concluded that the presumption against waiver should not be imported into a collateral review of a final conviction, because doing so would ignore "the presumption of regularity" that attaches to a final conviction. *Id.* The Court reasoned that when a circuit court is required to inform a defendant of his rights, and no transcript shows that the court failed to do so, on collateral review "it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to government misconduct) that the defendant was not advised of his rights." *Id.* at 30.

Clark claims that the State's reliance on *Parke* is misplaced, and that *Parke* actually undercuts the State's position. (Clark's Br. 22–28.) But she fails to address *Parke's* conclusion that where no transcript exists because the defendant did not appeal her conviction and so much time passed that the court reporter's notes were destroyed by operation of law, the presumption of regularity prevails over the presumption against waiver.

Clark points out that *Parke* does not hold that a defendant cannot meet her burden without a transcript, with just an affidavit. (Clark's Br. 25.)

True, but that wasn't the issue in the case. And the Wisconsin Supreme Court has determined that in plea withdrawals, an affidavit is insufficient to shift the burden under *Bangert*: "practically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." *Negrete*, 343 Wis. 2d 1, ¶ 32. The same logically applies to collateral attacks.

Clark claims that *Parke* approved of a procedure much like Wisconsin's. (Clark's Br. 26.) But *Parke* approved of Kentucky's procedure, under which a final judgment was presumed regular, and the defendant had the burden of overcoming that presumption by "produc[ing] evidence that his rights were infringed or some procedural irregularity occurred in the earlier proceeding." *Parke*, 506 U.S. at 24. In Wisconsin, courts routinely ignore the presumption of regularity and shift the burden based on the defendant's allegation of circuit court error.

Clark claims that in *Baker*, the Wisconsin Supreme Court "set forth a burden-shifting procedure that harmonizes" the presumption against waiver and the presumption of regularity. (Clark's Br. 30) But *Baker* court concluded only that the defendant overcame the presumption of regularity

"under the circumstances of this case," in which a transcript that should have been available was lost. *Id.* at 76.

In a case with no evidence of negligence or misconduct, a defendant's mere allegation cannot reasonably overcome the prior conviction's presumption of regularity. It makes no sense that a final judgment is presumed regular, but only until a defendant challenges it.

Baker should be limited to cases in which a transcript is unavailable due to negligence or misconduct. In a normal case, like this one, a court should presume that the judgment was obtained in a regular manner, and that the prior court complied with its required duties. To overcome that presumption requires more than a defendant's self-serving affidavit. "[P]ractically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." *Negrete*, 343 Wis. 2d 1, ¶ 32.

II. Clark failed to prove that she was denied the right to counsel, so her collateral attack motion should have been denied.

As the State explained in its initial brief, Clark did not make a prima facie showing sufficient to shift the burden to the State. Her affidavit was sufficient to entitle her to a hearing under *Bentley*, but her testimony at the hearing was insufficient to prove that she did not waive counsel knowingly, intelligently, and voluntarily.

Clark argues that the court did not shift the burden based only on her affidavit, and that her affidavit and testimony were sufficient to shift the burden. (Clark's Br. 31–34.) And she claims that the State failed to prove she waived counsel knowingly, intelligently, and voluntarily in her prior cases. (Clark's Br. 34–37.)

But the *Bangert* burden-shifting procedure should not have applied because there was no evidence *showing* that the prior circuit courts erred. The motion should have been decided under *Bentley*. Clark's testimony that the courts erred did not overcome the presumption of regularity, so her motion should have been denied.

Clark claims that even under *Bentley*, she proved that her right to counsel was violated in her prior cases. (Clark's Br. 37–40.) She asserts that "the circuit court accepted [her] version of what happened during the previous proceedings." (Clark's Br. 38.) But the court left little doubt that it did not believe Clark, but felt it had to grant her motion because the State could not prove that she validly waived counsel. (R. 68:12, A-App. 182.) Had the court properly presumed the regularity of the prior convictions, and not shifted the burden with no evidence demonstrating a circuit court error, there can be no serious doubt that the court would have denied Clark's collateral attack motion.

Clark also argues that if this Court adopts the State's argument that *Bentley*, rather than *Bangert*, applies because there is no transcript demonstrating circuit court error, it should remand to give her an opportunity to satisfy her burden. (Clarks Br. 40–41.) Clark does not explain what other evidence she would present to attempt to prove that she did not waive counsel knowingly, intelligently, and voluntarily. If this Court were to determine that Clark should be afforded another opportunity to present the same evidence again, it could remand for a second hearing under the proper standards.

CONCLUSION

This Court should reverse the circuit court's order granting Clark's collateral attack motion.

Dated this 22nd day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2992 words.

Dated this 22nd day of April 2021.

Electronically signed by:

s/ Michael C. Sanders
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 22nd day of April 2021.

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