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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP55-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT BAUR,

Defendant-Respondent.

ON APPEAL FROM A NON-FINAL ORDER GRANTING THE DEFENDANT'S MOTION COLLATERALLY ATTACKING A PRIOR OWI CONVICTION, IN PORTAGE COUNTY BRANCH 2, THE HON. ROBERT SHANNON PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. In an OWI collateral attack motion hearing, whether assertions made in a defendant's affidavit are alone sufficient, without any record in a transcript or documents from the court's file, to shift the burden to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was free, knowing, and voluntary. This issue is recently bypassed to the Wisconsin Supreme Court in ***State of Wisconsin v. Teresa L. Clark***, Appeal No. 20AP1058-CR). The question is whether current practice of circuit courts in collateral attack motion hearings is a correct interpretation of the law.

The circuit court ruled that the burden shifted to the State based only on the assertions made in the defendant's affidavit.

2. Whether the State proved that the defendant's 1995 waiver of counsel was free, voluntary and knowing, when his testimony established he was previously represented by an attorney in a criminal matter and decided that he did not want an attorney because he was satisfied with the offer made by the prosecutor and didn't want to pay for an attorney.

The circuit court ruled that the State did not meet the burden of showing the defendant's waiver was free, knowing, and voluntary, characterizing it as "practically, an extremely difficult burden…" (59:25)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of this Court's opinion may be appropriate to provide guidance to circuit courts in deciding collateral attack motions when no evidence shows that a circuit court failed to give the defendant the information required to validly waive the right to counsel in a prior case.

STATEMENT OF THE FACTS AND CASE

In a criminal complaint filed October 24, 2017, the State of Wisconsin charged Robert Baur with Operating a Motor Vehicle While Intoxicated as a 3rd offense, and Operating with a Prohibited Alcohol Concentration as a 3rd offense. (5; A-AP2). According to the complaint, Baur was arrested on September 22, 2017, by an officer from the Stevens Point Police Department. The officer responded to the Taco Bell on Highway 10 East in the City of Stevens Point because an employee of the Taco Bell called to report an intoxicated driver. The officer located Baur in his vehicle in the parking lot. After field sobriety testing Baur was arrested for OWI as a third offense. Baur's blood was drawn and was later tested at the State Lab of Hygiene, showing a result of .186% ethanol in Baur's blood. The complaint states that department of transportation records show Baur has convictions for Operating While Intoxicated in 1992 and 1995.

On September 8, 2020, Baur filed a motion collaterally attacking the 1995 conviction for OWI 2nd offense, which occurred in Kenosha County. (49; A-AP 6). The motion requests that the circuit court in this OWI 3rd case vacate that prior conviction for OWI 2nd for purposes of OWI counting rules, based solely on the representations in an affidavit signed by Baur and attached to the motion. The motion concedes that that circuit court record from that 1995 Kenosha case does not contain a transcript nor a waiver of right to counsel form. (49; A-AP 7, ¶ I. 3.) The motion further asserts, based on Baur's affidavit alone:

> "the circuit court judge failed to advise Mr. Baur how counsel could benefit him in terms of negotiating his case with the prosecutor, subpoenaeing witnesses on his behalf; identifying legal and factual issues in his defense, binging pretrial motions on his behalf; etc."

Baur's affidavit contains several interesting representations. According to Baur, he was not represented by an attorney in the OWI 2nd in 1995, and that he was

"never represented by an attorney for any *alcohol-related traffic violation*" and as such he did not understand the assistance an attorney could provide. (49, A-AP 12, ¶ 3, *emphasis added*). Baur further asserts that "at no time during my court appearance" did the court advise him that an attorney could discover defenses to the charge. (49, A-AP 12, ¶ 5). According to Baur's affidavit, had he known an attorney could assist him "beyond what I had already discussed with the prosecutor, I would have sought a lawyer to assist me." (49, A-AP 13, ¶ 8).

The Court heard Baur's collateral attack motion on December 9, 2020. (59; A-AP 14-40). At the beginning of the hearing, the State requested an adjournment of the hearing so that it could file a brief regarding the burden shifting process in collateral attack motions. (59:4-6; A-AP 17-19). Though the defendant did not object to this request, the court ordered the hearing to commence. (59:6; A-AP 19). The court instructed defense counsel to proceed with the motion, and defense counsel pointed out that he filed a motion with an affidavit from Baur, implying that the defense was relying solely on the affidavit to establish a prima facie case. (59:6; A-AP 19). The court then asked the State whether it wished to call Baur to testify. The State informed the Court that it again objected to the burden being shifted to the State based solely on the defendant's affidavit. (59:6; A-AP 19). The court advised the State that the "issue will be preserved for appeal." (59:6).

Baur was questioned by the prosecutor by phone through the court's Zoom system. (59:3; A-AP 16). Baur testified that the first time he was charged with a criminal offense was in 1990, though this is most likely the 1992 conviction for OWI. (59:8; A-AP 21). Baur said that this 1990 matter was an OWI charge, and that it was a misdemeanor. Baur testified that he did not receive jail time, only fines. Baur testified that he had an attorney in that case. (59:8; A-AP 21). Later in his testimony, Baur clarified that he was also charged with fleeing an officer in the same matter. (59:8; A-AP 21). Baur identified the attorney by name, and said that these charges occurred in Brown County. Baur agreed that the attorney helped him

get a better result than he would have had otherwise. (59:15; A-AP 28). Baur also agreed that his attorney explained his rights to him, and that he received a significant benefit by having counsel, as the fleeing was dismissed and he only pled to the OWI first. (59:15; A-AP 28).

Baur testified he did not have an attorney in the 1995 OWI 2nd from Kenosha County. (59:9; A-AP). Baur first said, "I didn't at that point feel I needed one." (59:9; A-AP 22). He elaborated by saying that he didn't know if it would have made a difference or not in the case, and "it cost me money in the first offense." (59:9; A-AP 22). At the time of the 1995 case, he did not believe there was value to having an attorney. (P-AP 22) because he talked to the prosecutor, who conveyed the penalties Baur would receive if he pled, and "I believe it was close to minimum fines and costs." (59:10; A-AP 23). He ultimately pled guilty or no contest, and he was sentenced to fines and costs and thirty days in jail. (59:9-10; A-AP 22-23). Baur testified that "I don't recall everything that was discussed in it, as far as the details…" regarding the plea hearing in 1995. (59:11; A-AP 24). The State asked Baur about a number of rights the circuit court judge would have reviewed with him, such as the right to a jury trial, a unanimous jury, the right to confront witnesses, and other things. Baur said he did not recall whether those things were discussed, and was not sure about the details of his plea hearing in 1995:

> Well, I'm not a hundred percent sure because at that point it's -- I was more concerned about what I was going to be facing in the time and the money and everything else with that. So as far as any of the details, it was 25 years ago, you know. (59:13; A-AP 26).

Baur further explained that "a lot of it may go over my head." (59:14; A-AP 27).

Baur's complaint about his right to an attorney is really that the judge presiding over the 1995 case should have advised him to get an attorney. Baur testified that if someone had told him that "I would be better off getting an

attorney to fight this, I think I would have probably took that advice..." (59:11-12; A-AP 24-25). During questioning the State pointed out that the judge is not required to advise defendants to get an attorney, and may only advise a defendant that he has the right to counsel and the right to self-representation. Baur responded: "I guess so, I don't know." (59:12; A-AP 25). At this point Baur made the statement "a lot of it may go over my head…" (59:13; A-AP 26).

At the conclusion of Baur's testimony the State argued that Baur made a free, knowing and voluntary choice to proceed without counsel in the 1995 matter. The State argued Baur was previously represented by counsel in another matter where he received significant assistance including the dismissal of a fleeing charge, Baur said he didn't see a value in paying for an attorney, so he talked to the prosecutor and settled for something close to a minimum penalty. (59:23; A-AP 36).

The circuit court ruled that the State had not met its burden:

> And based on the affidavit and Mr. Baur's testimony, the court is not satisfied that it can determine that he made a knowing, voluntary and intelligent waiver of his right to be represented by counsel. It is a pity that the record here apparently was destroyed. We don't know what was in that record. (59:24; A-AP 37)

The Court further ruled:

> So the court notes that the burden of the state, based on the prima facie showing is to overcome the presumption of non-waiver clearly and convincingly. Under these circumstances, that is practically an extremely difficult burden for the state. (59:25; A-AP 38)

The Court later entered a written order granting the defendant's collateral attack motion. (51; A-AP 1). The State filed a petition for leave to appeal the non-final order. The Court of Appeals granted the motion and issued an order allowing the State to file this appeal. (56).

STANDARD OF REVIEW

Whether a defendant waived her right to counsel knowingly, intelligently, and voluntarily is a question of law reviewed de novo. ***State v. Ernst***, 2005 WI 107, ¶ 10, 283 Wis. 2d 300, 699 N.W.2d 92. Whether a defendant has satisfied the burden of showing a prima facie violation of the right to counsel also presents a question of law reviewed de novo. ***Id***.

ARGUMENT

I. A defendant collaterally attacking a prior conviction has the burden to show that he did not validly waive counsel in the prior case. A defendant's mere allegation that the court failed to properly accept the waiver of counsel is not sufficient to shift the burden to the State to prove a valid waiver.

A. A circuit court that accepts a defendant's waiver of counsel is required to ensure that the waiver is knowing, intelligent, and voluntary.

A defendant charged with a crime is entitled to counsel at a plea hearing. ***Iowa v. Tovar***, 541 U.S. 77, 87 (2004). A defendant may waive counsel. ***Id***. In accepting a defendant's waiver of counsel, a trial court is required to give the defendant sufficient information to ensure that the waiver is knowing, intelligent, and voluntary. ***Id***. at 87–88 (*citing* ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938)). The Sixth Amendment is satisfied at the guilty plea stage when the trial court informs the person of the nature of the charges, the right to an attorney for the plea, and the potential penalties the person faces. ***Id***. at 81. A court accepting a waiver of counsel, like a court accepting a waiver of the right to a trial, is required to create a record showing the waiver. ***Carnley v. Cochran***, 369 U.S. 506, 516 (1962); ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969).

In Wisconsin, a trial court is required to conduct a personal colloquy to ensure that a waiver of counsel is knowing and voluntary. ***Ernst***, 283 Wis. 2d 300, ¶ 20; ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). In addition to the information required by the Sixth Amendment, the court is also required to advise the defendant about the difficulties and disadvantages of self-representation. ***Ernst***, 283 Wis. 2d 300, ¶ 14; ***Klessig***, 211 Wis. 2d at 206. Before ***Klessig***, a court was not required to conduct a colloquy with a defendant, but it was required that the record reflect the defendant's "deliberate choice to proceed without counsel," as well as "his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty." ***Pickens v. State***, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980), overruled by ***Klessig***, 211 Wis. 2d 194.

In ***Klessig***, the supreme court overruled ***Pickens*** "to the extent that we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." ***Klessig***, 211 Wis. 2d at 206. The supreme court required a circuit court to "conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self- representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." ***Id***. In ***Ernst***, the supreme court affirmed that the waiver colloquy mandated in ***Klessig***, while not required by the Sixth Amendment, is required under the supreme court's superintending and administrative authority. ***Ernst***, 283 Wis. 2d 300, ¶¶ 19–20.

B. A defendant collaterally attacking a prior conviction on the ground that her right to counsel

was violated in the prior case must prove that she did not waive counsel knowingly, intelligently, and voluntarily.

When the State proposes to use the fact of a prior conviction to enhance the sentence for a subsequent offense, a defendant may collaterally attack the conviction. ***State v. Hahn***, 2000 WI 118, ¶¶ 17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. A collateral attack 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." ***Ernst***, 283 Wis. 2d 300, ¶ 22 n.5 (***quoting State v. Sorenson***, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354). A defendant may collaterally attack a prior conviction only on the ground of a violation of the constitutional right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶ 22 (*citing* ***Hahn***, 238 Wis. 2d 889, ¶ 17).

A presumption of regularity "attaches to final judgments, even when the question is waiver of constitutional rights." ***Parke v. Raley***, 506 U.S. 20, 29 (1993) (*citing* ***Johnson***, 304 U.S. at 464. A defendant who collaterally attacks a prior uncounseled conviction has the burden of proving that she did not waive her right to counsel knowingly, intelligently, and voluntarily. ***Tovar***, 541 U.S. at 92. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." ***Parke***, 506 U.S. at 30. A court may therefore presume "that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." ***Id***.

C. When a defendant collaterally attacking a prior conviction makes a prima facie showing that her right to counsel was violated in the prior case, the burden shifts to the State to prove that she validly waived counsel.

In ***Bangert***, 131 Wis. 2d 246, the Wisconsin Supreme Court established a burden-shifting procedure for plea withdrawal motions based on a circuit court's failure to comply with its mandatory duties in accepting a guilty plea. The supreme court held that a defendant moving to withdraw a plea on the ground that the court failed to give her the information required for a valid guilty plea has the initial burden of making a prima facie showing that the court failed to provide the required information. ***Id***. at 274. When the defendant has "shown" a prima facie violation or failure by the court, and alleges that she did not know or understand the information the court failed to give her, the burden shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." ***Id***.

In ***Klessig***, the supreme court adopted the ***Bangert*** burden-shifting procedure for direct attacks on a conviction alleging an invalid waiver of counsel in which the waiver colloquy is inadequate. ***Klessig***, 211 Wis. 2d at 207.

In ***Ernst***, the supreme court adopted the ***Bangert*** burden-shifting procedure for collateral attacks on prior convictions when a defendant makes a prima facie showing that her right to counsel was violated in the prior case. ***Ernst***, 283 Wis. 2d 300, ¶ 25. The supreme court relied on ***State v. Hampton***, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14, for what a defendant must do to make a prima facie showing and shift the burden under ***Bangert***. ***Ernst***, 283 Wis. 2d 300,¶ 25.

In ***Hampton***, the court said that in a claim "based upon defects in the plea colloquy," a defendant "will rely on the plea hearing record." ***Hampton***, 274 Wis. 2d 379, ¶ 47. And the burden shifts when "the defendant's motion shows a violation" of the trial court's mandatory duties, "and alleges that he in fact did not know or understand the information which should have been provided" in the previous proceeding. ***Id***. ¶ 46. Once the burden shifts, the State must prove by clear and convincing evidence that the

defendant waived counsel knowingly, intelligently, and voluntarily, notwithstanding the trial court's failure to adequately inform the defendant of her right to counsel. ***Ernst***, 283 Wis. 2d 300, ¶ 27.

D. When no transcript showing a defective waiver of counsel is available, a defendant cannot show a prima facie violation of her right to counsel based on mere allegations, so the burden should not shift to the State.

The supreme court in ***Ernst*** explained that the Bangert burden-shifting procedure applies when the defendant makes a prima facie showing of a denial of a constitutional right, by pointing to evidence showing that the court in the prior case failed to give her the required information, and alleging that she did not understand the information the court failed to give her. ***Ernst***, 283 Wis. 2d 300, ¶ 25. The court said nothing suggesting that a defendant can make a prima facie showing and shift the burden by merely alleging, rather than showing, that the trial court failed to give her the required information. The same burden-shifting procedure cannot reasonably apply in that situation, where the defendant does not "rely on the plea hearing record." ***Hampton***, 274 Wis. 2d 379, ¶ 47.

In ***Bangert***, the supreme court "implemented a new approach" to remedy a court's failure to comply with its required duties in accepting a guilty plea, ***Bangert***, 131 Wis. 2d at 274. The court said that the burden shifts "Where the defendant has shown a prima facie violation of Section 971.08 or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing." Id. The burden does not shift when the defendant alleges that the court failed in its mandatory duties and alleges that he did not understand the information that she alleges the court failed to give him. The burden shifts when the defendant shows that the court failed in its mandatory duties and alleges that he did not understand the information that he shows that the court failed to give him.

The Wisconsin Supreme Court has made it clear that the ***Bangert*** burden-shifting procedure does not apply when a defendant cannot show that the circuit court failed to give her the required information for her to waive a constitutional right.

In ***Hampton***, the supreme court confirmed that the Bangert burden-shifting procedure does not apply when the defendant cannot show that the circuit court failed to give required information: "Bangert-type cases are confined to alleged defects in the record of the plea colloquy." ***Hampton***, 274 Wis. 2d 379, ¶ 51 (emphasis added). "The initial burden rests with the defendant to make a pointed showing that the plea was accepted without the trial court's conformity with§ 971.08 or other mandatory procedures." ***Id.*** ¶ 46 (*citing* ***Bangert***, 131 Wis. 2d at 274). "To obtain an evidentiary hearing based upon defects in the plea colloquy, the defendant will rely on the plea hearing record." Id. ¶ 47.

In ***State v. Balliette***, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, the supreme court explained that "[i]n a Bangert-type case, the defendant points to a specific deficiency in the plea colloquy and asserts that he lacked the requisite understanding to make a knowing, intelligent, and voluntary plea." Id. ¶ 55. The court said, "Because evidence to support the defendant's motion is contained in the court transcript, the State bears the burden of proof in any Bangert hearing." ***Id.***

In ***State v. Negrete***, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, another plea withdrawal case, the supreme court explicitly rejected the argument that a defendant can show a prima facie violation of a constitutional right by merely alleging that the court failed to give him the information required for her to validly waive the right. Id. ¶¶ 20, 30–33.

The defendant in ***Negrete*** moved to withdraw his plea, alleging that the trial court failed to inform him about possible deportation upon conviction of a felony. ***Negrete***, 343 Wis. 2d 1, ¶ 5. There was no transcript of the plea hearing. ***Id.*** ¶ 7. The supreme court concluded that because

the defendant was unable to point to a defect in the plea colloquy, the ***Bangert*** burden-shifting procedure did not apply. ***Id.*** ¶ 20. In making this determination, the supreme court cited ***Hampton*** and ***Ernst***. Id. ¶¶ 30–31. The court explained that the Bangert burden-shifting procedure applies "when: (1) the defendant can point to a plea colloquy deficiency evident in the plea colloquy transcript, and (2) the defendant alleges that he did not know or understand the information that should have been provided in the colloquy." ***Id.*** ¶ 19 (*citing* ***Bangert***, 131 Wis. 2d at 274–75; ***Hampton***, 274 Wis. 2d 379, ¶ 46).

With no transcript showing a defect in a required colloquy, "Bangert's burden shifting procedure is not applicable. " ***Id.*** ¶ 20. The court reasoned that "the Bangert procedure is predicated on a defendant making 'a pointed showing' of an error in the plea colloquy by reference to the plea colloquy transcript." ***Id.*** ¶ 20 (*citing* ***Hampton***, 274 Wis. 2d 379, ¶ 46). The supreme court noted that "Bangert contemplated a shift in the burden of proof from the defendant to the State based upon a showing of a deficiency in the plea colloquy transcript." ***Id.*** ¶ 30 (*citing* ***Bangert***, 131 Wis. 2d at 274–75). The court added that "the necessary showing requires a defendant to point to specific deficiencies evident on the face of the plea colloquy transcript." ***Id.*** (*citing* ***Hampton***, 274 Wis. 2d 379, ¶ 51). "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." ***Id.*** ¶ 31. And the court recognized that "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." ***Id.*** ¶ 32.

In ***Ernst***, the supreme court adopted the same ***Bangert*** burden-shifting procedure that it has explained does not apply when a defendant cannot show a defect in the court's required colloquy. Nothing in ***Ernst*** even suggests that a defendant can make a prima facie showing and shift the burden without actually showing that the court in the prior case failed to give her the information required for her to validly waive counsel.

The supreme court recognized in ***Hampton***, ***Balliette***, and ***Negrete*** that when a defendant moves to withdraw her plea but does not show that the trial court failed to give her the information required for a valid waiver of her right to a trial, she does not make a prima facie showing and the ***Bangert*** burden-shifting procedure does not apply. There is no reason to think that the rule for those plea withdrawal cases is somehow different than the rule for collateral attacks. After all, the supreme court in ***Ernst*** adopted the same ***Bangert*** burden-shifting procedure that applies in plea withdrawal cases, and the same requirements for a prima facie showing. ***Ernst***, 283 Wis. 2d 300, ¶¶ 25, 31 (*citing* ***Hampton***, 274 Wis. 2d 379, ¶ 57; ***Bangert***, 131 Wis. 2d at 274).

The information that a court is required to give a defendant for a valid waiver of counsel is very similar to the information the court must give for a valid guilty plea, and in most cases, the court will be conducting the waiver of counsel colloquy at the plea hearing. In both situations, the court is required to inform the defendant of the seriousness of the charges and the potential penalties. *See* ***Klessig***, 211 Wis. 2d at 206; Wis. Stat. § 971.08.

The State acknowledges that in ***State v. Bohlinger***, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, the court of appeals concluded that a defendant can make a prima facie showing that he was denied the right to counsel without even alleging that the court's required waiver colloquy was defective. ***Id***. The court said that in ***Ernst***, the supreme court did "not hold that a defendant must allege a defective colloquy in order to state a prima facie case." ***Id***. ¶ 18. The court concluded in ***Bohlinger*** that the defendant made a prima facie showing that his right to counsel was violated even though the trial court properly gave him all the information required for him to validly waive counsel, because he was intellectually incapable of understanding the information. ***Id***. ¶ 20. The court held that because the defendant was incapable of understanding the information the court gave him, and could not waive counsel knowingly, intelligently, and voluntarily, the burden shifted

to the State to prove that he somehow had waived counsel knowingly, intelligently, and voluntarily. ***Id***. ¶¶ 20–21.

Though the court of appeals correctly concluded that the defendant in ***Bohlinger*** was entitled to a hearing on his claim that his waiver of counsel was not knowing, intelligent, and voluntary, the court's application of the ***Bangert*** burden-shifting procedure was incorrect.

As the court noted in ***Ernst***, the supreme court explained the type of allegations a defendant must make in order to make a prima facie showing of a violation of the defendant's right to counsel. ***Bohlinger***, 346 Wis. 2d 549, ¶ 18 (*citing* ***Ernst***, 283 Wis. 2d 300, ¶¶ 25–26). But ***Ernst*** did not say that those allegations alone would be sufficient to make a prima facie showing. In ***Ernst***, a transcript of the plea hearing at which the defendant waived counsel in the prior case showed that the court had not conducted an adequate waiver colloquy. ***Ernst***, 283 Wis. 2d 300, ¶ 6. In particular, the trial court said nothing about the difficulties and disadvantages of self-representation. ***Id***. While the Sixth Amendment does not require a court to inform a defendant about the difficulties and disadvantages of self-representation, id. ¶ 15 (*citing* ***Tovar***, 541 U.S. at 81), courts in Wisconsin are required to do so, id. ¶ 14 (*citing* ***Klessig***, 211 Wis. 2d at 206). That is why ***Ernst*** addressed whether a collateral attack could be based on a violation of the ***Klessig*** requirements, rather than only on a violation of the Sixth Amendment right to counsel. Id. ¶¶ 22– 26.

The supreme court in ***Ernst*** determined what procedures apply "when the defendant makes a sufficient prima facie showing on a collateral attack." ***Ernst***, 283 Wis. 2d 300, ¶ 27. When the defendant has made a prima facie showing, "then the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered." ***Id***. The supreme court thus adopted the ***Bangert*** burden-shifting procedure for a collateral attack on a prior conviction when the defendant made a prima facie showing that her right to counsel was violated in the prior case. Id. ¶¶ 25, 27. The supreme court also explained what a

defendant must allege to make a prima facie showing of a violation of the right to counsel when a transcript shows that the trial court failed to give the defendant the information required for her to validly waive counsel. ***Id.*** ¶¶ 25–26.

The supreme court in ***Ernst*** concluded that the defendant failed to make a prima facie showing that his right to counsel was violated in the prior case; therefore, the burden did not shift to the State and the defendant's collateral attack motion failed. ***Id.***

Bohlinger, on the other hand, is a proper example of a motion that should be analyzed under ***Bentley***, 201 Wis. 2d 303, rather than under ***Bangert***, 131 Wis. 2d 246, because it does not depend on a showing of a violation of the court's required duties in accepting a waiver of counsel. *See* ***Negrete***, 343 Wis. 2d 1, ¶¶ 3, 33. Under ***Bentley***, if a defendant alleges sufficient facts in his motion that, if true, would entitle her to relief, he is entitled to a hearing to prove that he did not waive counsel knowingly, intelligently, and voluntarily, regardless whether the circuit court gave him the required information. The State will further discuss this type of motion, in section I. F. of this brief.

Bohlinger's conclusion that the Bangert burden-shifting procedure can be applied without a showing that the trial court failed to provide information required for a waiver of a constitutional right is contrary to supreme court opinions in ***Bangert***, ***Hampton***, ***Balliette***, ***Negrete***, and ***Ernst***.

E. When a transcript of a waiver of counsel is not available for reasons other than the State's misconduct or negligence, a defendant collaterally attacking the prior conviction must overcome the presumption that a final conviction was regular, and that the court in the prior case performed its required duties in accepting the waiver.

In Wisconsin, court records in OWI cases are often destroyed long before a defendant moves to collaterally attack a prior conviction:

> The Supreme Court's Record Retention Rules provide a limited "shelf life" for court records that will be needed to counter collateral attacks of prior drunk driving convictions: (1) court reporter's notes are destroyed after ten years, SCR 72.01(47); (2) traffic forfeiture case files and related documents are destroyed after five years, SCR 72.01(24), (24a) and (24m); and (3) misdemeanor case files and related documents are destroyed after twenty years, SCR 72.01(18), (19) and (20). ***State v. Drexler***, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182.

The same is true in other states. *See, e.g.*, ***People v. Galland***, 197 P.3d 736 (Cal. 2009) (Under Government Code Sections 68152 and 68153, records in non- capital cases may be destroyed after 10 years.). In Wisconsin, when a defendant does not appeal a conviction, a transcript is generally not prepared. Since court reporters' notes are destroyed after ten years, **SCR 72.01(47)**, it is not unusual for there to be no transcript showing a defendant's waiver of counsel at a plea hearing or a waiver hearing.

The issue that routinely arises is: what procedure should courts follow to decide collateral attack motions made after court reporter's notes, and transcripts if any were prepared, have been destroyed?

In ***Drexler***, this Court said that "under Wisconsin law," when a transcript is unavailable, "a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." ***Drexler***, 266 Wis. 2d 438, ¶ 10. This Court relied on ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), which it read as providing that "when a defendant mounts a collateral attack on a prior conviction challenging a denial of the right to counsel and there are no transcripts available, a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." ***Drexler***, 266 Wis. 2d 438, ¶ 10 (*citing* ***Baker***, 169 Wis. 2d at 77–78). This Court recognized that "the State is placed in an untenable position under ***Baker*** if

a defendant collaterally attacking a prior conviction can meet his or her burden of proof by simply filing an affidavit recounting his or her version of what occurred five, ten, twenty or twenty-five years earlier." ***Id***. ¶ 11 n.6. This Court said that "it is necessary for the supreme court to re-examine ***Baker***." ***Id***.

The State agrees that Baker should be re-examined if it is stands for the broad proposition that when a transcript is unavailable, a sufficient affidavit is always enough to shift the burden to the State. But the State respectfully asserts that in ***Drexler*** this Court read ***Baker*** too broadly. The ***Baker*** court considered the unique circumstance of a transcript that should have been available, but was lost, presumably by the State. The supreme court concluded that under that circumstance, a defendant's affidavit was sufficient to make a prima facie showing. It did not provide that when there is no transcript by *proper* operation of law, a defendant can make a prima facie showing of a denial of her right to counsel, and shift the burden to the State, simply by alleging a denial of the right to counsel in an affidavit.

In ***Baker***, the defendant had four convictions for operating a motor vehicle after revocation (OAR). ***Baker***, 169 Wis. 2d at 56. He collaterally attacked two of them, the second and third convictions. Id. at 58. The supreme court considered a transcript of the plea hearing for the third OAR conviction, which demonstrated that the defendant was not present when the trial court accepted his guilty plea. ***Id***. at 71–73. The court applied the ***Bangert*** burden-shifting procedure, noting that in ***Bangert***, it had "stated that when a defendant shows a prima facie violation of **sec. 971.08**, the state bears the burden of showing that the plea was entered knowingly, voluntarily, and intelligently." ***Id***. at 74. The court concluded that the transcript of the plea hearing showed that the plea-taking process "facially violated sec. 971.08(1)." ***Id***. at 75. The court concluded that since the defendant made a prima facie showing of a violation, "The burden thus shifts to the state to show that Baker knowingly, voluntarily and intelligently entered the plea and waived his constitutional rights." ***Id***.

For Baker's second OAR conviction, which had been entered only four years previously, id. at 56, there was no transcript showing a violation of the trial court's duties in accepting the defendant's plea: "The transcript of the proceedings of this earlier conviction is not available; it has been lost." ***Id***. at 76. The defendant submitted an affidavit asserting that he had not waived counsel. ***Id***. at 77. In analyzing the defendant's second OAR conviction, the court seemingly recognized that the Bangert burden-shifting procedure did not apply, since the defendant did not show that the trial court had failed to conduct an adequate colloquy. The court did not even mention ***Bangert*** in analyzing the defendant's collateral attack on his second OAR conviction.[1]

The court instead fashioned a procedure to decide the collateral attack "under the circumstances." ***Id***. at 77. The court concluded that with his affidavit, "Baker met his burden of production under the circumstances of this case." ***Id***. at 78. The court noted that a conviction carries a presumption of regularity, but also that courts "indulge in every reasonable presumption against waiver of counsel." ***Id.*** at 76. The court rejected the idea that since the transcript was lost, the defendant should have "attempted to reconstruct the trial record from court minutes, docket entries, and testimony of people who were present at the proceeding in question." ***Id***. at 77. The court therefore concluded that the defendant made a prima facie showing because he "met his burden of production under the circumstances of this case." ***Id***. at 78.

The "circumstances" in ***Baker*** included the fact that the transcript of the colloquy was mistakenly lost. ***Id***. at 76. The only evidence showing what the trial court did in accepting the defendant's plea was the minutes sheet, which showed only that the defendant was not represented and pled guilty. ***Id***. at 76. The line on the minutes sheet stating, "All rights explained by the Court" was not marked.

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[1] In ***State v. Negrete***, Justice Abrahamson, who authored ***Baker***, said that Negrete was "not a Bangert case because there is no transcript." ***State v. Negrete***, 2012 WI 92, ¶ 61 n.13, 343 Wis. 2d 1, 819 N.W.2d 749 (Abrahamson, C.J., dissenting).

Id. And in 1986 when the defendant entered his plea, trial courts were not required to conduct a waiver-of-counsel colloquy to accept an uncounseled defendant's plea. That requirement was imposed in 1997. *See* ***Klessig***, 211 Wis. 2d at 206.

The supreme court had no reason to presume that the trial court had informed the defendant of the right to counsel. After all, the court knew that in the third OAR case, the same trial court did not follow proper procedures to preserve the defendant's constitutional rights when accepting his plea. Instead, the trial court allowed the defendant's attorney to enter a guilty plea on the defendant's behalf, without the defendant even being present. ***Id***. at 74. The supreme court therefore concluded that "under the circumstances of this case," where no transcript was available because it had been lost, the defendant made a prima facie showing that his right to counsel was violated. ***Id***. at 78.

The supreme court in ***Baker*** was faced with a unique factual situation—a transcript that should have been available was not due to the State losing it, so it fashioned an appropriate procedure *for that unique situation*. That remedy is not applicable to cases such as this where the transcript and court reporter's notes were properly destroyed in accordance with SCR 72.01.

Shortly after the Wisconsin Supreme Court issued its decision in ***Baker***, the United States Supreme Court addressed the situation in Baur's case, where there is no transcript of a plea hearing, not because it was lost, but because the defendant did not appeal so it was never produced, and the court reporter's notes were destroyed according to law, in ***Parke***, 506 U.S. 20 (1992), The Court concluded that on collateral review, the presumption of regularity that attaches to a final conviction overcomes the presumption against waiver of a constitutional right, ***id***. at 30, and that a state may impose a burden of production on a defendant even when there is no transcript, ***id***. at 34.

In ***Parke***, the defendant was charged as a persistent felony offender in 1986, and he moved to exclude two predicate convictions from 1979 and 1981 "because the records did not contain transcripts of the plea proceedings and hence did not affirmatively show that defendant's guilty pleas were knowing and voluntary." ***Id***. at 23.

The Supreme Court recognized that a trial court may not accept "a defendant's guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary," and that "the waiver of rights resulting from a guilty plea cannot be 'presume[d] . . . from a silent record.'" ***Parke***, 506 U.S. at 29 (alterations in original) (quoting Boykin 395 U.S. at 242). But the Court declined "To import ***Boykin's*** presumption of invalidity" to the collateral review of a conviction, because doing so would ignore the "'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." ***Id***. at 29 (*citing* ***Johnson***, 304 U.S. at 464, 468). The Court reasoned that "Boykin colloquies have been required for nearly a quarter century. On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." ***Id***. at 30. The Court concluded that "[i]n this situation, Boykin does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." Id.

Baker's reasoning and the procedure it set forth *under the circumstances of that case* is consistent with ***Parke***. A defendant collaterally attacking a prior conviction must overcome the presumption of regularity attached to the conviction by "coming forward with evidence to make a prima facie showing." ***Baker***, 169 Wis. 2d at 77. If no transcript of the prior hearing is available, but not because of the State's misconduct or negligence, the conviction should be presumed regular, and it is permissible to require the defendant to present additional evidence showing that

the court failed in its required duties. ***Parke***, 506 U.S. at 32–34.

But if the transcript is unavailable due to the State's misconduct or negligence, as in ***Baker***, the defendant's affidavit alone is sufficient to shift the burden to the State to prove a valid waiver. ***Baker***, 169 Wis. 2d at 76, 78.

The supreme court in ***Baker*** did not hold that defendants are relieved of their burden of proving that the right to counsel was violated when a transcript or a court reporter's notes are unavailable or destroyed in accordiance with Wisconsin law. Instead, the holding in ***Baker*** should be limited to situations where the State lost a transcript it should have been able to produce becasuse the defendant should not bear the burden of fixing the State's mistake. But in cases where the court reporter's notes were destroyed according to law, the defendant should be required to overcome the presumption of regularity that attaches to a final conviction. ***Parke***, 506 U.S. at 31. The Wisconsin Supreme Court recognized this distinction in ***Negrete***, 343 Wis. 2d 1, ¶ 32.

Alternatively, if this Court concludes that ***Baker*** cannot be limited to its circumstances involving a lost transcript, this Court should decline to follow ***Baker*** and ***Drexler*** because those cases are inconsistent with ***Parke***, and with subsequent supreme court decisions including ***Hampton***, ***Balliette***, ***Negrete***, and ***Ernst***. This Court is bound by more recent supreme court decisions. *See* ***State v. Patterson***, 2009 WI App 161, 321 Wis. 2d 752, ¶ 15, 776 N.W.2d 602; ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) ("When decisions of our supreme court appear to be inconsistent,we follow the court's most recent pronouncement.").

F. A defendant collaterally attacking a prior conviction who cannot point to a transcript showing an invalid waiver of counsel, but who sufficiently alleges an invalid waiver, is entitled to an evidentiary hearing at which she can

> attempt to prove that her right to counsel was violated.

When a defendant moves for plea withdrawal and cannot show that the trial court in the prior case failed to give her the information required for her to validly waive the right to a trial, the ***Bangert*** burden-shifting procedure does not apply. Instead, a plea withdrawal motion is analyzed under ***Bentley***, 201 Wis. 2d 303. ***Negrete***, 343 Wis. 2d 1, ¶¶ 3, 33.

Bentley provides that when a defendant cannot point to evidence showing a defect in the trial court's required colloquy, a court applies a two-part test to determine whether to hold a hearing on the motion. "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." ***Hampton***, 274 Wis. 2d 379, ¶ 55 (*quoting* ***Bentley***, 201 Wis. 2d at 310). However, a court has discretion to deny a motion without a hearing "[1] if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or [2] presents only conclusionary allegations, or [3] if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.*** ¶ 52 (*quoting* ***Nelson v. State***, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972)).

The ***Hampton*** court stated: "In ***Bentley***-type cases, the defendant has the burden of making a prima facie case for an evidentiary hearing, and if he succeeds, he still has the burden of proving all the elements of the alleged error." ***Id***. ¶ 63. In ***Negrete***, the supreme court concluded that "where a defendant is unable to point to a defect evident on the face of a plea colloquy transcript because such transcript is unavailable, the more appropriate review of a motion to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that set forth in Bentley." ***Negrete***, 343 Wis. 2d 1, ¶ 33. The court added that "Allegations that are 'less susceptible to objective confirmation in the record' are particularly suited to a ***Bentley***-type analysis, because the defendant is required to allege particular facts that would entitle the defendant to relief before the court is obligated

to hold an evidentiary hearing on the motion." ***Id***. (*footnote omitted*) (*citing* ***Hampton***, 274 Wis. 2d 379, ¶ 51).

Just as the Bangert standard applies to both plea withdrawal motions and collateral attacks when the defendant makes a prima facie showing of a violation of a constitutional right, the ***Bentley*** standard, which applies when the defendant cannot make such a showing in a plea withdrawal motion, should also apply when the defendant cannot make a prima facie showing in a collateral attack.

The issue in a collateral attack where the defendant cannot point to evidence showing that the court failed to give her the required information for her to validly waive counsel is whether the defendant has alleged facts that, if true, would entitle her to relief. If the defendant's motion does not allege facts that would entitle her to relief, or presents only conclusory allegations, or if the claim is conclusively disproved by the record, the circuit court has the discretion to deny the motion without a hearing. ***Hampton***, 274 Wis. 2d 379, ¶ 52 (*quoting* ***Nelson***, 54 Wis. 2d at 497–98). "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." ***Id***. ¶ 55 (*quoting* ***Bentley***, 201 Wis. 2d at 310). At the hearing, just like at a hearing on a motion for plea withdrawal, the defendant retains the burden of proving a violation of her constitutional right.

A collateral attack motion on a prior conviction based on something other than a defect in the waiver colloquy should be analyzed under ***Bentley***. For instance, the collateral attack motion in ***Bohlinger***, 346 Wis. 2d 549, where the defendant alleged that he was intellectually incapable of waiving counsel knowingly, intelligently, and voluntarily, but did not dispute that the court gave him the information required for him to validly waive counsel, would be analyzed under ***Bentley***. The ***Bangert*** burden-shifting procedure could not properly apply because the defendant did not show that the trial court failed to give him the required information. If the defendant sufficiently alleged that he did not waive counsel knowingly,

intelligently, and voluntarily, notwithstanding that the court provided him the requisite information, he would be entitled to a hearing at which he could prove his claim.

II. Baur failed to prove that he was denied the right to counsel in his prior case, and the circuit court court should have denied the collateral attack motion.

A. Baur did not show a prima facie violation of his right to counsel in his prior cases, so the Bangert burden shifting procedure did not apply.

In his collateral attack motion, Baur alleged that he did not waive counsel knowingly, intelligently, and voluntarily. (49: 3; A-AP 8). In his affidavit, Baur alleged that he did not know that he was at a disadvantage proceeding without counsel, did not know the benefits that an attorney could potentially provide, and did not understand his rights, nor the penalties to which he was subjected if convicted. (49; A-AP 12-13).

Baur acknowledges that there is no record of the proceedings, but asserts that this means the court must find a per se violation of the requirement that he voluntarily, knowingly, and intelligently waive his right to counsel. (49: 5; A-AP 10, ¶11). According to Baur, the only facts are those in his affidavit, which he claims clearly establishes that there are "several elements of a proper plea colloquy which are missing." (49: 5; A-AP 10, ¶11).

However, it makes no sense to shift a defendant's burden to the State because the defendant did not appeal a final conviction and transcripts were therefore not prepared, and the court reporter's notes have been destroyed in accordance with the law. As the Supreme Court recognized in ***Parke***, "serious practical difficulties will confront any party assigned an evidentiary burden," when a transcript is unavailable. ***Parke***, 506 U.S. at 31. The

Court also recognized that the State will not have superior access to such records, and that in a collateral attack, "we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant." ***Id***. at 32. The Court added that "it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." ***Id***. at 30.

The burden should not have shifted to the State. Baur did not point to any evidence showing that the circuit court in the 1995 case failed to give him the required information. A final judgment is presumed regular. ***Parke***, 506 U.S. at 29; ***Baker***, 169 Wis. 2d at 76. It is therefore presumed that a court accepting a waiver of counsel performed its required duties in accepting the waiver and was satisfied that the defendant pleaded guilty or waived the right to counsel knowingly, intelligently, and voluntarily. To overcome that presumption, a defendant must show that the court did not perform its required duties. As the supreme court has recognized, "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, "because there is no evidence in the record that the court did not comply." ***Id***. (*citing* ***Hampton***, 274 Wis. 2d 379, ¶ 51.) Because Baur failed to "show[ ] a prima facie violation" of the courts' required duties in his prior cases, ***Bangert***, 131 Wis. 2d at 274, he failed to overcome the presumption of regularity that applies to a final judgment, and the Bangert burden-shifting procedure should not have been applied.

B. Baur's allegations were sufficient under Bentley to entitle him to an evidentiary hearing.

Because Baur did not overcome the presumption of regularity that attached to the judgments of conviction in his prior case by showing a prima facie violation of the right to counsel in that case, the ***Bangert*** burden-shifting

procedure was inapplicable. Instead, Baur's motion should be resolved under ***Bentley***. "Allegations that are 'less susceptible to objective confirmation in the record' are particularly suited to a Bentley-type analysis, because the defendant is required to allege particular facts that would entitle the defendant to relief before the court is obligated to hold an evidentiary hearing on the motion." ***Negrete***, 343 Wis. 2d 1, ¶ 33 (*footnote omitted*) (*quoting* ***Hampton***, 274 Wis. 2d 379, ¶ 51.)

Baur's motion and affidavit were sufficient to warrant an evidentiary hearing. In his motion, Baur alleged that he did not make a deliberate choice to proceed without counsel, and did not understand the difficulties and disadvantages of proceeding without counsel, or know the seriousness of the charges against him and the penalties he faced. In his affidavit, Baur asserted that the circuit court did not advise him about the difficulties and disadvantages of proceeding without counsel, the seriousness of the charges, or the penalties he faced, and that he did not understand the information that he alleged the court failed to give him. These allegations, if true, would prove that Baur was denied the right to counsel. He was therefore entitled to an evidentiary hearing to prove his claim.

C. At the evidentiary hearing, Baur did not prove that he was denied the right to counsel in his prior case.

At the hearing on his motion collaterally attacking the 1995 OWI conviction, Baur had the "burden to prove that [he] did not competently and intelligently waive [his] right to the assistance of counsel." ***Tovar***, 541 U.S. at 92.

To satisfy this burden, Baur had to overcome the presumption of regularity that attaches to a final conviction, ***Parke***, 506 U.S. at 31. Wisconsin courts have been required to ensure that waiver of counsel is knowing, intelligent, and voluntary since at least 1980. ***Pickens***, 96 Wis. 2d at 564. This Court therefore should presume that the circuit court

in Baur's earlier case ensured that her waiver was knowing, intelligent, and voluntary.

Baur's testimony during the collateral attack motion hearing did not line up with his affidavit. In his affidavit he asserts that "prior to the foregoing incident, I had never been represented by an attorney for any *alcohol-related traffic violation*." (49; A-AP 12, ¶3). This is an interesting statement in light of the testimony provided by Baur during the motion hearing. Baur testified that the first time he was charged with a criminal offense was in 1990 (really 1992). (59:9; A-AP 22). Baur said that this 1990 matter was an OWI charge, and that it was a misdemeanor. Baur testified that he did not receive jail time, only fines. Baur testified that he had an attorney in that case. (59:9; A-AP 22). Later in his testimony, Baur clarified that he was also charged with fleeing an officer in the same matter. (59:15; A-AP 28). Baur identified the attorney by name, and said that these charges occurred in Brown County. Baur agreed that the attorney helped him get a better result than he would have had otherwise. (59:14; A-AP 27).

In addition, Baur testified that the attorney in the 1990 matter went through all of his rights with him and explained everything. Baur agreed that he had a significant benefit by having counsel in 1990, as the fleeing was dismissed and he only pled to the OWI first. (59:14; A-AP 27). Certainly Baur understood that he had the right to counsel and the assistance counsel could provide.

During testimony, Baur said he did not have an attorney in the 1995 OWI 2nd from Kenosha County. (59:9; A-AP 22). Baur first testified, "I didn't at that point feel I needed one." (P-AP 22). Baur elaborated by saying that he didn't know if it would have made a difference or not in the case, and "it cost me money in the first offense." (59:9; A-AP 22). Baur then agreed that at the time of the 1995 case, he did not believe there was a value to having an attorney. (59:9; A-AP 22). Baur said that he ultimately pled guilty or no contest, and he was sentenced to fines and costs and thirty days in jail. (59:9-10; A-AP 22-23). Baur also said that he talked to the prosecutor, who conveyed the penalties

Baur would receive if he pled, and "I believe it was close to minimum fines and costs." (59:10; A-AP 23). Baur testified that he had a plea hearing with the judge in 1995, and "I don't recall everything that was discussed in it, as far as the details…" (P-AP 24).

The prosecutor specifically asked Baur about a number of rights the circuit court judge would have reviewed with him, such as the right to a jury trial, a unanimous jury, the right to confront witnesses, and other things. Baur initially said he did not recall whether those things were discussed. Baur ultimately said he was not sure about the details of his discussion with the judge in 1995;

> Well, I'm not a hundred percent sure because at that point it's -- I was more concerned about what I was going to be facing in the time and the money and everything else with that. So as far as any of the details, it was 25 years ago, you know. (P-AP 26).

Baur further explained that "a lot of it may go over my head." (P-AP 27).

This testimony significantly contradicts statements reported in Baur's affidavit. In the affidavit, Baur asserts that he was never represented by counsel in a "prior alcohol related traffic offense," that he was unfamiliar with how an attorney could help him, that he was not aware an attorney could assist him in identifying defenses, that he was never aware that an attorney could engage in negotiations on his behalf.

Baur's testimony shows that he simply does not recall what happened during the prior proceedings, which is unsurprising considering the length of time that has passed.

The circuit court should have presumed the regularity of Baur's final conviction in 1995. It should have presumed that the court properly informed him of his right to counsel, and was satisfied that he was waiving counsel knowingly, intelligently, and voluntarily. Baur's self-serving affidavit, which was contradicted by his courtroom

testimony, did not overcome the presumption of regularity that attaches to final convictions.

Baur did not prove that he did not waive counsel knowingly, intelligently and voluntarily, so the circuit court should have denied his collateral attack motion.

CONCLUSION

For the foregoing reasons, this court should vacate the circuit court's order granting the defendant's collateral estoppel motion, and remand the matter to the circuit court for further action consistent with that order.

Dated this 4th day of June, 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 10984 words.

Dated this 4th day of June, 2021.

Brian J. Pfeil
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 4th day of June, 2021.

Brian J. Pfeil
Assistant District Attorney

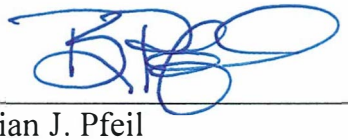
APPENDIX CERTIFICATION

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 the content requirements of Wis. Stat. § 809.19(2)(b); which contains at a minimum, a table of contents, the findings or opinion of the circuit court, a copy of any unpublished opinion cited under § 809.23, and 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 the record is required by law to be confidential, the portions of the record included in this appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 4th day of June, 2021



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