STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2021AP55-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ROBERT J. BAUR,

Defendant-Respondent.

APPEAL FROM A NON-FINAL ORDER
ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY,
BRANCH II, THE HONORABLE ROBERT W. SHANNON PRESIDING,
TRIAL COURT CASE NO. 17-CT-296

BRIEF & APPENDIX OF DEFENDANT-RESPONDENT

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STATEMENT OF THE ISSUE

WHETHER MR. BAUR'S PRIOR CONVICTION IN KENOSHA COUNTY FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED SHOULD BE PRECLUDED FROM USE AS A PENALTY ENHANCER IN THE INSTANT MATTER BASED UPON *State* v. *Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997) AND IN LIGHT OF THE RECENT DECISION IN *STATE v. CLARK*, 2022 WI 21, ___ Wis. 2d ___, 972 N.W.2d 533?

> Trial Court Answered: YES, in relevant part. The decision in this matter was rendered prior to *State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 972 N.W.2d 533, and therefore, the lower court did not have the benefit of knowing that the burden of establishing a deficient plea colloquy in the absence of any record of the prior plea now fell to the defendant. Nevertheless, to the extent that the circuit court was required to make a finding regarding whether Mr. Baur's collateral attack on his prior conviction was meritorious, it granted his motion, concluding "[t]here is no way here for either the state or the court to determine *nunc pro tunc* what happened here 25 years ago. Mr. Baur has filed an affidavit and has testified to the best of his recollection and knowledge what happened there. And as the only party present at that proceeding in Kenosha County, that's the evidence we have." R59 at 24:6-13; D-App. at 102.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question which, when examined under the appropriate standard of review, may be disposed of easily and in a manner consistent with well-established rules of appellate review. The issue presented is of a nature that can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue before this Court is premised upon facts similar to a decision recently issued by the Wisconsin Supreme Court which has definitely disposed of

the issue Mr. Baur raises, and therefore, is of such a nature that publishing this Court's decision would have little impact upon future cases.

STATEMENT OF THE FACTS AND CASE

Mr. Baur was charged criminally in Portage County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R5. Mr. Baur retained private counsel to represent him, and he entered a plea of not guilty to both charges.

By pre-trial motion electronically filed on September 8, 2020, Mr. Baur collaterally attacked his 1995 operating while intoxicated conviction from Kenosha County which the State pled as a penalty enhancer in the Criminal Complaint it filed on October 24, 2017. R49 & R5, respectively.

Mr. Baur annexed to his motion an affidavit in which he averred that "[a]t no time during any court appearance did the judge inform me that an attorney would have been able to ascertain whether other legal and/or factual defenses existed in my case which could have resulted in either a reduction of the original charge to a lesser, non-alcohol related violation or an acquittal at trial." R49 ¶ 5. Additionally, Mr. Bauer averred that the "judge never informed me that an attorney could engage in negotiations on my behalf beyond those in which I had already engaged, subpoena witnesses on my behalf, or raise pre-trial motion issues, ... I did not understand that I was disadvantaged by proceeding without counsel." R49 ¶¶ 5-6.

The circuit court scheduled Mr. Baur's motion for an evidentiary hearing on December 9, 2020. R59. At the hearing, the circuit court concluded that "[t]here is no way here for either the state or the court to determine *nunc pro tunc* what happened here 25 years ago. Mr. Baur has filed an affidavit and has testified to the best of his recollection and knowledge what happened there. And as the only party present at that proceeding in Kenosha County, that's the evidence we have." R59 at 24:6-13; D-App. at 102. Based upon these findings of fact, the circuit court granted Mr. Baur's motion to strike his prior Kenosha County conviction. R51.

After the adverse judgment had been rendered against the State, it petitioned this Court for leave to appeal the non-final order on February 18, 2021. R56. The Court granted the State's petition, however, it ordered that briefing be withheld until such time as the Wisconsin Supreme Court issued its decision in *State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 972 N.W.2d 533, which it did on April 20, 2022. The

Clark decision is on all fours with Mr. Baur's appeal, and therefore, controls the outcome of this appeal as more fully set forth below.

STANDARD OF REVIEW ON APPEAL

The instant case involves a mixed question of constitutional law and fact. "A question of constitutional fact is 'one whose determination is decisive of constitutional rights.'" *State v. Hajicek*, 2001 WI 3, ¶ 14, 240 Wis. 2d 349, 620 N.W.2d 781, quoting *State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552. The issue of whether Mr. Baur's constitutional right to counsel was denied by an inadequate plea colloquy requires the application of a constitutional standard. *Hajicek*, 2001 WI 3, ¶ 14.

Questions of constitutional fact present a mixed question of fact and law that is reviewed using a two-step process. *Id.* ¶ 15., citing *Martwick* 2005 WI 5, ¶ 16; *State v. Phillips*, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998). This Court first reviews the circuit court's findings of historical fact employing a deferential standard of review and will uphold the circuit court's findings unless they are clearly erroneous. *Hajicek*, 2001 WI 3, ¶ 15; *State v. Weed*, 2003 WI 85, ¶ 13, 263 Wis. 2d 434, 666 N.W.2d 485.

After giving great deference to the lower court's findings on matters of fact, this Court then reviews the circuit court's application of constitutional law to those facts *de novo*. *Hajicek*, 2001 WI 3, ¶ 15; *Weed*, 2003 WI 85, ¶ 13.

ARGUMENT

I. CURRENT STATE OF THE LAW.

A. State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 972 N.W.2d 533.*

Recently, in *State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 972 N.W.2d 533, the Wisconsin Supreme Court addressed an issue which, factually, is on point with the issue raised in the instant appeal.

In 2018, the defendant in *Clark* was charged in Ashland County with both operating a motor vehicle while intoxicated [hereinafter "OWI"] and operating a motor vehicle with a prohibited alcohol concentration as a fourth offender. *Id*. at ¶ 4. Ms. Clark retained counsel who filed two motions collaterally attacking her 1995 and 2002 convictions in Eau Claire County for use as penalty enhancers in the

Ashland County case on the ground that "she did not knowingly, intelligently, and voluntarily waiver her right to counsel." *Id*. By affidavit filed with her motions, Ms. Clark alleged that she was unrepresented and that the circuit court "did not conduct a colloquy with her regarding the difficulties and dangers of proceeding *pro se*." *Id*. Based upon these allegations, the State conceded that Ms. Clark made a *prima facie* showing as required under *State* v. *Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, and was therefore entitled to an evidentiary hearing on her motions. *Id*.

Due to the passage of time, none of the relevant documents from either plea hearing nor the transcripts from these hearings had been preserved. *Id*. ¶ 5. Because the relevant documents had not been preserved, "the circuit court concluded that Clark's testimony [that she had not been properly advised] shifted the burden to the State, which submitted insufficient evidence to refute Clark's testimony," whereupon the circuit court granted her motions. *Id*. ¶ 7.

On appeal, the State successfully argued that it was saddled with an unworkable burden if it had to establish that a colloquy was deficient in the absence of a record. *Id*. ¶ 18. Relying on *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), the *Clark* court concluded that "if a defendant collaterally attackin a prior OWI/PAC conviction cannot point to a defect in the relevant transcript, the burden-shifting procedure does not apply. Instead, the defendant must carry the burden to demonstrate that a violation occurred." ¶¶ 13, 20.

B. Application of Clark *to the Facts.*

The instant case is on point with *Clark* to the extent that Mr. Baur challenged a prior conviction for which no transcript or other relevant documents had been preserved. Similarly, Mr. Baur made a *prima facie* showing by affidavit that he had not been properly advised of the advantages of proceeding with an attorney versus the disadvantages of proceeding without one, just as in *Clark*. Finally, like *Clark*, an evidentiary hearing was held on Mr. Baur's collateral attack. To this extent, *Clark* controls, and therefore, Mr. Baur now bears the burden of establishing that his constitutional rights under *Klessig* were violated in his prior Kenosha County case.

Unlike *Clark*, however, nowhere within the four corners of the circuit court's findings of fact and conclusions of law are there any observations by the lower court that it was "skeptical" about Mr. Baur's testimony, or that Mr. Baur's "credibility was 'somewhat lacking,'" or that it had any "suspicion . . . that the chances of what

the defense [was] asking [it] to believe [were] not terribly great,'" as there were in *Clark*. *Id*. ¶ 7. To this extent, *Clark* **is** distinguishable from the facts of the instant matter. More specifically, the circuit court found that "[t]here is no way here for either the state or the court to determine *nunc pro tunc* what happened here 25 years ago. Mr. Baur has filed an affidavit and has testified to the best of his recollection and knowledge what happened there. And as the only party present at that proceeding in Kenosha County, that's the evidence we have." R59 at 24:6-13; D-App. at 102.

II. STATEMENT OF THE LAW AS IT RELATES TO THE FACTORS TO BE COVERED AT AND DURING A VALID CHANGE OF PLEA HEARING.

Before examining whether the outcome in the court below should be reversed as the State suggests, it is necessary to examine what is required under the prevailing standard in order to establish that a plea colloquy has been deficient. In *State* v. *Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court held that in order for an accused's waiver of counsel to be valid, the record must reflect:

> (A) a deliberate choice to proceed without counsel;
>
> (B) an awareness of the difficulties and disadvantages of self-representation;
>
> (C) an awareness of the seriousness of the charge or charges; and
>
> (D) an awareness of the general range of possible penalties.

Klessig, 211 Wis. 2d at 205-07. If a circuit court fails to conduct such a colloquy, a reviewing court may not find that there was a valid waiver of counsel. *Id.* at 201.

Prior to the *Klessig* decision, *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), provided the necessary guidance for conducting a waiver of counsel colloquy, and although the same four factors were to be considered by the court, it was not necessary to conduct a complete colloquy on each of the factors. The *Klessig* court, however, specifically overruled *Pickens* to the following extent:

> We now overrule *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. Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and post-conviction motions.

> Thus, a properly conducted colloquy serves the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources. We hope that our affirmation of the importance of such a colloquy will encourage the circuit courts to continue their vigilance in employing such examination.

Klessig, 211 Wis. 2d at 206.

A defendant who faces an enhanced sentence based upon a prior conviction may only attack the prior conviction based upon a denial of the constitutional right to counsel. *State* v. *Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528. The right to counsel under the Federal and State Constitutions is identical. *Klessig*, 211 Wis. 2d at 202-03. To pursue an attack, the defendant must first make a *prima facie* showing that he or she did not know or understand the information that should have been provided in the previous proceeding and, as a result, did not knowingly, intelligently, and voluntarily waive the right to counsel. *See State* v. *Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92. As part and parcel of this examination, information which "should have been provided in the previous proceeding" includes information relating to the "seriousness of the charge" and an "awareness of the general range of penalties." *Klessig*, 211 Wis. 2d at 205-07.

In *Ernst*, the supreme court concluded that alleging a *Klessig* violation alone, without an allegation of a specific defect in the prior preceding, was insufficient to make *prima facie* showing that the waiver of counsel was invalid. The court required more, namely: alleging specific facts showing that the waiver was not, in fact, knowing, voluntary, and intelligent based upon the trial court's failure to address the *Klessig* factors. *Ernst*, 2005 WI 107, ¶ 26. In other words, the defendant must allege more than a simple technical violation of the right to counsel, but must allege facts that demonstrate that he actually did not know or understand the *Klessig* factors. *Id*.

III. APPLICATION OF THE LAW TO THE FACTS.

In the instant matter, Mr. Baur filed an affidavit along with his motion challenging the colloquy in his prior Kenosha case. R49 at pp. 7-8. In his affidavit, Mr. Baur specifically alleged that "[a]t no time during any court appearance did the judge inform me that an attorney would have been able to ascertain whether other legal and/or factual defenses existed in my case which could have resulted in either a reduction of the original charge to a lesser, non-alcohol related violation or an

acquittal at trial." R49 ¶ 5. Additionally, Mr. Bauer averred that the "judge never informed me that an attorney could engage in negotiations on my behalf beyond those in which I had already engaged, subpoena witnesses on my behalf, or raise pre-trial motion issues, ... I did not understand that I was disadvantaged by proceeding without counsel." R49 ¶¶ 5-6. Obviously, the lower court determined that Mr. Baur had pled a *prima facie* case under *Ernst* or it would not have granted him an evidentiary hearing on the matter. R59.

At the hearing, the circuit court made a finding that "[t]here is no way here for either the state or the court to determine *nunc pro tunc* what happened here 25 years ago. Mr. Baur has filed an affidavit and has testified to the best of his recollection and knowledge what happened there. And as the only party present at that proceeding in Kenosha County, that's the evidence we have." R59 at 24:6-13; D-App. at 102.

Based upon the foregoing, the issue in this case becomes whether Mr. Baur's testimony satisfies the burden he now bears under *Clark*. Mr. Baur believes he has satisfied this burden because the lower court never made a finding that he was not credible or that it was "skeptical" about his character for truthfulness as the circuit court believed in *Clark*. R59 at 23:15 to 26:3. Even if the lower court in this matter was laboring under the now erroneous assumption that the State bore the burden of proving that the colloquy was adequate, there is nothing in the record to refute Mr. Baur's averments. The record in this case is not only devoid of a transcript from Mr. Baur's Kenosha County prior offense, but additionally, the record lacks a signed Plea Questionnaire from Kenosha County, a Waiver of Right to Counsel form from Kenosha, any Clerk's Minutes which indicate that a plea colloquy was adequately undertaken, *etc*. Quite simply, there are no indicia in the record which undercut, cast aspersions on, or otherwise call into question Mr. Baur's assertions regarding the deficiency of his colloquy, and the lower court could find none as its findings imply.

If this Court concludes, in the absence of all of the foregoing—and, notably, without a finding from the lower court that Mr. Baur was not credible—then it will be engaging in the very act of which the dissent in *Clark* warned. More specifically, Justice Bradley, with whom Justices Dallett and Karofsky joined, admonished that the burden which the majority placed upon *defendants* in *Clark* was "a nearly impossible burden" to satisfy. *Clark*, 2022 WI 21, ¶ 45 (Brandley, J., dissenting). More specifically, Justice Bradley stated:

> Decrying the hardship that would be placed on the State by applying the usual burden-shifting framework, the majority laments that "automatically shifting the burden to the State in the absence of a transcript would put the State 'in an untenable position.'" Majority op., ¶18 (citing *Drexler*, 266 Wis. 2d 438, ¶ 11 n.6). **But what about the defendant? The majority's position puts the defendant in a similarly untenable position**.

Clark, 2022 WI 21, ¶ 46 (Brandley, J., dissenting)(emphasis added).

Mr. Baur must ask: If, in a case like his, there is nothing in the record to refute testimony he offered *under oath* that he was not provided with any information regarding the advantages of proceeding with counsel, what more could he do to prove his case? Ruling against Mr. Baur in this instance means—in a very real and practical sense—that no defendant anywhere, anytime, under any circumstances, could ever prove that his plea colloquy was deficient. The same concern which the *Clark* had for placing an "unworkable burden" on the State in cases where no transcript of a prior plea colloquy exists should be equally applicable to a defendant. Finding against Mr. Baur in this matter is the equivalent of overruling, *sub silento*, the decision in *Klessig* as collateral attacks on prior convictions would no longer be viable.

As the standard of review for questions such as those presented by this appeal requires, this Court is obligated to uphold the circuit court's findings unless they are clearly erroneous. *Hajicek*, 2001 WI 3, ¶ 15; *Weed*, 2003 WI 85, ¶ 13. There is nothing in the record before this Court nor in the circuit court's findings which demonstrate that the lower court was "clearly erroneous" when it concluded that Mr. Baur had proved his case. It is incumbent, therefore, upon this Court to conclude that Mr. Baur has satisfied his burden under *Clark*.

In the alternative, should this Court not agree with Mr. Baur's position, Mr. Baur respectfully requests that, at a minimum, his case be remanded to the circuit court for a rehearing on his motion.

CONCLUSION

Because the lower court did not find that Mr. Baur was not credible, and further, because no evidence exists which contradicts Mr. Baur's averment that his Kenosha County plea colloquy was deficient, this Court should not upset the decision of the court below to strike from consideration as a penalty enhancer Mr. Baur's prior conviction for operating while intoxicated in Kenosha County.

In the alternative, should this Court conclude that the record does not satisfy the new standard under *Clark*, Mr. Baur respectfully requests that this Court remand his case to the circuit court for a rehearing on his motion collaterally attacking his prior conviction.

Dated this 16th day of June, 2022.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
Sarvan Singh, Jr.
State Bar No. 1049920
Attorneys for Defendant-Respondent
Robert J. Baur

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,339 words.

I also certify that no appendix has been filed with this brief, either as a separate document or as part of this brief.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 16, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 16th day of June, 2022.

MELOWSKI & SINGH, LLC

Electronically signed by:
Sarvan Singh, Jr.
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