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COURT OF APPEALS

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

REPLY BRIEF OF
PLAINTIFF-APPELLANT

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TABLE OF AUTHORITIES

1. *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)
2. *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)
3. *State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 927 N.W.2d 533

ARGUMENT

While this appeal was pending, the Wisconsin Supreme Court addressed the application of the respective procedures set forth in *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) and *State v. Bangert*, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986) to collateral attack motions in *State v. Clark*, 2022 WI 21, ___ Wis. 2d ___, 927 N.W.2d 533. In the *Clark* decision, the Wisconsin Supreme Court clarified that the *Bentley* procedure requires a defendant seeking to withdraw a guilty or no contest plea after sentencing to prove the plea was deficient by clear and convincing evidence. *Id.* ¶13. The Court then went on to explain that the alternative procedure set forth in *Bangert* is utilized when the defendant identifies a defect in the relevant proceeding's record, typically by reference to the plea colloquy transcript. *Id.* ¶14 Only after the defendant identifies a deficiency in the colloquy does the burden shift to the State to prove the conviction's sufficiency. *Id.*

It is undisputed in this matter that there is not transcript of the plea hearing in the 1995 case from which the defendant raised the collateral attack motion. Accordingly, and as set forth in the Plaintiff-Appellant's original brief on page 3, the State pointed out to the trial court that the burden remained on the defendant to prove a deficiency in the plea (i.e. the *Bentley* procedure) and should not be shifted to the State (i.e. the *Bangert* procedure) because there was no transcript of plea hearing in the 1995 case, but the trial court disregarded the argument stating that the "issue will be preserved for appeal."

As set forth on page 5 of the Plaintiff-Appellant's brief, the trial court reiterated that the burden was on the State and granted the Defendant-Respondent's motion finding that the State had not had not met its burden "to overcome the presumption of non-waiver clearly and convincingly."

The Supreme Court's ruling in *Clark* clarifies that the trial court misapplied the legal standard by using the *Bangert* procedure instead of the *Bently* procedure.

CONCLUSION

Because the trial court did not use the appropriate legal standard in deciding the collateral attack motion, this case should be remanded to the trial court for a rehearing using the proper *Bentley* procedure.

Dated this 18th day of August, 2022.

Respectfully submitted,

CASSIDY COUSINS, District Attorney for Portage County

Electronically signed by Brian J. Pfeil

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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 716 words.

Dated this 18th day of August, 2022.

Electronically signed by Brian J. Pfeil
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.

Dated this 18th day of August, 2022.

Electronically signed by Brian J. Pfeil
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