STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021 AP 1826

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ERIC ALLAN ERICKSON,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM THE ORDER OF
THE CIRCUIT COURT OF GREEN COUNTY
The Honorable Faun M. Phillipson, Presiding
Green County Circuit Court Case 2021 CT 10

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STATEMENT OF THE ISSUES

I. Did the Defendant establish a prima facie showing that his constitutional right to counsel was violated in his 2006 OWI proceeding?

Trial Court Answered: Yes.

II. Did the State fail to establish by clear and convincing evidence that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in his 2006 OWI proceeding?

Trial Court Answered: Yes.

STATEMENT ON PUBLICATION

The Defendant-Respondent does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). Publication is not necessary.

STATEMENT OF THE CASE AND FACTS

This case is before this court as a result of the State appealing the Trial Court's decision granting the Defendant's motion to collaterally attack a 2006 OWI conviction on the grounds that his constitutional right to counsel was not honored. The Defendant's collateral attack motion stems from a criminal complaint alleging he operated a vehicle while under the influence of an intoxicant and with a prohibited blood alcohol concentration, both as a third offense, on November 27, 2020. (Rec. 4 at 1-2.) Prior to this incident, the Defendant was twice convicted of operating while under the influence of an intoxicant, first on September 9, 2002, and again on October 2, 2006. (Rec. 4 at 2.)

In March 2021, the Defendant filed his Motion to Collaterally Attack a Prior Conviction targeting his 2006 OWI conviction on the basis that the conviction was obtained without the Defendant's valid waiver of the assistance of counsel. (Rec. 11.) In an Affidavit submitted in support of this Motion, the Defendant averred he was not represented by an attorney in that proceeding, was not advised of the possibility of having a court-appointed attorney represent him in the proceeding, and was not informed of the potential penalties and collateral consequences associated with a second OWI conviction. (A-App. 003-04; Rec. 13 at 1-2.)

To this Affidavit, the Defendant attached the Plea Questionnaire/Waiver of Rights form, Exhibit A, from his 2006 plea hearing. This Waiver form did not include a written waiver of his right to an attorney. It did not advise the Defendant of the maximum penalties or the mandatory minimum penalties associated with the

charges against him. The Plea Questionnaire form further did not inform the Defendant that, if convicted of second offense operating while under the influence of an intoxicant, this conviction could be used as an enhancement of future penalties if he were arrested again for operating while under the influence of an intoxicant. (A-App. 005-08; Rec. 13 at 3-6.)

In his Affidavit, the Defendant further averred that he was never provided the Waiver of Attorney form, CR-226, (attached as Exhibit B to his Affidavit) nor was he informed that he had the right to ask the Court to review the State Public Defender's determination that he was not indigent if he was unable to hire his own attorney. The Waiver of Attorney form would have informed him that he had the right to ask the Court to find him indigent or partially indigent and to request a court-appointed attorney at County expense, even if he have been found not eligible for a public defender. (A-App. 009-10; Rec. 13 at 7-8)

The Defendant further averred that the Court did not inform him that an attorney would have been able to help him negotiate a settlement of his case with the District Attorney or any of the other information which is provided on the Waiver of Counsel Form CR-226. (A-App. 004; Rec. 13 at 2.)

The Defendant further supported his motion with the Affidavit of Attorney Robert S. Duxstad, who averred that, upon his review of the record, there was no evidence of the Defendant's oral or written waiver of his right to an attorney. (R-App. 03; Rec. 14 at 1.) The Transcript from the October 2, 2006 Plea and Sentencing, which was attached to Attorney Duxstad's Affidavit, showed that the

Trial Court never asked the Defendant if he waived his right to counsel; never engaged in any colloquy with the Defendant regarding the advantages or disadvantages of having counsel; and, never explained the means available to him to obtain counsel. (R-App. 06-14; Rec. 14 at 4:5—5:13, 6:12-12:13.)

The State moved to deny the Defendant's Motion to Collaterally Attack a Prior Conviction without an evidentiary hearing, arguing that Defendant's Motion and Affidavits did not establish a prima facie showing that his constitutional right to counsel was violated. (Rec. 17 at 1-3.) Before the Trial Court held a hearing on the State's Motion, the Defendant filed an additional Affidavit. (A-App. 011-012, Rec. 20). In his second Affidavit, the Defendant asserted that while he knew his minimal earnings disqualified him from having a public defender, he did not know he could have a Court-appointed attorney. *Id*. He further stated that he would have sought a Court-appointed attorney if he had known that was an option. *Id*. He further stated that he did not know all the collateral consequences of a second conviction for operating while under the influence. *Id.*

A hearing on the State's Motion to Dismiss the Defendant's Motion to Collaterally Attack the 2006 Conviction was held before the Honorable James R. Beer on May 17, 2021 and the Trial Court rendered an oral decision on May 27, 2021. (A-App. 14, 28 and Rec. 48,47.) At the hearing, Defendant's counsel again asserted that because the Trial Court never engaged the Defendant in a waiver-of-counsel colloquy before allowing him to proceed pro se, he was denied his constitutional right to counsel. (A-App. 016-17, 020-22; Rec. 48 at 3:5-4:20, 9:24-

11:7.) Defense counsel also argued that the Defendant was incapable of making a knowing, intelligent, and voluntary waiver of his right to counsel because he was not informed of the potential for court-appointed counsel, made aware of all possible penalties and collateral consequences of a second OWI conviction, nor given information as to the benefits of having an attorney. *Id*.

The State, in response, maintained that a defendant need only be informed of their right to an attorney for their constitutional right to counsel to be satisfied, and that Defendant was aware of that right. (A-App. 019-22, 024-25; Rec. 48 at 6:5-9:21, 11:8-12:5.) Additionally, the State argued that a defendant must do more than allege a defective waiver-of-counsel colloquy to meet their burden of a prima facie showing that their right to counsel was violated. *Id.*

The Trial Court rendered its oral ruling on May 27, 2021, finding that Defendant had made a prima facie showing that his right to counsel was violated in the proceedings leading to his 2006 OWI conviction and that the Defendant had not knowingly, intelligently, and voluntarily waived his right to counsel during the 2006 proceedings. The Trial Court ordered an evidentiary hearing, at which the State would have its opportunity to prove, by clear and convincing evidence, that the Defendant had knowingly, intelligently, and voluntarily waived his right to counsel during the 2006 proceedings. (A-App. 029-33; Rec. 47 at 2:1-6:1.) The Trial Court noted that *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (1997), specifically mandates that a circuit court conduct a colloquy designed to ensure that 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. (A-App. 029-32; Rec. 47 at 2:20-3:25.) It was in light of that mandate, and in reliance on the Wisconsin Supreme Court's decision in *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, that the Trial Court determined that there was no evidence that Defendant had knowingly, intelligently, and voluntarily rejected an offer of counsel. (A-App. 31-32; Rec. 47 at 4:4-16.)

The evidentiary hearing on the Defendant's Motion to Collaterally Attack the 2006 OWI Conviction was held on August 24, 2021 before the Honorable Faun Marie Phillipson. (A-App. 38; Rec. 49.) At the evidentiary hearing, the Transcript from the 2006 plea hearing was marked as Exhibit A and admitted into evidence. (A-App. 70, 94: Rec 49 at 33:6 -10. 57:9 – 11)[1]

At the hearing, the Defendant affirmed the truthfulness of the statements he had made in his first affidavit. (A-App. 45-47; Rec. 49 at 10:9) Specifically, that the Defendant was earning $9 an hour in 2006, that he did not have sufficient income or assets to pay for his own attorney, and that he was never advised of his right to have the Court review a determination of indigency by the Public

[1] The 2006 Plea Hearing Transcript was attached to Duxstad's Affidavit as Exhibit 1. (R. App. 3; Rec. 14) and was the Transcript considered by the Trial Court when it made its decision on whether or not the Defendant has made a prima facie showing that his right to counsel had been violated. The same transcript was marked as Exhibit A at the Motion Hearing held on August 21, 2021 hearing. To be consistent when referring to the 2006 Plea Hearing Transcript this Brief will make all references to R. App. 3-15; Rec. 14 at 2-13.

Defender's office. (A-App. 46-51; Rec. 49 at 9:22-13:17) He further testified that he only had a high school education, was 26 years old at the time of his 2006 OWI conviction, was divorced, had one six- year old daughter whom he had 50-50 placement with no child support, and was living with his parents paying $300 per month in rent. (A-App. 64-66; Rec. 49 at 27:8-28:15)

The Defendant further affirmed the truthfulness of the statements he made in his second affidavit. (A-App. 47-48; Rec. 49 at 10:14-11:11) Specifically, that he knew his earnings would likely make him ineligible for a public defender but that with his minimal earnings he could not afford to retain a private attorney. (A-App. 48-49, 75-76; Rec. 49 at 11:16-12:3, 38:7-16)

The Defendant testified that no one, including the Trial Court, ever told him of his right to a *State v. Dean* hearing or the Court's discretion to appoint him an attorney independent of the public defender. He testified that he had no recollection of the Assistant District Attorney, during their brief meeting, lasting a few minutes, telling him of his right to an attorney, and that he had not reviewed a waiver form concerning his right to counsel. (A-App. 67-68; Rec. 49 at 30:8-31:13)

The Defendant further testified that in 2006, the Trial Court never inquired about his efforts or decision to go to the Public Defender's Office or to seek an attorney in any way; never inquired of him regarding the advantages of having an attorney represent him; and no one ever told him that many times an attorney can

tell him things that he wouldn't otherwise know. (A-App. 71; Rec. 49 at 34:10 - 23)

The Defendant testified that in 2006 he did not know the pitfalls of acting as his own attorney or know an attorney would advise him of his legal rights and options and assist him in understanding the Court procedures and all the legalities regarding the offense that he was charged with; nor was he told that an attorney would potentially help negotiate a better deal for him, or investigate and explore other possible defenses to the charges he faced, or could file special motions relating to the intoxilyzer or blood test. (A-App. 77-79; Rec. 49 at 40:2 – 42:3)

He testified he was not told that an attorney can help mitigate the sentence he might receive; he was not told upon a third conviction the minimum jail sentence was 30 days and the maximum sentence could be up to one year in jail; he was not told what the penalties would be for additional convictions of OWI or that consumption of less alcohol could put him in jeopardy of being convicted of a future offense; he was not told of the longer revocation periods if convicted again of OWI; and he was not told of the consequences a subsequent conviction would have with respect to ignition interlock devices. (A-App. 72-74; Rec. 49 at 35:3 – 37:4)

During his examination by the State, the Defendant acknowledged that the sentencing judge had advised him of increased penalties if convicted of OWI in the future. (A-App. 56; Rec. 49 at 19:2-24) However, the State failed to clarify that the 2006 Transcript shows the discussion regarding additional future penalties took

place only after the Defendant had entered his plea and been sentenced by the Court. (R-App. 12; Rec. 14 at 9:5-10:22) However, the Trial Court, in its findings, did clarify that any discussion regarding additional future penalties only took place after the Defendant had entered his plea and had been sentenced. (A-App. 135; Rec. 39 at 6:2-5)

The Defendant testified he neither understood nor was he told that the Judge was not able to give him any advice or act as his attorney, that the District Attorney was not there to be his attorney, that neither the court personnel nor the judge were required to explain to him any court proceedings or what the law says. The Defendant stated he was going into the plea hearing somewhat blind. (A-App. 79-80; Rec. 49 at 42:21 – 43:22)

The Defendant testified he never defended himself before, that he did not know the legal rules and procedures, or that he could challenge the evidence presented by the District Attorney. He testified if the Court had advised him of those items in the Waiver of Right to an Attorney – CR-225 form, he would have asked the Trial Court for a hearing on the appointment by the Court of an attorney to represent him at that time. (A-App. 81 - 82; Rec. 49 at 44:2 – 45:8)

In separate testimony, Guy Taylor, the public defender in 2006, confirmed that a person working a full-time job would probably not get a public defender and only if they are found not indigent by his office was a defendant told of the potential alternative of having Court appointed counsel at County expense. (A-App. 99-100; Rec. 49 at 62:11 – 63:6) Taylor also testified he had no recollection of the Judge

informing the defendants of their right to court appointed counsel at the initial appearance stage. (A-App. 101; Rec. 49 at 64:14-21)

The State attempted to prove, by clear and convincing evidence, that Defendant had knowingly, intelligently, and voluntarily waived his right to counsel during the proceedings leading to his 2006 OWI conviction. However, the State never produced any evidence that Defendant was informed of his potential right to court-appointed counsel, the benefits of having counsel, or all the potential collateral consequences of a second OWI conviction before he entered his no contest plea in 2006. Significantly, the State could point to no evidence from the record demonstrating that Defendant ever affirmatively waived his right to counsel during the proceedings leading to his 2006 OWI conviction.

As a result of the State's failure to produce any evidence that Defendant knowingly, intelligently, and voluntarily waived his right to counsel during his 2006 OWI proceedings, the Trial Court held:

> "The record in Green County Case No. 2006 CT 47, the case in which Mr. Erickson appeared pro se and pled no contest to operating a motor vehicle while intoxicated as a second offense contains no waiver of right to attorney form, nor does the transcript from the plea and sentencing hearing on October 2, 2006 reflect the *Klessig* or *Tovar*[2] factors were addressed. Specifically the plea colloquy between the court and Mr. Erickson never mentions the right to counsel or the difficulties and disadvantages of proceeding without counsel. While the court did mention the seriousness of the charges and the general range of penalties, this was done only after his plea was accepted and his sentence was already pronounced.

[2] The Court earlier in its decision referenced *Iowa v. Tovar* 541 U.S. 77, 81, 124 S. Ct. 1379, 158 L.Ed.2d 209 (2004), as to what information is needed for a valid waiver of counsel. (A-App. 134; Rec 39 at 5:6 - 17)

> The Sixth Amendment provides for the right to counsel at all crucial stages of a criminal prosecution, as set forth in the *State of Wisconsin versus Hampton.*[3] A plea and sentencing hearing is one of those crucial stages. Colloquies between the court and a defendant are not mere formalities, but in fact – and by law – represent actual constitutional rights.
>
> While the court recognizes that collateral attacks are generally disfavored, based on the evidence presented, the court concludes there is insufficient evidence to find that Mr. Erickson made a knowing, intelligent and voluntary waiver of his right to counsel with regard to his second OWI conviction, and therefore, the 2006 conviction should be disregarded for trial and disposition of the instant action."
>
> (A-App. 134-35; Rec. 39 at 5:18 - 6:19.)

[3] This reference is to *State v. Hampton*, 274 Wis.2d 379, 683 N.W.2d 14 (2004).

STANDARD OF REVIEW

Whether a defendant knowingly, intelligently, and voluntarily waived their constitutional right to counsel is a question requiring the application of constitutional principles to the facts. *State v. Ernst*, 2005 WI 107, ¶ 10, 283 Wis. 2d 300, 699 N.W.2d 92. These questions are reviewed de novo, but with the benefit of the Circuit Court's analysis. *Id*. Whether the defendant made a prima facie showing that the waiver of their constitutional right to counsel during a previous conviction was invalid is a question of law that is reviewed de novo. *Id.*

The appellate court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. See Wis. Stat. § 805.17(2); *State v. Finley*, 2016 WI 63, ¶59, 370 Wis. 2d 402, 882 N.W.2d 761. In so doing, the appellate court examines the record for evidence to support the circuit court's findings of fact. See *Becker v. Zoschke*, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

ARGUMENT

I. DEFENDANT NEVER WAIVED HIS RIGHT TO COUNSEL PRIOR TO HIS 2006 OWI CONVICTION; THEREFORE, THIS COURT MUST AFFIRM THE LOWER COURT'S DECISION GRANTING DEFENDANT'S MOTION TO COLLATERALLY ATTACK THAT PRIOR CONVICTION.

The Wisconsin Supreme Court's decision in *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) outlines the requirements a Circuit Court must comply with before accepting a defendant's waiver of their right to counsel. A defendant is presumed not to have waived their right to counsel unless waiver is affirmatively shown. *Id.* at 204. There is no evidence from any proceedings leading to Defendant's 2006 OWI conviction affirmatively showing his waiver of his right to counsel; as a result, this court must affirm the lower court's decision granting Defendant's motion to collaterally attack that conviction.

Wisconsin case law supports the position that there cannot be a valid waiver of counsel without some evidence of an affirmative waiver of that right by the defendant. In *State v. Ernst*, 2005 WI 107, ¶ 25, 283 Wis. 2d 300, 699 N.W.2d 92, the Wisconsin Supreme Court discusses how the requirements from *Klessig* apply in a situation where a defendant has made an affirmative waiver of their right to counsel. The court ultimately concludes that the defendant's right to counsel was not violated, in large part, because the

defendant made an affirmative waiver of their right to counsel. *Id.* at ¶ 26. In *State v. Hammill*, 2006 WI App. 128, ¶ 3, 11, 293 Wis. 2d 654, 718 N.W.2d 747, the Court of Appeals affirmed a decision denying the defendant's collateral attack of a prior conviction because the minutes from the Plea Hearing associated with that conviction indicated that the defendant affirmatively waived their right to counsel. In *State v. Lebo*, 2015 WI App. 43, ¶ 32, 362 Wis. 2d 539, 865 N.W.2d 884, the Court found that a defendant cannot collaterally attack a prior conviction without alleging, at least, that they never actually waived their right to counsel prior to that conviction. In all of these cases, and in others, courts rejected the collateral attack because, in part, there was evidence that the defendants had affirmatively waived their right to counsel in the prior convictions. This is a distinguishing factor because the Defendant in the instant case, unlike the defendants in the cases cited above, never affirmatively waived his right to counsel.

Wisconsin case law also supports the notion that a reviewing court cannot find a valid waiver of the right to counsel by a defendant if there is no evidence that the defendant affirmatively waived their right to counsel. In *State v. Baker*, 169 Wis. 2d 49, 76-78, 485 N.W.2d 237 (1992), the Wisconsin Supreme Court found no waiver of counsel when the transcripts from the disputed proceeding were missing and the defendant averred, in sworn

affidavits, that they did not waive their right to counsel. The court reasoned, in part, that the waiver of counsel cannot be presumed from a silent record. *Id.* at 76. In *State v. Ehmke,* 2010 WI App. 19, ¶ 9, 323 Wis. 2d 278, 779 N.W.2d 724, the court found no waiver of counsel because the record contained no evidence of an affirmative waiver from the defendant or any inquiry by the trial court as to whether the defendant desired to proceed without counsel.

The instant case is similar to *Baker* and *Ehmke*, but contains substantially more evidence that the Defendant never waived his right to counsel prior to his 2006 OWI conviction. Unlike those cases, there is a transcript from the Plea and Sentencing Hearing from Defendant's 2006 OWI conviction, and it contains no affirmative waiver of the right to counsel. R-App. 06-14; Rec. 14 at 4:5—5:13, 6:12-12:13. In addition, the Defendant has averred, in sworn affidavits, that he never waived his right to counsel in that proceeding. A-App. 003-04, 011-12; Rec. 13, 20. The law is clear in Wisconsin that waiver of the right to counsel cannot be found without evidence of an affirmative waiver of that right on the record, and that evidence does not exist in the instant case. *See Klessig*, 211 Wis. 2d at 204 ("Nonwaiver is presumed unless waiver is affirmatively shown"). Therefore,

this court must affirm the lower court's decision granting the Defendant's Motion to Collaterally Attack his 2006 OWI Conviction.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE DEFENDANT ESTABLISHED A PRIMA FACIE SHOWING THAT HIS CONSTITUTIONAL RIGHT TO COUNSEL WAS VIOLATED DURING HIS 2006 OWI PROCEEDINGS.

An alleged violation of the requirements outlined by the Wisconsin Supreme Court in *State v. Klessig* can form the basis for a motion to collaterally attack a prior conviction. *Ernst*, 2005 WI 107, ¶ 2. To do so, the defendant must point to specific facts demonstrating they did not knowingly, intelligently, and voluntarily waive their constitutional right to counsel during that prior conviction. *Id.* The Defendant has done so, and the record clearly establishes that he did not knowingly, intelligently, and voluntarily waive his right to counsel during his 2006 OWI conviction.

To establish a valid waiver of counsel, the circuit court must conduct a colloquy in conformance with the Wisconsin Supreme Court's decision in *Klessig*. *Klessig*, 211 Wis. 2d at 206. This colloquy is designed to ensure that the defendant: (1) made a deliberate decision to proceed without counsel; (2) knew of the difficulties and disadvantages of self-representation; (3) knew the seriousness of the charge or charges against them; and (4) knew the general range of potential penalties associated with the charges against them. *Id*. If this colloquy is not conducted, a reviewing court may not find that there was a valid waiver of counsel. *Id*.

The Plea and Sentencing transcript from Defendant's 2006 OWI conviction clearly demonstrates that at no time did the Trial Court ensure that the Defendant made a deliberate choice to proceed without counsel. (R-App. 05-13; Rec. 14 at 4:5—5:13, 6:12-12:13.) During that Plea and Sentencing proceeding, the Trial Court never conducts anything close to a *Klessig* colloquy. *Id.* The only mention of any constitutional rights comes when the court asks Defendant if he understood the plea questionnaire and waiver of rights form that he filled out, and the Defendant responds in the affirmative. (R-App. 06-7; Rec. 14 at 4:5-5:7.) That form, however, did not mention Defendant's constitutional right to counsel. (A-App. 003-04; Rec. 13 at 3-4.) The rest of the transcript is silent with respect to defendant's right to counsel; and the trial judge never asked the Defendant if he intended to waive his right to counsel and proceed without counsel. (R-App. 05-13; Rec. 14 at 4:5—5:13, 6:12-12:13.)

The State argues that the Defendant cannot rely on specific facts in the record demonstrating he did not knowingly, intelligently, and voluntarily waive his right to counsel because, among other things, the Defendant knew he had the right to counsel. While the record demonstrates that the Defendant knew about his right to counsel in some limited form, that fact does not address the question of whether he waived that right. Wisconsin law is clear that waiver of the right to counsel cannot be proven unless the circuit court conducts a colloquy to ensure that the defendant made a deliberate choice to proceed without counsel. *Klessig*, 211 Wis.

2d at 206. That the Defendant knew of his right to counsel has no bearing on this issue.

In the Plea and Sentencing Hearing in defendant's 2006 OWI conviction proceedings, the Circuit Court did not conduct a colloquy to ensure that the Defendant made a deliberate choice to proceed without counsel. R-App. 05-13; Rec. 14 at 4:5—5:13, 6:12-12:13. In fact, in that proceeding, the Trial Court never mentioned the Defendant's right to counsel at all. *Id*. Absent that colloquy, "a reviewing court may not find, based on the record, that there was a valid waiver of counsel" *Klessig*, 211 Wis. 2d at 206. The transcript from the 2006 Plea and Sentencing Hearing, then, conspicuously lacking any record of a colloquy, is sufficient evidence to establish a prima facie showing that the Defendant never knowingly, intelligently and voluntarily waived his right to counsel in his 2006 OWI conviction.

On page 13 of its Brief, the State argues that the Defendant's testimony on August 24, 2021 demonstrated that his assertions that he was unaware of the general range of penalties, the underlying charges, and his right to be counseled were inaccurate. First, the Defendant's August 24, 2021 testimony has no bearing on whether the Circuit Court properly decided the Defendant's prima facie showing nearly two months earlier. More importantly, the State's argument again distracts from the central point of law: absent a colloquy, an absence averred to by the Defendant and verified by transcript, this Court cannot may not find that the Defendant knowingly, voluntarily and intelligently waived his right to counsel.

The State additionally argues, based on *State v. Hammill*, 2006 WI App 128, ¶ 11, 293 Wis. 2d 654, 718 N.W.2d 747, that a defendant's lack of memory cannot make up the basis for a prima facie showing that their right to counsel was not knowingly, intelligently, and voluntarily waived in a prior proceeding. Again, the Defendant's lapsed memory, considered at the August 24th hearing, is not relevant with respect to whether the Affidavits considered on May 17, 2021 were sufficient to establish a prima facie showing he had not knowingly, voluntarily and intelligently waived his right to counsel. Therefore, *Hammill* is inapplicable as to whether the Defendant established that prima facie showing.

In *Ernst*, the Wisconsin Supreme Court makes clear that an insufficient *Klessig* colloquy can make up the basis for a defendant's collateral attack on the grounds that they did not knowingly, intelligently, and voluntarily waive their right to counsel. *Ernst*, 2005 WI 107, ¶ 2. If this is the basis for a defendant's collateral attack, however, a defendant cannot merely allege that the *Klessig* colloquy was defective, they must instead point to specific facts demonstrating that they did not knowingly, intelligently, and voluntarily waive their right to counsel. *Id*.

First, the instant case is not one involving an insufficient colloquy: there is no colloquy at all. That said, the Defendant has pointed to specific facts demonstrating that he did not knowingly, intelligently, and voluntarily waive his right to counsel during the proceedings for his 2006 OWI conviction. These include the Circuit Court's failure even to ask the Defendant, at any time, whether he was making a deliberate choice to proceed without counsel or advise him of his right to

Court-appointed counsel. Similarly, he was not advised of all the potential penalties and consequences of his plea, or that an attorney would have been able to help him negotiate a settlement of his case with the District Attorney, or of any of the other information which is provided on form CR-226. The Defendant alleged sufficient specific facts in his affidavits and with the Transcript of the 2006 plea hearing that demonstrated that he never knowingly, intelligently, and voluntarily waived his right to counsel during his 2006 OWI conviction, and therefore made a prima facie showing as required for his collateral attack.

III. THE STATE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL DURING HIS 2006 OWI CONVICTION.

Since the Defendant made a prima facie showing that his right to counsel was not honored during his 2006 OWI conviction, the burden shifted to the State to prove that he knowingly, intelligently, and voluntarily waived his right to counsel. *Klessig*, 211 Wis. 2d at 207. It is the State's burden to show the circuit court conducted 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 at 206.* If the circuit court fails to conduct such

a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel. *Id*.

The State argues that the ruling in *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L.Ed.2d 209 (2004), "effectively overruled *Klessig*'s requirement that the courts must inform defendants of the difficulties and disadvantages of self-representation." (App. Brief, at 21) However, the Wisconsin Supreme Court has held that *Tovar* did not overrule *Klessig*[4], and that the United States Supreme Court, in *Tovar*, actually endorsed the *Klessig* colloquy requirement.

> "We recognize the Supreme Court's decision in *Tovar*. We conclude, however, that the *Klessig* requirements are not based on the Sixth Amendment and, thus, do not conflict with the Supreme Court's holding. We do not conclude that the *Klessig* requirements are dictated by Article I, Section 7 of the Wisconsin Constitution.[4] In *Klessig*, we never suggested that the colloquy requirements were based on either the United States Constitution or Article I, Section 7 of our State Constitution. Instead, we made it clear that the requirements were a court-made procedural rule. Specifically, this court used its superintending and administrative authority to "mandate" the use of a colloquy in cases involving a defendant's waiver of the right to counsel, in order to serve **"the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources."** *Klessig*, 211 Wis.2d at 206, 564 N.W.2d 716 (emphasis added).
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> …
>
> The justification for the superintending and administrative authority this court utilized in *Klessig* is similar to that which we invoked in *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). In that case, we held that a circuit court must follow prescribed methods for

[4] Additionally, the Supreme Court, in *Tovar*, discusses the information a defendant who *elects* to proceed without counsel must be provided, implying that the court still contemplates an affirmative waiver from a defendant before concluding that the defendant's right to counsel has been honored. *Tovar*, 541 U.S. at 88.

> determining the defendant's understanding of the nature of a charge. In so holding, we concluded that, under the United States Constitution, no particular procedure is mandated for a circuit court's acceptance of a no contest or guilty plea. Instead, we made "mandatory" that, as a procedural requirement, in order to assist the circuit court in making the constitutionally required determination that a defendant's plea is voluntary, a circuit court must undertake a personal colloquy with the defendant. The purpose of the colloquy is to ascertain his or her understanding of the nature of the charge, prior to the court's acceptance of a guilty or no contest plea, pursuant to Wis. Stat. § 971.08(1). *See State v. Livingston,* 159 Wis.2d 561, 572, 464 N.W.2d 839 (1991). We based the sources of the required duties of the circuit court on the statute and on our "superintending and administrative authority over the circuit courts...." *Bangert,* 131 Wis.2d at 267, 389 N.W.2d 12 (footnote omitted).
>
> ¶ 21 Similarly, in *Klessig*, we required a circuit court to undertake a colloquy, even though such an action was not constitutionally required. We conclude that the *Klessig* colloquy requirement was and is a valid use of the court's superintending and administrative authority, just as it was in *Bangert,* and that such a rule does not conflict in any way with the United States Supreme Court's decision in *Tovar*, but rather receives endorsement from the Supreme Court's language in that decision."
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> *State v. Ernst*, 2005 WI 107, ¶¶ 18, 20, 21, 283 Wis. 2d 300, 314–16, 699 N.W.2d 92, 99–100.

The State incorrectly argues that the colloquy no longer must include the trial court's required notice to the defendant of the difficulties and disadvantages of self-representation. As cited above, *Ernst* does not support such a position. Rather, the Ernst decision re-affirms that a *Klessig* colloquy, which included the notice to the defendant of the difficulties and disadvantages of self-representation, is a mandatory procedural requirement, in order to assist the circuit court in making the constitutionally required determination that a defendant's plea is voluntary,

When the burden shifts to the State in a collateral attack, it must prove, by clear and convincing evidence at an evidentiary hearing, that a defendant knowingly, intelligently, and voluntarily waived their right to counsel during the proceeding for the prior conviction. *Klessig*, 211 Wis. 2d at 206. The State offered insufficient evidence to meet this clear and convincing standard during the evidentiary hearing, and the arguments advanced in their brief are inadequate to remedy that failure. The State argues it has provided this evidence, in part, because the record demonstrates that the Defendant knew enough about his right to counsel to make a knowing, intelligent, and voluntary waiver of that right under the Supreme Court's standard outlined in *Tovar*. *Tovar*, 541 U.S. at 88. While the record is inconclusive in terms of the extent of the Defendant's knowledge of his right to counsel during his 2006 OWI proceedings, the scope of his knowledge is immaterial to whether the State proved, by clear and convincing evidence, that the Defendant waived his right to counsel prior to his 2006 OWI conviction. The State cannot satisfy its burden by showing that the Defendant knew he had the right to an attorney, even if that knowledge is extensive. The State can only satisfy its burden by showing that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel. *Klessig*, 211 Wis. 2d at 207.

The State points to evidence from the Defendant's 2006 initial appearance to suggest that he did knowingly, intelligently, and voluntarily waive his right to counsel in that proceeding–but this is insufficient to satisfy their clear and convincing evidence burden. As an initial matter, there is only limited evidence

available from that proceeding, consisting of testimony from two witnesses to the proceeding and minutes from the proceeding. (A-App. 011, 043-61, 080-96, 100-104; Rec. 33, 49 at 8:9-26:19, 19:21-61:4, 65:16-69:23.) These pieces of evidence establish, at best, that the Defendant was informed of his right to counsel and the general punishments associated with conviction for second offense OWI at this proceeding. This evidence does not in any way establish that the Defendant waived his right to counsel during this proceeding. Specifically, there is a check box on the minutes form from this proceeding labeled "Defendant waives right of attorney" and it is not checked, while other check boxes around it are checked. (A-App. 011; Rec. 33.) It is possible that the circuit court informed the Defendant of the nature of the charge, the general range of penalties, and provided information regarding the right to counsel during this initial appearance, but the minutes clearly demonstrate that Defendant never waived his right to counsel at that time. *Id.* The State's argument that the information provided to the Defendant during this initial appearance was sufficient to effectuate a knowing, intelligent, and voluntary waiver of his right to counsel ignores that Wisconsin law requires a defendant to actually waive that right, which clearly did not happen during the Defendant's 2006 initial appearance. *Klessig*, 211 Wis. 2d at 206.

In fact, in rendering its decision, the Trial Court determined as an historical fact that "the record in Green County Case No. 2006 CT 47, the case in which Mr. Erickson appeared pro se and pled no contest to operating a motor vehicle while intoxicated as a second offense contains no Waiver of Right to an Attorney – CR-

225 form, nor does the transcript from the plea and sentencing hearing on October 2, 2006 reflect that the *Klessig* or *Tovar* factors were addressed." (A-App. 132; Rec. 39 at 5:18 - 24) This finding certainly implies that the entire record, not just the plea hearing, lacks any evidence of a colloquy addressing the waiver of counsel.

Aside from the fact that Defendant never waived his right to counsel, the record also demonstrates that, had there been a waiver, it would not have been knowing, intelligent, and voluntary. The Defendant testified that he did not know about his right to court-appointed counsel, and instead believed that his only options for representation were through the public defender's office or hired representation. (A-App. 001; Rec. 13 at 1.) Additionally, there is no evidence the court at the plea hearing informed the Defendant of the full range of penalties and consequences potentially associated with a second OWI conviction or confirmed that the Defendant fully understood those penalties prior to entering his plea. The Trial Court's mention that the conviction would trigger enhanced penalties in subsequent OWI proceedings arrived casually and only after the Circuit Court had accepted the Defendant's "no-contest" plea and imposed its sentence. (R-App. 11; Rec. 14 at 11:18-23.) In other words, the court did not give the Defendant enough information for him to make a knowing, intelligent, and voluntary waiver of his right to counsel nor did the Court confirm that the Defendant understood the information a person needs to know in order to make an intelligent and voluntary waiver. The Defendant was not effectively advised of his right to counsel because he was never made aware of the potential for court-appointed counsel. The minutes

from the Defendant's initial appearance for his 2006 OWI conviction suggest he was made aware of the possibility of representation through the public defender's office. (R-App. 012; Rec. 33.) Additionally, Defendant had previously hired attorneys to represent him in other matters, so he knew retaining private representation was also an option. (A-App. 043-61, 080-92; 49 at 8:9-26:19, 19:21-57:15.) However, neither of these alternatives were feasible for the Defendant. He testified that he never contacted the public defender's office because he knew, as a full time employee making about $360 per week, that he would be ineligible for a public defender. (A-App. 064; Rec. 49 at 29:4-6.) He also testified that he could not afford to hire private representation. *Id.* Consequently, the Defendant believed he had to represent himself against the 2006 OWI charges, because he was not made aware of a third option: court-appointed counsel. If the Defendant could have demonstrated, by a preponderance of the evidence, that he could not afford counsel despite being ineligible for a public defender, he would have received court-appointed counsel expensed to the county. *State v. Dean*, 163 Wis. 2d 503, 513-14, 471 N.W.2d 310 (Wis. Ct. App. 1991). Had the Defendant known about this option, he stated that he would have pursued it. (A-App. 9; Rec. 20 at 1.) Ultimately, because the Defendant was never informed of this option, he was incapable of making a knowing, intelligent, and voluntary waiver of his right to counsel.

The State argues, based on the Wisconsin Supreme Court's holding in *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182, that a defendant does not need to be informed of every potential option for counsel in order to

knowingly, intelligently, and voluntarily waive their right to counsel. *Drexler, however*, does not foreclose the possibility that a defendant needs to be informed of their right to potential court-appointed counsel to effectuate a valid waiver of their right to counsel. *Drexler* simply holds that current Wisconsin law does not require a court, during their *Klessig* colloquy, to inform a defendant of every potential option for counsel before taking a valid waiver of counsel from that defendant. *Id.* at ¶ 17. The decision goes on to state that it is possible that courts should be required to inform defendants of their potential right to court-appointed counsel in Wisconsin, based on this state's long-standing judicial policy establishing that an indigent defendant be provided counsel. *Id.* at ¶ 18. A decision by this court that the trial court's failure to inform a defendant of their potential right to court-appointed counsel, coupled with the trial court's failure to conduct any colloquy at all regarding a waiver of that defendant's right to counsel, would not be in conflict with *Drexler*. Additionally, in the instant case, there is conflicting evidence whether the circuit court informed the Defendant of any right to counsel, let alone the potential right to court-appointed counsel, before allowing him to proceed *pro se*. Therefore, it is clear that the Defendant never knowingly, intelligently, and voluntarily waived his right to counsel.

The Defendant also was never informed of all of the penalties and consequences associated with a second OWI conviction before his no contest plea was entered in 2006. The minutes from his initial appearance are inconclusive as to what information he was provided at that hearing, –but they contain no evidence

that he was informed of the effect a second OWI conviction would have on the sentences stemming from any subsequent OWI conviction. (A-App. 011; Rec. 18.) The State points to material from the transcript of the plea and sentencing proceeding, where the Trial Court discusses this information with the Defendant, but, as previously noted, this occurred after the Defendant entered (and the Court accepted) his no contest plea. (R-App. 11; Rec. 14 at 11:18-23.) The Plea Questionnaire form also did not include the range of penalties for a second offense OWI conviction. (A-App. 05-9; Rec. 13 at 3-6.)

The State also did not present clear and convincing evidence that the Defendant knew the consequences of proceeding without an attorney. The Defendant knew little of the litany of items that the Waiver of Right to an Attorney – CR-225 form contains. These items are critical to a Defendant having an intelligent and knowing waiver of his right to an attorney. The little evidence submitted by the State in that respect does not meet the clear and convincing standard. The Defendant could not make a knowing and intelligent waiver while not knowing the full legal ramifications of a second OWI conviction, and he was clearly never informed of all those ramifications before entering his plea, while unrepresented.

The greater weight of Wisconsin case law compels a decision affirming the lower court's grant of Defendant's Motion to Collaterally Attack his 2006 OWI Conviction on the grounds that his constitutional right to counsel was violated. In *Ernst*, the Wisconsin Supreme Court held that an insufficient *Klessig* colloquy can

form the basis for a collateral attack, but denied the defendant's motion because they did not point to specific facts demonstrating that the *Klessig* colloquy they received was insufficient. *Ernst*, 2005 WI 107, ¶ 2, 26. Additionally, the defendant in *Ernst* affirmatively waived their right to counsel. *Id.* at ¶ 6. In *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), the Wisconsin Supreme Court overturned the lower court's decision rejecting the defendant's collateral attack motion because the record provided limited evidence regarding the defendant's waiver of his right to counsel, and the defendant filed an affidavit stating he was not represented by counsel and never affirmatively waived his right to counsel. Finally, in *Klessig*, the Wisconsin Supreme Court explicitly held that if the circuit court does not conduct a colloquy to ensure that, among other things, the defendant made a deliberate choice to proceed without counsel, a reviewing court may not find, based on the record, that there was a valid waiver of counsel. *Klessig*, 211 Wis. 2d at 206. These cases make it clear that, in Wisconsin, a defendant must affirmatively waive their right to counsel for their constitutional right to counsel to be honored. In the instant case, it is obvious that Defendant never waived his right to counsel. The minutes from the Defendant's initial appearance clearly demonstrate that the Defendant never waived his right to counsel in that proceeding, and the transcript from the Plea and Sentencing Proceeding likewise demonstrates that no waiver occurred at that time. (A-App. 011; R-App. 11; Rec. 14 at 11:18-23.)

The State has made, at best, a case that the Defendant may have some information to make a knowing, intelligent, and voluntary waiver of counsel.

Specifically, that he may have known of his right to a public defender and what the penalty range was for a second offense. The State did not establish, however, the he had full knowledge of how to obtain a court-appointed lawyer, and there was no clear and convincing evidence that the Defendant appreciated the pitfalls of representing himself. Most importantly, what the State has not done, is provide any proof that Defendant ever waived his right to counsel.

CONCLUSION

The two issues presented are: (1) whether the Circuit Court correctly found that the Defendant met his initial burden in collaterally attacking his 2006 OWI conviction by making a prima facie showing that his right to counsel was not honored; and (2) whether the Circuit Court correctly held that the State failed to prove, by clear and convincing evidence, that the Defendant made a knowing, intelligent, and voluntary waiver of his right to counsel in his 2006 OWI conviction. The correct response to both issues is yes.

The Defendant met his burden of making a prima facie case that his right to counsel was not honored during his 2006 OWI conviction in accordance with the Wisconsin Supreme Court's decisions in *Klessig* and *Ernst*. *Klessig* outlines what a circuit court must do to allow a defendant to proceed without counsel; *Ernst* makes it clear that a defective *Klessig* colloquy can serve as the basis for a collateral attack motion. *Klessig*, 211 Wis. 2d at 206; *Ernst*, 2005 WI 107, ¶ 2. The Defendant pointed to specific facts demonstrating that he did not make a knowing, intelligent,

and voluntary waiver of counsel during his 2006 OWI conviction – these being, specifically, that the record contains no evidence that defendant ever affirmatively waived his right to counsel or that the circuit court engaged in any *Klessig* colloquy. He asserted that he was not advised nor did he know of all the potential penalties and consequences of a second offense OWI conviction, his right to court-appointed counsel, and the benefits of counsel and the pitfalls of representing himself. Affirmatively, he claimed that he would have sought Court-appointed counsel if he would have known of that option. Therefore, the Defendant met his burden of making a prima facie showing that his right to counsel was not honored during his 2006 OWI conviction.

Further, the State has failed to meet its burden of showing by clear and convincing evidence that the Defendant made a knowing, intelligent, and voluntary waiver of his right to counsel during his 2006 OWI conviction. Instead, the State focused solely on the information the Defendant may have had regarding his right to counsel when he plead no contest at his 2006 OWI Plea and Sentencing Proceeding. This evidence is questionable at best, and it does nothing to demonstrate that the Defendant actually waived his right to counsel. There is no evidence the Defendant was ever made aware of his potential right to court-appointed counsel, and contrary to the State's argument, *Drexler* does not foreclose on the possibility of this being a violation of Defendant's constitutional right to counsel. *Drexler*, 2003 WI App 169, ¶ 18. There is no evidence the Defendant was ever informed of the collateral consequences of a second OWI conviction on any

subsequent OWI convictions before he plead no contest to his second OWI. Finally, there was no evidence that the Defendant was fully informed of the benefits of counsel and the pitfalls of proceeding without counsel.

Ultimately, whether the Defendant had the information or was constitutionally required to be informed of is immaterial to the crux of this case; that being, the State has produced no evidence demonstrating that the Defendant ever affirmatively waived his right to counsel. There was no colloquy in any proceeding in which the Circuit Court asked the Defendant if it was his deliberate choice to proceed without counsel, and none of the written forms the Defendant completed prior to entering his plea contain any information indicating a waiver of the right to counsel. Therefore, the State failed to meet its burden to prove, by clear and convincing evidence, that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel. Therefore, the Defendant respectfully requests that the Court of Appeals affirm the Trial Court's Order granting the Defendant's Motion to Collaterally Attack the 2006 OWI Conviction and remand the matter to the Trial Court for further proceedings.

Dated this 24th day of February 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this brief is 8938 words.

Dated this 24th day of February 2022.

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