STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2024 AP 002306

Ozaukee County Circuit Court Case No. 2023CT000305

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW JOHN FLYNN,

Defendant-Appellant

STATE'S RESPONSE TO THE DEFENDANT'S APPEAL FROM THE JUDGEMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, BRANCH I, THE HONORABLE STEVEN M. CAIN PRESIDING, TRIAL COURT CASE 23-CT-305

BRIEF FOR PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the defendant establish a *prima facie* case that he was entitled to a hearing on his motion collaterally attacking his prior conviction for operating a motor vehicle while under the influence of an intoxicant?

Circuit Court: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is necessary in that the issues raised can be resolved using well-established principles set forth in existing published case law.

STATEMENT OF THE CASE

On August 16, 2023, Matthew John Flynn, defendant-appellant, (Flynn), was charged, via criminal complaint, with Operating a Motor Vehicle While Under the Influence of an Intoxicant – Third Offense, in violation of Wisconsin Statute, section 346.63(1)(a). [R.3] After receiving the defendant's blood alcohol concentration, an Amended Complaint was filed on September 22, 2023, adding a charge of Operating a Motor Vehicle With a Prohibited Alcohol Concentration – Third Offense, in violation of Wis. Stat. § 346.63(1)(b). [R.15]

Flynn filed multiple pre-trial motions, including a collateral attack of a 2011 Sheboygan County OWI conviction. [R.21] A hearing on the motion was held on March 22, 2024, where Judge Paul Malloy denied the Flynn's request, stating he did not met his burden. [R.28] Judge Malloy noted there was a presumption of regularity in the Sheboygan County hearing, in which the judge would follow proper plea and waiver colloquy's. [R.28 at 13:11 to 14:20]

Flynn filed an amended collateral attack motion, adding a sentence to his original motion, and including an affidavit, plea questionnaire/waiver of rights, waiver of right to an attorney. [R.35, 36] Another hearing was held on September 3, 2024, where Judge Steven Cain gave parties a new date so he could review the filings and transcripts. [R. 65] During this second hearing, the court again questioned whether Flynn would meet his burden, given the presumption of regularity. [R65 at 5:3-6 and 6:10-15]

During the September 3, 2024 hearing, Judge Cain confirmed there was no transcript and the only available documents were the plea questionnaire/waiver of rights form and the waiver of right to an attorney form. Flynn's attorney confirmed the record he had available was limited to the forms presented [R65 at 7: 11-13, 16-24]. The State indicated they reached out to current members of the Sheboygan County District Attorney's Office and they had no additional documents; that the only supplemental information the State had was based on a review of the Wisconsin Circuit Court Access website. [R65 at 10: 1-7]

On November 5, 2024, a third hearing was held and Judge Cain again denied the Flynn's motion. [R. 58] The court held that, in the absence of a transcript, there is a presumption of regularity. The court also noted without the transcript, there's simply no way for Flynn to demonstrate otherwise. [R 58 at 4:4-11] Flynn entered a guilty plea to Operating While Intoxicated, 3rd Offense. [R.43, 58]

Flynn filed a timely Notice of Appeal. [R.46] The issue on appeal is whether the court erred in denying Flynn's request for a hearing on his motion.

STATEMENT OF FACTS

On August 12, 2023, Village of Saukville Police Officer Christopher Janich initiated a traffic stop in the Village of Saukville, Ozaukee County, in a vehicle driven by Flynn.

Officer Janich noted Flynn's glossy eyes and asked to speak with Flynn outside of his vehicle. Flynn was uncooperative and refused to get out of his vehicle. Flynn was eventually coaxed out of his vehicle where officers noted the odor of alcohol and Flynn's slurred speech. Flynn did poorly on standardized field sobriety testing, including a preliminary breath test showing a .200 breath alcohol concentration. Flynn provided samples of blood, which were tested by the Wisconsin State Lab of Hygiene, showing a blood alcohol concentration of .194 g/100 mL.

The criminal complaint noted Flynn had two prior OWI convictions, one of which was in the Circuit Court of Sheboygan County, case number 2010CT000331.

ARGUMENT

I. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING FLYNN'S REQUEST TO HAVE A HEARING ON HIS COLLATERAL ATTACK MOTION

On appeal, Flynn argues the court erred in denying a hearing on the collateral attack motion.

A court must first determine whether a motion, on its face, alleges sufficient material facts that, if true, would entitle the defendant to relief. This question of law is reviewed *de novo*. If the motion does not raise facts sufficient to bring relief, or contains only conclusory allegations, or if the record demonstrates the defendant is not entitled

to relief, the court has discretion to grant or deny a hearing. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50, 53-54 (1996).

In *State v. Klessig,* 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (1997), the Wisconsin Supreme Court mandated the use of a colloquy in every case where a defendant wishes to represent themselves, in order to prove the defendant is knowingly and voluntarily waiving their right to an attorney. The court went on to say "[c]onducting 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 preserving and documenting that valid waiver for purposes of appeal and postconviction motions." *Id.* The *Klessig* court stated a circuit court judge must conduct a colloquy showing 1) the defendant made a deliberate choice to proceed without an attorney, 2) the defendant is aware of the difficulties and disadvantages of representing themselves, 3) the defendant is aware of the seriousness of the charge, and 4) the defendant is aware of the general range of penalties they could face if convicted. *Id.*

Once a judgment is entered, the conviction is afforded a presumption of regularity. *State v. Clark,* 2022 WI 21, ¶ 13, 401 Wis.2d 344, 352-53, 972 N.W. 2d 533, 537, *citing Parke v. Raley*, 506 U.S. 20, 29, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). The presumption of regularity is a concept going back over a hundred years. "Reasonable presumptions are to be made in favor of the regularity and validity of the actions of public officers and tribunals." *State ex rel. Lawrence v. Burke*, 253 Wis. 240, 246-47, 33 N.W.2d 242, 246 (1948), *citing Falkner v. Guild,* 10 Wis. 563 (1860), *Willis v. Prince*, 45 Wis. 610 (1878).

In *State v. Ernst,* 2005 WI 107, ¶ 28, 283 Wis.2d 300, 699 N.W.2d 92, the court held a defendant had a right to collaterally attack a prior OWI conviction where the defendant was not represented by an attorney and did not knowingly and voluntarily waive their right to an attorney.

In analyzing the procedure for bringing a collateral attack on a prior OWI conviction, the *Clark* court held "if a defendant collaterally attacking 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." *Clark*, 401 Wis.2d 344, ¶ 20, 972 N.W.2d 533. In other words, the burden shifting should not shift to the State when no transcript is available. *Id.*, ¶ 3. However, if the defendant can point to a defect in the plea colloquy transcript, the defendant will have provided a prima facie challenge and the burden shifts to the State. *Id.*, ¶ 16.

Clark stated, in no uncertain terms, that if the defendant cannot point to a defect in a transcript, the defendant has not met the burden of showing a prima facie challenge, thus shifting the burden to the State. Here, Flynn has not provided a transcript showing a defective waiver of attorney colloquy.

While the defendant has provided a plea questionnaire and waiver of attorney forms, the courts are still left with the unanswered questions of what happened during the waiver of attorney colloquy. Absent a showing otherwise, like the transcript, as noted by both Judge Cain and Judge Malloy, the presumption is the Sheboygan County judge did go over the proper colloquy as outlined in *Klessig.*

Flynn ignores the very specific and direct holding of *Clark* and suggests alternative means of proof can be used in lieu of a transcript. If the court in *Clark* wanted to have other documents considered, they would have outlined those documents; instead, they specifically stated there needs to be a transcript.

CONCLUSION

Both circuit court judges properly found Flynn had not provided a prima facie showing of proof, shifting the burden to the State. Moreover, the court did not abuse its discretion in ruling against Flynn.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat., for a brief produced with a proportional serif font. The length of this brief is 1411 words.

Electronically signed by: Kristian K. Lindo
KRISTIAN K. LINDO
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH § 809.19(12), Wis. Stat.

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Wis. Stat.

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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Electronically signed by: Kristian K. Lindo
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