10. AB

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2016AP2438-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SCOT ALAN KRUEGER,

Defendant-Appellant.

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ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE BRIAN A. PFITZINGER PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not required because it will not assist the court. Publication is not requested.

STATEMENT OF THE CASE

Plaintiff-Respondent, the State of Wisconsin (hereinafter "the State"), points out that Scot Krueger (hereinafter "Krueger"), has incorrectly referred to the dates of his prior convictions. Other than that, the "Statement of the Case" as set forth by Krueger is accurate.

Krueger states that "(t)he criminal complaint alleged that Krueger had been previously convicted of two other OWI offenses, one in 1989 and one in 1993...". Krueger is in error in that he has provided the *violation* year for the first OWI conviction, and the *conviction* year for the second OWI conviction. The correct

dates are found on the second page of the criminal complaint, and are as follows (see R.1:2):

- Violation date 12/15/1989, conviction date 05/08/1991, and
- Violation date 08/30/1992, conviction date 04/21/1993.

This error does not affect the outcome of the appeal but is offered for the sake of accuracy and consistency.

ARGUMENT

The trial court correctly concluded that Krueger did not establish a prima facie case that he was denied his constitutional right to counsel in connection with his 1993 OWI conviction.

Krueger's affidavit asserted that the court that presided over his 1993 OWI conviction engaged in an inadequate plea colloquy. The pertinent portions of his affidavit consist of the following (R.17:2) :

> ¶3. I recall being charged and convicted of an operating while intoxicated offense in Dodge County Circuit Court on April 21, 1993. I was not represented by an attorney at any time in the proceedings.
>
> ¶4. At the time of the above conviction, I did not understand the difficulties and disadvantages of proceeding without an attorney, and I was not aware that an attorney could be appointed to represent me if I could not afford one.
>
> ¶5. At no time during the above mentioned case was I advised by the judge, or anyone else in the proceeding, of the difficulties and advantages of proceeding without an attorney, nor that an attorney could be appointed to represent me if I could not afford one.

The State has no quarrel with paragraph #3.

Paragraph 4 is completely devoid of facts that link the plea colloquy's alleged deficiencies to a conclusion that the deficiencies rendered Krueger's waiver of counsel unknowing, unintelligent, or involuntary.

Paragraph 5 is merely an allegation that the trial court did not follow the colloquy mandated by the Wisconsin Supreme Court in *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). As the Wisconsin Supreme Court clarified in *State v. Ernst*, 283 Wis. 2d 300, 699 N.W. 2d 92 (2005), the *Klessig* requirements are a "court-made procedural rule", but are not required by either the Wisconsin

Constitution or the United States Constitution. *Ernst* at 314-15, 99-100. The failure of a court to follow the *Klessig* requirements does not, in and of itself, entitle a defendant to relief via collateral attack.

Despite the skimpy, bare-bones assertion contained in Krueger's affidavit, and the State's protestations that the affidavit was inadequate to make a prima facie showing, the circuit court granted a hearing and allowed Krueger to attempt to supplement his affidavit with testimony. Being granted a hearing, however, is not the equivalent of establishing a prima facie showing that one's constitutional right to counsel was denied, certainly not when the testimony goes no further than to reiterate that the plea colloquy did not meet the requirements of *Klessig*.

At the hearing, while the burden of proof was on Krueger, he readily acknowledged that the trial court informed him of the nature of the charge (R.18:9, 13) and the range of penalties he faced (R.18:13). Specifically with regard to the right to counsel, however, he testified that it was not explained to him that he had the constitutional right to have a lawyer involved, that he did not know that he had a constitutional right to have a lawyer if he couldn't afford one, that he did not make contact with the public defender's office, and that he did not speak with any lawyer prior to going to court. (R.18:10). He went on to testify that he was unaware that if he could not afford an attorney, one might be appointed for him, and that he was unaware that he could ask the court to appoint an attorney. (R.18:11). With that, Krueger's testimony in response to the direct examination of his trial counsel was concluded.

The United States Supreme Court established in *Iowa v. Tovar*, 541 U.W.77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) that the type of information Krueger alleged the court failed to give him is simply not constitutionally required. The *Tovar* court specifically held that "the Sixth Amendment right to counsel did not require the trial court, before accepting the defendant's waiver of counsel at a plea hearing, to give a rigid and detailed admonishment of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risked overlooking a defense." The failure to advise Krueger as to the "difficulties and advantages of proceeding without an attorney", or "that an attorney could be appointed to represent (him) if (he) could not afford one" (R.17:2), if indeed that happened, simply does not rise to the level of depriving Krueger of his constitutional right to counsel.

The prosecutor then cross-examined Krueger. The State notes that the burden had not yet shifted to the State; the burden was still on Krueger to make a prima facie showing that he had not knowingly, intelligently, and voluntarily waived his constitutional right to counsel. This was made clear in an exchange between the

prosecutor and the court at R.18:22. The significant portions of Krueger's testimony on cross-examination were as follows:

- Krueger was asked if he received a copy of the criminal complaint. He answered "police report". (R.18:12). He testified that he could not recall receiving a copy of the charging document. (R.18:14).

- Krueger said he had no contact with the prosecuting attorney (R.18:12), but acknowledged that there was a "county representative....a district attorney, assistant district attorney" in the courtroom (R.18:13).

- Krueger testified that there was no hearing, but he acknowledged that "we went to the judge and they asked me how I pled", and that this took place in a courtroom. (R.18:12).

- Krueger testified that he remembered "coming to court, being read the charges, asking how (he) pled and that was it" (R.18:15).

It is readily apparent that Krueger's testimony did not materially add to his affidavit. He failed to make factual connections between the alleged colloquy deficiencies and how they led to his entry of an unknowing, unintelligent, or involuntary plea.

The Wisconsin Court of Appeals has, on numerous occasions, addressed the quantum of proof that is required for a defendant who is collaterally attacking a prior conviction to meet his burden of proof. A very recent case is *State v. Seward*, Appeal No. 2016AP1248-CR. This is an unpublished decision, and is cited for its persuasive value. The relevant statements in Seward's affidavit were as follows, Id at 3-4:

- (1) "I was never advised of and I did not know or understand the difficulty or disadvantage of proceeding without counsel."

- (2) Prior to his 2006 court proceeding, "I had never been involved in the court system."

- (3) "The court never advised me that there might be an advantage to having an attorney, nor did the court advise me that it might be difficult to proceed without counsel."

- (4) "Because I had never been involved in the criminal system before, I did not know or understand the difficulty or disadvantage of proceeding without an attorney."

Seward's affidavit is quite similar to Krueger's affidavit. Both affidavits are, in essence, complaints that the *Klessig* colloquy was not followed. Both affidavits proclaim that the defendant did not understand "the difficulties and disadvantages of proceeding without an attorney", (R.17:2). But as pointed out in *State v Seward*:

> This factual averment is headed in the right direction, but is still not enough to trigger a Sixth Amendment violation. Seward can arguably make a prima facie showing by averring that he did not "understand the role counsel could play in the proceeding." *State v. Gracia*, 2013 WI 15, ¶36, 345 Wis. 2d 488, 826 N.W.2d 87 (quoting *State v. Schwandt*, No. 2011AP2301-CR, unpublished slip op. ¶ 14 (WI App May 16, 2012)). However, the lesson of *Ernst* is that bare assertions of *Klessig* deficiencies are not enough. There must be factual connections made between the deficiencies in the colloquy and why that rendered the waiver unknowing, unintelligent, or involuntary. Seward still must point to "specific facts" indicating he did not knowingly, intelligently, and voluntarily waive his right to counsel. *Ernst*, 283 Wis. 2d 300, ¶26. A conclusory statement that Seward did not understand the advantages of counsel and the disadvantages of proceeding pro se—without identifying what he did not know or understand—is not enough. See *State v. McGee*, No. 2010AP3040-CR, unpublished slip op. ¶¶ 9-10 (WI App Apr. 26, 2011) (holding that the assertion a defendant "did not understand the difficulties and disadvantages of self-representation" without the support of "specific facts or examples" did not state a prima facie case); see also *State v. Reggs*, No. 2013AP2367-CR, unpublished slip op. ¶¶11-12 (WI App July 3, 2014) (holding a defendant failed to make a prima facie showing because his affidavit was "not sufficiently specific"); *State v. Bowe*, No. 2013AP238-CR, unpublished slip op. ¶ 14 (WI App Sept. 17, 2013) (concluding that a defendant failed to make a prima facie showing because he "made no specific averments regarding what he did not know or understand").
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> *State Of Wisconsin, Plaintiff-Respondent, v. Matthew A. Seward, Defendant-Appellant.*, No. 2016AP1248-CR, 2017 WL 1115277, at 4 (Wis. Ct. App. Mar. 22, 2017)

Like so many other defendants, Krueger's affidavit was "headed in the right direction", but it fails simply because it did not go beyond the bare assertion that the trial court failed to adhere to *Klessig*. Failure to conduct a plea colloquy in accordance with *Klessig*, in and of itself, does not establish a constitutional defect, and only a constitutional defect is sufficient to grant the relief Krueger seeks. The Wisconsin Supreme Court made this abundantly clear in *State v. Ernst*, wherein the Court ruled as follows:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she "did not know or understand the information which should have been provided" in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel. *See Hampton,* 274 Wis.2d 379,¶ 46, 683 N.W.2d 14 (citing *Bangert,* 131 Wis.2d at 274-75, 389 N.W.2d 12). Any claim of a violation on a collateral attack that does not detail such facts will fail.
>
> *State v. Ernst*, 2005 WI 107, ¶ 25, 283 Wis. 2d 300, 318–19, 699 N.W.2d 92, 101.

Krueger cites to *State v. Baker*, 169 Wis.2d 49, 485 N.W.2d 237 (1992) for support for his contention that his affidavit was sufficient. Krueger's reliance on *Baker* is misplaced. The manner in which the Wisconsin Supreme Court decided *Baker* was found to be incorrect by the U.S. Supreme Court in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), was disapproved of in *State v. Drexler*, 266 Wis. 2d 438, 669 N.W.2d 182, (also cited by Krueger to bolster his contention), and overruled in *State v. Hahn*, 238 Wis. 2d 889, 618 N.W. 2d 528 (2000).

State v. Baker: Baker had been convicted of operating a motor vehicle with a revoked operating privilege on four prior occasions and faces six months to a year of imprisonment if convicted of a fifth offense. Baker objected to two of his prior offenses being considered at sentencing. In the first case, he had not appeared in court; instead, an attorney entered a plea on his behalf. In the second case, the court records had been destroyed and there was no evidence to indicate whether he had been represented by counsel. Baker swore in an affidavit that he had not been represented by counsel and had not waived that right. On appeal, the Court of Appeals held that the first conviction should be disregarded on grounds that with only his attorney in court in his stead, there was no evidence that Baker "knowingly, voluntarily, and intelligently" waived his right *to trial* (emphasis added) when entering his plea. The Court of Appeals upheld counting the second conviction because it found Baker's self-serving affidavit to be insufficient evidence of a constitutional violation by the trial court (which it presumed had acted constitutionally). The Wisconsin Supreme Court held that defendants could collaterally attack prior convictions for any alleged violation of the defendant's constitutional rights in the prior proceeding and upheld the lower courts' decision to exclude evidence of the first challenged OAR conviction (in which the attorney had entered the plea on the defendant's behalf). The Court also established a mechanism for weighing evidence in collateral attack cases and, applying that rule, concluded that Baker had met his burden of proof to collaterally attack the second conviction. This was done without any discussion of the content of Baker's affidavit or what facts were set forth in it. The Court then stated that, given Baker's affidavit, the state had the burden of proving that

Baker knowingly, voluntarily, and intelligently waived his right to counsel and held that the state had not met that burden. (*Baker* at 78.)

Custis: Two years later, in *Custis v. United States*, 511 U.S. 485 (1994), the U.S. Supreme Court expressly limited applicability of collateral attack to cases in which a defendant was denied his right to *counsel* (emphasis added). Custis attempted to collaterally attack some prior convictions on the basis that his counsel was ineffective and that therefore his constitutional right effective counsel had been abridged. The U.S. Supreme Court rejected his appeal and held that a defendant could not collaterally attack a prior conviction on that ground or on any constitutional ground other than the failure to provide counsel. Thus the U.S. Supreme Court essentially ruled that the Wisconsin Supreme Court's decision in *Baker* was wrongly decided.

Hahn: The Wisconsin Supreme Court corrected its decision in *Baker* in *State v. Hahn*, 238 Wis. 2d 889, 618 N.W. 2d 528 (2000). Hahn, like Baker, alleged that prior to entering a plea in a prior conviction that was being considered for sentence enhancement purposes, he had not "knowingly, voluntarily, and intelligently" entered his plea because the circuit court never informed him of collateral consequences that could result from the plea. Relying on the *Baker* decision, Hahn collaterally attacked that prior conviction. The Wisconsin Supreme Court used *Hahn* as an opportunity to correct and reverse its mistake in *Baker*, and overruled *Baker*. The Court limited collateral attacks on prior convictions to cases involving the deprivation of the right to counsel. The Court stated that "in an enhanced sentence proceeding predicated on a prior conviction, the U.S. Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." (*Hahn* at ¶17).

Drexler: Within the context of a fourth offense OWI, Drexler argued that his second offense OWI should not be counted because the trial court "failed to advise him that he had the right to counsel appointed by the court and paid for by the county, even though he did not qualify for counsel provided by the state public defender." *State v. Drexler*, 266 Wis. 2d 438, 442, 669 N.W.2d 182, 184. While true that the trial court did not go into that amount of detail regarding counsel, the Court of Appeals held that:

> a trial court does not err if it does not advise the defendant of the variety of sources for appointed counsel and the variety of sources for reimbursement of counsel. A trial court is only obligated to advise a defendant of the right to counsel; it is not required to conduct a colloquy before accepting a waiver of counsel that includes specific advice to a defendant that the right to appointed

> counsel includes the right to counsel appointed by the court and paid for by the county. *State v. Drexler*, 266 Wis. 2d 438, 451, 669 N.W.2d 182, 188 (2003).

Krueger also relies upon *Drexler*, but *Drexler* does not help him in the least. Even if the trial court did not advise Krueger of the variety of sources for counsel, this was not a constitutional error and does not strengthen his affidavit.

At the conclusion of Krueger's testimony, the trial court judge launched into an exposition of his then twenty-eight years of knowledge of the way Dodge County court commissioners and circuit court judges handle initial appearances and plea colloquys with criminal defendants. The trial court judge stated that "since 1998 every single judge in Dodge County has conducted a thorough plea colloquy with, with (sic) defendants" (R.18:23). He mentioned one judge who adamantly talked defendants into getting an attorney, and another judge who "would not under any circumstance let a defendant plead without at least asking about whether they wanted an attorney. We bend over backward here in Dodge County to make sure that people are represented" (R.18:24). The trial court judge concluded that the defendant's version of what he claims he experienced at his court appearance in 1993 essentially flew in the face of what the judge knew to be true, in the county where he sat through literally thousands of plea hearings, both as a prosecutor and a defense attorney (R.18:24,26). The trial court concluded that Krueger had "no credibility because he simply can't remember...he can't say what happened back on this date and this time because he, frankly, doesn't know" (R.18:26).

The State notes the similarity between this case and *State v Hammill*, 293 Wis. 2d 654, 718 N.W.2d 747 (Ct. App. 2006). In both cases, there was no transcript of the plea hearing, and the defendants testified that they did not waive the right to counsel. At the collateral attack motion hearing, the Barron County judge's clerk testified with regard to the judge's plea colloquy practices. The clerk did not specifically remember Hammill's plea hearing, but testified to the judge's practice. If a clerk's testimony is relevant to determining whether a defendant's testimony is credible, so is that of a judge who has been actively involved in a given county's criminal justice system for decades. In this case, the trial court judge's knowledge and clear memory of nearly three decades worth of plea colloquy practices clearly outweighs Krueger's sketchy recollection of what transpired in his case, a recollection that the trial court judge found to bear only a faint and partial resemblance to what routinely took place in Dodge County plea colloquys. In the *Hammill* case, that defendant's failure to testify to facts that demonstrated that he did not know or understand information that should have been provided to him resulted in a finding that he had failed to make a prima facie showing. That is the same finding that the trial court made with regard to Krueger's testimony.

It is clear from the transcript of the motion hearing that the burden never shifted to the State. Defense counsel directly examined Krueger, then the prosecutor cross examined Krueger. The trial court then had to make a determination as to whether the defendant had made the requisite prima facie showing. Had the trial court determined that he had made the requisite showing, the burden would then have shifted to the State. But that did not happen. The trial court concluded that the defendant lacked credibility, and there is no basis for arguing that the trial court's credibility finding was an abuse of discretion.

In summary: Krueger filed a bare-bones, self-serving affidavit that nevertheless got him the hearing he requested. At the hearing, the burden was squarely on him, but he never advanced his cause to the point that the burden shifted to the State. The trial court was entitled to assess the credibility of the defendant's testimony, and when held up against the trial court's own decades-long experience of how the courts in Dodge County function, the court trial concluded that the defendant was not credible.

CONCLUSION

For the foregoing reasons, the Trial Court's decision that Krueger failed to establish a prima facie case that he was denied the constitutional right to counsel in connection with his 1993 OWI conviction should be affirmed.

Dated this 13th day of April, 2017.

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