STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1058-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

TERESA L. CLARK,

Defendant-Respondent.

PETITION FOR BYPASS

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INTRODUCTION

A person charged with an offense related to operating while under the influence of an intoxicant (OWI) may collaterally attack a prior offense that is being used to enhance the charge, on the ground that she was denied the constitutional right to counsel in the prior case. The issues in this case concern how a court resolves a collateral attack when there is no evidence demonstrating that the circuit court in the prior case failed to give the person the information necessary for her to validly waive counsel.

In *State v. Ernst*, 2005 WI 107, 283 Wis 2d 300, 699 N.W.2d 92, this Court adopted a procedure for resolving collateral attacks when there *is* evidence demonstrating a deficiency in the circuit court's waiver-of-counsel colloquy in the prior case—usually a transcript of the plea hearing. The procedure is the same one used to resolve motions for plea withdrawal on the basis of an inadequate plea colloquy.

Under this procedure, established in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), a defendant makes a prima facie showing that her guilty plea was not knowing, intelligent, and voluntary by pointing to evidence demonstrating a deficiency in the circuit court's required colloquy and alleging that she did not understand the information that the record shows the court failed to give her. *Id.* at 274–75. The burden then shifts to the State to prove, by clear and convincing evidence, that her plea was nonetheless knowing, intelligent, and voluntary. *Id.*

In a collateral attack, a defendant makes a prima facie showing that her waiver of her right to counsel was not knowing, intelligent, and voluntary by pointing to evidence

demonstrating a deficiency in the circuit court's required colloquy and alleging that she did not understand the information that the record shows the court failed to give her. *Ernst*, 283 Wis 2d 300, ¶ 25. The burden then shifts to the State to prove, by clear and convincing evidence, that her waiver of counsel was nonetheless knowing, intelligent, and voluntary. *Id.* ¶ 27.

The issues in this case concern the procedure for resolving a collateral attack when there is *no* evidence demonstrating an inadequate colloquy. In plea withdrawal motions in which there is no evidence of an inadequate plea colloquy, the *Bangert* burden-shifting procedure does not apply. *State v. Negrete*, 2012 WI 92, ¶¶ 31–32, 343 Wis. 2d 1, 819 N.W.2d 749. A defendant's motion to withdraw her plea on the basis of an allegedly inadequate colloquy, when no evidence demonstrates an inadequate colloquy, is resolved under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *Negrete*, 343 Wis. 2d 1, ¶ 33. If a defendant alleges sufficient facts that, if true, would entitle her to relief, she is entitled to a hearing. *Id.* ¶¶ 18, 31–32. But at that hearing, she retains the burden of proving that her plea was not knowing intelligent, and voluntary. *Id.* ¶¶ 20, 31–32; *State v. Hampton*, 2004 WI 107, ¶ 63, 274 Wis. 2d 379, 683 N.W.2d 14.

Logically, just like the burden does not shift for a plea withdrawal motion when no evidence demonstrates an inadequate colloquy, the burden should not shift in a collateral attack when no evidence demonstrates an inadequate colloquy. But this Court has not yet adopted the *Bentley* procedure for collateral attacks. As a result, circuit courts apply the same burden-shifting procedure for resolving collateral attacks in which there is *no* evidence demonstrating an inadequate colloquy that they apply when there *is* such

evidence. Under this approach, the burden shifts to the State once the defendant merely alleges an inadequate colloquy.

The *Bangert* burden-shifting procedure makes sense when there is evidence demonstrating an inadequate colloquy. A defendant *shows* that the circuit court failed to give her the required information and *alleges* that the court's error mattered because she did not know the information the court failed to give her. The burden then shifts to the State to prove that, notwithstanding the circuit court's error, the defendant waived counsel knowingly, intelligently, and voluntarily. But it makes no sense to shift the burden to the State to prove that the defendant validly waived counsel notwithstanding the court's error when there is no evidence showing that the circuit court erred.

The court of appeals has recognized "the practical difficulties" "that ensue when a defendant can meet his or her burden of establishing a prima facie case simply by filing an affidavit providing a self-serving rendition of events that transpired in court five, ten, or even twenty years later." *State v. Drexler*, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. It termed these difficulties "a problem of statewide concern that should properly be addressed by the supreme court." *Id.* And the court of appeals has recognized that it cannot establish a proper procedure—only this Court can. *Id.*; *State v. Lebo*, No. 2014AP730-CR, 2015 WL 1525988, ¶ 29 n.4 (Ct. App. Apr. 7, 2015) (unpublished).[1] The court of appeals has called on this Court to address this issue. *Id.* And the court has suggested that this Court adopt the *Bentley* procedure for collateral attacks when no evidence demonstrates an inadequate colloquy. *Id.*

[1] The court of appeals opinion in *Lebo* is appended to this petition.

The State petitions this Court to accept this appeal on bypass because there is a need for a proper procedure for resolving a collateral attack on a prior conviction when there is no transcript demonstrating that the circuit court did not conduct an adequate waiver-of-counsel colloquy. And only this Court can establish that procedure.

ISSUES PRESENTED

I. Does the burden shift to the State when a defendant collaterally attacking a prior conviction does not point to evidence that *shows* that the circuit court failed to inform her of the right to counsel but merely *alleges* that the court failed to do so?

The circuit court answered "yes." It concluded that the burden shifts to the State based solely on a defendant's affidavit alleging that the circuit court failed to give her the information required for her to validly waive counsel, even though no evidence shows that the court failed to give her that information.

This Court should answer "no." If a defendant does not show a prima facie violation of her right to counsel with evidence showing that the circuit court failed to conduct an adequate waiver-of-counsel colloquy, the burden should not shift to the State to prove a valid waiver. A defendant who sufficiently alleges a violation of her right to counsel is entitled to a hearing, but she should retain the burden of proving that her right to counsel was violated.

II. Did Clark prove that her right to counsel was violated in her prior cases?

The circuit court answered "yes." It concluded that Clark satisfied her burden by alleging that the circuit courts

in her prior cases failed to give her the required information, and that the burden shifted to the State. The court granted Clark's collateral attack motion because it concluded that the State did not then prove that Clark waived her right to counsel knowingly, intelligently, and voluntarily (as no transcript was available).

This Court should answer "no." Clark did not show that the circuit courts in her prior cases failed to give her the required information, so the burden should not have shifted to the State. Clark was entitled to a hearing, but she failed to prove that she did not waive counsel knowingly, intelligently, and voluntarily, so her collateral attack motion should have been denied.

RELIEF REQUESTED

The State petitions this Court, pursuant to Wis. Stat. §§ 808.05 and 809.60, to bypass the Court of Appeals and take jurisdiction to review this appeal directly. This appeal is from a non-final order entered June 8, 2020 in the Ashland County Circuit Court, the Honorable John P. Anderson, presiding granting a motion collaterally attacking two prior convictions. The court of appeals granted the State's petition for leave to appeal on July 16, 2020. The defendant filed her response brief in the court of appeals on February 8, 2021, and the State received notice of the filing on February 9, 2021, so this petition is timely. Wis. Stat. § 809.60(2) (petition for bypass must be filed within 14 days after service of response brief).

STATEMENT OF THE CASE

A truck driven by Teresa M. Clark collided with a car, injuring the other driver. (R. 11:2–4, A-App. 188–90.) A blood test revealed that Clark had an alcohol concentration of 0.194. (R. 11:4, A-App. 190.) Clark's Wisconsin Department of Transportation driving record showed three prior OWI

convictions, in Chippewa County in 1994, and in Eau Claire County in 1995 and 2002. (R. 11:3, A-App. 189.) The State therefore charged Clark with operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC), both as 4th offenses. (R. 11, A-App. 187–91; 15, A-App. 191–94.) It also charged her with OWI causing injury and PAC causing injury, both as 2nd or subsequent offenses. (R. 11, A-App. 187–91; 15, A-App. 191–94.)

Clark collaterally attacked her Eau Claire County convictions. (R. 29, A-App. 102–03.) In an affidavit, Clark's defense counsel asserted that the file for the 1995 case was destroyed pursuant to SCR 72.01(18) because 20 years had passed, and a transcript could not be prepared for her 2002 plea hearing because the court reporter's notes are no longer available. (R. 30, A-App. 107–10.)

Clark claimed in an affidavit that she did not have an attorney in the two cases. (R. 31:1, A-App. 104.) She alleged that the judges in those cases did not address her personally or conduct a colloquy in when she waived counsel and pleaded guilty. She alleged that she did not make a deliberate choice to proceed without counsel, and did not know her rights, what an attorney could do for her, the seriousness of the charges, or the penalties she faced. (R. 31:2–3, A-App. 105–06.)

The State did not dispute that Clark's allegations were sufficient to entitle her to a hearing. (R. 36; 67:4, A-App. 119.) But it asserted that since Clark did not point to evidence demonstrating that the courts in her prior cases failed to give her the information required for her to validly waive counsel, it should remain her burden to prove that she was denied the right to counsel. (R. 36; 67:4, A-App. 119.)

Clark testified that the judges in her prior cases never told her she had the right to counsel, or about the seriousness of the charges or the penalties she faced. (R. 67:6–8, A-App. 121–23.) Clark also testified that she did not know the information that she alleged the judges failed to give her. (R. 67:8–9, A-App. 123–24.) But she presented no evidence demonstrating that the judges in her prior cases did not conduct adequate waiver colloquies.

The parties could not present any documents from the 1995 case because the record had been destroyed. The State presented four documents from the 2002 case: the criminal complaint, a bond sheet, and minutes sheets from the hearing at which Clark pleaded no contest to OWI as a third offense, and the sentencing hearing. (R. 37, A-App. 111; 38, A-App. 112; 39, A-App. 113; 40, A-App. 114–15.)

The criminal complaint indicated that Clark was charged with both OWI and PAC as third offenses and it listed the penalties for those charges. (R. 40:1, A-App. 114.) The complaint alleged that Clark crashed her vehicle, and that her alcohol concentration was .259. (R. 40:2, A-App. 115.)

On the minutes sheet for the plea hearing, boxes indicating that Clark appeared "without counsel," that she pleaded "No Contest" to OWI 3rd, and that "Def. advised of [her] right to attorney/constitutional rights" were checked. (R. 39, A-App. 113.) The minutes sheet indicated that the PAC charge was dismissed but would be read in at sentencing. (R. 39, A-App. 113.)

The minutes sheet for the sentencing hearing indicated that the court imposed 55 days of jail with Huber and stayed the sentence. (R. 39, A-App. 113.) Boxes on the minutes sheet indicating that Clark appeared "without counsel," and that

"Def. advised of [her] right to attorney/constitutional rights" were checked. (R. 38, A-App. 112.)

Clark acknowledged signing the bond sheet but said she did not know what she was signing. (R. 67:20–21, A-App. 135–36.) She acknowledged receiving the criminal complaint, but said, "I don't know if I read it; I may have read it." (R. 67:26, A-App. 141.) Clark acknowledged that the information on the minutes sheets was correct. (R. 67:30, 33, A-App. 145, 148.) But she said the judges did not advise her of her constitutional rights. (R. 67:37, 40, A-App. 152, 155.)

At the close of the hearing, the State asserted that Clark's convictions were final and should be presumed regular (R. 68:5, A-App. 175), and that Clark did not satisfy her burden of showing that she was denied the right to counsel in her prior cases (R. 68:6–7, A-App. 176–77).

Defense counsel told the court that because the State did not present evidence refuting it, Clark's testimony is "a verity." (R. 68:10, A-App. 180.) Counsel said, "this may seem unfair, but this is the law. This is the way it goes." (R. 68:10, A-App. 180.) Counsel said that the record does not prove that Clark was advised of her rights, so "[t]he Court has little or no choice in this case just because of the proof issues." (R. 68:10, A-App. 180.)

The court said that "my suspicion is that the chances of what the defense is asking me to believe is not terribly great." (R. 68:12, A-App. 182.) The court said, "I found the defendant's credibility somewhat lacking on the stand because of her, just simply: I don't remember anybody telling me anything; nobody told me anything, type of comments." (R. 68:12, A-App. 182.) The court said it "has its suspicion about the veracity, about the truthfulness, of what I'm being

told." (R. 68:12, A-App. 182) But the court concluded that "while I -- I have my suspicions about the truthfulness of what I'm being told, I don't have -- there's nothing in the record for it to be refuted, so I'm going to grant the motion for collateral attack." (R. 68:12, A-App. 182.)

The circuit court issued a written order stating that Clark met her initial burden and the burden shifted to the State, which failed to prove that she waived counsel knowingly, intelligently, and voluntarily in her two prior cases. (R. 56, A-App. 101.) The order has the effect of reducing the OWI and PAC charges from 4th offenses (felonies) to 1st offenses (civil forfeitures).

The State petitioned for leave to appeal the circuit court's order, and the Court of appeals granted the petition. The State now petitions this Court for bypass.

ARGUMENT FOR BYPASS

A. This case satisfies the criteria for bypass.

The statute governing petitions for bypass, Wis. Stat. § 809.60, does not set forth criteria for granting such petitions. But this Court has indicated that "A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." Wisconsin Supreme Court Internal Operating Procedures, III.B.2.

This Court should grant bypass because this case satisfies the criteria in Wis. Stat. § (Rule) 809.62(1). The proper procedure for resolving a collateral attack on a prior conviction on the basis of an alleged violation of the person's

constitutional right to counsel is a real and significant issue of constitutional law. Wis. Stat. § 809.62(1r)(a). There is a need for this Court to establish a rule to resolve this type of claim. Wis. Stat. § 809.62(1r)(b). And a decision by this Court will develop and clarify the law on a question of law that is of statewide impact and that is certain to recur. Wis. Stat. § 809.62(1r)(c).

B. A decision by this Court is needed to develop and clarify the law by establishing that in a collateral attack on a prior conviction when there is no evidence showing an inadequate waiver-of-counsel colloquy, the burden does not shift from the defendant to the State.

This case presents this Court with an opportunity to provide much-needed guidance on an issue of statewide importance—the procedure that applies for collateral attacks on prior OWI conviction when a defendant cannot point to evidence demonstrating an inadequate waiver-of-counsel colloquy. This is a question of law that is certain to recur unless resolved by this Court. And the court of appeals cannot establish the proper procedure.

The court of appeals has recognized the problems with the procedure Wisconsin courts currently apply to collateral attacks when the defendant cannot point to evidence demonstrating an inadequate waiver-of-counsel colloquy. In *Drexler*, 266 Wis. 2d 438, the court of appeals noted that under the reasoning of this Court's opinion in *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), a defendant can "establish a prima facie case of a constitutional deprivation simply by filing a self-serving affidavit." *Id.* ¶ 11 n.6. The court referred to this as "a problem of statewide concern that should properly be addressed by the supreme court." *Id.* The court recognized that "the lack of a transcript for prior

convictions more than ten years old will make it almost impossible for the State to overcome a defendant's prima facie case of a constitutional deprivation of counsel and establish a knowing, voluntary and intelligent waiver of counsel." *Id.* (citing *Baker*, 169 Wis. 2d at 78). The court noted that it could not resolve this problem "Because the supreme court is the only court with the power to overrule, modify or withdraw language from a previous case." *Id.* (citing *Cook v. Cook*, 208 Wis.2d 166, 189–90, 560 N.W.2d 246 (1997)). The court said,

> it is necessary for the supreme court to re-examine *Baker* in light of the practical difficulties—demonstrated by this case—that ensue when a defendant can meet his or her burden of establishing a prima facie case simply by filing an affidavit providing a self-serving rendition of events that transpired in court five, ten or even twenty years earlier.

Id.

Before it decided *Drexler*, the court of appeals certified the case to this Court on two issues, the first of which is much like the one the presented in the current case:

> Because of the conflict between statutes governing the use of prior convictions to enhance the sentence for subsequent crimes and Wisconsin Supreme Court rules for the retention of records, does the procedure found in *State v. Baker*, 169 Wis.2d 49, 485 N.W.2d 237 (1992), for challenging a prior conviction when a transcript is not available have to be revised?

State v. Drexler, 2003 WL 739127, 02-1313-CR (Ct. App. March 5, 2003). This Court denied the certification. The court of appeals then affirmed Drexler's conviction because it concluded that his affidavit was insufficient to warrant a hearing, this Court denied the defendant's petition for review.

The court of appeals pointed out the problem with the procedure for resolving collateral attacks again in *Lebo*, 2015 WL 1525988. The State's argument in *Lebo* was similar to the one it makes in this case. The court of appeals noted that it could not adopt the State's argument because "the State's proposed rule" would conflict with this Court's decision in *Baker*, 169 Wis. 2d 49, and the court of appeals' decisions in *Drexler*, 266 Wis. 2d 438, and *State v Bohlinger*, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900. *Lebo*, 2015 WL 1525988, ¶¶ 26–29.

Although the court of appeals did not adopt the State's proposed rule, it said that "in the absence of the contrary case law" it cited, it "would find the argument persuasive." *Id.* ¶ 29, n.4. And the court again discussed the problems caused by a defendant being able to make a prima facie showing of a violation without evidence demonstrating that the circuit court failed to conduct an adequate colloquy. *Id.* (quoting *Drexler*, 266 Wis. 2d 438, ¶ 11 n. 6). The court of appeals recognized in *Lebo* that "Adopting a *Nelson/Bentley*-type procedure for collateral attack motions where transcripts of the prior proceedings are unavailable would alleviate this problem because the defendant would retain the burden of proof." *Id.* [2]

The court pointed out that in *Drexler* it had "called upon the supreme court to reexamine *Baker*, or, alternatively, to reconcile SCR ch. 72 with the sentencing scheme for drunk driving offenses." *Lebo*, 2015 WL 1525988, ¶ 29 n.4 (quoting *Drexler*, 266 Wis. 2d 438, ¶ 11 n.6). The court said, "We renew that call today, adding a suggestion that the court consider adopting a *Nelson/Bentley*-type procedure for collateral attack motions like the one at issue in this case." *Id.* But this Court

[2] *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629 (1972).

did not have an opportunity to consider adopting that standard because the court of appeals reversed the order granting Lebo's collateral attack because of an insufficient affidavit, *id.* ¶ 34, and Lebo did not petition this Court for review.

Bypass of the court of appeals is appropriate in this case because the court of appeals will likely be unable to adopt the argument raised by the State that it found "persuasive" in *Lebo*. At most, the court of appeals will likely be able only to again renew its call for this Court to "re-examine *Baker*," and to "consider adopting a *Nelson/Bentley*-type procedure for collateral attack motions like the one at issue in this case." *Id.*

C. This Court should clarify that like in a plea withdrawal motion, in a collateral attack the burden does not shift from the defendant to the State simply because of the unavailability of a transcript of the plea hearing.

Clark moved to collaterally attack her two prior convictions, claiming that she pleaded guilty in both cases without counsel, and that the circuit courts accepted her pleas without conducting a waiver colloquy. (R. 31.) She claimed that the judges in those cases accepted her pleas without informing her about the seriousness of the charges she faced, or the general range of penalties that could be imposed. (R. 31.)

In order to properly accept Clark's guilty pleas, the circuit courts were required to inform her of the seriousness of the charges she faced, and the general range of penalties that could be imposed. Wis. Stat. § 971.08. If Clark proved that the courts failed to give her that information, she would show a manifest injustice, entitling her to withdraw her plea. *Hampton*, 274 Wis.2d 379, ¶ 63. But if she filed the same

affidavit in support of a motion to withdraw her pleas that she filed in support of her collateral attack on the same convictions, the *Bangert* burden-shifting procedure would not apply.

As this Court concluded in *Negrete*, 343 Wis. 2d 1, ¶ 31, "[w]here the transcript of the plea hearing is unavailable," and a defendant moves to withdraw her plea, "*Bangert*'s burden shifting procedure does not apply." This Court gave two reasons. First, "the defendant will not be able to make the requisite showing from the transcript that the circuit court erred in the plea colloquy." *Id.* This Court reasoned that "practically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." *Id.* ¶ 32. Second, "the rationale underlying *Bangert*'s burden shifting rule does not support extending that rule to situations where a violation is not evident from the transcript." *Id.* ¶ 31. This Court reasoned that "more fundamentally, the rationale underlying *Bangert*'s low standard for burden shifting—that the State can avoid such burden by ensuring that the circuit court complies with the colloquy requirements—rings hollow, because there is no evidence in the record that the court did not comply." *Id.* ¶ 32.

This Court explained that "[w]ithout linking the shift of the burden of proof to a showing of error evident on the face of the transcript, we would ignore the general rule that a defendant seeking to withdraw his plea retains the burden of proving his claim by clear and convincing evidence." *Id.* This Court concluded that "where a defendant is unable to point to a defect evident on the face of a plea colloquy transcript because such transcript is unavailable, the more appropriate review of a motion to withdraw a guilty or no contest plea

under Wis. Stat. § 971.08(2) is that set forth in *Bentley*, 201 Wis. 2d at 310." *Negrete*, 343 Wis. 2d 1, ¶ 33.

The same standards should apply to a collateral attack on the same convictions. A defendant who collaterally attacks a prior uncounseled conviction has the burden of proving that she did not waive her right to counsel knowingly, intelligently, and voluntarily. *Iowa v. Tovar*, 541 U.S. 77, 87 (2004). And just like in a plea withdrawal motion, a defendant collaterally attacking a prior conviction must make a prima facie showing of a violation of her constitutional right to shift the burden to the State. But under current law, and unlike in plea withdrawals, circuit courts routinely shift the burden to the State when a defendant submits only a self-serving affidavit alleging an inadequate colloquy, with no evidence demonstrating an inadequate colloquy. It makes no sense that the burden *does not* shift when a defendant moves to withdraw a plea by simply alleging an inadequate colloquy, but that it *does* shift when a defendant collaterally attacks the same conviction by simply alleging an inadequate colloquy.

This incongruous result—courts shifting the burden to the State on the basis of an affidavit even with no transcript demonstrating an inadequate colloquy—occurs because of *Baker*, 169 Wis. 2d 49. In *Baker*, this Court shifted the burden to the State in a collateral attack when the transcript of the plea hearing was unavailable. But *Baker* had unique circumstances, and its decision should be limited to those circumstances or similar ones. It should not apply to every case in which a transcript is unavailable.

In *Baker*, the defendant collaterally attacked a prior conviction for which there was no transcript of the plea hearing, because the State lost it. *Baker*, 169 Wis. 2d at 76. This Court did not apply *Bangert*. But it fashioned a

procedure to decide the collateral attack "under the circumstances" that was identical to the *Bangert* burden-shifting procedure. *Id.* at 78. This Court concluded that with his affidavit alleging an inadequate colloquy, the defendant "met his burden of production under the circumstances of this case." *Id.*

As this Court recognized in *Negrete*, when it is the defendant's burden to prove a violation of a constitutional right, the burden should not shift to the State based on a mere allegation of a violation of that right. *Negrete*, 343 Wis. 2d 1, ¶¶ 31–33. But the court of appeals and circuit courts throughout Wisconsin have interpreted *Baker* as providing that *anytime* a transcript is unavailable, a defendant collaterally attacking a prior conviction makes a prima facie showing of a violation of her right to counsel, and shifts the burden to the State, by simply alleging an inadequate colloquy. *See, e.g.*, *Drexler*, 266 Wis. 2d 438, ¶ 10. In other words, *Baker* is being applied in a manner that contradicts *Negrete*. Accordingly, this Court should limit *Baker* to the unique circumstances of that case—the State lost a transcript that should have been available. But when there is no negligence or misconduct by the State, the unavailability of a transcript should not be sufficient to shift the burden to the State.

When the burden shifts without a transcript, the State has to make a near impossible showing that a defendant understood information that the circuit court failed to give her, even though there is no evidence demonstrating that the court failed to give her that information. In this case, even though there is no evidence demonstrating that the circuit courts failed to give Clark the required information, the circuit court concluded that the burden shifted to the State based on Clark's mere allegations, which the court did not

even find credible. (R. 68:12, A-App. 182.) And because the court found that the State was unable to prove that Clark understood the information that she alleged the circuit courts failed to give her in her prior cases, the court granted her collateral attack motion. (R. 56, A-App, 101.) As a result, Clark will be charged with OWI and PAC as only first offenses, even though she has three prior convictions. And if convicted, it will be for a civil forfeiture, instead of a felony.

The same rule that applies to motions for plea withdrawal should apply to collateral attacks. If there is no transcript showing that the circuit court in the prior case failed to conduct an adequate colloquy, the burden should not shift from the defendant to the State. A collateral attack with no transcript showing an inadequate waiver-of-counsel colloquy is properly decided under *Bentley*. If the defendant's affidavit is sufficient, she is entitled to a hearing. But she retains the burden of proving that her right to counsel was violated. Here, Clark was entitled to a hearing, and she received one. But at the hearing, she did not come close to satisfying her burden by proving that she did not waive counsel knowingly, intelligently, and voluntarily.

CONCLUSION

This Court should grant this petition to bypass the court of appeals and establish: (1) that the holding in *Baker* is limited to situations where the State fails to preserve a transcript; and (2) that when a defendant collaterally attacks a prior conviction and there is no evidence showing an inadequate waiver-of-counsel colloquy in the prior case, the burden does not shift from the defendant to the State. Unless the State loses the transcript, the defendant's motion is

properly resolved under *Bentley*, rather than *Bangert*. And since Clark did not satisfy her burden, her collateral attack motion should have been denied.

Dated this 22nd day of February 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for bypass produced with a proportional serif font. The length of this petition is 5,056 words.

Dated this 22nd day of February 2021.

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for bypass is identical in content and format to the printed form of the petition for bypass filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for bypass filed with the court and served on all opposing parties.

Dated this 22nd day of February 2021.

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General

Appendix
State of Wisconsin v. Teresa L. Clark
Case No. 2020AP1058-CR

COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP730-CR **Cir. Ct. No. 2012CF49**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SHERWOOD A. LEBO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Reversed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 STARK, J. The State of Wisconsin appeals an order granting Sherwood Lebo's motion to collaterally attack two operating while intoxicated

(OWI) convictions and denying the State's motion for reconsideration.[1] The circuit court concluded: (1) Lebo made a prima facie showing that his right to counsel was violated in the prior proceedings; (2) the burden therefore shifted to the State to prove that Lebo knowingly, intelligently, and voluntarily waived his right to counsel; and (3) the State failed to meet its burden. Conversely, we conclude Lebo failed to make a prima facie showing that his right to counsel was violated. We therefore reverse.

BACKGROUND

¶2 On October 30, 2012, Lebo was charged in Kewaunee County with one count of OWI and one count of operating with a prohibited alcohol concentration, both as seventh, eighth, or ninth offenses. The complaint listed six prior convictions for OWI-related offenses. On May 23, 2013, Lebo moved to collaterally attack three of these prior convictions—two Shawano County OWI convictions from 1998 and 1999, and a Brown County OWI conviction from 2000. Lebo asserted he was denied his constitutional right to counsel in the Shawano and Brown County proceedings.

¶3 In an affidavit submitted in support of his motion, Lebo averred he was not represented by an attorney in the Shawano and Brown County proceedings; he is unable to read; he was in special education classes from kindergarten through twelfth grade; he was discharged from the Marine Corps because he could not read; and he has had memory problems throughout his life. Lebo further averred he could not remember "the circumstances" of the hearings

[1] We granted the State's petition for leave to appeal a nonfinal order on May 13, 2014.

that took place in the Shawano and Brown County cases. However, with respect to all three of those cases, Lebo asserted he "just agreed with everything the Judge said, because [he] didn't know what to do." Lebo also averred, "I did what 'they' told me, meaning, I went with what 'they' were going to give me for the charge."

¶4 Lebo's attorney also submitted an affidavit, in which she averred the record from the Brown County case contained a plea questionnaire/waiver of rights form, but the records from the Shawano County cases did not. A copy of the plea questionnaire/waiver of rights form from the Brown County case was attached to Lebo's collateral attack motion. Notations on the form indicated it was read to Lebo by his wife because Lebo "does not read or write."

¶5 Lebo's counsel further averred that she attempted to obtain transcripts from two hearings in the Brown County case and from the only hearing that occurred in the 1998 Shawano County case, but she was informed the court reporters' notes were destroyed after ten years, and, as a result, transcripts could no longer be obtained. Counsel also averred that she attempted to obtain a transcript of the only hearing in the 1999 Shawano County case, but the court reporter did not respond to her request. However, because the case was over ten years old, counsel stated she "presume[d]" the reporter's notes had been destroyed and the transcript was therefore unavailable.

¶6 In the absence of transcripts, Lebo submitted minutes sheets from the two Shawano County hearings. The minutes sheet from the 1998 case stated, "Does not want atty[.] Plea of 'guilty' entered. Def. advised of rights. Those rights waived." The minutes sheet from the 1999 case similarly stated, "Will represent self[.] Pleas of 'guilty' entered. Def. advised of rights. Those rights waived."

¶7 Lebo also submitted minutes sheets from two hearings in the Brown County case. The first minutes sheet, from the February 7, 2000 initial appearance, noted "Def. can't read or write." Due to the ambiguous placement of an "X" on the form, it is unclear whether the form indicates that Lebo was "advised of right to counsel" during the hearing or was "referred to public defender." The second minutes sheet from the Brown County case, from the March 14, 2000 plea and sentencing hearing, indicated Lebo entered a no contest plea. A box next to the words "Advised & Waived rights" was checked.

¶8 After considering letter briefs filed by the parties, the circuit court denied Lebo's motion to collaterally attack the Brown County conviction, concluding Lebo failed to make a prima facie showing his right to counsel was violated in the Brown County proceedings. However, the court reached a contrary conclusion with respect to the Shawano County cases. Accordingly, the court concluded the burden shifted to the State "to prove by clear and convincing evidence that [Lebo] knowingly, intelligently, and voluntarily waived his right to counsel" in the Shawano County cases.

¶9 An evidentiary hearing was held on September 5, 2013. At the hearing, Lebo testified he was not represented by counsel in the two Shawano County cases. He could only remember one of the Shawano County hearings. Lebo stated he "probably did sign some papers" during the hearing, but he could not remember anything specific about the papers. He stated the judge talked to him for "about five minutes or so[,]" but he could not "remember at all anymore" what they talked about. He could not remember whether he spoke with the judge about getting a public defender or whether they discussed his options for getting an attorney, what an attorney would do for him, or the difficulties of self-representation.

¶10 When asked whether he requested an attorney in the Shawano County proceedings, Lebo responded, "No, because I can't afford it, so I just told them I will just take it the way it is. And I don't know if I have to have a lawyer or not. I don't know." The State then asked Lebo whether he made a financial decision not to hire a lawyer in the Shawano County cases, and he responded, "I guess, yeah. I'm not sure."

¶11 When asked if he knew what the potential penalties were when he went to court in the Shawano County cases, Lebo answered, "When I went to court, yeah, but I don't remember what they were anymore." Lebo was also asked if the judges told him about the charges he faced, and he responded, "I think so, have talked about it, but I don't remember it." Lebo further testified, "Whatever the judge[] offered me, I just took it, did it. He just gave me the time. Whatever the time was, I just went and did it." He explained, "I just thought I was guilty, so I just did whatever they said to do." He also stated he "didn't know you could fight [drunk driving charges]" because "once you have that alcohol level in you, that's what you are going to get charged with no matter what." When describing what appears to be a subsequent 2000 case, during which he was represented by counsel, Lebo stated, "That's when I went to court and I didn't even know what a lawyer would do for you."

¶12 After briefing, the circuit court issued a written decision granting Lebo's motion to collaterally attack the Shawano County convictions. The court concluded the State failed to prove Lebo knowingly, intelligently and voluntarily waived his right to counsel.

¶13 The State moved for reconsideration, arguing the court erred by concluding Lebo made a prima facie showing that his right to counsel was violated

in the Shawano County proceedings. In addition, the State argued the court applied an incorrect legal standard when it shifted the burden of proof to the State. The State asserted the burden of proof shifts "only in cases in which a transcript demonstrates a deficiency in a required colloquy[.]" Because transcripts of the Shawano County hearings were unavailable, and because Lebo's affidavit did not assert the Shawano County courts failed to conduct proper waiver colloquies, the State argued the burden of proof remained with Lebo to show that his waivers of counsel were not knowing, intelligent, and voluntary.

¶14 The circuit court concluded the State's argument regarding the burden of proof had "arguable merit," but it was not directly supported by existing Wisconsin law. The court further stated that, even if the State was correct that the burden of proof remained with Lebo, Lebo proved his pleas were not knowing, intelligent, and voluntary. The court therefore entered an order granting Lebo's motion to collaterally attack the Shawano County convictions and denying the State's motion for reconsideration.

DISCUSSION

¶15 On appeal, the State renews its argument that the burden remained with Lebo to prove he did not knowingly, intelligently, and voluntarily waive his right to counsel in the Shawano cases because his collateral attack motion failed to demonstrate that the waiver colloquies in those cases were defective. To place this argument in context, we first provide some background information regarding the right to counsel and the procedure for collaterally attacking prior convictions.

¶16 "A criminal defendant in Wisconsin is guaranteed ... the assistance of counsel for his defense by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution as made applicable to the

states by the Fourteenth Amendment." ***State v. Klessig***, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997) (footnotes omitted). However, a defendant also has a constitutional right to self-representation. ***Id.*** at 203. Thus, if a defendant knowingly, intelligently and voluntarily waives his or her right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to represent him or herself. ***Id.*** at 204.

¶17 Before accepting a waiver of the right to counsel, a circuit court must conduct a colloquy 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.***

¶18 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only on the ground that he or she was denied the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶25, 238 Wis. 2d 889, 618 N.W.2d 528. In ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, our supreme court set forth the procedure that applies when a defendant attempts to collaterally attack a prior conviction. First, the defendant must make a prima facie showing that his or her constitutional right to counsel was violated in the previous proceeding. ***Id.***, ¶25. To do so, the defendant must point to "specific facts" demonstrating that he or she did not know or understand the information that should have been provided in the previous proceeding and, therefore, did not knowingly, intelligently, and voluntarily waive his or her right to

counsel. ***Id.***, ¶¶25-26. "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***, ¶25.

¶19 If the defendant makes this prima facie showing, the burden shifts to the State to prove, by clear and convincing evidence, that the defendant's waiver of counsel was knowing, intelligent, and voluntary. ***Id.***, ¶27. "[T]he court should, at such a time, hold an evidentiary hearing to allow the State an opportunity to meet its burden." ***Id.*** If the State fails to meet its burden, "'the defendant will be entitled ...' to attack, successfully and collaterally, his or her previous conviction." ***Id.*** (quoted source omitted).

¶20 The State argues the burden-shifting procedure for collateral attacks set forth in ***Ernst*** applies only when the defendant "point[s] to evidence demonstrating a defect in the [circuit] court's colloquy." In support of this argument, the State analogizes collateral attack motions to motions for plea withdrawal.

¶21 As the State points out, motions for plea withdrawal fall into two general categories: ***Bangert*** motions and ***Nelson/Bentley*** motions. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). A ***Bangert*** motion is "based on defects in the plea colloquy." ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. For purposes of a ***Bangert*** motion, "The initial burden rests with the defendant to make a *prima facie* showing that his [or her] plea was accepted without the trial court's conformance with [WIS. STAT.] § 971.08 or other mandatory procedures[.]" ***Bangert***, 131 Wis. 2d at 274. The defendant must also allege he or she did not know or understand the information that should have been provided during the

plea hearing. ***Id.*** If the defendant makes this showing, the burden shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered," despite any defects in the plea colloquy. ***Id.***

¶22 Unlike a ***Bangert*** motion, a ***Nelson/Bentley*** motion is generally based on factors extrinsic to the plea colloquy, such as ineffective assistance of trial counsel. ***Hoppe***, 317 Wis. 2d 161, ¶3 & n.n. 3-4. If a ***Nelson/Bentley*** motion "on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." ***Bentley***, 201 Wis. 2d at 310. However, the court has discretion to deny the motion without a hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 309-10. At a ***Nelson/Bentley*** hearing, the defendant has the burden to prove, by clear and convincing evidence, that plea withdrawal is necessary to avoid a manifest injustice. ***Hoppe***, 317 Wis. 2d 161, ¶60.

¶23 The State notes that our supreme court relied on ***Bangert*** and its progeny when adopting the burden-shifting procedure for collateral attack motions set forth in ***Ernst***. *See* ***Ernst***, 283 Wis. 2d 300, ¶25. The State also observes our supreme court has clarified that, when a defendant moves to withdraw his or her plea based on a defective plea colloquy, but no transcript of the plea hearing is available, the defendant's motion should be treated as a ***Nelson/Bentley*** motion, rather than a ***Bangert*** motion. *See* ***State v. Negrete***, 2012 WI 92, ¶3, 343 Wis. 2d 1, 819 N.W.2d 749. The ***Negrete*** court explained that, "practically speaking, where there is no transcript of the plea colloquy, the showing required under ***Bangert***, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." ***Id.***, ¶32. The court also reasoned that, in ***Bangert*** cases, the

rationale for shifting the burden of proof to the State is that "the State can avoid such burden by ensuring that the circuit court complies with the colloquy requirements[.]" ***Id.*** However, that rationale "rings hollow" when there is no transcript of the plea hearing and, accordingly, "no evidence in the record that the court did not comply" with its required duties. ***Id.***

¶24 The State argues there is "no logical reason that the ***Bangert*** procedure ... adopted in ***Ernst*** for collateral attacks is somehow different [from] the ***Bangert*** procedure that applies to direct attacks." The State therefore argues that, similar to plea withdrawal motions, when a defendant's collateral attack motion fails to point to specific evidence showing a defect in the waiver of counsel colloquy, the burden does not shift to the State. Instead, the State argues this type of collateral attack motion should be analyzed using the procedure set forth in ***Bentley***. In other words, the State argues that, even if an evidentiary hearing is held, the defendant should retain the burden to prove his or her waiver of counsel was not knowing, intelligent, and voluntary.

¶25 Lebo, in turn, argues there is no published appellate case supporting the State's argument that the burden-shifting procedure prescribed by ***Ernst*** applies only to those collateral attack motions in which the defendant points to specific evidence of a defect in the plea colloquy. In addition, Lebo asserts the State's argument is directly contrary to three prior cases: ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992); ***State v. Drexler***, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182; and ***State v. Bohlinger***, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900.

¶26 In ***Baker***, the defendant moved to collaterally attack a previous conviction based on an alleged violation of his right to counsel. ***Baker***, 169

Wis. 2d at 76. Because the transcript of the earlier proceedings was "lost,"[2] the defendant relied on his own affidavit, in which he averred he "was unrepresented by counsel [in the earlier proceedings], and did not at any time affirmatively waive his right to counsel." ***Id.*** Based on these allegations, the supreme court concluded the defendant made a prima facie showing that his right to counsel was violated, and the burden therefore shifted to the State to prove he knowingly, intelligently, and voluntarily waived that right. ***Id.*** at 78.

¶27 In ***Drexler***, the defendant averred he was not informed during prior proceedings that "'he could have the court appoint counsel for him if he could not afford counsel, and the state or the county could be held responsible for paying the cost of appointed counsel.'" ***Drexler***, 266 Wis. 2d 438, ¶6. Relying on ***Baker***, we stated a defendant's affidavit "is sufficient to establish a prima facie case of being denied the right to counsel." ***Drexler***, 266 Wis. 2d 438, ¶10. Accordingly, "[o]nce Drexler made this prima facie case ... the burden was on the State to come forward with evidence countering Drexler's affidavit." ***Id.***

¶28 In ***Bohlinger***, the defendant moved to collaterally attack two prior OWI convictions. ***Bohlinger***, 346 Wis. 2d 549, ¶2. He did not allege the waiver of counsel colloquies in those cases were facially deficient; instead, he argued he was unable to understand the information provided to him because of cognitive and learning disabilities. ***Id.***, ¶5. The circuit court found that the defendant did not have the cognitive capability to waive his right to counsel in the prior cases. ***Id.***, ¶13. Nevertheless, the court denied the defendant's motion because it did not

[2] Contrary to the State's assertion, the holding of ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), was not premised on the fact that "the State lost a transcript it should have been able to produce[.]"

allege the waiver colloquies in the prior cases were deficient. ***Id.*** We reversed, reasoning, "While ***Ernst*** states that a defective colloquy '*can* form the basis for a collateral attack' when supported by additional evidence, it does not hold that a defendant must allege a defective colloquy in order to state a prima facie case." ***Bohlinger***, 346 Wis. 2d 549, ¶18 (quoting ***Ernst***, 283 Wis. 2d 300, ¶37; emphasis in ***Bohlinger***). We remanded to the circuit court to hold an evidentiary hearing, at which the State would have the burden to prove that the defendant "in fact possessed the constitutionally required knowledge and understanding to execute valid waivers of counsel." ***Id.***, ¶21.[3]

¶29 We agree with Lebo that the State's argument regarding the burden of proof is not supported by existing law. According to the State, when a defendant cannot point to a defect in the waiver of counsel colloquy evident on the face of a transcript, the defendant's collateral attack motion should be treated as a ***Nelson/Bentley*** motion, such that the defendant retains the burden of proof. *See* ***Negrete***, 343 Wis. 2d 1, ¶33. However, this rule would run contrary to ***Baker*** and ***Drexler***, both of which held that a defendant's affidavit alone can establish a prima facie case that the defendant's right to counsel was violated, thereby shifting the burden of proof to the State. The State's proposed rule would also conflict with ***Bohlinger***, where we applied the burden-shifting methodology set forth in ***Ernst*** despite the defendant's failure to allege any defect in the previous waiver of counsel colloquies. Moreover, while our supreme court has expressly distinguished between plea withdrawal motions that allege defects evident on the

[3] Notably, unlike the circuit court in ***State v. Bohlinger***, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, the circuit court in this case never concluded Lebo's cognitive limitations rendered him incapable of waiving his right to counsel.

face of the plea hearing transcript and motions that set forth other bases for plea withdrawal, neither the supreme court nor this court has recognized a similar distinction in the context of collateral attack motions. We therefore agree with Lebo that, in this case, the circuit court did not err by applying the burden-shifting procedure prescribed by ***Ernst***.[4]

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[4] Although we do not adopt the State's argument regarding the burden of proof, we note that, in the absence of the contrary case law cited above, we would find the argument persuasive.

As we previously pointed out in ***Drexler***, the relationship between the sentencing scheme for drunk driving offenses and the supreme court rules for record retention "compounds the problem of permitting a defendant to establish a prima facie case of a constitutional deprivation simply by filing a self-serving affidavit." ***State v. Drexler***, 2003 WI App 169, ¶11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. Under the sentencing scheme for drunk driving offenses, to determine whether an offense is a second offense, any eligible offense within the previous ten-year period is counted. *See* WIS. STAT. § 346.65(2)(am)2. (2013-14). To determine whether an offense is a third or subsequent offense, all eligible offenses during the defendant's lifetime are counted. Sec. 346.65(2)(am)3.-7. (2013-14).

However, the supreme court rules for record retention provide a limited shelf life for court records that will be needed to counter collateral attacks on prior drunk driving convictions. For instance, SCR 72.01(47) permits court reporter notes to be destroyed after ten years. Traffic forfeiture case files and related documents may be destroyed after five years, *see* SCR 72.01(24), (24a), (24m), and misdemeanor case files and related documents may be destroyed after twenty years, *see* SCR 72.01(18), (19), (20).

As we noted in ***Drexler***, the lack of transcripts for prior convictions over ten years old "will make it almost impossible for the State to overcome a defendant's prima facie case of a constitutional deprivation of counsel and establish a knowing, voluntary and intelligent waiver of counsel." ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. This puts the State in an "untenable position" because, under ***Baker***, 169 Wis. 2d 49, a defendant can make a prima facie showing "by simply filing an affidavit recounting his or her version of what occurred five, ten, twenty or twenty-five years earlier." ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. Adopting a ***Nelson/Bentley***-type procedure for collateral attack motions where transcripts of the prior proceedings are unavailable would alleviate this problem because the defendant would retain the burden of proof.

In ***Drexler***, we called upon the supreme court to reexamine ***Baker***, or, alternatively, to reconcile SCR ch. 72 with the sentencing scheme for drunk driving offenses. *See* ***Drexler***, 266 Wis. 2d 438, ¶11 n.6. We renew that call today, adding a suggestion that the court consider adopting a ***Nelson/Bentley***-type procedure for collateral attack motions like the one at issue in this case.

¶30 Nevertheless, we agree with the State that the circuit court erred by concluding Lebo made a prima facie showing his right to counsel was violated in the Shawano County cases. Whether Lebo made a prima facie showing is a question of law that we review independently. *See* ***Ernst***, 283 Wis. 2d 300, ¶26. As discussed above, to make a prima facie showing that his or her right to counsel was violated during a prior proceeding, a defendant must point to specific facts demonstrating that he or she did not know or understand information that should have been provided during the waiver of counsel colloquy. ***Id.***, ¶¶25-26.

¶31 Here, the affidavit attached to Lebo's collateral attack motion averred Lebo was not represented by an attorney in the Shawano County proceedings; is unable to read; was in special education classes during school; and suffers from memory problems. Lebo also averred he could not remember "the circumstances" of the Shawano County hearings. However, Lebo asserted he "just agreed with everything the Judge said, because [he] didn't know what to do[,]" and he did "what 'they' told me[.]"

¶32 These allegations are insufficient to make a prima facie showing that Lebo did not know or understand the information that should have been provided during the Shawano County proceedings. Notably, Lebo did not allege that he did not waive his right to counsel in the prior proceedings, that the courts failed to advise him of any information required by ***Klessig***, or that he was unaware of the required information.[5] In addition, the minutes sheet from the 1998 case stated,

[5] For this reason, Lebo's case is distinguishable from ***Baker*** and ***Drexler***, both of which found that the defendants made prima facie showings based solely on allegations in their affidavits. In ***Baker***, the defendant specifically alleged he did not waive his right to counsel. ***Baker***, 169 Wis. 2d at 76. In ***Drexler***, the defendant alleged the court never informed him an attorney could be appointed for him if he could not afford counsel. ***Drexler***, 266 Wis. 2d 438, ¶6. As summarized above, Lebo's affidavit did not contain similar allegations.

(continued)

"Does not want atty[,]" and the minutes sheet from the 1999 case similarly stated, "Will represent self[.]" Both of the minutes sheets also stated, "Def. advised of rights. Those rights waived." This provides circumstantial evidence that Lebo was advised of and waived his right to counsel.

¶33 Moreover, "upon collateral attack a judgment carries with it a presumption of regularity." ***Baker***, 169 Wis. 2d at 76. Further, as the United States Supreme Court has stated, "On collateral review, ... it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." ***Parke v. Raley***, 506 U.S. 20, 30 (1992). Here, the circuit court failed to apply the presumption of regularity when it concluded Lebo made a prima facie showing that his right to counsel was violated.[6]

¶34 Finally, even if we considered Lebo's testimony from the evidentiary hearing, we would nevertheless conclude he failed to make a prima facie showing. *See* ***State v. Hammill***, 2006 WI App 128, ¶¶9-11, 293 Wis. 2d

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In addition, we observe that our supreme court recently rejected a defendant's attempt to collaterally attack a prior conviction, reasoning that, although the defendant asserted on appeal that there was no evidence indicating he was aware of the general range of penalties he faced at the time he waived his right to counsel, his affidavit did not specifically allege he was unaware of that information. *See* ***State v. Foster***, 2014 WI 131, ¶¶75-77, __ Wis. 2d __, 856 N.W.2d 847.

[6] Admittedly, collateral attack motions are also subject to a contrary principle that courts "indulge in every reasonable presumption against waiver of counsel[.]" ***Baker***, 169 Wis. 2d at 76. However, despite this principle, the defendant still bears the initial burden on a collateral attack motion to allege specific facts supporting a prima facie showing that his or her right to counsel was violated. ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92. Lebo has failed to do so here.

Baker also states that a waiver of the right to counsel "will not be presumed from a silent record." ***Baker***, 169 Wis. 2d at 76. However, the record in this case is not completely silent. The minutes sheets from the Shawano County proceedings support an inference that Lebo was advised of and waived his right to counsel.

654, 718 N.W.2d 747 (considering defendant's testimony at an evidentiary hearing in order to conclude defendant failed to make a prima facie showing his right to counsel was violated). At the hearing, Lebo could recall very little about what occurred during the Shawano County proceedings. He testified he could remember one of the hearings, and he remembered speaking to the judge for about five minutes, but he could not remember what they discussed. In particular, he could not remember whether they discussed representation by a public defender, what an attorney could do for him, the difficulties of self-representation, or the charges against him. *See* ***Klessig***, 211 Wis. 2d at 206. A defendant cannot make a prima facie showing simply by alleging he or she does not remember what occurred during the earlier proceedings. *See* ***Hammill***, 293 Wis. 2d 654, ¶11. In addition, Lebo specifically testified he knew the penalties for the charges against him at the time of the Shawano County proceedings. *See* ***Klessig***, 211 Wis. 2d at 206. On this record, we conclude Lebo failed to make a prima facie showing that his right to counsel was violated.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for bypass, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of February 2021.

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 22nd day of February 2021.

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 22, 2021

Sheila T. Reiff
Clerk, Wisconsin Supreme Court
110 East Main Street, Ste. 215
Post Office Box 1688
Madison, WI 53701-1688

Re: *State of Wisconsin v. Teresa L. Clark*
Case No. 2020AP1058-CR

Dear Ms. Reiff:

Enclosed for filing in the above action please find an original and nine copies of the Petition for Bypass. A copy of this petition has been mailed to the attorney for the defendant-respondent.

Sincerely,

Michael C. Sanders/jas

Michael C. Sanders
Assistant Attorney General

MCS:jas

c: Richard S. Gonsdik
Attorney for Defendant-Respondent

David Meany
District Attorney, Ashland County