Appeal No. 03-1728-CR **Cir. Ct. No. 02CF000304**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALAN J. ERNST,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

May a defendant assert his Fifth Amendment privilege against self-incrimination at an evidentiary hearing held to consider his collateral attack on a prior conviction, where the record of that prior conviction demonstrates an invalid waiver of his Sixth Amendment right to counsel?

BACKGROUND

The controlling facts are brief and undisputed. Alan J. Ernst was charged in a criminal complaint with his fifth offense of operating a motor vehicle

while under the influence of alcohol. Ernst filed a motion challenging one of the four prior convictions that the State is invoking to enhance the penalty for the currently charged fifth offense. Ernst argued that the fourth conviction was obtained without a valid waiver of his right to counsel.

The circuit court found that the record of the fourth conviction was not sufficient to establish a valid waiver under ***State v. Klessig***, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997). The State requested an evidentiary hearing to show that the record, when viewed in the context of Ernst's experience with the legal system, did establish a valid waiver of counsel.

Ernst disputed the State's right to an evidentiary hearing. Ernst also raised his Fifth Amendment privilege against self-incrimination, contending that he could not be compelled to testify at an evidentiary hearing in the present case.

The circuit court ruled that the State is entitled to an evidentiary hearing to determine whether Ernst knowingly, intelligently, and voluntarily waived his right to counsel in the prior proceeding. The court further determined that compelling Ernst to testify at the evidentiary hearing would not violate the Fifth Amendment. The circuit court explained its ruling as follows:

> The procedure laid out in ***Baker***[1] which allows the state to attempt to prove a valid waiver by clear and convincing evidence really would be meaningless in the absence of an evidentiary hearing.
>
> ….
>
> I don't see any basis to distinguish the direct challenge to a conviction based on a violation of the right to counsel versus a collateral attack to a prior conviction based on that same right….

[1] ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992).

> ….
>
> [W]here the defendant puts that in issue, and there's a right to counsel violation shown in the record, and where ***Baker*** allows the state to attempt to prove that there was a valid waiver by clear and convincing evidence that the state should be allowed to question the defendant in that regard.

Ernst filed a petition for leave to appeal the nonfinal order of the circuit court and the petition was granted.

DISCUSSION

The interlocutory appeal issue is whether the State may call Ernst and elicit testimony from him to sustain its burden to establish the validity of Ernst's waiver of counsel in the prior proceeding. This raises the question of whether testimony compelled in a collateral attack on a prior conviction could incriminate the defendant within the meaning of the Fifth Amendment. There is currently no Wisconsin authority on the issue presented, nor is there any national authority other than one case from the State of Washington, which addresses the complementary issue of drawing improper inferences from a defendant's silence.

In ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), the court recognized the defendant's right to "collaterally attack" a prior conviction on grounds that the conviction was obtained in violation of the defendant's constitutional rights. ***Id.*** at 69. Baker, facing his fifth operating a motor vehicle after revocation (OAR) charge, moved the trial court to have the second and third OAR convictions declared void for purposes of sentencing in the current proceeding. ***Id.*** at 58. The supreme court held that Baker's second and third convictions were constitutionally infirm and could not be considered in subsequent

sentencing proceedings. ***Id.*** at 55-56. Relying on four United States Supreme Court decisions,[2] the Wisconsin Supreme Court established the following rule: "A defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense." ***Id.*** at 59.

Baker also addressed the burdens of production and persuasion with regard to the collateral attack. The supreme court held:

> Because the defendant must overcome the presumption of regularity attached to the prior conviction, the defendant bears the initial burden of coming forward with evidence to make a prima facie showing of a constitutional deprivation in the prior proceeding. If the defendant makes a prima facie showing of a violation of the right to counsel, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding.

Id. at 77. ***Baker***, however, does not establish what evidence is available to the State to overcome the presumption against the waiver nor does it approach the Fifth Amendment concerns now raised in Ernst's appeal.

Subsequently, in ***Klessig***, the supreme court held that when the record in a criminal case involving an unrepresented defendant does not affirmatively establish a valid waiver of the right to counsel and that defendant later challenges the validity of his conviction in that case on that basis, an evidentiary hearing must be held "to determine whether [the defendant] knowingly, intelligently, and voluntarily waived his right to the assistance of

[2] The ***Baker*** court relied on the following decisions: ***Burgett v. Texas***, 389 U.S. 109 (1967); ***United States v. Tucker***, 404 U.S. 443 (1972); ***Loper v. Beto***, 405 U.S. 473 (1972); and ***Lewis v. United States***, 445 U.S. 55 (1980). *See* ***Baker***, 169 Wis. 2d at 60-63.

counsel." ***Klessig***, 211 Wis. 2d at 207. Further, the court adopted "an evidentiary hearing procedure for resolving invalid waiver of counsel claims that is similar to the procedure established by this court for the resolution of guilty plea waivers." ***Id.*** The ***Klessig*** court provided the following procedural guidance:

> The circuit court should first determine whether it can make an adequate and meaningful nunc pro tunc inquiry into the question of whether Klessig was competent to proceed pro se. If the circuit court concludes that it can conduct such an inquiry, then it must hold an evidentiary hearing on whether Klessig was competent to proceed pro se. If the circuit court finds that a meaningful hearing cannot be conducted, or that Klessig was not competent to proceed pro se, then Klessig must be granted a new trial.

Id. at 213. Unlike Ernst, Klessig made a direct challenge to his conviction. The remedy available to Klessig, therefore, was a new trial. Though the ***Klessig*** court established the evidentiary procedure for invalid waiver of counsel claims, it did not expressly address Fifth Amendment implications in a collateral attack.

In ***Lefkowitz v. Turley***, 414 U.S. 70 (1973), the United States Supreme Court stated:

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Id. at 77. The State contends that in ***Klessig***, the supreme court implicitly eliminated the Fifth Amendment privilege from the evidentiary hearing process. There, the court adopted the State's position that an evidentiary hearing on an invalid waiver of counsel motion should be the same as that used for resolution of

a guilty plea waiver. ***Klessig***, 211 Wis. 2d at 207. When a defendant challenges the validity of a guilty plea, "[t]he state may examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." ***State v. Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986). ***Bangert*** further provides that allowing a court "to consider only the plea hearing transcript essentially raises procedural form over constitutional substance." ***Id.*** at 276.

Using the ***Bangert*** analysis, we have held that in order to prove that a defendant's guilty plea is valid, the State "may use the entire record to meet its burden, including the testimony of the defendant and defense counsel." ***State v. Grant***, 230 Wis. 2d 90, 99, 601 N.W.2d 8 (Ct. App. 1999).

Bangert and ***Grant***, however, are distinguishable from the current appeal. First, both involved a direct attack on the underlying conviction rather than a collateral attack on a prior conviction. Second, neither ***Bangert*** nor ***Grant*** addressed the constitutional concerns raised by the Fifth Amendment privilege against self-incrimination. Ernst's assertion of his constitutional privilege arguably changes this from an issue of "procedural form," as described in ***Bangert***, to one of "constitutional substance." *See* ***Bangert***, 131 Wis. 2d at 276.

The scope of the Fifth Amendment was addressed by the United States Court of Appeals for the District of Columbia Circuit, which held that the privilege may be properly invoked where three elements exist: "i) the compulsion; ii) of testimony; iii) that incriminates." ***United States v. Hubbell***, 167 F.3d 552, 567 (D.C. Cir. 1999), *cert. granted*, 528 U.S. 926 (U.S. Oct. 12, 1999) (No. 99-166), *aff'd*, 530 U.S. 27 (U.S. Dist. Col. June 5, 2000) (No. 99-166). The State seeks to compel Ernst's testimony, satisfying the first two elements. The third

element, whether Ernst risks self-incrimination at the evidentiary hearing in the present proceeding, is the decisive issue in this appeal.

Prior OWI convictions may be relevant to a current proceeding in two situations. The first is where the prior convictions are used to lower the threshold blood alcohol level required for conviction of the current OWI charge. In this case, the prior convictions are elements that must be proven as part of the State's case. ***State v. Alexander***, 214 Wis. 2d 628, 652, 571 N.W.2d 662 (1997). The second is where the prior convictions are used to enhance the penalty for the current OWI conviction. In this case, the prior convictions are not elements of the crime currently charged. ***State v. McAllister***, 107 Wis. 2d 532, 532-33, 319 N.W.2d 865 (1982); ***State v. Lindholm***, 2000 WI App 225, ¶6, 239 Wis. 2d 167, 619 N.W.2d 267. If Ernst's fourth OWI conviction is not an element of the current charged offense, is there still a risk of self-incrimination at the evidentiary hearing?

In ***Mitchell v. United States***, 526 U.S. 314 (1999), the United States Supreme Court rejected the idea that entry of a guilty plea "completes the incrimination of the defendant, thus extinguishing the privilege." ***Id.*** at 325. "If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." ***Id.*** at 326. Mitchell was making a direct challenge to her underlying conviction; therefore, she faced "adverse consequences" related to sentencing in that particular proceeding. Here, the State seeks testimony about a prior proceeding in which Ernst's conviction and sentence are finalized. Though ***Mitchell*** is factually distinguishable, the discussion of postconviction incrimination is relevant. Specifically, the Supreme Court states:

> The Fifth Amendment by its terms prevents a person from being "compelled in any criminal case to be a witness against himself." To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the law and to common sense. As to the law, under the Federal Rules of Criminal Procedure, a court must impose sentence before a judgment of conviction can issue. As to common sense, it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment.

Id. at 327 (citation omitted). Here, Ernst is also concerned with the severity of his punishment, though the potential sentence enhancement is not attached to the conviction under attack. ***Mitchell*** does not explicitly state that the privilege is portable from one proceeding to a subsequent proceeding, but such an inference might be drawn.

The State of Washington appellate court declined to extend ***Mitchell*** to sentence enhancement hearings. In ***State v. Blunt***, 71 P.3d 657, 659 (Wash. Ct. App. 2003), Blunt's sentence turned on the number of prior convictions against him. The issue in ***Blunt*** was whether the court could draw a negative inference from the defendant's silence at sentencing. ***Id.*** at 660. The Washington court held:

> Nonetheless, most courts have generally declined to extend ***Mitchell*** to prohibit inferences from silence in the context of sentence enhancements that do not involve factual details of the underlying crime. Similarly, the purpose of Blunt's sentencing hearing was to establish his prior convictions, not to make any "factual determinations respecting the circumstances and details" of the [charge].

Blunt, 71 P.3d at 662 (citing ***Mitchell***, 526 U.S. at 328). The State suggests that the ***Blunt*** analysis is applicable here because "[d]rawing an adverse inference from silence is constitutionally objectionable only when that silence is a legitimate exercise of the privilege against self-incrimination." In other words, Blunt's

silence at his sentencing was not a legitimate exercise of his constitutional privilege because the court was allowed to draw a negative inference from his silence. No Wisconsin case law supports or refutes this contention.

CONCLUSION

This certification will allow the supreme court to assess the defendant's right to invoke the constitutional privilege against self-incrimination in an evidentiary hearing held in response to the defendant's collateral attack on a prior conviction and to decide the policy issues presented by this case.