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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP002316-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

Jefferson Co. Case
No. 2011CF000221

RICHARD J. SULLA,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDERS DENYING DEFENDANT'S POSTCONVICTION MOTION ENTERED IN JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE JACQUELINE R. ERWIN AND THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT, RICHARD J. SULLA

SUBMITTED BY:

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral argument or publication in this case because he believes that the issues can be fully described in the parties' briefs and that the issues may be decided using presently established legal precedent.

STATEMENT OF THE CASE

On July 26, 2011, a criminal complaint was filed against Richard J. Sulla (Sulla) for four counts including: burglary while armed, conspiracy to commit arson of building, burglary of a building or dwelling, and operating a motor vehicle without the owner's consent – as party to a crime, all charges alleged as repeat criminal offender offenses. (R. 2: 1-7; A-Ap. 105-11).

The case progressed and on April 10, 2012, after Sulla pleaded no-contest to the offenses, he was adjudged convicted for one count of burglary while armed, as a repeater, under § 943.10(b) and § 939.62(1)(c), Wis. Stats., and one count of burglary to a building or dwelling, as a repeater, under § 943.10(1m)(a) and 939.62(1)(c), Wis. Stats. (R. 39: 1-3; A-Ap. 115-17).

On May 15, 2012, the Court sentenced Sulla to a fifteen-year total bifurcated imprisonment sentence consisting of seven and one-half years of initial confinement and seven and one-half years of extended supervision for the burglary while armed offense, consecutive to all other sentences, and to a consecutive total bifurcated five-year imprisonment sentence consisting

of two and one-half years of initial confinement and two and one-half years of extended supervision for the burglary to a building or dwelling offense. (R. 39: 1-3; A-Ap. 115-17).

On August 2, 2013, Sulla filed a postconviction motion seeking to withdraw his no-contest pleas or alternatively for a sentence modification or resentencing. The postconviction motion also stated secondary issues of ineffective assistance of trial counsel and of judicial bias and conflict of interest. (R. 52: 1-2, R. 53: 1-15). Sulla further requested that the court order an evidentiary hearing including a ***Machner*** hearing to be held. (*Id*.). The State filled a response brief. (R. 56: 1-7). The circuit court held two non-evidentiary hearings on September 6, 2013 and September 23, 2013. (R. 67, 68). Thereafter, on September 27, 2013 and September 30, 2013 the circuit court entered two written decisions and orders denying Sulla's postconviction motion. (R. 58: 1-9, A-Ap. 124-32; R. 59: 1-4; A-Ap. 133-36).

This case is before this Court pursuant to Sulla's notice of appeal filed on October 15, 2013. (R. 61: 1-2).

STATEMENT OF THE FACTS

On July 26, 2011, a criminal complaint was filed against Richard J. Sulla (Sulla) for four criminal counts: (count 1) burglary while armed, (count 2) conspiracy to commit arson of building, (count 3) burglary of a building or dwelling, and (count 4) operating a motor vehicle without owner's consent – as party to a crime, all crimes alleged a repeat offender penalty enhancer. (R. 2: 1-7; A-Ap. 105-11).

The complaint begins describing a burglary/house fire incident at a residence. (*Id.*). The complaint indicates that a Deputy Johnson of the Jefferson County Sheriff's office was dispatched to investigate a fire at W193 Oosty Avenue in the Town of Oconomowoc. (*Id*.). Upon arrival, the officer spoke to witnesses who indicated that flames were seen coming from the residence of Laurie and Joseph Dudley. (*Id*.). In part, the witnesses reported that two pick-up trucks were observed leaving the area at a high rate of speed, that the sound of glass breaking was heard, that there were flames seen in the residence basement window, and that the basement door was unlocked. (*Id*.). The complaint indicates that the officer spoke with the

father of Joseph Dudley and he stated that his son's family was out of town camping, and that they never left their house without locking the doors. (*Id*.). The complaint further states that Joseph Dudley, upon arriving home from camping, indicated that there were firearms missing from his gun cabinet:

> The guns had been kept in a gun cabinet with glass doors that had been broken and were standing open. Joseph stated that he and his family always lock and deadbolt their doors. After speaking with Joseph, Detective Garcia determined that the fire was intentionally set to cover up a burglary. Joseph signed a no consent form stating he did not consent to the burglary, the damage to his residence or the theft of his property.

(*Id*.). The complaint further indicates that Joseph Dudley noticed silverware and keys missing from his house and that he found a propane tank in the basement area that had not been there before the burglary. (*Id.*).

The complaint then noted details of the second burglary investigation:

> On October 1, 2010 at 10:03 p.m., Deputy Riesen of the Jefferson County Sheriff's Office, was dispatched to W172 Bellview Avenue, in te Town of Ixonia, Jefferson County, Wisconsin [hereinafter the "Ziemann residence"] regarding a burglary. Upon arrival, Deputy Riesen met with the complainants Maria and Joseph Ziemann. The Ziemanns stated that their house had been burglarized on October 1, 2010 between 5:30 and 10:00 p.m. During this time, they had been at their son's football game in Beaver Dam. The Ziemanns stated that the house had not been locked. Maria stated that when they arrived

> home, she noticed that her beige 2004 Windstar van with Wisconsin registration SCREEMN was missing from the garage. Deputy Riesen had the Ziemanns walk through the house and tell them everything that was missing. . . . Maria signed a no consent form stating that she did not consent to the burglary.
>
> On October 12, 2010, Detective Maze of the Jefferson County Sheriff's office received a report that the Windstar van that had been stolen from the Ziemanns was currently at the Waukesha Huber Facility. Detective Maze spoke with Detective Rick Bach, who stated that the van had a stolen rear plate, but the original plate was still on the front.

(*Id.*). The complaint indicates that Maria Ziemann gave permission to search the van, and that during the search, several items were recovered, including a receipt from Greater Milwaukee Coin and Jewel Exchange, bearing the name of Richard Sulla, and indicating that Sulla had sold something to the shop. (*Id.*). Detective Maze, after speaking to Huber staff for the Waukesha County Jail, discovered that Sulla was an inmate at the Huber facility. (*Id.*).

Subsequently, Detective Maze conducted a Mirandized interview of Mr. Sulla, in which Sulla indicated that he received the van from a friend, and that the van had been involved in several burglaries, including one in Jefferson in which guns were taken and a fire occurred at the residence. (*Id.*).

The complaint further states that Detective Maze conducted another interview on October 13, 2010, during which Sulla denied his involvement in the burglary and arson of the Dudley's residence. (*Id.*). Sulla indicated that he was aware of the burglary, as he knew of three individuals who burglarized the residence, one of whom had discovered a hole in his glove, and thus, wished to destroy evidence linking him to the burglary, i.e., any fingerprints left, by way of setting fire to the crime scene. (*Id.*).

Further, the compliant indicates that Sulla stated that he did receive guns taken from the residence, and which he assisted the police in recovering the guns. (*Id.*). Sulla indicated to police that Scott Tarantino and Tony Vuk had involvement in the burglaries. (*Id.*). Sulla stated that he received property stolen from the Ziemann residence, which he was to sell including video games and at least one coin. (*Id.*).

The complaint indicates that Sulla was again interviewed by Detective Maze on October 26, 2010, during which Sulla stated that he was not involved in the burglary and arson at the Dudley's residence. (*Id).* Later,

during another interview, Sulla indicated that he had been involved in the burglary of the Ziemann residence with Scott Tarantino, in which Tarantino took the van and Sulla took various items to pawn. (*Id*.).

After the complaint was filed the case progressed. On September 12, 2011, the initial appearance was held and Sulla appeared without counsel by video-conference from the Racine Youthful Offender Correctional Facility. (R. 62: 1-15). On October 17, 2011, with a State Public Defender attorney now representing him, and after waiver of a preliminary hearing, the circuit court found probable cause to bind Sulla over for trial, and an information was filed and Sulla pled not guilty the offenses. (R. 63: 1-4).

The case further progressed through the judicial system. On April 9, 2012, there was a final pretrial and a motion hearing held in anticipation of a jury trial scheduled for the next day. (R. 64: 1-41). Following that hearing, in the evening, the defense attorney met with Mr. Sulla and set forth a proposed plea agreement. This particular meeting is significant as relevant to one of the main issues of this case, because Mr. Sulla asserts, as argued below,

that the attorney misadvised him regarding the effect of the arson read-in offense.

Ultimately, the next day, on April 10, 2012, Sulla pled no-contest and was adjudged convicted of one count of burglary while armed, as a repeater, under § 943.10(b) and § 939.62(1)(c), Wis. Stats., and one count of burglary to a building or dwelling, as a repeater, under § 943.10 (1m)(a) and 939.62(1)(c), Wis. Stats. (R. 39: 1-3, A-Ap. 115-17). In addition, counts 2 and 4, for conspiracy to commit arson and operating a motor vehicle without the owner's consent, were dismissed as *read-in offenses*. (R. 65: 3). Of note, the victims John and Laurie Dudley were present at the time of the plea and the circuit court made no mention of personal familiarity of either of them at that time. (*Id.* at 2-11),

On May 15, 2012, Sulla was brought before the court for sentencing. At the sentencing hearing, the circuit court disclosed the following:

> THE COURT: Lawyers, let me disclose that Joe Dudley is a name familiar to me from my youth. My spouse and I grew up in Oconomowoc and I – I know the name, don't have any need to disclose, but so that you are aware.

(R. 66: 2).

The State, while not making a specific recommendation as to length of imprisonment, made a request for consecutive imprisonment and noted repeatedly the severity of the arson offense. (R. 66: 2-16). Defense counsel requested a fifteen year total bifurcated imprisonment sentence concurrent with Sulla's other imprisonment sentences in other cases in other counties, which the held a prison release date to community supervision of approximately May 11, 2025, i.e., thirteen years hence. (R. 66: 23; see also, R. 49: 3). The circuit court actually sentenced Sulla to a consecutive combined total bifurcated imprisonment sentence of twenty years, consisting of ten years of initial prison confinement and ten years of extended supervision. (R. 66: 54-55). The court also declared Sulla ineligible for the Challenge Incarceration Program or the Earned Credit Release. (*Id.*).

On August 2, 2013, Sulla filed a postconviction motion seeking to withdraw his no-contest pleas, or alternatively, for a sentence modification or resentencing. (R. 52: 1-2, R. 53: 1-15). The postconviction motion also stated secondary issues of ineffective assistance of trial counsel and of judicial bias and conflict of interest. (*Id.*).

Sulla further requested that the court order an evidentiary hearing, including a ***Machner*** hearing, to be held. (*Id*.). The State filled a response brief. (R. 56: 1-7).

The circuit court held two non-evidentiary hearings, the first on September 6, 2013, and the second on September 23, 2013. (R. 67, 68). Thereafter, on September 27, 2013 and September 30, 2013, the circuit court entered two decisions and orders denying Sulla's postconviction motion. (R. 58: 1-9, A-Ap. 124-32; R. 59: 1-4; A-Ap. 133-36).

Sulla appeals from the judgment of conviction and the denial of his postconviction motion. (R. 61: 1-2).

Additional facts will be added to the arguments section of this brief as necessary.

ARGUMENTS

I. THE TRIAL COURT ERRED IN NOT PERMITTING SULLA TO WITHDRAW HIS NO CONTEST PLEAS.

A. Standard of Review

On appeal, the issue of whether a plea was knowingly, intelligently, and voluntarily made presents a question of constitutional fact. ***State v. Van Camp***, 213

Wis. 2d 131, 140, 569 N.W.2d 577 (1997). The appellate court will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. *Id*. The appellate court reviews Constitutional issues independently of the circuit court's determinations. ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987).

B. Sulla Should Be Permitted to Withdraw His No Contest Pleas

Sulla first asserts, that upon his postconviction motion, the circuit court erred in not allowing him to withdraw his no contest pleas.

A criminal defendant attempting to withdraw a plea must make a prima facie showing that the plea was not intelligently, knowingly, and voluntarily made. ***State v. Canedy***, 161 Wis. 2d 565, 584, 469 N.W.2d 163 (1991). After the sentencing has occurred, as is the case here, the criterion of "manifest injustice" must be shown in order to withdraw a plea. See ***State v. Truman***, 187 Wis. 2d 622, 625, 523 N.W.2d 177, 178 (Ct. App. 1994). The manifest injustice standard requires the showing of a serious flaw in the fundamental integrity of the plea. See ***Libke v. State***, 60 Wis.2d 121, 128, 208 N.W.2d 331, 335 (1973).

Defendants seeking to withdraw a plea after sentencing must demonstrate a manifest injustice by clear and convincing evidence. See ***Truman***, 187 Wis. 2d at 625, 523 N.W.2d at 179.

As stated in his postconviction motion, Mr. Sulla asserts that he was misinformed and did not understand that the read-in charge for purposes of sentencing, he would effectively be considered to have committed the arson offense. Mr. Sulla throughout all stages of the cases consistently maintained that he was in no way involved in the arson offense. (R. 50: 1, ¶¶ 3-4; A-Ap. 118, 121). Sulla contends that because he did not know that the court would consider the arson offense as having been committed by him at the sentencing hearing, his pleas were therefore "unknowingly" entered.

When a defendant pleads no contest, he or she waives several constitutional rights. Waivers of constitutional rights must be voluntary, and also must be knowing, and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. See ***Brady v. United States***, 397 U.S. 742, 748, 90 S.Ct. at 1463 (1970).

Notably in this case, the *postconviction* circuit court stated that it reviewed the postconviction motion using both the ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), analyses. (R. 67: 6, A-Ap. 129). In ***State v. Hampton***, 2004 WI 107, ¶¶ 59-63, 274 Wis. 2d 379, 683 N.W.2d 14, the Wisconsin Supreme Court noted the distinction of the analyses regarding motions to withdraw guilty and no contest pleas:

> ¶ 59. "The nature and specificity of the required supporting facts will necessarily differ from case to case." *Bentley*, 201 Wis. 2d at 314. For instance, in the case of a *White* violation, it is relatively easy to point to the discussion of the plea agreement in the plea hearing transcript and show that there was no reference to the fact that the court is not bound by the terms of the plea agreement. It would be considerably more difficult to expand on an allegation that the defendant did not understand information that was not conveyed to him.
>
> ¶ 60. By contrast, the *Bentley* court explained that normally a defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of "manifest injustice by clear and convincing evidence." *Bentley*, 201 Wis. 2d at 311. When, for example, the basis for this injustice is an allegation that defendant involuntarily entered a plea because of the ineffective assistance of counsel, his claim raises questions about both deficient performance and prejudice. *Id.* at 311-12. To establish deficient performance, a defendant must necessarily provide the factual basis for the court to make a legal determination. To show prejudice, a

> defendant must do more than merely allege that he would have pleaded differently but for the alleged deficient performance. He must support that allegation with "objective factual assertions." *Id.* at 313.
>
> ¶ 61. *Bangert*-type violations should be apparent from the record. *Bentley*-type allegations will often depend on facts outside the record. To ask the court to examine facts outside the record in an evidentiary hearing requires a particularized motion with sufficient supporting facts to warrant the undertaking.
>
> ¶ 62. There is a second distinction between *Bangert*-type cases and *Bentley*-type cases. In *Bangert*-type cases, the defendant has the initial burden of showing the basis for a hearing; but if he succeeds, the burden shifts to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered. *Bangert*, 131 Wis. 2d at 274.
>
> ¶ 63. In *Bentley*-type cases, the defendant has the burden of making a *prima facie* case for an evidentiary hearing, and if he succeeds, he still has the burden of proving all the elements of the alleged error, such as deficient performance and prejudice. The defendant must prove the linkage between his plea and the purported defect. The defendant's proof must add up to manifest injustice.

Id., ¶¶ 59-63. Sulla notes that he pleaded specific supporting facts to his motion to withdraw his no contest pleas. (R. 49-53). In Sulla's affidavit he explained that he considered the court's recognition of his denial of the arson offense as a critical part of his agreement to the plea. (R. 50: 1-6, A-Ap. 118-23). Further, Sulla states that he was

misinformed by his attorney regarding what he believed to be the consequences of the no contest plea, regarding the arson, and that ***he would not have pled no contest*** to the offenses at the April 10, 2012 plea hearing had he known that the Court would consider the arson as having been committed by him.

The failure of Sulla to understand the ramifications of the read-in provides a basis for plea withdrawal as the pleas cannot be said to be freely, knowingly, intelligently, and voluntarily made.

Sulla's affidavit states, in part:

> 2. That on or about September 29, 2011, Attorney Jeffrey De La Rosa was appointed by the State Public Defender's office. That to my best of my belief Attorney De La Rosa had no more than about three telephone conferences with me and no more than two or three in person visits with me besides very brief visits in court or in the jail-holding areas at the time of hearings.
>
> At one point I went for about four or five months without any visit or conversation with Attorney De La Rosa and I wrote to him expressing my concern in this regard. Attached as Exhibit A which is a copy of my correspondence to him.
>
> 3. That my Attorney De La Rosa told me that agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would "look at" at sentencing. I did not understand and my Attorney did not explain the effect that a read-in offense has because Attorney De La Rosa did not explain it to me. In fact, ***I did not commit the subject arson*** and if I had known that it was going to be considered as a negative at my sentencing ***I would not have entered the no-contest***

> ***plea***[.]
>
> 4. That Attorney De La Rosa never supplied the discovery to me and that there were communications from the District Attorney that were never shown to me until I was appointed an appellate attorney. The documents attached as Exhibit B are some of those documents.
>
> 5. That when the Judge at sentencing mentioned that she had a familiarity with the Dudley's, that I relied on my attorney to protect my interests in any regard related to that and that if I had known before I pleaded no contest in the instant cases, I would not have pleaded in the case unless I had a different judge or assurances that my case was being handled fairly.

(R. 50: 1-2, ¶¶ 2-5, A-Ap. 118-19) (emphasis added). Notably, in paragraph four of Sulla's affidavit he points to a letter that specifically mentions that Sulla's defense attorney "[did not] have authority to plead on the Arson[.]" (R. 50: 4, A-Ap. 121). Sulla pleaded specific supporting facts to his motion to withdraw his no contest pleas in his affidavit as noted above and in motion brief. (R. 49-53).

The failure of Sulla to understand the ramifications of the read-in provides a basis for plea withdrawal as the pleas cannot be said to be freely, knowingly, intelligently, and voluntarily made. Notably, there was very little discussion of the matter, i.e., the great effect of the read-in offense of arson at the sentencing, at the time of the plea to the burglary offenses. (R. 65: 3, 10). In both instances the

circuit court stated at the plea hearing that it would dismiss charges will "consider those offenses when I sentence you." (*Id*.).

In its postconviction decision dated September 27, 2013, the circuit court stated, in part:

> The defendant does not allege that he is innocent of the offenses to which he entered his pleas or that the state did not have proof to prove him guilty of those offenses . . . [.]
>
> * * * *
>
> . . . . The read-in gave him the benefit of the bargain which was to avoid the significant prison exposure from the arson. The defendant does not even allege in his affidavit that he would have gone to trial. As our United States Supreme Court wrote:
>
> "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1983).

(R. 58: 2-3, A-Ap. 125-26). Sulla first submits that, contrary to what the circuit court states, prior to his plea, Sulla did in-fact enter *not guilty* pleas to all the charges leveled in the complaint and, in fact, up until the day before the plea hearing, there were proceedings in anticipation of a jury trial. (R. 64: 1-41). Sulla raised both in his affidavit and his postconviction motion that he would <u>not</u> have pled no-contest if he had known that the

read-in arson offense would be considered as a negative in his sentencing hearing. (R. 50: ¶ 3, A-Ap. 118; R. 53: 7-8).

Moreover, the circuit court erred in its analysis as to whether Sulla received "a benefit of the bargain" as this issue, as it is framed in the circuit court's decision, completely misstates the point of the postconviction motion. Clearly, Sulla brought the motion to withdraw his no-contest pleas because he did not understand the consequences of the read-in offense of arson on his sentences for the burglary offenses. To say that Sulla received a benefit is incorrect because the arson offense was repeatedly raised by the State and also by sentencing court itself as an aggravating factor, i.e., as a means for justifying a vastly increased sentence for the two burglary offense convictions. (R. 29: 1-12, R. 66: 48-53). As he argued in his brief and at the postconviction motion hearing, Mr. Sulla did not believe that the State was going to argue for an increased sentenced on the burglary offenses based on the read-in offense of arson, however that was exactly what the State did. (R. 53: 8, R. 67: 40-41).

The circuit court in its postconviction motion decision stated Sulla by signing the "Plea Questionnaire" and "Modified Criminal Case Settlement" forms demonstrates Sulla's understanding of the entry of his pleas. Sulla disagrees. The plea forms in question consist of general boiler-plate language providing lengthy renditions of the many Constitutional and statutory rights being given up by entering a guilty or no-contest plea. In fact the court at the plea hearing only *very* generally stated the consideration given to the read-in arson offense. (R. 65: 3, 10).

Furthermore, in ***State v. Hoppe***, 2009 WI 41, ¶¶ 30-32, 317 Wis. 2d 161, 765 N.W.2d 794, the Wisconsin Supreme Court, stated the following regarding the use of plea questionnaire forms during the plea colloquy:

> ¶ 30 A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties. "A circuit court has significant discretion in how it conducts a plea hearing" and may, "[w]ithin its discretion, ... incorporate into the plea colloquy the information contained in the plea questionnaire, relying substantially on that questionnaire to establish the defendant's understanding[.]"[16] Indeed, we stated in Bangert that one way for the circuit court to inform the defendant of the constitutional rights that he is waiving and to verify the defendant's understanding that he is waiving these rights is for the circuit court to "specifically refer to some portion of the record or communication between defense counsel and [the]

> defendant which affirmatively exhibits [the] defendant's knowledge of the constitutional rights he will be waiving" and then to "ascertain whether the defendant understands he will be waiving certain constitutional rights by virtue of his guilty or no contest plea[.]"[17]
>
> ¶ 31 A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. ***Although a circuit court may refer to and use a Plea Questionnaire/Waiver of Rights Form at the plea hearing, the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in Brown***. The point of the substantive in-court plea colloquy is to ensure that the defendant's guilty plea comports with the constitutional requirements for a knowing, intelligent, and voluntary plea.
>
> ¶ 32 The Plea Questionnaire/Waiver of Rights Form provides a defendant and counsel the opportunity to review together a written statement of the information a defendant should know before entering a guilty plea. A completed Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea. The plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the Form. Although we do not require a circuit court to follow inflexible guidelines when conducting a plea hearing,[18] the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.

Id. at ¶¶ 30-32 (emphasis added). As noted above the circuit court at the plea hearing only in very general terms indicated the "consideration" of the arson read-in offense at the time of Sulla's sentencing. (R. 65: 3, 10).

Another point that Sulla contends displays error by the circuit court is its assertion; "Defendant Sulla certainly would have been advised by his attorney that the

sentencing court could, in an exercise of discretion; considered he 'committed' the arson offense under the rubric of 'character of the accused' even if the state dismissed the count outright or if he had a trial, and the jury acquitted him on the count of arson." (R. 58: 3, A-Ap. 126). Sulla disagrees that the import of a jury trial acquittal of arson would carry the same weight at sentencing as the consideration of an egregious act of burning down someone's home as a read-in offense, as here. Sulla maintains that he did in-fact suffer prejudice in his sentencing – a twenty-year total bifurcated sentence consecutive to his other sentences resulting in a release to earned release in the year 2035 now. (R. 49: 3).

Another note of importance to Mr. Sulla's postconviction motion for plea withdrawal, was the judge's disclosure at the sentencing hearing, i.e., after the plea was accepted, that she knew the victims. The sentencing transcript indicates:

> THE COURT: Lawyers, let me disclose that Joe Dudley is a name familiar to me from my youth. My spouse and I grew up in Oconomowoc and I – I know the name, don't have any need to disclose, but so that you are aware.

(R. 66: 2).

In support of his motion to withdraw his no contest pleas, Sulla's affidavit states, in part:

> 5. That when the Judge at sentencing mentioned that she had a familiarity with the Dudley's, that I relied on my attorney to protect my interests in any regard related to that and that if I had known before I pleaded no contest in the instant cases, I would not have pleaded in the case unless I had a different judge or assurances that my case was being handled fairly.

(R. 50: 2, ¶ 5, A-Ap. 119).

In ***State v. American TV and Appliance of Madison, Inc.***, 151 Wis. 2d 175, 443 N.W.2d 662 (Wis., 1989), the Wisconsin Supreme Court articulated a standard regarding judicial disqualifications for potential bias stating:

> The standard by which to measure the basis for disqualification under sec. 757.19(2), Stats., is evident. The situations requiring disqualification under subs. (a) through (f) are objectively measurable. However, in sub. (g), because the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification.

(*Id.*). In the present case, as noted above, the circuit court after a very brief recognition of a potential bias gave a statement – no need to disclose - utterance. Sulla asserts that this was not an adequate determination of whether disqualification was necessary. Accordingly, Mr. Sulla

states that this provides another reason supporting a manifest injustice finding sufficient to sustain a plea withdrawal in this case.

C. Mr. Sulla's Trial Counsel Provided Ineffective Assistance Of Counsel

As he argued in the Postconviction Motion, in the alternative, to the extent Sulla's trial counsel misinformed and failed to properly advise him regarding the read-in arson offense consequences, or to object and request information regarding the late disclosure of a conflict by the judge indicating potential bias, Sulla asserts that his trial counsel provided ineffective assistance of counsel.

The right of effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. In ***Strickland v. Washington***, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the United States Supreme Court set forth the guidelines for ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, the defendant must show both that counsel performed deficiently and that counsel's errors prejudiced his defense. *Id.* at *687.* To demonstrate deficient performance the defendant must show that

counsel's representation "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688.

Determining whether a defendant who has entered a plea has been denied effective assistance of counsel requires the application of a two-part test. ***Hill v. Lockhart***, 474 U.S. 52, 58, 106 S.Ct. 366 (1985). The first inquiry is whether counsel's performance fell below the objective standard of reasonableness. *Id*. at 57, 106 S.Ct. 366. The second inquiry is whether counsel's ineffective performance affected the outcome of the plea. *Id*. at 59, 106 S.Ct. 366. "In other words, in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*.

Sulla notes that his postconviction motion brief quoted the above stated ***Hill v. Lockhart***, and supplied specific facts in the affidavits regarding the trial counsel's deficient performance and the link to Sulla's unknowing no contest plea. (R. 53: 9-10, see also, R. 50: 1-6; A-Ap. 118-23, R. 51: 1-2).

In its postconviction decision dated September 27, 2013, the circuit court stated, in part:

> . . . . The read-in gave him the benefit of the bargain which was to avoid the significant prison exposure from the arson. The defendant does not even allege in his affidavit that he would have gone to trial. As our United States Supreme Court wrote:
>
> "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1983).

(R. 58: 2-3, A-Ap. 125-26). Sulla submits that he raised both in his affidavit and his postconviction motion that he would not have pled no-contest if he had known that the read-in arson offense would be considered as a negative in his sentencing hearing. (R. 50: ¶ 3, A-Ap. 118; R. 53: 7-8).

Sulla brought the motion to withdraw his no-contest pleas because he did not understand the consequences of the read-in offense of arson on his sentences for the burglary offenses. The circuit court in stating that Sulla received a benefit is incorrect because the arson offense was repeatedly raised by the State and also by sentencing court itself as an aggravating factor justifying an increased sentence for the two burglary offense convictions. (R. 29: 1-12, R. 66: 48-53).

The circuit court in its postconviction motion decision stated Sulla by signing the "Plea Questionnaire" and "Modified Criminal Case Settlement" forms demonstrates Sulla's understanding of the entry of his pleas. Sulla disagrees. The plea forms in question consist of general boiler-plate language providing lengthy renditions of the many Constitutional and statutory rights being given up by entering a guilty or no-contest plea. In fact the court at the plea hearing only *very* generally stated the consideration given to the read-in arson offense. (R. 65: 3, 10). Sulla submits that he was denied effective assistance of trial counsel.

Therefore, Sulla submits that the circuit court erred in denying his motion to withdraw his no contest pleas and in failing to grant him an evidentiary hearing including a Machner hearing.

II. THE TRIAL COURT ERRED IN ITS DETERMINATIONS REGARDING THE JUDGE'S BIAS OR APPEARANCE OF JUDICIAL BIAS

Sulla asserts that the circuit court erred in its determinations regarding the judicial bias.

The court, on May 15, 2012 at the commencement of the sentencing hearing stated:

> THE COURT: Lawyers, let me disclose that Joe Dudley is a name familiar to me from my youth. My spouse and I grew up in Oconomowoc and I – I know the name, don't have any need to disclose, but so that you are aware.

(R. 66: 2).

Sulla contends that this disclosure, which occurred shortly before Mr. Sulla was sentenced, and over a month after he had pled no contest, reveals that the Judge had determined subjectively, without any prompting by the prosecution or defense, that an appearance of bias may exist.

The postconviction motion circuit court, a different judge, determined that the plea and sentencing judge's determination did not involve a determination of subjective bias. (R. 68: 14-21, A-Ap. 185-92). Sulla disagrees.

Under § 757.19(2)(g) Wis. Stats., a judge must disqualify himself or herself: "When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

The court stated in ***State v. American TV and Appliance of Madison, Inc.***, 151 Wis.2d 175, 443 N.W.2d 662 (Wis., 1989),:

> The standard by which to measure the basis for disqualification under sec. 757.19(2), Stats., is evident. The situations requiring disqualification under subs. (a) through (f) are objectively measurable. However, in sub. (g), because the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification.

(*Id.*).

Sulla's affidavit states, in part:

> 5. That when the Judge at sentencing mentioned that she had a familiarity with the Dudley's, that I relied on my attorney to protect my interests in any regard related to that and that if I had known before I pleaded no contest in the instant cases, I would not have pleaded in the case unless I had a different judge or assurances that my case was being handled fairly.

(R. 50: 2, ¶ 5, A-Ap. 119). Further, Sulla's father, Michael Sulla, stated the following in his affidavit:

> 2. That on May 15, 2012, I attended the sentencing hearing in the above-captioned case, and that I was present just after the sentencing concluded and my son was taken out of the immediate courtroom. That at that point as the Mr. and Mrs. Dudley were beginning to leave the Judge stood up and in a very outward display of familiarity and friendliness said to Mr. Dudley "Hey Joe, I know . . . . " and then the judge indicated some name. The talk continued about something to the effect of I know someone closely as someone you know. I believe that it was a friendly connection to her husband, but of this I am not certain.

> 3. That I was very surprised by the unusual timing, right at the conclusion of a criminal sentencing hearing, of this outward display of casualness friendliness toward Mr. Dudley and thought it was unusual, bizarre, and seemed improper for the courtroom setting and timing.

(R. Michael Sulla Affidavit.).

As noted above, the circuit court after its very brief recitation that the judge recognized the names of the victims stated that it had no need to disclose. Sulla asserts that this was not an adequate determination of whether disqualification was necessary.

Accordingly, Mr. Sulla submits that the circuit court erred in its determinations regarding judicial bias or the appearance of judicial bias in this case.

III. SENTENCE MODIFICATION IS WARRANTED BECAUSE THE COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION

Mr. Sulla asserts that the circuit court erroneously exercised its sentencing discretion. Sulla particularly asserts that the total bifurcated twenty year imprisonment sentence imposed for this offense was unduly harsh in light of the facts surrounding the offense. Mr. Sulla believes that a proper sentence for the offense should be more in accord

with as his defense counsel argued, i.e., fifteen years concurrent.

The postconviction motion court stated, in part:

> . . . [T]his record clearly does establish that the Court paid attention and was listening to the presentation of both sides, as the Court was required to do , and then used those preferences to the Court's findings or conclusions . . . which is, again appropriate sentencing discretion.

(R. 68: 39, A-Ap. 172). Sulla submits that his sentence now set for a release to extended supervision in 2035, was unduly harsh given all the mitigating and aggravating factors.

The underlying purpose of a sentence modification is to correct an "unjust sentence." ***See Hayes v. State***, 46 Wis. 2d 93, 105, 175 N.W.2d 625 (1970). Further, an erroneous exercise of sentencing discretion may be found where a sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***See Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

In the present case, there were several mitigating factors that warranted consideration for a proper exercise

of the court's sentencing discretion. First, it should be noted that Sulla's record is essentially all from a short period, less than two years, of burglary offenses; non-assaultive, and in an effort to get money for heroin and painkiller type medicines. He is young and he has a history of serving his country in the military, from which he was honorably discharged.

In ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court stated that "the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." In ***State v. Daniels***, 117 Wis. 2d 9, 21, 343 N.W.2d 411 (Ct. App. 1983) (footnote omitted), the court of appeals discussed the circuit court's sentencing discretion:

> The trial court exhibits the essential discretion if it considers the nature of the particular crime (the degree of culpability) and the personality of the defendant and, in the process, weighs the interests of both society and the individual.

Id. (emphasis added). Similarly, in ***State v. Babler***, 170 Wis. 2d 210, 214, 487 N.W.2d 636, 637-38 (Ct. App. 1992), the court concluded that a review of sentencing for

an erroneous exercise of sentencing discretion requires consideration of the "gravity of the offense" and "the harshness of the penalty." Furthermore, in the seminal case of ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512, 518-19 (1971), the Wisconsin Supreme Court stated that when the legislature grants sentencing power to the courts to impose sentences covering a range "it left it to judicial discretion to determine where in that range the sentence should be selected." The ***McCleary*** Court also stated:

> . . . . we must conclude that the legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation and lighter sentences were to be used in cases where the protection of society and the rehabilitation of the criminal did not require a maximum or near-maximum sentence.

Id.

Given Mr. Sulla's acceptance of responsibility for the offense, that he expressed remorse for his conduct, and for the above stated reasons, he respectfully submits that the sentence in this case, the twenty year total bifurcated sentence, is unduly excessive. ***See Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). Accordingly, Mr. Sulla respectfully requests a sentence

modification granting him a reduced overall imprisonment sentence.

A. The Trial Court Erred In Failing to Grant Mr. Sulla Eligibility For the Substance Abuse Program

Mr. Sulla also asserts that the trial court erred in denying him eligibility for the Wisconsin Substance Abuse Program (formerly the Earned Release Program) based on the mitigating factors presented at the sentencing and to correct the court's erroneous exercise of sentencing discretion.

Mr. Sulla submits that the sentencing court should have found him eligible for the Substance Abuse Program because the circuit court erroneously exercised its discretion. In ***State v. Steele***, 2001 WI App 160, ¶8-9, 246 Wis. 2d 744, 749-50, 632 N.W.2d 112, 115, the Court of Appeals stated:

> The language of Wis. Stat. §§ 302.045(2) and 973.01(3m) is plain. The sentencing judge must first determine whether the offender meets the preliminary criteria of § 302.045(2) regarding voluntariness, age, nature of offense, substance abuse issues, and absence of psychological, physical or medical limitations. Then the court must determine, exercising its own sentencing discretion, whether an offender who already meets the § 302.045 specified criteria is eligible for boot camp. Sec. 973.01(3m). Even if the offender meets all of the department's eligibility requirements under § 302.045(2), the trial

> court has the discretion under § 973.01(3m) to declare an offender ineligible for boot camp.
>
> The phrase "exercise of sentencing discretion" is well understood under Wisconsin law and needs no explanation. The sentencing court is required to exercise its discretion to create a sentence within the range provided by the legislature which reflects the circumstances of the situation and the particular characteristics of the offender. ***State v. Borrell***, 167 Wis. 2d 749, 765, 482 N.W.2d 883 (1992).

Id. A proper exercise of discretion requires that a circuit court logically interpret the facts, apply the proper legal standard, and use a rational process to reach a conclusion that a rational judge could reach. ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999).

In the present case, at the sentencing hearing, the transcript reveals the following:

> THE COURT: Because of the chronocity . . . . I'm going to find you ineligible for Chips re - - CIP Release and for Earned Credit Release.

(R. 66: 54-55). Mr. Sulla respectfully asserts that the circuit court's non-eligibility determination for the Substance Abuse Program was not a proper exercise of discretion.

Conclusion

For all the reasons stated above, the defendant-appellant, Richard J. Sulla, respectfully requests that this

Court vacate the current judgment of conviction and sentence, that it allow Sulla to withdraw his no contest pleas, or in the alternative, that it order a remand to the circuit court for sentence modification, or for such further relief as this Court deems just and appropriate.

Signed at Milwaukee, Wisconsin, this 21st day of July 2014.

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,408 words.

Dated this 21st day of July, 2014.

_____

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CERTIFICATION OF ELECTRONIC COPY OF BRIEF

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated at Milwaukee, Wisconsin, this 21st day of July, 2014.

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