STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP2316-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. SULLA,

Defendant-Appellant.

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

PLAINTIFF-RESPONDENT'S BRIEF

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C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent the State of Wisconsin (the "State") agrees with defendant-appellant Richard J. Sulla ("Sulla") and does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

Sulla was charged with burglary while armed, repeater; conspiracy to commit arson of a building, repeater; burglary of a building or dwelling, repeater; and operating a motor vehicle without the owner's consent, party to a crime, repeater (1:1-7, Appellant's Appendix ("A-Ap.") at 105-111; 2). He pled no-contest to burglary while armed and burglary of a building or dwelling, signing the plea questionnaire/waiver of rights form that included the understandings that "although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased" and that Sulla "may be required to pay restitution on any read-in charges" (23; A-Ap. at 112-113).

The criminal case settlement, signed by Sulla and his attorney, indicated that Sulla was pleading no contest to Count 1, burglary with a dangerous weapon as a repeater, and Count 3, burglary of a building or dwelling as a repeater, and that Count 2, conspiracy to commit arson of a building as a repeater and Count 4, operating a motor vehicle without consent as a repeater, were dismissed and read-in, and imposed restitution in the amount of $462,070 (24; A-Ap. at 114).

At the plea hearing, Judge Jacqueline R. Erwin conducted the following colloquy with Sulla:

> THE COURT: Mr. Sulla, I understand that of the four counts made against you, you intend to withdraw your not guilty pleas and instead plead no contest to crimes in Counts 1 and 3 called armed burglary and burglary both as habitual criminals. Is that right?
>
> (Mr. Sulla speaking with Mr. De La Rosa off the record).
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: And then you expect that both sides will ask me to dismiss Counts 2 and 4, conspiracy to commit arson and operating a motor

> vehicle without owner's consent, again both as habitual criminal, but have me consider those offenses when I sentence you, also true?
>
> MR. SULLA: Yes, ma'am.

(65:2-3). The court then recited the State's sentence recommendation for "consecutive prison sentences with some extended supervision" on both counts, no contact with the victims, and restitution on Count 1 (65:3). Judge Erwin then continued the colloquy with Sulla:

> THE COURT: So Mr. Sulla, have I correctly stated the representation that the State's attorney has made to you regarding the State's recommendations?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: Have you had enough time with Mr. De La Rosa?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: He's told you and you've – you understand from him that I don't have to follow that recommendation or your recommendation or anyone's recommendations in these cases, don't you?
>
> MR. SULLA: Yes, ma'am.
>
> THE COURT: In fact, on Count 1, I could order imprisonment up to 21 years and up to $50,000 in fines and on Count 3, I could order imprisonment up to 18 ½ years and up to $25,000 in fines, so regardless of the recommendations, my authority is to – for a total of 39 ½ years imprisonment and $75,000 in fines; do you understand my sentencing authority?
>
> MR. SULLA: Yes, ma'am.

(65:4). Sulla testified that he had signed and understood the plea questionnaire/waiver of rights form (65:4-5). After Sulla pled no contest to Counts 1 and 3, the court found that his pleas were "knowing, voluntary, and

intelligent. They and the dismissed charges are sufficiently supported by fact" and accepted the pleas, finding that Sulla was a habitual criminal (65:10).

Prior to sentencing, the victims of the burglaries and arson submitted letters to the court describing the trauma they suffered as a result of these crimes (28). Further, the district attorney submitted a sentencing memorandum, outlining the aggravating factors in these crimes, Sulla's eighteen prior criminal convictions, all but one occurring in the last two years, with a total of fifteen felonies and ten burglaries, and the resulting need to protect the public from Sulla's criminal activities (29).

At the sentencing hearing, prior to the sentencing colloquy, Judge Erwin disclosed that the name of one of the victims of these crimes, "Joe Dudley," was "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" (66:2).

Before imposing sentence, Judge Erwin discussed Sulla's age at the time of the burglaries – twenty-two and twenty-three years old -- and the fact that he had eighteen criminal convictions before these crimes (66:46). Further, the court described the aggravating factor that he committed these burglaries while on work release: he was "at that place, the jail, where [he] had only to say the word and there were professionals who would have assisted [him] in addressing drug abuse or addiction" (66:46-47). She also addressed the nature of the crime of residential burglary, describing it as "a feeling of personal violence," which included as to Count 1 for armed robbery, the aggravating factor that he stole "a bunch of guns" (66:50). Judge Erwin also specifically addressed the read-in count of arson:

> [Y]ou asked me to dismiss it and consider it as a read-in. So I'm going to. **I'm not going to consider that you are uninvolved with it.** You gave me a victim – You gave me a plea questionnaire that says that you understand that if charges are read in as part

> of the plea agreement they have the following effect; at sentencing, **the judge may consider read in charges when imposing sentence,** but the maximum penalty will not be increased and that you might be required to pay restitution for read in charges and that the State can't prosecute you separately for it in the future.

(66:50-51). The court further stated, regarding the read-in arson charge and Sulla's statement that he was in Michigan at the time of the arson and thus claimed that he was "non-participatory in the torching altogether": "the arson followed the burglary that you were involved with. And so it followed the felony" (66:51).

The court considered the sentencing factor of protection of the public and found that despite

> the guidance provided by the Department, despite your dad's best attempts, despite being in the jail for heaven's sakes, you continued to commit pretty big crimes.
>
> The nature of the crimes also concerns the Court on this issue of community safety. Residential burglaries are those kinds of crimes where people including the burglars are often hurt, talked about the danger of gun thefts and putting guns into the stream of commerce. Not so minor issue of driving the uninsured van. And, of course, arson is a dangerous activity. Unwillingness to conform to the rules of probation, [H]uber release, the prior conviction you have for the escape and bail jump read-ins, all negative on the issue of public protection, Mr. Sulla.

(66:52). The court stated the goals of her sentencing decision as "first and foremost public protection. Second, deterrence. . . . My third goal is to punish you. Other methods were tried. A lot of public effort was ordered. And you were nonetheless chronic in victimizing additional people" (66:52-53). Additionally, the court stated it hoped for rehabilitation and restitution for the victims (66:53).

The court further explained that the impact and perception of the victims justified ordering consecutive sentences:

> Your decisions to watch for the opportunities to find the entries, to choose the items to steal, to cause damage, those created a separate loss, separate fear in the victims that – of your crimes that we are talking about today. So for that factor, the situation that you were in at the time you committed these crimes and the gravity of crimes, I'm going to order consecutive sentences.

(66:53-54). Therefore, the circuit court ordered fifteen years imprisonment on Count One, bifurcated into "7 ½ years initial confinement followed by 7 ½ years extended supervision," and on "Count 3, consecutive 5 years imprisonment made up of 2.5 years of initial confinement, followed by 2.5 years of extended supervision." Further, the circuit court explained that "[b]ecause of the chronicity" of Sulla's criminal record, "I'm going to find you ineligible for . . . Earned Credit Release" (66:54-55).

The judgment of conviction was entered, sentencing Sulla to fifteen years on Count 1, armed burglary, with seven years and six months initial confinement and seven years and six months extended supervision, and five years on Count 3, burglary of a building or dwelling, with two years and six months initial confinement and two years and six months of extended supervision, to be served consecutively to each other and to any other sentence (33; 39; A-Ap. at 115-117).

Sulla filed a postconviction motion pursuant to Wis. Stat. § 809.30, asking the court to vacate the judgment of conviction and allow him to withdraw his no contest pleas and further, alleging that he is entitled to sentence modification or a resentencing hearing because the court erroneously exercised its discretion (52). Sulla argued that his plea was not knowingly made and resulted in a "manifest injustice" because "he was misinformed and did not understand that for purposes of the read-in

arson charge, he would effectively be considered to have committed the offense" (53:6). Sulla alleged the he was denied his right to effective assistance of counsel and requested a *Machner* hearing (53:9). Sulla further argued that the trial judge was biased because of "her familiarity with the victims, Mr. and Mrs. Dudley" (53:10). Finally, Sulla asserts that the sentence was "unduly harsh in light of the facts surrounding the offense" (53:11).

After a hearing and by decision dated September 27, 2013, the circuit court denied Sulla's request for an evidentiary hearing because "the record conclusively demonstrates and shows that his counsel was not deficient and that there was not any prejudice to the defendant" (58:1; A-Ap. at 124). The circuit court noted the fact that Sulla had signed the plea questionnaire and waiver of rights, which included the understanding that the judge may consider read-in charges, as well as the plea hearing transcript that "clearly and conclusively demonstrate[s] that the court's colloquy with the defendant established that he knew that Judge Erwin would 'consider' . . . those offenses [the read-ins]" during sentencing (58:6; A-Ap. at 129). The court denied all other issues raised in Sulla's postconviction motion, "based upon the entire record and file including the arguments and presentation of counsel and the reasoning and rationale set forth by the court and the pronouncements as to findings and conclusions made by the court a the continued post-conviction motion hearing on 9-23-2013" (58:9; A-Ap. at 132).

In a supplemental decision, the circuit court addressed the issue of whether Sulla agreed to restitution, finding that "the record sufficiently refutes the allegations raised by defendant Sulla. Because the record conclusively demonstrates so, Mr. Sulla is not entitled to an evidentiary hearing, nor should he be allowed to withdraw his pleas on this basis" (58:2; A-Ap. 134). Therefore, the "motion for an evidentiary hearing or for plea withdrawal . . . is denied" (59:4; A-Ap. at 136).

Sulla filed a notice of appeal, appealing from the judgment of conviction and the orders denying defendant's postconviction motion (61).

ARGUMENT

I. SULLA IS NOT ENTITLED TO WITHDRAW HIS NO CONTEST PLEAS BECAUSE THEY WERE MADE KNOWINGLY AND NO MANIFEST INJUSTICE OCCURRED.

A. Relevant law and standard of review.

On appeal, Sulla asserts both that plea withdrawal is warranted to correct the manifest injustice of ineffective assistance of counsel, *and* as a matter of due process, because a defect in the plea colloquy rendered the plea involuntary: specifically, that neither his counsel nor the court adequately explained the effect of the dismissed and read-in charge of arson on his sentence. Sulla's brief at 10-20.

A properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *see also State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) (reaffirming *Machner* hearing as condition precedent for reviewing claim of ineffective assistance of trial counsel). However, a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. A circuit court's decision to summarily deny a motion must be measured against the standard set in *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and reaffirmed in *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A hearing is required only if the motion alleges

facts which, if proved true, would entitle the defendant to relief. *See Bentley*, 201 Wis. 2d at 310; *Nelson*, 54 Wis. 2d at 497; *see also Curtis*, 218 Wis. 2d at 555 n.3. If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *Bentley*, 201 Wis. 2d at 309-10 (citing *Nelson*, 54 Wis. 2d at 497-98). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law reviewed by an appellate court *de novo*. *Bentley*, 201 Wis. 2d at 310. If the motion is deficient, the circuit court's decision to deny it without a hearing, for any of the reasons listed above, is reviewed under the deferential erroneous exercise of discretion standard. *Bentley*, 201 Wis. 2d at 310-11.

In order to withdraw a guilty or no contest plea after sentencing, a defendant carries the heavy burden of establishing that the trial court should permit the defendant to withdraw the plea to correct a "'manifest injustice.'" *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). This court and the Wisconsin Supreme Court have identified two "'different route[s] to plea withdrawal.'" *State v. Basley*, 2006 WI App 253, ¶ 4, 298 Wis. 2d 232, 726 N.W.2d 671 (quoting *State v. Howell*, 2006 WI App 182, ¶ 16, 296 Wis. 2d 380, 722 N.W.2d 567); *see also State v. Howell*, 2007 WI 75, ¶ 2, 301 Wis. 2d 350, 734 N.W.2d 48.

Under the *Bangert* line of cases, the defendant may claim that the plea colloquy on its face was deficient. Wisconsin Stat. § 971.08(1)(a) requires the judge taking the plea to "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." A plea that is not knowingly, voluntarily or intelligently entered creates a manifest injustice. *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). If the challenge is to the plea colloquy on its face, the initial burden rests with the

defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08(1)(a), or other mandatory procedures. *Bangert*, 131 Wis. 2d at 274.

> Where the defendant has shown a *prima facie* violation of [Wis. Stat.] sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274.

Under the Fourteenth Amendment's guarantee of due process, a state trial court may accept a plea of guilty or no contest only when it has been made knowingly, voluntarily and intelligently. *Bangert*, 131 Wis. 2d at 257. To ensure that a plea of guilty or no contest satisfies this constitutional standard, a trial court must address the defendant personally at the plea hearing concerning the defendant's understanding of the nature of the charges and the potential punishment, and ascertain "that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). *See Bangert*, 131 Wis. 2d at 266-68. A defendant who establishes the denial of a constitutional right relevant to the plea decision is entitled to plea withdrawal as a matter of right. *See id.* at 283. This determination presents a question of "constitutional fact," subject to independent review. *Id.*

If the defendant's challenge to his plea is not based on inadequacies of the plea colloquy, but, instead, based on "some factor[s] extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion," plea withdrawal follows the *Nelson/Bentley* line of cases. *Howell*, 301 Wis. 2d 350, ¶ 74. A defendant making such a claim must meet a higher standard for pleading than a *Bangert* motion.

> To entitle a defendant to an evidentiary hearing under *Nelson/Bentley*, a defendant must "allege[] facts which, if true, would entitle the defendant to relief . . . . However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Howell, 301 Wis. 2d 350, ¶ 75 (quoted source omitted).

If a defendant claims that the actions of counsel rendered the defendant's plea unknowing and involuntary, the defendant must establish both the inadequate performance of counsel and that counsel's actions prejudiced the decision whether to plead guilty or go to trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of a motion to withdraw a guilty plea, to satisfy the prejudice prong of the *Strickland* test, the defendant must allege facts to show "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley*, 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). However, a defendant must do more than merely allege that he would have pled differently; the motion for plea withdrawal must include objective factual assertions indicating why he would not have pled guilty absent his attorney's deficient performance. This may include indicating special circumstances that might support the conclusion that the defendant placed particular emphasis on the information the attorney failed to impart in deciding whether to plead guilty. *Bentley*, 201 Wis. 2d at 313, 317.

As stated above, a defendant is entitled to withdraw a guilty plea after sentencing only if he or she establishes, by clear and convincing evidence, that a manifest injustice has occurred. *Bentley*, 201 Wis. 2d at 311. Upon making a postconviction motion to withdraw a plea after sentencing, a defendant is entitled to an evidentiary hearing only if the motion alleges facts that, if true, would

entitle the defendant to relief. *Id.* at 309-10; *Nelson*, 54 Wis. 2d at 497-98.

B. Sulla has not shown that the plea colloquy was deficient or any other constitutional violations entitling him to withdraw his no contest plea.

Sulla asserts that he is entitled to withdraw his plea for manifest injustice both because counsel was ineffective and did not advise him of the effect of the "read-in" charge of arson on his sentence, and because the circuit court in its plea colloquy did adequately advise him of the effect of the read-in charge of arson by using "very general terms" and referring to the plea questionnaire (Sulla's brief at 19-20). He argues that his failure to understand the effect of the read-in charges rendered his plea unknowing and involuntary, and therefore constitutionally invalid.

As set forth above, *Bangert* requires the defendant who seeks plea withdrawal to make a prima facie showing that the plea was accepted without conformance to Wis. Stat. § 971.08 or other mandatory procedures. *Bangert*, 131 Wis. 2d at 274. A defendant is entitled to an evidentiary hearing to withdraw a guilty plea upon: (1) a *prima facie* showing of a violation of § 971.08(1) or other court-mandated duties that points to passages or gaps in the plea hearing transcript; and (2) an allegation that the defendant did not know or understand information that should have been provided at the plea hearing. *State v. Brown*, 2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes this *prima facie* showing and allegation, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy. *State v. Hoppe*, 2009 WI 41, ¶ 44, 317 Wis. 2d 161, 765 N.W.2d 794. If the State carries its burden of proof that the guilty plea was

knowing, intelligent, and voluntary, the plea remains valid. *Id*. Otherwise, the defendant may withdraw the guilty plea. *Id*.

In this case, Sulla has not made a *prima facie* showing that the plea colloquy was deficient and therefore, no evidentiary hearing was required on his motion for plea withdrawal on this basis. During the plea colloquy, the circuit court confirmed that Sulla understood that two charges would be dismissed and read-in, and that the charges could be considered by the court in its sentencing decision:

> THE COURT: And then you expect that both sides will ask me to dismiss Counts 2 and 4, conspiracy to commit arson and operating motor vehicle without owner's consent, again both a habitual criminal, **but have me consider those offenses when I sentence you**, also true?
>
> MR. SULLA: Yes, ma'am.

(65:3) (emphasis added). In addition, the circuit court confirmed that Sulla and his attorney signed the plea questionnaire and waiver of rights form, which contains the understanding that "the judge may consider read-in charges when imposing sentence" (23; 65:4-5).

In an attempt to counter this evidence, Sulla submits his own affidavit in support of his postconviction motion that states that his attorney told me that a read-in offense "was just something the Court would 'look at' at sentencing" but that he did not understand "the effect that a read-in offense has" (50:1; A-Ap. 118). However, this affidavit is insufficient to controvert the colloquy where Judge Erwin clearly and succinctly explained that she would "consider those [read-in] offenses" when she sentenced Sulla (65:3). Not only did Judge Erwin personally address Sulla on this issue, Sulla also signed the plea questionnaire/waiver of rights form in this case to confirm his understanding (65:3; 23). The evidence in the record supports the finding that there was no defect in the

plea colloquy. Therefore, the State has presented clear and convincing proof that the plea was knowingly, voluntarily, and intelligently made, and Sulla has offered nothing to controvert the circuit court's finding. Therefore, Sulla is not entitled to post-sentencing plea withdrawal.

C. Sulla did not receive ineffective assistance of counsel because the record conclusively demonstrates that his attorney's performance was not deficient and Sulla was not prejudiced.

Sulla's second argument for why he should be allowed to withdraw his plea is because his attorney had provided ineffective assistance by "fail[ing] to properly advise him regarding the read-in arson offense consequence, or to object and request information regarding the late disclosure of a conflict by the judge indicating potential bias" (Sulla's brief at 23). For the reasons set forth below, Sulla has wholly failed to provide clear and convincing evidence that his counsel performed deficiently and that counsel's errors prejudiced his defense.

On appeal, Sulla argues that his "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's brief at 23). The Wisconsin Supreme Court has consistently held that "the decision of what plea to enter 'is uniquely one that should be the client's, not the lawyer's.'" *State v. Ludwig*, 124 Wis. 2d 600, 610-11, 369 N.W.2d 722 (1985) (quoting *State v. Felton*, 110 Wis. 2d 485, 514, 329 N.W.2d 161 (1983)). In order for the defendant to make a knowing, intelligent and voluntary decision to plead guilty or no contest, counsel

must fully disclose the terms of the final plea agreement to the defendant. *Cf. State v. Woods*, 173 Wis. 2d 129, 140-41, 496 N.W.2d 144 (Ct. App. 1992). However, Sulla presents no credible evidence to support his allegation that his attorney failed to disclose the effect of the read-in offenses on his sentence prior to Sulla's entry of his no contest pleas.

At the plea hearing, Sulla stated that he understood that the read-in offenses, conspiracy to commit arson and operating a motor vehicle without the owners' consent, would be considered in the sentencing decision and he also stated that he had had enough time to discuss the terms of the plea agreement with his attorney, Jeffrey De La Rosa (65:3-4). Sulla responded affirmatively when the court specifically asked whether Sulla understood from Mr. De La Rosa that the court does not "have to follow [the State's] recommendation or your recommendations or anyone's recommendations in these cases" for sentencing and that, in fact, the court had the authority to order a total of thirty-nine and one-half years imprisonment and $75,000 in fines (65:4). Regarding the plea questionnaire, the court noted that it recognized "Mr. De La Rosa's signature on it" and confirmed with Sulla that he had also signed it and that before he signed it, he read it and understood it (65:4-5). The court further informed Sulla of the constitutional rights he was giving up by pleading no contest, and asked him if he understood, and Sulla asked

> MR. SULLA: Can I ask my attorney one quick question, ma'am?
>
> THE COURT: Of course.
>
> (Mr. Sulla speaking with Mr. De La Rosa off the record.)
>
> MR. DE LA ROSA: Thank you, Judge.
>
> THE COURT: Did you have enough time with your attorney, Mr. Sulla?

MR. SULLA: Yes, ma'am.

THE COURT: Did you understand the rights that I recited and explained to you?

MR. SULLA: Yes, ma'am.

THE COURT: You give up those rights?

MR. SULLA: Yes, ma'am.

(65:7).

Clearly, prior to entering his plea, Sulla had sufficient time to consult with his attorney and advised the court that he understood the terms of the plea, including the effect of the read-in charges. The court specifically questioned him on whether he understood that the read-in charges would be considered during sentencing and the extent of her sentencing authority (65:3). Sulla also specifically testified that he understood the terms of the plea and that he had signed the plea questionnaire with his attorney, which included the understanding that the read-in charges would be considered when imposing sentence (23, A-Ap. 112-13; 65:4-5). Sulla's allegation that he "did not understand the consequences of the read-in offense of arson on his sentences for the burglary offenses" (Sulla's brief at 25) is completely belied by the record. Sulla pled no contest knowingly, voluntarily and intelligently and his attorney's performance in connection with his plea was not deficient.

Therefore, Sulla's ineffective assistance claim fails on the deficient performance prong and this court is not obligated to consider the prejudice prong. *See Strickland*, 466 U.S. at 697. Nevertheless, even if this court were to find that trial counsel's performance was deficient, Sulla fails to point to evidence in the record to prove that, "'but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Other than his own affidavit stating that if he "had known that it

was going to be considered as a negative at my sentencing[,] I would not have entered the no-contest plea" (50:1-2; A-Ap. at 118-19; Sulla's brief at 15-16). However, this statement is contradicted by the record at the plea hearing where Sulla testified that he understood that the read-in charge of arson would be considered at sentencing and that he had signed and understood the plea questionnaire containing this information (65:3-5).

Based on Sulla's own testimony and the plea colloquy itself which was not deficient, the circuit court in its decision denying Sulla's postconviction motion for plea withdrawal rejected Sulla's allegations about Attorney De La Rosa, finding that Sulla's allegations do not "rise to the level of a deficiency" because "[e]ven if you consider the affidavit of the defendant, he claims that counsel told him he 'was not admitting guilt and that it [the arson] was just something the court would "look at" at sentencing,'" these "are accurate statements of the law" (58:8). Further, the decision found that Attorney De La Rosa "[had] his client review with him both the Criminal Case Settlement and Plea Questionnaire," which was "clearly proper performance and is the sort of practice designed to formally and technically explain and appraise [Sulla] of the import of how the read-in arson offense fits into the overall sentencing framework" (58:8). Therefore, the circuit court found that "the plea colloquy . . . conclusively demonstrate[s] that counsel performed in a Constitutionally sufficient fashion to ensure the defendant understood what he was doing" (58:8-9).

Sulla's conclusory ineffective assistance claim fails to prove that his counsel performed deficiently, or that he was prejudiced because he would not have entered his no contest plea but for his counsel's deficient performance. Sulla presents no credible evidence to support his contention that he must be allowed to withdraw his plea in order to correct a manifest injustice. Thus, the decision denying Sulla's motion to withdraw his no contest plea must be affirmed.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THERE WAS NO JUDICIAL BIAS REQUIRING DISQUALIFICATION.

Sulla's further argument for why he should be allowed to withdraw his plea and/or be resentenced is based on a statement made at the beginning of the sentencing hearing by Judge Erwin that the name of one of the victims was "a name familiar to me from my youth," and that although she "kn[e]w the name" she did not have "any need to disclose" (66:2). On appeal, Sulla argues this "potential bias" may have required disqualification of Judge Erwin, which "provides another reason supporting a manifest injustice finding sufficient to sustain a plea withdrawal" (Sulla's brief at 22-23). Sulla argues that this comment by the judge "reveals that the Judge had determined subjectively, without any prompting by the prosecution or defense, that an appearance of bias may exist" (Sulla's brief at 27). Thus, Sulla asserts that "the circuit court erred in its determination regarding judicial bias" because this "brief recitation that the judge recognized the names of the victims stated that it had no need to disclose" was not "an adequate determination of whether disqualification was necessary" (Sulla's brief at 29).

Sulla's claim of judicial bias fails for two reasons: first, Sulla forfeited this claim by failing to object to the comments at the sentencing hearing; and second, even if he or his attorney had objected, the claim fails because Sulla cannot demonstrate that Judge Erwin was actually biased.

A. Sulla forfeited his judicial bias claim by not objecting at the sentencing hearing.

Sulla did not object to the circuit court's comment or seek recusal of Judge Erwin at his sentencing hearing.

He consequently forfeited his judicial bias claim based on them. *See, e.g., State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) ("A challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter").

By failing to make a contemporaneous objection to Judge Erwin's impartiality at the sentence hearing after she commented that the victim's name was familiar to her, Sulla deprived the circuit court of the opportunity to address his concerns regarding the comment or to take precautionary measures less drastic than the remedy of plea withdrawal that he now seeks. *See, e.g., State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996) (Policies behind the contemporaneous objection rule include reducing trial-error, promoting finality in litigation, and the development of an accurate factual record). Therefore, Sulla has forfeited this claim and it should be denied.

B. Sulla has not shown objective facts that show actual bias and therefore his attorney was not ineffective for not objecting and his claim for judicial bias fails.

If Sulla's judicial bias claim has not been forfeited, it fails on the merits. There are two types of judicial bias: subjective, based on a "judge's own determination of his or her impartiality," and objective, based on "whether objective facts show actual bias." *State v. O'Neill*, 2003 WI App 73, ¶ 11, 261 Wis. 2d 534, 663 N.W.2d 292. Whether judicial bias exists is a question of law this court independently determines. *Id.* ("Whether a trial judge is impartial, that is, a neutral and detached decision maker, is a question of law, which we review de novo").

Sulla incorrectly analyzes this two-pronged test for judicial bias, asserting that Judge Erwin, by making a

disclosure that the name of one of the victims was familiar to her, "had determined subjectively . . . that an appearance of bias may exist" (Sulla's brief at 27). This is inaccurate, because Judge Erwin did not make a subjective determination of bias; on the contrary, she stated that although she was familiar with the victim's name, she did not have any "need to disclose" (66:2). Clearly, this shows that Judge Erwin had determined that there was **no** subjective bias. Therefore, the only type of bias that could be found in this case is objective bias. *See State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994) (The "inquiry into the subjective test [was] at an end" because a judge "believed himself capable of acting in an impartial manner").

This court has set forth the standard for finding objective bias as follows:

> In applying the objective test, we presume that a judge is free of bias, and to overcome this presumption the defendant must show by a preponderance of the evidence that the judge is in fact biased. . . . It is not sufficient to show that there is an appearance of bias or that the circumstance might lead one to speculate that the judge is biased.

O'Neill, 261 Wis. 2d 534, ¶ 12.

Sulla's claim there was a manifest injustice that warrants plea withdrawal because Judge Erwin was biased fails. First, Sulla has not and cannot show that his defense counsel was ineffective for not raising the judicial bias issue at his sentencing hearing. As previously stated, in order to support a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Bentley*, 201 Wis. 2d at 312. Sulla has not shown that Attorney De La Rosa's performance was deficient because he has not shown, on either an objective or subjective basis, that judicial bias existed.

At the sentencing hearing, Judge Erwin made a subjective finding that there was no judicial bias by stating that there was no need to disclose that she was familiar the name of one of the victims (66:2). On appeal, Sulla has not shown that Judge Erwin was objectively biased. All Sulla points to is the comment by Judge Erwin that she was familiar with the name of one of the victims (66:2) and the affidavit he submitted from his father, Michael Sulla, stating that he was surprised that Judge Erwin spoke with the victim in a casual or friendly manner after the conclusion of the sentencing hearing (51). However, even taken together, Judge Erwin's comment that she was familiar with the victim's name and Sulla's father's speculation about the import of her speaking to the victim do not objectively establish actual bias.

The judge's comment and Michael Sulla's affidavit do not create the appearance of bias, let alone the actual bias Sulla would have to establish to prevail. *See, e.g.*, *McBride*, 187 Wis. 2d at 416 ("As long as no actual bias exists, the appearance of bias" is not enough). Judge Erwin made the comment that she was familiar with the victim's name from her childhood prior to the start of the sentencing hearing (66:2), and according to Michael Sulla's affidavit she addressed the victim, perhaps about a common acquaintance of her husband, after the conclusion of the sentencing hearing (51). However, Sulla points to nothing else that would support his claim that Judge Erwin was biased, other than Judge Erwin's statement and Sulla's father's speculation.

Sulla has failed to demonstrate objective facts showing that Judge Erwin was actually biased. Therefore, Attorney De La Rosa was not deficient for not requesting her recusal or disqualification, and Sulla is not entitled to an evidentiary hearing on this issue. Sulla has failed to allege sufficient facts to support his claim for judicial bias that would justify allowing him to withdraw his no contest pleas in this case.

III. SENTENCE MODIFICATION IS NOT WARRANTED BECAUSE THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION.

A. Relevant law and standard of review.

Sentencing falls within the discretion of the circuit court, and appellate review is limited to a determination of whether the circuit court erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971); *see also State v. Gallion*, 2004 WI 42, ¶ 68, 270 Wis. 2d 535, 678 N.W.2d 197. A circuit court can consider several factors in sentencing a defendant. *See* Wis. Stat. § 973.017; *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

The three primary factors to be considered by the sentencing court, are the gravity of the offense, the defendant's character, and the need to protect the public. *Harris*, 119 Wis. 2d at 623. The weight placed on each factor is also within the circuit court's discretion. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). An appellate court will find an abuse of discretion only where a sentence is 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. *Id*. (citation omitted).

Wisconsin's Earned Release Program, now called Wisconsin's Substance Abuse Program, is administered by the Department of Corrections under Wis. Stat. § 302.05. *State v. Owens*, 2006 WI App 75, ¶ 5, 291 Wis. 2d 229, 713 N.W.2d 187. During the confinement portion of a bifurcated sentence, the successful completion of the program will result in the conversion of the remaining confinement period to extended supervision under Wis. Stat. § 302.05(3)(c)2. The court's decision on eligibility to participate in the program is discretionary:

Under Wis. Stat. § 973.01(3g), "the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program under s. 302.05 (3) during the term of confinement in prison portion of the bifurcated sentence." Therefore, this court reviews that determination for an erroneous exercise of discretion. *See Owens*, 291 Wis. 2d 229, ¶ 7. "There is a strong public policy against interfering with the trial court's sentencing discretion, and we presume the trial court acted reasonably." *Id.*

B. The sentence imposed by the circuit court is not unduly harsh, and the circuit court properly exercised its discretion in sentencing Sulla and finding him ineligible for the Substance Abuse Program.

Sulla argues that his sentence imposed by the court on the two counts – burglary while armed and burglary of a home or dwelling – for twenty years imprisonment, bifurcated into ten years of initial confinement and ten years of extended supervision, was "unduly harsh in light of the facts surrounding the offense" and that "a proper sentence for the offense should be more in accord with as his defense counsel argued, i.e., fifteen years concurrent" (Sulla's brief at 29-30). Sulla cites "mitigating factors" such as that his record is 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," and that he served in the military and has accepted responsibility and expressed remorse (Sulla's brief at 31-32). Thus, Sulla asserts he is entitled to sentence modification. Further, Sulla argues that the sentencing court "should have found him eligible for the Substance Abuse Program because the circuit court erroneously exercised its discretion" (Sulla's brief at 33).

The sentencing court fully explained its reasoning for imposing consecutive sentences and for denying Sulla eligibility for the Substance Abuse Program and the sentence was not unduly harsh. At Sulla's sentencing hearing, the circuit court properly addressed the seriousness of Sulla's burglary offenses, committed while he was on work release, which is an "aggravating" factor because Sulla was in jail where he could have received assistance "in addressing drug abuse or addiction" (66:46-47). The court gave Sulla credit for his service as a marine reservist (66:47), but also noted that his "deceit," including "[i]nventing evidence to throw the police off, falsely blaming others," reflected negatively on his character, as well as his being "wise in the ways of career criminal even as young as you are, Mr. Sulla" (66:47).

The court indicated that Sulla was not only a thief, but he also has "been a liar" and while the court believed that he was remorseful, the court specifically described its reasoning for imposing consecutive sentences for the two burglaries: because of the nature of the crime's effects on the victims, "their lost memories, their lost security, their lost time, their lost money, their lost piece of mind in their own community" (66:48). The court further described the nature of the crime of home burglary: "it's a feeling of personal violence . . . [and] having that place where we should all be able to go and feel as safe as we can anywhere, violated" (66:49-50).

The court also considered the aggravating factor in the armed robbery, which involved Sulla stealing "a bunch of guns" that then "go in to the stream of commerce when they are sold for cash you wanted and can be used to victimize others" (66:50). Further addressing the factor of public protection, the sentencing court noted that the State used the word "chronicity" to describe Sulla's persistent criminal behavior, so that "despite … the guidance provided by the Department, despite your dad's best attempts, despite being in the jail for heaven's sakes, you continued to commit pretty big crimes" (66:51-52). Sulla's chronic criminal activity posed dangers to the

public such as the fact that residential burglaries often involve people getting hurt, the dangerous nature of the gun thefts, of driving an uninsured van, of arson, and of his unwillingness to conform to probation and Huber release, as well as his "prior conviction[s] . . . for escape and bail jump read-ins" (66:52).

In sum, the court described its sentencing goals as

> first and foremost public protection. Second, deterrence. It may be that you have turned that corner and nobody ever has to look at you sideways again to deter you from committing a crime. But a lot of other people in black robes talked to you before this and you need to be deterred yourself specifically and others who are tempted to do the same thing need that deterrence. My third goal is to punish you. Other methods were tried. A lot of public effort was ordered. And you were nonetheless chronic in victimizing additional people.

(66:52-53). In addition, the court indicated it hoped for rehabilitation and also restitution to the victims (66:53).

After fully explaining the reasons for the sentence, the court sentenced Sulla on both counts to a total of twenty years imprisonment, bifurcated into ten years initial confinement and ten years extended supervision, to be served consecutively with any other sentence (66:54). The maximum sentence that the court could have imposed on the two counts was a total of thirty-nine and one-half years of imprisonment (65:4).

On appeal, Sulla does not claim that the court did not properly address the sentencing factors; he simply alleges that the court's sentence was unduly harsh, identifies what he believes are certain mitigating factors, and then concludes that the court erred in denying him a reduced prison term (Sulla's brief at 30-33). At its core, Sulla's claim of error regarding his sentence amounts to mere disagreement with the circuit court's decision to reject his request for a shorter or concurrent sentence. If such disagreement were enough to vacate a court's

sentencing determination, few would stand. Contrary to Sulla's suggestion, the circuit court's sentencing decision was not "unduly harsh" just because it imposed more time than his attorney recommended.

More to the point, Sulla's sentence was not 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." *Ocanas,* 70 Wis. 2d at 185. The State described the gravity and the "chronicity of the criminal conduct" of Sulla and the fact that he committed the burglaries in this case while he was on Huber release from jail (66:14), which the court cited as a primary reason it ordered consecutive sentences: "[T]he situation that you were in at the time you committed these crimes and the gravity of the crimes" (66:54). Sulla's arguments for resentencing demonstrate only his disagreement with the circuit court's decision -- not any error in that decision. As discussed above, the weight placed on any one or more sentencing factors is within the circuit court's discretion. *Ocanas,* 70 Wis. 2d at 185. Sulla's sentence should be affirmed.

Further, Sulla makes no valid argument as to why the court abused its discretion in finding him ineligible for the Substance Abuse Program. The court based its determination on the chronic nature of Sulla's criminal activity: "Because of the chronicity – umm – and the record, I'm going to find you ineligible for . . . Earned Credit Release [now the Wisconsin Substance Abuse Program]" (66:54-55). Sulla has failed to demonstrate how the circuit court's decision was an erroneous exercise of its discretion. Basing its decision to find him ineligible for the Wisconsin Substance Abuse Program, which could decrease his confinement time, on Sulla's chronic criminal behavior emphasized public safety and was a reasonable exercise of the circuit court's discretion. Therefore, the circuit court properly exercised its discretion both in sentencing Sulla and in denying his eligibility for the Wisconsin Substance Abuse Program.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this court affirm the decisions denying Sulla's postconviction motion for plea withdrawal or sentence modification, and affirm the judgment of conviction.

Dated this 21st day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,801 words.

Dated this 21st day of August, 2014.

_____
ANNE C. MURPHY
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

Dated this 21st day of August, 2014.

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