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

REPLY BRIEF OF THE DEFENDANT-APPELLANT, RICHARD J. SULLA

SUBMITTED BY:

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ARGUMENTS

In reply to the points raised in the State's brief, the defendant-appellant, Richard J. Sulla, respectfully reasserts the issues and arguments in his brief-in-chief and the following additional arguments.

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

Sulla first notes to this Court the main issue on appeal, that plea withdrawal should be permitted, was also pled in the alternative, as ineffective assistance of counsel. Therefore, any assertion that a waiver of rights occurred by the plea itself is without merit because the issues are preserved by the ineffective assistance of counsel claim, as described below. See ***State v. Kelty***, 2006 WI 101, ¶ 43, 294 Wis. 2d 62, 716 N.W.2d 886.

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). When, as here, the defendant has already been sentenced, 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).

Sulla should be permitted to withdraw his no contest pleas because a "manifest injustice" occurred and he provided several specific factual and legal bases in affidavits, legal memorandum, and at the postconviction motion hearing supporting the plea withdrawal motion. (R. 49-53, 67-68). To counter Sulla's arguments, the State argues its brief that Sulla failed to establish a sufficient *prima facie* showing and thus, the State claims, he was not entitled to an evidentiary hearing. Sulla strongly disagrees. The State in its brief on this point contends:

> In an attempt to counter this evidence, Sulla submits his own affidavit in support of his postconviction motion that states that that his attorney told [him] that a read-in offense "was just something the Court would 'look at' at the 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 the issue, Sulla also signed the plea questionnaire/waver of rights form in this case to confirm his understanding.

(State's Brief p. 13). Contrary to the State's claims, however, the affidavits by Sulla, his father, Michael Sulla, particularly show otherwise.

Sulla's affidavit states, in part:

> 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). In addition, Sulla's father, Michael Sulla, stated in part in his affidavit:

> 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.
>
> 4. That I recall specifically talking to Attorney De La Rosa by telephone prior to my son accepting a plea agreement and Attorney De La Rosa told me in no way is Richard accepting guilt for the arson offense in this case.

(R. 51: 1-2, ¶¶ 2-4).

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. 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*.).

Furthermore, it is important to note that in one communication from the District Attorney to Sulla's trial attorney 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).

Sulla points out that the State in its brief does not fully address the benefit of the bargain findings of the postconviction court. Sulla asserts that 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 State, just as the postconviction court did, stated that Sulla by signing the plea questionnaire/waiver of rights form demonstrates Sulla's understanding of the entry of his pleas. (State's Brief p. 17). Sulla disagrees. As he noted the plea questionnaire consists of general boiler-plate language with 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. "
>
> * * * *
>
> ¶ 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.

Id. at ¶¶ 30-31 (emphasis added). 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 note of importance to Mr. Sulla's postconviction motion for plea withdrawal, was the judge's disclosure at the sentencing hearing, i.e., over a month 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 ***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.

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 State complains in its brief that Sulla makes a conclusory ineffective assistance claim. (State's Brief pp. 16-17). The State claims that Sulla's statement that he did not understand the consequences of the read-in offense of arson on his sentences for the burglary offenses "is belied by the record." (State Brief, at 16). The State goes on and argues: "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 counsel's errors, he would not have pleaded guilty and would have insisted in going to trial.' " (Id. at 16) (citations omitted).

Sulla diusagrees and notes his thorough pleading in this matter with affidavits. Sulla notes that his postconviction motion brief quoted ***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).

Therefore, Sulla asserts the right of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. See ***Strickland v. Washington***, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). 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 State's Brief asserts:

> 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 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 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.

(State's Brief p. 21). Sulla disagrees.

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). The postconviction court is incorrect.

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. 51: 1-2).

As noted above, the circuit court after its very brief recitation that the judge recognized the names of the victims and the stated that it had no need to disclose. That is not a determination as to *an appearance* of bias. 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 INCLUDING ELIGIBILITY FOR THE SUBSTANCE ABUSE PROGRAM) IS WARRANTED IN THIS CASE BECAUSE THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION.

After review of the State’s arguments in its brief, Sulla states that he disagrees with the State’s contentions

regarding the sentence modification issue, and he reasserts without further argument the facts and arguments in his brief-in-chief on this matter.

CONCLUSION

For all the reasons stated above and in his brief-in-chief, 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 3rd day of October, 2014.

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,989 words.

Dated this 3rd day of October, 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 3rd day of October, 2014.

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