RECEIVED
11-23-2015
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP002316-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

vs.

RICHARD J. SULLA,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REMANDING THE ORDER DENYING A MOTION FOR PLEA WITHDRAWAL ENTERED IN JEFFERESON COUNTY CIRCUIT COURT, THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF OF THE DEFENDANT-APPELLANT, RICHARD J. SULLA

SUBMITTED BY:

Scott A. Szabrowicz
State Bar Number 1029087
Attorney for Defendant-Appellant

P.O. Address:
4227 W. Forest Home Ave.
Milwaukee, WI 53215
Tel: (414)395-6594
Fax: (815)301-3334

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Wisconsin Case Law

Federal Case Law

Wisconsin Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Richard J. Sulla (Sulla) submits that both oral argument and publication are warranted in this case.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case is before the court on the State's petition for review of an unpublished per curium decision of the court of appeals. *State v. Richard J. Sulla*, No. 2013AP2316-CR (Wis. Ct. App. Dist. IV May 21, 2015). The court of appeals decision reversed the circuit court's denial of Sulla's postconviction motion and remanded the cause to the circuit court for an evidentiary hearing on Sulla's motion.

Charges and Plea The initiating charges were filed by the State on July 26, 2011, in a criminal complaint that alleged four criminal counts against Sulla including for four criminal counts: (Count 1) burglary – arming self with a dangerous weapon, (Count 2) conspiracy to commit arson of building or dwelling, (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; Def-App-A-Ap. 101-07).

After stating the general offense information, the complaint describes a burglary and arson at a residence in Town of Oconomowoc later determined to be the home of L.D. and J.D.[1] (*Id*. at 2, Def-App-Ap. 102). The offense was reported, in part, based on witnesses seeing flames in the residence on September 4, 2010. (*Id*). The complaint then details a second burglary investigation located in the Town of Ixonia later determined to be the residence of M.Z. and J.Z on October 1, 2010. (*Id*. at 3-4, Def-App-Ap. 103-04).

The complaint references statements to the police in which Sulla first denied his involvement in the burglary and arson of the D.'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

[1] Defendant-Appellant references names of victims by initials throughout this brief as directed under Rule 809.96, Wis. Stats., for the protection of privacy and dignity interest of crime victims.

fingerprints left, by way of setting fire to the crime scene. (*Id*. at 4-6, def-App-Ap. 104-06).

The case 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, as argued below, Sulla stated 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).

Sentencing 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 [J.D.] 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 sentencing proceeded and the circuit court 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.*).

Postconviction Motion and Appeal 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, Pet-Ap. 138-46, 59: 1-4; Pet-Ap. 150). Sulla appealed from the judgment of conviction and the denial of his postconviction motion. (R. 61: 1-2). Thereafter, on May 21, 2015, the court of appeals reversed the order and remanded the cause for an evidentiary hearing. This case is now before this Supreme Court pursuant to State's petition for review of an unpublished per curium decision of the court of appeals. *State v. Richard J. Sulla*, No. 2013AP2316-CR (Wis. Ct. App. Dist. IV May 21, 2015).

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

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED THE PRICIPLES OF *BENTLEY* IN

DETERMINING THAT SULLA SHOULD BE GRANTED AN EVIDENTIARY HEARING.

A. Standard of Review

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 courts will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. *Id*. Appellate courts review Constitutional issues independently of the circuit court's determinations. *State v. Harvey*, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987).

Further, in the present case, the court of appeals decision cited *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), as controlling the case. In its decision, the court of appeals indicated the analysis it determined to reach the result, stating in part:

> ¶7 . . . . . Under *Bentley*, a defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief. *Id* at 309. The allegations must be more than conclusory. *Id*. at 309 – 10.
>
> ¶8 We regard Sulla's motion as being made under *Bentley*. Because the circuit court denied the motion without an evidentiary hearing, the first question before us is whether the motion

> alleges facts that, if true, would entitle Sulla to relief. This is a question of law that we review without deference to the circuit court. *Id.* at 310. As far as we can tell from the case law, this evaluation is to be made without weighing the allegations for truth or credibility against the rest of the record.

(Slip op, ¶¶ 7-8).

The full standard as explained by the *Bentley* Court, which relied on *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), set forth a two-part mixed standard of appellate review. The *Bentley* Court stated:

> . . . . . If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis.2d at 497, 195 N.W.2d 629. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. See *Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard. *Brookfield v. Milwaukee Metropolitan Sewerage Dist*., 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

Bentley, 201 Wis. 2d at 310-11.

B. The Court of Appeals Properly Determined that Under the First Prong of *Bentley* that Sulla was Entitled to an Evidentiary Hearing.

The court of appeals ordered a remand to the circuit court, not as to whether Sulla would ultimately be entitled to withdraw his no contest pleas, but only that Sulla be granted an evidentiary hearing.

On this issue, the court of appeals first noted that the State "does not appear to dispute that if Sulla failed to properly understand the read-in concept, that would be a fact entitling him to relief, in the sense that it would make the plea not knowing, voluntary, and intelligent." (Slip op., ¶ 11, Pet-Ap. 106). Further the court of appeals stated; "Nor does the State argue that the factual allegation of Sulla's lack of understanding is conclusory." (*Id*.). The court of appeals then stated:

> ¶12 We conclude that Sulla's factual allegation is sufficient. It is not inherently implausible that a defendant would misunderstand the read-in concept. That concept is not intuitively obvious to non-lawyers. The idea of a defendant admitting to the conduct underlying the charges, even while the State dismisses the charges, has a certain inconsistency that creates a potential for confusion. That same potential is also present in the distinction between the idea that read-in does not increase the legally available sentence, but the court is still able to consider the read-in for purposes of lengthening a sentence on the actual conviction for some *other* charge.
>
> ¶13 In that potentially confusing context, Sulla's allegation that his attorney told him "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" is sufficient to allege why Sulla may not have understood the read-in concept. . . . .

(Slip op. ¶¶ 12-13, Pet-Ap. 106-07). Sulla submits that the court of appeals thus properly identified a fundamental issue to this case, that is, the difference of how a lawyer (and the court) and a non-lawyer *view* and *communicate* critical matters such as admitting or denying guilt and the consideration by a court of read-in offense at sentencing.

Sulla points out that he pleaded specific facts in his postconviction motion. The motion, filed on August 2, 2013, sought to withdraw his no-contest pleas, or alternatively, for a sentence modification or a resentencing hearing. 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* [2] hearing to be held. (*Id*.). Sulla's postconviction motion provided detail to his assertions as shown below. In the memorandum accompanying the postconviction motion, Sulla alleged the following:

[2] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct.. App. 1979).

> The case progressed, and 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. Following that hearing, in the evening, Attorney De La Rosa met with Mr. Sulla and set forth a plea agreement. Mr. Sulla submits that, as argued below, his attorney mis-advised him regarding the effect of the arson read-in offense. Similarly, Mr. Sulla's father, Michael Sulla, states that during a telephone conversation with his son's attorney, that the arson read-in offense was discussed (as argued below). (See Michael Sulla affidavit).

(R. 53: 4-5). Later in the memorandum, Sulla argued as follows:

> Sulla submits that 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. Mr. Sulla has consistently maintained that he was in no way involved in the arson of the [D.'s] residence, and feels that it is important that the Court recognize this assertion. He therefore contends that, because he did not know that the court would effectively consider the arson offense as having been committed by him, his pleas were "unknowingly" entered. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." See ***Boykin v. Alabama***, 395 U.S. 238, 242, 89 S.Ct. 1709 (1969). 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).
>
> 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. 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.

(*Id*. at 6-8). At this point in the memorandum, paragraphs two through five of Sulla's affidavit were cited which alleged fact regarding details of his contacts with his trial attorney, perceived problems with getting information regarding his case, Sulla's understanding of the plea agreement and the read-in arson offense, and also regarding issues concerning the circuit court judge's disclosure at the sentencing hearing of familiarity with the D..s' name and the relationship to entering the ultimate no contest pleas. (*Id*. at 7-8). Sulla's affidavit stated 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 [D.'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, Pet-Ap. 132-37).

Following the listed affidavit paragraphs, the postconviction motion memorandum states:

> Also, Sulla indicated that he believed that the State was going to remain silent as to the arson offense and that he would not be admitting guilt to it. Undersigned counsel was told directly by Mr. Sulla of this belief.
>
> 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 little discussion of the matter of such great consequence to Sulla. (Plea Hearing Trans., p. 3).

(*Id*. at 8). Sulla submits that his postconviction motion, in its entirety, did meet the requisite standard as set forth in *Bentley*. *See State v. Bentley*, 201 Wis. 2d at 313-14 ("The nature and specificity of the required supporting facts will necessarily differ from case to case. However, the defendant should provide facts which allow the reviewing

court to meaningfully assess his or her claim.") (citation omitted)).

The State, however, narrowly focuses on just a few short passages taken from one paragraph, paragraph three of Sulla's affidavit which consisted of only three sentences. (State's Brief, pp. 18-20) The State claims that court of appeals "erred as a matter of law in holding that Sulla's affidavit claiming that he believed that a read-in offense would not have a negative effect on sentencing provided sufficient facts for an evidentiary hearing under *Bentle.y*" (*Id*. at 18) . The State then goes on and argues that "[n]o one could sensibly believe – and courts must not allow a doctrine to take root - that a sentencing court's consideration of other bad acts (such as a read-in offense, could operate as anything other than a negative factor." (*Id*. at 19-20).

However, the court of appeals noted the potential for confusion created by the assertion that a read-in may operate as a means for lengthening the sentence for the actual offense conviction even while the read-in offense is dismissed. The opinion states:

> ¶12 We conclude that Sulla's factual allegation is sufficient. It is not inherently implausible that a defendant would misunderstand the read-in concept. That concept is not intuitively obvious to non-lawyers. The idea of a defendant admitting to the conduct underlying the charges, even while the State dismisses the charges, has a certain inconsistency that creates a potential for confusion***. That same potential is also present in the distinction between the idea that read-in does not increase the legally available sentence, but the court is still able to consider the read-in for purposes of lengthening a sentence on the actual conviction for some other charge.***

(Slip op., ¶ 12) (emphasis added).

Further, Sulla asserts that it should be clear that he did not assert the word negative an absolute, i.e., with no qualifier. Sulla also points out that there is no apparent reference made by the circuit court to the term "negative" in its written decision on this issue, at least with any substantive mention. (R. 58: 1-9, Pet-Ap. 138-46). Sulla submits that this evidences that the circuit court itself took the reference as it was, that is, Sulla's own words as a layman (a non-lawyer), and how he interpreted his understanding of the plea agreement. The entire motion, the memorandum, and supporting documents are what should be measured regarding the sufficiency issue.

Further, Sulla also disputes the State's argument that "under *Nelson* and *Bentley* when determining whether an

evidentiary hearing is required, the circuit court must determine not only whether the motion states sufficient non-conclusory facts, but also whether those facts are true." (State's Brief, p. 18). This is not correct. The *Bentley* Court stated the proper standard:

> . . . . . If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis.2d at 497, 195 N.W.2d 629. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. See *Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).

Bentley, 201 Wis. 2d at 310-11. While it is true that the circuit court found that Sulla's motion pleadings were insufficient even if accepted as true for an evidentiary hearing, the court of appeals found otherwise. The Court of Appeals stated:

> ¶12 We conclude that Sulla's factual allegation is sufficient. It is not inherently implausible that a defendant would misunderstand the read-in concept. That concept is not intuitively obvious to non-lawyers. The idea of a defendant admitting to the conduct underlying the charges, even while the State dismisses the charges, has a certain inconsistency that creates a potential for confusion. That same potential is also present in the distinction between the idea that read-in does not increase the legally available sentence, but the court is still able to consider the read-in for purposes of lengthening a sentence on the actual conviction for some *other* charge.

(Slip op. ¶ 12).

This Court should sustain the court of appeals' decision which granted Sulla an evidentiary hearing on his motion to withdraw his no-contest pleas.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN DENYING SULLA AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW HIS NO CONTEST PLEAS.

On this issue, whether the circuit court erroneously exercised its discretion in denying Sulla an evidentiary hearing, the proper standard of review was addressed in *Bentley* as the second of the two-part mixed standard of appellate review. *Bentley*, 201 Wis. 2d 310-11. The *Bentley* Court stated:

> . . . . . If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis.2d at 497, 195 N.W.2d 629. . . . .
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard. *Brookfield v. Milwaukee Metropolitan Sewerage Dist*., 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

Id.

Further, in this case, regarding whether a record conclusively demonstrates that a defendant is entitled to relief, the court of appeals stated:

> ¶16 However, a court can also properly deny a postconviction motion if the "'record conclusively demonstrates'" that the defendant is not entitled to relief. *Bentley*, 201 Wis. 2d at 309-10 (quoted source omitted). That was the path mainly taken by the circuit court in this case. Case law provides that this is a discretionary decision for the circuit court. ***Id.*** at 310-11. We are not aware of any well-developed formulation in case law that describes the circumstances under which a court may conclude that the "record conclusively demonstrates" that a defendant is not entitled to relief. Therefore, we next discuss what we understand to be the scope of a court's ability to reject a postconviction motion's factual allegations on that basis.

(Slip op., ¶ 16).

The court of appeals stated then noted a potential inconsistency in *Bentley*. The court of appeals stated; "That case law requires a hearing to be held if the defendant alleges facts that, if true, would entitle the defendant to relief, but it also allows a hearing to be denied if the record conclusively demonstrates that the defendant is not entitled to relief." (*Id*. at ¶ 17). The court of appeals reconciled the inconsistency, stating the following:

> ¶18 To reconcile these concepts, we understand a record to "conclusively demonstrate" the falsity of a defendant's factual allegations when, even after hearing the expected testimony in support of the postconviction motion at an evidentiary hearing, no reasonable fact-finder could find in the defendant's

> favor, in light of the rest of the record. This standard reconciles the two concepts in a way that provides for hearings in those cases where arguable factual disputes exist, but makes hearings unnecessary when only one outcome is reasonably possible. If the record is not sufficiently conclusive to meet that standard, it means that the allegations are reasonably disputable and a hearing must be held, because normally a court cannot make findings on reasonably disputable facts by using solely a paper record.

(*Id*. at ¶ 18).

The court of appeals then applied the standard:

> ¶21 Applying these concepts to the present case, we are unable to agree with the circuit court's conclusion that the record conclusively demonstrates that Sulla properly understood the read-in concept. While the circuit court accurately described several aspects about the existing record that cast doubt on the accuracy of Sulla's allegation, none of them rise to the level of making it impossible for reasonable fact-finder to believe that Sulla failed to properly understand the read-in concept, if Sulla's attorney gave him the explanation Sulla alleges.
>
> ¶ 22 ***Although we will not attempt to discuss all aspects of the record here***, we note certain passages in the circuit court's analysis that show it exceeded the scope of what a court can properly consider when deciding whether the record conclusively demonstrates the falsity of the defendant's allegations. For example, in one passage the court speculated that Sulla "would presumably testify" in a particular way, and "at that point his credibility is impeached not only by double digit prior criminal convictions without even considering his demeanor or what would be revealed through cross examination.. What would be gained by an evidentiary hearing? The court made a credibility determination by weighing Sulla's allegation against portions of the existing record like the plea colloquy and plea questionnaire. These types of credibility judgments and speculation about expected testimony cannot substitute for an evidentiary hearing.

(Slip op. ¶ 21-22).

In its decision, the Court of Appeals indicated the analysis it determined to reach the result, stating in part:

> ¶ 23 To obtain an evidentiary hearing, a defendant seeking to withdraw a plea must also allege that she or he would have pled differently if she or he had properly understood the information she or he claims not to have understood. *Bentley*, 201 Wis. 2d 313. As we described earlier, Sulla alleged about the read-in that "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."
>
> ¶24 We follow the same path of analysis as we did above. Sulla's allegation that he would not have accepted the plea alleges a fact that, if true, entitles him to relief. Sulla's allegation is not conclusory because it identifies a specific concern that would have affected his plea decision, namely, the potential use of arson read-in at sentencing.
>
> ¶25 The circuit court concluded that Sulla's allegation was insufficient. It did so in part on the ground that Sulla did not say that he would have gone to trial. While it is true that Sulla's allegation did not use the word "trial," we are not aware of any law requiring use of any specific words in this context. By saying that he would not have accepted the plea offer, Sulla was necessarily saying that he would either gone to trial or negotiated for a different offer. It is not necessary for a defendant to allege with precision which of those would have happened after the defendant rejected the offer containing the read-in. Nor is it really even possible to make that allegation, given that the outcome of further plea negotiations would have depended on decisions made by the prosecution.

(Slip op, ¶¶ 23-25).

The court of appeals applied the standard:

> ¶21 Applying these concepts to the present case, we are unable to agree with the circuit court's conclusion that the record conclusively demonstrates that Sulla properly understood the read-in concept. While the circuit court accurately described several aspects about the existing record that cast doubt on

> the accuracy of Sulla's allegation, none of them rise to the level of making it impossible for reasonable fact-finder to believe that Sulla failed to properly understand the read-in concept, if Sulla's attorney gave him the explanation Sulla alleges.
>
> ¶ 22 ***Although we will not attempt to discuss all aspects of the record here***, we note certain passages in the circuit court's analysis that show it exceeded the scope of what a court can properly consider when deciding whether the record conclusively demonstrates the falsity of the defendant's allegations. For example, in one passage the court speculated that Sulla "would presumably testify" in a particular way, and "at that point his credibility is impeached not only by double digit prior criminal convictions without even considering his demeanor or what would be revealed through cross examination.. What would be gained by an evidentiary hearing? The court made a credibility determination by weighing Sulla's allegation against portions of the existing record like the plea colloquy and plea questionnaire. These types of credibility judgments and speculation about expected testimony cannot substitute for an evidentiary hearing.

(Slip op. ¶ 21-22).

Sulla submits that his failure 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 D'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, Pet-132-33). 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, Pet-Ap. 135). Sulla states he pleaded specific supporting facts

to his motion to withdraw his no contest pleas in his motion. (R. 49-53).

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, Pet-Ap. 139-40). Sulla notes, however, 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).

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 motion brief and at the postconviction motion hearing, Sulla did not believe that the State was going to argue for an increased sentence 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 demonstrated Sulla's understanding of the entry of his pleas. (R. 58: 4-6, Pet-Ap. 141-43). The State argues its brief in this Court too that the Criminal Case Settlement and the Guilty Plea Questionnaire together with the plea

colloquy was properly used to support that the Sulla "knew that the sentencing court could consider his conduct in the arson offense in deciding the appropriate sentences for counts one and three [the burglary offenses]." (State's Brief, p. 22). The State further claims that the "double digit prior criminal convictions" undermined Sulla's assertion that "he did not understand the effect of the read-in offense on his sentence[.]" (*Id*. at pp. 22-23). Sulla notes however, that almost all of the criminal convictions occurred within a two year time period of each other and none of them approached such an egregious act as the arson of someone's home. (R. 29: 3-4, Pet-Ap. 116-17).

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

> ¶ 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 ¶¶ 31-32 (emphasis added).

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, Pet-Ap. 140). 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 release from initial prison confinement time in the year 2035 now. (R. 49: 3).

The court of appeals concluded "we are unable to agree with the circuit court's conclusion that the record conclusively demonstrates that Sulla properly understood the read-in concept." (Slip op., ¶ 21). The court of appeals also stated "Essentially, the court speculated about what decisions Sulla might have made about a plea or a trial without there being any testimony from Sulla[.]" (*Id.*).

Sulla agrees with the court of appeals' analysis that he be permitted an evidentiary hearing. Regarding whether he should be permitted to withdraw the no-contest pleas.

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE AN EVIDENTIARY SHOULD BE ORDERED UNDER CASE LAW PRECEDENT.

Sulla asserts that while *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, and *State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, are thorough and instructive regarding applications of read-in offenses, the cases would not necessitate any change to the court of appeals' opinion here.

First, in *State v. Straszkowski*, unlike the present In addition case, an evidentiary hearing was held postconviction and the trial attorney testified. *Straszkowski*,, 2008 WI 65, 310 Wis. 2d 259, ¶21. That is contrary to the issue in this case at the very least as the current case involves an evidentiary hearing. Although Staszkowski is a very good source for the history of the cases involving read-in offenses.

Further, in *State v. Frey*, the defendant challenged a sentencing, not the plea regarding a read-in offense, unlike in the present case where there is an evidentiary hearing ordered for a plea withdrawal motion. While it is true that Frey discussed plea hearings including read-in offenses Sulla does not believe it would control the issue in this case taken from State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

IV. THE CIRCUIT 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 J.D. 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, Def-App-Ap. 138-45). 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 [D.'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 in his affidavit regarding the D's.

> 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 [D.s]y were beginning to leave the Judge stood up and in a very outward display of familiarity and friendliness said to [J.D.] "Hey [J.D,] 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 [J.D.] 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.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

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.

Sulla disagrees 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 in the alternative, to the extent that counsel 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.

Conclusion

For all the reasons stated above, the Defendant-Appellant, Richard J. Sulla, respectfully requests that this Court affirm the court of appeals' order remanding the case

hearing on Sulla's plea withdrawal motion, that the court reverse the findings regarding judicial bias or for such further relief as this Court deems just and appropriate.

Signed at Milwaukee, Wisconsin, this 23rd day of November, 2015.

_____

Scott A. Szabrowicz
SBN 1029087
Attorney for the Defendant-Appellant

4227 W. Forest Home Avenue
Milwaukee, WI 53215
Tel: (414)395-6594
Fax: (815)301-3334

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 7,396 words.

Dated this 23rd day of November, 2015.

_____

Scott A. Szabrowicz
State Bar No. 1029087

P.O. Address:
4227 W. Forest Home Ave.
Milwaukee, WI 53215
Tel: (414)395-6594

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 23rd day of November, 2015.

_____

Scott A. Szabrowicz
SBN 1029087
Attorney for the Defendant-Appellant