STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2316-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD J. SULLA,

Defendant-Appellant.

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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT.....2

I. THE COURT OF APPEALS ERRED IN HOLDING THAT, AS A MATTER OF LAW, SULLA'S ALLEGATION THAT HE DID NOT UNDERSTAND THAT THE READ-IN OFFENSE WOULD NEGATIVELY AFFECT HIS SENTENCE ENTITLED HIM TO AN EVIDENTIARY HEARING. 2

II. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DISCRETION TO DETERMINE THAT THE RECORD CONCLUSIVELY DEMONSTRATED THAT SULLA UNDERSTOOD THE EFFECT OF A READ-IN OFFENSE AND WAS NOT ENTITLED TO A HEARING.....4

III. SULLA'S CLAIM THAT THE TRIAL JUDGE WAS BIASED IS NOT BEFORE THIS COURT PURSUANT TO THIS COURT'S ORDER GRANTING THE PETITION. 7

CONCLUSION 11

Cases

In re Ambac Assur. Corp.,
2012 WI 22, 339 Wis. 2d 48,
810 N.W.2d 450.....8

Page

Nelson v. State,
54 Wis. 2d 489,
195 N.W.2d 629 (1972) 2, 5

State v. Bentley,
201 Wis. 2d 303,
548 N.W.2d 50 (1996) 2, 4

State v. Frey,
2012 WI 99, 343 Wis. 2d 358,
817 N.W.2d 436 .....4, 6

State v. McBride,
187 Wis. 2d 409,
523 N.W.2d 106 (Ct. App. 1994) 10, 11

State v. O'Neill,
2003 WI App 73, 261 Wis. 2d 534,
663 N.W.2d 292 10

State v. Straszkowski,
2008 WI 65, 310 Wis. 2d 259,
750 N.W.2d 835 .....4, 6

Statutes

Wis. Stat. § 751.06 9

Wis. Stat. § 757.19(2)(g) (2013-14) 9

Wis. Stat. § (Rule) 809.62(3) 7

Wis. Stat. § (Rule) 809.62(3)(d) 8, 9

Wis. Stat. § (Rule) 809.62(3)(e) 9

Page

Wis. Stat. § (Rule) 809.62(3m)(b) 8, 9

Wis. Stat. § (Rule) 809.62(6).....8, 9

Other Authorities

Judicial Council Committee Comments,
July 2008.....8

STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2316-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD J. SULLA,

Defendant-Appellant.

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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

INTRODUCTION

The State asks this court to reverse the court of appeals' decision remanding for an evidentiary hearing on Sulla's motion for plea withdrawal, based on Sulla's assertion that he did not understand that his agreement to have the arson charge dismissed and read in would negatively impact his sentence.

Sulla argues that the court of appeals properly applied *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), to require an evidentiary hearing as a matter of law when a defendant alleges that he or she did not understand the effect of a read-in charge on sentencing. The State maintains that the court of appeals' decision impermissibly creates a per se rule that such an allegation always justifies a hearing. Further, the State asserts that the court of appeals' decision is contrary to both *Bentley* and *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), which allow the circuit court to exercise its discretion to deny a hearing if the record conclusively demonstrates the defendant is not entitled to relief, and also ignores this court's decisions establishing that a defendant's agreement as part of a plea to have an offense read in does not admit guilt to that offense, but it does expose a defendant to a higher sentence.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT, AS A MATTER OF LAW, SULLA'S ALLEGATION THAT HE DID NOT UNDERSTAND THAT THE READ-IN OFFENSE WOULD NEGATIVELY AFFECT HIS SENTENCE ENTITLED HIM TO AN EVIDENTIARY HEARING.

In *Bentley*, this court set forth the standard to determine whether a defendant is entitled to a hearing on a motion for plea withdrawal as a matter of law:

> 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. . . . Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

Bentley, 201 Wis. 2d at 310-11 (citations omitted).

In his brief, Sulla asserts that the court of appeals correctly applied *Bentley* to determine that he was entitled to an evidentiary hearing as a matter of law as a result of his allegation that he did not understand the read-in concept because it is "not intuitively obvious to non-lawyers "and the idea of "admitting to conduct underlying the charges even while the State dismisses the charges . . . creates a potential for confusion," as does the fact that the court can "consider the read-in for purposes of lengthening a sentence on a conviction" (Sulla's brief at 15). This statement by the court of appeals goes to the very heart of its misapplication of this court's holding in *Bentley*. To broaden *Bentley* to require the trial court to grant an evidentiary hearing on a motion for plea withdrawal based on a defendant's misunderstanding about the effect of a read-in charge allows any defendant who agrees to a plea including dismissed and read-in charges to later obtain a hearing on a motion to withdraw the plea because the read-in concept was confusing and not intuitive.

Based on this interpretation of *Bentley*, a circuit court is forced to grant an evidentiary hearing regardless of the fact that, as here, the read-in concept was explained in the plea questionnaire, by counsel and by the court. This is absurd – yet, this is the inevitable result of the court of appeals' decision remanding this case for a hearing based on Sulla's allegations that he was confused about the impact the read-in arson charge would have on his sentence.

Sulla's assertion that he did not understand that the read-in arson charge would negatively affect his sentence does not state facts which, if true, would entitle Sulla to withdraw his plea because it is inherently incredible. Even as a non-lawyer, how could Sulla believe that a read-in charge could have anything but a negative impact on his sentence? Further, his counsel's statement to 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" (Sulla's brief at 11) – is an accurate

statement of the law regarding the effect of a read-in charge on his sentence. *See State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, and *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436 (explaining the plea process and establishing that agreeing to a read-in does not admit guilt, but it does affect sentencing). Sulla's assertion that he did not understand that a read-in charge would negatively affect his sentence because his attorney did not explain it to him is inherently incredible and therefore insufficient to entitle Sulla to a hearing under *Bentley* because the assertion does not present facts that, if true, would entitle Sulla to withdraw his plea.

The court of appeals' decision that Sulla is entitled to a hearing on his plea withdrawal motion as a matter of law based on his inherently incredible allegations that he did not understand that a read-in offense would negatively affect his sentence misapplies *Bentley* and should be reversed.

II. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DISCRETION TO DETERMINE THAT THE RECORD CONCLUSIVELY DEMONSTRATED THAT SULLA UNDERSTOOD THE EFFECT OF A READ-IN OFFENSE AND WAS NOT ENTITLED TO A HEARING.

Under *Bentley*,

> 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.

Bentley, 201 Wis. 2d at 310-11. *Nelson* provides that where "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." *Nelson*, 54 Wis. 2d at 497-98 (citations omitted).

The circuit court denied Sulla's motion for plea withdrawal without a hearing after determining, consistent with *Bentley* and *Nelson*, that Sulla had not alleged sufficient facts and that the record conclusively demonstrated he was not entitled to relief. In exercising its discretion, the circuit court examined the record and found that Sulla had signed the plea questionnaire form, agreeing that read-in offenses would be considered in sentencing (58:5, Pet-Ap. 142). The circuit court determined that the plea colloquy established that Sulla "did understand the court could consider his culpability as to the arson in crafting a sentence" because the court informed him that it would consider those read-in offenses (58:6, Pet-Ap. 143). The circuit court also considered that Sulla's purported lack of understanding about the read-in offense was refuted by his "double-digit prior criminal convictions," which included at least eighteen dismissed and read-in charges (58:7, Pet-Ap. 144; 29:3-4, Pet-Ap. 116-17).

In reversing the circuit court's discretion to deny a hearing, the court of appeals attempted to "reconcile" the concept of requiring a hearing when a defendant alleges facts that would entitle the defendant to relief with the concept of denying a hearing if the record conclusively demonstrates that the defendant is not entitled to relief, holding that a circuit court may only find that the record "'conclusively demonstrate[s]' 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" (Slip op. ¶ 18, Pet-Ap. 108-09). This interpretation fundamentally misapplies *Bentley* by creating a per se rule that an evidentiary hearing is required whenever a

defendant's "expected testimony" "is about something internal to the defendant, like her or his understanding or intent, or is based on events that would not normally be covered by the existing record" (Slip op. ¶¶ 18, 20, Pet-Ap. 108-10). Based on Sulla's "expected testimony" in his affidavit stating his internal misunderstanding about the effect of the read-in charge on the sentence, the court of appeals reversed the circuit court's discretionary denial of a hearing and found that it improperly speculated "about what decisions Sulla might have made about a plea or trial, without there being any testimony from Sulla that addressed those matters regarding his own internal goals and intent" (Slip op. ¶ 26, Pet-Ap. 111-12). The court of appeals essentially precluded the circuit court from exercising its discretion to find that the record as a whole conclusively demonstrated that Sulla's allegations that he misunderstood the read-in concept did not warrant an evidentiary hearing.

In misapplying *Bentley* to overrule the circuit court's discretion, the court of appeals ignored this court's decisions in *Straszkowski*, 310 Wis. 2d 259, ¶ 97, and *Frey*, 343 Wis. 2d 358, ¶ 73, establishing that agreeing to have a charge dismissed and read in is not an admission of guilt and that a read-in charge exposes the defendant to a higher sentence as part of the plea bargain. The court of appeals committed a fundamental error of law by requiring a hearing based on Sulla's allegations that his counsel did not explain that the read-in offense "was going to be considered a negative at [his] sentencing" (Sulla's brief at 11), because under *Straszkowski* and *Frey*, Sulla's counsel's explanation – 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'"(Sulla's brief at 11) – is legally accurate and could not provide a basis to grant Sulla a hearing on his plea withdrawal motion. Sulla's trial counsel properly and accurately advised Sulla about the effect of the arson read-in as part of the plea agreement, thereby eliminating Sulla's justification for plea withdrawal.

Sulla's statement in his affidavit that he did not understand that the read-in charge would "be considered as a negative at [his] sentencing" (Sulla's brief at 11) is refuted by the evidence in the record that the effect of a read-in charge was properly explained to him and by precedent establishing that while agreeing to a read-in charge does not admit guilt, it is a part of the plea bargain process whereby the defendant agrees to have the read-in charges considered at sentencing. Therefore, the circuit court properly exercised its discretion to deny Sulla's motion without a hearing because the record conclusively demonstrated he was not entitled to relief. The court of appeals' decision remanding to the circuit court for a hearing should be reversed.

III. SULLA'S CLAIM THAT THE TRIAL JUDGE WAS BIASED IS NOT BEFORE THIS COURT PURSUANT TO THIS COURT'S ORDER GRANTING THE PETITION.

In 2009, new rules regarding the contents of a petition for review, cross-petitions and responses took effect, including Wis. Stats § (Rule) 809.62(3) providing that a response to a petition **may** contain:

> (d) Any alternative ground supporting the court of appeals result or a result less favorable to the opposing party than that granted by the court of appeals.
>
> (e) Any other issues the court may need to decide if the petition is granted, in which case the statement shall indicate whether the other issues were raised before the court of appeals, the method or manner of raising the issues in the court of appeals, whether the court of appeals decided the issues, and how the court of appeals decided the issues.

The goal of the amendment was to apprise the supreme court of any issues it may have to decide if it grants review: part (d) and (e) "are intended to facilitate the supreme court's

assessment of the issues presented for review, not to change current law regarding the application of waiver principles to a respondent." Judicial Council Committee Comments, July 2008, Wis. Stat. § (Rule) 809.62(3).

In *In re Ambac Assur. Corp.*, 2012 WI 22, 339 Wis. 2d 48, 810 N.W.2d 450, this court looked at the new rule and, in a footnote, indicated that there was "a potential conflict between the language of § 809.62(3)(d) (stating that a response 'may contain . . . [any] alternative ground supporting the court of appeals result . . .') and § 809.62(6) (referring to consideration of 'an issue that was identified *in a petition'* (emphasis added)." *Id.* at ¶ 27 n.14.[1] In her concurring opinion, Justice Abrahamson noted that this conflict between the two rules is also evidenced by new language in § 809.62(6) that "now prohibits 'parties' from raising issues not raised in the petition for review. Yet subsections (3)(d) and (3m)(b) expressly authorize a responding party to raise issues not necessarily identified in the petition for review" *Id*. at ¶ 43.

In his response to the State's petition, Sulla included two additional issues not included in the petition for review that were decided in the State's favor by the court of appeals: judicial bias and erroneous exercise of sentencing discretion. Although Sulla raised these additional issues as he is entitled to do under § 809.62(3), this court ordered that the State "may not raise or argue issues not set forth in the petition for review unless

---

[1] Wis. § (Rule) 809.62(6) provides:

> The supreme court may grant the petition . . . upon such conditions as it considered appropriate . . . If a petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review.

otherwise ordered by the court," citing Wis. Stat. § (Rule) 809.62(6) (Pet-Ap. 101). In her concurrence to the order granting the petition for review, Justice Abrahamson acknowledged that Sulla's response "protects the party's right to assert grounds not addressed by the petitioner" (Pet-Ap. 102). However, the order granting review **explicitly** limits the issues presented for review to those set forth in the petition (Pet-Ap. 101). Despite this court's order conditioning review on this limitation of issues, Sulla argues his claim of judicial bias in his response brief (Sulla's brief at 27-30).

Therefore, this case squarely presents the conflict between Wis. Stat. § (Rule) 809.62(6), allowing this court to grant the petition conditioned on limiting the issues to be considered on review to those presented in the petition, and Wis. Stats. § (Rule) 809.62(3)(d),(e) and (3m)(b), which allow a respondent to include other grounds or issues in a response to a petition without filing a cross-petition. While this court could have granted the petition and ordered the parties to address the additional issues raised by Sulla in his response, this court expressly limited the issues being reviewed in its order to those presented in the State's petition.

If this court decides to exercise its power of discretionary review under Wis. Stat. § 751.06 to address Sulla's judicial bias claim, the State asserts that the court of appeals correctly found that Sulla's claim that the trial judge "failed to make a sufficient subjective consideration of the need for disqualification under Wis. Stat. § 757.19(2)(g) (2013-14). . . fails because Sulla cites no law that requires any specific form or content for such a determination to be adequate" (Slip op. ¶ 27, Pet-Ap. 112). In his brief, Sulla argues that because the trial judge stated that the name of one of the victims was "familiar" to her, this "reveals that the Judge had determined subjectively . . . that an appearance of bias may exist" (Sulla's brief at 28). However, by stating that she had "no need to disclose," the trial judge subjectively determined that she was not biased; therefore, the

only type of bias that could have existed was "objective." *See State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994) ("inquiry into the subjective test [was] at an end" because the judge "believed himself capable of acting in an impartial manner"). In determining objective bias,

> 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.

State v. O'Neill, 2003 WI App 73, ¶ 12, 261 Wis. 2d 534, 663 N.W.2d 292.

Sulla has not shown that the judge was objectively, actually biased. All Sulla points to is the judge's comment that she was familiar with the name of one of the victims, his own affidavit stating as such, and the affidavit of his father stating that he was surprised when she spoke with the victim in a casual or friendly manner after the sentencing hearing (Sulla's brief at 28-29). The judge's comment and Sulla's father's speculative 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). Sulla has failed to allege sufficient facts to support his claim for judicial bias or ineffective assistance of counsel for not objecting to the judge that would justify allowing him to withdraw his plea.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court reverse the Wisconsin Court of Appeals' decision remanding this case for an evidentiary hearing on Sulla's plea withdrawal motion and affirm the decision denying Sulla's claims for judicial bias and erroneous exercise of sentencing discretion.

Dated this 17th day of December, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

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 2,740 words.

Dated this 17th day of December, 2015.

_____

Anne C. Murphy
Assistant Attorney General

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 17th day of December, 2015.

_____

Anne C. Murphy
Assistant Attorney General