WISCONSIN COURT OF APPEALS
DISTRICT 3

State of Wisconsin,
Plaintiff-Respondent,

v. Case No. 17-AP-147

Yatau Her,
Defendant-Appellant.

Defendant-Appellant's Brief

Appeal from the circuit court for Eau Claire County, William M. Gabler, Sr., Judge.

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I. Whether Her was entitled to an evidentiary hearing on his dual-purpose ***Bangert*** & ***Nelson*/*Bentley*** motion to withdraw his no-contest plea.

> The circuit court denied Her's plea-withdrawal motion on the merits in a written decision, without affording Her a hearing.

II. Whether Her had a constitutional right to a grand jury determination of probable cause.

> The circuit court rejected Her's argument on the merits in a written decision.

Statement on Oral Argument and Publication

Oral argument is not requested.

Publication is requested, as the decision may clarify or further develop the law regarding: (a) the accuracy and/or sufficiency of the plea questionnaire form vis-a-via read-in offenses; (b) a circuit court's obligations to explain the consequences of read-in charges during the plea colloquy or (c) the knowledge a defendant must possess about the likely effect of read-in charges.

Statement of Case

Yatau Her faced three criminal charges, as set forth in the Information: Count 1, attempted first-degree intentional homicide, PTAC, repeater, use of dangerous weapon; Count 2, armed robbery with use of force, PTAC, repeater; Count 3, possession of a firearm - adjudged delinquent, repeater. (11:1-2) The Information issued in the usual manner, after a probable cause determination at a preliminary hearing. (42:11)

Her pled no-contest to attempted first-degree intentional homicide without any modifiers/enhancers, and the remaining charges were dismissed and read in. (24:1, 46:2) Although Her filed multiple plea-withdrawal motions in the interim, the case ultimately proceeded to sentencing. (36:2-3; 49:4, 6) The court sentenced Her to 39 years' imprisonment, consisting of 24 years' initial confinement and 15 years' extended supervision.

Her's appointed postconviction counsel concluded there were no issues of arguable merit, and so advised Her. (30) Her then elected to proceed pro se and diligently pursued a direct appeal, which was rejected in a brief per curiam decision. (35:1; *not Index numbered, 4-pg Decision in appeal no. 06-AP-1892).

Her subsequently filed a Wis. Stat. § 974.06 motion with extensive exhibits, raising the two issues now presented on appeal and requesting a hearing. (52:1-2, 6-7) The circuit court reviewed the plea hearing and sentencing transcripts and denied Her's arguments on the merits in a written decision, without holding an evidentiary hearing. (54:1-3)

Statement of Facts

At Her's plea hearing, the prosecutor set forth the terms of the plea agreement. (46:2-3) Regarding read-in offenses, the prosecutor stated only that: "The remaining charge of armed robbery in Count Two and possession of a firearm in Count Three would be dismissed and treated as read-ins." (46:2) Thereafter, nobody mentioned read-ins until after the judge had completed the colloquy, accepted the plea, and found Her guilty. (46:2-24) At that point, the court simply stated: "Count Two and Three are dismissed and read in." (46:24)

Her filed a pro se Wis. Stat. § 974.06 motion with supporting exhibits in the circuit court. (52:1-95) The motion presented two arguments in support of Her's request to withdraw his plea. First, Her asserted his plea was not knowing, voluntary, and intelligent because he was never informed that read-in crimes would likely be considered by the court and increase his sentence on the underlying crime to which he pled. (52:6, 8) Her raised this issue under both the ***Bangert*** and ***Nelson*/*Bentley*** framework, alleging error both in the circuit court's plea colloquy and trial counsel's representation. (52:11) Second, Her argued his plea was invalid because it was obtained contrary to the Fifth Amendment requirement that a grand jury make the probable cause determination. (52:12)

Her's motion alleged the following:

> I assert that I did not know and understand how the read-in charges would affect the sentence, especially that I exposed myself to the likelihood of a higher sentence. Had I known and

> understood this direct consequence I would not have pleaded no contest, but instead would have insisted on proceeding to trial. In addition, I assert that I did not know or understand that the Fifth Amendment to the Constitution of the United States of America guaranteed that I could not be tried or sentenced for an infamous crime unless on a presentment or indictment of a Grand Jury. Armed with this knowledge I certainly would not have pleaded no contest, but instead would have insisted on requesting dismissal of all charges. (52:7)

Her's motion further asserted he had sufficient reason for not raising his two issues previously on direct appeal, since his postconviction attorney had failed to identify and inform him of the issues and file a postconviction motion, instead making a no-merit determination. (52:6) In other words, Her was unable to personally argue in his pro se direct appeal that he was never informed of the read-in consequences or grand jury right, precisely *because* he was never so informed. (52:15) Her requested an evidentiary hearing on his motion. (52:2, 16).

The circuit court denied Her's pro se Wis. Stat. § 974.06 motion without holding a hearing. (54:1-4) It appears from the record that the State had filed no response.

The court rejected Her's arguments regarding read-in offenses without reference to any legal authority. (54:1-3) The court did, however, refer extensively to the plea and sentencing transcripts and base its holding on that review. (54:1-3) The court did not parse its determination between the ***Bangert*** or **Nelson/*Bentley*** analyses, instead providing two reasons for rejecting the read-in-offenses argument.

First, the court held Her understood the significance of the read-in charges because the record conclusively demonstrated Her was aware of the maximum penalty on the charge to which he pled. (54:1-3)

Second, the court held Her failed in his burden to "demonstrate[] that anything about the dismissed and read-in counts in any way affected the length of the sentence." (54:3) Rather, explained the court, it sentenced Her based on the facts of the case and not "upon the number of counts that the District Attorney included in the Information." (54:2)

The circuit court also rejected Her's Fifth Amendment grand-jury argument, observing that Wisconsin statutes permit the commencement of criminal proceedings by either a complaint or indictment by grand jury. (54:3)

Her moved for reconsideration, stressing the court had missed the point on read-in offenses and not addressed the actual argument presented. (56:3-4) Her also noted the court had, in fact, referred at sentencing to the facts underlying the dismissed and read-in charges. (56:4) The court summarily denied the reconsideration motion. (57:1). Her now appeals.

Argument

I. Her was entitled to an evidentiary hearing on his dual-purpose *Bangert* & *Nelson*/*Bentley* motion to withdraw his no-contest plea.[1]

Standard of Review

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482 (quoting ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906). One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily. ***Id.***

A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. ***Id.***, ¶25. Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact that is reviewed independently. ***Id.*** In making this determination, the appellate court accepts the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Id.*** Whether a defendant has pointed to a plea colloquy deficiency that establishes a violation of Wis.

[1] "The ***Bangert*** and ***Nelson/Bentley*** motions … are applicable to different factual circumstances. A defendant invokes ***Bangert*** when the plea colloquy is defective; a defendant invokes ***Nelson/Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***State v. Hoppe***, 2009 WI 41, ¶3 n.4, 317 Wis. 2d 161, 765 N.W.2d 794 (source omitted).

Stat. § 971.08 or other mandatory duty at a plea hearing is a question of law reviewed de novo. ***Id.***, ¶26. Likewise, the necessity of a plea-withdrawal evidentiary hearing is a question of law subject to de novo review. ***State v. Hoppe***, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794.

A. *Bangert* Motion

Due process requires that a defendant's guilty plea must be "affirmatively shown" to be knowing, intelligent, and voluntary. ***Taylor***, 347 Wis. 2d 30, ¶30. "Before the court accepts a plea of guilty or no contest, it must 'address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.'" ***Id.*** (quoting Wis. Stat. § 971.08(1)(a)). Thus, "to ensure that a plea is knowing, intelligent, and voluntary, the court is required, at the plea hearing and on the record," to, inter alia: (a) Ascertain whether any promises or agreements were made in connection with the defendant's anticipated plea; (b) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea; and (c) Notify the defendant of the direct consequences of his plea. ***Id.***, ¶31 (citing ***Brown***, 293 Wis. 2d 594, ¶35).

A defendant who believes the circuit court failed to fulfill a mandatory duty under Wis. Stat. § 971.08 or the caselaw may file a "***Bangert*** motion" to withdraw his plea. ***Taylor***, 347 Wis. 2d 30, ¶32.

> In the … '***Bangert*** motion,' the defendant must (1) make a prima facie showing of a violation of [a] mandated duty, and (2) allege that the defendant did not, in fact, know or understand the information that should have been provided during the plea colloquy. ***Id.*** 'A defendant attempting to make this prima facie showing must point to deficiencies in the plea hearing transcript; conclusory allegations are not sufficient.' Assuming the defendant makes a proper ***Bangert*** motion, the defendant is entitled to an evidentiary hearing ('***Bangert*** hearing'), where the State has the burden to prove by clear and convincing evidence that the defendant's plea, despite the inadequacy of the plea colloquy, was knowing, intelligent, and voluntary.

Id. (underlining added) (internal citations omitted); *see* ***State v. Bangert***, 131 Wis. 2d 246, 274 389 N.W.2d 12 (1986)

In this case, we are concerned, primarily, with the circuit court's mandatory duty to notify the defendant of the direct consequences of his plea.[2] Specifically, the court never told Her the effect the read-in charges would have on the potential term of imprisonment (i.e., confinement and/or extended supervision) for the charge to which Her was pleading. Indeed, the court never mentioned the topic of read-ins during the colloquy. Rather, after completing the colloquy, accepting the plea, and finding Her guilty, the court merely stated: "Count Two and Three are dismissed and read in." (46:24)

As will be established below, the court's failure to properly address the read-ins during the plea colloquy is a ***Bangert***

[2] While the circuit court's duty to notify of direct consequences is most relevant here, the two other mandatory duties set forth above—agreements/promises attendant to the plea & understanding of the potential punishment—are closely related.

violation that requires remand for an evidentiary hearing. However, there is a larger problem here, which should be clarified for the circuit court on remand, and for others throughout the state.

Compounding the knowledge void left by the circuit court's omitting any discussion of read-ins here, the standard plea-questionnaire form presents information about read-ins that is confusing and misleading, if not outright inaccurate. (13) The second page of that form (CR-227 05/04) states the following in the "Understandings" box: (13:2)

> I understand that if any charges are read-in as part of a plea agreement they have the following effects:
>
> - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
> - Restitution – I may be required to pay restitution on any read-in charges.
> - Future prosecution – the State may not prosecute me for any read-in charges.

There are multiple problems with the "Sentencing" portion of the statement. First, the statement is phrased negatively, such that a simple, quick read suggests to the lay defendant that the read-in charges will *not* increase the defendant's penalty. Second, read-ins have the precise opposite effect, being aggravating factors that are likely to increase the actual penalty within the available penalty range. *See* ***State v. Frey***, 2012 WI 99, ¶¶67-68, 70, 73-74, 343 Wis. 2d 358, 817 N.W.2d 436. *That*

information is what the form needs to impart. Third, the form inaccurately states the judge "may" consider the read-ins. The form should instead state the court "will" consider the read-ins, as sentencing courts are required to consider all available information relevant to sentencing. *See* ***Frey***, 343 Wis. 2d 358, ¶¶45-48, 68, 102. Indeed, by the very definition of read-ins, sentencing courts are supposed to consider read-in crimes at sentencing. *See* Wis. Stat. § 973.20(1g)(b). In summary, the form suggests that the court might not even consider the read-in offenses and that, if it does, the defendant's sentence will not be increased. Those are real problems that need to be fixed.

A plea form is merely a starting point to aid courts and defense counsel in their duties to inform a defendant, and should never be relied on as the sole source of information on any topic. ***State v. Hoppe***, 2009 WI 41, ¶¶31-32, 38, 317 Wis. 2d 161, 765 N.W.2d 794. However, as to read-in offenses, the form steers the defendant in the wrong direction from the start. The court of appeals should criticize this sloppy language in a published decision so that the forms committee can be alerted to correct it, and to ensure that judges, prosecutors, and defense counsel are adequately and accurately advising about the effect of read-ins in the numerous affected pleas entered regularly across Wisconsin.

Returning to the ***Bangert*** issue, the form aside, a circuit court needs to advise a defendant of the consequences of read-in offenses during the plea colloquy, to specifically include conveying that the read-in offense(s) are likely to increase the actual term of imprisonment within the available penalty range

on the offense to which he or she is pleading. A plea cannot be knowingly, voluntarily, and intelligently entered where the defendant is not told this direct and substantial consequence of the plea bargain. This is common sense.

This court need not take Her's word for it. Our supreme court recently provided an example of a proper colloquy on read-in offenses. In ***State v. Loomis***, 2016 WI 68, ¶20, 371 Wis. 2d 235, 881 N.W.2d 749, the circuit court advised the defendant it would view the read-in offenses as an "aggravating factor at sentencing." Further, the circuit court explained:

> Mr. Loomis, I just—there is a recent Supreme Court decision in ***State v. Frey***[,343 Wis. 2d 358, ¶37,] that describes what a read-in offense is. And I just want to quote from that decision so that you fully understand it ….
>
> "The defendant exposes himself to the *likelihood* of a higher sentence within the sentencing range and the additional possibility of restitution for the offenses that are 'read in.'"
>
> So you're limited in this agreement to a sentencing range within—up to the maximums for the charges that you're pleading guilty. You're agreeing, as the Supreme Court decision indicates, that the charges can be read in and considered, and that has the effect of *increasing the likelihood, the likelihood of a higher sentence* within the sentencing range. You understand that?

Id., ¶21 (emphasis added). In its analysis, the supreme court observed, "read-in charges are expected to be considered at sentencing 'with the understanding that the read-in charges

could increase the sentence up to the maximum that the defendant could receive for the conviction in exchange for the promise not to prosecute those additional offenses.'" ***Id.***, ¶114 (quoting ***Frey***, 343 Wis. 2d 358, ¶61).

This direct consequence of read-in charges—an *expectation* of increased sentence length—was well-recognized law long before the recent ***Loomis*** decision. *See* ***Frey***, 343 Wis. 2d 358, ¶¶63-74 (discussing and quoting multiple cases recognizing the expectation). As the supreme court summarized in ***Frey***, "both parties give something up by accepting a read-in procedure—the State agrees not to prosecute other crimes and a defendant risks … a higher sentence." ***Id.***, ¶74.[3]

Further, our supreme court long-ago recognized the common-sense proposition that a circuit could should convey the consequences of read-ins to the defendant during the plea colloquy: "The defendant should be advised by the trial court, on the record, of the effect of the read-ins, including that the judge may take these offenses into consideration when sentencing." ***Garski v. State***, 75 Wis. 2d 62, 77, 248 N.W.2d 425 (1977).

This advisement requirement is made obvious by its inclusion on the well-intended, poorly-executed form plea questionnaire already discussed above. The admonition has also

[3] It is also worth noting that, "By their very nature, read-ins stand apart from other charges that may be considered by a sentencing court. The implication is that more weight is placed on the admitted charges than on unproven or acquitted offenses." ***State v. Floyd***, 2000 WI 14, 27, 232 Wis. 2d 767, 606 N.W.2d 155.

been more recently stated, though apparently (mis)guided by the language already set forth on the plea form[4]:

> [C]ounsel and courts should advise defendants that (1) the read-in charge will be considered by the sentencing court, but the maximum penalty will not be increased; (2) the defendant may be required to pay restitution on the read-in charge; and (3) the defendant may not be prosecuted for the read-in charge in the future.

State v. Sulla, 2016 WI 46, ¶¶9, 35, 369 Wis. 2d 225, 880 N.W.2d 659 (citing ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835). There is, however, one important distinction in ***Sulla*** from the language used in the plea form. The supreme court observes the defendant should be told the read-in charge "will" be considered by the sentencing court, rather than "may," as used in the plea form. ***Id.*** Indeed, just prior to this pronouncement, the court reiterated the long-standing view that read-in charges "are expected to be considered in sentencing, with the understanding that read-in charges could increase the sentence up to the maximum …[,]" and that they expose a defendant to "the likelihood of a higher sentence within the sentencing range." ***Id.***, ¶33 & fn.14 (quoted source omitted).[5]

If the legally trained and educated judge, prosecutor, and defense counsel all *expect* that read-in offenses *will* be considered

[4] It appears this may be a case of the "tail wagging the dog." As evidenced by the plea questionnaire form used in the present case, the existing read-in language has been present on the form since at least the May 2004 version. (13:2)

[5] ***Sulla*** did not resolve the sufficiency or propriety of the read-in language on the plea form, because the defendant there did not assert any ***Bangert*** argument. *See* ***State v. Sulla***, 2016 WI 46, ¶25 & fn. 12, 369 Wis. 2d 225, 880 N.W.2d 659.

at sentencing and will *likely increase the penalty* on the crime to which the defendant pleads, how can the rule be anything but that the defendant must know too? Anything less cannot result in a knowing, intelligent, and voluntary plea. Anything less would be deceitful.

Here, the plea hearing transcript reveals the circuit court never mentioned the topic of read-in offenses, much less discuss their effect, during the plea colloquy (46:6-24), and Her's motion alleged he did not know or understand that they would be considered at sentencing with a likelihood of an increased sentence (52:7). Thus, Her is entitled to a ***Bangert*** evidentiary hearing where the State has the burden to prove his plea was knowing, intelligent, and voluntary despite the deficient colloquy. *See* ***Taylor***, 347 Wis. 2d 30, ¶¶31-32 ("[T]he court is required, at the plea hearing and on the record, to … [n]otify the defendant of the direct consequences of his plea[.]").

B. *Nelson/Bentley* Motion

Her's Wis. Stat. § 974.06 motion was a dual-purpose plea-withdrawal motion, like that presented in ***Hoppe***, 317 Wis. 2d 161, ¶¶2-3. Her reincorporates and presents his preceding ***Bangert*** argument as a ***Nelson/Bentley*** claim. This court need only reach this alternative argument if it determines the plea colloquy was not deficient because the circuit court had no duty to apprise Her of the consequences of read-in offenses.

"The ***Bangert*** and ***Nelson/Bentley*** motions … are applicable to different factual circumstances. A defendant

invokes ***Bangert*** when the plea colloquy is defective; a defendant invokes ***Nelson/Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***State v. Hoppe***, 317 Wis. 2d 161, ¶3 n.4 (source omitted). The primary practical difference between the two formulations is that in a ***Bangert*** hearing the burden to prove the plea was knowing, intelligent, and voluntary is shifted to the State, whereas under ***Nelson/Bentley*** the defendant has the burden. *See* ***Brown***, 293 Wis. 2d 594, ¶18; ***Taylor***, 347 Wis. 2d 30, ¶32.

The first part of the ***Nelson/Bentley*** test is that: "If a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." ***Sulla***, 369 Wis. 2d 225, ¶25 (quoted source omitted). The corollary, however, is that:

> 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.

Id., ¶25 (quoted source omitted).

Her's motion specifically alleged he did not know and understand the effect of the read-in offenses, particularly that they exposed him to the likelihood of a higher sentence. (52:7) Her further alleged that, had he been aware of the consequences, he would not have pled no contest and would have insisted on a

trial. (52:7) Her alleged that his trial counsel's explanation of read-ins consisted of nothing more than reading the verbatim text of the plea questionnaire form, which did not provide the knowledge Her lacked. (52:8) Further, trial counsel conveyed his opinion to Her that the sentence would likely not exceed 15-18 years' initial confinement. (52:9) Her reiterated that "no one" apprised him of the likelihood of an increased penalty—the primary sentencing effect of the read-in charges, including the court or trial counsel. (52:9-10)

Her's motion also asserted that the court record affirmatively demonstrated his reluctance to plead to the underlying attempted intentional homicide charge, because he always disputed the "intent" element of the crime. (52:10-11; 46:5)

Her need not demonstrate ineffective assistance counsel under the ***Nelson*/*Bentley*** analysis, although that is one way of showing a manifest injustice permitting plea withdrawal. *See* ***Hoppe***, 317 Wis. 2d 161, ¶¶59-63 & fn. 44. Rather, he simply need show that the plea was not entered knowingly, intelligently, and voluntarily because he did not know the consequences of the read-in offenses. *See* ***id.***, ¶60. Nonetheless, Her's motion did sufficiently allege an ineffective assistance claim, asserting trial counsel performed deficiently by failing to apprise him of the read-in consequences, and asserting prejudice by alleging he would not have pled no-contest had counsel properly advised him.

Consequently, Her is entitled to remand for an evidentiary hearing to have an opportunity to prove he did not know the consequences of the read-in offenses and his plea was therefore not knowing, intelligent, and voluntary. *See* ***Sulla***, 369 Wis. 2d 225, ¶25.

II. Her had a constitutional right to a grand jury determination of probable cause.

Her understands this court does not have the authority to grant relief on this claim and presents the issue to preserve his right to make the argument to a subsequent court.

Her's pro se Wis. Stat. § 974.06 motion argued his plea was invalid because it was obtained contrary to the Fifth Amendment requirement that a grand jury make the probable cause determination. (52:6-7, 12-14) Her asserted the Fifth Amendment grand-jury requirement extended to the states under the Fourteenth Amendment. (52:13) However, the U.S. Supreme Court long ago determined that the states were not subject to the federal grand-jury requirement. *See* ***Hurtado v. California***, 110 U.S. 516 (1884). Her believes the time has come to revisit whether defendants are afforded minimum due process under the preliminary hearing and Information procedure for determining probable cause, particularly given the diminishment of rights afforded at the preliminary hearing.

Conclusion

For the foregoing reasons, Her requests this Court recognize that the plea questionnaire form is defective vis-à-vis read-in offenses, clarify that a circuit court must apprise defendants during the plea colloquy that read-in offenses are expected to be considered at sentencing and likely increase the penalty within the sentencing range, and remand for a ***Bangert*** evidentiary hearing where the State will bear the burden of proof. Alternatively, Her requests remand for a ***Nelson/Bentley*** evidentiary hearing.

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CERTIFICATION

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Dated: _____, ____

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James D. Miller