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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 24AP419

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JONATHON WAYNE ALLEN BEENKEN,

Defendant-Respondent.

APPEAL FROM AN ORDER DENYING MOTION TO
REVOKE DIVERSION AGREEMENT, ENTERED IN THE
MONROE COUNTY CIRCUIT COURT, THE
HONORABLE MARK L. GOODMAN, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

Defendant-Respondent, Jonathon Beenken, was charged with new crimes in Juneau County case 2023CF160 and the State moved to revoke a diversion agreement in Monroe County case 2019CF485. The diversion agreement mandated that the trial court shall revoke the diversion agreement upon a showing of probable cause that new crimes were committed. The State submitted a criminal complaint from Juneau County case 2023CF160 with its motion which alleged that Beenken had battered the victim and left bruising and blood on the victim's body. In the absence of any specific findings of fact, the trial court denied the Motion to Revoke diversion agreement, mainly noting Beenken's substantial progress on the diversion agreement. Did the trial court erroneously find that there was insufficient probable cause to believe Beenken had committed a new crime in violation of the diversion agreement?

The trial court answered "no" and denied the State's Motion to Revoke Diversion Agreement without making any factual findings regarding whether probable cause existed to believe that Beenken had committed a new crime in violation of the diversion agreement.

This Court should answer "yes," and reverse.

The trial court reasoned that it had to balance the allegations of a new criminal act and Beenken's substantial compliance with the remainder of the diversion agreement. The State argued in its Motion to Reconsider that the specific language of the diversion agreement took away the trial court's discretion if the State sets forth sufficient probable cause that a new crime was committed. Did the trial court erroneously exercise its discretion in denying the Motion to Revoke?

The trial court answered "no" and denied the State's Motion to Reconsider without further comment.

This Court should answer "yes," and reverse.

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

Plaintiff-Appellant anticipates the issue raised in this appeal can be fully addressed by the briefs. Accordingly, Plaintiff-Appellant is not requesting oral argument. This appeal is ineligible for publication under Wis. Stat. 809.23(4)(b).

STATEMENT OF THE CASE

Defendant-Respondent, Jonathon Wayne Allen Beenken, was charged in Monroe County 2019CF485 with multiple felony and misdemeanor counts on September 16, 2019. (R. 1.) The parties came to a resolution where Beenken would plea to Count 3 – Substantial Battery, Repeater, Domestic Abuse and the parties would jointly propose a diversion agreement. (R. 38.) The diversion agreement required Beenken to remain on bond and not commit new crimes – amongst several other less relevant conditions – for two years. (R. 43.)

On March 23, 2021, Beenken entered a no contest plea to Count 3 with the remaining counts being dismissed but read-in for sentencing purposes. (R. 38.) The Court accepted the plea, but deferred a finding of guilty and approved the diversion agreement for two years. (R. 43.)

The diversion agreement contained this specific language –

The defendant shall not violate any criminal or criminal traffic laws. In order for the State to show a violation of any criminal or criminal traffic law, the State must show by probable cause, that a violation of that law has been committed. It is sufficient that the State show this by introducing the criminal complaint but is not limited by that method. A hearing will be held in order to determine whether there is probable cause that a violation of paragraph (2) has been committed. If the State presents evidence to the level of probable cause that any violation occurred, the Court shall revoke this agreement & find the defendant guilty.

(R. 43.)

On November 16, 2021, the State filed a Motion to Revoke Diversion Agreement, attaching a criminal complaint alleging new crimes in Juneau County 2021CF272. (R. 48.) The State and Beenken reached an agreement to extend his diversion agreement for six additional months to September 22, 2023. (R. 42.)

On August 31, 2023, the State filed a Motion to Revoke Diversion Agreement, attaching a criminal complaint alleging

new crimes in Juneau County 2023CF160. (R. 55.) A hearing on the motion took place on December 6, 2023. (R. 64.)

The complaint in Juneau County 2023CF160 alleged the following –

PROBABLE CAUSE:

Your complainant makes this complaint upon the investigation and report of Deputy Brandon Carmody, whom your complainant has relied upon in the past and found to be truthful and reliable. On July 23, 2023, at 4:30pm, Deputy Carmody was working patrol in Juneau County, Wisconsin. Deputy Carmody was informed the Sheriff's Office received a department to department message from the Jackson County Sheriff's Office concerning JIM.

The message requested our department contact Black River Falls Police Officer C. Smart, who had spoken to JIM at Black River Falls Memorial Hospital. Deputy Carmody contacted the Jackson County Dispatch Center and was forwarded to Officer Smart.

Officer Smart was dispatched to the hospital where he met with JIM and her daughter, PIK. Officer Smart advised he observed several bruises and marks on JIM that indicated she had been beaten. JIM had a bloody lip, bruises on her hands and red marks around her face and head. JIM allowed Officer Smart to photograph the bruises and he forwarded the photographs to Deputy Carmody.

JIM said she and Jonathon have been dating for between two and three months. JIM said every time she tried to leave the relationship she would "get her ass kicked." She said in the past week and a half, she tried to leave six times and there was domestic violence each time. JIM said she did not report any of those incidents.

JIM said at approximately 11:30 AM on July 23 she tried to leave Jonathon again. Jonathon began to beat her with closed fists and she was forced to cower in the "fetal position" as he hit her. JIM said all of the visible marks were from the incident. The incident took place in Jonathon's trailer located on 23rd Street in Necedah Township. Jonathon told JIM if she called the police they "better be ready for a shootout" because he was not going back to jail. Further investigation showed Jonathon is currently on a deferred prosecution for substantial battery on Monroe County Case 2019CF485.

Deputy Carmody made contact with MLB. MLB said at approximately 11 AM on July 23, JIM came running into the main house with blood coming from her mouth and yelling at Jonathon

to get away from her. JIM tripped coming up the stairs as she attempted to get away from Jonathon. Jonathon followed her and repeatedly told her they needed to talk. JIM left the house and locked herself in her car. MLB saw Jonathon pounding on the car windows telling her they needed to talk. JIM left the driveway at a high rate of speed and Jonathon “chased” her to his truck.

Your complainant has reviewed a copy of a Monroe County Bail Bond in Case No. 19CF485, entitled the State of Wisconsin vs. Jonathon Wayne Allen Beenken, which was purportedly signed by the defendant on December 3, 2019. One of the conditions of said bond is “Defendant shall not commit any crime.” Said bond was in full force and effect on July 23, 2023.

Based on the foregoing, the complainant believes this complaint to be true and correct.

(R. 55:3-5.)

At the hearing, the State initially relied upon the criminal complaint, but defense counsel objected to revocation, submitting a written statement of the alleged victim in 23CF160 “wherein [the victim] basically recants.” (R. 64:4.) The statement read –

I am recanting the probable cause that was written on my behave (sic) because it is wrong and it is not what really happened. First off Deputy Brandon Carmody contacted me at my uncles home where he called me and I told him on the phone I would not talk to him that I did not trust the Sheriff’s department at all. I told him that yes Jon chased me but that he did not have a gun which is true. I did see Officer Smart at the hospital but I did not say that everytime I tried to leave I got my ass kicked. I did not say I tried to leave 6 times. I would love to give an actual statement of what happened that day and the days that led to the incident but this is prof (sic) enough that there is no one in this sherri...that can be trusted. I feel like I can’t talk to anyone here about it because they make up their (sic) own version and mix my words up.

(R. 58:1-2.)

The State disagreed with the weight of this written statement, describing it at best as a “partial recantation.” (R. 64:5.) The State argued that the narrative of the criminal complaint included specific allegations of physical violence against the victim that were not corrected, supplemented, or

otherwise recanted in this new submitted written statement. (R. 64:6.)

Officer Smart advised he observed several bruises and marks on J.I.M. that indicated she had been beaten, she had a bloody lip, bruises on her hands, had red marks around her face and head.

J.I.M. said at approximately 11:30am on July 23rd, she tried to leave Jonathon again. Jonathon began to beat her with closed fists and she was forced to crawl up in a fetal position as he hit her. J.I.M. said all of the visible marks – visible marks were from the incident.

(R. 64:5-6.)

The State argued that the remaining allegations against Beenken in the criminal complaint were still sufficient for probable cause, and therefore the Court should grant the motion to revoke. (R. 64:6.)

The Court noted multiple positive accomplishments of Beenken while on diversion – completing a domestic violence assessment and had engaged in mental health therapy. (R. 64:9.) The Court noted that it had to balance whether Beenken committed a new criminal act with Beenken's substantial compliance with the terms of the diversion agreement. (R. 64:10.) The Court denied the Motion to Revoke –

I think what I have to do, I would have to side with the Defendant on this, then, because of his – because his mostly – mostly positive performance and we do have another charge. It's dressed up with some felony bail jumping and misdemeanor bail jumping. An I think if I have to weigh everything out, I have to come down on his side because he's had a mostly I have to come down on his side because he's had a mostly positive – we have a lot of these motions and I don't see, in a lot of these motions, where he's been able to go beyond what he's done. Like I said, most the people, they stub their toe on the domestic violence assessment and he's done that and so that shows that he's invested a substantial effort into this. So I'm not going to revoke his agreement for those reasons.

(R. 64:10-11.)

The State filed a Motion to Reconsider on December 15, 2023. (R. 59.) The Court denied the motion without comment

on December 21, 2023.¹ The Court signed an order on February 27, 2024, denying the Motion to Revoke and amending Count 3 to Disorderly Conduct, in violation of Monroe County ordinance 20-16, and found Beenken guilty consistent with a successful end to the diversion agreement. (R. 68.) This appeal follows.

¹ Upon filing of this brief, the State will also be submitting a Motion to Supplement Record on Appeal in order to provide a record citation in this location.

STANDARD OF REVIEW

A trial court's discretionary determination will be upheld "as long as the court considered the facts of the record under the proper legal standard and reasoned its way to a rational conclusion." *State v. Terrill*, 2001 WI App 70, ¶ 8, 242 Wis. 2d 415, 625 N.W.2d 353. The trial court's determination of the sufficiency of the complaint for probable cause is a legal determination to be reviewed de novo, however, the trial court's implicit factual findings must be reviewed under the clearly erroneous standard. *State v. Smaxwell*, 2000 WI App 112, ¶ 5, 234 Wis. 2d 230, 612 N.W.2d 756.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT THERE WAS INSUFFICIENT PROBABLE CAUSE TO FIND THAT A NEW CRIME WAS COMMITTED IN VIOLATION OF THE DIVERSION AGREEMENT

In denying the State's Motion to Revoke Diversion agreement, the State acknowledges that there are implicit findings supporting the trial court's decision. (R. 64:8-11.) However, the State believes said implicit findings are clearly erroneous and that there were sufficient facts for a finding of probable cause for the reasons set forth below.

Probable cause to arrest "refers to that quantum of evidence which would lead a reasonable officer to believe that the defendant probably committed a crime." *State v. Truax*, 151 Wis. 2d 354, 359-360, 444 N.W.2d 432 (Ct. App. 1989) (citation omitted). Probable cause to arrest is to be "judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *Id.* at 360 (citing *State v. Wilks*, 117 Wis. 2d 495, 502, 354 N.W.2d 498 (Ct. App. 1984)). "The information need only lead a reasonable officer to believe that guilt is more than a possibility." *Id.* Courts must look to "the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether he or she reasonably believed that the defendant had committed an offense. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App.

1990) (citing *Monroe County v. Kruse*, 76 Wis. 2d 126, 130-31, 250 N.W.2d 375 (1977)).

The State's best argument that probable cause existed came straight from the criminal complaint in Juneau 2023CF160. (R. 55:3-5.) Officers made contact with the victim, JIM, and viewed physical injuries to JIM's lip, hands, face, and head. JIM reported that Beenken beat her with closed fists numerous times on July 23, 2023, and that her injuries were from his actions. (R. 55:3.) An additional witness, MLB, saw JIM with blood coming from her mouth, running into a home, yelling at Beenken to get away from her. (R. 55:3.) These were statements that JIM made directly to a law enforcement officer. (R. 55:3.)

Beenken attempted to cut against the weight of the allegations in the criminal complaint with a supplemental written statement from JIM. (R. 58.) However, that written statement largely did not refute anything in the criminal complaint. The only things that JIM refuted from the criminal complaint were a statement that she allegedly made that she tried to leave 6 times and that she got her ass kicked every time she tried to leave. (R. 58:1.)

Taking the allegations in their entirety, even with some recantation by JIM, there still remains sufficient facts to find that Beenken plausibly committed a crime. JIM was treated for injuries at a hospital, injuries that she stated were caused by Beenken, and a separate witness saw JIM with blood coming from her mouth running away from Beenken on the same date. This Court should find that the trial court's implicit findings were clearly erroneous, and that there was sufficient probable cause that Beenken committed a new crime in violation of the Diversion Agreement.

II. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN DENYING THE MOTION TO REVOKE

Absent an agreement by all parties, a trial court lacks authority to modify a diversion agreement once the Court has already accepted the agreement. *State v. Barney*, 213 Wis. 2d 344, 360-61, 570 N.W.2d 731 (Ct. App. 1997). Once a trial court has approved a plea agreement, the trial court is bound

by the terms of that agreement. *State v. Comstock*, 168 Wis. 2d 915, 950-51, 485 N.W. 2d 354 (1992); *Terrill*, 242 Wis. 2d at 420-21. The only exception to the rule is where a fraud is committed upon the Court. *Terrill*, 242 Wis. 2d at 421-22 (quoting *United States v. Ritsema*, 89 F.3d 392, 399 (7th Cir. 1996)).

While it appears that there is a dearth of authority on diversion agreements, the *Barney* case provides strong persuasive authority that trial courts are beholden to the terms of such agreements after approval. *Barney*, 213 Wis. 2d at 362. In *Barney*, the parties entered into a plea agreement to recommend a diversion agreement that prohibited the defendant from committing further crimes and from violating any term or condition of probation. *Id.* at 349-50. If the State moved to revoke alleging such a violation, the trial court must determine by a preponderance of the evidence whether a violation occurred and whether any “reasonable and appropriate alternatives” to revocation were appropriate. *Id.* at 350.

The State did file a Motion to Revoke citing four violations of the defendant’s probationary conditions. *Id.* at 352. The trial court did eventually revoke the diversion agreement, and found the defendant guilty of a deferred felony count. *Id.* at 353. On appeal, the defendant argued that the trial court did not consider any alternatives to revocation before revoking the diversion agreement. *Id.* at 359-60. The Court of Appeals agreed, holding that a party to a diversion agreement is entitled to rely upon the terms and conditions therein upon approval by the Court. *Id.* at 362.

The present matter is analogous to *Barney*. The trial court exercised its discretion and balanced the commission of a new offense with Beenken’s compliance with the other conditions of the diversion agreement. (R. 64:8-11.) However, the express language of the diversion agreement as approved by the trial court left the trial court with no discretion upon a showing of probable cause that a new crime had been committed –

If the State presents evidence to the level of probable cause that any violation occurred, the Court shall revoke this agreement & find the defendant guilty.

(R. 43:1.)

Just like the trial court in *Barney*, the trial court in Beenken's case is beholden to the terms it ratified. As set forth above, the State believes sufficient probable cause was presented to the trial court that Beenken had committed a new crime and therefore the diversion agreement must be revoked, and Beenken must be found guilty of Count 3.

CONCLUSION

For the above reasons, the State respectfully requests this Court vacate the amended Count 3 ordinance conviction from February 27, 2024, reinstate the original Count 3 Substantial Battery with enhancers, reverse the trial court and find that there was probable cause to believe that Beenken had committed a new crime in violation of the diversion agreement, find Beenken guilty of Count 3 Substantial Battery with enhancers, and remand for sentencing.

Dated this 7th day of June, 2024.



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CERTIFICATION AS TO FORM AND LENGTH

I certify this brief meets the form and length requirements of Rule 809.19(8)(b), (bm), and (c) for a brief with a proportional serif font. The length of this brief is 2,736 words.

Dated this 7th day of June, 2024.



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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of June, 2024.



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