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**COURT OF APPEALS**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP000419–CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JONATHON WAYNE ALLEN BEENKEN,

Defendant-Respondent.

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On Appeal from an Order Denying the State’s Motion  
to Revoke a Diversion Agreement and an Order  
Denying the State’s Motion to Reconsider,  
Entered in the Monroe County Circuit Court, the  
Honorable Mark L. Goodman, Presiding

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BRIEF OF  
DEFENDANT-RESPONDENT

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## CASES CITED

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### **STATUTES CITED**

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## **ISSUE PRESENTED**

Whether the circuit court erroneously exercised its discretion by denying the state's requests to revoke Beenken's diversion agreement?

In response to the state's motion to revoke the diversion agreement, the circuit court held a hearing pursuant to the terms of the agreement, considered the record before it, including the "evidence" presented by the parties, and denied the state's motion. The court later denied the state's motion to reconsider and entered an order amending the diverted count to an ordinance violation pursuant to the terms of the agreement.

This Court should affirm.

## **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Beenken does not request oral argument and publication is not appropriate because this is a one-judge appeal under Wis. Stat. §§ (Rule) 809.23(1)(b)4. and (4)(b).

## **STATEMENT OF THE CASE AND FACTS**

The following summary statement of the case and facts is provided to supplement the state's statement of the case, to clarify the record on appeal, and to focus the court's attention to the issue presented. In general, the state overstates

the circuit court's balancing of Beenken's overall compliance with the diversion agreement with the state's allegation that Beenken committed a new crime in violation of the agreement. (*See* State's Br. at 13). Instead, the court recognized that the issue for the court to decide was whether the state met its burden to establish probable cause that Beenken committed a new crime. (64:8-11; App. 22-25). Pursuant to the terms of the diversion agreement, the court held a hearing to determine whether probable cause existed. (43:1; App. 3). After explicitly "weigh[ing] everything out," including a criminal complaint and the alleged victim's recantation, the court determined that Beenken did not violate any term of the agreement. (64:4, 7-11; 55:3-4 *contra* 58; App. 18, 21-25, 10-11 *contra* 13-14).

On March 23, 2021, the state and Beenken entered into a diversion agreement. (43; App. 3-6). Pursuant to the agreement, Beenken pled guilty to count three and the prosecution on that count was suspended for 24 months. (43:1; App. 3). A condition of the agreement was that Beenken "shall not violate any criminal or criminal traffic laws." (43:1; App. 3). He also agreed to keep his address up to date, file monthly written reports certifying his compliance with the agreement, pay a \$20 per month "Diversion Agreement fee," meet in person with the diversion program coordinator every three months, appear at review hearings in the circuit court regarding his compliance with the agreement, and undergo a domestic violence assessment and follow through with

any treatment recommended treatment. (43:2-3; App. 4-5).

With regard to the condition that Beenken not commit any new crimes, the agreement explained that “[i]n 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.” (43:1; App. 3). The agreement then states that “[i]t is sufficient that the State show this by introducing the criminal complaint but is not limited by that method.” (43:1; App. 3). The agreement further explains that “[a] hearing will be held in order [for the court] to determine whether there is probable cause that a violation of paragraph two (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.” (43:1; App. 3).

On February 28, 2022, the parties stipulated to a six-month extension of the agreement. (52). The stipulation made no substantive changes to the terms or conditions of the original agreement. (52; 43). Thereafter, the court signed an order extending Beenken’s diversion agreement until September 22, 2023. (54; App. 7).

On August 31, 2023, the state moved to revoke the agreement. (55; App. 8-9). The basis for the state’s motion to revoke was the filing of a new criminal case in Juneau County, which alleged that Beenken committed three new offenses: felony bail jumping,

misdemeanor battery, and disorderly conduct. (55:1, 3-4; App. 8, 10-11). The state attached to its motion a copy of the criminal complaint in Juneau County Case No. 2023-CF-160. (55:3-4; App. 10-11). A hearing on the state's motion was held on December 6, 2023. (64; App. 15-27).

At the motion hearing, the state initially relied on its written motion to revoke. (64:3; App. 17). In response, Beenken submitted a statement from the alleged victim in Juneau County Case No. 23-CF-160 "recanting the probable cause that was written on my behalf because it is wrong and it is not what really happened." (58:1; App. 13). Specifically, the alleged victim asserted that Beenken "chased me but that he did not have a gun which is true." (58:1; App. 13). Further, the alleged victim stated that she "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 up to the incident but this is prof (sic) enough that there is no one in this [sheriff's office] that can be trusted. I feel like I can't talk to anyone here about it because they make up their own version and mix my words up." (58:1-2; App. 13-14).

The court marked the statement as Exhibit 2 and noted that, "[i]t's not being received as evidence but the Court did look at it and so I think it's important that it be part of the file." (64:4; App. 18). In response, the state argued that the statement, "[a]t best, it is a partial recantation." (64:5; App. 19). The state then read from portions of the criminal complaint in Juneau

County Case No. 23-CF-160. (64:5-6; App. 19-20). While acknowledging that the alleged victim's statement does "take back certain things," the state asserted that "there is still a sufficient probable cause for the Court to find that Mr. Beenken has violated his diversion agreement." (64:6; App. 20).

Beenken argued that the alleged victim's recantation "cut against the Court's ability to make a probable cause finding sufficient for termination purposes." (64:7; App. 21). Beenken also noted that "no probable cause finding" had been made in Juneau County Case No. 23-CF-160 and asked the court to "deny the State's motion and allow the deferred judgment agreement to expire by its own terms." (64:7; App. 21). In response, the state asked the court to make its own determination of probable cause that Beenken committed a new crime in violation of the diversion agreement. (64:8; App. 22). The state added that this was not "Mr. Beenken's first misstep." (64:8; App. 22).

The court then issued its decision by noting that "this is a pretty close call." (64:8; App. 22). The court recognized that the agreement "forbids" Beenken from committing new crimes and allows the state to submit a criminal complaint "for the Court to find probable cause on that ground. And that's what the State has done." (64:8; App. 22). The court then explained that the *state's* motion nevertheless "paints a fairly positive picture of Mr. Beenken." (64:9; App. 23). The court summarized the state's recounting of Beenken's compliance with the terms and conditions of the



agreement. (64:9; App. 23). The court then turned its focus to “paragraph two” of the agreement, which concerned the condition that Beenken “shall not violate any criminal or criminal traffic laws.” (64:9; App. 23). The court considered that the alleged victim was “apparently recanting,” which Beenken argued “should cause the Court to look very carefully at whether or not the Court should base its decision on the new filing in 23-CF-160.” (64:9-10; App. 23-24).

After noting that the state was “within its discretion to bring this motion,” the court stated that Beenken’s “substantial compliance” made this a “tough decision.” (64:10; App. 24). Ultimately, the court weighed “everything out” and stated that, “I have to come down on [Beenken’s] side.” (64:10-11; App. 24-25). The court then welcomed the state’s expressed interest in filing a written motion to reconsider. (64:11-12; App. 25-26). The state filed a motion to reconsider on December 15, 2023, and the court issued a written order denying the state’s motion to revoke and its motion to reconsider, and according to the terms of the diversion agreement, amended count three to a disorderly conduct ordinance violation. (68; App. 28).

The state appealed. (71; 75).

## STANDARD OF REVIEW

Beenken agrees with the state that a circuit court exercises discretion when determining whether to revoke a diversion agreement. *See State v. Barney*, 213 Wis. 2d 344, 361, 570 N.W.2d 731 (Ct. App. 1997). A circuit court's discretionary determination is reviewed under the clearly erroneous standard of review. *See State v. Daley*, 2006 WI App 81, 292 Wis. 2d 517, 526, 716 N.W.2d 146. While “probable cause” is a legal determination reviewed de novo, an appellate court defers to a circuit court's factual findings, whether implicit or explicit, unless clearly erroneous. *See State v. Moore*, 2023 WI 50, ¶8, 408 Wis. 2d 16, 991 N.W.2d 412.

## ARGUMENT

**The circuit court, pursuant to the terms of the diversion agreement, held a hearing on the state's motion to revoke, considered the relevant record, and properly exercised its discretion to determine that Beenken did not violate any condition of the diversion agreement.**

This is not a complex or difficult case. The ultimate question is whether the circuit court erroneously exercised its discretion by concluding that Beenken did not violate the diversion agreement. The record shows the circuit court acted pursuant to the terms of the agreement, properly considered the evidence presented to the court by the parties,

including a criminal complaint filed in Juneau County Case No. 23-CF-160 and the alleged victim's recantation, and determined the state failed to establish probable cause that Beenken committed a new crime in violation of the agreement.

While the state faults the circuit court for both considering Beenken's overall compliance with the diversion agreement and refusing to accept the criminal complaint as incontrovertible probable cause that Beenken committed a new crime, it is the state that ignores the plain terms of the agreement. The agreement established a procedure for the circuit court to consider evidence to determine whether probable cause exists. Stated differently, the diversion agreement, to which Beenken, the state, and the circuit court are signatories, vested the circuit court with authority to determine whether the state met its burden to establish probable cause that Beenken committed a new crime. The circuit court properly exercised its discretion by considering the evidence presented at the motion hearing and concluding that the state failed to meet its burden to prove Beenken violated any condition of the agreement.

The state is correct that there is a "dearth of authority on diversion agreements" and that "trial courts are beholden to the terms of such agreements after approval. (State's Br. at 13) (citing *State v. Barney*, 213 Wis. 2d at 362). What *Barney* makes clear is that circuit courts and the parties are bound by the terms of a diversion agreement. If an agreement calls for the circuit court to consider "reasonable and

appropriate alternatives” to revocation of the agreement, for example, the court is bound to actually consider any such alternatives, regardless of the seriousness of the underlying charges. *Barney*, 213 Wis. 2d at 361-62. If, an agreement included a provision that “the filing of a criminal complaint alleging that the defendant committed a new crime shall result in the automatic revocation of the agreement,” then all parties and the court would be bound by that clear and unambiguous provision.

However, as much as the state would like this case be like the latter example, Beenken’s situation is actually more like *Barney*. The only substantive difference here is that the circuit court strictly considered and complied with the explicit terms of the agreement, including holding a hearing on the state’s motion to revoke, entertaining “evidence” presented by the parties, and then determining whether the state met its burden to establish probable cause that Beenken committed a new crime. Because the circuit court complied with the explicit terms of the diversion agreement, and exercised its discretion in doing so, this Court should affirm.

While the state understandably focuses on the portion of the agreement that states that “[i]t is sufficient that the State show this by introducing the criminal complaint,” the state ignores the remainder of the agreement to which the circuit court and the parties are bound. With regard to the condition that Beenken not commit any new crimes, paragraph two of the agreement says much more than the state

acknowledges. First, the provision places the burden on the state to establish probable cause that Beenken committed a new crime. (43:1; App. 3). Second, the provision provides that a “hearing will be held in order to determine whether there is probable cause” that Beenken committed a new crime. (43:1; App. 3). Third, the provision explicitly places an evidentiary burden on the state to establish probable cause and vests the circuit court with authority to determine whether probable cause exists and whether Beenken violated the agreement. (43:1; App. 23).

Here, the circuit court complied with the explicit terms of the agreement. First, while the court acknowledged and considered the state’s “evidence,” set forth in a criminal complaint filed in Juneau County Case No. 23-CF-160, the court also rightly considered the “evidence” presented by Beenken. (64:3-8; App. 17-22). While the state disputed the weight to be given to the alleged victim’s recantation, the state never disputed Beenken’s right to present the evidence or the form of the evidence. In reality, both the complaint filed by the state and the statement filed by Beenken are hearsay. While the agreement uses the term “evidence,” the agreement does not clarify whether the rules of evidence were to apply at any revocation hearing. Because the state submitted its own hearsay statement, and because it did not object to Beenken’s rebuttal hearsay evidence, what’s good for the goose is good for the gander, as they say.

Based on this record, the circuit court was not presented with an open and shut case for revocation. Instead, the court was required to consider and weigh the state's hearsay evidence against Beenken's hearsay evidence. And, no matter how much the state discounts the alleged victim's recantation, the statement objectively cuts against a finding of probable cause that Beenken committed a new crime. As set forth above, the alleged victim in Juneau County Case No. 23-CF-160 clearly asserted that: "I am recanting the probable cause that was written on my behalf [in the criminal complaint] because it is wrong and it is not what happened." (58:1; App. 13). The alleged victim goes on to counter specific allegations included in the criminal complaint and concludes by stating, "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 [sheriff's office] that can be trusted. I feel like I can't talk to anyone here about it because they make up their own version and mix my words up." (58:1-2; App. 13-14).

Confronted with this "evidence," the court was correct to call Beenken's case a "pretty close call." (64:8; App. 22). Further, the court was very clear about what it was tasked with deciding: "So, then, that puts the focus on paragraph two of the new charges being filed." (64:9; App. 23). While the court did indisputably go on to discuss the fact that, aside from these new charges, Beenken fully complied with the diversion agreement, that does not mean the court did anything other than determine that the state failed to meet its

burden to establish probable cause that Beenken committed a new crime. As noted above, Beenken was subject to numerous conditions as part of the diversion agreement. Any violation would have been a basis for the circuit court to revoke the agreement and proceed to sentencing. (43:2; App. 4). Further, the state opened the door and invited the court to consider Beenken's overall compliance by arguing itself that the new charges in Juneau County were not his "first misstep." (64:5-8; App. 19-22). The court clearly weighed "everything out," including but not limited to the criminal complaint filed by the state.

What the state cannot do is sign onto a diversion agreement with Beenken and the circuit court and then refuse to be bound by every term and condition of the agreement. The diversion agreement in Beenken's case did not create an automatic revocation process if Beenken picked up new charges. Instead, the agreement included a condition that Beenken not commit any new crimes and created a process to be followed if the state believed Beenken had done so. While the state was free to utilize a criminal complaint to establish probable cause, the agreement indisputably gave Beenken a right to a hearing and enabled him to present his own evidence to rebut the state's motion. Further, the agreement vested the circuit court with authority to determine whether Beenken violated any term of the agreement.

After the court complied with the procedure set forth in the agreement and considered the record before it, the court exercised its discretion and

determined that Beenken did not violate the only condition of the agreement that was at issue. While the state wants to make this case about the court weighing Beenken's overall compliance against his commission of a new crime, the record and the court's statements and decision on December 6, 2023, rebut the state's arguments. Because the circuit court acted in compliance with the diversion agreement and carefully exercised its discretion, this Court should affirm.



## CONCLUSION

For the reasons set forth above, Jonathon Wayne Allen Beenken respectfully asks this Court to affirm the circuit court's order denying the state's motion to revoke and the state's motion to reconsider.

Dated this 15<sup>th</sup> day of August, 2024.

Respectfully submitted,

Electronically signed by

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,863 words.

### **CERTIFICATION AS TO APPENDIX**

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of August, 2024.

*Electronically signed by*

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