STATE OF WISCONSIN
COURT OFPEALS
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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY FOUND THAT THERE WAS INSUFFICIENT PROBABLE CAUSE AND ERRONEOUSLY EXERCISED ITS DISCRETION BY CONSIDERING THE TOTALITY OF PERFORMANCE ON DIVERSION

Due credit to Beenken, his response brief is a well-reasoned argument in support of guessing the trial court's implicit findings during the hearing of December 6, 2023. However, because both parties are left guessing at the factual findings made by the trial court and only have a transcript of the hearing, it becomes incumbent upon this Court to determine what the trial court found and how it came to its conclusions.

The trial court's first words after the parties finished argument were that it is a "pretty close call." (R. 64:8.) Despite Beenken's belief that the statement was related to the evidence (Beenken Br. at 14.), the State contends that it was related to all of the trial court's considerations. (R. 64:8.) After this statement, the trial court went on to discuss the seriousness of the diverted charge, the procedure for revocation if a new crime is charged, the positive and completed conditions by Beenken, and finally, the evidence submitted by the parties. (R. 64:8-9.) The trial court goes so far to note how a victim recanting "is not a shocking development because the court sees that all the time…," which appears to be discounting the weight of the recantation. (R. 64:9-10.) The trial court was never solely focused on whether the evidence was sufficient to revoke. Beenken also argues that "the court was required to consider and weigh the state's hearsay evidence against Beenken's hearsay evidence." (Beenken Br. at 14.) Beenken submits zero authority for such a proposition and such analysis is not contained within the diversion agreement.

At a probable cause hearing, bindover is appropriate despite competing facts when "a believable or plausible account of the defendant's commission" of a crime exists. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). A probable cause hearing "is not a proper forum to choose

between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant." *Id*.

As stated in the State's brief-in-chief, there was no specific recantation of the allegations that Beenken physically assaulted JIM. (State Br. at 8-9.) JIM was treated for her injuries at a hospital, injuries to her lip, hands, face, and head that JIM said were caused by Beenken. (R. 55:3-5.) A separate witness saw JIM with blood coming from her mouth running away from Beenken on the same date. (R. 55:3-5.) There is absolutely a believable and plausible account that Beenken committed a crime, and the trial court should have concluded that there was sufficient probable cause for revocation.

Lastly, Beenken's argument rests on the proposition that the trial court implicitly found that the evidence showed a lack of probable cause, but ignores the express words of the trial court when making its final determination. (Beenken Br. at 14.) The trial court never mentions once that there was insufficient evidence to support probable cause. The express terms of the diversion agreement required the trial court to only determine whether there was sufficient evidence set forth at a hearing to establish probable cause that a new crime was committed. (R. 43:1.) The State submits that a refusal to revoke the diversion agreement despite sufficient evidence of probable cause is an erroneous exercise of discretion.

The trial court's words reveal the actual reason why it denied the Motion to Revoke –

> Go back to what I said earlier, this is a very grave charge. It's a Class I felony but it's got enhancements on it. And I had to think carefully about whether what was said in the Juneau County case should tag Mr. Beenken with the felony – convicted felony record. But it's tough. Certainly Mr. Betthauser is within his discretion to bring this motion and so there is a lot – there is a lot here. The State's right to do this and certainly this man's, I guess, substantial compliance with the terms. So I have to balance those and it's a tough decision.
>
> 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. And I think if I have to weigh everything out, 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.)

Beenken all but concedes that the trial court considered more than just the evidence of a new crime – "[t]he court clearly weighed 'everything out,' including but not limited to the criminal complaint filed by the state." (Beenken Br. at 15.) The express terms of the diversion agreement limit the trial court to only determine whether probable cause exists that a new crime was committed. (R. 43:1.) Any additional evidence including the closeness to the end of the diversion, mention of a related harassment restraining order, or a previous motion to revoke leading to an extension of the diversion, are simply context and not relevant. (R.64:5, 7.) The relevant evidence received by the trial court was in the form of a criminal complaint and a written statement from JIM. (R. 55; R. 58.)

Beenken also argues that "the agreement vested the circuit court with authority to determine whether Beenken had violated nay term of the agreement." (Beenken Br. at 15.) While that statement is true in some respects, the trial court was also bound to revoke the diversion agreement upon allegations of a new criminal act "[i]f the State presents evidence to the level of probable cause that any violation occurred…." (R. 43:1.) The trial court's discretion is limited to determining whether probable cause exists, and if probable cause exists, the trial court must revoke. (R. 43:1.)

The State submits that the trial court's analysis was clear, unequivocal, and exceeded the bounds of the diversion agreement. The trial court was absolutely concerned with Beenken being found guilty of a felony. (R. 64:10.) The trial court stated multiple times how it has to balance Beenken's compliance with the new criminal allegations. (R. 64:10.) That is not the analysis that the trial court adopted in the diversion agreement. (R. 43:1.) The trial court did not conclude that the State did not submit sufficient evidence to meet its burden. The

trial court chose against revocation for irrelevant considerations outside the bounds of the diversion agreement despite a sufficient showing of probable cause that a new crime was committed. This was an erroneous exercise of discretion. Because the trial court erroneously exercised its discretion, this Court should grant the State's relief.

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 30th day of August, 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 1,187 words.

Dated this 30th day of August, 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 30th day of August, 2024.

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