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August 13, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP355-CR State of Wisconsin v. Jeffrey William Stanley
(L.C. # 2016CF1500)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jeffrey William Stanley appeals a judgment of conviction and an order denying his postconviction motion. Stanley contends that he is entitled to plea withdrawal because he did not understand the effects of read-in charges. Alternatively, Stanley argues that he is entitled to resentencing because the circuit court relied on the improper factor of Stanley's choice of

profession as a legal marijuana horticulturist. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

Stanley was charged with aggravated battery, first-degree recklessly endangering safety, strangulation, victim intimidation, criminal damage to property, maintaining a drug trafficking place, and possession of THC. Pursuant to a plea agreement, Stanley pled guilty to aggravated battery and first-degree recklessly endangering safety, and the remaining charges were dismissed and read in for sentencing purposes. The circuit court sentenced Stanley to a total of fifteen years of initial confinement and six years of extended supervision. At sentencing, the court stated that Stanley's decision to be a horticultural consultant in the marijuana industry "seem[ed] like a pretty dangerous occupation to be choosing," given his "extremely addictive personality" and his history of drug and alcohol abuse.

Stanley moved to withdraw his plea on grounds that the circuit court did not sufficiently explain the effects of the read-in charges to him, and that he did not in fact understand the effects of the read-in charges when he entered his plea. *See* ***State v. Frey***, 2012 WI 99, ¶43, 343 Wis. 2d 358, 817 N.W.2d 436 (explaining that read-in charges are acknowledged as true). Alternatively, he moved for resentencing on the ground that the court improperly considered his chosen profession in the legal marijuana industry. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (court erroneously exercises its discretion when it imposes its sentence based on improper factors).

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

At a postconviction motion hearing, Stanley testified that his understanding of the dismissed and read-in charges at the time he entered his plea was that those charges were "literally dismissed," so that they were "just simply gone." Stanley testified that he did not understand that he was admitting the conduct underlying the read-in charges. He stated that his understanding of dismissed and read-in charges was that "the State doesn't have what it takes to prosecute" those charges. Stanley's trial counsel testified that he did not remember having a specific conversation with Stanley about the effect of read-in charges, but that his usual practice was to explain that a dismissed but read-in charge could be considered at sentencing but could not increase the maximum penalty.

At the conclusion of the hearing, the circuit court found that Stanley understood the effect of the read-ins at the time he entered his plea. The court found that Stanley's testimony that he did not understand the effects of the read-ins was self-serving and not credible. The court also explained that its consideration of Stanley's choice of profession in the legal marijuana industry was in the context of considering Stanley's history and character. The court explained that appropriate factors for the court to consider in sentencing include the defendant's criminal record and history of drug use. The court explained further that Stanley's continued use of drugs and alcohol, mental health issues, and treatment needs were relevant to the sentencing objective of rehabilitation. The court determined that it had not considered any improper factors at sentencing. Accordingly, the court denied Stanley's motion for plea withdrawal or resentencing.

A post-sentencing motion for plea withdrawal must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Sulla***, 2016 WI 46, ¶24, 369 Wis. 2d 225, 880 N.W.2d 659. "'One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea.'" ***Id.***

(quoted source omitted). We affirm a circuit court's factual findings unless they are clearly erroneous. ***State v. Finley***, 2016 WI 63, ¶59, 370 Wis. 2d 402, 882 N.W.2d 761. We independently review whether those facts establish that the defendant knowingly, intelligently, and voluntarily entered his or her plea. ***Id.***

We review a circuit court's sentencing for an erroneous exercise of discretion. ***State v. Fuerst***, 181 Wis. 2d 903, 909, 512 N.W.2d 243 (Ct. App. 1994). A circuit court erroneously exercises its discretion if it bases the sentence on an improper consideration. *See* ***id.*** at 909-10. A circuit court has the opportunity to clarify its sentencing comments at a postconviction motion hearing. *See* ***id.*** at 915.

Stanley argues that his plea was not knowing, intelligent, and voluntary because he did not understand the effects of the read-in charges. He contends that the circuit court insufficiently advised him as to the effects of the read-in charges by stating only that the court could "rely on those facts and circumstances when it comes to sentencing on the other two counts." Stanley contends that he did not, in fact, understand that the court could rely on the read-in offenses to impose a longer sentence. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (defendant has initial burden to show defect in plea colloquy and to allege that he or she did not understand the information that should have been provided).

The State responds that the dispositive factual question as to Stanley's motion for plea withdrawal is whether Stanley understood the effects of the read-in charges. It contends that the circuit court made a factual finding that Stanley did, in fact, understand the effects of the read-in charges, and that Stanley has not shown that the court's finding was clearly erroneous. The State points to the plea colloquy and plea questionnaire as supporting the circuit court's finding that

Stanley understood that the court could consider the read-in charges at sentencing. It also points to Stanley's testimony at the postconviction motion hearing that Stanley understood that the court could "consider some of the charges" even though they were dismissed, and his trial counsel's testimony that it was counsel's usual practice to explain the effect of read-ins to clients prior to the plea hearing. Additionally, the State contends that Stanley's contention that he did not understand the effect of read-ins is undermined by his previous cases in which charges were dismissed and read in. *See* ***Sulla***, 369 Wis. 2d 225, ¶48. The State contends that Stanley's assertion that he did not understand that he was admitting guilt to the read-in charges is unavailing because agreeing to read-ins does not admit guilt. *See* ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835 (circuit courts should avoid telling defendants that read-in offenses admit guilt of those offenses because that is not an accurate statement of the law; rather, defendants should be advised that the court may consider read-in charges when imposing sentence without increasing the maximum penalty for the offense of conviction).

In reply, Stanley contends that, whether or not the circuit court complied with plea colloquy requirements, he is entitled to withdraw his plea because he did not, in fact, understand that the circuit court could rely on the read-in charges to impose a longer sentence.[2] *See* ***State v. Hinkle***, 2019 WI 96, ¶10 n.10, 389 Wis. 2d 1, 935 N.W.2d 271 (defining read-in charges as

[2] Stanley does not make entirely clear in his initial brief whether he asserted a claim for plea withdrawal based on a defect in the plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), or facts extrinsic to the plea colloquy under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). To the extent that Stanley initially argued a plea colloquy defect, it appears that Stanley concedes in reply that the plea colloquy was not defective. In any event, as the State asserts, Stanley's plea withdrawal claim is premised on his assertion that he did not understand the effects of the read-in charges. As explained below, we conclude that the circuit court's finding that Stanley did understand the effects of the read-in charges is dispositive of Stanley's claim for plea withdrawal. We reach this conclusion regardless of whether Stanley's claim arose under ***Bangert*** or under ***Bentley***.

"'charges [that] are expected to be considered in sentencing, with the understanding that 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'" (quoted source omitted)). He contends that the State has not established that his prior experience with read-in offenses established that understanding. Stanley argues that there has been no showing that he understood that the read-in charges could increase his sentence up to the maximum.

We conclude that Stanley's claim for plea withdrawal fails because the circuit court found that Stanley did, in fact, understand the effect of the read-in charges, and Stanley has not shown that the court's finding was clearly erroneous. Contrary to Stanley's contention, there is evidence in the record showing that Stanley understood that the court could consider the read-in charges to increase Stanley's sentence. The following record evidence supports the circuit court's finding that Stanley understood the effects of the read-ins: the statement on the plea questionnaire that Stanley signed stating that "the judge may consider read-in charges when imposing sentence"; Stanley's acknowledgment during the plea colloquy that the circuit court could "rely on those facts and circumstances" of the read-in charges "when it comes to sentencing on the other two counts"; Stanley's statement at the postconviction motion hearing that he understood that the court could "consider some of the charges" that were dismissed and read in; and Stanley's trial counsel's testimony at the postconviction motion hearing that counsel's usual practice would have been to explain the effect of the read-ins to Stanley before the plea hearing. Additionally, the court found that Stanley's testimony that he did not understand the effects of the read-ins was not credible. We discern no basis to disturb the circuit court's factual finding based on the record and the court's credibility determination.

In the alternative, Stanley argues that he is entitled to resentencing because the circuit court relied on the improper factor of Stanley's choice of profession in the legal marijuana industry. *See* ***State v. Alexander***, 2015 WI 6, ¶¶17-18, 360 Wis. 2d 292, 858 N.W.2d 662 (circuit court erroneously exercises its sentencing discretion if it relies on improper factor at sentencing). Stanley argues that it was improper for the court to state that it was a "pretty dangerous occupation to be choosing" because Stanley had expressed an intent to be involved in the legal, rather than illegal, marijuana business. Stanley contends that it was improper for the circuit court to state a negative opinion of Stanley's choice of a legal profession.

The State responds that it was not improper for the sentencing court to consider Stanley's chosen profession in the legal marijuana industry as "dangerous." It argues that the court made that statement in the context of considering Stanley's "lifelong mental health issues," his history of "self-medicating with alcohol and marijuana," and his history of illegal marijuana possession and delivery. The State argues that the court recognized that there is a legal marijuana industry, but found that it was a dangerous profession for Stanley based on Stanley's particular history. In reply, Stanley reiterates his argument that he has a right to pursue a legal occupation, and that the court's negative opinion about his chosen profession was an improper sentencing factor.

We conclude that the circuit court did not consider an improper factor at sentencing. The court's comments that the legal marijuana trade was a "dangerous" choice for Stanley related to the court's consideration of Stanley's mental health issues and criminal history, including marijuana-related offenses. The court explained that it considered Stanley's mental health issues, criminal convictions for offenses related to alcohol, marijuana, and other drugs, and history of self-medicating with alcohol and marijuana. The court noted that Stanley had worked as a "horticultural consultant apparently for marijuana growing operations in California and in

Michigan." The court acknowledged that there are states that have a legal marijuana industry, but that in other states marijuana is illegal, and found that Stanley's addictive personality and his history with marijuana made the legal marijuana profession a "dangerous" choice for him. The court further explained at the postconviction motion hearing that its comments about Stanley's choice to work in the legal marijuana industry were made in the context of considering Stanley's mental health issues and marijuana-related history in attempting to fashion a sentence that met Stanley's rehabilitative needs. Thus, contrary to Stanley's argument, the court did not state a categorically negative opinion about the legal marijuana industry. Rather, the court considered Stanley's choice of that profession in the context of his mental health issues and criminal history. We discern no erroneous exercise of the circuit court's sentencing discretion.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals