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

2019AP1395-CR State of Wisconsin v. Jesse A. Cotto (L.C. # 2018CF359)

Before Brash, P.J., Dugan and White, 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).

Jesse A. Cotto appeals a judgment of conviction entered after he pled guilty to one count of armed robbery. He also appeals a motion denying postconviction relief. He alleges that he is entitled to withdraw his guilty plea because the circuit court did not have a discussion with him during the plea hearing about the ramifications of dismissing a second count of armed robbery and reading it in for sentencing purposes. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition.

See WIS. STAT. § 809.21 (2019-20).[1] We reject Cotto's premise that the circuit court's mandatory duties during a plea colloquy include discussing the ramifications of reading in a dismissed offense. Therefore, we summarily affirm.

The State charged Cotto with two counts of armed robbery. He decided to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty to one of the counts, and the State agreed to recommend a nine-year term of imprisonment bifurcated as five years of initial confinement and four years of extended supervision. The State also agreed to move the circuit court to dismiss the second count and read it in for sentencing purposes.

The circuit court conducted a plea colloquy with Cotto. As a component of that colloquy, the circuit court established that Cotto had signed a plea questionnaire and waiver of rights form after reviewing it with his trial counsel. Among the provisions in the form were disclosures that:

> if any charges are read-in as part of a plea agreement they have the following effects: [1] Sentencing - although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased. [2] Restitution - I may be required to pay restitution on any read-in charges. [3] Future prosecution - the State may not prosecute me for any read-in charges.

Cotto confirmed on the record that everything on the form was true and correct. Cotto's trial counsel also told the circuit court that she had reviewed the form with Cotto, and she assured the circuit court that, in her opinion, Cotto was acting knowingly, intelligently, and voluntarily in entering his guilty plea.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

At the conclusion of the plea hearing, the circuit court accepted Cotto's guilty plea to one count of armed robbery. The circuit court also granted the State's motion to dismiss and read in the second count of armed robbery.

The case proceeded to sentencing. After considering the parties' sentencing recommendations and various sentencing factors, the circuit court imposed an evenly bifurcated eight-year term of imprisonment and ordered that Cotto serve that term consecutively to a previously imposed revocation term.

Cotto moved for postconviction relief seeking plea withdrawal. In support, he alleged that the circuit court had failed to fulfill its duty to advise him during his plea colloquy "as to the legal consequences of his plea with respect to the read-in offense." The circuit court denied the motion without a hearing, concluding that circuit courts do not have a mandatory duty when accepting guilty pleas to explain to defendants the consequence of dismissing and reading in offenses for sentencing purposes. Cotto appeals.

A defendant who wishes to withdraw a guilty plea after sentencing must establish that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

To ensure that a defendant's guilty plea is knowing, intelligent, and voluntary, the circuit court must perform certain statutory and court-mandated duties on the record during the plea hearing. *See* ***id.***, ¶31. When, as here, a defendant alleges that the circuit court failed to perform one or more of its mandatory duties, the defendant may seek plea withdrawal pursuant to ***State v.***

Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Howell***, 2007 WI 75, ¶¶26-27, 301 Wis. 2d 350, 734 N.W.2d 48. Under the ***Bangert*** procedure, the defendant must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) allege that the defendant lacked knowledge or understanding of the information that should have been provided at the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes both of the necessary showings, the circuit court must hold an evidentiary hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant entered his or her plea knowingly, intelligently, and voluntarily. *See* ***id.***, ¶40. We consider *de novo* the sufficiency of the plea colloquy and the need for an evidentiary hearing. *See* ***State v. Hoppe***, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794.

In ***Brown***, our supreme court set forth a list of the duties that the circuit court must perform during a plea hearing and the statutory or case law origin of each obligation. *See* ***id.***, 293 Wis. 2d 594, ¶35 & nn.13-22. The supreme court has reiterated that list on multiple occasions. *See*, e.g., ***Hoppe***, 317 Wis. 2d 161, ¶18; ***Taylor***, 347 Wis. 2d 30, ¶31; ***State v. Pegeese***, 2019 WI 60, ¶23, 387 Wis. 2d 119, 928 N.W.2d 590. The list does not include a duty to advise the defendant about the ramifications of a charge that has been dismissed and read in for sentencing purposes.

Although Cotto recognizes that the supreme court has not included the obligation to discuss read-in charges on the list of duties that the circuit court must perform during a plea hearing, he suggests that the law regarding the circuit court's obligation in regard to read-in charges is uncertain. In his view, the supreme court has not "meaningfully clarified" whether a colloquy about read-in offenses is mandatory. We disagree. To date, the supreme court has

clearly not imposed a duty to discuss the ramifications of read-in charges as a component of a plea colloquy.

In reaching this conclusion, we have considered Cotto's suggestion that the ramifications of read-in charges are part of the "direct consequences of the plea," of which the defendant must receive notice. *See* ***Brown***, 293 Wis. 2d 594, ¶35 & n.21. Specifically, Cotto asserts that, in ***State v. Lackershire***, 2007 WI 74, ¶ 28 n. 8, 301 Wis. 2d 418, 734 N.W.2d 23, "the supreme court ... rejected, in a footnote, this [c]ourt's attempt to categorize the read-in consequences as 'collateral.'" Cotto, however, does not mention that the supreme court subsequently abrogated ***Lackershire*** in regard to its discussion of read-in offenses. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶89-93, 310 Wis. 2d 259, 750 N.W.2d 835. Absent a discussion accounting for the supreme court's subsequent treatment of ***Lackershire***, we view Cotto's argument as undeveloped and unavailing. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285.

We have also considered Cotto's suggestion that the supreme court's decision in ***Hoppe*** supports plea withdrawal here. In ***Hoppe***, the supreme court stated that it "assume[d] without deciding" that failure to discuss read-in charges at a plea colloquy constituted a ***Bangert*** violation. *See* ***Hoppe***, 317 Wis. 2d 161, ¶46. The ***Hoppe*** court went on to hold, however, that regardless of any such violations, the defendant was not entitled to withdraw his plea because he entered it knowingly, intelligently, and voluntarily. *See* ***id.***, ¶¶57-58. We do not see anything in the supreme court's assumption in ***Hoppe*** that advances Cotto's claim. The court's express reservation of a decision is not a decision in disguise. Rather, the reservation implements the well-settled rule that an appellate court should decide cases "on the narrowest grounds possible." *See* ***State v. Cain***, 2012 WI 68, ¶37 n.11, 342 Wis. 2d 1, 816 N.W.2d 177. Moreover, Cotto

indicates that the supreme court's remarks in ***Hoppe*** are significant "in connection with [the supreme court's] language in ***Lackershire***," which, as we have seen, the supreme court subsequently abrogated. We conclude that neither ***Hoppe*** nor ***Lackershire*** assists Cotto here.

As does the State, we acknowledge our supreme court's statement that when a guilty plea involves an agreement to read in a charge, the "better practice" is to "recognize" that the agreement:

> affects sentencing in the following manner: a circuit court may consider the read-in charge when imposing sentence but the maximum penalty of the charged offense will not be increased; a circuit court may require a defendant to pay restitution on the read-in charges; and a read-in has a preclusive effect in that the State is prohibited from future prosecution of the read-in charge.

Straszkowski, 310 Wis. 2d 259, ¶93 (footnotes omitted). We also acknowledge that in ***State v. Sulla***, 2016 WI 46, ¶35, 369 Wis. 2d 225, 880 N.W.2d 659, the supreme court again described the "better practice" when a plea agreement includes read-in charges and stated that counsel and circuit courts "should" advise defendants in the manner described in ***Straszkowski*** when a plea agreement includes such charges. These recommendations and descriptions of best practices, however, are not mandates. Accordingly, although we agree with Cotto both that a defendant "should understand" the implications of reading in dismissed charges and that addressing the matter during the plea colloquy "makes practical sense," we are satisfied that he does not identify a case or statute mandating that the circuit court personally advise a defendant regarding the effect of a read-in charge.

Moreover, the record shows that Cotto in fact received the information that the supreme court indicated in ***Straszkowski*** and ***Sulla*** should be given to defendants whose guilty pleas involve charges that are dismissed and read in. The information was included on the plea

questionnaire and waiver of rights form that Cotto signed and filed. Cotto confirmed during the plea colloquy that he reviewed the form with his trial counsel and that everything on the form was true. Trial counsel in turn assured the circuit court that she had reviewed the form with Cotto and that she had no concerns about the knowing, intelligent, and voluntary nature of his plea.

The supreme court held in ***Pegeese*** that a plea questionnaire and waiver of rights form is a useful tool that a circuit court may use to ensure a knowing, intelligent, and voluntary plea. *See* ***id.***, 387 Wis. 2d 119, ¶¶36-37. ***Pegeese*** includes an explicit recognition that the circuit court's use of a form does not require "magic words" or the formalistic recitation of each caution and advisement that the form contains. *See* ***id.***, ¶41. Here, the form that Cotto signed, coupled with the circuit court's inquiries and trial counsel's assurances, shows that Cotto received the precise information about the ramifications of read-in offenses that the supreme court in ***Straszkowski*** and ***Sulla*** recommended defendants receive at the time of their pleas.

"'[A] guilty plea is a grave and solemn act[.]'" ***Jacobs v. State***, 50 Wis. 2d 355, 360, 184 N.W.2d 110 (1971) (citation omitted). Therefore, a defendant seeking to withdraw a guilty plea "must show 'a serious flaw in the fundamental integrity of the plea.'" *See* ***Cain***, 342 Wis. 2d 1, ¶25 (citations and one set of quotation marks omitted). Cotto does not show such a flaw. He complains that the circuit court did not advise him on the record about the effect of a read-in charge, but he does not point to any controlling authority requiring the circuit court to give him such an advisement. Therefore, he has not identified a failure by the circuit court to comply with the obligations imposed by ***Bangert*** and its progeny. Because Cotto has not made a prima facie case that the plea colloquy was defective, further analysis is not required. *See* ***Brown***, 293

Wis. 2d 594, ¶¶39-40. The circuit court properly denied his postconviction motion for plea withdrawal without a hearing, and therefore we affirm.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals