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**DISTRICT II**

July 19, 2023

*To*:

Hon. Peter L. Grimm
Circuit Court Judge
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Christopher P. August
Electronic Notice

Michael C. Sanders
Electronic Notice

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

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2022AP1170-CR State of Wisconsin v. James F.K. Allen (L.C. #2019CF235)

Before Gundrum, P.J., Grogan and Lazar, 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).**

James F.K. Allen appeals from a judgment of conviction for attempted homicide, entered upon his no contest plea, and from an order denying his motion for postconviction relief in which he asserted that his plea should be withdrawn because he did not understand the effect of having charges and enhancers dismissed and read in for the purpose of sentencing. 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 (2021-22).[1] Because the circuit court did not clearly err in finding that Allen understood the effect of read-in charges, we affirm.

Allen stabbed his girlfriend in the neck multiple times while she was driving a car. Eventually, Allen's girlfriend was able to push him out of the car and get medical help. Allen stopped another car traveling down the highway and used the driver's phone to call 911. Allen told authorities that he had tried to kill his girlfriend and wanted to turn himself in.

The State charged Allen with two counts from this incident: attempted first-degree intentional homicide as an act of domestic abuse and aggravated battery as an act of domestic abuse, both with the use of a dangerous weapon, as a repeater, and as a domestic abuse repeater. Allen reached an agreement with the State under which he would plead no contest to attempted first-degree intentional homicide as an act of domestic abuse. In exchange, the State would dismiss the aggravated battery count and all enhancers as well as the charges from a separate misdemeanor case—but all the dismissed charges and enhancers would be read in at sentencing. Following Allen's plea, the circuit court sentenced him to twenty-two years of initial confinement followed by twenty years of extended supervision.

Allen filed a postconviction motion seeking to withdraw his plea, arguing that his counsel was ineffective for various reasons and that the circuit court failed to ensure that Allen understood the consequence of read-in offenses. The circuit court conducted an evidentiary hearing. It determined that its colloquy with Allen at his plea hearing was inadequate with respect to read-in offenses such that the burden shifted to the State to prove that Allen

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

understood their effect on his sentencing. Allen's trial counsel testified that throughout his thirty-year career as a criminal defense attorney he typically discusses read-ins with clients and informs them that "the judge can consider the facts and circumstances related to those dismissed and read-in charges when determining what an appropriate sentence would be." He further testified that he would have read to Allen each of the "Understandings" on the plea agreement form (which was signed by Allen) and explained the effect that read-ins have on a sentence. The "Understanding" related to read-ins on the form states in relevant part that the defendant "understand[s] that if any charges are read-in as part of a plea agreement they have the following effect[]" on sentencing: "[A]lthough the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased."

In its oral ruling, the circuit court denied Allen's motion for postconviction relief, determining that Allen's trial counsel was highly credible and competent and not ineffective in his representation of Allen. Relevant to this appeal, it found that the plea form clearly explained the consequences of the read-in charges and that Allen's trial counsel read this form to Allen. Thus, the court determined that the State had shown "that the defendant did understand read-ins." Allen renews his argument related to read-ins before this court, contending that his trial counsel's testimony was insufficient to show that Allen actually comprehended the effect of read-ins on sentencing and that the plea form misstated the law with respect to the same.

Whether a plea was knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Straszkowski***, 2008 WI 65, ¶29, 310 Wis. 2d 259, 750 N.W.2d 835. We review the circuit court's relevant findings of fact for clear error, ***id.***, meaning we uphold those findings unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Martwick***, 2000 WI 5, ¶43, 231 Wis. 2d 801, 604 N.W.2d 552. We then determine "the

application of constitutional principles regarding a knowing, intelligent and voluntary plea to those evidentiary facts independently." ***Straszkowski***, 310 Wis. 2d 259, ¶29.

We conclude that the circuit court's factual findings that Allen's trial counsel "read the plea form" to Allen, who did not have questions about it, that the effect of read-ins "was explained [to Allen] by counsel," and that Allen "did understand read-ins" are supported by the great weight of the evidence and therefore are not clearly erroneous. The evidence supporting these findings includes Allen's trial counsel's testimony, discussed above, which the court found credible. It also includes the plea form, which Allen signed, acknowledging his understanding about read-ins; although a signed form alone is not sufficient to demonstrate a party's understanding of the information contained therein, it is relevant to the determination of knowledge. *See* ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 ("[U]se of the Plea Questionnaire/Waiver of Rights Form 'lessen[s] the extent and degree of the colloquy otherwise required between the trial court and the defendant.'" (second alteration in original; citation omitted)). Finally, Allen's plea colloquy, at which he confirmed that he had sufficient education and knowledge to understand the plea form and that he was "able to read through and understand each line" of that form "with [his] attorney's help," is further evidence supporting the circuit court's factual findings as to Allen's knowledge regarding read-ins.

There is no contradictory evidence in the Record showing a lack of understanding about the ramifications of read-in charges; although Allen testified at his postconviction hearing regarding other aspects of his plea agreement and interactions with his trial counsel, as the circuit court noted, "Mr. Allen himself offered no testimony in support of what he didn't know about read-ins." Again, at his plea hearing, Allen replied affirmatively when asked whether he read

and understood each line of the plea questionnaire, which made clear that "the judge may consider read-in charges when imposing sentence."

We need not reach the issue of whether the circuit court was correct in determining that the burden had shifted to the State to prove that Allen's plea was knowing, voluntary, and intelligent. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986). Even if the State had the burden, the evidence it presented was sufficient to support the circuit court's determination that it had satisfied that burden. In view of the facts found by the circuit court and summarized here, we conclude that Allen's plea was knowing, voluntary, and intelligent with respect to the consequences of read-in charges.

Finally, we address Allen's assertion that the law with respect to read-ins is incorrectly stated on the plea questionnaire he signed—reflecting that read-ins *may* be considered rather than that they *will* be considered in sentencing—so even if he signed and understood that, he did not understand the actual legal consequence of read-in charges. We disagree with his premise. In ***State v. Sulla***, 2016 WI 46, ¶11, 369 Wis. 2d 225, 880 N.W.2d 659, the defendant signed a plea questionnaire that had the same language explaining read-ins that was on Allen's form. Our supreme court said nothing indicating that that language was wrong or that it was changing the read-in procedure in any way relevant to this case.

Because Allen's plea was knowing, intelligent, and voluntary with respect to the effect of read-in offenses, we affirm.

IT IS ORDERED that the judgment and order of the circuit court are affirmed. *See* WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*
*Clerk of Court of Appeals*