STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal Nos. 2014AP001248-CR
2014AP001249-CR
2014AP001250-CR
2014AP001251-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON MAY 1, 2014, AND A JUDGMENT OF CONVICTION ENTERED ON JULY 9, 2013, BY THE CIRCUIT COURT FOR POLK COUNTY, HON. MOLLY E. GALEWYRICK, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. In exchange for Tourville's plea of guilty or no contest to four criminal charges, the State agreed to cap its sentence recommendation at the "high end" of whatever sentence the presentence investigation (PSI) recommended. The PSI recommended a range of initial confinement and

extended supervision time, but it did not make a recommendation as to whether the sentences should be served consecutively or concurrently.

a. Did the State breach the plea agreement when it recommended consecutive sentences?

b. If so, was the trial attorney ineffective in failing to object to the recommendation?

The trial court ruled that the State's recommendation was within the "high end" of the PSI and was therefore not a breach of the plea agreement.

2. Was there a sufficient factual basis to allow the court to accept Tourville's guilty plea to the charge in Polk County Case Number 2012CF27?

The trial court ruled that there was sufficient factual basis.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Tourville welcomes oral argument to clarify any questions the court may have. Publication may not warranted be as the issues raised in this appeal are controlled by existing precedent.

STATEMENT OF THE CASE

Between 2011 and 2013, the State charged Patrick Tourville with various crimes in four separate Polk County cases.

- 2011CF293: Theft, resisting/obstructing an officer, operating vehicle without owner's consent.

- 2011CF376: Burglary while armed, felony theft (2 counts), misdemeanor theft, bail jumping, and felon in possession of a firearm.

- 2012CF27: Theft and felon in possession of a firearm.

- 2013CF107: Bail jumping (5 counts) and possession of drug paraphernalia.

All charges from these four cases were subsequently incorporated into a plea agreement. On April 18, 2013, in accordance with the agreement, Tourville plead guilty or no contest to four counts, one count corresponding to each of the above case numbers.[1] (Doc. 26:5 in 2014AP1251). In exchange, the State agreed to dismiss and read in the remaining counts. (Doc. 26:5 in 2014AP1251). The court, Hon. Molly GaleWyrick, accepted the terms of the plea agreement.

On July 8, 2013, the same court sentenced Tourville to consecutive prison sentences totaling 26 years (14.5 years initial confinement (IC) plus 11.5 years extended supervision (ES)). (Doc. 53a:83-84 in 2014AP1248) (Attached as Appendix A).

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[1] Polk Co. Case No. 11 CF 293 corresponds to Appeal No. 2014AP1248.
Polk Co. Case No. 11 CF 376 corresponds to Appeal No. 2014AP1249.
Polk Co. Case No. 12 CF 27 corresponds to Appeal No. 2014AP1250.
Polk Co. Case No. 13 CF 107 corresponds to Appeal No. 2014AP1251.

The full transcription of the plea hearing, sentencing hearing, postconviction hearing, and various other documents are found in different Appeals numbers. Therefore, in this brief, citations to the record will cite to the appeals case number where the full transcription is located. In some cases, the same full document can be found in all four appeals numbers, but citations will only be made to one case for the sake of simplicity.

On December 26, 2013, Tourville filed a postconviction motion raising the same two issues contained in this appeal. (Doc. 69 in 2014AP1248). The court conducted a postconviction hearing on March 18, 2014. (Doc. 91 in 2014AP1248). Following briefing, the court issued a written decision on May 13, 2014, denying relief the motion relief on both issues. (Doc. 62 in 2014AP1249) (Attached as Appendix B). This appeal followed.

STATEMENT OF FACTS

Although the facts relevant to the two issues in this case are temporally intertwined, they are conceptually distinct, and are described separately below.

Facts related to Issue No. 1—the plea breach issue

At the April 18, 2013, plea hearing, the prosecutor District Attorney Dan Steffen, recited the terms of the plea agreement, stating that Tourville would plead guilty or no contest to one count in each of the case numbers, with dismissal of the other counts. (Doc. 26:5 in 2014AP1251). Neither DA Steffen nor Tourville's attorney, George Miller, mentioned what sentencing recommendations would be made by the parties under the plea agreement.

However, Judge GaleWyrick stated that she had received the "plea questionnaire waiver of rights forms" for each of the cases (Doc. 26:14 in 2014AP1251). Attached to each of these forms was an Addendum that had been signed by Tourville. The Addendum for the first three case numbers (12CF81, 11CF376, and 11CF293) stated:

> The joint sentencing recommendation is to order a presentence investigation; the state will cap its recommendation at the high end of what the PSI orders.

(Doc. 32:4 in 2014AP1248; Doc. 32:4 in 2014AP1249; Doc 31:4 in 2014AP1250. (Attached as Appendix C) No Addendum was attached to the plea questionnaire for Case 13CF107 (Doc. 13 in 2014AP1251).

Subsequently, a Presentence Investigation Report (PSI) was filed with the court. (Doc. 44 in 2014AP1251). The table below sets forth the PSI's recommendations for each sentence. The prosecutor then made recommendations that were generally on the high end of the PSI's recommendations, as shown in the table.

Polk County Case Number	PSI sentence recommendation[2]	State's sentence recommendation[3]
2011CF293	16-18 months IC 6 months ES	1 year IC 2 years ES
2011CF376	4-6 years IC 3-4 years ES	6 years IC 4 years ES
2012CF27	16-18 months IC 6 months ES	1.5 years IC 6 months ES
2013CF107	1-2 years IC 2 years ES	2 years IC 2 years ES

The PSI was silent as to whether these sentences should run consecutively or concurrently to each other. Nevertheless, the prosecutor recommended consecutive sentences on all four cases, stating:

[2] PSI's recommendations are in Doc. 44:17 in 2014AP1251.

[3] State's recommendations are in Doc. 53a:36-37 in 2014CF1248 (Attached as Appendix D).

> And while the PSI doesn't talk about current [sic] or context [sic]. I'm requesting that these be consecutive. These are crimes take place over the course of 2 plus years from the oldest to the newest. They are all separate situations showing a history of crimes, a series of events. So I think that they should be served consecutive to each other.

(Doc 53a:37 in 2014AP1248).

In his postconviction motion, Tourville argued that the State breached the plea agreement by recommending consecutive sentences, which went beyond the recommendation in the PSI. (Doc. 57:1-3 in 2014AP1250). He further argued that Atty. Miller was ineffective in failing to object to the alleged breach.

At the postconviction hearing, Atty. Miller testified that his understanding of the plea agreement was as set forth in the Plea Questionnaire and Addendum (Doc. 91:12 in 2014AP1248). He testified that at the time of the plea, neither he nor Tourville knew what the PSI would recommend, but knew that whatever the PSI recommended for a sentence, the State could not recommend a longer sentence (Doc 91:12 in 2014AP1248). Atty. Miller testified that he "did not have a strategic reason for not objecting" to the State's recommendation of consecutive sentences because it "slipped my mind to object." (Doc. 91:17 in 2014AP1248).

In a written decision, Judge GayleWyrick held that the State did not breach the plea agreement by recommending consecutive sentences. (Doc. 67:2-4 in 2014AP1250) (Attached as Appendix B). The court held that the plea negotiation "did not consider the issue of concurrent or consecutive sentences," and that therefore, the State's recommendation of consecutive sentences was within the "high end" of what the PSI recommended. (Doc. 67:4 in

2014AP1250). Accordingly, the court did not find that Tourville's attorney was ineffective in failing to object to the State's recommendation. (Doc. 67:4 in 2014AP1250).

Facts related to Issue No. 2--the factual basis issue

In Polk County case number 2012CF27, the State accused Tourville of theft. (Doc. 2 in 2014AP1250). According to the amended criminal complaint, several men–but not Tourville–broke into the home of Kevin Beyl and stole a safe containing firearms and other tools. (Doc. 2:2 in 2014AP1250). The men then took the safe to Tourville and told him about the burglary and asked for his help in opening the safe. Tourville then went along with them to a campground where the men opened and disposed of it.

Although Tourville had not participated in the burglary, the charging section of the Complaint alleged that Tourville "took and carried away" movable property as a party to a crime. (Doc 2:1 in 2014AP1250).

The Complaint also stated that Tourville's actions were contrary to Wis. Stat. § 943.20(1)(e) & (3)(d). (Doc 2:1 in 2014AP1250). As was later acknowledged by the State (Doc. 91:40 in 2014AP1248), the complaint clearly cited the wrong statute because § 943.20(1)(e) makes it a crime to fail to return property that had been *rented* or *leased*—something that had not been alleged at any point.

At the plea hearing, the court addressed whether there was a factual basis for the theft charge. Tourville told the court that he did not give the burglars anything, and that he did not hide anything. (Doc. 26:10 in 2014AP1251). The court then told Tourville that he was being charged because he "gave surroundings" to the other defendants. (Doc. 26:11 in 2014AP1251). At that point, the court said, "And

everybody agrees that that meets the elements of the crime?" (Doc. 26:11 in 2014AP1251). The prosecutor agreed, but neither Tourville nor his attorney said anything on the record before the court accepted the plea.

In his postconviction motion, Tourville argued that there was no factual basis that Tourville had violated § 943.20(1)(e) as charged, and that he was therefore entitled to withdraw his plea. (Doc. 57:5-6 in 2014AP1250).

In her written decision, Judge GaleWyrick held that there was a factual basis for Tourville's plea. The court ruled that the reference to § 943.20(1)(e) was a "scrivener's error." (Doc. 67:4 in 2014AP1250). The court further held that Tourville's participation in disposing of the safe amounted to a violation of Wis. Stat. § 943.20(1)(a), which was set forth in the probable cause portion of the complaint. (Doc. 67:4 in 2014AP1250). The court stated that Tourville understood what he was pleading to, and therefore there was no manifest injustice. (Doc. 67:6-7 in 2014AP1250).

STANDARD OF REVIEW

The Court applies a *de novo* standard to determine whether, as a matter of law, the State's conduct breached the terms of a plea deal. *State v. Smith*, 207 Wis. 2d 258 at 266, 558 N.W.2d 379 (1997). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact, and the Court will not reverse finding of fact unless they are clearly erroneous. *Id.* In this case there are no disputed facts concerning the contents of either the plea agreement or the PSI. Thus, the first issue should be reviewed *de novo*.

Where the trial court has determined that there was a sufficient factual basis for acceptance of a plea, the appellate

court will not upset that determination unless it is clearly erroneous. *State v. Mendez,* 157 Wis. 2d 289, 295, 459 N.W.2d 578 (Ct. App. 1990). The defendant has the burden of showing by clear and convincing evidence that the withdrawal of the plea is necessary to correct a manifest injustice. *State v. Spears,* 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

ARGUMENT

I. The State breached the plea agreement by recommending consecutive sentences, and Tourville's attorney was ineffective in failing to object to the breach.

When the State and defendant agree to a plea deal, both parties are obligated to abide by its terms. In this case the State agreed to cap its sentence recommendation at the "high end" of what the PSI recommended. The PSI did not recommend consecutive sentences. But at sentencing, the State added a recommending that the sentences be served consecutively. This went above the "high end" of what the PSI recommended and was a breach of the plea agreement. Tourville's trial attorney was ineffective for not objecting to this breach of the agreement, and Tourville is entitled to a re-sentencing under a different judge.

A. The State breached the plea agreement by recommending a harsher sentence than the PSI recommendation.

Due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). *See also Smith*, 207

Wis. 2d at 271. Terms of a plea deal must be followed. *State v. Williams*, 2002 WI 1, ¶ 37, 249 Wis. 2d 492, 637 N.W.2d 733 (a prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement).

In Tourville's case, the terms of the plea agreement were set forth in the "Written Addendum to Plea Questionnaire/Waiver of Rights Form" that was submitted to the court at the time of the plea.[4] The Plea Questionnaires were signed by both Atty. Miller and Tourville. Tourville also separately signed the Addendums. According to those terms:

> The joint sentencing recommendation is to order a presentence investigation; the state will cap its recommendation at the high end of what the PSI orders.

(Doc. 44:4 in 2014AP1248); Doc. 32:4 in 2014AP1249; Doc. 31:4 in 2014AP1250). These terms were not stated orally at the time of the plea, and there was some discussion at the postconviction hearing as to whether the terms were actually part of the final plea agreement.[5] The

[4] The Addendums of each case differed depending on the charged offense in each case. However, the above language was the same in three of the cases—11CF376, 11 CF293, and 12CF27. As to 13CF107, there was no Addendum setting forth the terms of the plea deal.

[5] At the postconviction hearing, DA Steffen told the court that the final plea agreement did not include a cap on the sentencing recommendation. (Doc. 91:62 in 2014AP1248). However, DA Steffen did not offer any sworn testimony supporting that. At the postconviction hearing, two letters were introduced into evidence. The first was a December 19, 2012 letter from DA Steffen to Atty. Miller stating that in exchange for a plea to charges in the first three cases, the "state would agree to be capped at the high end range of the PSI." (Doc. 91:19 in 2014AP1248). The second letter, again from DA Steffen to Atty. Miller, dated March

court acknowledged receiving the "individual plea sheets," that is, the Plea Questionnaire forms. (Doc. 26:6 in 2014AP1251).

The PSI recommended a range of initial confinement and extended supervision for each charge, but it did not recommend that the sentences be served consecutively. (Doc. 14b:17 in 2014AP1251). Instead, it simply gave a range regarding each case:

> Case No. 11CF 293: 16-18 months IC, 6 months ES
> Case No. 11CF376: 4-6 years IC, 3-4 years ES
> Case No. 12CF27: 16-18 months IC, 6 months ES
> Case No. 13CF107: 1-2 years IC, 2 years ES

The PSI's recommendation contrasts starkly with the prosecutor's recommendation at sentencing, when, after making sentence individual recommendations as to each of the four cases, he told the court that "I'm requesting that these be consecutive." (Doc. 53a:37 in 2014AP1248) (Attached as Appendix D). By recommending consecutive sentences, the State breached the plea agreement.

26, 2012, came after Tourville was charged with additional counts in 13CF107. That letter stated that "if your client wants to enter a plea to Count 1 of the Information we would use the same PSI and argue sentencing." DA Steffen argued that since the second letter did not mention a "cap," there was none. (Doc. 91:61-62 in 2014AP1248). However, Atty. Miller testified that in his opinion, the "March 26th letter read in conjunction with your December 19th, 2012 letter indicates that you're still capping at the high end of the PSI." (Doc. 91:23 in 2014AP1248).

The court did not make findings as to whether the terms of the plea agreement included a cap on the State's recommendation, but instead simply held that the State's recommendation fell within the PSI's sentencing recommendation, and therefore was not a breach.

In denying postconviction relief, Judge GaleWyrick acknowledged that the difference between concurrent and consecutive sentences is "material and substantial." (Doc. 67:3 at 2014AP1250). This is an important distinction because a defendant is not entitled to relief when the breach is merely technical rather than a "substantial and material breach." *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). *See also State v. Howard*, 2001 WI App 137, ¶ 18-19, 246 Wis. 2d 475, 630 N.W.2d 244 (whether sentences are to be concurrent or consecutive is "extremely important," and if the State agrees to recommend concurrent sentences, it cannot then recommend a consecutive sentence without committing a material and substantial breach).

However, the court found that the State did not breach the plea agreement because it concluded that Tourville "got exactly what he bargained for, a recommendation at the "high end" of the PSI. (Doc. 67:3 at 2014AP1250).

The court is wrong. The State's recommendation that the sentences be served consecutively was not within the "high end" of the PSI. The PSI said nothing about the sentences being consecutive and there is no reason to assume that the "high end" includes this feature that effectively makes the sentence recommendation much more severe.[6] The State's recommendation for consecutive sentences does not fit

[6] This distinguishes Tourville's case from *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 366. In *Bowers*, the Court held that the State did not breach the plea agreement when it recommended consecutive sentences, even though the plea agreement had not addressed whether the recommendation would be for concurrent or consecutive sentences. *Id.* Unlike *Bowers*, Tourville's plea agreement was not silent as to recommending consecutive or concurrent sentences – it required the State to limit its recommendation to the recommendation of the PSI. Since the PSI did not ask the Court to impose consecutive sentences, the State's recommendation of consecutive sentences exceeded the PSI's recommendation.

within the structure of the PSI's recommendation—it extends it to heights never articulated in the PSI. Obviously, if the PSI writer had wanted to recommend consecutive sentences, she could have easily done so. By adding its own terms in addition to the PSI recommendations, the State drastically changed the actual recommendation.

It might be contended that the PSI's recommendation is ambiguous in that it does not specify whether the sentences are to run concurrently or consecutively. However, in the face of ambiguity, there is a rebuttable presumption that a sentence should be served concurrently, not consecutively. *See State v. Rohl,* 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991) ("Where an offender is actually or constructively serving a sentence for one offense and is then ordered to serve another sentence for a different offense, the second sentence will be deemed to run concurrently with the first sentence in the absence of a statutory or judicial declaration to the contrary"). *See also State v. Ogelsby*, 2006 WI App 95, 292 Wis. 2d 716, 715 N.W.2d 727. Similarly, when a PSI does not explicitly recommend consecutive or concurrent sentences, the PSI should be presumed to recommend concurrent sentences.

It is true that the courts in *Rohl* and *Ogelsby* were dealing with different situations than is present in this case. This was alluded to by the court in its decision denying postconviction relief. (Doc. 67:2 at 2014AP250). However, these cases are relevant because they illustrate the principle that unless it is clear that a court intends sentences to be consecutive, they must be presumed to be concurrent.[7] There

[7] A related principle is that penal laws are to be construed strictly to safeguard a defendant's rights. *State v. Austin,* 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978); *United States v. Santos,* 553 U.S. 507, 514 (2008). *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95 (1820) (it is a fundamental principle of American law that the rule of lenity requires

is no reason that same principle should not apply to a prosecutor's sentencing request or a PSI sentencing recommendation.

Accordingly, Tourville is entitled to resentencing under the terms of the plea agreement. At the resentencing, the State can recommend sentences at the high end of the sentencing range suggested in the PSI, but cannot include a recommendation that the sentences should be consecutive. The resentencing hearing must be before a different court that did not hear the prohibited recommendation of the State. *See Smith*, 207 Wis. 2d at 282.

B. Tourville's trial attorney was ineffective by failing to object to the State's breach of the plea agreement.

Tourville's trial attorney, Atty. Miller, failed to object when the State recommended consecutive sentences. This failure violated Tourville's right to effective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, Atty. Miller's failure to object to the breach was deficient performance. By failing to object, Tourville's right to directly challenge the State's breach may have been waived. *See Howard*, 2001 WI App. 137 at ¶ 12 (stating that "when Howard failed to object to the State's alleged breach of the plea agreement at the sentencing hearing, he waived his right to directly challenge the alleged breach of the plea"). At the postconviction motion hearing, Atty. Miller testified that

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"penal laws ... to be construed strictly"). *State v. Kittilstad*, 231 Wis. 2d 245, 266-67, 603 N.W.2d 732 (1999).

he had no strategic reason for not objecting, but that it was an oversight which "slipped [his] mind." (Doc. 69:17 at 2014AP1249).

Tourville was prejudiced because he did not receive the recommendation for which he bargained. In *State v. Smith*, 207 Wis. 2d at 281, the Supreme Court held that:

> The breach of a material and substantial term of a plea agreement by the prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable. Our conclusion precludes any need to consider what the sentencing judge would have done if the defense counsel had objected to the breach by the district attorney. Rather, our conclusion is premised on the rule of *Santobello*, that when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled.

Therefore, for the purposes of determining ineffective assistance of counsel, the defendant is automatically prejudiced when the State violates a substantial and material term of the plea agreement. *Id.* at 282.

The prejudice analysis is the same in this case as *Smith*. By recommending consecutive sentences, the State exceeded the PSI's recommendation, which violated a material and substantial term of the plea agreement. As a result of this breach, Tourville was denied due process because he did not get the benefit of the deal that he made in exchange for pleading guilty to the charges.

The proper remedy for the State's breach of a plea agreement is resentencing by a different judge under the terms of the original plea agreement. *See Howard*, 2001 WI App 137 at ¶ 36.

II. There was insufficient factual basis for the court to accept Tourville's guilty plea in case number 2012 CF 27.

A. Legal Standards

The court is required to establish a factual basis before accepting a plea. *State v. Lackershire*, 2007 WI 74, ¶ 34, 301 Wis. 2d 418, 734 N.W.2d 23. Before accepting a plea of guilty or no contest, the court must find enough facts to satisfy itself "that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). A factual basis inquiry protects the defendant from voluntarily entering a plea in which there is no factual basis for guilt. *Lackershire*, 2007 WI 74, at ¶ 35; *White v. State*, 85 Wis. 2d 485, 271 N.W.2d 97 (1978).

A post-sentencing motion for withdrawal of a guilty plea should only be granted when necessary to correct a manifest injustice. *State v. Johnson,* 200 Wis. 2d 704, 708, 548 N.W.2d 91 (Ct. App. 1996) *aff'd,* 207 Wis. 2d 239, 558 N.W.2d 375 (1997). A defendant shows the requisite "manifest injustice" when the court fails to ensure a sufficient factual basis for a defendant's plea. *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

Where the trial court has determined that there was a sufficient factual basis for acceptance of a plea, the reviewing court will not upset that determination unless it is "clearly erroneous." *State v. Mendez,* 157 Wis. 2d at 295. The defendant has the burden of showing, by clear and convincing evidence, that the withdrawal of the plea is necessary to correct a manifest injustice. *State v. Spears*, 147 Wis. 2d at 434.

B. Application

On April 18, 2013, Tourville entered pleas of guilty or no contest to one count in each of the four cases under which he was charged. In his postconviction motion, and on appeal, Tourville submits that there was no factual basis for his plea to the charge of felony theft (Count 1) in Case No. 2012CF27.

At the plea hearing, the court attempted to establish the factual basis for Tourville's plea. The court did this in two ways. First, it engaged in a discussion with Tourville, the prosecutor, and Tourville's attorney. (26:9-11). Second, it alluded to the criminal complaint and "all other information in these files." (Doc. 26:12 in 2014AP1251). Neither these, nor any other source provides a factual basis, as shown below.

1. Information from the Criminal Complaint is insufficient to establish a factual basis.[8]

The Criminal Complaint in 2012CF27 was filed on January 23, 2012. (Doc. 1:1 in 2014AP1250) (Attached as Appendix E). Count One of the Complaint charged Tourville with Felony Theft, Party to a Crime, as a Repeater, contrary to §§ 943.20(1)(e) & (3)(d), 939.05, and 939.62(1)(b). The reference to § 943.20(1)(e) was clearly in error, since (1)(e)

[8] This section will examine the Criminal Complaint and the Amended Criminal Complaint. Outside the discussion with Tourville at the time of the plea, which will be discussed in the next section, there is no other information in the record that would establish a factual basis. At the plea hearing, DA Steffen specified that the Preliminary Hearing should also be included as a source of information to establish a factual basis. (Doc. 26:12 in 2014AP1251). However, the Preliminary Hearing in this case was waived by Tourville, so no evidence was adduced at such a hearing. (Doc. 18:3-5 in 2014AP1250).

makes it a crime to fail to return rental or leased property—facts that were never alleged or alluded to in any manner throughout the case.[9]

Two days later, the State filed an Amended Criminal Complaint. (Doc. 2:1 in 2014AP1250) (Attached as Appendix F). The charging section added something that was not in the original complaint, namely, the allegation that under the Felony Theft charge, Tourville "did take and carry away movable property of another." Although the Amended Complaint continued to erroneously cite to § 943.20(1)(e), it is clear that the State meant to charge under the portion of the theft statute listed in (1)(a) which states as follows:

> **943.20 Theft. (1)** ACTS. Whoever does any of the following may be penalized as provided in sub. (3):
>
> (a) Intentionally *takes and carries away*, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of such property.

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[9] Wisconsin's theft statute, Wis. Stat § 943.20, contains five sections that detail different types of theft. Section (1)(e) of the statute reads:

> 943.20(1) Whoever does any of the following may be penalized as provided in sub. (3):
>
> …
>
> (e) Intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement after the lease or rental agreement has expired. This paragraph does not apply to a person who returns personal property, except a motor vehicle, which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement, within 10 days after the lease or rental agreement expires.

(emphasis added).

The State did *not* include in the Complaint all of the various forms of theft listed in § (1)(a). Instead, it chose only the part of the statute that makes it a crime to "take and carry away" property.

Therefore, it must be determined whether the Amended Complaint alleged sufficient facts which, if proved, would constitute the crime of taking and carrying away property of another.[10] However, there are no such facts. According to the Amended Complaint, three men—not including Tourville—broke into the home of Kevin Beyl and stole a safe. (Doc. 2:2 in 2014AP1250). The men then drove to Tourville's residence and told him about the burglary and asked for his help in opening the safe. Tourville then joined them and the four of them went to a campsite. While there, one of the men used a torch to cut off the bottom of the safe and the rest poured water on the safe to keep the guns from burning. They all took the guns out of the safe, and the disposed of the safe in a swamp. The men then dropped off Tourville was later paid in cash for his assistance. (Doc 2:2 in 2014AP1250).

[10] In this appeal, Tourville does not argue that he should be allowed to withdraw his guilty plea on the basis that there are no facts alleging that he failed to return rental or leased property under § 943.20(1)(e). Although there clearly is no factual basis for that charge, it is unlikely that Tourville was prejudiced by the erroneous citation. *See* Wis. Stats. 971.26 (No indictment, information or complaint shall be invalid nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which does not tend to the prejudice of the defendant). *See also Craig v. State,* 55 Wis. 2d 489, 493, 198 N.W.2d 609 (1972); *State v. Piltz,* 2005 WI App 1, 277 Wis. 2d 875, 690 N.W.2d 885.

Thus, while it is clear that others took and carried away the property, there is no allegation in the Complaint that evidence that Tourville did so.

The fact that the State also charged Tourville under the party to a crime statute does not salvage the case. There is nothing in the Amended Complaint indicating that Tourville helped the others plan the burglary or theft, or that he was even aware of it until after the fact, when the other men brought the safe to him. Therefore, the party to a crime statute, Wis. Stat. § 939.05 does not operate to make Tourville liable in a vicarious manner. That statute states:

> **939.05 Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

Applying the above, since Tourville knew nothing about the burglary or theft until *after* the fact, none of Tourville's actions can be construed as:

(a) Directly committing the crime of taking and carrying away movable property of another;

(b) Aiding and abetting the taking and carrying away of movable property;

(c) Involvement in a conspiracy to move and carry away property of another.

To be guilty of theft, both "taking" and "carrying away" are distinct elements of the crime and must be proven separately. *See Champlain v. State*, 53 Wis. 2d 751, 755, 193 N.W.2d 868 (1972). The Wisconsin Supreme Court ruled in *Berry v. State* ,90 Wis. 2d 316, 280 N.W.2d 204 (1979), that to prove the "carrying away" element, the State must prove that there was movement "away from the area where the product was intended to be…."; *See also Johnson*, 200 Wis. 2d 704 (holding that there was insufficient factual basis for defendant's guilty plea to stealing a car because there was no carrying away: he could not start the car and therefore never moved it from where it was parked).

Here, any "carrying away" that Tourville participated in began from his house, not the victim's residence. Under *Berry*, Tourville's participation in moving the safe from his house to the campground does not satisfy the "carrying away" element of 943.20(1)(a).

2. Information gathered at the plea hearing is insufficient to establish a factual basis.

At the plea hearing, the court discussed the factual basis requirement related to the theft charge in 12CF27. The following dialog occurred:

> THE COURT: On your plea you understand – by your plea you're acknowledging that on or about August 27th, 2010 in this county with others you took and carried away movable property belonging to

another, specifically firearms belonging to a Kevin Beyl without his consent and with intent to keep them?

MR. MILLER: Do you understand those elements?

THE DEFENDANT: Intent, I never did the burglary. I have him a place to –

MR. STEFFEN: Says party to the crime.

THE COURT: That's as a party to a crime.

THE DEFENDANT: Yeah. Guilty. I understand.

THE COURT: All right. Finally in 13 CF 107 – let's go back to that so we make certain that the facts meet the elements of the crime. Mr. Miller, why don't you articulate, you just both said it on the record, and I think Mr. Tourville did as well, but the facts that meet the elements of the crime.

MR. STEFFEN: Judge, let me just say quickly that Mr. Tourville's statement was I didn't do the burglary and he's charged with a theft as a party to the crime. As part of the theft it would be our –the allegations that after the burglary took place and these individuals were looking for a way to store or stash the guns that were taken as a result of the burglary, that Mr. Tourville not only helped them in cracking a safe, but helped them in providing them with a means to hide the property that was taken as a result of the burglary. It was listed out in the probable cause statement as well.

THE DEFENDANT: I didn't give them nothing.

MR. MILLER: You were around them, you watched them, you were aiding and abetting them.

> THE DEFENDANT: I gave them a place to do it. I didn't give them no materials or I didn't hide nothing.
>
> THE COURT: You gave them a place –
>
> THE DEFENDANT: To cut open, yeah.
>
> THE COURT: Material that was –
>
> THE DEFENDANT: I didn't give them no material.
>
> THE COURT: No. No. No. You gave them the surroundings, the place to hopefully gain access to the safe.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Right.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And everybody agrees that that meets the elements of the crime?
>
> MR. STEFFEN: Yes.

(Doc. 26:8-11 in 2014AP1251) (Attached as Appendix F).

In its decision denying the postconviction motion, the court ruled as follows:

> What Defendant Tourville admitted to was providing a location to conceal the safe while attempts were made to gain access to it. Eventually, he participated in disposal of the safe which was an attempt to conceal it. While not pretty and certainly not textbook, the colloquy supports the conclusion that in 12 CF 27, Mr. Tourville was pleading to a violation of

> §943.20(1)(a) and there was a factual basis for the plea. Mr. Tourville hasn't provided testimony or even an affidavit that claims he didn't understand what he was pleading to in 12 CF 27. In fact the record indicates he was clearer on the facts than the Court was and spoke up when I tried to put words in his mouth. There was no manifest injustice.

(Doc. 67:6-7 in 2014AP1250).

The problem with the court's decision is that nowhere in the plea colloquy is there information that Tourville took and carried away property from the owner. The court apparently believed that providing a location to conceal the safe, or participating in the disposal of the safe was sufficient to establish a factual basis under the theft statute. It would have established this if the State had charged Tourville with "concealing" the property, which is another way to commit theft under § 943.20(1)(a). But he was not charged with "concealing" the property; he was charged with "taking and carrying away" the property.

The different modes of committing theft cannot be simply substituted for each other, as the court attempted to do. In *Jackson v. State*, 92 Wis. 2d 1, 10-11, 284 N.W.2d 685 (Ct. App. 1979), the court stated that:

> Section 943.20(1)(a), Stats., is similar to the statute involved in *Gipson*. It contains five distinct alternative elements of the offense. Without proof of one of these alternative elements, there is no crime of theft. The State must plead one of these alternative elements of the offense in the complaint or information. Without one of these alternative elements in the complaint or information, no crime is charged; therefore, the complaint or information is jurisdictionally defective and void. *Champlain v. State*, 53 Wis. 2d 751, 754, 193 N.W.2d 868, 871 (1972). The State may not, however,

> charge the defendant in the disjunctive by alleging that he took and carried away Or used Or transferred, etc. Where the complaint charges in the disjunctive and the terms are not synonymous, the complaint is defective. The charging document is duplicitous and fails to charge an offense with the requisite certainty or specificity.

This plea colloquy failed in providing the requisite certainty and specificity required by *Jackson*. Therefore, there was no factual basis for the plea, and Tourville must be allowed to withdraw his guilty plea in 12CF27.

CONCLUSION

For the above reasons, Tourville is entitled to a resentencing with a different judge under the terms of his original plea agreement. In addition, Tourville is entitled to withdrawal of his guilty plea in case number 2012CF27.

Respectfully submitted this 22st day of August, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,185 words.

John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

John A. Pray

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

John A. Pray

TABLE OF APPENDICES