STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2016AP002387-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

NOAH M. SANDERS,
Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Jefferson County Circuit Court, the Honorable David J. Wambach, Presiding

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BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. The State will supplement the statement of the facts and case as appropriate in its argument.

ARGUMENT

Summary of Law and Standard of Review

In cases where a defendant has alleged lack of factual basis to support the plea, reviewing courts have conducted an analysis under *State v. Bangert* to determine whether the lack of factual basis entitles the defendant to withdraw his plea. *See State v. Lackershire*, 2007 WI 74, ¶51, 301 Wis. 2d 418, 734 N.W.2d 23. (citations omitted)

Under *Bangert*, a defendant is entitled to an evidentiary hearing if the defendant's postconviction motion makes a *prima facie* showing that the plea was accepted without the trial court's conformance with Wis. Stat. §971.08 or other mandatory procedures and alleges that the defendant did not know or understand the information that should have been provided at the plea colloquy. *State v. Howell*, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48 (discussing *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986)). If a defendant succeeds in making this showing, the burden shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." *Bangert*, 131 Wis. 2d at 274 (citations omitted). The issue of whether a defendant made a *prima facie* showing under

§971.08, Wis. Stats. is subject to *de novo* review. *State v. Brown*, 2006 WI 100, ¶21, 293 Wis. 2d 594, 716 N.W.2d 906.

Section 971.08(1)(b), Wis. Stats. requires a trial court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b) (2015-16). The factual basis requirement '"protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (quoting *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166 (1969). A sufficient factual basis requires a showing that '"the conduct which the defendant admits constitutes the offense charged.'" *Lackershire*, 2007 WI 74, ¶33 (citing *White*, 85 Wis. 2d 488 and quoting *Ernst v. State*, 43 Wis. 2d 661, 674, 170 N.W.2d 713 (1969)). Pleading guilty to conduct that does not fall within the charge is incompatible with a knowing and intelligent guilty plea. *Lackershire*, 2007 WI 74, ¶35.

In the context of a negotiated plea, a circuit court "need not go to the same length to determine whether the facts would sustain the charge . . . " *State v. Sutton*, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146 (quoting *Broadie v. State*, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975). Factual basis can be established

from the facts set forth in the criminal complaint. *Id.* "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." *State v. Thomas*, 2000 WI 13, ¶22, 232 Wis. 2d 714, 605 N.W.2d 836. A factual basis may be established "when counsel stipulate on the record to the facts in the criminal complaint." *Id.* at ¶21.

I. BECAUSE SANDERS DID NOT MAKE A *PRIMA FACIE* SHOWING THAT THE TRIAL COURT DID NOT COMPLY WITH §971.08, WIS. STATS. OR THAT SANDERS DID NOT KNOW OR UNDERSTAND THE FACTUAL BASIS FOR THE CHARGES TO WHICH HE PLEAD GUILTY, HE IS NOT ENTITLED TO RELIEF.

1. The Complaint Established A Sufficient Factual Basis for The Two Counts of Intimidation of A Victim, Contrary to §940.22(2), Wis. Stats.

In *State v. Freer*, the Wisconsin Court of Appeals held that §940.44(2), Wis. Stats. prohibits knowingly or maliciously preventing or dissuading a victim from providing **any one or more** of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution. 2010 WI App 9, ¶24, 323 Wis. 2d 29, 779 N.W.2d 12 (emphasis added).

The Court relied on the facts as set forth in the Criminal Complaint to establish the factual basis for the defendant's guilty plea to Counts 1 and 3. (Transcript of Plea Hearing, 9:16-25, 10:1-10).

Regarding the facts that support Count 1, Sanders' conduct consists of trying to convince [KL] of his version of events regarding how her lip was injured. In Sanders' version of events, [KL] bit Sanders and then bit her own lip. Sanders asked [KL] why she had to call the police, indicating he was not happy she did so. Sanders told [KL] that she should not tell his probation agent anything that will "fuck him" more, which indicated that Sanders believed that it was [KL]'s fault that Sanders was in trouble. The State believes that Sanders' conduct of trying to pressure [KL] into accepting his version of events, which differed from her own, was conduct in which Sanders tried to dissuade [KL] from assisting the prosecution. Sanders' attempt to blame [KL] for his situation was an attempt to make [KL] feel guilty about Sanders' predicament and further dissuade her from assisting the prosecution.

Regarding the facts that support Count 3, Sanders told [KL] that she kept telling him to hit her. When [KL] reminded Sanders during their conversation that they should not be speaking due to the 72 hour contact prohibition, Sanders advised [KL] that he was "very

good with the law," and told her they can have contact while he is in jail. Sanders then ordered [KL] to go to the police and tell them she wanted the 72 hour contact prohibition removed. First, Sanders tried to convince [KL] that it was her fault she got hit. Then Sanders reminded [KL] that he knew how to manipulate the law. Finally, he ordered her to waive the contact prohibition, which would only further allow him access to [KL].

The State believes that all of these factors combined were an attempt to dissuade [KL] from assisting with the prosecution. Sanders again tried to manipulate [KL] into believing the incident was her fault, tried to manipulate her into dropping the 72 hour contact prohibition, which would be relevant to whether or not [KL] feared having contact with Sanders, and manipulated her into believing that he would get his way because he was "good with the law." Sanders' manipulations provide a factual basis that Sanders attempted to dissuade [KL] from assisting with the prosecution.

Sanders' reliance on *Lackershire* to support his claim that there was no factual basis for Intimidation of a Victim charges to which Sanders plead guilty is misplaced. In *State v. Lackershire*, the Wisconsin Supreme Court determined that the defendant's plea colloquy was not adequate because the factual basis relied upon established a substantial question of whether she was the victim of

the sexual assault rather than the perpetrator. 2007 WI 74, ¶4. Because of this, the court found that the trial court should have made further inquiry, other than relying on the facts in the criminal complaint and testimony from the preliminary hearing, to determine whether there was a sufficient factual basis to support the defendant's plea. *Id.* at ¶¶4, 39. In reaching this decision, the court noted that the facts in the Complaint and testimony relied upon raised a question as to whether the defendant admitted to the conduct that constituted the offense charged. *Id.* at ¶38. The defendant had maintained that she was raped in every statement she made. *Id.* at ¶¶40-41. At the plea colloquy, the trial court only asked the defendant if she had sexual intercourse with someone under 16, and the defendant stated that she did. *Id.* at ¶¶43-45.

However, the court failed to ask whether the defendant still maintained that she was raped. *Id.* at ¶43. As the court stated:

> Under the facts of this case, however, merely stating that the charge involved intercourse [with] a child served to obscure the fact that being the victim of rape negates a charge of sexual assault. Similarly, it obscures the fact that if the underlying conduct was a sexual assault of Lackershire, then that conduct does not constitute the offense charged. Given the unique circumstances of this case, the circuit court's description of the charge failed to protect Lackershire from pleading guilty without realizing that if the underlying conduct was a sexual assault upon her, then her conduct does not actually fall within the charge.
> *Id.* at ¶¶43-45.

Sanders' case cannot be compared to *Lackershire*, as the probable cause section of the complaint in Sanders' case alleges

facts that constitute the crime of Intimidation of a Victim. Unlike *Lackershire*, there was no intervening factor, such as rape, that would absolve Sanders of liability. Sanders is not suggesting that there is exculpatory evidence out there that is not apparent from the Criminal Complaint. Unlike *Lackershire*, there was no confusion regarding the nature or factual basis to which Sanders plead guilty. Sanders points to nothing that would absolve him of liability. The only potential defense is a denial that the events as stated occurred. This possible defense was negated when Sanders plead guilty. *See State v. Bratrud*, 204 Wis.2d 445, 451, 555 N.W.2d 663 (Ct. App. 1996) (finding that a plea of guilty is an admission of "all factual assertions which were pleaded in the information."). As stated, the Complaint in this matter established a sufficient factual basis for the two counts of Intimidation of a Victim, and the court's reliance on the Criminal Complaint to establish the factual basis was proper.

2. The Trial Court's Reliance on The Criminal Complaint for The Factual Basis Conformed with 971.08, Wis. Stats., And Sanders Has Failed to Show That He Did Not Know Or Understand How The Facts Set Forth in The Criminal Complaint Constituted The Charges to Which He Plead Guilty.

At the plea hearing, the court asked defense counsel if he felt Sanders understood the charges against him, the elements of those charges, and the possible consequences of being found guilty, and

defense counsel answered yes. (Transcript from Plea Hearing,7:5-9). The court asked defense counsel if he was confident that the defendant was knowingly and intelligently waiving his constitutional rights, and defense counsel answered yes. (7:10-13). The court asked defense counsel if he believed the factual portion of the Complaints provided an adequate factual basis for the court to accept the defendant's plea and find him guilty, and defense counsel answered yes. (9:16-22). The court then asked Sanders if he felt a jury could find him guilty of offenses he was pleading guilty to based on the facts in the criminal complaints, and Sanders answered yes. (9:23-25, 10:1-6). The court stated that it had reviewed the factual portions of the criminal complaints and agreed that they provided an ample basis to accept Sanders' guilty pleas. (10:7-10). Regarding the Intimidation of a Victim charges at issue here, the court read the elements to Sanders and asked him how he plead to the charges. (13:23-25, 14:1-8, 22-25, 15:1). Sanders plead guilty. (14:9, 15:2).

In *Thomas*, the Wisconsin Supreme Court articulated how trial courts can establish the factual basis for a plea. The court stated, "a factual basis is established when counsel stipulate on the record to facts in the criminal complaint." 2000 WI 13, ¶21. In *Thomas*, the defendant moved to withdraw his conviction for second degree reckless homicide as party to a crime on the grounds that a factual

basis did not exist for his plea. *Id.* at ¶10. The Court disagreed and found that a proper factual basis was established. *Id.* at ¶27. The court noted that at the plea hearing, the defendant agreed that he understood the elements of the crime charged. *Id.* at ¶25. The State and defense counsel both stipulated to the factual basis. *Id.* The court asked defense counsel if he would stipulate to the facts as the district attorney read them from the complaint, and defense counsel responded yes. *Id.* There had been some dispute regarding certain small points, but it was determined that none of these points "imputed" the elements of the crime. *Id.* at ¶26. This was further clarified at the sentencing hearing where the defendant stated that he agreed with the stipulation of facts as stated at the plea hearing. *Id.* The court concluded that, "when the record is viewed under the totality of the circumstances, it is evident that Thomas assented to the facts as his counsel stipulated to them." *Id.* at ¶27.

Similarly, in the plea hearing in this matter, the State and defense counsel both stipulated to the factual basis for the guilty plea, which consisted of the facts in the Criminal Complaint. (Transcript from Plea Hearing, 9:16-22). Sanders indicated that defense counsel went through all the documents related to the plea including the plea questionnaire, the case settlement forms, and the elements of the offenses to which Sanders was pleading guilty.

(3:21-25, 4:1). Sanders indicated that he understood everything defense counsel read to him. (4:2-7). The plea questionnaire and waiver of rights form as well as elements and penalty forms that defense counsel reviewed with Sanders were submitted to the court prior to the hearing. (2:24-25, 3:1-4). There was never any time at the plea hearing where Sanders indicated that he misunderstood the charges to which he was pleading or that he was indecisive about entering his guilty plea. When the court asked Sanders how he plead to the charges in this matter, Sanders answered guilty. (13:23-25, 14:1-9, 14:22-25, 15:1-2). Because the court complied with §971.08, Wis. Stats., and there is no indication Sanders did not know or understand how the facts in the criminal complaint provided the factual basis for the charges, Sanders failed to make the required showing that he was entitled to an evidentiary hearing on his Motion to Withdraw the Plea.

II. SANDERS CANNOT ESTABLISH A MANIFEST INJUSTICE WOULD RESULT IF HE IS NOT ALLOWED TO WITHDRAW HIS PLEA.

A defendant seeking to withdraw a guilty plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" *State v. Cain*, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177 (citing *State v.*

Thomas, 2000 WI 13, ¶16 and quoting *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1991)). "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary, and unintelligently entered." *State v. Denk*, 2008 WI 130, ¶71, 315 Wis. 2d 5, 758 N.W.2d 775 (citing *State v. Dawson*, 2004 WI App 173, ¶6, 276 Wis. 2d 418, 688 N.W.2d 12). One type of manifest injustice is lack of a sufficient factual basis to support the plea. *Thomas*, 2000 WI 13, ¶17. On review, this court must determine whether a manifest injustice would result if the defendant is not allowed to withdraw his plea, not whether the court erred in accepting the plea. *Cain*, 2012 WI 68, ¶30 (citing *White*, 85 Wis. 2d at 491). "This is so because while the plea may have been invalid at the time it was entered, it may be inappropriate, in light of later events, to allow the withdrawal of the plea." *Cain*, 2012 WI 68, ¶30.

When applying the manifest injustice test, a reviewing court may examine the entire record or "totality of the circumstances" to determine whether a manifest injustice would result if the defendant is not allowed to withdraw his plea. *See id.* at ¶31.

As stated previously, the State does not believe Sanders made a *prima facie* showing that he was entitled to an evidentiary hearing on whether he should be allowed to withdraw his plea. However,

should this Court find Sanders made a *prima facie* showing, the State believes that once the court views the "totality of the circumstances" in the record, it will conclude that denying Sanders' request to withdraw his plea would not result in a manifest injustice.

The charges at issue in this matter were not the only charges the defendant plead to on March 4, 2016. Sanders also plead to one count of Disorderly Conduct, Domestic Abuse in Jefferson County Case 2015CM000206 and five counts of Misdemeanor Bail jumping in Jefferson County Case 2015CM000347. (Transcript of Plea Hearing, 10:21-25, 12:24-25, 13:1-17, 16:16-25, 17:1-4). The charge of Misdemeanor Bail jumping in 2016CM000109 was dismissed and read-in. (9:7-12). The facts of 2015CM000206 concern the incident in which Sanders injured [KL]'s lip. (Criminal Complaint in 2015CM000206, Supplemental Appendix Document A). The facts of 2015CM000347 indicate that there were a total of 69 phone calls between [KL] and Sanders between June 25, 2015 and July 27, 2015. (Criminal Complaint in 2015CM000347, Supplemental Appendix Document B). The facts of 2016CM000109 indicate that there were 165 phone calls made to [KL] using Sanders' PIN number and 31 phone calls made to [KL] using another inmate's PIN number from the Dodge County Jail on and between August 26, 2015 and October 16, 2015. (Criminal Complaint in

2016CM000109, Supplemental Appendix Document C). When considered in isolation, the factual basis for the two counts of Intimidation of a Victim in this case to which Sanders plead might seem benign. However, when considered as part of the larger picture or the "totality of the circumstances," the facts supporting these two charges are part of a larger picture of domestic abuse against [KL].

At the sentencing hearing, the trial court noted that Sanders' actions of disputing what occurred with [KL], questioning why [KL] went to the police and telling [KL] not to tell his probation agent about these incidents were "part of the context and dynamics of domestic abuse." (Transcript of Sentencing Hearing, 23:15-25, 24:1-6, Supplemental Appendix Document D). The court then noted that one of the purposes of the 72 hour contact prohibition in domestic violence cases is to prevent the offenders from intimidating the victim so that the victim does not cooperate with the prosecution. (Appx. Doc. D, 24:19-25, 25:1-12). The court noted that as a result of trying to control the people [KL] spoke to about this incident or what she said about the incident, Sanders was making prosecution of these crimes more difficult. (Supp. Appx. Doc. D, 25:24-25, 26:1-12). The trial court clearly viewed the charges in this matter to be the result of an abusive relationship that was not limited to two phone calls, but rather, as part of a pattern common to abusive

relationships. That conclusion is supported by the totality of the circumstances, which includes three other cases in which Sanders either abused [KL] or ignored court orders that are intended to protect [KL] from intimidation. As such, even if Sanders met his burden under the *Bangert* test, he cannot show that a manifest injustice will result if he is denied the opportunity to withdraw his guilty pleas.

CONCLUSION

The Complaint in this matter provided sufficient factual basis for the two counts of Intimidation of a Victim, contrary to §940.44(2), Wis. Stats. to which Sanders plead guilty. The facts set forth in the Complaint showed Sanders attempted to get [KL] to accept an alternative version of what occurred, one in which [KL] was the aggressor. They showed that Sanders was angry that [KL] reported the incident to the police. They showed that Sanders pressured [KL] to waive the 72 hour contact prohibition and not speak with his probation agent. Finally, they showed that Sanders tried to intimidate [KL] with his knowledge of the law. All of these factors combined provide sufficient factual basis that Sanders knowingly or maliciously dissuaded [KL] from assisting in the prosecution of Sanders.

Given the Complaint established a sufficient factual basis for the charges, the court's colloquy complied with §971.08(1), Wis. Stats. The court reviewed the factual basis, which came from the Criminal Complaints, and properly concluded that they provided "ample basis" for the crimes charged. Pursuant to *Thomas*, the court was allowed to rely on counsel's stipulation that the Criminal Complaints provided the factual basis for the crimes charged. There is nothing in the record that indicates that Sanders' plea was not knowing and intelligent. As such, Sanders failed to make a *prima facie* showing under Wis. Stat. §971.08 or other mandatory procedures or that he did not know or understand the factual basis for the crimes to which he plead guilty.

Finally, Sanders plead guilty to charges in two other cases on the same date he entered his guilty plea in this matter. These charges involved either Sanders committing another crime against [KL] or violating the bond in this matter by having contact with [KL]. Another case involving similar contact was dismissed and read-in. Considering the totality of the circumstances, Sanders cannot show a "manifest injustice" occurred such that he should be allowed to withdraw his plea.

Based on the foregoing, the State respectfully requests that this Court affirm the decision of the trial court to deny Sanders' request for an evidentiary hearing and/or withdraw his plea.

Dated this 19 day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 24 pages with 4,364 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 19 day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19 day of March, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(2)(a), 809.19(12)(f)

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is a Supplemental Appendix that complies with Wis. Stats. §§809.19(2)(a) and 809.19(12)(f) and contains portions of the record essential to the 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 required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials, specifically juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserve confidentiality and with appropriate references to the record.

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

Dated this 22 day of March, 2017.

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