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WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY
HONORABLE DAVID WAMBACH

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
NOAH M. SANDERS,
DEFENDANT-APPELLANT.

REPLY BRIEF AND ARGUMENT OF APPELLANT

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ARGUMENT

I. Mr. Sanders has made a *prima facie* showing that the circuit court's plea colloquy did not comply with Wis. Stats. § 971.08(1)(b) and is accordingly entitled to relief .

Mr. Sanders submits that he has made a *prima facie* showing that the circuit court's plea colloquy failed to comply with Wis. Stats. § 971.08(1)(b). Accordingly, he is entitled to relief.

Although the court may rely on the stipulation of counsel that the facts set forth in the criminal complaint provide a factual basis for the charges that are the subject of the plea(s), the court's inquiry into whether Mr. Sanders in fact committed the offenses was insufficient.

Several cases encompassing multiple charges were resolved at Mr. Sander's plea hearing. The court did not discuss each specific case, or the specific facts of each of the charges. Instead, the court made a rather general finding that the facts set forth in the various complaints provided a factual basis for the charges. The

stipulation obtained from defense counsel was equally non-specific.

Without a more specific and substantive inquiry into how the facts set forth in support of the individual charges alleged in counts one and three satisfy the elements of the offenses, the court's determination of a factual basis is *prima facie* inadequate to satisfy the requirements of Wis. Stats. § 971.08(1)(b). Accordingly, Mr. Sanders is entitled to relief.

A. The facts set forth in the criminal complaint do not provide a factual basis to support the charges set forth in counts one and three.

Counts one and three allege violations of Wis. Stats. § 940.22(2). In order to establish a violation, the state must prove that the defendant interfered with the prosecution of the underlying case by knowingly or maliciously preventing or dissuading a person who is the victim of a crime from either (1) causing a complaint, information, or indictment to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in

the prosecution. State v. Freer, 2010 WI App 9, ¶24, 323 Wis.2d 29, 779 N.W.2d 12 (Ct.App.2010).

Mr. Sanders respectfully disagrees that his conversations with KL constitute an attempt to dissuade or prevent KL from assisting in the prosecution of the underlying case. In one conversation, Mr. Sanders disputed KL's account of what had transpired, and told KL not to talk to his probation agent so as not to adversely affect his situation. In another conversation, Mr. Sanders disputed KL's assertion that he was not supposed to be having contact with her, and told her to have the seventy-two hour no contact provision removed.

The state submits that the underlying context of these conversations was to make KL feel guilty about Mr. Sanders predicament, and by doing so, dissuade KL from assisting in the prosecution of the underlying battery case. (Brief of Respondent, p. 10-11).

With respect to the more direct statements about talking to his probation agent and lifting the seventy-two hour no contact, Mr. Sanders would submit that neither statement would have any effect on whether KL would assist in the prosecution of the underlying case.

With respect to the more indirect statements in which Mr. Sanders, as the state argues, attempted to make KL feel guilty and less committed to assisting in the prosecution, Mr. Sanders reiterates that such a standard would be vague and ambiguous, and would preclude a reasonable person from knowing whether his conduct might be a violation of the statute. The court's reliance on its subjective background in determining that guilt is an effective way to influence behavior is consistent with Mr. Sanders' argument that the application of the statute suggested by the state is objectively vague.

Mr. Sanders would respectfully submit that

something more direct is necessary than attempting to make a crime victim feel guilty. Even if an overt direct statement such as "don't talk to the DA" or "take back what you said" is not required, there must be something more concrete. In Freer, for example, the defendant insinuated that consequences would follow if the person reported an altercation involving the two men. In the conversations relied on by the court to find a factual basis, Mr. Sanders made no similar threats.

Although the facts set forth in the complaint may well lead to the conclusion that Mr. Sanders was trying to make KL feel guilty about reporting the incident to police, Mr. Sanders maintains that such conduct is insufficient to establish a violation of Wis. Stats. § 940.44(2).

B. The court's reliance on the criminal complaint does not function as a sufficient determination of an adequate factual basis as required by Wis. Stats. § 971.08(1)(b).

In its inquiry to determine whether Mr. Sanders

in fact committed violations of Wis. Stats. § 940.44(2), the court relied on stipulation from defense counsel as well as statements from Mr. Sanders. (DOC 61:9-10; Appendix B:9-10).

However, as Mr. Sanders had noted, the court's inquiry was non-specific. The court did not discuss any of the specific facts alleged in the complaint. The court did not discuss how the facts alleged satisfied the elements of the offenses. Mr. Sanders would submit that the court's non-specific inquiry does not satisfy the requirement that it "personally ascertain whether a factual basis exists to support the plea." See State v. Bangert, 131 Wis.2d 246, 262, 389 N.W.2d 12 (1986).

One of the purposes of the requirement that the court ascertain whether a factual basis exists to support the plea is to prevent a defendant from pleading to a crime without realizing that his conduct does not actually fall within the charge. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23

(2007). The court's interaction with Mr. Sanders in which the court generally referred to "all the elements of all the offenses you're charged with" does not function to alleviate that concern. (DOC 69:9-10; Appendix B:9-10).

With respect to the general stipulation obtained from defense counsel, Mr. Sanders maintains that it is insufficient to satisfy the requirement of Wis. Stats. § 971.08(1)(b). The supreme court emphasized the importance of the court making a sufficient independent inquiry, even when defense counsel has stipulated to the factual basis, in State v. Howell, 2007 WI 75, ¶59, ¶61, 301 Wis. 2d 350, 734 N.W.2d 48 (2007).

Although factually distinguishable, the principle from Howell appears consistent with Mr. Sanders' argument that the court's duty to personally ascertain whether a factual basis exists to support a plea is not satisfied by the combination of a perfunctory exchange

with the defendant and a general stipulation from defense counsel.

II. As a consequence of an insufficient factual basis to support the charges set forth in counts one and three of the criminal complaint, it would constitute a manifest injustice not to permit Mr. Sanders to withdraw his pleas to counts one and three.

As discussed in Mr. Sanders' initial brief and argument, one of the questions in this case involves the applicable procedure for resolving requests for plea withdrawal that are based on challenges to the adequacy of the underlying factual basis.

As the supreme court noted in Lackershire, the Bangert procedure is an awkward fit. The court noted that by the very nature of the alleged defect, when the facts are undisputed and do not provide a factual basis for the plea, a manifest injustice has occurred and the defendant *is allowed* to withdraw his plea. State v. Lackershire, 2007 WI 74, ¶47-48, 301 Wis.2d 418, 734 N.W.2d 23 (2007)(Emphasis added).

The facts in this case are undisputed. If the undisputed facts alleged in support of counts one and three cannot, as a matter of law, constitute violations of Wis. Stats. § 940.44(2), Mr. Sanders is allowed to withdraw his plea. It would be unnecessary to have an evidentiary hearing to resolve factual disputes or determine whether Mr. Sanders' plea was knowing or intelligent in spite of the defect. By the nature of the defect itself, the plea cannot satisfy the requisite standard. Mr. Sanders submits that in order to avoid a manifest injustice, he should be allowed to withdraw his plea due to an inadequate factual basis. State v. Lackershire, 2007 WI 74, ¶48, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

In its brief, the state submits that this court should look to the totality of the circumstances to determine whether it would constitute a manifest injustice not to allow Mr. Sanders to withdraw his plea. (Brief of Respondent, p.17).

However, State v. Cain, 2012 WI 68, 342 Wis. 2d 1, 816 N.W.2d 177 (2012) did not involve a challenge to the factual basis for the defendant's plea. The issue in Cain was whether the defendant had actually entered a plea at all, not whether there was a factual basis for the plea itself. State v. Cain, 2012 WI 68, ¶27-28, 342 Wis. 2d 1, 816 N.W.2d 177 (2012). Accordingly, the issue the court decided was whether the circuit court had erred in accepting the defendant's plea, not whether the circuit court erred in finding a factual basis. State v. Cain, 2012 WI 68, ¶29, 342 Wis. 2d 1, 816 N.W.2d 177 (2012).

In Cain, the defendant made an admission during the sentencing hearing regarding the number of marijuana plants he possessed that was different than what he had admitted at the plea hearing. State v. Cain, 2012 WI 68, ¶29, 342 Wis. 2d 1, 816 N.W.2d 177 (2012). The court concluded that it was proper to examine the totality of the record, including the

admissions at the sentencing hearing, in order to determine whether a manifest injustice would occur if the defendant was not allowed to withdraw his plea. State v. Cain, 2012 WI 68, ¶29, 342 Wis. 2d 1, 816 N.W.2d 177 (2012).

Relying on Cain, the state is asking this court to go beyond a consideration of the totality of the circumstances of the present case. By the nature of its argument, the state appears to argue that Cain stands for the proposition that the court can consider not just the record of the present case (15CM251), but also the circumstances connected to the other cases that Mr. Sanders resolved on the day of his plea hearing. (15CM206 and 15CM347).(Brief of Respondent, p. 18-19).

Mr. Sanders would disagree that Cain stands for the proposition that the court can consider facts and circumstances from other cases in resolving the manifest injustice issue in the present case. The court in Cain

made no such inquiry, instead looking simply to the transcript from the sentencing hearing in the case before it.

In Cain, the court was attempting to resolve a conflict between the defendant's admissions. There is no such conflict here. Instead, the state submits that although the circumstances of the present case may seem benign, consideration of facts alleged in other cases paints a larger picture of abuse. (Brief of Respondent, p. 19).

Mr. Sanders would respectfully disagree that the court can or should rely on facts alleged in other cases to supplement the facts of the present case. Further, the resolution of the question as to whether failure to allow Mr. Sanders to withdraw his plea would result in a manifest injustice boils down to whether there are sufficient facts of record to establish violations of Wis. Stats. § 940.44(2), not whether facts from other cases

"are part of a larger picture of domestic abuse against KL." (Brief of Respondent, p. 19).

The conduct relied on by the court to provide a factual basis for the Mr. Sanders' pleas to counts one and three in case number 15CM251 does not establish violations of Wis. Stats. § 940.44(2). Due to an insufficient factual basis for those pleas, it would constitute a manifest injustice if Mr. Sanders is not allowed to withdraw them. State v. Lackershire, 2007 WI 74, ¶48, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

Mr. Sanders notes that the supreme court went on to observe in Lackershire that the failure to fulfill the Wis. Stats § 971.08(1)(b) factual basis requirement entitles the defendant to the Bangert procedure, based on cases subsequent to Bangert. State v. Lackershire, 2007 WI 74, ¶51, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

If this court determines that the Bangert procedure is appropriate and necessary, Mr. Sanders

would reiterate his argument that he has made a *prima facie* showing that the court's plea colloquy did not comply with Wis. Stats. § 971.08(1)(b), and as a consequence he did not understand that the conduct to which he admitted did not constitute the offenses charged in counts one and three.

Accordingly, he would be entitled to an evidentiary hearing in which the burden would shift to the state to show by clear and convincing evidence that Mr. Sanders' pleas to counts one and three were knowing, intelligent, and voluntary. State v. Lackershire, 2007 WI 74, ¶52, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

CONCLUSION TO REPLY BRIEF AND ARGUMENT

For the reasons stated, Mr. Sanders submits that the circuit court erred in denying his postconviction motion to withdraw his plea.

Accordingly, Mr. Sanders would respectfully request that the court reverse the denial of his

postconviction motion, permit the withdrawal of his plea to counts one and three, vacate the judgment of conviction; or in the alternative reverse the denial of his postconviction motion and remand for an evidentiary hearing.

Dated this 6th day of April, 2017.

Respectfully submitted,

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Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).

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

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Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2220 words.

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Certification of Appendix Compliance with Wis. Stats. § Wis. Stats. 809.19(2)(a).

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 Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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