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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2018AP2124-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

KENNETH J. HEINRICH,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN THE
CIRCUIT COURT FOR DODGE COUNTY,
HONORABLE STEVEN G. BAUER, CIRCUIT
COURT JUDGE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

Questions Presented

1. Were three counts of bail jumping multiplicitous where they were based on a single bond, as single condition of bond and a single incident of violating that bond?

What the circuit court found: The circuit court found the counts were not multiplicitous.

What the Court of Appeals should hold: The three counts are the same in law, the same in fact, and the legislature did not intend multiple punishments.

2. Was there a lack of a factual basis for Mr. Heinrich's no contest pleas, rendering the plea involuntary?

What the circuit court found: There was an adequate factual basis for the plea because "bail" is not the same as "bond."

What the Court of Appeals should hold: There was an inadequate factual basis for the plea because “bail” and “bond” mean essentially the same thing for the purposes of Wis. Stat. § 969.13(1), so the bond had previously been revoked by operation of law based upon Mr. Heinrich’s violation of bond months prior to the day of the present offense.

Statement on Oral Argument And Publication

Mr. Heinrich would not oppose the Court’s holding an oral argument, but publication of the decision is unlikely because this is an appeal of misdemeanor convictions. The decision is thus likely to be a one-judge decision under Wis. Stat. § 752.31(2)(f). *See* Wis. Stat. § Rule 809.23(1)(b)4.

Relevant Statutory Provisions

Wis. Stat. § 969.13(1) states,

If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited.

Wis. Stat. § 946.49(1)(a) states,

Whoever, having been released from custody under ch. 969 intentionally fails to comply with the terms of his or her bond is: If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

Statement of the Case

The Defendant-Appellant, Kenneth J. Heinrich, appeals from convictions and sentences after being found guilty of the misdemeanor crimes of Theft of Movable Property, in violation of Wis. Stat. § 943.20(1)(a), Carrying a Concealed Knife, in violation of Wis. Stat. § 941.231, Possession of Drug Paraphernalia, in violation of Wis. Stat. § 961.573(1), and three counts of Bail Jumping, in violation

of Wis. Stat. § 946.49(1)(a). Mr. Heinrich was sentenced as a repeater under Wis. Stat. § 939.62(1)(a), because he had been convicted on October 11, 2013, of the felony crime of Escape in Dodge County Cir. Ct. Case No. 2013CF230, which conviction remained throughout the case at bar (and remains to this day) unreversed, and thus the normal misdemeanor sentence lengths were enhanced.

The case began on March 1, 2017, when the State filed a criminal complaint charging Mr. Heinrich with Theft from a Person (class G felony), Carrying a Concealed Knife, Possession of Drug Paraphernalia, and three counts of Bail Jumping, all as repeaters. R1.¹ The case was bound over on March 9, 2017, following Mr. Heinrich's waiver of preliminary hearing, R6, and the State filed an information with the same counts on March 22, 2017. R10. The State

¹This brief will use the following system for citing to the record: R followed by the item's number according to the clerk's record followed, if applicable, by a colon and page number, *e.g.*, R1:2 for the second page of the criminal complaint.

filed an amended information on June 27, 2017, R20, which appears to be different than the original information only in that it states the defendant's date of birth and excludes his address.

On August 4, 2017, Mr. Heinrich pleaded no contest to Possession of Drug Paraphernalia, and three counts of Bail Jumping, all as repeaters. R25, R26, R85. The factual basis for the plea was the following, which is quoted verbatim from the criminal complaint:

From the report of Officer Birch. On Sunday, February 26, 2017, at approximately 7:23 p.m., I, Officer Birch, of the Mayville Police Department, was in the City of Horicon assisting Horicon Police Department on an unrelated call. Dodge County dispatch informed me that there was a theft in progress of a cash register at Sherwood Family Restaurant, located at 1145 Horicon Street, in the City of Mayville, County of Dodge, State of Wisconsin. I immediately started towards that location. As I was en route, dispatch also informed me that the suspect was a 48 to 50 year old white male with jeans, blues jean jacket, and curly brown hair. The suspect was not recognized by anyone in the restaurant and fled on foot towards downtown. There was approximately \$2,000 in the register at the time it was taken and the register was thrown on the ground. The caller

was later identified as an employee, [ND]. I traveled to Sherwood Family Restaurant to make contact with the witnesses. Upon arrival, I observed an upside down register in numerous pieces in the parking lot near the restaurant. There were four people standing around it. I recognized one of the people in the parking lot as [DL]. Two of the people stated they were employees of the restaurant and verbally identified themselves as [ND] and [CS]. The fourth person verbally identified herself as [FEK] and informed me that she was the owner of the restaurant ... All parties informed me they witnessed the incident inside the restaurant. [ND] informed me that the register was left where the suspect dropped it and it had not been touched. Photographs were taken of the register and its location in the parking lot. It was then collected and placed inside my patrol vehicle for safe keeping while I obtained more information from the witnesses until the cash register could be transported to the Mayville Police Department. [FEK] informed me that during the incident she was in the back of the kitchen doing dishes. She said she did not see anything, but heard [ND] yell, "Call 911." She then rushed to the front of the restaurant and was informed that a customer took the cash register and ran outside with it. She then went outside and saw a male, who she later learned was [DL], pushing another male that was carrying the register. She also heard [DL] yell, "Drop the register." After being pushed, the suspect dropped the register in the parking lot and then pulled out a big dark knife from his right hip area. [FEK]

yelled “be careful” when she saw the knife and went back inside the restaurant. [FEK] informed me that she never saw the suspect’s face because she was standing behind [DL]. When I asked [FEK] to describe the knife, she stated she did not know what kind of knife it was, but it was not a kitchen knife. She stated the knife had a big handle that was dark. She also said the metal part of the knife was also dark in color. When I asked her how long the knife was, she held her hands in front of her about six inches apart, indicating the estimated length of the knife. I then interviewed [CS] who informed me that she was the waitress for the suspect. She stated the suspect informed her that he was very hungry. She suggested to him the Dagwood burger and fries, which he ordered, as well as four cups of coffee. [CS] stated she noticed that he smelled of alcohol while she was taking his order and that his hands were shaky. After the male finished eating, [CS] placed his bill on the table which totaled to \$10.23. When she placed the bill on the table, the male just said, “OK” and kept his head down and didn’t look at her. [CS] said that was not normal behavior for customers. She informed me that normally when customers are given the bill, they make eye contact, generally say thank you, look at the bill, and reach for their wallet to pay for their bill. [CS] had what she described as an odd feeling about him and told [ND] to watch him and to make sure he pays his bill before he leaves. [CS] then went back into the servers’ station of the restaurant to eat some of her meal that was back there. [CS] did not come back out to the dining

area until she heard [ND] yell “call 911.” By the time [CS] got to the dining area, the suspect was already outside. [CS] stated that the suspect was a white male, approximately 5’11” to 6’0” tall, skinny, 45 to 50 years old. She reported that he had brown curly or wavy hair with a light beard. She said he was wearing a jean jacket, blue jeans, and brown shoes. The suspect was also carrying with him a white plastic bag with miscellaneous items. She stated he did not have an accent or anything distinct about his voice. [CS] said he did not have tattoos or scars that she noticed, but he did not take off his coat. She also said he was not wearing glasses. I asked her if it looked like he had just come from a store after buying the items in the bag. She did not believe so because she said the items looked older. She recalled seeing a folded shirt in the bag, cigarette wrapping papers, and a leather item. [CS] could not remember seeing what store the bag was from. I then interviewed [ND] She informed me that when the suspect came into the restaurant, she sat him down in a booth near the northeast corner of the restaurant at approximately 7:10 p.m. She then took his drink order of a cup of coffee. [ND] reported that he smelled of cigarette smoke and alcohol. [ND] thought the male was a little fidgety but nothing too unusual. She stated he came into the restaurant alone and no one joined him throughout the course of his meal. [ND] informed me that [CS] waited on him and she did not have contact with him again until he was done with his meal. Towards the end of his meal, [CS] told [ND] to keep a close eye on the male

because she had a feeling that he was going to try to leave without paying his bill. When the male walked up to the register, she went behind the register station. He began checking his pockets saying, "I know I had \$20.00." [ND] suggested that maybe he left his money in his booth. They both went over to the booth, but there was no money found by the booth where he was sitting. [ND] turned around and saw the male standing back up by the register and saw him tug on the register cord. This concerned her so she hurried back up to the register station. Once she got back to the register, she thought that he maybe accidentally hit the register cord while reaching for a pen. The male continued to insist that he had \$20.00 and again checked his pockets and wallet. [ND] stated she could see several plastic cards inside of his wallet but was not able to identify any stores, credit cards, or names on the cards. [ND] suggested again that maybe he had dropped his money near where he was sitting. [ND] began walking toward the booth where he was seated. She was approximately five steps away between the first and second row of tables closest to the register when she turned around to speak with the suspect when she saw him grab the register on either side of it near the bottom and run towards the door. As this was happening, [ND] yelled, "Hey, hey, hey, call 911!" When the suspect ran out the door, she called 911. I next interviewed [DL]. He informed me that he was at the restaurant having dinner with his father and several other people. His attention was caught when [ND] yelled, "Hey, hey, hey!" He then saw a man

rushing out the door. [DL] got up and ran out of the restaurant after him. They both exited through the south door. Once exiting the restaurant, he saw the male holding the cash register running south. [DL] pushed him with two open hands on his back while yelling, "Drop the register." The male fell, dropping the register on the hood of a silver Mercury with registration plates of 525ZAM. The vehicle was estimated to be in the second or third parking stall south of the door. When the suspect dropped the register on the vehicle, he fell between it and another vehicle that was parked next to it. While the suspect was on the ground, he reached to his right hip with his left hand pulled out a dark matte knife and was holding it towards him. [DL] reported that he said, "Don't even think about it." The man then got up and ran south. [DL] felt the male threatened aggressive behavior and he feared for his safety. [DL] then went back inside to tell his dad what had happened. [DL] stated that he was not injured during the altercation. In addition to the description that was already given, [DL] recalled the suspect's hair was slightly graying. He also said the suspect was wearing a red flannel shirt under his jean jacket. [ND] estimated there to be eleven customers in the restaurant during the incident. She informed me that everyone she had talked to inside the restaurant did not recognize the suspect. Written statements were collected from [ND, CS, K and DL]. A No Consent was collected from [FEK] for the damage to the cash register which was estimated to be worth approximately \$300.00. A second No Consent form

was obtained for the meal the suspect did not pay for in the amount of \$10.23. Crime Victim forms were also provided to [ND]. It should be noted that [FEK] does not know if the suspect was able to take any money out of the register because she did not touch or open the cash drawer after the incident. When I found the cash register lying in the parking lot outside, it had multiple bills sticking out of the drawer but the drawer was still closed. [FEK] informed me she did not give the subject permission to take or damage any of the restaurant's property.

From the report of Det. Hockers. On Monday, February 27, 2017, I, Detective Hockers, of the Mayville Police Department, followed up on this case in an attempt to identify the suspect in this case, a description of the subject was placed on the Mayville Police Department Facebook page. There was a phone call made to the police department by an individual who observed a male white subject matching the description of our suspect in this case. That caller observed the suspect and identified him as having the first name of "Kenny". The caller stated Kenny was at Sidelines Bar, in Mayville, Wisconsin, on Sunday, February 26, 2017, between 4:30 and approximately 6:00 p.m. The subject who called stated Kenny was wearing a denim jacket and some type of red flannel shirt underneath the jacket. The subject was also carrying a white plastic bag and had his own rolled cigarettes. The caller stated Kenny was acting like he was "out of it" and stated they believe Kenny may use heroin and other drugs. The caller was not

positive of Kenny's last name; however, I was later able to identify that the suspect would be Kenneth J. Heinrich. I also had the opportunity to meet with [ND] who is one of the witnesses at Sherwood Family Restaurant. I met with her at the Mayville Police Department where she advised me and gave me the description of the suspect who she saw. That description does match the description of Heinrich. She was also able to tell me that while the suspect was at Sherwood Restaurant on the night of this occurrence, he was carrying a white, plastic bag, much like a Piggly Wiggly type bag. Inside of the bag was some type of brown box with equipment to roll his own cigarettes. On Monday, February 27, 2017, at 3:34 p.m., I received a text message from [CONVICTION] stating that Ken Heinrich just walked into Sidelines Tap and was wearing the same jacket and the same shirt as described yesterday. A short time later, [CONVICTION] called me back on the cell phone stating that Heinrich was carrying a white plastic bag and inside the bag were materials for rolling his own tobacco cigarettes. Myself, Captain Vossekuil, and Deputy Bauch, then went to Sidelines Tap where we made contact with Kenneth Heinrich as he was sitting at the west end of the bar consuming beer. He was wearing the same clothes that he had on the day of this incident. That was according to him later when I interviewed him. I explained to Heinrich that I needed to talk to him about a case. I asked him to step outside. When we stepped outside, I immediately asked him if he had any weapons on him. He stated he had a knife in

his back right pants pocket. At this time, I held his hands while Deputy Bauch reached in to grab the knife. She pulled out a black in color closing blade knife with a black blade on it. The knife brand is a SOG. I did not place Heinrich in handcuffs as he was cooperative at this time. I transported Heinrich to the Mayville Police Department. I should also note that he was carrying a white plastic bag with items in the bag used to roll his own tobacco cigarettes. Also in the bag were some dirty clothes. At the Mayville Police Department, I placed Heinrich into an interview room. At this time, I conducted an audio recorded interview of Heinrich. I advised Heinrich of his Constitutional Rights by reading them to him. I then asked him if he understood his rights. He said he did. I asked Heinrich if he would be willing to talk to me about this case. He said he would be. As I began to talk to him about the case, he was denying that he was involved with stealing the cash register. He also denied that he was at Sherwood Family Restaurant. He stated he had been there, but it was several days in the past. I then explained to Heinrich that I had witnesses who described him as being there and identified him as the person being there for his incident. It didn't take long in talking with Heinrich when he stated that he was going to tell me the truth about this matter. He stated it was him who was at the family restaurant. He went there to eat and while he was sitting there eating he decided that he needed some money. When he got up to pay for his food, he said he told the clerk that he lost a \$20 bill. When the clerk turned to

look for the \$20 bill, he grabbed the cash register and ran out the door. He stated at this time the cord from the cash register got caught in the door. There was then what he called two other patrons who came out after him. One of the patrons had a shovel in his hand. At that point, Heinrich stated he was having a difficult time carrying the cash register and dropped the cash register on the ground where he picked up some cash that fell out of the cash register. He stated the amount he got was \$36.00. I asked him if he had a knife with him. Heinrich stated he did. He stated at one point he pulled the knife out because one of the patrons was coming after him with a shovel. Later in the interview, he somewhat backed off from the fact that he had a knife due to the fact I felt he believed he knew that he may be charged with using this knife in the commission of this crime. I should note that the knife that was found on Heinrich's person when we picked him up from Sidelines meets the description of the knife that was given to Officer Birch on the night of this incident. Heinrich went on to state that he has been out of work and has been looking for work, but does not have any money. In fact, he had to borrow money from an individual by the name of Matt so that he could sit at the bar and drink beer. Heinrich admitted to me that this was stupid of him to have tried to steal this cash register, but he needed the money. A full recording of my interview with Heinrich will be attached with this report and available upon request. I advised Heinrich that I would be taking him to the Dodge County Jail. I transported him with handcuffs on his

wrists to the rear of his body to the Dodge County Jail. I booked Heinrich into the jail on charges of theft from a person which is a felony, endangering safety with a dangerous weapon, and carrying a concealed knife. I referred the charge of carrying a concealed knife due to the fact that Heinrich admitted to me that he was a convicted felon and he cannot possess a firearm. I should note that I placed Heinrich under arrest at the Mayville Police Department at approximately 6:15 p.m. on February 27, 2017. While Heinrich was still in the interview room at the Mayville Police Department and I advised him that he would be placed under arrest. I asked him to stand up so I could search his pockets. I asked Heinrich if he had anything in his pockets that was going to poke me or hurt me. He stated he did not. He then reached into his right front pants pocket and pulled out a glass tube that was approximately 2 ¾ inches long. He threw it on the table in the interview room and stated “crack pipe”. I took the glass crack pipe into my custody and I will be referring charges for possession of drug paraphernalia.

Conditions of Bail In preparing this complaint, the undersigned has reviewed the Wisconsin Circuit Court Access System (CCAP), for the purpose of reviewing the record of the defendant. The complainant has reviewed such records in the past and found CCAP to contain accurate records. The defendant is currently under the conditions of bond in Dodge County Case No. 16CM247, which was signed on 7/19/16 and was in place and in full effect on the

date of the above-listed allegations. A mandatory condition of that bond is to not engage in further criminal behavior. Habitual Criminality and Prior Felony Conviction In preparing this complaint, the undersigned has reviewed the Wisconsin Circuit Court Access System (CCAP), for the purpose of reviewing the record of the defendant. The complainant has reviewed such records in the past and found CCAP to contain accurate records. The defendant is a habitual criminal as that term is defined in sec. 939.62. The defendant was convicted of Felony Escape in Dodge County Case No. 13CF230 on 10/11/13 for an offense committed on 8/14/13. The conviction remains unreversed and of record.

R1: 3-9.

As part of the plea agreement, three other cases (17CT138, 17CM88, and 16CM247) were dismissed but read-in, and the State agreed to waive its right to a jury trial on the remaining two counts, *see infra*. R26:1, R85:6. The judge asked the State, “What are the bases for the misdemeanor bail jumpings?” to which the parties agreed that the only bond in question was that in 2016CM247, and that Mr. Heinrich had violated that bond by committing a

new crime while on that bond. R85:13-14.

The court went on to discuss with Mr. Heinrich the bases for the bail jumping charges:

Judge Bauer: So you understand they have to prove these misdemeanor bail jumpings, they're all separate crimes, you're out on one bond but what they said is you committed separate crimes that caused this — that basically makes these separate misdemeanor bail jumpings; do you understand that?

Mr. Heinrich: My understanding is that I was on bond for a disorderly conduct, that's — and the condition was is that no drinking, no drugs, no condition was is that no drinking, no drugs, no committing crimes, and that by me committing a theft and possessing drug paraphernalia which is not — I did, I'm guilty of that ... that's two of 'em and the third one, possessing a knife, from what I understand that's a new law and I was unaware that a felon ain't supposed to carry a knife, so I guess that would be the third one then.

R85:14-15.

The remaining charges, the felony Theft and the concealed weapon charge, proceeded to a bench trial on August 8, 2017. The main stipulation for that trial read, The State of Wisconsin, by ADA James Sempf, and the

defendant, by Attorney William Mayer hereby stipulate to the facts as contained in the criminal complaint as being a true and accurate account of what occurred in this matter on February 26, 2017. No one (including the owner) consented to the defendant[’s] taking and carrying away the cash register (and the defendant knew this). The defendant further admits that he decided while he was eating that he needed some money. He told the clerk that he had lost a \$20 bill in an effort to get her away from the cash register. When the clerk moved away from the cash register, he took the register and ran out the door. The defendant admits to being a convicted felon. The parties also agree, that the State may bring the knife, confiscated from the defendant, into evidence and that the Judge may decide from looking at this knife, whether the knife legally qualifies as a dangerous weapon.

R24.

The parties also stipulated that the victim was eight feet from the cash register when Mr. Heinrich took the register and ran out the door carrying it. R82: 5-6.

Further, the parties stipulated that Mr. Heinrich had a felony conviction for the purposes of the Carrying a Concealed Knife charge. R82:8. Mr. Heinrich also agreed that he had taken moveable property without consent on the

date in question. R82:12, 13.

The only witness to testify at the trial was Mr. Heinrich. He agreed he had eleven criminal convictions. R82:17. He testified that on February 26, 2017, he was broke and homeless. R82:17-18. He had not eaten for a couple of days when he went into the restaurant in Mayville with just a couple of dollars in his pocket. R82:19. He admitted that when the restaurant employee walked away from the counter, he grabbed the cash register, trying to avoid confrontation. R82:20.

Regarding the knife, Mr. Heinrich testified that he did not realize he could not carry a knife legally due to his felony status. R82:27.

After hearing the evidence and the arguments of counsel, the judge found Mr. Heinrich guilty of misdemeanor Theft (acquitting him of the felony) and Carrying a Concealed Knife. R82:48-50.

On September 6, 2017, Mr. Heinrich filed a motion to reconsider the circuit court's finding him guilty of

Carrying a Concealed Knife and one of the Bail jumping counts, that is, count four. R32. The circuit court denied that motion orally at the sentencing hearing on October 19, 2017, and proceeded to sentence Mr. Heinrich as a repeater to two years in prison on each of the six convictions, each sentence consisting of one year of initial confinement and one year of extended supervision. R90. The sentence on counts one through four all ran concurrently with each other, but the sentences on counts five and six (two of the bail jumping counts) ran consecutively to the other sentences and to each other, for a total sentence length of six years, that is, three years of initial confinement and three years of extended supervision.

Mr. Heinrich filed a notice of intent to seek postconviction relief, and postconviction counsel was appointed. R53. On August 3, 2018, Mr. Heinrich filed a motion for postconviction relief, R65, which the circuit court denied without a hearing by written decision and order filed October 17, 2018. R68.

In the motion for postconviction relief, Mr. Heinrich made two claims: first, he argued that could not be convicted of misdemeanor bail jumping for committing new crimes because he had previously violated bond by committing new crimes earlier than the crimes in this case, thus the circuit court was required to enter an order revoking bail under Wis. Stat. § 969.13(1). Second, he argued that the three bail jumping charges were multiplicitous because they were based on an alleged violation of a single bond by a single course of criminal conduct. R65. Because trial counsel had not objected to the multiplicitous charging scheme, Mr. Heinrich requested an evidentiary hearing under *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The circuit court denied the motion without and evidentiary hearing, finding,

Wis. Stat. §969.13(1) addresses bail, not bond, and is not relevant to the issue. The defendant was still on bond, therefore a factual basis exists for a bail jumping charge. The fact that he could have been charged with additional

bail jumping charges does not absolve him from this one ... The three bail jumping charges were based on the defendant committing three different crimes. Under these circumstances, “If the State were put to their proof, they would be required to prove up the condition in each bond. Each count would require proof of facts for conviction which the other two counts would not require because each bond would give rise to an individual factual inquiry.” *State v. Eaglefeathers*. 2009 WI App 2, ¶ 12, 316 Wis. 2d 152, 161, 762 N.W.2d 690, 694-95.

R68:1-2.

Mr. Heinrich filed a motion for reconsideration on October 25, 2018, R70, which the circuit court denied by written order filed October 30, 2018, finding that the motion for reconsideration re-argued the motion but did not meet the legal standard for a motion to reconsider. R72.

Mr. Heinrich filed a notice of appeal on November 5, 2018, which was timely. *See* Wis. Stat. § Rule 809.30(2)(j).

Argument

- I. It Violated the Prohibition Against Double Jeopardy to Convict Mr. Heinrich of Three Counts of Bail Jumping, and to Impose Consecutive Sentences for Those Three Counts, Which Were All Based on a Single Bond, a Single Bail Condition, and a Single Criminal Episode.

The Fifth Amendment of the United States Constitution and Article I, Section 8 (1) of the Wisconsin Constitution prohibit multiple punishments for the same offense, that is “double jeopardy.” When a defendant is charged in more than one count for a single offense, the counts are impermissibly multiplicitous. *State v. Rabe*, 96 Wis.2d 48, 61, 291 N.W.2d 809 (1980).

The Court examines multiplicity questions using a two-part test. *State v. Eaglefeathers*, 2009 WI App 2, ¶7, 316 Wis.2d 152, 762 N.W.2d 690. First, the Court considers whether the charged offenses are identical in law and in fact. *Id.* Then, the Court goes on to consider whether the legislature intended to authorize multiple punishments. *Id.*

Applying the first part of the test, are counts four through six the same in law? Yes, of course, they are all the same statutory violation. Are they the same in fact? This is subject to discussion, but the Court should conclude that they are the same in fact.

They are the same in fact, first because they all involved alleged violations of a single bond, not of multiple bonds. *Cf. State v. Richter*, 189 Wis.2d 105, 525 N.W.2d 168 (Ct. App. 1994) (multiple charges resulting from a single act that violated conditions imposed in several bonds were different in fact). Second, they are the same in fact because all three counts alleged violations of the same condition of bond of that single bond. *Cf. State v. Anderson*, 219 Wis.2d 739, 742, 580 N.W.2d 329 (1998) (violations of *different* conditions of bond are different in fact).

Lastly, the charges are the same in fact because they they are all alleged to have occurred at the same time and in the same place. Proof of one count was inextricably tied to the others, that is the same episode involving the knife, the stolen cash register, and the arrest soon after, with Mr.

Heinrich's having the crack pipe with him the whole while. Offenses are different in fact if they are either separated in time or are significantly different in nature. *State v. Stevens*, 123 Wis.2d 303, 322, 367 N.W.2d 799 (1985). Here, the offenses were not separated in time, and they were all bail violations of the same condition of bail. There was not a sufficient break in Mr. Heinrich's conduct to constitute more than one offense. *See State v. Warren*, 229 Wis.2d 172, 180, 599 N.W.2d 431.

The Court should not uphold these three bail jumping convictions as separate convictions, as to do so would be extending the current law beyond what *Anderson* and *Eaglefeathers* currently permit. *See Amy Johnson, Comment: the Use of Wisconsin's Bail Jumping Statute: a Legal and Quantitative Analysis*, 3 Wis. L.Rev. 101 (2018) (criticism of *Anderson* and *Eaglefeathers* — by extension, the law should not be extended to one bond/one course of conduct/one condition of bond to allow multiple convictions and consecutive sentences).

The first part of the test thus reveals that the charged offenses are not identical in law and in fact, so there is no presumption here that the legislature intended cumulative punishments. *Eaglefeathers*, 2009 WI App 2 at ¶7. *Eaglefeathers*, had a different outcome because “[i]n each of the three cases [for which Mr. Eaglefeathers was on bond] there were separate bonds issued by the court. We agree with the trial court that ‘if the State were put to their proof, they would be required to prove up the condition in each bond.’” *Id.* at ¶12 By contrast, in the case at bar, there was only one bond that was violated. The complaint alleged, “The defendant is currently under the conditions of bond in Dodge County Case No. 16CM247, which was signed on 7/19/16 ...” R1:8. No other bond was alleged to exist. There being no such presumption, the Court need not reach the second part of the test. In any case, even there were such a presumption to be overcome, given the nature of the proscribed conduct and the inappropriateness of multiple punishments in this particular fact situation, the

presumption should wither. *See, e.g., Warren*, 229 Wis.2d at 185. Otherwise, the Court risks an absurd result, where the State can charge a separate bond jump for each dollar bill a thief pulls out of a cash register or wallet.

II. Mr. Heinrich Should Be Permitted to Withdraw His No Contest Pleas to the Bail Jumping Counts Because They Lack a Factual Basis: His Bail Had Been Revoked by Operation of Law Prior to the Instant Offense.

To withdraw pleas after sentencing, a defendant must establish, by clear and convincing evidence, that failure to permit plea withdrawal will result in a manifest injustice. *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Plea withdrawal is necessary to correct a manifest injustice if a plea is not knowingly, intelligently, or involuntarily entered. *Id.*

Before a court may accept a no contest plea, there must be an affirmative showing or “allegation and evidence” that a plea is knowingly, voluntarily, and

intelligently made. *State v. Thomas*, 2000 WI 13, ¶14, 232 Wis.2d 714, 605 N.W.2d 836. Wisconsin Stat. §971.08(1)(b) sets forth an additional requirement that a circuit court must make such inquiry as satisfies it that the defendant in fact committed the crime charged. Thus, a factual basis is required and is distinct from the voluntariness requirement for guilty pleas. This requirement protects 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. *Id.*

The criminal complaint which served as the putative factual basis for the pleas alleged that at the time of the commission of the offenses, Mr. Heinrich was “currently under the conditions of bond in Dodge County Case No. 16CM247, which was signed on July 19, 2016.” R1:8-9

It was legally impossible for Mr. Heinrich to commit bail jumping regarding the bond in 16CM247 because he committed new crimes on December 20, 2016, see *State v.*

Heinrich, Dodge County Case No. 17CM88, and also on February 7, 2017, see *State v. Heinrich*, Dodge County Case No. 17CT138, and also on January 5, 2017, see *City of Mayville v. Heinrich*, Dodge County Case No. 17FO150, and also on January 5, 2017, see *City of Juneau v. Heinrich*, Dodge County Case No. 17FO58. Wisconsin Stat. §969.03(2) specifies, “As a condition of release in all cases, a person released under this section shall not commit any crime.”

Although the circuit court did not explicitly note the revocation of the bond in 16CM247, that bond was forfeited by operation of law because the defendant committed a crime while on bond. *See* Wis. Stat. § 969.13(1). (“If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action *shall* enter an order declaring the bail to be forfeited.”) (emphasis added). The use of the word “shall” describes a mandatory requirement of duty upon the circuit court. *See State v. Badzmierowski*, 171 Wis.2d 260, 262, 490 N.W.2d

784 (Ct. App. 1992). Because the bond was forfeited by operation of law, the failure of the circuit court to note the forfeiture has no effect of producing a reinstatement of the bond.

The circuit court found there was an adequate factual basis for the plea because, reasoned the circuit court, “bail” under Wis. Stat. § 969.13 is not the same as “bond.” R68. This is a question of statutory interpretation and application, questions of law reviewed *de novo*. *See State v. Alger*, 2015 WI 3, ¶21, 360 Wis.2d 193, 858 N.W.2d 346. A reviewing court’s “goal in interpreting statutory provisions is to give effect to the intent of the legislature, which we assume is expressed in the text of the statute. To this end, absent ambiguity in a statute, [the Court should not] resort to extrinsic aids of interpretation and instead apply the plain meaning of the words of a statute in light of its textually manifest scope, context, and purpose. A statute is ambiguous if it is susceptible to more than one reasonable understanding. If a statute is ambiguous, [then the Court]

may examine extrinsic sources in order to guide our interpretation.” (citations omitted). *State v. Stenklyft*, 2005 WI 71, ¶7, 281 Wis.2d 484, 697 N.W.2d 769.

There was an inadequate factual basis for the plea because “bail” and “bond” mean the same thing under Wis. Stat. § 969.13(1) and the bail jumping statute. The text of both statutes is clear.

The circuit court denied Mr. Heinrich’s motion for postconviction relief in part because, “Wis. Stat. §969.13(1) addresses bail, not bond, and is not relevant to the issue.” R68:2. While it is true there are some differences between “bail” and “bond,” those differences are not significant in terms of determining the meaning of § 969.13(1). Section 969.13 is very relevant.

Section 967.02 (1d) says,

“Bail” means the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody so that the person will appear before the court in which the person’s appearance may be required and that the person will comply with such conditions as are set forth in the bail bond.

Section 967.02 (1h), on the other hand says,

“Bond” means an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.

Further, in Chapter 969 there is no definition of “bond” but “bail” is defined as “monetary conditions of release” Wis. Stat. § 969.001(1). Under *Badzmierowski*, 171 Wis.2d at 262, *bail* forfeiture is mandated for any *bond* condition violation. Sec. 969.13(1) states, “If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited.”

Further, other provision of chapter 969 show the interplay of “bail” and “bond.” Section 969.02(2), states that “In lieu of release pursuant to sub. (1), the judge may require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties. Subsection (6) states, “When a judgment of conviction is

entered in a prosecution in which a deposit had been made in accordance with sub. (2) the balance of such deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered ... and then, if ordered restitution is satisfied in full, to the payment of the judgment.

Section 969.08(2) says, “Violation of the conditions of release or the bail bond constitutes grounds for the court to increase the amount of bail.” Section 969.09 (1), says “If a defendant is admitted to bail before sentencing the conditions of the bond shall include, without limitation ...

Section 969.13(1), says, “If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited.”

In sum, “bail” and “bond” do not live in different worlds. The terms are often functionally interchangeable. Section 969.13(1) applies to bonds and bails.

The bond in case 2016CM247 had previously been

revoked by operation of law based upon Mr. Heinrich's violation of bond months prior to the day of the present offense. Therefore there was no factual basis for the plea.

Mr. Heinrich notes this argument has once been brought up before this Court, but tardively. *See State v. Beiersdorf*, 208 Wis.2d 492, 499, n. 2, 561 N.W.2d 749 (Ct. App. 1997) (Section "969.03(2) ... requires as a condition of bail that a defendant 'shall not commit any crime.' Therefore, [Appellant] argues, upon his arrest for bail jumping his bail on the sexual assault charge should have been forfeited. Thus, he maintains, "[o]nly the lack of paperwork revoking bail in the sexual assault case prevents [him from] receiving 44 days jail-time credit in the sexual assault case.").

Wisconsin Stat. § 969.03(2) specifies, "As a condition of release in all cases, a person released under this section shall not commit any crime." Although the Court did not explicitly note the revocation of the bond in 16CM247, that bond was forfeited by operation of law because the

defendant committed a crime while on bond. *See* Wis. Stat. §969.13(1). (“If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action *shall* enter an order declaring the bail to be forfeited.”) (emphasis added). R65:3-4.

The circuit court should have granted Mr. Heinrich’s request for an evidentiary hearing because he alleged facts that if true would entitle him to relief. *Cf. State v. Bentley*, 201 Wis.2d 303, 306, 548 N.W.2d 50 (1996). In his motion for postconviction relief, Mr. Heinrich alleged that it was legally impossible for to commit bail jumping regarding the bond in 2016CM247 because he had committed new crimes on December 20, 2016, *see State v. Heinrich*, Dodge County Case No. 17CM88, also on February 7, 2017, *see State v. Heinrich*, Dodge County Case No. 17CT138, also on January 5, 2017, *see City of Mayville v. Heinrich*, Dodge County Case No. 17FO150, and on January 5, 2017, *see City of Juneau v. Heinrich*, Dodge County Case No. 17FO58.

Conclusion

For the reasons stated above, the Court should reverse the judgment below as to counts four, five and six, and order that Mr. Heinrich be permitted to withdraw his pleas as to those counts and that they be dismissed. In the alternative, the Court should order that counts five and six be dismissed, as only one conviction for bail jumping is appropriate under these circumstances. As a third alternative, the Court should order that the matter be remanded to the circuit court for an evidentiary hearing on Mr. Heinrich's motion for postconviction relief.

Respectfully submitted this 21st day of August, 2019.

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SECTION 809.19 (2) CERTIFICATE

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 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 been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed,

/s/David R. Karpe

SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix 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 8,055 words.

Signed,

/s/David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 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.

Signed,

/s/David R. Karpe