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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2018AP2124-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

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 OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Whether the circuit court appropriately denied Heinrich's post-conviction motion and Heinrich's motion for reconsideration challenging double jeopardy/multiplicity.

This Court should answer: Yes.

2. Whether the circuit court appropriately denied Heinrich's post-conviction motion and Heinrich's motion for reconsideration challenging the factual bases for Heinrich's no-contest pleas.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by application of established legal principles to the facts of record. Briefs will fully develop and explain the issues pursuant to Wis. Stats. §§ 809.22 and 809.23.

STANDARDS OF REVIEW

Whether a no-contest plea relinquishes a defendant's right to appeal an alleged double jeopardy violation is an issue implicating questions of waiver and what effect a plea has upon the right to be free from double jeopardy. These are questions of law we review de novo. *State v. Kelty*, 2006 WI 101, ¶ 13, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Trammell*, 2019 WI 59, ¶ 16, 387 Wis. 2d 156, 928 N.W. 2d 564.

Whether a factual basis existed for a guilty or no-contest plea is a question of constitutional fact. *State v. Lackershire*, 2007 WI 74, ¶ 24, 301 Wis. 2d 418, 734 N.W.2d

23. This Court accepts the circuit court's findings of historical and evidentiary facts unless clearly erroneous but determines independently whether those facts demonstrate a defendant's plea was not knowingly, voluntarily, and intelligently entered. *Id.*

ARGUMENT

THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED HEINRICH'S POST-CONVICTION MOTION AND HEINRICH'S MOTION FOR RECONSIDERATION.

- I. Heinrich's satisfactory no-contest pleas constituted relinquishment of his opportunity to have the Court determine merits of his double jeopardy/multiplicity challenge.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In the Wisconsin Constitution, the Double Jeopardy Clause is located in Article I, Section 8(1) and reads, "no person for the same offense may be put twice in jeopardy of punishment...." WI CONST Art. I, § 8 "We view these provisions as 'identical in scope and purpose' and therefore accept the 'decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both constitutions.'" *Kelty*, 2006 WI 101, ¶ 15, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Davison*, 2003 WI 89, ¶ 18, 263 Wis.2d 145, 666 N.W.2d 1.

Double jeopardy applies to criminal punishments. The Wisconsin Supreme Court has explained multiplicity, or double jeopardy, claims as follows:

Protection against multiple punishments or multiplicity involves three strains of analysis:

(1) second sentence challenges in which a court is alleged to have improperly increased a defendant's first sentence for a charged offense; (2) unit-of-prosecution challenges in which the state is alleged to have improperly subdivided the same offense into multiple counts of violating the same statute; and (3) cumulative-punishment challenges in which the state is alleged to have improperly prosecuted the same offense under more than one statute.

Kelty, 2006 WI 101, ¶ 16, 294 Wis. 2d 62, 716 N.W.2d 886 (citing *State v. Davison*, 2003 WI 89, ¶ 26, 263 Wis. 2d 145, 666 N.W.2d 1).

Stated another way, double jeopardy applies in three situations—it protects against: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for same offense. *State v. Henning*, 2004 WI 89, ¶ 16, 273 Wis. 2d 352, 681 N.W.2d 871 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

This case presents a unit-of-prosecution challenge because Heinrich disputes his convictions of three counts of misdemeanor bail jumping for violating one condition of one particular bond in a single prosecution. (Def.'s Br. 24) Heinrich claims that it violated his right against double jeopardy to convict him of three counts of bail jumping and to impose consecutive sentence for those three counts because they were all based on a single bond, single bail condition, and "single criminal episode." (*Id.*)

On March 1, 2017, a criminal complaint was filed charging Heinrich with Theft From Person or Corpse, Repeater; Carrying a Concealed Knife, Repeater; Possession of Drug Paraphernalia, Repeater; and three counts of Misdemeanor Bail Jumping, Repeater; in violation of Wis. Stats. §§ 940.20(1)(a) and (3)(e), 941.231, 961.573(1),

946.49(1)(a), 939.62(1)(b), and 939.62(1)(a). (R1) On March 9, 2017, Heinrich waived his preliminary hearing. (R6) An Information was subsequently filed with identical charges on March 22, 2017. (R10)

Heinrich plead no contest to all three counts of Misdemeanor Bail Jumping on August 4, 2017, expressly indicating his understanding that the three new crimes he was charged with were all violations of one bond. (R85:11) The circuit court engaged in a lengthy plea colloquy with Heinrich:

THE COURT: Okay. So you understand they have *to prove these misdemeanor bail jumpings, they're all separate crimes, you're out on 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?

KENNETH HEINRICH: My understanding is that I was on bond for a disorderly conduct, that's—and he 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—

THE COURT: M-hm

KENNETH HEINRICH: --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 a felon ain't supposed to carry a knife, so I guess *that would be the third one then.*

THE COURT: Yeah, well, that's what they're alleging; you understand that.

KENNETH HEINRICH: Yeah, that's my understanding, yeah, like that.

(R85:14-15 emphasis added) Subsequently, the circuit court explained that by pleading no contest, Heinrich was giving

up various constitutional rights and Heinrich indicated he understood. (R85:15-16)

“The general rule is that a guilty, no contest, or Alford plea ‘waives all nonjurisdictional defects, including constitutional claims.’” *Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886; *quoting State v. Multaler*, 2002 WI 35, ¶ 54, 252 Wis.2d 54, 643 N.W.2d 437. “Courts refer to this as the guilty-plea-waiver rule.” *Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886; *See State v. Riekkoff*, 112 Wis.2d 119, 122–23, 332 N.W.2d 744 (1983).

“We conclude that a guilty plea relinquishes the right to assert a multiplicity claim when the claim cannot be resolved on the record.” *Kelty*, 2006 WI 101, ¶ 2, 294 Wis. 2d 62, 716 N.W.2d 886. “When a defendant enters a knowing, intelligent, and voluntary guilty plea, the nature and effect of the plea necessarily mean that the defendant gives up the right to a fact-finding hearing on the propriety of multiple charges.” *United States v. Broce*, 488 U.S. 563, 576, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

Heinrich waived his right to challenge double jeopardy/multiplicity claims when he plead no-contest to the three bail jumping charges, expressly indicating his understanding of the three charges on the record. Heinrich’s no-contest pleas were otherwise satisfactory and constituted relinquishment of his opportunity to have this Court determine merits of his double jeopardy/multiplicity challenge.

II. Plea withdrawal is not warranted because there was a factual basis for Heinrich’s no-contest pleas.

“Before accepting a guilty plea, the circuit court must determine that a sufficient factual basis exists for the guilty

plea, namely that a crime has been committed and it is probable that the defendant committed it.” *State v. Payette*, 2008 WI App 106, ¶ 7, 313 Wis. 2d 39, 756 N.W.2d 423; Wis. Stat. § 971.08(1)(b). The inference of guilt need not be established beyond a reasonable doubt. *Payette*, 313 Wis. 2d 39, ¶ 7.

The court must discuss the factual basis for the charges for the plea to be knowing, intelligent, and voluntary. *Lackershire*, 301 Wis. 2d 418, ¶ 34. “[T]he factual basis for a guilty plea may be established by reference to the allegations set forth in the criminal complaint.” *State v. Sutton*, 2006 WI App 118, ¶ 17, 294 Wis. 2d 330, 718 N.W.2d 146. The question is whether the undisputed facts constitute the crime charged. *Lackershire*, 301 Wis. 2d 418, ¶ 48.

The factual basis requirement is different than the circuit court’s other obligations at a plea hearing. *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836. The factual basis requirement serves to protect a defendant who voluntarily pleads to a charge “with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” *Id.* (citation omitted). Thus, Wis. Stat. § 971.08(1)(b) does not require “a defendant to personally articulate the specific facts that constitute the elements of the crime charged.” *Thomas*, 232 Wis. 2d 714, ¶ 20. Instead, the factual basis must simply be developed on the record. *Id.*

To assess a defendant’s motion to withdraw a guilty plea on grounds of an inadequate factual basis, a court may look at the totality of the circumstances, including the preliminary hearing record, the plea hearing record, the sentencing hearing record, and other portions of the record. *Thomas*, 232 Wis. 2d 714, ¶ 18.

Where the court fails to conduct a sufficient inquiry into the factual basis, this Court follows a *Bangert* procedure.

Lackershire, 301 Wis. 2d 418, ¶ 51. First, the defendant must “make a prima facie showing that the circuit court violated Wis. Stat. § 971.08(1) or other plea colloquy requirements.” *Id.* ¶ 52. Then, the defendant must allege a lack of understanding or knowledge of something the court should have provided at the plea hearing. *Id.*

In the present case, the circuit court used the criminal complaint to establish a factual basis for Heinrich’s pleas with the consent of his trial counsel. (R85:17) That criminal complaint was provided verbatim in Heinrich’s Brief. The circuit court found that under these circumstances, “[i]f 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, 762 N.W.2d 690. The circuit court found that the three counts of bail jumping are different in fact as each count would require proof that the defendant committed a different criminal offense. (R:68)

In fact, the circuit court discussed this exact issue with Heinrich during the plea colloquy previously quoted in this response. Specifically, the circuit court made sure that Heinrich understood he was charged with one count of bail jumping for committing a new crime for each of the three new crimes he committed (and was also charged with in the same criminal complaint).

Heinrich argues that no factual basis existed because he cannot be convicted of misdemeanor bail jumping for committing new crimes in the present case since he had already violated that same bond by committing an earlier crime and thus, his bail was already forfeited. (Def.’s Br.) Essentially, Heinrich argues that since he had already violated bond by committing new crimes earlier than the

crimes in the present case, he was no longer on bond pursuant to Wis. Stat. § 969.13(1). (*Id.*)


Wis. Stat. § 969.13(1) addresses bail, not bond, and is not relevant to the issue. The circuit court agreed when it denied Heinrich's motions. (R:68) Heinrich was still on bond at the time the present crimes were committed, therefore a factual basis exists for all three bail jumping charges. As a result, the circuit court conducted a sufficient inquiry into the factual basis for Heinrich's no-contest pleas and Heinrich should not be permitted to withdraw them.

CONCLUSION

For the reasons discussed above, the State respectfully asks that this Court affirm the circuit court's denial of Heinrich's Post-Conviction Motion and Heinrich's Motion for Reconsideration.

Dated this 21st day of October, 2019.

Respectfully submitted,



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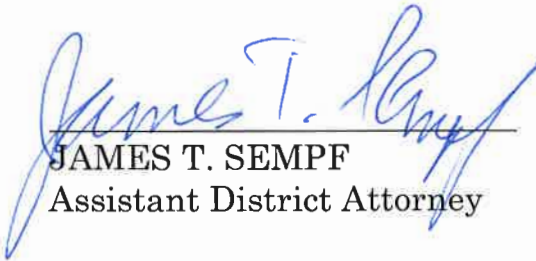
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,772 words.

Dated this 21st day of October, 2019.



JAMES T. SEMPF
Assistant District Attorney

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

I hereby certify that:

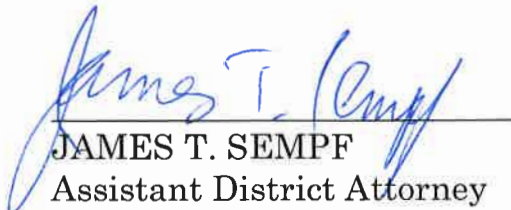
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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 21st day of October, 2019.



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