RECEIVED
08-23-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

2019AP001058-CR

WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE JILL J. KAROFSKY

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
KODY K. JOHNSON,
DEFENDANT-APPELLANT.

BRIEF AND ARGUMENT OF APPELLANT

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Kody Johnson

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

Table of Authorities Cited

ISSUE PRESENTED FOR REVIEW

I. Whether the record in the present case provides a factual basis for Mr. Johnson's plea(s) to three counts of contempt of court in violation of Wis. Stats. §785.01(1)(b).

Mr. Johnson raised this issue in his motion for postconviction relief, arguing that his pleas to three counts of contempt of court lacked a factual basis. Mr. Johnson also argued that even if a factual basis existed for the offense of contempt of court, the record did not establish a factual basis for pleas to three separate counts, as any contempt was a continuous act.

The circuit court held a hearing, and denied the motion. Mr. Johnson filed a timely Notice of Appeal.

STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Mr. Johnson does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE

Mr. Johnson was originally charged with felony interference with child custody, contrary to Wis. Stats.

§948.31(2).[1] Pursuant to his plea(s), Mr. Johnson was convicted of three counts of contempt of court as an unclassified misdemeanor, contrary to Wis. Stats. §785.01(1)(b). The state orally amended the complaint at the plea and sentencing hearing, but did not formally file a written amended complaint. The court placed Mr. Johnson on probation for a period of two years.

During the plea colloquy, the court purported to find a factual basis for the pleas based on the criminal complaint and supplemental facts set forth by defense counsel.

Mr. Johnson filed a motion for postconviction relief, seeking to withdraw his pleas to each of the three counts of contempt. The motion argued that the record did not establish a factual basis for the pleas. The motion further argued that if the record did establish a factual basis for contempt of court, the contempt was continuous and the record would not support a conviction for three distinct counts.

The circuit court held a hearing. No testimony or evidence was introduced; the parties each submitted oral arguments. At the conclusion of the hearing the circuit court denied the motion. The court found a factual basis for the pleas.

[1] All references to Wisconsin Statutes are to the 2017-2018 Edition unless otherwise specified.

Mr. Johnson subsequently filed a timely Notice of Appeal.

STATEMENT OF FACTS

According to the criminal complaint, on February 15, 2018, Officer Joswiak was dispatched to 1148 Morraine View Drive in the City of Madison for a preserve the peace. (DOC 1:1; Appendix B:1). An individual identified as T.L.C. had requested police presence for a child exchange. (DOC 1:1; Appendix B:1). T.L.C. advised that she shares a daughter with the father, identified as Kody K. Johnson. (DOC 1:2; Appendix B:2).

It was determined that Mr. Johnson had not been at his apartment in two to three weeks. (DOC 1:2; Appendix B:2). Officer Joswiak made telephone contact with Mr. Johnson, who advised that he was confused because he was told by other officers that he could have custody of the child. (DOC 1:2; Appendix B:2). Officer Joswiak advised Mr. Johnson that if there was no custody agreement in place, the mother has full custody of the child. (DOC 1:2; Appendix B:2). Officer Joswiak advised Mr. Johnson to return the child within twelve hours or face possible criminal charges pursuant to statute 948.31. (DOC 1:2; Appendix B:2).

The complaint states that there was no custody agreement in place between T.L.C. and Mr. Johnson. (DOC 1:2; Appendix B:2).

Det. Ludden made telephone contact with Mr. Johnson on February 16, 2018. (DOC 1:2; Appendix B:2). Det. Ludden advised Mr. Johnson that he had twelve hours to return the child. (DOC 1:2; Appendix B:2). Det. Ludden further advised Mr. Johnson that if he had concerns about the child's care or safety he should report them to Dane County Child Protection Services. (DOC 1:2; Appendix B:2). Det. Ludden advised Mr. Johnson that he could not simply overrule the state statute. (DOC 1:2; Appendix B:2). Mr. Johnson advised Det. Ludden that the child was fine and that he would abide by a court schedule once it was established. (DOC 1:2; Appendix B:2).

Det. Ludden spoke with Dane County Court Commissioner Jason Hanson on February 20, 2018. (DOC 1:2; Appendix B:2). Commissioner Hanson advised Det. Ludden that he had to first make a determination of paternity, and that a paternity hearing was scheduled for March 1, 2018. (DOC 1:2; Appendix B:2). Commissioner Hanson advised Det. Ludden that until paternity was established, the only person with legal custody was T.L.C. (DOC 1:2; Appendix B:2).

On that same day, Det. Ludden left a voicemail message for Mr. Johnson, advising him that she had discussed the case with the Dane County District Attorney's Office and that Mr. Johnson would face charges if he did not return the child immediately. (DOC 1:2; Appendix B:2). Det. Ludden provided Mr. Johnson with her contact information. (DOC 1:2; Appendix B:2).

According to Det. Kellogg's testimony at the preliminary hearing, Mr. Johnson attempted to appear at the paternity hearing by telephone. (DOC 54:10; Appendix D:10). The commissioner did not allow Mr. Johnson's telephonic appearance as it was untimely requested. (DOC 54:10; Appendix D:10). At the hearing, paternity was established. (DOC 54:10; Appendix D:10).

At the plea hearing, defense counsel attempted to supplement the factual record. (DOC 62:16; Appendix E:16). Defense counsel asserted that on March 1 there was a hearing to determine paternity and child placement. (DOC 62:16; Appendix E:16). When Mr. Johnson attempt to appear by telephone, Commissioner Hanson denied the request and informed Mr. Johnson that they would proceed without him. (DOC 62:17; Appendix E:17). On that date at that hearing, paternity

was determined to be Mr. Johnson and T.L.C was given full custody. (DOC 62:17; Appendix E:17).

Mr. Johnson did not return to Wisconsin, and was picked up in Indiana on March 7, 2018. (DOC 62:17; Appendix E:17). According to the statement of defense counsel, Mr. Johnson was in continuous contempt from March 1 to March 7. (DOC 62:17; Appendix E:17).

APPELLANT'S ISSUE ON APPEAL

I. Whether the record in the present case establishes a factual basis for Mr. Johnson's plea(s) to three counts of contempt of court in violation of Wis. Stats. §785.01(1)(b).

A. Summary of the Argument

Mr. Johnson submits that the factual record in this case does not establish a factual basis for his plea(s) to three counts of contempt of court in violation of Wis. Stats. §785.01(1)(b).

First, the record is insufficient to establish that there was a court order in place that required Mr. Johnson to return the child to the custody of T.L.C. Although defense counsel may stipulate to a factual basis, the statements of defense counsel at the plea hearing cannot themselves function as a factual basis for

the pleas. The order issued by the court commissioner on March 1, 2018, is not part of the factual record in this case. Other than the speculation of defense counsel, there is no indication in the record that the order awarded custody.

Second, Mr. Johnson was not actually aware of the contents of the court commissioner's order. He was not permitted to appear at the hearing by telephone, and there is no indication in the record that either the events or results of the hearing on March 1 were ever communicated to Mr. Johnson. Mr. Johnson submits that he could not be contemptuous of the contents of a court order of which he was unaware.

Finally, even if there is a factual basis to conclude that Mr. Johnson did indeed knowingly and intentionally disobey a court order, it was a single continuous act. Mr. Johnson submits that there is no legal basis to conclude that each twenty-four hour period of contempt constitutes a distinct and separate offense sufficient to provide a factual basis for three counts of conviction.

B. Standard of Review

The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion; the reviewing court will only reverse if the circuit court

has failed to properly exercise its discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997) An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997).

C. Relevant Law

When a defendant seeks to withdraw a plea after sentencing, he must establish by clear and convincing evidence that refusal to allow withdrawal of the plea would result in a manifest injustice. State v. Brown, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (2006).

Wis. Stats. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, it must make such inquiry as satisfies it that the defendant in fact committed the crime charged; establishing a sufficient factual basis requires a showing that the conduct which the defendant admits constitutes the offense charged. State v. Lackershire, 2007 WI 74, ¶33, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

The purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does

not constitute the charged crime. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007). A defendant's failure to realize that the conduct to which he pleads guilty does not fall within the offense charged is incompatible with that plea being knowing and intelligent. State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

A factual basis may be established through testimony by witnesses, reading of police reports or statements of evidence by the prosecutor. White v. State, 85 Wis.2d 485, 490, 271 N.W.2d 97 (1978). In applying the manifest injustice test on review, the court may consider the whole record since the issue is no longer whether the guilty plea should have been accepted, but rather whether there was an abuse of discretion in the trial court's denial of the motion to withdraw; facts adduced at the preliminary hearing and at the motion hearing may be considered in evaluating the denial of the motion to withdraw. White v. State, 85 Wis.2d 485, 491, 271 N.W.2d 97 (1978).

D. Argument

Mr. Johnson respectfully submits that the circuit court erroneously exercised its discretion in denying his motion for postconviction relief to withdraw his plea(s) in this case.

The facts set forth in the criminal complaint and preliminary hearing, and the supplemental facts set forth at the plea and sentencing hearing, do not establish that Mr. Johnson disobeyed, resisted, or obstructed the authority, process, or order of a court pursuant to Wis. Stats. §785.01(1)(b).

The circuit court erroneously found that the order issued by the court commissioner at the March 1 paternity hearing provided the basis for the offense of conviction. However, the order itself is not part of the factual record. Defense counsel's speculation as to the contents of the order cannot function as factual testimony. There is an insufficient basis in the record to conclude that the order awarded custody or required Mr. Johnson to return the child to T.L.C.

In addition, Mr. Johnson was not aware of the contents of the order because he did not appear at the March 1 paternity hearing. There is no indication in the record that law enforcement or any other party ever communicated the results of the hearing to Mr. Johnson. Regardless of whether Mr. Johnson submitted an untimely request to appear by telephone, he cannot engage in an act of contempt – disobedience, resistance, or obstruction – without knowledge of the contents of the court's order or awareness of the court's authority or process.

However, even if Mr. Johnson was in contempt of court as a result of the March 1 paternity hearing, there is an insufficient basis in the record to conclude that each passing day constituted a separate and distinct act of contempt sufficient to constitute a separate criminal offense. At best, the factual record would support a conviction to only one count of contempt.

1. Plea and sentencing hearing.

The plea and sentencing hearing was held on July 9, 2018. Count one of the information was orally amended to three counts alleging a violation of Wis. Stats. §785.01(1)(b). (DOC 62:2; Appendix E:2). Defense counsel set forth the functional elements of the offense – intentional disobedience, resistance, or obstruction of authority, process, or order of a court. (DOC 62:3; Appendix E:3). The court followed the procedure for punitive sanction set forth in Wis. Stats. §785.03(1)(b). (DOC 62:3; Appendix E:3).

Defense counsel provided supplemental facts that were not part of the criminal complaint or preliminary hearing. Defense counsel asserted that Commissioner Hanson entered an order in case number 18AP50PJ. (DOC 62:16; Appendix E:16). Defense counsel asserted that on March 1, 2018, there was a hearing to determine

paternity and child placement. (DOC 62:16; Appendix E:16). Mr. Johnson was in possession of the child at that time; he had been told by law enforcement to return the child to the mother. (DOC 62:16; Appendix E:16).

Consistent with the preliminary hearing testimony, defense counsel asserted that Mr. Johnson called in for the hearing. (DOC 62:16; Appendix E:16). Commissioner Hanson denied the request, informing Mr. Johnson that they would proceed without him because he had opted not to personally appear. (DOC 62:17; Appendix E:17). Defense counsel asserted that paternity was determined to be Mr. Johnson and full custody of the child was awarded to T.L.C. (DOC 62:17; Appendix E:17).

Mr. Johnson did not return with the child to Wisconsin until March 7, 2018. (DOC 62:17; Appendix E:17). Defense counsel asserted that as factual basis, Mr. Johnson was in continuous contempt of court from March 1 of 2018 to March 7 of 2018. (DOC 62:17; Appendix E:17).

The circuit court stated, "I get that the first count is March 1….so explain to me the other two." (DOC 62:18; Appendix E:18). Defense counsel responded, "I think we can do March 2nd and March 3rd." (DOC 62:18; Appendix E:18). The court asked the state if it

agreed; the state responded in the affirmative. (DOC 62:18; Appendix E:18).

Mr. Johnson respectfully submits that the facts set forth in the complaint, preliminary hearing, and plea hearing do not establish a factual basis for three counts of contempt of court in violation of Wis. Stats. §785.01(10)(b).

2. Postconviction motion hearing

Mr. Johnson noted at the postconviction motion hearing that the basis for the convictions was that Mr. Johnson allegedly violated a court order issued on March 1, 2018. (DOC 63:4; Appendix G:4). Mr. Johnson further noted that the criminal complaint essentially cuts off its factual narrative as of February. (DOC 63:4; Appendix G:4).

Mr. Johnson reiterated his arguments that the record does not include a copy of the paternity order or any indication that the order instructed Mr. Johnson to do something. (DOC 63:4-6; Appendix G:4-6). Mr. Johnson also argued that the record did not indicate that the events of the March 1 hearing or the contents of the order were communicated to Mr. Johnson. (DOC 63:7; Appendix G:7). Mr. Johnson argued that although defense counsel can stipulate to the factual basis, the

statements of defense counsel cannot in themselves create a factual basis. (DOC 63:8-9; Appendix G:8-9).

Mr. Johnson noted that both the state and defense counsel had referred to Mr. Johnson being in "continuous" contempt. (DOC 63:9; Appendix G:9). Mr. Johnson reiterated his argument that even if the record supports a finding that he was in contempt of a court order, the record does not provide a basis for three separate counts of contempt. (DOC 63:9-10; Appendix G:9-10).

Mr. Johnson further argued that whether custody was established or awarded at the March 1 paternity hearing is unclear from the record. (DOC 63:22; Appendix G:22). None of the parties describing the March 1 hearing were present for the hearing; postconviction counsel noted that the public CCAP record refers only to the paternity order. (DOC 63:21-22; Appendix G:21-22).

The circuit court made the finding that paternity was determined to be Mr. Johnson and T.L.C. (the biological mother) was given full custody. (DOC 63:23; Appendix G:23). Mr. Johnson did not return until March 7, 2018. (DOC 63:23; Appendix G:23). The court stated, "so the factual basis we have is that he was in continuous contempt of court from March 4th – excuse

me – from March 1st of 2018 to March 7 of 2018." (DOC 63:23; Appendix G:23).

The court stated that "I think this would be different had Mr. Johnson not had the opportunity to be at the March 1st hearing, but he did. And Commissioner Hanson at that hearing made a paternity determination and made a custody determination." (DOC 63:24; Appendix G:24). "From that point forward, there was a court order, and that were the -- those were the facts that were used at the plea hearing in this case." (DOC 63:24; Appendix G:24).

The court concluded that Mr. Johnson had failed to meet his burden to show by clear and convincing evidence that there would be a manifest injustice if he was not permitted to withdraw his plea(s). (DOC 63:24-25; Appendix G:24-25).

3. The circuit court erroneously exercised its discretion in denying Mr. Johnson's motion for postconviction relief.

The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion; the reviewing court will only reverse if the circuit court has failed to properly exercise its discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997) An exercise of discretion based on an erroneous

application of the law is an erroneous exercise of discretion. State v. McCallum, 208 Wis. 2d 463, ¶15, 561 N.W.2d 707 (1997).

a. The circuit court's finding of a custody order was erroneous.

The circuit court made a finding that at the March 1 paternity hearing, full custody was given to T.L.C. However, Mr. Johnson submits that the facts of record in this case do not support a finding that the court commissioner issued a custody order at the March 1 hearing.

Unfortunately, the order issued by the court commissioner at the March 1 paternity hearing is not part of the record in this case. There is no indication that either Mr. Johnson's defense counsel or the prosecutor was present at the paternity hearing and would have had firsthand knowledge of what the court commissioner actually ordered. The circuit court's conclusion that a custody determination was made at the March 1 paternity hearing is speculative. The facts of record not give rise to a reasonable inference that such a determination was made.

The basis for the court's conclusion appears to be the statements of Mr. Johnson's defense counsel at the

plea hearing. However, there is no indication that defense counsel was present at the paternity hearing, and it was not set forth on the record that defense counsel had a copy or firsthand knowledge of the order.

A factual basis may be established through testimony by witnesses, reading of police reports or statements of evidence by the prosecutor. White v. State, 85 Wis.2d 485, 490, 271 N.W.2d 97 (1978). In conducting the inquiry into whether there is a factual basis for the offense, the trial court may consider hearsay evidence, such as testimony of police officers, the preliminary examination record and other records in the case. State v. Black, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (2001).

Defense counsel's speculation as to what happened at the paternity hearing does not fall within any of these categories. Mr. Johnson does not dispute that a factual basis may be established by stipulation of counsel to the facts in the criminal complaint. See State v. Black, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (2001). However, Mr. Johnson submits that a factual basis cannot be established or created by factual assertions of defense counsel that are not supported by other aspects of the factual record.

Even if the court commissioner did make a custody determination at the March 1 paternity hearing,

there is an insufficient basis to draw the conclusion that the custody determination expressly ordered Mr. Johnson to return the child. The state chose to amend the charge in this case from interference with child custody to contempt of court. The fact that Mr. Johnson remained out of state with the child until he was apprehended on March 7 may or may not constitute interference with T.L.C.'s custody. Without a record of a specific court order requiring him to return the child, however, his conduct cannot be considered disobedience, resistance, or obstruction of an order of a court.

b. Mr. Johnson's awareness of the court commissioner's action.

Mr. Johnson argued that he could not be in contempt of the authority, process, or order of a court unless he was aware that the authority, process, or order of a court required him to do something. In order to be in contempt, Mr. Johnson would have had to engage in an act of disobedience, resistance, or obstruction. See Wis. Stats. §785.01(1)(b). There is no indication in the record that Mr. Johnson was ever advised of the events of the March 1 paternity hearing or the details of any order that was issued by the court commissioner.

The circuit court did not directly address the argument. Instead, the circuit court concluded that Mr. Johnson could have been at the hearing, and had he been at the hearing he would have known what occurred. (DOC 63:25; Appendix G:25).

It is not clear why the fact that Mr. Johnson had an opportunity to be at the paternity hearing is sufficient to establish that he knowingly engaged in an intentional act of contempt. Mr. Johnson attempted to appear by telephone, and the court commissioner could have permitted him to do so. Instead of allowing him to remain on the line and hear what was occurring at the hearing, the court commissioner chose to end the call and proceed without Mr. Johnson's telephonic appearance. (DOC 62:17; Appendix E:17).

The legislature has regulated contempt in Wis. Stats. ch. 785; contempt of court is defined as "intentional misconduct or disobedience towards the authority of the court." Frisch v. Henrichs, 2007 WI 102, ¶33, 304 Wis.2d 1, 736 N.W.2d 85 (2007). A finding of contempt rests on the trial court's factual findings; the critical findings are that the party was able to comply with the order and that the refusal to comply was willful and with intent to avoid compliance. See Evans v. Luebke, 2003 WI App 207, ¶24FN12, 267 Wis. 2d 596, 671 N.W.2d 304 (Ct.App.2003).

Mr. Johnson submits that he could not have engaged in intentional or willful refusal to comply with an order of the court if he was unaware of the court's action.[2] The fact that Mr. Johnson had the opportunity to appear in person at the paternity hearing does not render his subsequent conduct willful or intentional noncompliance. 'Willfulness' and 'intentional' are concepts that presuppose knowledge and awareness of what the person is purportedly required to do.

The circuit court also placed some significance on the fact that Mr. Johnson was aware of the order at the plea hearing. (DOC 62:25; Appendix G:25). However, the issue is not whether Mr. Johnson was aware of the order at the plea hearing, but rather, whether he was aware of the order during the period in which he was allegedly in contempt of the order.

A defendant's acceptance or stipulation to a factual basis cannot itself form the factual basis for the conviction. One of the purposes of the court's obligation to establish a factual basis for the plea is to protect the

[2] According to the circuit court's colloquy with Mr. Johnson, the state's amended complaint specifically charged him with disobeying a court order. (DOC 62:18-19; Appendix E:18-19). Accordingly, the factual basis must be specifically for contempt of a court order and not contempt of the general authority or process of the court. Thus, Mr. Johnson's awareness of the court order and its contents is essential to the existence of a factual basis for his pleas.

defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not constitute the charged crime. See State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007). It would be incompatible with this basic principle to suggest that Mr. Johnson's affirmative responses at the plea hearing somehow function to establish a factual basis for his pleas.

In short, Mr. Johnson's noncompliance with a court order or requirement cannot constitute contempt unless the noncompliance is willful and intended to avoid compliance. Noncompliance is not willful unless the individual is aware of that with which he is required to comply. It is not seriously disputed that Mr. Johnson was unaware of the contents or details of what happened at the March 1 paternity hearing.[3] Neither the state nor

[3] At one point during the postconviction motion hearing, the state asserted that law enforcement called Mr. Johnson *after* the order. (DOC 63:13; Appendix G:13). However, the state was unable to specifically identify any portion of the record to support its claim. The state then asserted that "even though we don't lay out each and every single one of the contacts that law enforcement had with the defendant" the court could infer from the record that the defendant "knew he was supposed to be turning the child back over." (DOC 63:15-16; Appendix G:15-16). However, it was law enforcement rather than the court that had previously instructed Mr. Johnson to return the child. Law enforcement's instructions prior to the March 1 hearing did not function to impart the details of that hearing to Mr. Johnson. Accordingly, Mr. Johnson submits that there is no real dispute that he was unaware of what specifically happened at the March 1 paternity hearing.

the circuit court refers to any legal authority in support of the proposition that Mr. Johnson's rejected attempt to appear by telephone at the paternity hearing somehow satisfies the requirement that his noncompliance with a court order purportedly issued at that hearing was willful and intentional.

Mr. Johnson submits that he had demonstrated by clear and convincing evidence that his pleas to three counts of contempt lacked a factual basis, and as a result, it would constitute a manifest injustice not to allow him to withdraw his pleas. The circuit court erroneously exercised discretion in denying Mr. Johnson's motion to withdraw his pleas.

c. Continuing contempt.

Even if Mr. Johnson was in contempt of the court commissioner's purported March 1 paternity hearing order/judgment until March 7, there is no basis for the conclusion that the continuous contempt can be broken down into three distinct and separate acts of contempt on March 1, March 2 , and March 3.

Wis. Stats. §785.01(1) does not define contempt of court in terms of twenty-four hour increments. The statute does not provide that a person who disobeys, resists, or obstructs an order, process, or authority of the

court is guilty of a separate criminal act for each day that passes without compliance.[4]

At the conclusion of the postconviction motion hearing, the circuit court clarified that it was finding a factual basis for three discrete acts of contempt. (DOC 63:25-26; Appendix G:25-26). The basis for the court's finding of three discrete acts of contempt rather than a single continuous act was that Mr. Johnson "agreed at the date that the plea was taken, on the plea hearing date, that they were discrete acts of contempt." (DOC 63:25-26; Appendix G:25-26).

Again, as one of the purposes of the court's obligation to establish a factual basis for the plea is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that

[4] A recent unpublished authored opinion from District I provides an example. In State v. Hall, 2019 WI App 21, 927 N.W.2d 934, (Wis. Ct. App. 2019), the defendant refused to comply with a family court order directing him to return his daughter to the child's mother, consistent with an earlier placement order. The court issued the order on June 15, 2016, and the defendant was noncompliant as of July 12, 2016. State v. Hall, 2019 WI App 21, ¶2, 927 N.W.2d 934, (Wis. Ct. App. 2019). Pursuant to a plea agreement, the state amended the original charge from two felony counts of interfering with child custody to one misdemeanor count of contempt. State v. Hall, 2019 WI App 21, ¶3, 927 N.W.2d 934, (Wis. Ct. App. 2019). Despite the fact that the defendant had been in contempt for twenty-seven days, the state charged only one count of contempt. This unpublished decision is cited for persuasive value pursuant to Wis. Stats. §809.23(3)(b); a copy is attached as Exhibit H.

his conduct does not constitute the charged crime, Mr. Johnson's perfunctory affirmative responses at the plea hearing cannot themselves establish the factual basis for his pleas to three separate counts. See State v. Lackershire, 2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007).

The issue is significant because, with convictions for three misdemeanors, the court was able to place Mr. Johnson on probation for two years instead of one. If this court concludes that the facts of this case provide a basis for only one misdemeanor count of contempt, the two years of probation imposed by the court would be contrary to Wis. Stats. §973.09(2)(a)1r. In that event, the excess term of probation would be void, and Mr. Johnson's term of probation would be commuted without further proceedings in accordance with Wis. Stats. §973.09(2m).

Other than Mr. Johnson's responses at the plea hearing, the circuit court identified no other basis for its finding that a factual basis supports convictions for three discrete counts of contempt of court. Even if the circuit court's finding that Mr. Johnson disobeyed an order of the court is correct, it was an erroneous exercise of discretion to reject his argument that any act of contempt was continuous and could not arbitrarily be

broken down into discrete acts for each twenty-four hour period of noncompliance.

CONCLUSION TO BRIEF AND ARGUMENT

Mr. Johnson respectfully requests that this court reverse the denial of his postconviction motion, vacate the judgment of conviction, and withdraw his pleasin this case.

Dated this 23rd day of August, 2019.

Respectfully submitted,

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Kody Johnson

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 5048 words.

_____

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.

_____

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 initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that

the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.
