

RECEIVEDSTATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**10-23-2019****CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2019AP001058-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KODY K JOHNSON,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 12, THE HONORABLE JILL J. KAROFKY, PRESIDING

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ISSUES PRESENTED

Is Defendant-Appellant Kody K. Johnson entitled to relief on his plea withdrawal claim where he asserts there is no factual basis for the plea to three counts of contempt of court in violation of Wis. Stats. §785.01(1)(b)?

The circuit court denied Johnson's Post-Conviction motion for plea withdrawal on May 30, 2019.

The Court should answer, "No."

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

INTRODUCTION

Johnson pled guilty to three counts of Contempt of Court, contrary to Wis. Stats. §785.01(1)(b), which were orally amended from one count of felony Interference with Child Custody, contrary to Wis. Stats. §948.31(2). The court placed Johnson on probation for two years. Johnson now seeks to withdraw those pleas, claiming there is an insufficient

factual basis for the pleas, and in the alternative, that there is only a factual basis for a single count of Contempt of Court.

First, Johnson argues that his pleas to three counts of Contempt of Court lacked a factual basis. Johnson is wrong. All that is required is that the factual basis is developed on the record. Several sources, including defense counsel and prosecutor statements, officer statements, a criminal complaint, and testimony from the preliminary hearing, can supply the facts necessary to establish a factual basis. Here, a factual basis for Johnson's plea was contained within the criminal complaint and developed on the record. At the time of Johnson's plea, the record contained information that satisfied the elements for the crimes to which Johnson pled guilty, the three counts of Contempt of Court.

Alternatively, Johnson argues that even if a factual basis existed for the offense of Contempt of Court, the records does not support a factual basis for three separate counts because any contempt was a continuous act. Again, Johnson is incorrect. He is in Contempt of Court from March 1-7, 2018. The State has discretion to charge one single count encompassing the seven days or seven separate counts

for each day. The State and defense counsel negotiated to have only three counts.

The circuit court rejected Johnson's claims after a hearing on his Post-Conviction motion. This Court should affirm the circuit court's ruling.

STATEMENT OF THE CASE

1. On March 6, 2018, a criminal complaint was filed in Dane County Circuit Court charging the defendant, Kody K. Johnson, with one count of Interference with Child Custody, contrary to Wis. Stats. §948.31(2). (1:1-3)

2. On April 3, 2018, a Preliminary Hearing was held in Branch 15. The defendant appeared with counsel David Knoll on behalf of his partner Toni Laitsch. Detective Kellogg testified that Johnson was told by law enforcement multiple times before the March 1, 2018 date to return the child to her mother and he did not do so. (54:5-6) Detective Kellogg further testified that on March 1, 2018, she talked to Johnson on the phone after he did not appear for the custody hearing and she told him "that the court commissioner had found that he had absolutely no custody at that point and that the child should

be returned to the mother immediately." (54:6) Detective Kellogg testified that Johnson was telling her that he was in Ohio and would return the next day, however after a felony warrant was issued, the U.S. Marshals located Johnson in Indiana with the child. (54:7-8)

3. On July 9, 2018, a Plea/Sentencing Hearing was held in Branch 12. The defendant appeared with counsel Attorney Michelle Tjader. Pursuant to a negotiated plea agreement, the defendant entered pleas of guilty to an orally amended complaint of three counts of Contempt of Court/Disobey Order, an unclassified misdemeanor, contrary to Wis. Stats. §785.01(1)(b). (42:1-2) Attorney Tjader further clarified that the definition would be "intentional disobedience, resistance or obstruction of the authority, process or order of a court." (62:3) The defendant and his trial counsel reviewed, filled out, and signed a Plea Questionnaire. (42:1-2) Attorney Tjader indicated that there was no reason not to accept the defendant's plea. (42:21) Attorney Tjader further supplemented the facts to apprise the court of the family court hearing on March 1, 2018 and the orders set forth therein. Attorney Tjader indicated that the "factual basis we have is that he was in continuous contempt of court from

March 1st of 2018 to March 7th of 2018." (62:16-18) The State and defense stipulated there would be three separate dates of contempt of court - March 1, 2 and 3, 2018. (62:18) The court went over the Plea Questionnaire and Waiver of Rights form with the defendant and the defendant indicated that he read the form before he signed it, he understood everything on the form, Attorney Tjader answered any questions that he had and that he and Attorney Tjader had enough time to talk about the case. The Court asks the defendant:

THE COURT: Okay. The first count of the state's amendment, Mr. Johnson, is that on or about March 1st, 2018, you disobeyed an order of court in violation of 785.01(1)(b). Do you understand the nature of that charge?

THE DEFENDANT: I do, your Honor.

....

THE COURT: Mr. Johnson, do you understand that as to that charge, the maximum penalty is a fine not to exceed \$5,000 or one year imprisonment in the county jail or both.

THE DEFENDANT: I do.

THE COURT: Count two is that on or about March 2nd, 2018, you disobeyed an order of the court. Do you understand the nature of that charge in Count No. Two?

THE DEFENDANT: I do, your Honor.

THE COURT: Just like the first charge, do you also understand that the maximum penalty under 785.04(2)(a) is a fine -- a \$5,000 fine or one year imprisonment or both?

THE DEFENDANT: I do, your Honor.

THE COURT: Count three alleges that on or about March 3rd, 2018, you intentionally disobeyed an order of the court. Do you understand the nature of Count 3?

THE DEFENDANT: I do, your Honor.

THE COURT: Do you understand the maximum penalty for Count 3 is a fine not to exceed \$5,000, or one year in jail or both?

THE DEFENDANT: I do, your Honor.

THE COURT: And as to each of these, Mr. Johnson, do you understand that I could, in fact, impose the maximum penalty on each of these counts?

THE DEFENDANT: I do, your Honor.

THE COURT: What is your plea to the amended Count No. 1, the contempt of court that the state charges happened on March 1st of 2018?

THE DEFENDANT: Guilty.

THE COURT: What is your plea to Count two, the contempt of the court that the state charges you committed on March 2nd, 2018?

THE DEFENDANT: Guilty.

THE COURT: What is your plea to Count 3, the contempt of court the state charges happened on March 3rd of 2018?

THE DEFENDANT: Guilty. (62:18-21)

The court found that the defendant knowingly, voluntarily, and intelligently entered his pleas. The Court then relied upon the facts in the criminal complaint together with the facts that Attorney Tjader put on the record, and accepted the defendant's pleas, finding him guilty of all three charges. (62:21-22)

Further, during the sentencing portion of the hearing the defendant stated:

I just want to let you know that I do take full responsibility for all that's happened. Although the situation, like my attorney mentioned, it was just more like domestic and just a dispute of -- over our child. I have never been to, you know, cause -- I never meant to cause any trouble or criminal activity or anything like that. And I just want to also let you know that, if given probation, I will successfully complete that and use the opportunity to get more treatment for parenting situations and use that to my advantage. (62:34)

At sentencing, the court adopted the joint recommendation of a withheld sentence of two years of probation. (62:38-39)

4. On January 23, 2019, Johnson filed a Motion for Post-Conviction Relief requesting that the court vacate the judgment of conviction and allow Johnson to withdraw his pleas. Johnson claimed that the orally amended complaint lacked a factual basis and therefore was not entered knowingly, voluntarily and intelligently. (47:1-7)

5. On February 25, 2019, the State filed a response brief requesting that the circuit court deny Johnson's Post-Conviction Motion. (48:1-9)

6. On May 30, 2019, a Post-Conviction hearing was held. Oral arguments were made by both parties. The circuit court denied Johnson's motion for plea withdrawal. (63:25-26) The court

ruled that Johnson failed to meet the manifest injustice standard. (63:24-25)

Johnson now appeals.

STANDARD OF REVIEW

"A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right." *State v. Taylor*, 2013 WI 34, ¶ 25, 347 Wis.2d 30, 829 N.W.2d 482 (citations omitted). "Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact that is reviewed independently." *Id.* "In making this determination, this court accepts the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous." *Id.*

When a defendant attempts to make a prima facie showing that the circuit court violated its duties during the plea hearing, this Court determines the sufficiency of the plea colloquy and necessity of an evidentiary hearing independently of the circuit court, but benefitting from its analysis. *State v. Hoppe*, 2009 WI 41, ¶ 17, 317 Wis.2d 161, 765 N.W.2d 794.

ARGUMENT

I. This Court should affirm because a factual basis for Johnson's plea was developed on the record.

Johnson's claim on appeal is that he is entitled to plea withdrawal because the circuit court failed to establish a factual basis for his plea. A factual basis for Johnson's plea was, however, developed on the record. Consequently, Johnson is not entitled to relief on his claim.

A. A defendant is entitled to post-sentencing plea withdrawal only when retaining the plea would result in a manifest injustice.

Before accepting a plea, a circuit court must perform the duties set forth in Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and it must ensure the plea is knowingly, intelligently, and voluntarily made. *State v. Brown*, 2006 WI 100, ¶¶ 23, 25, 293 Wis.2d 594, 716 N.W.2d 906. Relevant here, section 971.08 requires the circuit court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b).

The circuit court is required to find a factual basis to support a defendant's guilty plea. Wis. Stat. § 971.08(1)(b); and *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis.2d 714,

605 N.W.2d 836. The supreme court has identified this as the sixth duty that a circuit court must follow when it takes a plea. *Brown*, 293 Wis.2d 594, ¶ 35 (“(6) Ascertain personally whether a factual basis exists to support the plea;” (footnote omitted)).

The factual basis 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.” *Thomas*, 232 Wis.2d 714, ¶ 14 (quoted source omitted). Pleading guilty to conduct that does not fall within the charge is incompatible with a knowing and intelligent guilty plea. *State v. Lackershire*, 2007 WI 74, ¶ 35, 301 Wis.2d 418, 734 N.W.2d 23. A sufficient factual basis requires a showing that “the conduct which the defendant admits constitutes the offense charged.” *Id.* ¶ 33 (quoted source omitted). But when the parties have negotiated a plea, a circuit court “need not go to the same length to determine whether the facts would sustain the charge.” *State v. Sutton*, 2006 WI App 118, ¶ 16, 294 Wis.2d 330, 718 N.W.2d 146 (citation omitted). The failure to establish an adequate

factual basis for a plea constitutes a manifest injustice. *Thomas*, 232 Wis.2d 714, ¶ 17.

A defendant need not admit to the factual basis for the plea. Trial counsel's admission is sufficient for a court to find the required basis. *Id.* ¶ 18. When reviewing a motion to withdraw a guilty plea, a court may look to the "totality of the circumstances" to determine whether the defendant has agreed to the plea's factual basis. "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well as the defense counsel's statements concerning the actual basis presented by the state" *Id.* "A factual basis may also be established through witnesses' testimony, or a prosecutor reading police reports or statements of evidence." *Id.* ¶ 21. In assessing whether there was a sufficient factual basis for the plea, this court examines the totality of the circumstances in the circuit court. *Id.* ¶ 23.

When a court fails to establish a factual basis for the plea, a defendant may move for plea withdrawal under *Bangert*. *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis.2d 350, 734 N.W.2d 48. A *Bangert* motion "must (1) make a prima facie showing of a violation of Wis. Stat. §971.08 or other court-mandated

duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." *Brown*, 293 Wis.2d 594, ¶ 39. If the defendant makes the requisite showings, then "the court must hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." *Id.* ¶ 40.

A defendant moving for plea withdrawal after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *Id.* ¶ 18 (citation omitted). "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" *Id.* ¶ 16 (citation omitted). "[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offenses pleaded to, manifest injustice has occurred." *Id.* ¶ 17.

B. To satisfy the factual basis requirement, all that is required is for the factual basis to be developed on the record.

The "'factual basis' requirement is distinct from the.. 'voluntariness' requirement for guilty pleas." *Id.* ¶ 14 (citation omitted). "The factual basis requirement 'protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* (citation omitted).

"A judge does not have to 'engage in a colloquy with the defendant to establish a factual basis for a guilty plea.'" *Id.* ¶ 20 (quoting *United States v. Musa*, 946 F.2d 1297, 1302 (7th Cir. 1991)). This is because "[t]he phrase 'such inquiry,' indicates that a judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." *State v. Black*, 2001 WI 31, ¶ 12, 242 Wis.2d 126, 624 N.W.2d 363 (quoting *Thomas*, 232 Wis.2d 714, ¶ 22); Wis. Stat. § 971.08(1)(b) ("Before the court accepts a plea of guilty or no contest, it shall . . . [m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.").

To satisfy section 971.08(1)(b), "[a]ll that is required is for the factual basis to be developed on the record." *Thomas*, 232 Wis.2d 714, ¶ 20. Accordingly, "a court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine whether a defendant has agreed to the factual basis underlying the guilty plea." *Id.* ¶ 18. The totality of the circumstances includes "the plea hearing record," "counsel's statements concerning the factual basis," and the "preliminary hearing," among other portions of the record. *Id.* ¶¶ 18, 24; see also *Black*, 242 Wis.2d 126, ¶ 11 ("In conducting this 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.'" (citation omitted)).

Johnson has failed to establish that plea withdrawal is necessary to correct a manifest injustice. The circuit court complied with its obligation when it took Johnson's guilty plea. To the extent that this Court has any questions about the plea colloquy itself, the totality of the record demonstrates that Johnson entered his guilty plea knowingly, intelligently, and voluntarily. Taken together, Johnson's

plea colloquy, the executed guilty plea questionnaire and the record established both the preliminary hearing and the plea and sentencing hearing provide a factual basis for Johnson's plea.

C. Johnson is not entitled to plea withdrawal because a factual basis for his plea was developed on the record.

Here, a factual basis for Johnson's plea was developed on the record. As a result, Johnson is not entitled to plea withdrawal.

Wisconsin Statute § 785.01(1)(b) Contempt of Court means intentional disobedience, resistance or obstruction of the authority, process or order of a court. Wis. Stat. § 785.01(1)(b). That crime contains three elements: (1) A court ordered the defendant to return his daughter to the child's mother, (2) the defendant had the ability to comply with that order, and (3) the defendant intentionally disobeyed that court order. Wis. Stat. § 785.01(1)(b). The record established a factual basis for Johnson's plea because it contained information that satisfied all three elements.

Regarding the first element, at the preliminary hearing, Detective Kellogg testified "the court commissioner had found that he (Johnson) had absolutely no custody at that point and

that the child should be returned to the mother immediately." (54:6) Given that testimony, the court commissioner ordered Johnson to return the child to her mother.

As to the second element, at the preliminary hearing, Detective Kellogg testified that she spoke with Johnson and he told her that he was in Ohio and would return the next day with the child. (54:7-8) Given that evidence, the record at the time of his plea demonstrated that Johnson had the ability to return the child but chose not to do so.

As to the third element, Detective Kellogg testified that she told Johnson that "he had absolutely no custody at that point and that the child should be returned to the mother immediately" and he failed to comply with that order. (54:6) Detective Kellogg testified that a felony warrant was issued and U.S. Marshals located Johnson in Indiana with the child on March 7, 2018. (54:7-8)

Furthermore, Attorney Tjader supplemented the record and apprised the circuit court at the plea and sentencing hearing that the family court hearing/custody hearing occurred on March 1, 2018 and Johnson was ordered to return the child. Attorney Tjader and the State stipulated that Johnson was in

continuous contempt of court from March 1-7, 2018. (62:16-18)

Because the record contained information that satisfied the elements for Johnson's crimes, the record established a factual basis for Johnson's plea. *Thomas*, 232 Wis.2d 714, ¶ 20. The circuit court made the proper inquiries at the plea hearing and was able to form a sufficient factual basis for the pleas.

Johnson does not argue that he was unaware of the elements of his crime. See *Black*, 242 Wis.2d 126, ¶ 12. And even if he did, the record demonstrated that Johnson knew the elements. The Plea Questionnaire/Waiver of Rights form that Johnson signed outlined the charges to prove three counts of Contempt of Court. (42:1-2)

Johnson argues that the pleas to three counts of contempt of court lacked a factual basis. Johnson's post-conviction motion was conclusory and incomplete and the circuit court was correct to deny the motion. Johnson argues that statements of defense counsel cannot function as a factual basis and that the actual order issued by the court commissioner should have been admitted into the record. Johnson further argues that he was unaware of the contents of

the court commissioner's order. Lastly, Johnson argues that if there is a factual basis to conclude that he knowingly and intentionally disobeyed a court, that is was a single continuous act and therefore could not be three distinct and separate offenses. (Johnson's Br. 9-10)

Contrary to Johnson's belief, the law "does not dictate how a judge" must establish a factual basis. *Thomas*, 232 Wis.2d 714, ¶ 21. Certainly, the court could have established a factual basis using one of Johnson's methods, but the court was not required to do so to satisfy its obligation. "All that is required is for the factual basis to be developed on the record—several sources can supply the facts." *Id.* ¶ 20. As noted above, here, several sources, including testimony from the preliminary hearing and counsel's statements at the plea hearing supplied the necessary facts to establish a factual basis for Johnson's plea.

There was no speculation on the part of defense counsel as Johnson now claims. Attorney Tjader and the State are officers of the Court and were merely providing information to the circuit court that had been gleaned from law enforcement, the record and presumably Attorney Tjader's client. There is no requirement that if an individual is

entered into a plea with a joint recommendation to the court that all physical evidence and documentation be put into the record. Such a requirement would put a halt to the criminal justice system. Both the State and defense counsel would need to essentially put on a miniature trial in order to enter a plea. This is similar to situation when there is a violation of a bond or injunction, or a felon in possession of a firearm. The bond, injunction or judgement of conviction are only put into the record when said documentation is in dispute. That was not the case here. All parties stipulated to the custody order and the facts. (62:16-18)

As to Johnson's alternative claim that even if there is a factual basis that Johnson disobeyed an order of the court, that it would only constitute one single continuous act, Johnson is incorrect. The state could have amended to one single continuous act or potentially up to seven separate acts. Here, a plea to three acts was negotiated and agreed upon by the parties. The circuit court asked Johnson at the plea hearing if he agreed to the three distinct dates and he assented. (62: 18-20)

Here, the record established a factual basis for Johnson's plea, as it contained information that showed

Johnson (1) a court ordered the defendant to return his daughter to the child's mother, (2) the defendant had the ability to comply with that order, and (3) the defendant intentionally disobeyed that court order. Accordingly, this Court should reject Johnson's claim.

Johnson failed to prove by clear and convincing evidence that a refusal to withdraw his plea would result in a manifest injustice. The circuit court correctly held that Johnson failed to show that his plea was not knowingly, intelligently and voluntarily entered.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Johnson's Post-Conviction motion.

Dated this 22nd day of October, 2019.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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is 21 pages.

Dated: _____.

Signed,

Attorney

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

I hereby certify that:

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

I further certify that:

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

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

Dated this ____ day of October, 2019.

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