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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.

REPLY BRIEF AND ARGUMENT OF APPELLANT

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ARGUMENT

I. Mr. Johnson disagrees with the state's position that the circuit court properly determined that a factual basis exists for his pleas.

Mr. Johnson disagrees with the state's position that the circuit court developed a factual basis for his pleas on the record. The record does not present facts to establish each element of the offense of conviction.

The state submits that Detective Kellogg's testimony at the preliminary hearing establishes the existence of an order requiring Mr. Johnson to return the child. (State's Brief p. 15-16)(DOC 54:6). Mr. Johnson disagrees. According to the passage quoted by the state, the court commissioner found that Mr. Johnson did not have custody of the child, and that the child "should be returned to the mother immediately." (State's Brief p.16)(DOC 54:6). A careful reading of the entire passage from the preliminary hearing suggests that what actually happened is that the court commissioner found that Mr. Johnson did not have custody and that Detective Kellogg told Mr. Johnson to return the child as a consequence of that finding. (DOC 54:6). There is no specific indication that Detective Kellogg was

actually present during the hearing and would have known what the court commissioner said – when asked directly, he did not indicate that he was present. (DOC 54:6). The public record available through CCAP merely indicates that a paternity judgment was entered; there is no indication of an order being issued for Mr. Johnson to return the child. The instruction that the child should be returned immediately appears to be Detective Kellogg's rather than the court commissioner's.

However, even if the testimony from Detective Kellogg establishes that the court commissioner ordered Mr. Johnson to return the child immediately, the elements of the offense of conviction are not satisfied because Mr. Johnson was not present at the custody hearing – either in person or by telephone – and had no knowledge of what the court commissioner may have ordered him to do. As Mr. Johnson has argued, a person cannot intentionally disobey a court order if the person has no actual knowledge of the existence of the order or its contents.

Notably, the state offers no specific argument or basis to establish that Mr. Johnson was aware of the court commissioner's order and *intentionally* disobeyed it. The preliminary hearing transcript indicates that Detective Kellogg told Mr. Johnson to return the child

in a telephone call. (DOC 54:6). The passage relied on by the state (State's Brief p. 16) does not establish that Detective Kellogg informed Mr. Johnson that the court commissioner had issued an order requiring Mr. Johnson to return the child. If Mr. Johnson disobeyed Detective Kellogg's instructions, he did not engage in contempt of court.

The state goes on to argue that the factual record was supplemented by defense counsel, stating that the court commissioner ordered Mr. Johnson to return the child. (State's Brief, p.16). Certainly defense counsel may stipulate that a factual basis for a plea exists, but the state offers no authority for the proposition that a factual basis for a plea may be established by the factual assertions of defense counsel. Defense counsel was not reading from police reports or quoting hearing testimony, and Mr. Johnson again submits that the factual basis for a plea cannot be established by the independent factual assertions from defense counsel.

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). Since the factual record does not establish a factual basis for Mr. Johnson's knowing and intelligent pleas to

contempt of court, it would constitute a manifest injustice not to allow him to withdraw his pleas in this case. See State v. Booker, 2006 WI 79, ¶36, 292 Wis. 2d 43, 717 N.W.2d 676 (2006).

II. Mr. Johnson disagrees with the state's argument that the facts of record establish a basis for his pleas to three counts of contempt of court.

Even if the factual record establishes that Mr. Johnson intentionally disobeyed a court order to return the child to the custody of the mother, there is no basis for Mr. Johnson's pleas to three separate counts of contempt.

The state's entire argument in response appears to hinge on the fact that Mr. Johnson 'agreed' to three counts. (State's Brief, p. 19)(DOC 62:18-20). At the postconviction motion hearing, the court also relied on Mr. Johnson's 'agreement' in order to establish a basis for three separate counts of contempt. (DOC 63:25-26).

However, that position is inconsistent with the purpose of the requirement that the court make a factual basis determination - 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. See State v. Lackershire,

2007 WI 74, ¶35, 301 Wis.2d 418, 734 N.W.2d 23 (2007). The fact that Mr. Johnson agreed to plead to three counts of contempt does not itself establish a factual basis for the pleas. If it did, there would be no need for the court to make an independent determination.

The state offers no substantive argument as to why each day that Mr. Johnson did not return the child to the custody of the mother constitutes a separate and distinct criminal offense. The statute does not provide that each day in contempt is a separate criminal offense. The statute itself does not define the offense in twenty-four hour increments, and the selection of twenty-four hours as the marking point for each offense is entirely arbitrary.

Mr. Johnson submits that he has shown by clear and convincing evidence that the factual record does not establish a factual basis for convictions to three separate counts of contempt of court. If the court concludes that a factual basis exists for a plea to a single count of contempt of court, the judgment of conviction should be amended to show a conviction for a single count.

CONCLUSION AND REQUEST FOR RELIEF

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

Dated this 7th day of November, 2019.

Respectfully submitted,

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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 1034 words.

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