STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP1699-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAKYTA V.T. CHENTIS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Waukesha County Circuit Court, the Honorable Maria S. Lazar, Presiding, and an Order Denying Postconviction Relief, the Honorable J. Arthur Melvin, III, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. There was no factual basis for Mr. Chentis' plea, so he is entitled to withdraw the plea.

Mr. Chentis is entitled to plea withdrawal because the record fails to establish that he knowingly possessed a narcotic. Mr. Chentis pleaded no contest to possessing a quantity of heroin so small that even the crime lab could not measure it. The Wisconsin Supreme Court has held that such a conviction cannot stand. *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977). Facts that are insufficient to sustain a conviction cannot be used to support a no contest plea. Therefore, Mr. Chentis is entitled to plea withdrawal.

The State argues that the "aggregate facts set forth by the criminal complaint and the attorneys' verbal representations" were sufficient to establish a factual basis. (Respondent's Brief at 8.) The State insists that the drug paraphernalia and "fresh track marks" on Mr. Chentis' arm—which were noted in the complaint—were sufficient to impute knowing possession of the controlled substance. (Respondent's Brief at 9-10.) But similar circumstantial facts were present in *Kabat*, but were still insufficient to support the conviction. Therefore, this court should find the evidence inadequate to support Mr. Chentis' plea.

As a preliminary matter, the State points out the obvious fact that *Kabat* and *Poellinger* arose in a different procedural posture than this case. (Respondent's Brief at 11, 13.) Mr. Chentis made no attempt to disguise that distinction in his initial brief,

pointing out that *Kabat* and *Poellinger* involved claims that evidence was insufficient to support a conviction after trial. (Initial Brief at 8-11.) But the analysis from *Kabat* still controls here. If the evidence was insufficient to sustain Kabat's conviction after trial, it plainly would have been inadequate to supply a factual basis for a plea to the same charge. The factual basis requirement ensures that defendants are actually guilty of the crimes they plead guilty to; a factual basis cannot be found where there is no basis for a conviction. *See McCarthy v. United States*, 394 U.S. 459, 466-67 (1969); *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). Thus, even though *Kabat* involved a slightly different claim than that presented by Mr. Chentis, it is still controlling on the relevant issue.

The track marks and drug paraphernalia were not, as the State asserts, evidence of knowing drug possession. *Kabat* also involved evidence of drug paraphernalia—the ash seized from the defendant was found in a pipe—and it involved a confession— the defendant admitted to previously using the pipe to smoke marijuana. 76 Wis. 2d at 226, 227. Nevertheless, the Wisconsin Supreme Court held that the confession and circumstantial evidence was insufficient where the miniscule quantity of a controlled substance was found solely as a result of the crime lab's expertise. *Id.* at 228. The court found that *knowing* possession could not be imputed on those facts. *Id.* at 227.

The State has not identified any meaningful difference between the facts from *Kabat* and the allegations presented as a factual basis in this case.

Kabat and Mr. Chentis were both found with an immeasurably small quantity of a controlled substance, which was detected "solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in the articles possessed by the defendant." *Id.* Kabat possessed drug paraphernalia circumstantially suggesting that he knew about the controlled substance, just as Mr. Chentis did. In *Kabat*, the evidence was insufficient for a conviction, so it must be insufficient here.

In contrast, *Poellinger* involved an observable quantity of a controlled substance, albeit in the threads of a vial. *State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990). Mr. Chentis' case did not involve a distinct quantity of drugs that could be observed, collected, and tested. The record before the trial court contained no allegation that a residue was visible on the metal cup, as it was seen on the vial threads or the compact from *Poellinger*. Moreover, the complaint in this case did not allege the confession of knowing possession that was made in *Poellinger*.

The State brushes aside trial counsel's remark at sentencing that Mr. Chentis did not know the metal cup was in the car (while simultaneously arguing trial counsel's "verbal representations" should be construed against Mr. Chentis (Respondent's Brief at 8)). (Respondent's Brief at 14-15.) But the court considers the totality of the record when determining whether a factual basis existed. *State v. Thomas*, 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836. Trial counsel's sentencing remarks warrant scrutiny where the parties changed the factual basis for the plea without notifying the trial court, and where the plea was

ultimately based on facts completely absent from the criminal complaint. Oftentimes, the allegations in a complaint may be enough to supply a factual basis for a plea. And the complaint here would have been sufficient had Mr. Chentis pled guilty to possessing the substance that was originally believed to be a controlled substance. But when that substance turned out not to be a controlled substance, the parties and the circuit court needed to undertake a more comprehensive discussion of the evidence being used to support Mr. Chentis' plea, particularly in light of *Kabat*.

Finally, the State points out that Mr. Chentis' trial counsel inadvertently misstated at sentencing that the metal cup was found in the glove compartment, when it was actually found in a bag. (Respondent's Brief at 15.) This trivial misstatement is immaterial to establishing whether there was a factual basis for Mr. Chentis' plea.

The State has provided no compelling reason why this case should be controlled by *Poellinger* when the facts from *Kabat* are more readily comparable. The record reveals that Mr. Chentis possessed an immeasurable and seemingly unobservable quantity of heroin. The circuit court was obligated to undertake further inquiry to confirm that Mr. Chentis was guilty of the charged offense. Had the court made that inquiry, it would have had no basis to accept Mr. Chentis' plea. Therefore, this court should reverse and allow Mr. Chentis to withdraw his plea.

II. Mr. Chentis' counsel was ineffective for failing to seek dismissal of the charge where there was no basis for a conviction.

The evidence provided to the circuit court was insufficient to establish a factual basis for Mr. Chentis' plea, but the crime lab report further shows that there was no basis for Mr. Chentis to even be *charged* for possessing a controlled substance. After the white powdery substance that formed the basis for the criminal complaint tested negative, counsel should have sought dismissal of the charge against Mr. Chentis, citing *Kabat*. His failure to do so constituted ineffective assistance of counsel.

The State fleetingly—and falsely—asserts that Mr. Chentis abandoned his ineffective assistance claim before the trial court. (Respondent's Brief at 16.) The State's undeveloped argument should be ignored. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Moreover, Mr. Chentis plainly did not abandon his ineffective assistance claim; rather, he acknowledged to the postconviction court that after it denied his factual basis argument, he could not logically prevail on his claim of ineffective assistance. Rather than wasting the court's time and presenting a frivolous argument, Mr. Chentis accepted the court's denial of the ineffective assistance claim.

The State complains in a footnote that Mr. Chentis has not identified what motion should have been brought before trial, and that going to trial was Mr. Chentis' only recourse to the State's total lack of evidence after the exculpatory crime lab report was returned. (Respondent's Brief at 18 n.4.) Mr. Chentis'

postconviction motion and brief have unambiguously asserted that effective trial counsel should have sought dismissal because the State's prosecution was utterly lacking in light of *Kabat*. Mr. Chentis' counsel was permitted to bring "any motion" to the trial court's attention, and the State's inability to secure a conviction—as a matter of law—would have warranted dismissal of the felony charge. Wis. Stat. § 971.31(1)-(2).

Finally, the State argues that Mr. Chentis' appellate argument is novel, so trial counsel could not be ineffective for failing to pursue it. (Respondent's Brief 18.) Mr. Chentis' appellate argument is that *Kabat* foreclosed the possibility of his conviction after the white powdery substance was determined not to be a controlled substance. There is nothing about the rule from *Kabat*—a case decided in 1977—that is novel.

Here, counsel performed deficiently by failing to seek dismissal of the felony narcotic charge after receiving the exculpatory crime lab report, which eliminated the possibility that Mr. Chentis could be convicted of possessing a controlled substance. Mr. Chentis' counsel also performed deficiently by permitting Mr. Chentis to plead guilty to the charge were *Kabat* would have required its dismissal. Mr. Chentis was prejudiced because he clearly would not have pled guilty to the felony drug charge had his trial counsel had that charge dismissed. All of these allegations were present in Mr. Chentis' postconviction motion. Therefore, this Court should remand for an evidentiary hearing to determine whether the charge against Mr. Chentis must be dismissed for a lack of evidence.

CONCLUSION

For the reasons argued in his briefs, Mr. Chentis asks that the court reverse the decision of the circuit court denying his postconviction motion, and remand with instructions that Mr. Chentis be permitted to withdraw his plea to possessing a controlled substance. Mr. Chentis further asks that the case be remanded for an evidentiary hearing to determine whether the charge should be dismissed under *Kabat*.

Dated this 8th day of April, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,595 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 8th day of April, 2021.

Signed:

Electronically signed by Dustin C. Haskell
DUSTIN C. HASKELL
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