STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2022AP2196

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORDIARAL F. WEST,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION TO WITHDRAW PLEA AFTER SETENCING, ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE DALE L. ENGLISH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

A defendant seeking to withdraw a guilty plea after sentencing must demonstrate by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. Cordiaral F. West entered a negotiated plea agreement and pled guilty to possession with intent to deliver cocaine (greater than 5 grams but no more than 15 grams). This charge was based on numerous incidents with the following time frame: September 24, 2014 through May 24, 2015, inclusive. As a result of his plea, the State agreed to dismiss seven counts outright.

After sentencing, West moved to withdraw his plea, raising both *Bangert*[1] and *Nelson/Bentley*[2] claims. Specifically, West alleged that (1) his plea was based on erroneous information regarding possession and an inadequate factual basis; and, alternatively, (2) he would not have pled but for counsel's ineffective assistance. West's claims centered on his contention that the State could not aggregate numerous drug violations into a single crime in an expanded time frame. The postconviction court denied West's motion without an evidentiary hearing. It determined that Wis. Stat. § 971.365 governs the issue, and that under that statute and the information in the settled record, there was a factual basis for West's plea. Specifically, the court determined that under Wis. Stat. § 971.365, the State was legally entitled to aggregate West's alleged violations into a single crime in an expanded time frame.

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[1] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[2] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), *modified by State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

Was West entitled to an evidentiary hearing on his claim that a manifest injustice would result if he were not allowed to withdraw his plea?

The circuit court answered: No. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Like West, the State seeks publication. As the postconviction court pointed out, there are no "published appellate decisions in any way construing Section 971.365." (R. 146:15.) And here, the State requests that this Court determine in a published decision that Wis. Stat. § 971.365 allows for the aggregation of the amount of controlled substances where multiple acts of possession with intent to deliver controlled substances are prosecuted as one count.

Also like West, the State does not seek oral argument as it believes that the parties have fully developed the arguments in the briefs.

SUPPLEMENTAL STATEMENT OF THE CASE

A. The Complaint, Information, and Amended Information

The State charged West with five counts of conspiracy to deliver cocaine and one count of conspiracy to deliver THC. (R. 1:1–3.) According to the complaint, West approached a confidential informant (CI) on September 24, gave him a small amount of crack cocaine, and two phone numbers to call if the CI wanted more. (R. 1:4.) One number belonged to West and the other to Dazwan Jones. (R. 1:4.) Two undercover officers each made a separate cocaine purchase in an amount of one gram or less from Jones that became the predicate acts for Counts 1 and 2 against West. (R. 1:4–5.) On September 26, 2014, a different undercover officer made two additional

purchases of cocaine from Jones in amounts of more than one gram but not more than five grams which became the predicate acts for Counts 3 and 4. (R. 1:5.) So, there were four total undercover buys made with Jones.

Counts 5 and 6 were based on cocaine found on September 26, 2014, when a warrant was executed for Miguel West's property. (R. 1:5.) Both Miguel West and Jones were present. (R. 1:6.) During the search, police found mail addressed to Cordial West at the searched residence, as well as 14.53 grams of crack cocaine (Count 5) and 64.7 grams of marijuana (Count 6). (R. 1:5–8.)

By an information, the State added a count of possession (versus conspiracy) of more than one gram but not more than five grams of cocaine with intent to deliver, based on a transaction that occurred on May 24, 2015. (R. 16:4.) It also added a count of obstructing an officer. (R. 16:4.)

Finally, by an amended information filed on the first day of trial, the State charged West with possession (again, versus conspiracy) with intent to deliver cocaine (more than 5 grams but no more than 15 grams), second and subsequent offense. (R. 36.) The amended information provided that "between September 24, 2014 and May 24, 2015, in the City of Fond du Lac, Fond du Lac County, Wisconsin, [West] did possess with intent to deliver a controlled substance, to-wit: cocaine base, in an amount of more than 5 grams but not more than 15 grams." (R. 36:1.)

B. The Plea and Plea Colloquy

Also on the first day of trial, West negotiated with the State to plead guilty to the sole count charged in the amended information: possession with intent to deliver cocaine (greater than 5 grams but no more than 15 grams), second and subsequent offense. (R. 52.) All seven remaining counts would be dismissed outright. (R. 52:2; 138:75.) The State informed

the court that its "view of the evidence and the reason the Amended Information reads the way it does, No. 1, it includes the date of September 24 through and inclusive of May 24, 2015." (R. 138:78.) The State continued, "this is an appropriate amendment because between those dates we believe that there's sufficient evidence to prove that *in total* between September and May, September of '14 and May of '15, that Mr. West, the defendant, possessed more than five but less than 15 grams total during that entire time." (R. 138:80–81 (emphasis added).)

The State explained the benefit to West in taking the plea: "the benefit of the bargain and the reason, part of the reason, we're asking the [c]ourt to accept the amendment is, it reduces Mr. West's overall exposure but still accurately reflects the facts, at least, what the State believes it could prove if put to its proof at trial." (R. 138:81.)

Defense counsel informed the court that the plea was "a negotiated resolution" West was agreeing to "because we think there might be some appellate issues regarding the conspiracies, the multiple counts of conspiracy and the joinder." (R. 138:82.) Defense counsel explained: "we would have had to present inconsistent defenses. On the conspiracy, it would be one defense versus another potential defense on Counts 7 and 8." (R. 138:82.) It was defense counsel's opinion that the plea was in West's "best interest especially given the other case[3] that's coming up for sentencing." (R. 138:82.)

During the plea colloquy, the court informed West of the charge and asked West if he possessed the amount of cocaine during the provided time period:

> It's alleged that you possessed greater than five, up to 15 grams of cocaine with the intent to deliver during the time period between September 24th of this year

[3] "[T]he other case" was a case from which West was going to be sentenced on revocation of probation. (R. 77:82–83; 146:7, 8.)

> -- strike that -- September 24th of last year and May 24th of this year. So my question, Mr. West, is, do you admit to committing possession with intent to deliver cocaine greater than five, up to 15 grams, second and subsequent offense during that time period?

(R. 138:85–86.) West replied, "Yes." (R. 138:86.)

Finally, when the court asked defense counsel if he was satisfied that there was a factual basis for this count in the amended information, counsel replied, "Yes, there is." (R. 138:89.) West pled guilty[4], and the court found that West "freely, knowingly and voluntarily" entered his plea and found him guilty. (R. 138:87, 91.)

C. Sentencing

The court sentenced West to 10 years of initial confinement and 3 years of extended supervision, consecutive to any other sentence. (R. 58:1; 78:23.)

D. Motion to Withdraw Plea

West moved to withdraw his plea. (R. 142.) He first argued that since pleading guilty, West "learned that it was improper to add up smaller amounts of cocaine that he might have possessed at separate times to create a possession case

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[4] The plea questionnaire provides that West pled "no contest." (R. 52.) During the plea hearing, defense counsel informed the court that West was "going to proffer a no contest plea," but when asked how he pled, West replied, "guilty." (R. 138:75, 87.) West also acknowledged to the court that no one forced him to plead "guilty." (R. 138:88.) Defense counsel then told the court that he was satisfied that there was a factual basis in the amended information for "the guilty plea," and that he was satisfied that West entered the "guilty plea" freely, knowingly, and voluntarily. (R. 138:89.) The judgment of conviction also provides that West entered a guilty plea. (R. 58:1.) The State notes that throughout both his appellate brief and postconviction motion, West acknowledges that he pled guilty.

of a larger amount that he never possessed at one time." (R. 142:4.) And, had West known "of the impropriety of doing so, he would not have pled guilty to that charge, because it was a charge for which he was not guilty." (R. 142:4.) West argued that the court's "colloquy failed to establish whether the underlying conduct constituted the crime to which he entered a plea." (R. 142:7.) He argued that the court "never asked when, between September 24, 2014 and May 24, 2015, West possessed more than 5, but less than 15, grams of cocaine." (R. 142:7–8.) Rather, "there was an implicit belief that the possession of smaller amounts was cumulative, and that several less serious offenses could be combined into a single more serious offense." (R. 142:8.) And, "[f]or this reason, and because the plea was taken without an adequate factual basis," West requested plea withdrawal. (R. 142:8.)

West also moved for plea withdrawal on an alternative ground. (R. 142:8.) He argued that his motion "could be analyzed through the lens" that he pled guilty based on "counsel's failure to accurately review the full and actual elements of the offense with West and explain how [West's] conduct would have satisfied possession of 5-15 grams of cocaine." (R. 142:8–9.) He further argued that "[i]t was deficient performance to allow West to plead guilty to an offense for which there was no factual basis," and that absent counsel's deficiencies, "he would not have entered a plea, but instead, would have gone to trial." (R. 142:10.) According to West, "[i]t is a manifest injustice that West, who has always maintained he did not have control over the residence where the larger amounts of cocaine were found, should remain convicted of such an offense." (R. 142:11.)

E. Court's Decision Denying Plea Withdrawal

The court denied West's motion without an evidentiary hearing. (R. 148.) It recognized that "if there wasn't a legal basis for the guilty plea to the charge in the Amended Information, then an evidentiary hearing would be necessary to address potentially ineffective assistance of counsel and also address the argument concerning the defective plea colloquy." (R. 146:3.) But, if "there was a factual basis for the guilty plea to the charge in question, then, perforce, there wouldn't be any ineffective assistance of counsel and the plea colloquy would be sufficient." (R. 146:3–4.) Therefore, the court noted that it "had to figure out the answer to the question of whether there was a factual basis for the guilty plea to the charge in the Amended Information." (R. 146:4.)

The postconviction court noted that West's argument was that "you can't aggregate amounts possessed with intent to deliver at various times during the time frame to, in effect, become one count that exceeds the minimum." (R. 146:5.) In reaching its conclusion, the court reviewed the complaint, information, amended information, plea questionnaire, and the plea hearing. (R. 146:4.) The court noted that the circuit court "had a better background in [West's] case than maybe others due to its trial preparation and addressing some of the prior motions." (R. 146:8.) The court also noted that the plea in question was a *negotiated* plea, and therefore the trial court did not have to "go to the same length to determine whether a factual basis -- to determine whether a factual basis for the charge pled to and the plea existed, as it would have had to have done had the plea not been the result of a negotiated resolution." (R. 146:13–14.)

The court concluded, based upon the applicable statute and the record presented, that a factual basis existed. (R. 146:14.) Specifically, the court determined that Wis. Stat. § 971.365(1)(b) governs the issue. (R. 146:14–15.) The court

recognized that while there are no "published appellate decisions in any way construing Section 971.365," the statute provides that "[i]n any case under Section 961.41(1m)(cm)[5]" that "involve[es] more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." (R. 146:15.) The court then pointed out that the complaint alleged multiple violations:

> [T]here were four transactions here that were charged. The CI advised that he believed that Dazwan Jones was working under the direction of [West]. There were four undercover buys made with Dazwan Jones: two on September 24th and two on September 26th of 2014.
>
> Thereafter, also on September 26th of 2014, there was a search warrant execution at 42 South Street in Fond du Lac. Miguel West and Dazwan Jones were present. Found during the search was a letter to [West] from Charter sent to that address, 42 South Street, as well as 14.53 grams of crack and 64.7 grams of marijuana, et cetera.

(R. 146:15–16.) The court found that the various violations were pursuant "to a single intent and design and that the weight -- the weight in question exceeded both 5 grams and actually exceeded 15 grams."[6] (R. 146:17.)

Therefore, applying Wis. Stat. § 971.365(1)(b) to the allegations in the record, the court concluded that "the State was legally entitled to prosecute all of the alleged violations as a single crime." (R. 146:16.) The court was "satisfied that legally there was a factual basis for the Amended Information

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[5] Wisconsin Stat. § 961.41(1m)(cm) is the crime for which West pled: possession with intent to deliver cocaine.

[6] The court did not discuss the counts provided in the original information that included a count of possession of more than one gram but not more than five grams of cocaine with intent to deliver, based on a transaction that occurred on May 24, 2015. (R. 16:4.)

and the sole count and for the guilty plea." (R. 146:17.) Based on that conclusion, the court found "no ineffective assistance of counsel, the plea colloquy was appropriate." (R. 146:17.)

The court informed West he can "take this up on appeal, it's an interesting question, but the [c]ourt's comfortable with its analysis." (R. 146:17.)

West now appeals.

STANDARD OF REVIEW

Whether a motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question "review[ed] independently of the determination[ ] rendered by the circuit court." *State v. Ruffin*, 2022 WI 34, ¶ 27, 401 Wis. 2d 619, 974 N.W.2d 432. "Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law we review independently." *Id.*

"If [a] motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Ruffin*, 401 Wis. 2d 619, ¶ 28.

ARGUMENT

The record conclusively shows that West is not entitled to plea withdrawal. He has failed to show a manifest injustice.

West seeks an evidentiary hearing on his motion for plea withdrawal because "there was an inadequate factual basis for the crime to which he pled" and, because of ineffective assistance of counsel, "his plea was based on an erroneous understanding of possession." (West's Br. 10, 13–14.) The record conclusively shows that West is not entitled to relief on either claim, and therefore the circuit court

appropriately exercised its discretion when it denied West's motion for plea withdrawal without a hearing.

A. To obtain plea withdrawal, a defendant must prove a manifest injustice either extrinsic to or as part of the plea.

A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482.

"Two legal paths are available to a defendant who seeks to withdraw his plea after sentencing." *State v. Sulla*, 2016 WI 46, ¶ 25, 369 Wis. 2d 225, 880 N.W.2d 659. First, a defendant may allege that the plea colloquy is defective. *Id*. To ensure that a plea is voluntary, circuit courts should generally comply with the duties established in Wis. Stat. § 971.08 and *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *Taylor*, 347 Wis. 2d 30, ¶¶ 30–31. When a defendant demonstrates that the circuit court failed to comply with mandated plea requirements and alleges that he did not understand information that should have been provided at a plea hearing, the circuit court must grant an evidentiary hearing. *Taylor*, 347 Wis. 2d 30, ¶ 32.

Second, when a circuit court's colloquy complies with the requirements mandated under section 971.08 and *Bangert*, a defendant may allege that a factor extrinsic to the plea colloquy rendered his plea infirm. *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48. One such extrinsic factor, ineffective assistance of counsel, requires that the defendant sufficiently allege both that counsel performed deficiently during the plea process and that the deficient performance prejudiced the defendant. *Sulla*, 369 Wis. 2d 255, ¶ 25.

B. Applying Wis. Stat. § 971.365 to the settled record, a factual basis exists for West's plea.

1. Legal principles governing a motion to withdraw a guilty plea based upon an insufficient factual basis to support the plea.

The circuit court is required to find a factual basis to support a defendant's guilty plea. Wis. Stat. § 971.08(1)(b); *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836. 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." *Thomas*, 232 Wis. 2d 714, ¶ 14 (citation 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 (citation omitted). But when the parties have *negotiated* a plea, as in West's case, 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 question of whether a factual basis exists for [West's] plea is a question of law reviewed *de novo*." *State v. Stewart*, 2018 WI App 41, ¶ 15, 383 Wis. 2d 546, 916 N.W.2d 188[7].

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[7] West does not advance a standard of review in his appellate brief. (West's Br. 10–13.) The State notes that in *State v. Peralta*, 2011 WI App 81, 334 Wis. 2d 159, 800 N.W.2d 512, this Court rejected the State's argument that a circuit court's ruling regarding

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. *Thomas*, 232 Wis. 2d 714, ¶ 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,

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the factual basis for a plea may be overturned only if it is clearly erroneous:

> [T]he underlying question as to whether a factual basis for the plea exists is subject to different standards of review depending on how the factual basis is presented to the trial court. When the State presents testimony to support the factual basis, this court applies the clearly erroneous test. However, when the factual basis for the plea derives solely from a document in the record, we do not give deference to the findings made by the trial court, and instead review the issue *de novo*.

Id. ¶ 16 (citations omitted). In this case, unlike *Peralta*, the court's finding of a factual basis involved more than reading the complaint. *Peralta*, 334 Wis. 2d 159, ¶ 16. The court's finding also included defense counsel's stipulation at the plea hearing. (R. 146:9.) At the same time, the State presented no "testimony" to support its factual basis. *Peralta*, 334 Wis. 2d 159, ¶ 16.

But in *State v. Tourville*, 2016 WI 17, 367 Wis. 2d 285, 876 N.W.2d 735, which was decided after *Peralta*, our supreme court applied the clearly erroneous standard in reviewing the factual basis for a plea, without making the distinction articulated in *Peralta*. *See Tourville*, 367 Wis. 2d 285, ¶ 18. In at least one case decided after *Tourville*, however, this Court has continued to use the *de novo* standard of review set forth in *Peralta*. *State v. Stewart*, 2018 WI App 41, ¶ 15, 383 Wis. 2d 546, 916 N.W.2d 188. The State does not address whether *Peralta* and *Stewart* are consistent with *Tourville* because the factual-basis determination in this case *also* requires this Court to engage in statutory interpretation, which requires a *de novo* standard of review.

the sentencing hearing record, as well as the defense counsel's statements concerning the factual 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 this case, the factual basis determination requires this Court to interpret Wis. Stat. § 971.365. Statutory interpretation presents a question of law that this Court reviews *de novo*. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995). In interpreting statutes, this Court primarily focuses on the statutory language. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. This Court assumes that the statutory language expresses the legislature's intent. *See id.* ¶ 44. When a statute manifests a clear meaning, this Court's inquiry ceases, and it will apply that meaning. *See Lincoln Sav. Bank, S.A. v. DOR*, 215 Wis. 2d 430, 443, 573 N.W.2d 522 (1998). Only when a statute is ambiguous do courts apply rules of statutory construction or look to extrinsic evidence of the legislature's intent. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996). Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face. *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977).

2. The relevant statutes at issue: Wis. Stat. §§ 971.365 and 961.41(1m)(cm).

There are two statutes at play in this case for this Court to interpret in order to determine whether a factual basis exists for West's plea. Wisconsin Stat. § 971.365, entitled "Crimes involving certain controlled substances," provides in part that "[i]n any case" under "961.41(1m)(cm)" that "involve[es] more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." Wis. Stat. § 971.365(1)(b). Relevant to this appeal, nothing in Wis. Stat. § 971.365 requires that the statute be affirmatively pled in an information or complaint.

Wisconsin Stat. § 961.41(1m)(cm)2. provides that it is a Class E felony to possess with intent to deliver cocaine and cocaine base that is more than 5 grams but not more than 15 grams.

3. A factual basis exists for West's plea.

The circuit court correctly found a factual basis for West's plea. Based on the totality of the circumstances and plain language of Wis. Stat. § 971.365, this Court should affirm.

As indicated above, the court reached its conclusion applying Wis. Stat. § 971.365 to the allegations in the record. (R. 146:16.) It noted that the languge of Wis. Stat. § 971.365 provides "[i]n any case under Section 961.41(1m)(cm)" that involves "more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." (R. 146:15.) Then, applying Wis. Stat. § 971.365(1)(b) to the allegations in the record, the court concluded that "the State was legally entitled to prosecute all of the alleged violations as a single crime." (R. 146:16.) Specifically, the court "reviewed the complaint," going

through the "four undercover buys" of cocaine and the seizure of cocaine in Miguel West's residence. (R. 146:15–16.) As previously indicated, Counts 1 and 2 in the complaint were for buys in the amount of one gram or less, and Counts 3 and 4 were for buys in the amount of at least one gram, but less than five grams. (R. 1:1–2.)[8] The court was "satisfied that legally there was a factual basis for the Amended Information and the sole count and for the guilty plea." (R. 146:17.) Therefore, "the State was legally entitled to prosecute all of the alleged violations as a single crime." (R. 146:16.)

The court also reached its conclusion based on trial counsel's stipulation to a factual basis. (R. 146:9.) While West notes that the court never asked *West* if a factual basis existed (West's Br. 9, 12), that was not required. *Thomas*, 232 Wis. 2d 714, ¶ 18. While it appears West also argues that no factual basis exists that West ever "*possessed*" (versus "*delivered*") the amount charged during the time-period charged (West's Br. 12), this also fails. First, during the plea colloquy, West admitted to the court that he "*possess[ed]* with the intent to deliver the cocaine, greater than five, up to 15 grams" from "September 24th of last year and May 24th of" 2015 this year." (R. 138:85.) Second, in order to make a "delivery" of cocaine, one must physically "possess" the cocaine immediately before the delivery.

Finally, as the postconviction court pointed out, West's plea was a *negotiated* plea, and therefore the trial court did not have to "go to the same length to determine whether a factual basis -- to determine whether a factual basis for the charge pled to and the plea existed, as it would have had to have done had the plea not been the result of a negotiated

[8] And, as recognized above, by an information the State added a count of possession of one to five grams of cocaine with intent to deliver, based on a transaction that occurred on May 24, 2015. (R. 16:4.)

resolution." (R. 146:13–14.) *See Sutton*, 294 Wis. 2d 330, ¶ 16 (Providing that 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.").

Therefore, based on the totality of the circumstances and plain language of Wis. Stat. § 971.365, this Court should affirm the circuit court's conclusion that a factual basis exists for West's plea. Under the circumstances, the circuit court's refusal to allow West to withdraw his plea did not result in a manifest injustice. The record conclusively shows that West is not entitled to relief.

4. Response to West's claims regarding Wis. Stat. § 971.365

In the final section of his brief (Section I.C.), West makes arguments regarding the application of Wis. Stat. § 971.365, which the State now addresses:

First, West notes that Wis. Stat. § 971.365 "was *not* included in the Amended Information relied on by the circuit court to establish a factual basis." (West's Br. 16.) But this omission does not mean that the State cannot charge West, as it did, for violating Wis. Stat. § 961.41(1m)(cm). This Court has held that "[w]hile citation to a specific statute may be the preferred practice, failure to specifically cite to a statute in the information and complaint is harmless error where there is no prejudice to the defendant." *State v. Elverman*, 2015 WI App 91, ¶ 22, 366 Wis. 2d 169, 873 N.W.2d 528. And here, the amended information provided sufficient notice of the specific act and the specific timeframe for which West was being charged, and a single intent or design was readily inferable from the details provided in both the complaint and information. The amended information sufficiently advised West of the charge against him so the absence of Wis. Stat. § 971.365 did not prejudice him, and West does not argue otherwise. Second, as previously indicated, nothing in Wis.

Stat. § 971.365 requires that the statute be affirmatively pled. It is not a pleading statute.

West next argues that Wis. Stat. § 971.365 is an "obscure statutory provision." (West's Br. 16.) First, the statute was enacted in 1985, and its title is clear that it applies to "[c]rimes involving certain controlled substances." Wis. Stat. § 971.365. While admittedly not the most applied statute, that does not make it obscure. Second, West does not explain why this statute, which clearly addresses the State's authority to charge multiple violations as a single crime if the violations were pursuant to a single intent and design, is "obscure." Wis. Stat. § 971.365(1). Third, even if the statute *was* obscure, that doesn't mean that the circuit court could not apply it.

Next, West claims that he has always "steadfastly maintained" that he had nothing to do with the 14.53 grams of cocaine seized in Miguel West's residence, and therefore what cocaine remains "is *below* the threshold for the offense to which West pled guilty.[9] (West's Br. 7, 17.) This is not true. During the plea colloquy, the court informed West of the charge he was pleading to and asked West if he possessed the amount of cocaine during the time period provided in the amended information, which encompassed the date that police seized the 14.53 grams of cocaine:

> It's alleged that you possessed greater than five, up to 15 grams of cocaine with the intent to deliver during the time period between September 24th of this year -- strike that -- September 24th of last year and May 24th of this year. So my question, Mr. West, is, do you admit to committing possession with intent to deliver cocaine greater than five, up to 15 grams,

[9] West also notes that he submitted an affidavit with his postconviction motion, as did Jones and Miguel West (R. 139; 140; 141), where all three averred that West had nothing to do with the cocaine seized at Miguel West's apartment (R. 139:1; 140:2; 141:2).

> second and subsequent offense during that time period?

(R. 138:85–86.) West replied, "Yes." (R. 138:86.) Further, before this conversation, the court asked defense counsel, "And just so the record is clear then, the proposed amendment to Count 7 would be to amend to possession with intent to deliver cocaine, greater than five, up to 15 grams?" Defense counsel replied, "Correct," and that the enhancer would remain. (R. 138:75–76.) The court then asked West, "And, Mr. West, is that your understanding as well?" And West replied, "Yes." (R. 138:76.)

Additionally, the original information added a count of possession of one to five grams of cocaine with intent to deliver, based on a transaction that occurred on May 24, 2015 (within the amended information's timeframe). (R. 16:4.) When the amount of cocaine in this count is added to the amounts of cocaine in Counts 1, 2, 3, and 4 in the complaint, the sum equals 5 to 15 grams of cocaine. In other words, the State does not need the 14.53 grams of cocaine charged in Count 5 of the complaint to get to the amount that West pled to: possession with intent to deliver cocaine greater than 5 grams but no more than 15 grams. (R. 52.)

West next argues that an adequate factual basis would "have needed to establish that the various violations were 'pursuant to a single intent and design.'" (West's Br. 17.) And, West argues, "the idea of a 'single intent and design'" was "never addressed during the plea hearing." (West's Br. 18.) West is mistaken, because "[a] single intent or design to commit theft may be inferred from the complaint." *Elverman*, 366 Wis. 2d 169, ¶ 21. So, too, the logic follows, can a single intent or design to possess with intent to deliver be inferred from the complaint. And here, the complaint alleged that West gave a CI two phone numbers to call if he wanted to buy cocaine. (R. 1:4.) One of those numbers put the CI in contact with Jones. (R. 1:4.) Jones then completed four cocaine

transactions with two CI's, totaling around four grams of cocaine. (R. 1:4–5.) Then, police seized 14.53 grams of cocaine during the search of Miguel West's home, where police found mail addressed to West at Miguel West's home. (R. 1:5–6.) Finally, according to the information on May 24, 2015, West possessed with the intent to deliver cocaine in the amount of one gram but not more than 5 grams. (R. 16:4.) The postconviction court correctly determined that "based on all of that, the [c]ourt could easily conclude that the various violations were pursuant to a single intent and design." (R. 146:17.)

West also argues that the charges that he was "previously facing" were conspiracy charges and that "[t]here does not appear to be any clear authority that allows the State to aggregate multiple conspiracy charges into a single charge of possession with intent." (West's Br. 18.) Assuming for the sake of argument that this is true, it is of no consequence. West did not plead to aggregate conspiracy charges. He pled to possession with intent to deliver cocaine, which is expressly covered under Wis. Stat. § 971.365(1)(b). Also, it is not accurate to state that he was only "previously facing" conspiracy charges. The original information charged West with one count of *possession* of one to five grams of cocaine with intent to deliver, based on a transaction that occurred on May 24, 2015. (R. 16:4.)

Finally, West argues that Wis. Stat. § 971.365(1)(b) is "ambiguous" and "void for vagueness." (West's Br. 18–19.) He argues that it is ambiguous because the languge of the statute "is too vague to put individuals on notice that drug dealing in small amounts can be aggregated and charged as a single instance of a large scale drug transaction." (West's Br. 18.) But the plain language of the statute makes it clear to people like West that "[i]n any case" under "961.41(1m)(cm)" that "involve[es] more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant

to a single intent and design." Wis. Stat. § 971.365(1)(b). West fails to explain how this language is ambiguous. Merely calling it ambiguous does not make it so.

Turning to West's void-for-vagueness claim, in his appellate brief West provides the principles and the test for determining whether a statue is void for vagueness (West's Br. 18–19), but then West abruptly ends his brief (West's Br. 19). West provides no argument as to how Wis. Stat. § 971.365 is void for vagueness applying the legal principles he lays out. (West's Br. 19.) And, "[a] party must do more than simply toss a bunch of concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories." *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). Further, this Court need not consider undeveloped legal arguments. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Should this Court nonetheless address West's void-for-vagueness argument, he still loses. Whether a statute is void for vagueness "presents a legal question that this [C]ourt reviews independently." *State v. Hibbard,* 2022 WI App 53, ¶ 22, 404 Wis. 2d 668, 982 N.W.2d 105. This Court begins "with the presumption that the statute is constitutional, *State v. Barrett*, 2020 WI App 13, ¶ 14, 391 Wis. 2d 283, 941 N.W.2d 866, and [it] review[s] it with an eye towards preserving its constitutionality." *Id.* ¶ 23. This Court "will not invalidate a statute on vagueness grounds 'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.'" *Id.* (quoting *State v. Thomas*, 2004 WI App 115, ¶ 14, 274 Wis. 2d 513, 683 N.W.2d 497).

The void-for-vagueness doctrine's "aim is two-fold: (1) to ensure that our laws provide sufficient notice of what conduct is prohibited so that those wanting to obey the law may conform their behavior accordingly and (2) to provide those

charged with enforcement of the law objective standards for doing so." *Hibbard,* 404 Wis. 2d 668, ¶ 24. As the supreme court has provided, "[a] statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence regarding what it prohibits and if it fails to provide an objective standard for enforcement." *State v. McKellips*, 2016 WI 51, ¶ 41, 369 Wis. 2d 437, 881 N.W.2d 258. A "fair degree of definiteness is all that is required." *Id.* (citation omitted). A statute is also not "void for vagueness simply because 'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" *State v. Pittman*, 174 Wis. 2d 255, 277, 496 N.W.2d 74 (1993) (quoting *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976)). Nor is a statute unconstitutionally vague "simply because it is ambiguous." *State v. Smith*, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). Rather, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711.

A defendant can challenge a statute on its face—"meaning that it operates unconstitutionally under all circumstances,"—or as an "as-applied" challenge, where the defendant contends that the statute "operates unconstitutionally on the facts of a particular case or with respect to a particular party." *State v. Herrmann*, 2015 WI App 97, ¶ 6, 366 Wis. 2d 312, 873 N.W.2d 257. West does not articulate in his brief which challenge he is bringing (West's Br. 18–19), but it appears to the State that his undeveloped claim concerns a facial challenge.

The State notes that West failed to give the Attorney General notice that he was challenging the constitutionality of a statue, which is required under Wis. Stat. § 806.04(11). While admittedly a "curable defect" in this case, *In re A.P.,* 2019 WI App 18, ¶ 27, 386 Wis. 2d 557, 927 N.W. 2d 560*,* West fails to argue why this Court should cure his defect, and so

this Court should decline to consider the merits of West's constitutional challenge to the statute.

Should this Court nonetheless consider West's constitutional challenge on the merits, West loses because Wis. Stat. § 971.365 gives "fair notice to a person of ordinary intelligence regarding what it prohibits," and it also provides "an objective standard for enforcement." *McKellips*, 369 Wis. 2d 437, ¶ 41. Here, the clear language of the statute provides that "[i]n any case" under "961.41(1m)(cm)" that "involve[es] more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." Wis. Stat. § 971.365(1)(b). And, Wis. Stat. § 961.41(1m)(cm)2. provides that it is a Class E felony to possess with intent to deliver cocaine and cocaine base that is more than 5 grams but not more than 15 grams. Wis. Stat. § 971.365. So the statute provides notice that the State can aggregate more than one violation of Wis. Stat. § 961.41(1m)(cm) into a single count.

While West may not like the consequences of the statute's permissible aggregation, those consequences do not make the statute unconstitutionally vague. West has failed to meet his burden to show beyond a reasonable doubt that Wis. Stat. § 971.365 is unconstitutionally vague.

C. West's plea was not "based on an erroneous understanding of possession." (West's Br. 10.) It was a correct understanding. The record conclusively shows that counsel did not provide ineffective assistance.

Turning to West's alternative *Nelson-Bentley* claim, West argues that defense counsel provided ineffective assistance when he failed to "accurately review the full and actual elements of the offense with West and explain how his conduct would have satisfied possession of 5-15 grams of cocaine." (West's Br. 13.) West's argument fails.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under Wis. Const. art. I, § 7 encompass a criminal defendant's right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 226–36, 548 N.W.2d 69 (1996). To succeed on an ineffective assistance of counsel claim, a defendant must prove both that trial counsel performed deficiently and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687.

Deficient Performance. To prove deficient performance, the defendant must show that counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. The defendant must demonstrate that counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." *Id*. at 690.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "Counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary." *State v. Domke*, 2011 WI 95, ¶ 41, 337 Wis. 2d 268, 805 N.W.2d 364.

While *Strickland*'s reasonable professional competence standard applies "before, during, or after trial," the substantial deference afforded to counsel's judgment may be assessed differently depending on the stage of the proceeding. *Premo v. Moore*, 562 U.S. 115, 126 (2011). And courts assess deficient performance differently when a case is resolved through a plea rather than through trial. Recognizing that pleas are often negotiated before the record has been fully developed and the parties' cases have not yet been well defined, the Supreme Court has cautioned "that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea

was negotiated, offered, and entered." *Id.* As the court explained, "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." *Id.* at 124. Those opportunities include a plea to lesser charges and a recommendation for a lesser sentence while the risks include an adverse trial outcome and the possibility that the State's case may grow "stronger and prosecutors find stiffened resolve." *Id.*

Prejudice. To demonstrate prejudice, a defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. To prove prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In the plea context, *Strickland* prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "[This] inquiry . . . focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Lee v. United States*, 582 U.S. 357, 367 (2017). As the Supreme Court cautioned, "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 369. "Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

Thus, to show prejudice from accepting a plea, a defendant has two, alternative options. "First, the defendant can demonstrate based on 'contemporaneous evidence' that counsel's deficient performance so offended 'expressed preferences' such that the defendant would have not pleaded guilty." *State v. Savage*, 2020 WI 93, ¶ 35, 395 Wis. 2d 1, 951

N.W.2d 838 (citation omitted). "Second, the defendant can demonstrate that the defense would have likely succeeded at trial." *Id*.

With respect to deficient performance, West argues that his counsel was deficient when he "allow[ed] West to plead guilty to an offense for which there was no factual basis." (West's Br. 14.) But as argued above, the circuit court correctly determined that a factual basis *did* exist (R. 146:17), and therefore counsel cannot be deficient for allowing West to plead when there was no "[m]isunderstanding of the applicable law" by defense counsel. (West's Br. 14.) In other words, the record conclusively shows that counsel was not deficient because counsel was not required to "disavow" (West's Br. 9) West of the fact that the State could prove the offense by adding up the lesser amounts of cocaine into one count.

Because there was no deficient performance, there was no prejudice. But even if defense counsel provided deficient performance, West fails to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 58–59. In this case, the plea resulted in West pleading guilty to one count, while the remaining ***seven*** counts were dismissed outright. (R. 52:2; 138:75.) And, as defense counsel informed the court during the plea hearing, if the case went to trial, "we would have had to present inconsistent defenses. On the conspiracy, it would be one defense versus another potential defense on Counts 7 and 8." (R. 138:82.) It was in West's "best interest [to plead] especially given [West's] other case that's coming up for sentencing." (R. 138:82.) West suffered no prejudice.

The record conclusively shows that West is not entitled to relief of his claim of ineffective assistance of counsel. The circuit court properly denied his motion on this issue without a hearing.

D. If the circuit court erred, the proper remedy is to remand for an evidentiary hearing.

If this Court determines that West's motion made a prima facie showing that the plea colloquy did not conform to section 971.08's or *Bangert*'s mandated requirements, then this Court should remand the case for an evidentiary hearing. *See Howell*, 301 Wis. 2d 350, ¶¶ 86–88. Similarly, if this Court determines that the plea colloquy complied with section 971.08's or *Bangert*'s mandated requirements, but that West raised a factor extrinsic to the colloquy that potentially renders his plea infirm, then this Court should remand the matter for a hearing. *See id.* ¶¶ 75–78. However, because West failed to prove either, remand for a hearing is not necessary.

CONCLUSION

This Court should affirm the circuit court's order denying West's motion to withdraw his plea after sentencing.

Dated this 2nd day of May 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,584 words.

Dated this 2nd day of May 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 2nd day of May 2023.

Electronically signed by:

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