Appeal No. 2007AP1877-CR **Cir. Ct. No. 2004CF2137**

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. HOWARD,

DEFENDANT-APPELLANT.

FILED

Nov 14, 2008

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Clerk of Court of Appeals

ERRATA SHEET

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PLEASE TAKE NOTICE that corrections were made to paragraph number 26 in the above-captioned opinion which was released on October 15, 2008. A corrected electronic version in its entirety is available on the court's website at www.wicourts.gov.

COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1877-CR **Cir. Ct. No. 2004CF2137**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO and MEL FLANAGAN, Judges. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. Joshua T. Howard appeals from a judgment of conviction for conspiracy to commit theft by fraud, contrary to WIS.

STAT. §§ 943.20(1)(d) & (3)(c), and 939.31 (2003-04), and from his motion for postconviction relief.[1] Howard, who pled guilty, argues that he should have been permitted to withdraw his plea after sentencing on grounds that no factual basis for his plea exists, because the theft of telephone services (which he admitted) does not fall within the definition of "property" found in § 943.20(2)(b) that applies to § 943.20(1)(d) (the crime to which he pled guilty).[2] He also argues that he is entitled to a ***Machner***[3] hearing to determine whether his trial counsel was ineffective for failing to request documentation of the restitution ordered. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 Howard, an inmate at Waupun Correctional Institution serving a 133-year sentence for crimes unrelated to this case, was charged with conspiracy to commit theft by fraud of property valued at more than $10,000, and conspiracy to misappropriate personal identifying information in connection with the theft of approximately $40,000 in telephone service fees, both as an habitual criminal.

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[1] The parties agree that the corrected judgment of conviction does not accurately reflect the crime to which Howard pled guilty. Upon remittitur, we direct the trial court to correct the judgment of conviction to reflect that Howard was convicted of violating WIS. STAT. §§ 943.20(1)(d) & (3)(c), and 939.31, rather than WIS. STAT. § 943.201(2)(a) (the identity theft statute).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Howard also asserts that his conduct falls squarely within WIS. STAT. § 943.45, theft of telecommunications service. However, he recognizes that the existence § 943.45 does not preempt prosecution under WIS. STAT. § 943.20. Rather, he contends that prosecution under § 943.20 is improper because his conduct does not fall within the definition of property in § 943.20(2)(b).

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

According to the complaint, which ultimately served as the factual basis for Howard's plea, Howard and several other individuals participated in a "burn-out phone scam" where they set up telephone accounts in the names of other people, and then used the telephone numbers until the telephone company terminated service for non-payment of bills. The complaint alleged that Howard, while an inmate at Waupun, used the fraudulently obtained telephone numbers to place over 2000 collect calls from July 2002 through May 2003, totaling about 40,000 minutes of talking time.

¶3 Prior to entering a guilty plea, Howard chose to represent himself. Standby counsel was appointed for him and advised him. At the preliminary hearing, Howard raised the issue of the cost of the telephone services, asking a witness to identify the actual cost to the telephone company, SBC, exclusive of profit. The court commissioner rejected Howard's suggestion that profit could not be considered and concluded that SBC had produced sufficient evidence that its loss exceeded $10,000, which was the issue before the commissioner as it considered whether to bind Howard over for trial for a theft exceeding $10,000. Ultimately, Howard was bound over for trial.

¶4 The State gave Howard a written plea offer pursuant to which he would plead guilty to one count of theft by fraud of property valued at more than $10,000, without the penalty enhancer for habitual criminality. The State agreed to recommend a ten-year consecutive sentence comprised of four years of initial confinement and six years of extended supervision, and to forego any further prosecution of Howard for the actions alleged in the complaint. The State placed several conditions on the proposed agreement, including that the State would "request that Joint and Several restitution be ordered by the court for the losses

directly attributable to the crimes charged in the Information in the amount of $38,178.85."

¶5 Howard accepted the plea agreement and appeared before the trial court to change his plea to guilty.[4] Howard told the trial court that he had decided to accept legal counsel for the plea hearing and sentencing, and that his former standby counsel would represent him.

¶6 Howard pled guilty consistent with the written plea agreement, a copy of which was provided to the trial court. The State also specifically noted that it would be requesting $38,178.85 in restitution for SBC. Both trial counsel and Howard told the trial court that the State had accurately described the plea agreement. When the trial court accepted Howard's plea, it asked if he understood that the value of the telephone services was "almost $40,000"; Howard said he did.

¶7 Both Howard and his trial counsel told the trial court that the complaint would serve as the factual basis for the plea. The court then completed the plea colloquy with Howard, found him guilty and set the case for sentencing.

¶8 At sentencing, the trial court indicated that it would award restitution of $42,214.67, at which point trial counsel objected and indicated that the State and SBC were seeking only $38,178.85, consistent with the plea agreement. The State confirmed that although it was able to identify additional losses, SBC was not requesting more. The trial court accepted what it termed a "stipulation" and

[4] The Honorable Jean W. DiMotto presided over the plea hearing and sentencing. The Honorable Mel Flanagan considered and denied the motion for postconviction relief.

ordered joint and several restitution of $38,178.85, identifying the co-defendants who would be jointly and severally liable for the restitution.

¶9 Postconviction counsel was appointed for Howard. Howard moved for postconviction relief. First, he argued that there was no factual basis for his guilty plea because telephone services do not constitute "property" as defined in WIS. STAT. § 943.20(2)(b). Thus, he argued, a manifest injustice existed that should allow him to withdraw his guilty plea. Second, Howard challenged the restitution order, arguing that he was entitled to a ***Machner*** hearing to determine whether his trial counsel provided ineffective assistance when he stipulated to the restitution amount, and to determine the proper amount of restitution.

¶10 The trial court denied Howard's motion without a hearing, without seeking a brief from the State. In rejecting the claim concerning the factual basis for the plea, the court relied on its decision in the case of Howard's co-defendant, Matthew Steffes, where the court denied a similar motion based on the factual basis for the plea. The court explicitly adopted the reasoning set forth by the State in its response brief in the Steffes case.[5] The trial court also rejected Howard's argument concerning restitution, concluding that no ***Machner*** hearing was

[5] The State's trial court brief in the Steffes case ("the Steffes brief") asserted that "[t]o use the telephone is to use (and consume) electricity," and cited an encyclopedia definition of telephones. The Steffes brief also supplied an affidavit from a telephone company employee that opined: "[p]ower networks support telephone networks" and "the use of telephone services is inextricably bound together with the use of electricity, and to use the telephone is to use an applied form of electricity." Although the Steffes brief did not explicitly invite the trial court to take judicial notice of the fact that to use a telephone is to use electricity, and the trial court itself never used those words in its orders denying either defendant's motion, the State on appeal asserts that when the trial court adopted the reasoning of the Steffes brief to deny Howard's postconviction motion, "the court essentially took judicial notice of the inextricable dependence of telephone calls on the use of electricity to effect those calls."

necessary and that trial counsel's performance had not been deficient. This appeal follows.

DISCUSSION

I. Guilty plea withdrawal.

¶11 Howard argues that he should be allowed to withdraw his guilty plea. A defendant who moves to withdraw a plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations and one set of quotation marks omitted). One such ground for finding manifest injustice is that no factual basis for the plea exists. ***State v. Booker***, 2006 WI 79, ¶36, 292 Wis. 2d 43, 717 N.W.2d 676. Plea withdrawal under the manifest injustice standard rests in the trial court's discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997), *modified on other grounds*, ***State v. Kivioja***, 225 Wis. 2d 271, 295, 592 N.W.2d 220 (1999). We conclude that the motion was properly denied because there was a factual basis for the plea, and because any trial court error in the motion denial process was harmless.

A. Factual basis for the plea

¶12 Howard's motion for plea withdrawal alleged that, as a matter of law, the facts alleged in the complaint did not provide a factual basis for his plea to taking "property" as that term is defined in WIS. STAT. § 943.20(2)(b). We agree with the trial court that the theft of telephone services is included in the definition of property found in § 943.20(2)(b). Therefore, we conclude that the

trial court did not erroneously exercise its discretion in denying Howard's motion to withdraw his plea, because there was a factual basis for the plea.

¶13 As with all statutory analysis, we begin by looking at the language of the statute itself. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (The court begins statutory interpretation with the language of the statute and "'[i]f the meaning of the statute is plain, we ordinarily stop the inquiry'" and give the language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.") (citation omitted). The term "property" used in WIS. STAT. § 943.20 is specifically defined in § 943.20(2)(b): "'Property' means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights."

¶14 The State argues that telephone services are included in the definition of property, in two ways: (1) telephone service is an applied form of electricity, and falls within the term "electricity" in WIS. STAT. § 943.20(2)(b); and (2) the statutory language includes the phrase "without limitation," suggesting that the examples of property listed are not exhaustive. We conclude that telephone services fall within the term "electricity" and, therefore, we do not consider the State's second argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

¶15 The State's argument is premised on its interpretation of the term "electricity" found in WIS. STAT. § 943.20(2)(b). The State explains:

> Section 943.20 defines "electricity" as "property" for purposes of the crime of theft by fraud. The statute does not constrain the scope of electricity-as-property in terms of

> the electricity's use or source: the statute does not distinguish electricity used, say, to run a refrigerator from electricity used to transmit speech or data over a wire, nor does the statute distinguish electricity provided by an electric utility from electricity provided by a telephone company.

(Footnote omitted.) The State asserts that this court can take judicial notice of the fact that telephones "'convert speech and data to electrical energy, which is sent great distances,'" citing Richard M. Rickert, Telephone, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA (2007).[6] It also notes that our supreme court has "recognized that electricity [lies] at the core of telephone service," citing ***Wisconsin Telephone Co. v. City of Oshkosh***, 62 Wis. 32, 37, 21 N.W. 828 (1884) (noting, in the course of discussing whether a statute addressing telegraphs would also apply to telephones, that with both telegraphs and telephones, "'the transmission, if it takes place, is performed by a wire acted on by electricity.'") (citation omitted).

¶16 In response, Howard argues that taking judicial notice is improper because "[p]hone service *does not equal* electricity." He further argues that "[i]f phone service merely involves or requires electricity, but is not the same as electricity, then it is not property for purposes of the statute." (Emphasis in original.) We are unconvinced that taking judicial notice in this instance is improper, and we disagree with Howard's legal conclusions.

[6] Available online at http://encarta.msn.com/encyclopedia_761569402/Telephone.html. The State also quotes Eugene Blanchard, INTRODUCTION TO NETWORKING AND DATA COMMUNICATIONS ch. 19(v) (2001) ("The [telephone] [h]andset contains transducers that convert mechanical energy into electrical energy. The microphone converts speech into electrical energy while the diaphragm (or speaker) converts electrical signals into audible signals.") (available online at http://www.rigacci.org/docs/biblio/online/intro_to_networking/c3668.htm).

¶17 By definition, facts capable of judicial notice are those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. § 902.01(2)(b). We have independently surveyed a variety of sources[7] and we conclude that we can take judicial notice of the fact that when one consumes telephone service, one is consuming an applied form of electricity that uses an electric current to transmit the human voice. *See* WIS. STAT. § 902.01(2)(b) (Judicial notice can be taken of "[a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); ***Perkins v. State***, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973) (concluding that a court may take judicial notice of facts easily accessible and capable of immediate and accurate determination).

¶18 Further, we conclude that the term "electricity" found in WIS. STAT. § 943.20(2)(b) is broad enough to encompass the transmission of electricity over telephone lines. The statute does not specifically distinguish the type of electricity being used, or which utility is providing the electricity. The lack of such specificity convinces us that the legislature intended the term electricity to be interpreted broadly, and that electricity used to transmit the human voice falls within the term electricity used in § 943.20(2)(b). *See* ***State v. Quintana***, 2008 WI 33, ¶32, 308 Wis. 2d 615, 748 N.W.2d 447 ("When the legislature does not use words in a restricted manner, the general terms should be interpreted broadly to give effect to the legislature's intent.").

[7] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2350 (unabr. ed. 1993) (defining telephone as "an apparatus consisting of a transmitter … for converting sound esp. of the human voice into electrical impulses or varying electrical current for transmission by wire").

¶19 In summary, we agree with the trial court that there was a factual basis for Howard's plea because he admitted the theft of telephone services, which, we conclude, fall within the term "electricity" that is used in WIS. STAT. § 943.20(2)(b). Howard's motion to withdraw his plea based on a manifest injustice was therefore without merit, and the trial court did not erroneously exercise its discretion when it denied Howard's motion.

B. Concerns about the motion denial process

¶20 Howard raises several concerns regarding the trial court's consideration of his postconviction motion. First, he takes issue with the fact that the trial court denied his motion without a hearing. However, a review of Howard's motion reveals that he did not ask for a hearing on his motion for plea withdrawal.[8] Howard cannot now be heard to complain about the lack of a motion hearing when he did not request one. *See* ***State v. Williquette***, 180 Wis. 2d 589, 603, 510 N.W.2d 708 (Ct. App. 1993) (Appellate courts do not look with favor upon claims of prejudicial error when no action was requested by counsel).

¶21 Howard also contends that the trial court erroneously exercised its discretion when it denied his motion without briefing by the State and by adopting the reasoning from its decision in Steffes's case. Howard argues that the trial court, if it indeed implicitly took judicial notice that telephone service is or involves electricity, did so improperly because it relied on briefs and an affidavit not made available to Howard. We agree. We are troubled by the fact that the

[8] Howard did request a hearing on his allegation of ineffective assistance of counsel, in the event that he was not allowed to withdraw his plea. We address that hearing request in section II of this opinion.

trial court essentially took the brief and affidavit that the State filed in the case of Howard's co-defendant and treated them as the State's response in Howard's case, without notice to Howard (or the State). This was an erroneous exercise of discretion, as it deprived Howard of an opportunity to respond and allowed the trial court to implicitly take judicial notice of a fact in a document that was not made available to Howard. Although prior notification is not always required before a trial court takes judicial notice as long as a party has the opportunity to respond afterward, *see* WIS. STAT. § 902.01(5),[9] we conclude it was not appropriate to take judicial notice of a fact in an affidavit submitted in another case without providing the parties with notice and an opportunity to be heard. Nonetheless, we conclude this error was harmless, for several reasons.

¶22 First, nothing prevented Howard from seeking a hearing (which is specifically permitted by WIS. STAT. § 902.01(5)), or reconsideration, of the trial court's decision in which it appeared to take judicial notice. *See* ***id.*** He simply chose not to do so. Second, the crucial fact of which we take judicial notice—that when one consumes telephone service, one is consuming an applied form of electricity that uses an electric current to transmit the human voice—is a fact readily discernable from a variety of sources, as we have explained, *supra.* Finally, Howard has had an opportunity to fully explore these issues on appeal and we have concluded, as a matter of law, that there was a factual basis for the plea. Consequently, he was not prejudiced by the trial court's actions. *See* ***Gittel v. Abram***, 2002 WI App 113, ¶29, 255 Wis. 2d 767, 649 N.W.2d 661 (party was not

[9] WISCONSIN STAT. § 902.01(5) provides: "OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. *In the absence of prior notification, the request may be made after judicial notice has been taken.*" (Emphasis added.)

prejudiced by lack of notice and opportunity to be heard in the trial court concerning the court's authority under WIS. STAT. § 806.07, where appellate court considered all issues *de novo* and ruled against the party). For these reasons, the trial court's error of *sua sponte* considering and relying on the State's brief and affidavit in another case, without notice to Howard, was harmless. *See* WIS. STAT. § 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."); ***Nommensen v. American Cont'l Ins.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301 (for error to affect the substantial rights of the party, "there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.").

II. Alleged ineffective assistance of counsel.

¶23 Howard claims that the trial court erred when it denied his claim of ineffective assistance of counsel without a ***Machner*** hearing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must establish that the lawyer's performance was deficient and that the defendant suffered prejudice as a result). A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Id.*** If "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Id.*** Applying these standards, we conclude that the trial court did not erroneously exercise its discretion when it denied Howard a hearing.

¶24 In his postconviction motion, Howard argued that his trial counsel "stipulated to an astronomically high restitution figure." He acknowledged that counsel "may have done so because there was some discussion of additional amounts that ha[d] been discovered and might be claimed" but contended that "there is no indication in the record how this astronomical figure was arrived at other than a chart attributing certain 'loss amounts' to each fraudulent phone account." Howard's motion questioned whether some of the losses erroneously included lost profits and taxes, and argued that his counsel was ineffective for stipulating to the amount without any support, testimony or documentation indicating what SBC's actual losses were.

¶25 We conclude that the record conclusively demonstrates that Howard is not entitled to relief. From the day the complaint was filed, Howard was aware that SBC alleged losses of over $38,000. Indeed, Howard questioned the basis for those numbers when he represented himself at the preliminary hearing. Despite having questioned whether SBC's claimed losses included lost profits, Howard did not pursue that issue and, instead, decided to accept a plea agreement, knowing that the State would be seeking $38,178.85. Only after deciding to accept the agreement did Howard accept the assistance of counsel. He offered no affidavit with his motion for postconviction relief indicating that he asked his counsel to challenge the restitution request, and the transcripts belie any suggestion that Howard wished to challenge it. Rather, Howard pled guilty to theft of services that the trial court explicitly noted were worth nearly $40,000, and he agreed that the allegations in the complaint, including identified losses of over $38,000, provided a factual basis for his plea. In exchange, other charges and penalty enhancers were dropped, and the trial court ultimately gave Howard credit for having pled guilty.

¶26 Even at the sentencing, when Howard offered numerous statements on his behalf during allocution, he did not contest the restitution figure. When the trial court started to award over $42,000 in restitution, both trial counsel and the State quickly reminded the court about the plea agreement, at which point the court ordered the amount the State had pledged to request. Howard never said a word in opposition as this discussion occurred.

¶27 The record in this case is consistent with the conclusion that when Howard was proceeding *pro se*, he was aware of the restitution amount and elected not to challenge it, and that when he later accepted counsel, he did not ask his counsel to challenge it. There are no affidavits or facts in the record suggesting otherwise. The record conclusively demonstrates that trial counsel was not deficient for failing to object to a restitution figure known to all parties from the start, considered by Howard as he represented himself, explicitly listed in the plea agreement and ultimately accepted by Howard. Thus, Howard was not entitled to a ***Machner*** hearing, and the trial court did not erroneously exercise its discretion when it denied the motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.