

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1871-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS SCOTT PIERCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Vergeront, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Thomas Scott Pierce appeals a judgment convicting him of being party to the crime of perjury as a repeat offender and an order denying his postconviction motion. He claims there was an insufficient factual basis to support his no contest plea. Having reviewed the record, however,

we are satisfied that the trial court's determination that there was a factual basis for the plea was not clearly erroneous. We therefore affirm.

¶2 A prison official at the Fox Lake Correctional Institution recovered two balloons of marijuana from Tammy Pellet when Pellet came to the prison to visit her boyfriend, Pierce. Pellet admitted to the police that she had been attempting to smuggle the marijuana in to Pierce. Two days later, prison officials monitored a telephone call in which Pierce advised Pellet to contact the police and change her story to say that the marijuana was left in her pocket from a previous party, because simple possession was a less serious charge than possession with intent to deliver.

¶3 Pellet subsequently testified at her preliminary hearing that she had forgotten the marijuana was in her pocket from a prior occasion. As a result of her testimony, Pierce was charged with being party to the crime of perjury as a repeat offender. Pierce entered a no contest plea to the charge, but subsequently sought to withdraw it for lack of a factual basis. The trial court denied the plea withdrawal motion and Pierce appeals.

¶4 A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *State v. Krieger*, 163 Wis. 2d 241, 249-51, 471 N.W.2d 599 (Ct. App. 1991). A manifest injustice may occur when there is no factual basis to support the plea. *Id.* at 254. However, the trial court's determination that there was a sufficient factual basis for the plea will be sustained unless it is clearly erroneous. *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

¶5 Before accepting a no contest plea, the trial court must ascertain “that the defendant in fact committed the crime charged.” WIS. STAT. § 971.08(1)(b) (1999-2000).¹ 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.” *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (citation omitted). Proof beyond a reasonable doubt is not necessary to support a no contest plea. *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988). The factual basis requirement is further relaxed when a plea has been negotiated between the parties. *Smith*, 202 Wis. 2d at 25.

¶6 Pierce contends that there was no factual basis to show that he either assisted Pellet to commit perjury or intended that she do so, because he only told her to lie to the police, not in court. The monitored telephone conversation, however, showed that Pierce created the story which Pellet later used to lie on the stand. The story therefore assisted Pellet in committing perjury. It is, moreover, an entirely natural consequence that a person who has lied to police will sustain that same lie in later court proceedings. Therefore, it is reasonable to infer that Pierce intended Pellet to carry her lie as far as necessary to protect herself and him. We conclude that the trial court’s determination that there was a factual basis for the plea was not clearly erroneous.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

