

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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. 00-2875-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORENZO S. BALLI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL S. GEORGE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Lorenzo Balli appeals a judgment convicting him of attempted escape. The issue is whether there was a sufficient factual basis for the conviction. We conclude that there was. Accordingly, we affirm.

¶2 The facts are not disputed. Balli removed bricks from the wall of his prison cell and entered the duct system in the wall. He crawled to an area adjacent to another prisoner's cell where he was apprehended. Balli was charged with attempted escape. He moved to dismiss before the preliminary hearing on the grounds that the facts presented in the complaint did not support a charge of attempted escape because they did not show that Balli did any act that would have resulted in him committing the crime of escape but for intervention of some extraneous factor. The trial court denied the motion. Balli pled guilty and was convicted. Balli did not file a postconviction motion challenging the factual basis for the conviction; instead he filed this appeal.

¶3 As a preliminary matter, we address the State's argument that Balli has waived his right to challenge the factual basis for the conviction because he did not file a postconviction motion in the trial court. The State points to the general rule that a challenge to the validity of a plea cannot be made for the first time on appeal. *State v. Nelson*, 108 Wis. 2d 698, 701-02, 324 N.W.2d 292 (Ct. App. 1982). Balli urges us to review the case on the merits, explaining that he did not file a postconviction motion because he believed that it would have been futile to do so. The trial court had already rejected his challenge to the factual basis for the charge when it denied his motion to dismiss before the preliminary hearing.¹ He advocates for a very conservative extension of *State v. Higgs*, 230 Wis. 2d 1, 601 N.W.2d 653 (Ct. App. 1999) to allow review of his claim. We decline to extend *Higgs*, but we conclude that this case is appropriate for review on the

¹ Balli also contends that he is not attempting to withdraw his plea. Rather, he is attempting to have the conviction vacated because he believes the facts of this case do not support a conviction for attempted escape.

merits. See *Schultz v. Nepco Employees Mut. Benefit Ass'n, Inc.*, 190 Wis. 2d 742, 750 n.8, 528 N.W.2d 441 (Ct. App. 1994) (“The waiver rule is one of administration, not of right, and we will, in a proper case, decline to apply it.”).

¶4 Balli argues that there was not a sufficient factual basis for the conviction because he did not intend to leave the prison, just his cell. Relying on *State v. Sugden*, 143 Wis. 2d 728, 422 N.W.2d 624 (1988), Balli contends that a defendant may be convicted of attempted escape, or escape, only when that person leaves one secured part of the prison for another *with the intent to escape the prison itself*. We reject this reading of *Sugden*. In *Sugden*, the supreme court held that an inmate completed the crime of escape when he left a locked cottage on prison grounds without lawful authority because he had left the “custody” of the institution, which can occur within the walls of the institution. *Id.* at 737. The supreme court explained that “‘custody’ per se of an institution is not directly related to its geographical outer boundaries.” *Id.* Although Sugden intended to leave the prison, nothing in the *Sugden* decision mandates that intent to leave the prison grounds is required. Rather, the focus must be on whether the person charged attempted to leave the custody of the institution. Because Balli left the confines of his cell, unlawfully entering the duct system, he escaped the custody of the institution and thus was properly convicted of attempted escape.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

