COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2386-CR **Cir. Ct. No. 01-CM-1876**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK EMERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Derrick Emerson appeals from a judgment of conviction for retail theft as a repeater pursuant to WIS. STAT. §§ 943.50(1m)(d) and 939.62 and from a postconviction order denying his motion to withdraw his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

guilty plea. Emerson argues that he should have been allowed to withdraw his guilty plea based on the trial court's failure to make an express finding that a factual basis existed for the plea. We reject Emerson's argument.

¶2 Before getting to the facts of this case, we set out the applicable law. A trial court's decision whether to allow withdrawal of a guilty plea is a matter of discretion, subject to the erroneous exercise of discretion standard on review. ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. The "factual basis" requirement is distinct from the "voluntariness" requirement for guilty pleas. ***Id***. at ¶14. The factual basis requirement protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his or her conduct does not actually fall within the charge. ***Id***. This principle is echoed in WIS. STAT. § 971.08(1)(b), which requires that a trial court must, before accepting a plea of guilty or no contest, "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged."

¶3 While the trial court may engage the defendant personally in the process of establishing a factual basis, the law does not require such a colloquy. Neither the rule nor the cases interpreting the rule require a defendant to personally articulate the specific facts that constitute the elements of the crime charged. The federal courts have long held that a judge does not have to engage in a colloquy with the defendant to establish a factual basis for a guilty plea. ***Thomas***, 2000 WI 13 at ¶20.

¶4 WISCONSIN STAT. § 971.08, governing the taking of pleas of guilty and no contest, is in accord with this case law. Paragraph (1)(a) of the statute requires the trial court to "[a]ddress the defendant personally" when ascertaining

the voluntariness of the plea, and the defendant's understanding of the charge and the potential punishment. However, para. (1)(b), which addresses the factual basis for a plea, mandates no such personal colloquy. Instead, the statute simply directs the trial court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." ***Id.*** "The phrase, 'such inquiry,' indicates that a judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." ***Thomas***, 2000 WI 13 at ¶22.

¶5 When, as in this case, a defendant seeks to withdraw a guilty plea after sentencing, the defendant is required to demonstrate a manifest injustice by clear and convincing evidence. ***Id.*** at ¶16. The "manifest injustice" test requires the defendant to show a serious flaw in the fundamental integrity of the plea. ***Id***. Generally, if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred. ***Morones v. State***, 61 Wis. 2d 544, 551-52, 213 N.W.2d 31 (1973).

¶6 Although the ultimate question of plea withdrawal is committed to the trial court's discretion, ***Thomas***, 2000 WI 13 at ¶13, the question of whether the facts demonstrate a factual basis presents a question of fact which we ordinarily would review under the clearly erroneous standard, *see* ***Broadie v. State***, 68 Wis. 2d 420, 423, 228 N.W.2d 687 (1975).[2] In this case, however, the trial court did not make an express determination that a factual basis existed for Emerson's guilty plea. Therefore, we cannot employ the clearly erroneous test.

[2] This standard of review, however, has been questioned. *See* ***State v. Mendez,*** 157 Wis. 2d 289, 295 n.2, 459 N.W.2d 578 (Ct. App. 1990); ***State v. Merryfield***, 229 Wis. 2d 52, 61 n.4, 598 N.W.2d 251 (Ct. App. 1999).

Nonetheless, this omission on the part of the trial court does not preclude meaningful appellate review on the question since the factual basis for the retail theft charge is set out in the probable cause portion of the complaint, and Emerson makes no challenge to that recital. Whether a given set of facts fulfills a particular legal standard presents a question of law. *See* ***State v. Clappes***, 117 Wis. 2d 277, 280-81, 344 N.W.2d 141 (1984).[3]

¶7 We now turn to the specific procedure in this case. Although the trial court did not make an express factual basis finding, the court did explore the elements of the retail theft charge with Emerson. The transcript of the plea colloquy reveals the following:

> THE COURT: The charge against you, Mr. Emerson, is that on the 12th of August of this past year, at the Village of Pleasant Prairie, in this county, you intentionally concealed merchandise held for resale by a merchant without the merchant's consent, knowing that you were acting without the merchant's consent and with intent to deprive the merchant permanently of the possession of the property. Do you understand this charge against you?
>
> DEFENDANT: Yes.

¶8 The trial court's language mirrored the charging portion of the retail theft count of the criminal complaint. That language covered all the elements of the offense of retail theft in compliance with WIS. STAT. § 971.08(1)(a), which requires that the trial court "[a]ddress the defendant personally and determine that

[3] In ***State v. Clappes***, 117 Wis. 2d 277, 281-87, 344 N.W.2d 141 (1984), the supreme court held that it was entitled to conduct an independent review as to whether the defendant was in custody for purposes of interrogation, and, after conducting that review, the supreme court reached a conclusion contrary to that reached by the trial court. If an appellate court is free to make an independent determination where the trial court has ruled on the question, it logically follows the appellate court is also permitted to make an independent determination where, as here, the trial court has not ruled on the matter.

the plea is made voluntarily with understanding of the nature of the charge." Emerson makes no claim on appeal that the trial court failed to follow this provision of the statute. Therefore, this case does not present a situation where Emerson admitted to an offense not known to the law or where the plea was involuntary or uninformed.

¶9 That brings us to the factual basis question. As we have noted, we look to the probable cause portion of the complaint on this question, and we review the question as one of law since the facts are undisputed. The factual allegations in the probable cause portion of the complaint are based on the following firsthand observations of a store security person. Emerson entered the store with two other individuals; Emerson and one of the individuals each selected various items from the store shelves; Emerson then removed a bag from his pocket; the bag bore the label of a different store; both Emerson and the third individual then placed the selected items into the bag; and Emerson and the other individuals then left the store without paying for the items.[4] These allegations clearly establish that Emerson's conduct constituted the offense of retail theft.

¶10 Finally, we observe that this case was resolved pursuant to a plea agreement. Emerson was originally charged with retail theft and obstructing an officer. However, the parties agreed that the State would dismiss the obstructing charge in exchange for Emerson's guilty plea to the retail theft charge. In addition, the agreement did not constrain the parties from arguing their respective

[4] Emerson correctly observes that the probable cause recitals do not expressly state that the merchant did not consent to the theft. However, the only reasonable inference to be drawn from the allegations is that the merchant did not consent. In addition, the trial court's personal colloquy with Emerson regarding the elements of the offense established that the items were taken without the consent of the merchant.

positions at the sentencing. When a guilty plea is made pursuant to a plea bargain, the trial court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea. ***Broadie***, 68 Wis. 2d at 423-24.

¶11 In conclusion, while it would have been preferable for the trial court to have made an express finding that a factual basis existed for Emerson's guilty plea, we are not persuaded that Emerson's guilty plea was based on conduct that did not "fall within the charge" of retail theft. ***Thomas***, 2000 WI 13 at ¶14. As such, Emerson has failed to demonstrate a "serious flaw in the fundamental integrity of the plea" resulting in a manifest injustice. *See* ***id***. at ¶16. Therefore, the trial court did not misuse its discretion by denying Emerson's motion to withdraw his plea. We affirm the judgment of conviction and the postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.