



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 22, 2020

To:

Hon. David M. Bastianelli
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Michael D. Graveley
District Attorney
912 56th Street
Kenosha, WI 53140-3747

Pamela Moorshead
Assistant State Public Defender
735 N. Water Street, Ste 912
Milwaukee, WI 53202-4116

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2019AP31-CR

State of Wisconsin v. Donald J. Williams (L.C. #2017CF595)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Donald J. Williams appeals from a judgment of conviction for operating a motor vehicle without consent, as a repeater, and from an order denying his motion for postconviction relief, in which he asserted that plea withdrawal should be allowed as his plea was accepted without a factual basis that Williams knew he was using the vehicle without consent. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We conclude that the circuit court did not erroneously exercise its discretion in determining that a sufficient factual basis exists showing that Williams knew he operated the vehicle without consent. We affirm.

In January 2013, two Kenosha County deputies saw Williams drive a Ford Explorer through a red light. After the deputies learned the truck was stolen, Williams stated he had borrowed it from his brother.

Williams agreed to plead guilty to the original charge of operating a motor vehicle without owner's consent, as a repeat offender. In return, the State would dismiss certain traffic violations and abstain from making any sentence recommendation.

On the morning of the plea hearing, Williams and his attorney reviewed and completed a plea questionnaire and waiver of rights form. It is five pages. On the first page, the form confirms that Williams understands the English language, he understands the charge to which he is pleading, and he is not under any undue influence of a drug. Another section states that Williams "understand[s] that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney"

The form then refers to an attached sheet, which is entitled, "ELEMENTS OF COMMON CRIMINAL OFFENSES." Among the offenses listed is operating a motor vehicle

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

without the owner's consent. A box is marked for this offense, followed by the elements of the crime:

- I intentionally drove/operated the vehicle of another.
- The driving/operating of such vehicle was without the consent of the owner.
- I knew that such driving/operating was without owner's consent.

See WIS. STAT. § 943.23(3).

A section entitled, "Defendant's Statement," signed and dated by Williams, confirms that that he had "reviewed and understand[s] this entire document and any attachments. I have reviewed it with my attorney I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty."

Thereafter, the attorney declares in the form: "I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document."

At the plea hearing, the circuit court told Williams he "need[ed] to cover with you the nature of the charge so I know that you know you understand what you're pleading to." The court identified the elements of the charge, expressly including the element that Williams "knew your driving ... is without [the] owner's consent," and confirmed with Williams' attorney that the court could rely on the complaint as a factual basis for Williams' plea. The court then had this exchange with Williams:

THE COURT: They're saying this happened on June 15th of 2017, that on that date you were—you're operating, apparently, a blue Ford in the vicinity of 30th Avenue and 60th Street in Kenosha County, Wisconsin; that that particular vehicle was owned by [H. S.]; that [H. S.] did not give you consent to operate that vehicle, and you knew you did not have consent to operate that vehicle. Do you understand the nature of the charge and what they're saying you did, sir?

MR. WILLIAMS: Yes, sir.

The circuit court also confirmed with Williams that he knew and understood the information provided in the plea questionnaire, asking him if he went through it with his attorney earlier, read it over, checked boxes, and signed it, to which Williams replied, "Yes, Sir." The court asked, "Do you have any questions concerning the contents of that document or the rights you're waiving?" Williams replied, "No, sir."

After additional discussions with Williams, the court accepted the plea of guilty, noting the prior conviction, finding a factual basis for accepting the plea, and determining that the plea was freely, voluntarily, and intelligently made with benefit of counsel. The court therefore found him guilty.

The circuit court ordered a presentence investigation report. The report stated that Williams originally told police he borrowed the truck from his brother. The report also stated that Williams said he bought the truck from "someone he thought he knew" in North Chicago for \$1500. Williams said he did not know the truck was stolen.

At sentencing, Williams' attorney said that his client denied ever saying that he bought the truck. In allocution, Williams reiterated his claim that he did not know the truck was stolen. Appearing skeptical, the court queried how the presentence reporting agent would come up with

Williams claiming that he purchased the car in Illinois for \$1500. The court noted that, when talking to police, Williams said he had borrowed it from his brother.

The court imposed a sentence of five years, with three years of initial confinement and two years of extended supervision.

Williams moved to withdraw his guilty plea, arguing that no factual basis existed for it because he “never agreed to any facts suggesting that he knew he was operating the vehicle without the consent of the owner.” In a written decision, the circuit court denied the motion, holding that based on its review of the plea transcript, Williams’ answers during the colloquy, and the plea questionnaire, Williams knowingly, intelligently, and voluntarily admitted to the facts required to support the conviction, specifically explaining:

[T]he defendant had plead[ed] guilty to a charge of OVWOC. The defendant entered a plea to the charge on August 3, 2017. During the plea colloquy, the court first informed the defendant that “I need to cover with you the nature of the charge so I know that you understand what you’re pleading to,” and advised the defendant what the elements of the crime of OVWOC were. The court then asked counsel if the complaint could be used to provide a factual basis for the crime.

The court then, in using the complaint, informed the defendant the date, place and type of vehicle he was to have been operating. That the vehicle was owned by [H. S.], that the defendant did not have the consent of [H. S.] to operate his vehicle, and also that the defendant knew he did not have that consent. The defendant was then asked if he understood the charge and also what he did. The defendant responded “Yes sir.”

The fact the defendant in the presentence may have tried to minimize his involvement or knowledge of the crime is not unusual. Based on the transcript of the plea hearing the court is satisfied that the defendant has failed to show by clear and convincing evidence he is entitled to withdraw his plea.

Williams appeals.

The failure to establish a sufficient factual basis for a guilty plea is one type of manifest injustice that justifies plea withdrawal. *State v. Johnson*, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). Before a circuit court may accept a guilty plea, there must be a requisite showing that the plea is knowingly, voluntarily, and intelligently made. *State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. In addition to the above voluntariness requirement, WIS. STAT. § 971.08(1)(b) requires a factual foundation for the plea: the circuit court must be satisfied “that the defendant in fact committed the crime charged.” This factual 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).

Williams argues that the court failed to establish a sufficient factual foundation that he committed the offense, specifically that Williams knew he had no consent to use the car. He claims specifically that the court failed to ask Williams at the plea hearing what criminal conduct he was admitting to, and that the complaint, upon which the court partly relied, contains no allegation that Williams was aware he had no consent to use the car. We reject these contentions.

To show an insufficient factual basis is Williams’ burden, and he must meet it with clear and convincing proof. See *State v. Scott*, 2017 WI App 40, ¶30, 376 Wis. 2d 430, 899 N.W.2d 728. In reviewing a plea withdrawal motion on this basis, we may look to the “totality of the circumstances,” including the plea and sentencing records. *Id.* (citation omitted). The court’s denial of such a motion is discretionary, which we will not disturb absent an erroneous exercise of discretion. *Id.*

A sufficient factual basis exists “if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.” *State v. Black*, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. An inference of guilt need not be established beyond a reasonable doubt. *See State v. Payette*, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423.

“All that is required is for the factual basis to be developed on the record—several sources can supply the facts.” *Thomas*, 232 Wis. 2d 714, ¶20; *see Davis v. United States*, 470 F.2d 1128, 1129 n.2 (3d Cir. 1972) (cited with approval in *Thomas*) (noting that it is unnecessary that the court personally ask the defendant any questions to determine the factual basis). Where, as here, the guilty plea results from a negotiated agreement, “the 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 v. State*, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975).

Operating a vehicle without consent occurs when the defendant (1) intentionally operates the vehicle of another, (2) without the owner’s consent, and (3) knowing that consent was absent. WIS. STAT. § 943.23(3). Focusing on the third element, Williams asserts that “[t]he record does not contain an admission by Mr. Williams, personally or through counsel, that he knew he did not have the consent of the owner to drive the [truck].” Williams falls far short of showing, much less clearly and convincingly, that the record fails to establish that he did not know he was operating the vehicle without consent.

Contrary to his assertion, the record reveals that Williams admitted to knowing he had no consent, a point actually reinforced several times. Before the plea hearing, and with the benefit of counsel, Williams reviewed the plea questionnaire and waiver of rights form. The form explains that the subject crime has elements, each one of which the “State would have to prove beyond a reasonable doubt.” One page is entitled in all upper case letters, “ELEMENTS OF COMMON CRIMINAL OFFENSES,” which identifies several crimes, one of which is marked with an “X” and entitled, “Operating a Motor Vehicle without Owner’s Consent.” Thus, the very title of the crime to which Williams marked and planned to plead guilty actually highlights the lack of consent. The section lists the three elements of the crime, including that the operation was without consent and that “I knew [Williams knew] that such operation was without consent.” After reviewing this document, Williams confirmed, in writing and by date, that he reviewed it with counsel, understood it, and would affirmatively ask the court to accept his plea of guilty. His counsel also signed and dated the document.

At the plea hearing, the court recited the elements of the crime, including that Williams drove the vehicle without consent and that he knew his driving was without consent. The court then interrupted itself to confirm with Williams’ counsel that the court could use the complaint for the elements, to which counsel responded in the affirmative. The court continued, stating that Williams was driving the car of another, that the owner “did not give you consent to operate,” and that “you knew did not have consent to operate.” When asked, “Do you understand the nature of the charge and what they’re saying you did, sir?” Williams replied, “Yes, sir.”

Williams also confirmed for the court that he went through the plea questionnaire and waiver of rights form with his attorney, read it, checked boxes, and signed it. He had no questions concerning the contents of that document or the rights he was waiving.

Williams points out that he provided different stories to different people, e.g., he bought the truck down in Illinois, or that he borrowed the truck from his brother—multiple contradicting statements that somehow undercut the circuit court’s determination that sufficient facts existed that Williams knew he had no consent to use the truck. His assertion is rife with flaws. “[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*, 232 Wis. 2d 714, ¶22. Both guarantees are present here. Moreover, Williams’ argument runs counter to the circuit court’s task of viewing the totality of the circumstances when getting to the factual foundation of a plea, including the plea record hearing, defense counsel statements, and other portions of the record. *Id.*, ¶18. Williams’ inability to get his story straight about the car prior to the plea when making a statement to the police, and later in the presentence interview, but not in court when the court was taking his guilty plea, does not undermine the evidence he provided directly to his lawyers and in the courtroom when the judge was determining whether there was a factual basis for, and accepting, his guilty plea.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals