COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0230-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYREN E. BLACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and TIMOTHY G. DUGAN, Judges. *Reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. Tyren E. Black appeals from a judgment entered after he pled no contest to one count of felon in possession of a firearm,

contrary to WIS. STAT. § 941.29(2) (1997-98).[1] He also appeals from an order denying his postconviction motion. Black claims that he should be allowed to withdraw his plea because there was an inadequate factual basis to accept his plea. He argues that the record establishes that the gun belonged to his girlfriend, that he only "touched the weapon in passing" without any intent to possess it, and that he only pled no contest because his trial counsel advised him that this brief touching constituted possession. We agree that on the record before us, there was an insufficient factual basis to accept Black's no contest plea on the possession of a firearm charge. Accordingly, we reverse that part of the judgment, and remand the case to the trial court with directions to allow Black to withdraw his plea as to this count.[2]

I. BACKGROUND

¶2 On December 31, 1997, several Milwaukee police officers went to 1928 North 34th Street to investigate a narcotics complaint. The officers were admitted into the upper residence and discovered several bags of marijuana and a semi-automatic pistol under the mattress in Felicia Ferguson's bedroom. Ferguson, the resident in the upper unit, was Black's girlfriend. Black lived in the lower residence of the building.

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[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] Black also pled guilty to possession of marijuana with intent to deliver. He does not challenge this conviction. Therefore, this opinion is limited to the possession of a firearm conviction, and postconviction order relating to that charge. Further, Black also raises a claim of ineffective assistance of trial counsel; however, because of our disposition, we need not reach that claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

¶3 Black told the police that the marijuana was his, and that he had handled the pistol two days earlier, but did not know who owned it. Black was charged with possession with intent to deliver a controlled substance and possession of a firearm by a felon. Both counts included a habitual criminality penalty enhancer. Black entered into plea negotiations with the State, wherein the State agreed to dismiss the habitual criminality penalty enhancer in exchange for a plea. Black pled no contest, and the trial court indicated it would use the criminal complaint as a factual basis to support the plea. Black was not questioned as to the details of the factual basis for the firearm charge. The plea was accepted and he was sentenced to six years on the drug charge and two years, consecutive, on the firearm charge.

¶4 Black subsequently filed a postconviction motion seeking to withdraw his no contest plea on the firearm charge. He argued that the record did not contain an adequate basis for accepting his plea on the firearm charge. He indicated that Ferguson wrote to the court before his no contest plea, explaining that she owned the gun, that Black had only touched it once "looking at it after [she] purchased it," and told her to get rid of it.

¶5 The trial court denied the postconviction motion. Black now appeals.

II. DISCUSSION

¶6 "A defendant who seeks to withdraw a guilty or no contest plea 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. Krieger***, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). The motion to withdraw a plea is addressed to the sound

discretion of the trial court, and we will only reverse if the trial court fails to properly exercise its discretion. *See* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶7 WISCONSIN STAT. § 971.08(1)(b) provides that, before accepting a plea of guilty or no contest, a trial court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." A trial court's failure to ascertain that "'the defendant in fact committed the crime charged'" is an erroneous exercise of discretion and constitutes a "manifest injustice," which is grounds for the withdrawal of a guilty plea. ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997) (citation omitted).

¶8 A sufficient inquiry did not occur here. The only reference to the gun in the criminal complaint, which the trial court used to accept the plea, was that Black "had handled the pistol on Monday in Felicia's bedroom, but that he doesn't know who the gun belongs to." At the time Black entered his plea, the record also contained a letter to the court from Felicia stating that she, not Black, owned the gun, that Black only touched it once to look at it, and told her to get rid of it. 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).

¶9 The firearms charge requires proof of two elements: (1) that the defendant possessed a firearm; and (2) that the defendant had been convicted of a felony. *See* WIS JI—CRIMINAL 1343 (1997). Possession can be proven in two ways: either that the defendant *actually* possessed the firearm or, that he *constructively* possessed the firearm. *See* ***State v. Peete***, 185 Wis. 2d 4, 9, 517 N.W.2d 149 (1994). Actual possession requires that the defendant knowingly had

a firearm under his "actual physical control." *See* ***id.*** at 16. Inherent in the definition of actual possession is the concept of knowing or conscious possession. *Cf.* ***Schwartz v. State***, 192 Wis. 414, 418, 212 N.W. 664 (1927). Constructive possession can be utilized to satisfy this element if the object is not in the physical possession of the defendant or where possession is shared with another. "[C]onviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess," ***State v. R.B.***, 108 Wis. 2d 494, 497, 322 N.W.2d 502 (Ct. App. 1982), or facts showing that the item was "in an area over which the person has control and the person intends to exercise control over the item," WIS JI—CRIMINAL 920 (1990).

¶10 Black's counsel actually raised this issue during the initial appearance, arguing that "there's nothing in the complaint to show that at any time the pistol or gun was within his possession or control." The trial court rejected the motion to dismiss at that point, explaining that Black's admission that he "handled it" was sufficient "at least for probable cause." Implicit in this ruling, however, is that that statement alone is insufficient to supply the basis to accept Black's no contest plea.

¶11 Accordingly, under either an actual or a constructive possession analysis, the trial court did not have sufficient facts at the plea hearing to accept Black's plea on the firearm charge. WISCONSIN STAT. § 941.29, "is aimed at keeping firearms away from felons, because the legislature has determined that felons are more likely to misuse firearms." ***State v. Coleman***, 206 Wis. 2d 199, 210, 556 N.W.2d 701 (1996). The question arises then, whether the statute intends to cover a situation as alleged in the instant case, where the undisputed facts reveal that the gun was not Black's, Black touched it only briefly, and did not intend to use it or keep it around. Our supreme court has recently explained that

convictions involving possession of weapons require some type of nexus between the defendant, the weapon, and the crime. *Cf.* ***State v. Howard***, 211 Wis. 2d 269, 276-81, 564 N.W.2d 753 (1997). Similar reasoning can be extended to the case here in addressing whether Black's brief touching of the gun satisfies the "possession" element of the charge. We cannot conclude, as a matter of law, that "handling" the gun for a brief instance, coupled with the instruction to the owner to get rid of it, constitutes possession.

¶12 In sum, we conclude that a manifest injustice exists because there was an inadequate factual basis for the firearm charge, that the judgment as to this charge is reversed, and the case is remanded with directions to allow Black to withdraw his plea as to that charge. [3]

By the Court.—Judgment and order reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

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[3] The dissent indicates that Black waived his right to raise this issue. We, obviously, disagree. "A trial court's failure to establish a factual basis for the defendant's plea is evidence that a manifest injustice has occurred, warranting withdrawal of the plea." ***State v. West***, 214 Wis.2d 469, 474, 571 N.W.2d 196 (Ct. App. 1997). We have recently held that a defendant's challenge claiming there was an inadequate factual basis, survives his no contest plea. *See* ***State v. Higgs***, 230 Wis. 2d 1, 8, 601 N.W.2d 653 (Ct. App. 1999). Here, we have concluded that the facts the trial court relied on in finding Black guilty of the firearm charge were insufficient.

Further, the dissent attacks our reliance on a letter from Black's girlfriend, which the dissent claims was not a part of the plea record. The dissent is wrong. The letter was a part of the record, although the trial court did not specifically refer to it. The plea hearing occurred on February 16, 1998. As noted by the docket sheet, the letter was "received in writing and filed" on January 26, 1998. Accordingly, the letter was a part of the record, and we presume the trial court reviewed the record prior to accepting the plea. Admittedly, the trial court, as does the dissent, believed that "handling the firearm briefly" constituted a sufficient factual basis to support the charge. The majority of this court has concluded otherwise. We comment no further on the contents of the dissent. Its lack of logic speaks for itself. Often "inexplicability" is only in the mental eye of the beholder.

¶13 SCHUDSON, J. *(dissenting).* The record is clear. Black signed and filed a completed plea questionnaire listing "felon in possession of firearm" as one of the two offenses to which he was entering his pleas. In his questionnaire, Black expressly acknowledged:

> I have read (or have had read to me) the criminal complaint and the information in this case, and I understand what I am charged with, what the penalties are and why I have been charged. *I also understand the elements of the offense and their relationship to the facts in this case and how the evidence establishes my guilt*.

(Emphasis added.)

¶14 The record is clear. In the plea questionnaire, Black also acknowledged: "I understand that by pleading guilty I will be giving up any possible defenses …. I am further giving up my right to challenge matters commonly set forth in motions, such as … challenges to *the sufficiency of the complaint* and/or information." (Emphasis added.)

¶15 The record is clear. In the plea questionnaire, Black also acknowledged: "If the Court allows a plea of no contest, I understand that I will be giving up all of the same rights, defenses and motions that I would give up with a plea of guilty."

¶16 The record is clear. In the plea questionnaire, Black also acknowledged: "I have read (or have had read to me) this entire questionnaire, and I understand its contents."

¶17 The record is clear. In the plea questionnaire, Black's attorney acknowledged: "that I read the questionnaire to the defendant; that I discussed and explained the contents of the questionnaire to the defendant; that the defendant acknowledged his understanding of each item in this questionnaire; and that I personally observed the defendant sign and date his questionnaire."

¶18 The record is clear. At the plea hearing, Black and his lawyer each answered, "Yes," when the trial court asked, "Counsel, are you satisfied your client is entering his plea freely, voluntarily, intelligently, *with full understanding of the nature of the charges*, the maximum penalties and all the rights he is giving up by pleading no contest?"

¶19 The record is clear. At the plea hearing, the trial court asked Black, "What is your plea to these two charges?" Black responded, "No contest."

¶20 The record is clear. At the plea hearing, the trial court asked the parties, "May I use the complaint as a factual basis?" The Assistant District Attorney and Black's attorney each responded, "Yes."

¶21 The record is clear. Immediately after being advised by the attorneys that the complaint would be used as the factual basis, the trial court asked Black, "You understand that I'm going to use the facts in the complaint as a basis for your plea and sentencing?" Black responded, "Yes."

¶22 The record is clear. Immediately after Black responded, "Yes," to the court's question about using the complaint as the factual basis, his attorney advised the court that "Mr. Black specifically denies any knowledge *of the cocaine* as mentioned in the complaint." (Emphasis added.) But neither Black nor his attorney said anything indicating any addition to or reservation about Black's knowledge or possession *of the firearm*.

¶23 The record is clear. The complaint states that Black "stated that he had handled the [Ruger semi-automatic] pistol in Felicia's bedroom, but that he doesn't know who the gun belongs to."

¶24 The law is clear: Felon in possession of a firearm, *see* WIS. STAT. § 941.29(2), is a strict liability offense, subject only to a defense of privilege. *See* ***State v. Coleman***, 206 Wis. 2d 199, 207, 556 N.W.2d 701 (1996).

¶25 The law is clear. Even under the factual scenario most favorable to Black and the majority's theory, Black's possession of the firearm was not privileged. As the supreme court explained:

> In order to be entitled to the defense [of privilege], the defendant [charged with felon in possession of a firearm] must prove: (1) the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes [sic] he or she is [sic] under such a threat; (2) the defendant did not recklessly or negligently place himself or herself in a situation in which it was probable that he or she would be forced to possess a firearm; (3) the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed that he or she did not have such a chance; (4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm; (5) the defendant did not possess the firearm for any longer than reasonably necessary. We emphasize that a defendant will be able to establish these elements "only on the rarest of occasions," because of the difficulty in proving that he or she did not have a reasonable legal alternative to violating the law, and that he or she possessed the firearm for a period of time no longer than reasonably necessary.

Id. at 210-12 (citations and footnotes omitted). Obviously, *even accepting the assertions in Black's girlfriend's letter*, Black satisfies *none* of the criteria.[4]

¶26 The law is clear. One need not own a gun, or "know who the gun belongs to," in order to possess the gun. *See* WIS JI–CRIMINAL 1343 (1995) & 920 (1990).

¶27 The law is clear. A plea questionnaire, in combination with a criminal complaint, can provide the basis for a plea. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 828-29, 416 N.W.2d 627 (Ct. App. 1987).

¶28 The law is clear. The complaint in this case established Black's possession of the pistol—actual, by his admission; and constructive, by the additional allegations in the complaint linking the pistol to the drugs at the scene—and linked Black to the offense of possession with intent to deliver controlled substance.

¶29 The majority concludes, however, that "on the record before us, there was an insufficient factual basis to accept Black's no contest plea on the possession of a firearm charge." Majority at ¶1. But the majority reaches that conclusion: (1) by tightly tying its decision to things that are *not* part of the plea record; (2) by misrepresenting that assertions outside the plea record are "facts," and that those "facts" are "undisputed"; (3) by seeking legal support in unprecedented sources, including the comments of a court commissioner at

[4] Additionally, the majority's reliance on ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 273 (1997), is entirely misplaced. In ***Howard***, the supreme court determined that the State must establish a nexus between the underlying crime and the penalty enhancer of possession of a dangerous weapon. Although Howard was convicted of the charges of delivery of a controlled substance (cocaine), as a party to the crime, while possessing a dangerous weapon, and felon in possession of a firearm, ***Howard***'s holding addressed nothing at issue in this appeal. *See* ***id.*** at 276-81.

Black's initial appearance; and (4) by ignoring the case law that establishes that *even Black's girlfriend's version would establish the basis for Black's plea*.

(1) Referring to Black's postconviction motion, the majority writes that Black "indicated that Ferguson wrote the court before his no contest plea, explaining that she owned the gun, that Black had only touched it once 'looking at it after [she] purchased it,' and told her to get rid of it." Majority at ¶4. The majority reiterates, "At the time Black entered his plea, the record also contained a letter to the court from Felicia stating that she, not Black, owned the gun, that Black only touched it once to look at it, and told her to get rid of it." Majority at ¶8. But neither Black's postconviction assertions nor Ferguson's letter was part of the plea hearing in any way. In fact, *at the plea hearing*, neither Black nor anyone else even mentioned the letter. Factually and legally, the letter simply has *nothing* to do with the issue of whether the hearing provided a sufficient basis for Black's plea.

(2) The majority writes, "The question arises then, whether the statute intends to cover a situation as alleged in the instant case, *where the undisputed facts reveal that the gun was not Black's, Black touched it only briefly, and did not intend to use it or keep it around*." Majority at ¶11 (emphasis added). Wow! Where does that come from? *Absolutely nothing*—in the plea hearing or anywhere else in the record—establishes *any* of those "facts" as "undisputed."

(3) The majority notes that, at Black's initial appearance, defense counsel argued that "'there's nothing in the complaint to show that at any time the pistol or gun was within his possession or control.'" Majority at ¶10. The majority then writes:

> The trial court rejected the motion to dismiss at that point, explaining that Black's admission that he "handled it" was sufficient "at least for probable cause." *Implicit in this ruling, however, is that that statement alone is insufficient to supply the basis to accept Black's no contest plea*.

Id. at ¶10 (emphasis added). The majority's assertion finds absolutely no support in the record of the initial experience, where the entire exchange consisted of:

> [DEFENSE COUNSEL]: Commissioner, I do have a motion with regard to the felon in possession of a firearm. From reading the complaint, it indicates that Mr. Black was present in the residence when the police located the firearm in question under the mattress in the box spring in the bed frame, but it is not—there's nothing in the complaint to show that at any time that the pistol or gun was within his possession or control.
>
> THE COURT: Not true. Page three, by his own statement he handled it. It's all that's required at least for probable cause.

The majority's assertion also finds no support in the experience of virtually all judges who, at initial appearances, often offer such "at least for probable cause" comments when reviewing complaints. And the majority's assertion finds absolutely no support in the case law. No Wisconsin appellate court has ever concluded that the sufficiency of the factual basis for a plea is to be measured, even in part, by a court commissioner's comment finding probable cause at an initial appearance.

(4) The majority relies on assertions in Black's girlfriend's letter. But even if those assertions somehow could be considered to determine whether the plea hearing provided a factual basis, they would support the plea. As the majority acknowledges:

> "[C]onviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess," ***State v. R.B.***, 108 Wis. 2d 494, 497, 322 N.W.2d 502 (Ct. App. 1982), or facts showing that the item was "in an area over which the person has control and the

> person *intends to exercise control over the item*." WIS JI—CRIMINAL 920 (1990).

Majority at ¶9 (emphasis added). Certainly, when Black told Ferguson to "get rid" of the gun, he was intending to exercise control over the gun. *See* ***Coleman***, 206 Wis. 2d at 210-212. Thus, on appeal, the State correctly argues that Black "focuses on facts outside of the criminal complaint," and that even those facts "fail to undermine the trial court's finding of a factual basis."

¶30 The record is clear. The court carefully conducted the plea colloquy. Black, fully advised, acknowledged his understanding and personally entered his no contest plea. The complaint provided a factual basis for the plea. The State, in its memorandum in opposition to Black's motion to withdraw his plea, argued—accurately and with substantial caselaw support:

> Defendant, in his brief, obfuscates the issue by referring to post plea statements made by the defendant and his girl-friend. These, however, cannot and do not bear on the issue of whether the court erroneously exercised its discretion in finding the existence of an adequate factual basis for the entry of the plea.

(Footnote omitted.) And the postconviction court, in a written decision making specific references *to the record of the plea hearing*, correctly concluded that *the record* established an adequate factual basis for Black's plea.[5]

¶31 Reviewing whether a defendant had established the "manifest injustice" necessary to support plea withdrawal following sentencing, the supreme court recently declared:

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[5] Indeed, in addressing Black's related postconviction claim that counsel was ineffective, the postconviction court's written decision was even more emphatic: "*The defendant has offered nothing legally or factually in support of his claim that he was erroneously advised that 'a hurried unintentional possession of a weapon was still possession.' The claim is self-serving, conclusory, and without support.*" (Emphasis added.)

> While a judge must ensure that a defendant realizes that his or her conduct does meet the elements of the crime charged, he or she may accomplish this goal through means other than requiring a defendant to articulate personally agreement with the factual basis presented. A factual basis may also be established through witnesses' testimony, or a prosecutor reading police reports or statements of evidence. Finally, *a factual basis is established when counsel stipulate on the record to facts in the criminal complaint*.
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> … [WISCONSIN STAT. §] 971.08 states that a court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." 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*.

State v. Thomas, 2000 WI 13, ¶21-22, 232 Wis. 2d 714, 605 N.W.2d 836 (emphases added).[6]

¶32 In this case, the trial court fully complied. The trial court explicitly confirmed that Black understood the elements of the offense, and that he and both attorneys agreed that the complaint provided the factual basis for the plea.

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[6] The supreme court also reiterated that "a court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine whether a defendant has agreed to the factual basis underlying the guilty plea." ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836 (footnote omitted). Thus, in emphasizing *the record of the plea hearing* in this case, I do not suggest that additional portions of the record may not be considered. But in this case, Black provided no basis for looking beyond the plea hearing (and the majority, incorrectly referring to "facts" as being "undisputed," has utterly failed to shore up a record that Black simply failed to make).

As the supreme court explained, "It makes sense for a court to view the record in its totality *when a judge's initial inquiry into the factual basis may be satisfied by multiple sources spanning the entirety of the record*." ***Id.*** at ¶23 (emphasis added). But here, the "initial inquiry into the factual basis" was legally and logically limited to the complaint, based on the parties' agreement. No other source was necessary, precisely because Black and his attorney acknowledged the factual basis of the complaint—without reservation, qualification, or reference to his girlfriend's letter or to anything else that might have compromised the validity of the plea. Indeed, even at sentencing, neither Black nor his attorney gave the slightest hint that Black had any reservations about his plea.

¶33 To withdraw his plea after sentencing, Black had to carry "'the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit [him] to withdraw the plea to correct a "manifest injustice."'" ***Id.*** at ¶16 (quoted source omitted). He had to show "'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (quoted source omitted). *Based on the record*, he didn't come close and, therefore, the postconviction court correctly denied Black's motion to withdraw his plea.

¶34 The record is clear; this court should neither spin nor ignore it.[7] *Based on the record*, I would affirm the postconviction court's denial of Black's motion to withdraw his plea. Accordingly, I respectfully dissent.

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[7] In footnote three replying to this dissenting opinion, the majority continues to ignore and spin. *See* Majority at ¶12 n.3.

In the first paragraph of the footnote, the majority simply ignores what I have written. The majority inexplicably asserts, "The dissent indicates that Black waived his right to raise this issue." The majority points to nothing in my opinion to support its strange assertion. I have not indicated that Black waived this issue. Indeed, addressing the merits at length, I have no reason to do so. And, lest anyone be misled by the majority's puzzling comment, I absolutely do not do so.

In the second paragraph of the footnote, the majority spins—both the record and what I have written—as it slides from "plea record" to "record" to "plea hearing" to "record." Thus, the majority repeats its mistaken impression that because a letter is in the court *record* at the time of a plea hearing, it somehow becomes part of the *plea record*. The majority still offers no authority to support such a novel notion.

With the exception I've identified in footnote three, inapplicable to this case, no such authority exists, and with good reason. *See* Dissent at ¶19 n.3. Obviously, if items *in the record* but never referred to *in the plea hearing* could either establish or vitiate the factual basis for a guilty plea, *plea hearings* would often become exercises in futility, and appellate review would become utterly chaotic. Imagine the all-too-frequent scenario: an antiseptic guilty plea hearing would be followed by post-plea motions, post-sentencing motions, and appeals asking trial courts and appellate courts to examine myriad items *in the record but absent from the plea hearing record* that may contain statements of the defendant, statements of witnesses, opinions of others on the merits of the case (as we have here), and countless documents presenting various and often conflicting accounts of the alleged crime.