

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2016

Diane M. Fremgen
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.

Appeal No. 2015AP560-CR

Cir. Ct. No. 2014CF36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. James Green appeals the circuit court's judgment convicting him, based on his guilty pleas, of two crimes: attempted armed robbery with threat of force, as party to a crime and as a repeater, and possession of a firearm by a felon, as party to a crime. Green also appeals the court's order

denying his postconviction motion for plea withdrawal. As to both the judgment and the postconviction order, Green seeks reversal, arguing that a factual basis for his pleas was lacking. We disagree and affirm.

Background

¶2 According to the criminal complaint, Green and a juvenile attempted to rob victims at a residence, and either Green or the juvenile displayed a gun during the attempted robbery. The complaint further alleged that Green was a repeater with one or more prior felony convictions. At the preliminary hearing, witnesses testified consistent with some of the pertinent complaint allegations.

¶3 At Green's plea hearing, the prosecutor and Green's counsel agreed that the court could rely on the complaint allegations and the preliminary hearing testimony to establish a factual basis for Green's pleas. In addition, the court elicited statements directly from Green at the plea hearing, which we will refer to as Green's personal admissions, regarding some of the facts. Green's personal admissions included that Green participated in an attempted robbery, that Green's accomplice possessed a gun during the attempted robbery, and that Green had handled the gun earlier that same day. More specifically, the court and Green had the following exchange:

THE COURT: ... Mr. Green, can you tell me what you think you did ... that would make you guilty of these two offenses?

THE DEFENDANT: Yes, sir. I attempted with two, two of my old friends or whatever—well, not really friends but associates.... They, they said they knew about

some money and we had to go in the house and get it. I went in the house with them.¹

THE COURT: So when you went in the house, what did you do in the house then to try to get it?

THE DEFENDANT: I just searched around looking for the money, that's what I did, but.

THE COURT: I understand that. Then what did they do that would make you actually guilty of these two offenses?

THE DEFENDANT: They, they had, he had the gun, but he had the gun

THE COURT: ... [B]ut you're telling me that you didn't possess the gun itself?

THE DEFENDANT: Huh?

THE COURT: You didn't possess the gun itself?

THE DEFENDANT: I mean, I, I, I had possession of the gun once before, but not when we went in the house.

THE COURT: Well, when was it before that you had possession of it?

THE DEFENDANT: This is when I first saw the gun. When I first, when he showed me it at his apartment.

THE COURT: That same date?

THE DEFENDANT: I touched the gun. Yeah, it was the same day.

THE COURT: Okay. So you saw the gun then at that—earlier before you went to the house to do the robbery with them?

THE DEFENDANT: Yeah, he had showed me the gun and I grabbed it, I was looking at it, touching it.

¹ Like Green's personal admissions, the complaint suggests possible involvement of a third suspect. Whether Green had one or two accomplices is not pertinent to the issue on appeal.

Relying on the complaint allegations, the preliminary hearing testimony, and Green's personal admissions, the court concluded that there was a factual basis for Green's pleas.

Discussion

¶4 Green argues that he is entitled to plea withdrawal because the circuit court failed to establish a factual basis for his pleas. The factual basis requirement is found in WIS. STAT. § 971.08(1)(b),² which provides that the court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." See *State v. Black*, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363.

¶5 Green argues that "[t]he record does not show an admission of conduct by the defendant sufficient to form a factual basis" for either crime. Green points out that he never personally admitted to the truth of *all* of the allegations in the complaint or the preliminary hearing testimony. According to Green, his personal admissions during his plea colloquy are all that can be considered in determining the existence of a factual basis for his pleas.

¶6 Green is wrong. "[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint." *State v. Thomas*, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836; see also *id.*, ¶¶18, 22. Properly understood, this is a reference to defense counsel's agreement that the circuit court may look to facts in a criminal complaint and that such facts, if true, constitute the crime. Here, based on counsel's agreement, the complaint allegations and

² All references to the Wisconsin Statutes are to the 2013-14 version.

preliminary hearing testimony may be used to support the factual basis for Green's pleas.

¶7 Green argues that his personal admissions show that he "did not agree in any respect with what might have been his attorney's assessment of the factual basis for the charges." Assuming for argument's sake that Green's personal admissions were additionally necessary, we conclude that they were *consistent* with counsel's stipulation that the complaint and preliminary hearing testimony supplied a factual basis for Green's pleas. It is true that Green denied possessing the gun during the attempted robbery. However, Green admitted that he possessed the gun earlier, that he participated in the attempted robbery, and that his accomplice had the gun. Contrary to what Green may be suggesting, we see no reason why it matters who had the gun during the attempted robbery. As already noted, Green was charged with attempted armed robbery with threat of force *as a party to the crime*.

¶8 Green may be taking the position that, if he did not possess the gun during the attempted robbery, then there had to be some factual basis to conclude that Green knew or planned that the gun would be used in the attempted robbery. But Green provides nothing to back up this position. Moreover, the complaint allegations and Green's personal admissions support a reasonable inference that Green had such knowledge or plan. See **Black**, 242 Wis. 2d 126, ¶16 ("[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant").

Conclusion

¶9 For the reasons stated above, we affirm the judgment of conviction and the order denying Green's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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

