COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1171-CR **Cir. Ct. No. 2011CF130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISA A. BRABAZON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

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

¶1 BLANCHARD, J. Lisa A. Brabazon appeals the circuit court's order denying her postconviction motion for resentencing and appeals the underlying judgment convicting her on a guilty plea to one count of felony theft of items valued over $5,000 as a habitual criminal, contrary to WIS. STAT.

§§ 943.20(1)(a) and (3)(bm) and 939.62(1)(b) (2011-12).[1] First, Brabazon argues that the circuit court erroneously relied on the criminal complaint to find one aspect of the factual basis for her plea, namely, that the cumulative value of the stolen items exceeded $5,000. Second, Brabazon argues that the circuit court erroneously found that the State did not breach the plea agreement by recommending prison, as opposed to probation, at the sentencing hearing. For the reasons we explain below, we reject both arguments and affirm.

BACKGROUND

¶2 On June 6, 2011, the State filed a complaint charging Brabazon with one count of theft of items valued over $10,000, contrary to WIS. STAT. §§ 943.20(3)(c) and 939.62(1)(b). The offense level for that offense is Class G, which is punishable by a fine not to exceed $25,000 or imprisonment not to exceed ten years plus a four-year penalty enhancer based on the prior conviction, or both. *See* §§ 939.50(3)(g), 943.20(3)(c), and 939.62(1)(b).

¶3 According to the criminal complaint, on May 24, 2011, a Stevens Point police officer took a report of alleged thefts of jewelry from a residence. Specifically, the victim reported that earlier that evening she had confronted Brabazon at her residence about some jewelry missing from the victim's residence. The victim reported that Brabazon admitted to taking the jewelry and selling it at a pawn shop. The complaint reflected that the victim provided police with a list of the stolen jewelry and the victim's estimated value of each piece.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The total estimated value of the items stolen, as reported by the victim, was $11,000.

¶4 The complaint further alleged that, on May 25, 2011, a police detective interviewed Brabazon in jail. It was alleged that she had admitted that she had stolen numerous jewelry items from the same victim, referenced above, within the previous few months and had sold the jewelry at various pawn shops for money.[2]

¶5 The parties reached a plea agreement, which we will discuss in relevant part in more detail below. As part of the agreement, the State filed an amended information that reduced the charge from a Class G felony to a Class H felony. A Class H designation applies when the value of the property stolen exceeds $5,000 but not $10,000. *See* WIS. STAT. § 943.20(3)(bm). The penalties for that reduced charge are a fine not to exceed $10,000 or imprisonment not to exceed six years plus a four-year penalty enhancer based on the prior conviction, or both. *See* WIS. STAT. §§ 939.50(3)(h) and 939.62(1)(b).

¶6 At the plea hearing, held on October 3, 2011, the circuit court accepted Brabazon's guilty plea to the reduced charge. The court concluded that Brabazon's plea was "freely, voluntarily, and intelligently made" and that there was "an adequate factual basis to support the charge."

[2] Thus, it was alleged that Brabazon admitted to multiple acts of theft from the same victim over the course of a few months, which were treated by the State in this prosecution as a single offense, with the value of the stolen goods aggregated. Brabazon does not suggest on appeal that there is any defect in addressing the alleged conduct in that manner, only that the total value of the stolen items was not established with sufficient certainty.

¶7 Some facts relating to a separate criminal case are relevant to the breach-of-plea agreement issue Brabazon raises on appeal, and we recite those facts here. In the separate case, Brabazon was convicted of three counts of forgery on December 6, 2010, in Marathon County. As an original disposition in the Marathon County case, the court withheld sentence and imposed a three-year term of probation. At the time of the plea hearing in the instant case, Brabazon was alleged to have violated probation conditions imposed in the Marathon County case, but she had not yet been sentenced following revocation of her probation in the Marathon County case. However, the sentencing after revocation in the Marathon County case occurred on October 5, 2011, shortly before the sentencing in the instant case. In the Marathon County case, Barbazon received a four-year prison sentence, consisting of one year of initial confinement and three years of extended supervision.

¶8 On October 19, 2011, the circuit court held the sentencing hearing in this case. The State recommended a four-year prison sentence: one year of initial confinement and three years of extended supervision, consecutive to the sentence after revocation imposed in the Marathon County case. Brabazon's attorney indicated at sentencing in this case that, as reflected on the plea questionnaire and in the parties' prior plea discussions, Brabazon's understanding was that the State would be making a probation recommendation. As relevant to this appeal, the court in this case sentenced Brabazon to a prison term that included one year of initial confinement.

¶9 On March 8, 2012, Brabazon filed a motion for postconviction relief in this case. In the motion, Brabazon moved the court for a new sentencing, arguing that (1) the court failed to establish that a factual basis existed to support a

finding regarding the value of the stolen property, and (2) the State breached the plea agreement at the sentencing hearing.

¶10 The circuit court denied Brabazon's motion. The court determined that the aggregated value of the jewelry reflected in the complaint established an adequate factual basis for the plea, that the State had clearly stated the plea agreement on the record at the plea hearing, and that the State had honored the plea agreement at the sentencing hearing.

¶11 Brabazon appeals the order denying her motion for postconviction relief and the underlying judgment.

DISCUSSION

¶12 As indicated above, Brabazon first argues that the circuit court erroneously relied on the criminal complaint to find one aspect of the factual basis for her plea, namely, that the cumulative value of the stolen items exceeded $5,000. Second, Brabazon argues that the circuit court erroneously found that the State did not breach the plea agreement by recommending prison, as opposed to probation, at the sentencing hearing.

A. Factual Basis for the Value of the Stolen Items

¶13 Before reaching Brabazon's more specific arguments, we review the relevant law. The general rule in Wisconsin is that a guilty plea waives all nonjurisdictional defects, including constitutional claims. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. However, a defendant is entitled to withdraw a guilty plea after sentencing if the defendant demonstrates by clear and convincing evidence that a manifest injustice has occurred. ***State v. Wesley***, 2009 WI App 118, ¶22, 321 Wis. 2d 151, 772 N.W.2d 232. One category of manifest

injustice is a circuit court's failure to establish a factual basis for the crime to which the defendant pled. *See* ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836.

¶14 Thus, "[b]efore accepting a guilty plea, the circuit court must determine that a sufficient factual basis exists for the guilty plea, namely that a crime has been committed and it is probable that the defendant committed it." ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423 (citing WIS. STAT. § 971.08(1)(b) (providing that court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged")). Guilt must be inferable from the criminal complaint, at least if the complaint is to supply a factual basis for the plea as is frequently the case. *See* ***id.*** However, "[i]t is not necessary that guilt be the only inference that can be drawn from the facts in the complaint, nor that the inference of guilt is established beyond a reasonable doubt." ***Id.***

¶15 We generally review a circuit court's determination of a sufficient factual basis under a clearly erroneous standard. *See* ***id.*** However, "[w]hether the complaint alleges sufficient facts to establish probable cause that [the defendant] committed the crimes charged is a question of law which we review *de novo*." ***Id.***, ¶14. Here, for the reasons explained below, it does not matter which standard of review we apply, because we agree with the circuit court that the complaint supplied a factual basis for Brabazon's plea.

¶16 We first note that, apart from the alleged lack of a factual basis, there is no dispute as to the validity of Brabazon's plea. At the plea hearing, Brabazon agreed that she understood the charge against her in the amended information, the penalties for the offense, and the increased penalties for habitual criminality.

There is also no dispute that the circuit court used the criminal complaint as the factual basis for the plea. The court asked the parties if they would be relying "on the facts in the criminal complaint to support the charge." The prosecutor answered in the affirmative. Brabazon and her attorney did not reply in the affirmative, but neither did they object.

¶17 Turning to the alleged lack of a factual basis, Brabazon does not contest any aspect of the factual basis apart from the question of the value of the goods stolen. That is, she does not argue that there was not a factual basis that she committed a theft in violation of WIS. STAT. § 943.20(1)(a), only that there was not a factual basis that she stole items of a value of more than $5,000, to meet the terms of § 943.20(3)(bm). She argues that the victim's statement concerning the value of the stolen jewelry is "unsupported" and is "an insufficient factual basis to support a plea to felony theft." Brabazon argues that the values of the various items of jewelry are stated "without explanation," that no evidence exists that the victim had specific knowledge of the value of these items at the time of the thefts, and that "neither the complaint nor any other part of the record shows how the victim arrived at her figures."

¶18 Brabazon's argument fails, because it is evident that the complaint establishes a sufficient factual basis for the value of the stolen jewelry at the time of the thefts.

¶19 This court is convinced, for the following reasons, that the circuit court properly relied on the complaint to establish a factual basis for the plea, including the element relating to value of the stolen jewelry. As referenced above, the offense to which Brabazon entered a plea is a felony that requires proof of stolen property exceeding $5,000 in value. The criminal complaint identifies

particular pieces of jewelry and their estimated values, as provided by the victim, alleging that the total loss from thefts of the items was $11,000. Thus, the complaint explicitly values the stolen items in unambiguous dollar amounts, and attributes the valuations to someone in an apparent position to be aware of accurate values.

¶20 Under Wisconsin law, an owner of property may testify as to the value of his or her property and such testimony may establish a basis for a civil damages verdict, even though the owner's opinion as to value is not corroborated or based on independent factual data. ***Mayberry v. Volkswagen of Am., Inc.,*** 2005 WI 13, ¶42, 278 Wis. 2d 39, 692 N.W.2d 226. This case law supports a conclusion that the victim-owner's opinion of value here was sufficient to provide a factual basis to show that the value of the jewelry exceeded $5,000. Brabazon presents no reason to conclude that the victim's valuations, as set forth in the complaint, are unreliable.

¶21 Brabazon's argument relies heavily on ***White v. State***, 85 Wis. 2d 485, 271 N.W.2d 97 (1978), a case also involving a challenge to the factual basis for the value of a stolen item. Brabazon argues that, like the defendant in ***White***, she is entitled to a resentencing because the factual basis for the value was insufficient.

¶22 ***White*** is distinguishable from this case because it is clear that the defect in ***White*** was the lack of a basis to establish the value of the stolen item *at the time of the theft*. That is not the situation here.

¶23 More specifically, ***White*** involved the question of whether there was a factual basis to show that a stolen chain saw had a value of more than $100. *See* ***id.*** at 487-93. The circuit court acknowledged that there appeared to be nothing in

the record to establish the value of the chain saw at the time of theft, but the court found that the saw "probably" had a value of more than $100, apparently based on the owner-victim's preliminary hearing testimony that, more than a year before the theft, he had purchased the saw for $190 in cash plus a $60 "trade-in allowance." ***Id.*** at 489-90. The supreme court reversed, concluding that testimony of this sort, concerning *the purchase price* of the saw, was insufficient to establish a factual basis for its value *at the later time of theft*. *See* ***id.*** at 489-90, 493.

¶24 Here, in contrast, the complaint contains specific allegations by the victim as to the total value of the stolen jewelry at the time of theft. According to the complaint, each piece of the stolen jewelry is indicated as "valued" at a certain amount, suggesting a contemporaneous value. Moreover, Brabazon does not argue that there is any reason, and we see no reason, to infer from the complaint that the victim was offering a value for a time other than the time of the theft.

¶25 That ***White*** stands for the limited proposition that there must be some factual basis for value *at the time of the theft*, and provides no reason to overturn Brabazon's plea, is underscored by ***Peterson v. State***, 54 Wis. 2d 370, 195 N.W.2d 837 (1972), a case that the court in ***White*** made a point of acknowledging and distinguishing. *See* ***White***, 85 Wis. 2d at 490. In ***Peterson***, the court concluded that a factual basis for theft of an item exceeding $100 was established by police testimony that a defendant stole two "new" ovens. ***Peterson***, 54 Wis. 2d at 386. The ***White*** court explained that ***Peterson*** was distinguishable because, unlike in ***White***, there was a basis in ***Peterson*** for determining value at the time of the theft. *See* ***White***, 85 Wis. 2d at 490. Here, the complaint contains a basis for value at the time of the theft that is more specific than the police officer testimony in ***Peterson***, and Brabazon fails to address ***Peterson***.

¶26 For all these reasons, we conclude that the circuit court in this case did not err in relying on the complaint to establish the factual basis for the value of the jewelry at the time of its theft.

B. The Terms of the Plea Agreement

¶27 Turning to Brabazon's challenge to the circuit court's denial of her postconviction motion for a new sentence on the ground that the State breached the plea agreement through its sentencing recommendation, Brabazon's argument is that the circuit court committed clear error in reconstructing the terms of the plea agreement. More specifically, Brabazon argues that the State promised at the time of the plea hearing to recommend probation, and that the court clearly erred in finding that the State: (1) promised to recommend probation only if Brabazon received a probation disposition in the Marathon County sentencing after revocation and (2) reserved the right to recommend imprisonment if Brabazon received a sentence of imprisonment in the Marathon County case.

¶28 "Whether the State breached a plea agreement is a mixed question of fact and law." ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. "The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State's alleged breach of that agreement are questions of fact, … reviewed under the clearly erroneous standard." ***Id.*** "However, whether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo." ***Id.***

¶29 Here, our focus is on the circuit court's findings as to the terms of the plea agreement, and our standard of review is therefore deferential. We are convinced that the court did not clearly err in finding that, under the plea

agreement reached by the parties, the State conditioned its probation recommendation in this case on Brabazon receiving probation in her Marathon County case. Because Brabazon's argument that the State breached the agreement is based on her assertion that the State promised to make a probation recommendation only, and we reject that assertion, the separate questions addressed by the parties on appeal as to whether the alleged breach was substantial and whether Brabazon waived her right to hold the State to its bargain become moot.

¶30 The terms of a plea agreement can be found in sources that include the Plea Questionnaire/Waiver of Rights form and the plea colloquy held by the circuit court. A "Plea Questionnaire/Waiver of Rights Form provides a defendant and counsel the opportunity to review together a written statement of the information a defendant should know before entering a guilty plea." ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794. However, what is reflected on that form is not necessarily dispositive. *See generally* ***State v. Brandt***, 226 Wis. 2d 610, 613, 594 N.W.2d 759 (1999) (plea colloquy demonstrated defendant's understanding of the elements of crime when plea questionnaire reflected incorrect information on the elements).

¶31 We examine the Plea Questionnaire/Waiver of Rights form and the plea hearing held by the circuit court. The Plea Questionnaire/Waiver of Rights form, filed on the same day as the plea hearing, indicates that "[t]he plea agreement will be stated in court or is as follows: State to recommend probation for a period of two years." Thus, we acknowledge that, at least standing alone, the plea form supports Brabazon's argument.

¶32 At the hearing, however, the circuit court asked whether the parties had "reached some agreement with regard to the disposition in the matter." The State replied:

> The defendant would be pleading guilty or no contest to the amended charge in the information. We did discuss what the status of the defendant is, as it's my understanding she was on probation in a Marathon County case that has been revoked.
>
> We had initially thought or hoped that she would have been sentenced on this case [the revocation in Marathon County] by today's date. However, that sentencing has not yet taken place. So the [S]tate *was going to recommend a withheld sentence at this time with three years[']* probation.
>
> I actually kind of was hoping to see what she was going to get out of revocation. *Because to be honest, as I've expressed to Ms. Hogan, to me, it didn't really make a lot of sentence sense to put her on probation if she's going to receive a prison sentence [in the Marathon County case]*.
>
> ….
>
> … And certainly *if* she's going to receive a jail sentence, I think probation on this is appropriate because the main focus we would try to be getting at this point is restitution.
>
> *If, however, the [Marathon County] sentence would be a prison sentence, I'm not sure, just because I don't know how long she might receive initial confinement, if probation would make the most sense. But Ms. Hogan wants to proceed today, and we did discuss the state's recommendation of a probation sentence in this matter*.

(Emphasis added.)

¶33 The court then asked Brabazon's attorney whether the State's recitation of the agreement was her understanding of the plea agreement. She said, "Yes, Your Honor." She then said, "to give a little bit more background of

what was happening in the Marathon County case," Brabazon would be sentenced on the revocation on October 5, 2011, and Brabazon's agent in that case had recommended three to six months of county jail time, while the State was recommending prison time. She also added: "So it would be my hope that because of this case, the main concern is restitution. Probation would give Ms. Brabazon the opportunity to pay back the restitution, and that's her main concern as well. This is why I believe that this recommendation is appropriate." The court did not sentence Brabazon at the plea hearing, but instead ordered a copy of the presentence investigation report from the Marathon County case and scheduled a future hearing for sentencing.

¶34 On October 19, 2011, the circuit court held the sentencing hearing in this case. At the sentencing hearing, the prosecutor stated:

> Your Honor, it's my understanding that the defendant, in her Marathon County case, received a four year prison sentence: one year [of] initial confinement and three years [of] extended supervision; …
>
> ….
>
> So I think that what an appropriate sentence … would be to do a similar sentence to what she received in Marathon County and that run consecutive to the Marathon County case.

The State then added: "So what I was, at least the thought that I had in my mind in terms of a sentence, Your Honor, was a similar four year prison sentence: one year of initial confinement and three years [of] extended supervision, to be consecutive to the sentence that she's presently serving."

¶35 Brabazon's attorney indicated her disagreement:

> But on the plea questionnaire and in our discussions it was understood by Miss Brabazon that the State would be making a probation recommendation that now, apparently,

> because of the fact that she now received a prison sentence in Marathon County as a result of her probation being revoked, the State has determined that it's more appropriate for her to do prison time.

¶36 The court asked defense counsel whether she intended to proceed with the plea despite the fact that the State had allegedly changed the recommendation. Brabazon's attorney replied yes. The court then sentenced Brabazon to two years of incarceration: one year of confinement and one year of extended supervision.

¶37 After Brabazon moved for postconviction relief, the court held a postconviction motion hearing. At the hearing, the court asked Brabazon's attorney whether the prosecutor ever told the attorney anything about the probation being contingent on not receiving a sentence in the Marathon County case. Brabazon's attorney answered, "We knew [Brabazon] was going to be revoked, and that she was going to be sentenced. And then we were just kind of waiting to see what the [Marathon County case] sentence was going to be." Brabazon's attorney also testified that, after the plea hearing but before the sentencing hearing, when she learned of the sentence after the revocation given by the Marathon County court and passed on that information to the State, she was informed by the State that it "would be recommending a prison sentence." Both she and Brabazon testified that each knew they had the opportunity to withdraw the plea prior to the sentence, but they chose to proceed.

¶38 Based on this record, the circuit court found that "both sides knew full well that … what happened in Marathon County may change the recommendation of the district attorney" in the instant case. In other words, the court found that the State and Brabazon had never agreed that the State would unconditionally recommend probation, regardless of what happened in the

Marathon County case. Instead, the agreement was that the State's recommendation would depend on the outcome in that case.

¶39 We are not persuaded that the circuit court's findings regarding the plea agreement terms are clearly erroneous. Those findings are supported by, among other evidence, the prosecutor's explanation at the plea hearing, to the effect that it would not make sense for the court in the instant case to place Brabazon on probation if she received a prison sentence in her Marathon County case, and by the fact that Brabazon made no contemporaneous objection to the prosecutor's explanation. To the contrary, Brabazon's attorney indicated agreement with the prosecutor's explanation. As indicated above, that explanation repeatedly couched the State's recommendation in conditional terms: the State "*was going to recommend* a withheld sentence … with three years[']probation"; "it didn't really make a lot of sense to put her on probation *if* she's going to receive a prison sentence" in the Marathon County case; "*if* she's going to receive a jail sentence [in the Marathon County case], I think probation on this is appropriate"; "*If, however,* the [Marathon County] sentence would be a prison sentence, *I'm not sure … if probation would make the most sense*." (Emphasis added.) The court's findings are further supported by the fact that Brabazon's attorney acknowledged in her postconviction testimony that, during the course of plea negotiations, she and the prosecutor spoke of waiting to see what the sentence from the Marathon County case might be.

¶40 It gives us pause that the Plea Questionnaire/Waiver of Rights form indicates that the State would recommend probation. This and other evidence may have supported findings regarding the plea agreement terms different from those the circuit court made. However, that is not the test for whether the findings the court made are clearly erroneous. *See* ***Cogswell v. Robertshaw Controls Co.***, 87

Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) ("The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding."); *cf. also* ***Brandt***, 226 Wis. 2d at 621 (circuit court may rely on plea colloquy to establish defendant's understanding to be contrary to what is indicated in plea questionnaire).

¶41 In sum, the circuit court here could reasonably find that both sides understood, and incorporated into their agreement, the concept that the State's recommendation would be prison if Brabazon received a prison sentence in the Marathon County case.

¶42 We acknowledge that, studying the transcript of the plea hearing now with the benefit of hindsight, the prosecutor could have been more clear in reciting the State's recommendation.[3] However, we conclude that the circuit court reached one reasonable interpretation of what the prosecutor said without objection from the defense, in the context of all evidence before the court, and Brabazon fails to explain why we should conclude that the circuit court's interpretation was clearly erroneous.

[3] These circumstances highlight the potential utility of a recommendation recently made by the supreme court: "The State and defense counsel would be well advised to make sure they agree on the terms of any plea bargain by putting the agreement in writing." ***State v. Frey***, 2012 WI 99, ¶102, 343 Wis. 2d 358, 817 N.W.2d 436. We hasten to note that the plea hearing in the instant case had already occurred by the time ***Frey*** was issued, and therefore ***Frey*** came too late for consideration by the parties here. We simply remind readers of this advice, which is intended to avoid potential confusion and unnecessary subsequent litigation.

CONCLUSION

¶43 In sum, for the reasons stated, we affirm the circuit court's judgment of conviction and the order denying Brabazon's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.