COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2858-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES R. BOARDMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Reversed and cause remanded with directions.*

ROGGENSACK, J.[1] James Boardman appeals his misdemeanor bail jumping conviction on the grounds that there was no factual basis for his plea of no contest. Boardman argues that although the facts which he admitted on the record and upon which the circuit court relied (namely, that he contacted his

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

girlfriend in violation of a no-contact provision of his release on a disorderly conduct charge) would subject him to a civil forfeiture under § 968.075, STATS., they were insufficient to constitute the offense of bail jumping under § 946.49, STATS., because the bond document itself did not include the no-contact provision. We agree, and therefore reverse and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In the early morning hours of July 16, 1996, Boardman was arrested for disorderly conduct after an altercation with his girlfriend, Kathryn White. He was released on a signature bond, by which he agreed to appear for court hearings, submit to orders and process of the court, notify the court clerk of any change of address, and refrain from intimidating witnesses or victims and committing crimes. In addition to the signature bond, and as required by § 968.075(5)(b), STATS., for domestic abuse matters, Boardman also signed a conditional release and contact prohibition form (Conditional Release), by which he agreed to have no contact with White during the following seventy-two hours, on penalty of a $1,000.00 forfeiture.

According to the complaint, shortly after his release that same morning, Boardman located White sleeping in her car at a Quick Trip store and pounded on her window to tell her that he was going out to their place to pick up his stuff. However, upon leaving the Quick Trip, Boardman discovered that someone (he implied it was White) had flattened one of the tires on his van. Boardman then pulled into another service station and contacted the police to report the incident. At about 3:15 a.m., while Boardman was talking to a police officer regarding the damage to his van's tire, White (who said that she had

followed Boardman from the Quick Trip) pulled up in her car and started yelling at Boardman. Boardman yelled back and approached White's car, despite the officer's repeated warnings to stop. After several admonitions to Boardman, the officer arrested him for violating the Conditional Release. As a result of the entire night's events, the complaint filed against Boardman included two counts of disorderly conduct, one count of misdemeanor bail jumping and a count alleging a violation of the Conditional Release.

On the morning of trial, Boardman entered into an agreement with the State, whereby he pled guilty to the misdemeanor bail jumping count in exchange for the dismissal of the two counts of disorderly conduct and the violation of the Conditional Release. When the circuit court asked about his understanding of the charge to which he was pleading, Boardman stated, "I violated the conditions of release by contact, making contact with her after I was released." The district attorney offered the affidavit portion of the criminal complaint as the factual basis for the charge. The court determined that Boardman's "failure to comply with the terms of the bond" supplied a factual basis for the charge and accepted Boardman's plea.

The circuit court initially withheld sentence and placed Boardman on probation for one year. However, Boardman's probation was revoked after he violated its terms in May of 1997. The court then sentenced Boardman to nine months in jail, and Boardman moved to withdraw his plea on the grounds that he had not realized at the time of his plea that his conduct did not actually satisfy the elements of the crime charged.

DISCUSSION

Standard of Review.

Although this court generally will not disturb a circuit court's finding regarding the existence of a factual basis for accepting a plea unless it is clearly erroneous, ***State v. Johnson***, 200 Wis.2d 704, 709, 548 N.W.2d 91, 93 (Ct. App. 1996), we will consider *de novo* whether the circuit court has erred in the application of law to undisputed facts, such as the relationship between §§ 946.49 and 968.075, STATS., at issue here. *See* ***State v. Michels***, 141 Wis.2d 81, 88, 414 N.W.2d 311, 313 (Ct. App. 1987).

Factual Basis for Plea.

Before a circuit court may accept a no contest plea, it must determine: (1) the extent of the accused's education and general ability to comprehend; (2) the accused's understanding of the nature of the crimes charged and the potential punishments the court could impose; (3) the accused's understanding of the constitutional rights he is waiving; (4) whether promises or threats were made to the accused to obtain his plea; and (5) whether a factual basis existed to support conviction of the crime charged. ***State v. Bangert***, 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986). Thus, the "[e]stablishment of a factual basis for a plea to the charged crime is separate and distinct from the requirement that the voluntariness of the plea be established to the trial court's satisfaction." ***State v. Harrington***, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994). Therefore, "[b]efore a trial court can accept a guilty plea it must personally determine that the conduct which the defendant admits constitutes the offense … to which the defendant has pleaded guilty." ***Johnson***, 200 Wis.2d at 708, 548 N.W.2d at 93 (citation omitted). A circuit 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." ***Id.*** at 709, 548 N.W.2d at 93 (citation omitted).

In this case, Boardman was convicted of misdemeanor bail jumping after he admitted contacting his girlfriend in violation of the Conditional Release, signed subsequent to a domestic abuse charge. Bail jumping occurs whenever a person "having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond." Section 946.49(1), STATS. A conviction for bail jumping requires the State to prove: (1) that the defendant was charged with a misdemeanor; (2) that the defendant was released from custody on a bond; and (3) that the defendant knew the terms of the bond and knew that his conduct contravened those terms. ***State v. Dawson***, 195 Wis.2d 161, 170, 536 N.W.2d 119, 122 (Ct. App. 1995). The critical issue, then, is whether Boardman's contact with White violated a term of his bond.

The State first argues that the violation of a domestic abuse Conditional Release automatically violates a bond condition due to the interaction of several related statutes, regardless of whether the provision is actually included in the language of the bond. Citing an attorney general opinion, the State reasons that because § 968.075(5)(b) and (6), STATS., prohibit the release of a domestic abuse offender unless he or she agrees not to contact the victim within seventy-two hours of release on bond, a person who contacts a domestic violence victim within the three-day period after release violates both § 968.075(5)(a)2. and § 946.49, STATS. *See* 78 Wis. Op. Atty. Gen. 177 (Oct. 27, 1989).

The State's argument is unpersuasive for several reasons. First of all, the attorney general opinion on which the State relies focused upon whether an

arrest for a § 968.075(5)(a)2., STATS., violation, a civil forfeiture offense, could be justified on any other grounds. Nowhere in the opinion does the attorney general discuss whether the provision against contacting the victim was, or would need to be, contained in the bond itself. Therefore, the opinion does not address the question presented here, *i.e.*, whether one can be convicted of bail jumping when the provisions against contacting the victim are not restated, or incorporated by reference, in the bond, itself. Moreover, opinions of the attorney general, while generally instructive, are not binding on this court in any way. ***State v. Von Loh***, 157 Wis.2d 91, 99, 458 N.W.2d 556, 559 (Ct. App. 1990). In contrast, we are bound by our prior decisions. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997).

In ***Dawson***, we overturned the bail jumping conviction of a man who had committed a crime after being released from custody without a bond. ***Dawson***, 195 Wis.2d at 172, 536 N.W.2d at 123. The State had argued that the lack of a formal bond was irrelevant because the defendant's release from custody was nonetheless conditioned on his committing no further crimes. ***Id***. at 168, 536 N.W.2d at 121. However, we rejected the notion that statutory conditions of release were equivalent to the terms of a bond for purposes of the bail jumping statute, reasoning:

> The language of § 946.49(1), STATS., is unambiguous: defendants can only be convicted of bail jumping under this subsection if they "intentionally fail[] to comply with the terms of [their] bond." …
>
> Section 967.02(4), STATS., defines "bond" as "an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein….
>
> [T]he legislature has clearly criminalized only the actions of a defendant who is released under a secured bail bond or

> unsecured appearance bond, and then "fails to comply with the terms of [that] bond."

Id. at 168, 170, 536 N.W.2d 121-22. Because the bond which Boardman signed did not prohibit him from contacting White, he could not know that doing so would violate the terms of the bond. Indeed, the fact that the Conditional Release specifically stated that the penalty for violation would be a civil forfeiture of $1,000.00 undermines the notion that Boardman would have known that he faced criminal bail jumping charges for such contact.

The State next points out that Boardman's alleged pounding on White's car window in the Quick Trip parking lot after being released on bond would constitute the crime of disorderly conduct above and beyond any violation of the Conditional Release, and therefore, he violated the bond's express prohibition against committing any further crimes. While that might be true, it is insufficient to prevent the withdrawal of Boardman's plea, since the circuit court made no effort to ascertain whether Boardman agreed that he did beat on White's car window. We also note that we are not presented with a situation such as that discussed in ***State v. Eastman***, 185 Wis.2d 405, 414, 518 N.W.2d 257, 260 (Ct. App. 1994) and re-examined in ***State v. McKee***, 212 Wis.2d 488, 494, 569 N.W.2d 93, 96 (Ct. App. 1997), where the court analyzed when a defendant must be apprised of which aspects of his alleged conduct supported which of the multiple charges against him. Rather, here, the circuit court erroneously allowed Boardman to believe that specific conduct supported one specific charge, when in fact, it did not.

Jeopardy generally attaches when a guilty or no contest plea is accepted by the court. ***State v. Comstock***, 168 Wis.2d 915, 937-38, 485 N.W.2d 354, 363 (1992). However, a plea which is properly withdrawn on the motion of

the defendant cannot be said to have been validly accepted by the court. *See* ***State v. Pohlhammer***; 82 Wis.2d 1, 4, 260 N.W.2d 678, 680 (1978); *see also* ***People v. Aragon***, 14 Cal. Rptr.2d 561, 565 (Ct. App. 1992) (noting that when a plea is set aside, "the parties are generally restored to the positions they occupied before the plea bargain was entered"). Therefore, we reverse the judgment of conviction, and direct the circuit court to permit the plea to be withdrawn and also to reinstate the original charges, thereby placing the parties in the positions they occupied prior to the plea agreement.

CONCLUSION

Violating the Conditional Release subsequent to an arrest for alleged domestic abuse cannot give rise to a bail jumping charge unless a similar no-contact provision is also included in the actual terms of the bond signed by the defendant,[2] or the facts of record are sufficient to show that the contact itself rose to the level of another crime. Neither is the case here.

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

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

[2] The bond may simply state that it incorporates by reference the provisions of the conditional release form signed on an even date, or the actual terms of the conditional release form may be repeated verbatim.