

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 13, 2018**

Diane M. Fremgen  
Acting Clerk of Court of Appeals

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**Appeal No. 2016AP2453-CR**

**Cir. Ct. No. 2015CF9**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIK M. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Erik Smith appeals a judgment of conviction for three felonies, entered pursuant to his guilty pleas, and an order denying his postconviction motion. Smith seeks plea withdrawal, arguing there was an insufficient factual basis for his pleas to support territorial jurisdiction in the State

of Wisconsin. We agree with the State that Smith’s pleas were supported by a sufficient factual basis for territorial jurisdiction based on the State’s clear allegation—made both in the criminal complaint and orally by the prosecutor at the plea hearing—that the crimes occurred in Wisconsin. We therefore affirm.

## BACKGROUND

¶2 The State filed a criminal complaint alleging that Smith caused the death of Eric Volp during the overnight hours between October 10 and 11, 2008. According to the complaint’s probable cause statement, Volp was reported missing on October 12, 2008. Witnesses had last seen Volp together with Smith at the North Stables Bar in Iron Mountain, Michigan, during the early morning hours on October 11.

¶3 The complaint alleges that on July 6, 2009, law enforcement officials recovered Volp’s submerged body from the KC Creek in Marinette County, Wisconsin. The body was located a short distance from a bridge on U.S. Highway 8 that spans the creek.<sup>1</sup> Forensic pathological examinations revealed Volp’s death had been caused by multiple blunt force traumas that had, among other things, fractured his skull and all of his ribs. One doctor noted the rib fractures appeared to be “crush type injuries.”

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<sup>1</sup> We take judicial notice of several general distances relevant to this appeal, as provided by the online public mapping resource Google Maps. See *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 (7th Cir. 2013), *overruled on other grounds by Ortiz v. Werner Enters.*, 834 F.3d 760 (7th Cir. 2016). The approximate distance between the North Stables Bar in Michigan and the Wisconsin border is three and one-half miles. The approximate distance between the Wisconsin border and the KC Creek overpass on U.S. Highway 8 is fourteen and one-half miles.

¶4 Law enforcement interviewed Smith multiple times. Eventually, Smith admitted to having sexual relations with Volp on the night in question. Smith had stated the sexual encounter occurred in Volp's apartment, but the apartment building manager told authorities Volp no longer lived in the building on October 10, 2008, and he would not have had access to the apartment on that date. A citizen witness who spoke with Smith after Volp's disappearance told police that Smith had said Volp scratched him during a sexual encounter and that Smith was concerned police might discover his DNA under Volp's fingernails if Volp's body was recovered.

¶5 Authorities conducted a forensic examination of the vehicle Smith owned at the time of Volp's disappearance. The car had damage to its front and rear bumpers, as well as areas of missing paint. A paint chip found on Volp's corpse was consistent with the paint from Smith's vehicle. A dog trained in human remains detection alerted to the odor of human remains in the interior of the vehicle.

¶6 Police also received assistance from Smith's cellmate at a federal prison in Illinois, where Smith was being held on charges in a different case. Smith had told the cellmate about the events that occurred during and subsequent to the overnight hours on October 10 and 11, 2008. The cellmate's statements were restated in the complaint. According to the cellmate, Smith acknowledged being at a bar with Volp and that Volp had asked for a ride home. Smith told Volp he had to drop off other friends first. After doing so, Smith encountered Volp walking on the street. Smith picked up Volp, after which the two argued. The argument turned physical, and Smith's throat was scratched. At some point Smith and Volp left the vehicle, but the precise time this occurred in the sequence of events is unclear.

¶7 According to the inmate's account of Smith's statements, Smith then returned to his vehicle, but Volp called him on his cell phone and protested being left behind. Smith put the vehicle in reverse and hit something as he backed up. Smith then saw that Volp was under the vehicle and still alive. Smith reversed the vehicle and drove over Volp with the front wheels, too. Smith related that, after this, Volp was still breathing and making a gurgling sound. Smith told his cellmate he put Volp in a ditch on the side of the road, covering him with leaves and debris. The cellmate's information was ambiguous as to where, precisely, Volp's death occurred, and the complaint was candid in alleging that "there is no clear evidence as to the location where Eric M. Volp actually met his demise."

¶8 According to the complaint, after killing Volp, Smith drove home. He recovered Volp's body the next day and put it in his car trunk, where it remained for the day while Smith was at work. Smith then dumped Volp's remains from a highway bridge into a stream, and thereafter manually dragged the corpse downstream away from the road. Authorities confirmed there was a bridge upstream near where Volp's body was found, and that the body could not have floated downstream to its resting place given obstructions in the waterway.

¶9 Based on the foregoing, Smith was charged in Wisconsin in 2015 with four criminal offenses: (1) first-degree reckless homicide; (2) homicide by negligent operation of a motor vehicle; (3) hiding a corpse; and (4) hit and run resulting in death. The parties ultimately reached a plea agreement whereby Smith would plead guilty to all the charges except the first-degree reckless homicide charge, which was dismissed and read in at sentencing. As part of the agreement, the parties also obtained a letter from the Dickinson County prosecutor in

Michigan, who promised to forgo filing criminal charges there against Smith relating to Volp's death.<sup>2</sup>

¶10 At the plea hearing, the circuit court conducted an extensive colloquy regarding whether venue in Wisconsin was appropriate. The prosecutor was again forthright that the State could not “determine precisely where the initial incident occurred.” However, the State argued venue was appropriate in Marinette County either because the body was found in the county or because Smith had traveled through the county in connection with the offenses. In response, both defense counsel and Smith personally stipulated that Marinette County was a proper venue. Neither Smith nor the State raised the issue of whether Wisconsin had territorial jurisdiction over all of the offenses charged against Smith. The court accepted Smith's pleas and sentenced Smith to a significant prison sentence, consecutive to a federal sentence he was then serving.

¶11 After sentencing, Smith filed a postconviction motion seeking to vacate his judgment of conviction on the ground that the circuit court lacked territorial jurisdiction.<sup>3</sup> Smith believed the criminal complaint “suggest[ed] that Mr. Smith committed the crimes of homicide by negligent operation of a vehicle and hit-and-run resulting in death in Michigan,” and he therefore contended there was no basis on which to conclude that any constituent element of the offenses occurred in Wisconsin so as to establish territorial jurisdiction in this state. Even

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<sup>2</sup> Iron Mountain is located in Dickinson County, Michigan. The Dickinson County prosecutor represented that her agreement not to prosecute was approved by the investigating agency in Iron Mountain.

<sup>3</sup> Smith's attorneys initially filed a no-merit notice of appeal, which they moved to withdraw after identifying a potentially meritorious issue. This court granted that motion and extended the time for filing a postconviction motion in the circuit court.

though he maintained the court lacked territorial jurisdiction over only two of the three crimes, Smith argued the defect tainted the entire plea agreement and thus warranted withdrawal of all his pleas.

¶12 The State responded there was a “clear inference” in the complaint that Smith had driven Volp somewhere before committing the homicide, including possibly crossing the nearby Wisconsin border. The State also argued that by pleading guilty to the offenses in Wisconsin, Smith had waived his right to challenge territorial jurisdiction. Finally, the State asserted Smith was estopped from now challenging territorial jurisdiction for several reasons, namely his failure to assert a challenge until after sentencing, Michigan’s agreement not to charge Smith, and Smith’s stipulation to venue in Marinette County, Wisconsin, at the plea hearing.

¶13 The circuit court denied the motion, concluding that by stipulating to venue, Smith had effectively stipulated to Wisconsin’s territorial jurisdiction over the offenses. The court also adopted the State’s estoppel argument. Smith now appeals.

## **DISCUSSION**

¶14 This appeal involves Smith’s effort to vacate his criminal conviction. This issue, given the particular facts of this case, requires our integrated analysis of various legal concepts, namely, territorial jurisdiction, the sufficiency of a factual basis for proper entry of a guilty plea, and a defendant’s attempt to withdraw a plea postsentencing. Smith argues the factual bases supporting Wisconsin’s territorial jurisdiction over the negligent homicide and hit-and-run charges were lacking because the complaint did not support a reasonable inference that any element of those offenses occurred in Wisconsin. According to Smith,

this deficiency deprived the circuit court of territorial jurisdiction over those offenses, rendering his pleas manifestly unjust and his judgment of conviction invalid. Accordingly, Smith submits he is entitled to withdraw his pleas and to have his conviction vacated.

¶15 As an initial matter, we note the State contends that we need not reach the merits of whether Wisconsin had territorial jurisdiction over the two charged offenses. The State argues Smith has either waived his objection to territorial jurisdiction or is judicially estopped from now asserting that his pleas were lacking a factual basis for territorial jurisdiction. Whether territorial jurisdiction can be waived altogether, and how that waiver is accomplished, are undecided questions of state law.<sup>4</sup> See *State v. Randle*, 2002 WI App 116, ¶13, 252 Wis. 2d 743, 647 N.W.2d 324. Likewise, the State has not directed us to any legal authority applying judicial estoppel to preclude a defendant's postplea challenge to territorial jurisdiction. Under the circumstances, however, we need not address these issues because Smith's territorial jurisdiction challenge fails on its merits. See *Maryland Arms Ltd. P'Ship v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Issues that are not dispositive need not be addressed.").

¶16 Territorial jurisdiction, although a less well-known concept than personal and subject matter jurisdiction, *Randle*, 252 Wis. 2d 743, ¶8, is essential to a criminal prosecution under state law, see *Hotzel v. Simmons*, 258 Wis. 234,

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<sup>4</sup> In *State v. Randle*, 2002 WI App 116, 252 Wis. 2d 743, 647 N.W.2d 324, we adopted a limited waiver rule under which a defendant who enters a guilty plea to a lesser-included offense may not challenge territorial jurisdiction if it existed for the original charge. *Id.*, ¶14. We agree with the parties that *Randle*'s limited waiver rule is inapplicable under the facts of this case.

240, 45 N.W.2d 683 (1951). Territorial jurisdiction describes the reach of a state’s laws, which may extend beyond its geographic boundaries. 4 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 16.1(a) (4th ed. 2017). A court may act only upon crimes committed within the state’s territorial jurisdiction. *State v. Anderson*, 2005 WI 54, ¶32, 280 Wis. 2d 104, 695 N.W.2d 731. Territorial jurisdiction is a function of the United States Constitution’s Sixth Amendment requirement that a person be tried by an “impartial jury of the State and district wherein the crime shall have been committed.” *State v. Brown*, 2003 WI App 34, ¶24, 260 Wis. 2d 125, 659 N.W.2d 110.

¶17 The territorial reach of the State of Wisconsin’s criminal laws is established by WIS. STAT. § 939.03 (2015-16).<sup>5</sup> *Randle*, 252 Wis. 2d 743, ¶12. Under § 939.03(1)(a)—the only provision concerning territorial jurisdiction at issue in this case—a person is subject to prosecution and punishment under Wisconsin law if that person “commits a crime, any of the constituent elements of which takes place in this state.” The “constituent elements” of an offense are the elements the State is required to prove beyond a reasonable doubt in the prosecution of the offense. *Anderson*, 280 Wis. 2d 104, ¶33.

¶18 The current version of WIS. STAT. § 939.03 reflects a legislative judgment to extend jurisdiction to crimes that are not wholly committed within Wisconsin. See 7 Wisconsin Legislative Council, *Report of the Wisconsin Legislative Council Submitted to the Legislature and the Governor* 41 (1950). Because only a single element need occur within Wisconsin to confer territorial

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<sup>5</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.



jurisdiction, Wisconsin and another state may have concurrent jurisdiction over the same crime. *Anderson*, 280 Wis.2d 104, ¶43 (quoting 5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code* 3 (1953)). Generally, and consistent with the standard governing the sufficiency of a criminal complaint, the State is required to set forth facts or reasonable inferences from those facts giving rise to territorial jurisdiction. See *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989); see also *State v. Manthey*, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992).

¶19 Territorial jurisdiction is necessarily derived from the facts regarding the offenses. In a plea situation, the proper entry of a guilty plea depends on there being a factual basis to show that Wisconsin had jurisdiction over the charged crimes. This “factual basis” requirement is fairly straightforward: Before a circuit court accepts such a guilty plea, it must “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” WIS. STAT. § 971.08(1)(b); see also *State v. Lackershire*, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23 (observing the conduct admitted by the defendant must constitute the crime charged). Because the circuit court’s duties are designed to ensure a knowing, intelligent and voluntary plea, “establishing a factual basis under § 971.08(1)(b) is necessary for a valid plea.” *Lackershire*, 301 Wis. 2d 418, ¶34. We see no reason why the foregoing principles should not apply with equal force to the factual basis underpinning territorial jurisdiction.

¶20 It is somewhat unclear through what lens/procedure Smith contends his postconviction motion should be analyzed. Smith’s motion, as well as his arguments on appeal, appear to skip to his desired relief of having his judgment of conviction vacated on the ground that the circuit court lacked territorial jurisdiction over the two charged offenses at issue. He then also contends in his

reply brief that the State “agrees” with him that because Smith’s convictions followed a guilty plea rather than a trial, the criminal complaint is the sole source for determining if the State established territorial jurisdiction.<sup>6</sup> In doing so, however, Smith does not address why our review of the factual bases for supporting the circuit court’s territorial jurisdiction should be limited to the facts found in the complaint, given that this is a review following his entry of an otherwise valid guilty plea.

¶21 When seeking postsentencing plea withdrawal, the defendant carries the heavy burden of showing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A “manifest injustice” is a “serious flaw in the fundamental integrity of the plea,” *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995), which includes a circuit court’s “fail[ure] to establish a factual basis that the defendant admits constitutes the offense pleaded to,” *Thomas*, 232 Wis. 2d 714, ¶17.

¶22 As *Thomas* made clear, when reviewing a circuit court’s decision denying a defendant’s postsentencing motion for plea withdrawal, we are not limited to the criminal complaint’s probable cause statement to ascertain whether

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<sup>6</sup> While it is fair to say that the State focuses its appellate argument on the facts alleged in the complaint, both it and Smith quote from portions of the prosecutor’s comments during Smith’s plea hearing in an attempt to buttress their respective arguments on the merits of the territorial jurisdiction issue.

In addition, Smith’s brief-in-chief asserts the State stipulated at the postconviction motion hearing that all facts relevant to the territorial jurisdiction analysis were set forth in the criminal complaint. Our review of the transcript reveals no such stipulation by the State on the cited pages. Moreover, as set forth below, such a stipulation would be inconsistent with our obligation to review the “totality of the circumstances” on a motion for plea withdrawal. *See infra* ¶22.

there was a factual basis for the defendant’s plea. *Id.*, ¶18. Rather, we must analyze the “totality of the circumstances” to determine whether the defendant agreed to the factual basis underlying the guilty plea. *Id.* “The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well as defense counsel’s statements concerning the factual basis presented by the state, among other portions of the record.” *Id.* A circuit court’s decision on a plea withdrawal motion is a matter of discretion, *id.*, ¶13, although the ultimate determination of whether a court had territorial jurisdiction presents a question of law that we review de novo, *Randle*, 252 Wis. 2d 743, ¶18.

¶23 In this case, both the criminal complaint and the plea hearing transcript definitively show that a sufficient factual basis existed supporting territorial jurisdiction in Wisconsin. Smith correctly notes that the complaint’s probable cause statement expressed uncertainty regarding where Volp was killed. However, the legal charges—each count in the complaint setting forth the offenses—all included an allegation that the relevant crime occurred “in Marinette County, Wisconsin.” With these allegations, the State satisfied its obligation to explain in the complaint when and where the alleged offenses took place, even if law enforcement officials were not certain the crimes were actually committed there.<sup>7</sup> *See Adams*, 152 Wis. 2d at 73.

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<sup>7</sup> We note a complaint need only be minimally adequate to be sufficient. *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989). We do not engage in a hyper-technical review of the complaint’s allegations regarding the essential facts; rather, we evaluate the factual allegations using a common-sense approach. *Id.* In this case, it was apparent Smith had committed his crimes in one of two states, or perhaps even in both states. The subsequent law enforcement investigation did not reveal in which state the crimes occurred, so prosecutors had to select one state in which to bring charges or else let Smith escape punishment for his criminal conduct.

(continued)

¶24 At the plea hearing, the prosecutor also alleged that each of the offenses had occurred in the State of Wisconsin. Specifically, as to the negligent homicide charge, the prosecutor stated: “I inform the Court that this defendant did in Marinette County, Wisconsin, cause the death of another on or about the late night hours of October 10, 2008, or early morning hours of October 11, 2008 ....” Similarly, as to the hit-and-run charge, the prosecutor stated: “I inform the Court that this defendant did in Marinette County, Wisconsin, after being involved in an accident resulting in the death of a person ... fail to remain at the scene of the accident ....” After each of these statements, the circuit court asked Smith personally whether he had heard the charge as read by the assistant district attorney. Smith answered “yes” each time and thereafter immediately pled guilty to each offense.

¶25 Given this record, it is impossible to view the State as having failed to reasonably allege, as a factual matter and prior to Smith’s pleas, that the crimes of negligent homicide and hit and run occurred in the State of Wisconsin.<sup>8</sup> The allegation was present in the complaint, and the prosecutor orally repeated the allegation at the plea hearing. Smith could have insisted on going to trial, at which a jury would have determined any genuine dispute regarding the facts necessary to

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We also note that Smith relies on language in *State v. Brown*, 2003 WI App 34, 260 Wis. 2d 125, 659 N.W.2d 110, stating that, “[i]f the charging document does not properly allege that the crime was committed within the territorial jurisdiction of the state of Wisconsin, the trial court should grant a motion to dismiss.” *Id.*, ¶25 (quoting WIS JI—CRIMINAL 268). Smith did not file a motion to dismiss the criminal complaint; he instead pled guilty to three of the four charges therein. Nonetheless, any challenge to the sufficiency of the criminal complaint based on territorial jurisdiction would have failed, as the complaint plainly alleges the crimes occurred within Wisconsin.

<sup>8</sup> Given that the State alleged the entirety of the offenses occurred in Wisconsin, it is not necessary to individually consider the constituent elements of the offenses.

establish Wisconsin's territorial jurisdiction over the crimes. *See Brown*, 260 Wis. 2d 125, ¶23. Instead, he acknowledged being aware of the State's allegations, including those regarding the situs of the offenses, and entered his guilty pleas based upon the charges as read. Under the circumstances, we conclude territorial jurisdiction existed in Wisconsin as to each of the charged offenses, and we perceive no manifest injustice that would warrant plea withdrawal.

¶26 Even if we were to confine our analysis to the criminal complaint's probable cause section, we would still conclude there was a sufficient factual basis for territorial jurisdiction in Wisconsin for all of the charged crimes. The parties agree, consistent with the standard governing the sufficiency of the criminal complaint, that the State was required to set forth facts or reasonable inferences from those facts giving rise to territorial jurisdiction. *See Adams*, 152 Wis. 2d at 73.

¶27 It is undisputed Volp was killed in either Wisconsin or Michigan, with either being a plausible situs for the crimes. It is also undisputed that, during the night in question, Volp and Smith were in Michigan but within only a few miles of the Wisconsin border. Also, based on some of the factual allegations, there is at least one reasonable inference that Smith drove Volp in his vehicle for at least some distance before the time they argued and Smith eventually drove over Volp. Given their original proximity to Wisconsin and such driving having occurred, it is a reasonable inference that the acts comprising the murder occurred in Wisconsin, even if it is not the *most* reasonable inference under these facts. *See Manthey*, 169 Wis. 2d at 688-89 (“Where reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient.”).

¶28 Moreover, the discovery of Volp’s body in Wisconsin provides a reasonable basis for an inference that he was killed within this state. *Cf.* WIS. STAT. § 971.19(5) (setting venue in the county where a body was found if neither the location of the death nor the location of the act causing death can be determined).<sup>9</sup> Smith responds that such an inference is unreasonable because the facts alleged suggest Volp’s body was moved to KC Creek following his death. This argument simply begs the question—from where was Volp’s body moved, somewhere in Wisconsin or somewhere in Michigan? Where there are no facts clearly showing the death, or acts producing the death, occurred in another state, the body-location inference applies with sufficient force even when there was a subsequent attempt to move the body.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

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<sup>9</sup> Smith correctly notes that territorial jurisdiction is a separate issue from venue. Even though WIS. STAT. § 971.19(5) is a statutory provision regarding venue, it arises from the longstanding, common-sense notion that such circumstantial evidence as the presence of a body within a state is sufficient to allow a reasonable inference that the crime was committed in that state. *See, e.g., United States v. Rees*, 193 F. Supp. 849, 859 (D. Md. 1961) (acknowledging a “reasonable” and “generally recognized” presumption that a person died in the state where his or her body was found); *State v. McDowney*, 241 A.2d 359, 361 (N.J. 1967) (holding the presence of a body within the state allows a reasonable inference that “the crime was committed at that place”); *State v. Williams*, 468 S.E.2d 626, 630 (S.C. 1996) (“Generally, it can be inferred that the crime was committed in the state as well as county where the body is found.”).

