

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-2569, 00-2570

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TORRENCE D. GOSS,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Torrence Goss appeals two judgments convicting him of a total of ten felony counts of forgery, entered upon his negotiated no contest pleas. Goss argues that the trial court erroneously failed to establish a

factual basis for his no contest pleas. He also appeals orders denying his motion for postconviction relief. We affirm the judgments and orders.

1. Background

¶2 This consolidated appeal arises out of two criminal prosecutions for forgery. In November 1998, a criminal complaint charged Goss with twelve counts of felony forgery. In December 1998, a second criminal complaint was filed charging Goss with two additional counts of felony forgery. At the plea hearing, defense counsel advised the court that Goss agreed to enter a plea of no contest and that the prosecutor agreed to dismiss counts 7, 10, 11, and 12 of the initial complaint. Also, the prosecutor agreed to limit its argument at sentencing to a term of incarceration on one count only, with consecutive probation to be imposed on the other counts. The court engaged Goss in a plea colloquy, which Goss concedes adequately complied with all legal requirements except concerning the establishment of a factual basis for the pleas.¹

¹ Goss concedes that the court “did a thorough job of making certain that the plea was knowingly, voluntarily and intelligently entered” in compliance with other plea-taking procedures. These are described in WIS. STAT. § 971.08, which provides in part:

- (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
 - (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
 - (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

All statutory references are to the 1999-2000 version unless otherwise noted.

Additionally, the court’s general duties prior to accepting guilty or no contest pleas have been described in *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986):

- (1) To determine the extent of the defendant's education and general comprehension;

(continued)

¶3 The court painstakingly reviewed the facts alleged in the complaints with respect to each count. The court advised Goss that by entering a plea of no contest, he would be acknowledging that he uttered as genuine a forged writing, knowing that it had been falsely made, check numbered 4122 on Paul Schilcher's account at Community First, payable to Athletics North, in the amount of \$138.57, and supposedly signed by Paul Schilcher.

¶4 Next, the court advised Goss that he would be pleading to the same activity with respect to a check on the same account payable to Copp's grocery in the amount of \$27.63. The court advised Goss that the third count alleged the same kind of crime, with respect to check number 4113, on the same account, the same credit union, to Copp's in the amount of \$99.99. The court advised that the fourth count was "again the same kind of charge, October 7, 1998, check 4115, same account, same credit union, Copp's in the amount of \$74.73."

¶5 The court next advised that count five was also on October 7, the same kind of charge, "check 4121, same account, same credit union, payable to

(2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;

(3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;

(4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;

(5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him; and

(6) To personally ascertain whether a factual basis exists to support the plea. (Citations omitted.)

The record establishes that the circuit court conducted a very thorough plea colloquy, carefully complying with WIS. STAT. § 971.08 and *Bangert*.

Copps, in the amount of \$137.38.” The court then stated: “Count 6, again, October 8th, same kind of charge, 4119 is the check number, same credit union, same account. It is made out to All Car Automotive, amount of \$199.47.”

¶6 Next, the court advised that “count 8 is again the same account, same credit union, same type of charge done on September 6, [19]98, and [the] check is payable to Walmart in the amount of \$290.83” The court then described count nine as the same kind of charge occurring in October [19]98, on the Keith and Pat Huebner account at the Best Advantage Credit Union payable to Express Gas in the amount of \$19.36.”

¶7 The court then advised Goss of the factual allegations of the second file, which was that “you did on October 15, 1998, again, the same kind of charge, check numbered 5014, on the Keith and Pat Huebner account at the Best Advantage Credit Union, made payable to Shopko, in the amount of \$91.23” Last, the court stated that Goss was alleged to have committed the same type of offense “on October 22, [19]98, same type of charge, that’s uttering a forged writing, mainly, check 5067 on the Keith and Pat Huebner account at the same credit union, payable to Walgreens, in the amount of \$115.07.

¶8 After reciting the factual allegations with respect to each count, the court asked whether Goss understood. Each time, Goss answered affirmatively. He stated that he had no questions at all. The court advised Goss of the total penalties he was facing and asked whether Goss had been already convicted of a felony in the past. Goss had. In response to the court’s question, “[d]o you stipulate to a factual basis for the charges[.]” defense counsel replied “Yes”

2. Discussion

¶9 Goss argues that the trial court failed to establish a factual basis for the plea. We disagree. If a defendant seeks to withdraw his plea after sentencing, he carries a heavy burden of establishing, by clear and convincing evidence, that the circuit court should permit the plea to be withdrawn to correct manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. “[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred.” *Id.* at ¶17.

¶10 The purpose of ascertaining a factual basis is to make certain that the defendant is pleading to a crime he actually committed. *Peterson v. State*, 54 Wis. 2d 370, 385, 195 N.W.2d 837 (1972). A circuit court must “(m)ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” WIS. STAT. § 971.08(1)(b).

It is significant that both the federal rule and the Wisconsin adaptation speak in terms of a *judge’s* determination that a factual basis exists. Neither the rule nor the case law interpreting the rule requires a defendant to personally articulate the specific facts that constitute the elements of the crime charged. ... All that is required is for the factual basis to be developed on the record—several sources can supply the facts.

....

A factual basis may also be established through witnesses’ testimony, or a prosecutor reading police reports or statements of evidence.

Thomas, 2000 WI at ¶20 (citations somitted).

¶11 Goss maintains that “(t)he most that can possibly be said for this record is that it contains a bare stipulation of defendant, through his attorney, that

a sufficient factual basis for the no contest plea exists somewhere.” We disagree. Goss is correct that a mere stipulation or failure to object does not provide a sufficient basis for a determination that a factual basis exists. *See State v. Harrington*, 181 Wis. 2d 985, 991, 512 N.W.2d 261 (Ct. App. 1994). The record here, however, does not support Goss’s contentions.

¶12 The plea hearing transcript reveals that the court recited the factual allegations contained in the complaints. Because the court’s recitation tracks the factual allegations of the complaints, the only reasonable inference is that the court was reading from the complaints. As a result, when very shortly thereafter the court then asked defense counsel whether he stipulated to a factual basis, the compelling inference to be drawn is that the court was referring to the complaints and the allegations within. A factual basis may be established by stipulation of defense counsel to the facts contained in the criminal complaint. *Thomas*, 2000 WI at ¶21.

¶13 Goss claims that “(t)here is absolutely no identifications of what ‘the facts’ are which would constitute the offenses charged and thus no stipulations to the accuracy of any particular facts” and “[t]he record in this case contains no basis whatsoever upon which a reviewing court could make a determination that a factual basis for the no contest plea existed.” This claim strains logic. We are convinced that the record demonstrates the court was using the complaints to establish the factual basis. It identified the individual facts supporting the charges in the complaints using the wording of the complaints. In the context of the hearing, we conclude that the court’s omission of the words “in the complaints”

when it asked whether defense counsel stipulated to a factual basis, is not reversible error.²

¶14 Turning to the complaints, we are satisfied that they allege a sufficient factual basis for the charges. Without reciting the more than five pages of factual assertions arising out of the investigation by the Outagamie County Sheriff's Department and the Appleton Police Department, we observe that the complaints contain information obtained from the store manager and cashier, an acquaintance of Goss, and Goss himself. The officers obtained the stolen checks and showed them to Goss, who admitted the forged signatures were in his own handwriting. Officers obtained the checkbook with carbon copies from the Huebner account from Goss's acquaintance's mother who found them near a trash can. Goss's admissions, together with corroborating evidence in the complaints, establish a sufficient factual basis for the pleas.

By the Court.—Judgments and orders affirmed.

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

² The prosecutor summed up the issue at the postconviction hearing, stating in reference to the plea hearing: "I think everyone in the courtroom understood that we're talking about the Criminal Complaint here."

