

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP918-CR

Cir. Ct. No. 2005CF2835

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROY KENNARD WEATHERALL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. In this plea withdrawal case, the issue is whether the circuit court complied with the factual basis requirement. Many factual basis cases hinge on whether a particular set of facts satisfies the elements of a crime.

Here, however, the dispute centers on *which* facts a court may look to when satisfying the factual basis requirement. Weatherall contends that a court may look only to facts that a defendant, either personally or through counsel, admits are true or stipulates may be considered. The State contends that courts may consider any allegation in the record, regardless of any admission or stipulation. We conclude that the supreme court's decision in *State v. Thomas*, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836, compels rejection of the State's view. Applied here, a factual basis is lacking for the plea because Weatherall neither admitted nor stipulated to the use of a necessary factual allegation. Accordingly, we reverse the circuit court and remand with directions that Weatherall be permitted to withdraw his plea.

Background

¶2 Weatherall encountered fifteen-year-old Tammy M. on a street in Milwaukee. According to the allegations in the complaint, Weatherall stopped Tammy and told her she was pretty and could make a lot of money if she “got on the track.” Weatherall told Tammy that he was a pimp and had a lot of “bitches” working for him. He said he would keep only a portion of the money she made, and offered to protect her and take care of her and her one-year-old baby. He told her what to charge for different sexual activities. Tammy told Weatherall that she was on her own, needed money, and would give it a try.

¶3 The complaint further alleged that Weatherall told Tammy to walk on Greenfield Avenue in Milwaukee, make eye contact with drivers, and not to be nervous. Weatherall gave Tammy his cell phone number and told her to call him when she was finished with her customers. He also showed her “dance club”

magazines depicting naked women in sexually explicit poses. In addition, he gave her two condoms.

¶4 Tammy was arrested by a police officer posing as a customer. After her arrest, she cooperated with the police. She called the phone number Weatherall had given her and asked him to pick her up. When Weatherall arrived at her location, the police arrested him. A search of Weatherall's vehicle revealed a condom identical to condoms in Tammy's possession, magazines depicting nude females engaged in sexually explicit activities, and marijuana.

¶5 Weatherall was charged with several crimes: soliciting a child for prostitution under WIS. STAT. § 948.08, child enticement under WIS. STAT. § 948.07(2), exposing a child to harmful material under WIS. STAT. § 948.11(2)(a), and possession of marijuana.¹

¶6 A plea agreement was reached under which Weatherall would plead guilty to a new charge of causing mental harm to a child in violation of WIS. STAT. § 948.04.² At the plea hearing, when the circuit court indicated it would use the criminal complaint as a factual basis, Weatherall's counsel explained that there was an agreement that defense counsel would state the factual basis. Counsel also stated that there was a disagreement as to what actually occurred and that the parties would be arguing different facts during sentencing. Counsel then stated:

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The amended information and plea hearing transcript reference WIS. STAT. § 948.03, physical abuse of a child, rather than WIS. STAT. § 948.04. It is clear from other parts of the record and the parties' briefs, however, that all agree that the plea crime was causing mental harm to a child under § 948.04.

First, that [Weatherall] exercised temporary control of Tammy [M.] in that on May 16th of 2005, in the City and County of Milwaukee, between the addresses of 52nd and Hampton and 27th and Greenfield the car was being driven. It was his automobile. He was the driver. Tammy was a passenger, and to that extent he did exercise temporary control over [her] and that Tammy [M.] suffered mental harm in the jury instructions being described as psychological or intellectual functioning or harm to the child's functioning.

That in the automobile was marijuana. He does not admit that he at any time gave that marijuana to Tammy but Tammy was exposed to the presence of marijuana in the car.

Additionally, in the back seat of his car there were I believe two adult type magazines that contained photos of some nudity of dancers, strip clubs, and when Tammy was a passenger in that back seat she had access to and viewed those materials.

Additionally the fifth element is that Tammy had not attained 18 years of age. She was 15 at the time. It was a day that she should have been in school and as well this was a minor who should have been in school and instead was in Mr. Weatherall's car. There is I think intellectual harm done to a child like not having them in school when she should be. That he caused that harm with conduct that demonstrated substantial disregard for the well being, the mental health of Tammy and as I have stated, that she was 15 years old at the time.

Defense counsel proceeded to say that, although the facts she recited supplied a factual basis for causing mental harm to a child, Weatherall denied the allegation that he asked Tammy to engage in prostitution:

[Weatherall] has adamantly at this point denied that he ever asked her or solicited her to engage in prostitution but I understand that at sentencing the State is going to be arguing the facts as they—the facts in the complaint and police report and we will argue the facts as outlined. But I think it forms a factual basis and I would agree that what the defendant is admitting does constitute a factual basis.

Thus, Weatherall, through counsel, agreed that several facts could be considered for purposes of supplying a factual basis, but did not agree that the court could consider the allegation that he encouraged Tammy to engage in prostitution. Weatherall specifically denied the encouragement allegation.

¶7 In a postconviction motion for plea withdrawal, Weatherall argued that there was not a factual basis for his plea crime, causing mental harm to a child. The State conceded that the version of facts set forth by defense counsel at the plea hearing did not provide a factual basis for the plea, but argued that there was a sufficient factual basis for the original charges, some of which were more serious crimes. The State maintained that, under *State v. Harrell*, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), this was sufficient.

¶8 The circuit court determined that the record showed that Weatherall admitted to facts that formed the basis for a charge of exposing a child to harmful material—sexually explicit magazines and marijuana. The court concluded that, under *Harrell*, the factual basis established for the exposing-a-child-to-harmful-material charge was sufficient to support Weatherall's plea crime of causing mental harm to a child. The court therefore denied Weatherall's motion for plea withdrawal. Weatherall appealed.

Discussion

¶9 Weatherall seeks plea withdrawal, arguing that the factual basis requirement contained in WIS. STAT. § 971.08(1)(b) was not satisfied. More specifically, Weatherall contends that a particular alleged fact, that Weatherall encouraged Tammy M. to engage in prostitution, may not be considered for purposes of satisfying the factual basis requirement. As we later explain, if this encouragement allegation may not be considered, plea withdrawal is required. If,

on the other hand, the encouragement allegation may be considered, the factual basis requirement is satisfied and the circuit court properly denied Weatherall's plea withdrawal motion.

¶10 The dispute arises because, although the criminal complaint provides support for the allegation that Weatherall encouraged Tammy to engage in prostitution, at the plea hearing Weatherall's counsel specified facts that the defense agreed could be used for purposes of the factual basis requirement, which did not include the encouragement allegation, and counsel informed the court that Weatherall denied the encouragement allegation.

¶11 As explained below, once we resolve the parties' legal dispute, the application of the law to the facts here is a simple matter. The details of the parties' legal arguments are many and sometimes unclear. Nonetheless, we have boiled down their positions to the following.

¶12 Weatherall asserts that the primary purpose of the factual basis requirement is to ensure that pleas are knowingly entered. The factual basis requirement, Weatherall states, is meant to protect defendants who are aware of the elements of a crime, but do not realize that their conduct does not satisfy those elements. It follows, according to Weatherall, that the only facts that may be considered for purposes of the factual basis requirement are those that a defendant, personally or through counsel, admits are true, *or* agrees may be used for that purpose. Under this reasoning, the admission or agreement must occur before acceptance of a plea, otherwise this purpose is not fulfilled.

¶13 The State does not directly dispute that one purpose of the factual basis requirement is increasing the likelihood of a knowing plea, but the State's argument necessarily includes the proposition that such a purpose is at most

secondary and need not be fulfilled in every case. In the State's view, the core purpose of the factual basis requirement stands apart from a defendant's understanding. According to the State, the factual basis requirement is a purely judicial function that prevents pleas when the factual allegations do not support a conviction of the plea offense. In effect, a just judicial system should not permit pleas, whether knowing or not, when the facts the government hopes to prove do not match the crime. This purpose is distinct from what a defendant understands and, therefore, does not depend on whether a defendant admits facts or otherwise indicates in some manner which alleged facts may be considered. It follows, according to the State, that a court, either the circuit court or a reviewing court, may rely on any facts in the record to satisfy the factual basis requirement.

¶14 We are unable to reconcile the State's position with the supreme court's opinion in *Thomas*, 232 Wis. 2d 714.

¶15 In *Thomas*, after the prosecutor and defense counsel stipulated that facts from the complaint could be used for purposes of satisfying the factual basis requirement, the circuit court asked Thomas if he disputed what the prosecutor and defense attorney said about the stipulation, and Thomas answered "yes." The circuit court interpreted his yes answer as "Yes. He stipulates." *Id.*, ¶7. As recounted by the supreme court, Thomas argued on appeal that he was entitled to plea withdrawal because he disputed the factual basis for the plea. *Id.*, ¶10. Although the *Thomas* decision contains several statements of law that might be read as supporting the State's position, the dispute actually resolved by the supreme court was whether Thomas's "yes" meant that he agreed or disagreed with the stipulation. The court resolved this question by looking at whether Thomas agreed that certain facts could be used to satisfy the factual basis requirement.

¶16 The *Thomas* court stated that “a court may look at the totality of the circumstances to determine *whether a defendant has accepted the factual basis presented* underlying the guilty plea.” *Id.*, ¶23 (emphasis added). The court reviewed the entire record, including the sentencing transcript, and concluded that Thomas’s “yes” answer indicated agreement with the stipulation of facts as stated at the plea hearing. *Id.*, ¶¶23-26. In other words, “[a] factual basis supporting the plea was established, because when the record is viewed under the totality of the circumstances, it is evident that Thomas assented to the facts as his counsel stipulated to them.” *Id.*, ¶27.

¶17 If the State’s view of the factual basis requirement were correct, it would not matter what position Thomas had taken with respect to the stipulation. The *Thomas* court could have resolved the dispute before it by simply explaining that the defendant’s admissions or agreements did not matter—all that mattered was whether the record contained sufficient factual allegations. Instead, the *Thomas* court found it necessary to decide whether the record supported the circuit court’s understanding that Thomas was agreeing with the stipulation of facts put in by his counsel and the prosecutor.

¶18 We also find it difficult to reconcile the State’s position with *State v. Lackershire*, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23. The State’s argument is premised on the proposition that WIS. STAT. § 971.08 contains two distinct requirements, one geared to determining whether a plea is knowingly entered, and the other an independent requirement that courts make sure pleas are not accepted when alleged facts do not match the crime. The language of the statute might be read as supporting this view because it contains the distinct requirements that courts “determine that the plea is made voluntarily with understanding of the nature of the charge” and, separately, that a court “[m]ake

such inquiry as satisfies *it* that the defendant in fact committed the crime charged.” WIS. STAT. § 971.08(1)(a) and (b). The *Lackershire* court, at least implicitly, rejected this distinction.

¶19 In *Lackershire*, a woman was charged with sexually assaulting an underage boy. During the plea colloquy, the circuit court determined that Lackershire understood the elements of the offense, that is, she understood she was being charged with having sexual intercourse with a child under the age of sixteen years. *Lackershire*, 301 Wis. 2d 418, ¶14. As the decision plainly sets forth, there were factual allegations supporting this crime. The boy gave a statement to police asserting that he had consensual intercourse with Lackershire. *Id.*, ¶¶10-11. Nonetheless, Lackershire later complained that the circuit court failed to satisfy the factual basis requirement because “it did not ‘make such inquiry as satisfies it that [Lackershire] in fact committed the crime charged’ [and] [a]s a result of the failure, she did not realize that if she were the victim of rape, she could not have committed the offense charged.” *Id.*, ¶26.

¶20 If the State’s position here were correct, the proper response to Lackershire’s argument would have been that her understanding was an issue distinct from whether the factual basis requirement was met. Under the view the State advances here, Lackershire’s argument should have been analyzed purely as a question of whether the circuit court met its obligation to ensure a knowing plea and whether Lackershire entered a knowing plea. But that is not the analysis the *Lackershire* court engaged in. Rather, the court resolved the case by determining that there had been a failure to meet the factual basis requirement:

In the present case, the circuit court’s inquiry into the factual basis for the plea ... was ... insufficient. After the colloquy there remained a substantial question as to whether the facts that formed the basis of Lackershire’s

plea constituted the offense charged. Because of this substantial question, the plea colloquy failed to demonstrate that Lackershire realized that if the underlying conduct was a sexual assault upon her, that conduct could not constitute the offense charged.... Lackershire was potentially in the position of pleading guilty without realizing that her conduct did not constitute the offense charged.

Id., ¶38. In sum, the court held that the factual basis requirement was not met because “the colloquy did not establish that Lackershire realized that if the underlying conduct was an assault upon her, she could not be guilty of [sexual assault].” *Id.*, ¶46.

¶21 Accordingly, if there is no agreement to the use of an allegation, and if the allegation is not admitted, the allegation may not be used for purposes of establishing a factual basis. The record here is clear that there was no admission or stipulation regarding the encouragement allegation. And, as discussed below, when the encouragement allegation is removed, a factual basis for Weatherall’s plea is lacking.

¶22 Weatherall pled guilty to the crime of causing mental harm to a child. This crime requires proof of “mental harm,” which is defined as follows:

“Mental harm” means substantial harm to a child’s psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. “Mental harm” may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child’s age and stage of development.

WIS. STAT. § 948.01(2). The State’s sole “mental harm” factual basis argument is based on its assertion that mental harm is shown by the allegation that Weatherall encouraged Tammy to engage in prostitution and that Tammy attempted to do so.

If the encouragement allegation is not considered, there is no factual basis for the crime of causing mental harm to a child.

¶23 The State also argues that there is a factual basis for a more serious reasonably related offense, an alternative available under the holding in *Harrell*, 182 Wis. 2d 408. In *Harrell*, we held that the factual basis requirement is satisfied if there is a factual basis for “either the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered.” *Id.* at 419. The more serious related offenses the State points to are child enticement (for prostitution) and soliciting a child to practice prostitution. Both crimes are more serious related crimes,³ but the State’s factual basis argument again fails because it depends on the consideration of the encouragement allegation.⁴

¶24 Therefore, we conclude that the factual basis requirement is not met and that Weatherall is entitled to plea withdrawal.

¶25 Before closing, we make two observations about the parties’ arguments and the state of the law on this specific topic.

³ Causing mental harm to a child is a Class F felony. WIS. STAT. § 948.04(1). Child enticement is a Class D felony. WIS. STAT. § 948.07. Soliciting a child to practice prostitution is a Class D felony. WIS. STAT. § 948.08.

⁴ The circuit court denied Weatherall’s plea withdrawal motion based on *State v. Harrell*, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), but we agree with Weatherall that the circuit court’s reasoning is incorrect. The circuit court found that there was a factual basis for the related crime of exposing a child to harmful material. However, exposing a child to harmful material, a Class I felony under WIS. STAT. § 948.11(2)(a), is a *less* serious crime than causing mental harm to a child, a Class F felony under WIS. STAT. § 948.04(1). *See State v. West*, 214 Wis. 2d 468, 480, 571 N.W.2d 196 (Ct. App. 1997) (observing that “*Harrell* ... only applies when the reasonably related charge is ‘more serious’” than the plea crime and declining to apply *Harrell* when the reasonably related crime has the same maximum penalty as the plea crime). Accordingly, the circuit court’s reasoning does not support its decision.

¶26 Although we characterize Weatherall’s argument as including the proposition that courts may consider facts that a defendant does not admit are true but agrees may be considered, we acknowledge that this characterization is at odds with several statements in Weatherall’s brief. For the most part, Weatherall asserts that the only conduct that may be considered is conduct to which a defendant *admits*. Weatherall’s assertions are made in reliance on case law using the same “admits” language. *See, e.g., McCarthy v. United States*, 394 U.S. 459, 467 (1969); *Lackershire*, 301 Wis. 2d 418, ¶33; *State v. Black*, 2001 WI 31, ¶21 n.9, 242 Wis. 2d 126, 624 N.W.2d 363; *Thomas*, 232 Wis. 2d 714, ¶¶17, 19. However, when carefully read in context, we think it apparent that neither the case law nor Weatherall intends to preclude a defendant from entering a plea if, for whatever reason, a defendant chooses not to expressly admit facts. Indeed, Weatherall’s appellate briefs sometimes agree that “stipulated” facts may be considered. For example, he acknowledges that in *Black* it was sufficient that the defendant’s counsel agreed that the criminal complaint could be used for purposes of the factual basis requirement. Elsewhere, he seemingly equates “admitting” conduct with stipulating to the facts a court may consider. Accordingly, we do not construe either Weatherall’s argument or factual basis case law as precluding consideration of facts that a defendant or defense counsel agrees may be considered, even in the absence of an admission.

¶27 We also observe that we have not summarized the State’s several arguments as to why the factual basis requirement should be interpreted as being distinct from a court’s obligation to ensure that a plea is knowingly entered and, therefore, distinct from any admission or agreement made by the defendant or counsel. We do not detail these arguments because, regardless of the details or merit of some of these arguments, the State’s ultimate position is not viable in

light of *Thomas*. However, we do note that, if this case had arisen prior to *Thomas*, the result may well have been different. We think that *Thomas* effectively and silently overruled *Loop v. State*, 65 Wis. 2d 499, 222 N.W.2d 694 (1974).

¶28 In *Loop*, the court directly addressed whether the factual basis requirement could be satisfied by allegations presented to the court *after* a guilty plea hearing. *Id.* at 503. Although the *Loop* court concluded that the circuit court erred at the time of the plea hearing by failing to meet the factual basis requirement, the court nonetheless affirmed the denial of plea withdrawal because evidence presented after the plea hearing satisfied the factual basis requirement. *Id.* *Loop* is noteworthy because it post-dates decisions, such as *Ernst v. State*, 43 Wis. 2d 661, 170 N.W.2d 713 (1969), that might be read as suggesting that the factual basis requirement must be satisfied by reference to conduct to which a defendant admits. Further, because the *Loop* court considered information that was supplied after the plea hearing, there was plainly neither an admission nor an agreement that such information could be considered. In fact, the *Loop* court relied on disputed facts when it concluded that there was a factual basis supporting the plea. *Loop*, 65 Wis. 2d at 503. If the *Thomas* court had followed the reasoning in *Loop*, it would simply have looked to the record to determine whether the conviction was supported by a factual basis, rather than resolving whether the record supported a finding that Thomas agreed with the stipulation of facts put in by his counsel and the prosecutor.

Conclusion

¶29 We conclude that the circuit court failed to establish a factual basis for Weatherall's plea crime. We reverse the judgment and order and remand with directions that Weatherall be permitted to withdraw his plea.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

