**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 13, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP965-CR** **Cir. Ct. No. 2011CF81**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK A. GIERCZAK,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Mark A. Gierczak appeals a judgment of conviction and an order denying his motion for postconviction relief on the ground

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that he did not knowingly obstruct an "officer" within the meaning of WIS. STAT. § 946.41(2)(b). For the reasons we explain below, we conclude that there is a sufficient factual basis to support Gierczak's no contest plea to obstructing an officer. Accordingly, we affirm.

## BACKGROUND

¶2 The State originally charged Gierczak with a felony offense of interfering with fire fighting and a misdemeanor offense of criminal damage to property for an incident that occurred while Gierczak was in custody at the Waushara County Jail. The complaint alleges that a corrections officer observed Gierczak standing on a toilet and tampering with the sprinkler head located on the ceiling of his jail cell. Over the intercom system, the officer instructed Gierczak to get down and not to touch the sprinkler head. Gierczak ignored the officer's instruction and proceeded to dismantle the sprinkler head, which caused the sprinkler system to activate.

¶3 Pursuant to a plea agreement, Gierczak pled no contest to the original charged offense of criminal damage to property and to a reduced misdemeanor offense of obstructing an officer. The circuit court found that, while there was a sufficient factual basis to support the original charges, there was not a sufficient factual basis to support that Gierczak obstructed an officer because the record did not establish that the corrections officer had "full arrest authority." However, the court found the plea agreement to Gierczak's benefit and accepted the plea.

¶4 In his postconviction motion for plea withdrawal, Gierczak argued that the court should not have accepted his no contest plea because there was not a sufficient factual basis to support that he knowingly obstructed an officer. In

addition, Gierczak argued that the factual basis for the plea could not be established pursuant to ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), because the more serious charge of interfering with fire fighting was not reasonably related to his no contest plea to obstructing an officer.

¶5 At the postconviction motion hearing, the circuit court repeated that there was not a sufficient factual basis to support that Gierczak obstructed an officer because the record did not demonstrate that the corrections officer who instructed Gierczak over the intercom system had arrest authority. However, the court concluded that the State established a sufficient factual basis for the plea under the reasonable relationship test provided in ***Harrell***. Accordingly, the court denied the postconviction motion. Gierczak appeals.

## DISCUSSION

¶6 The parties primarily dispute whether, under ***Harrell***, there is a reasonable relationship between the more serious charge of interfering with fire fighting and the obstructing an officer offense to which Gierczak pled no contest. However, we do not address that issue because we conclude that there is a sufficient factual basis for the no contest plea to obstructing an officer.[2]

¶7 Gierczak contends that there is not a sufficient factual basis to support his no contest plea to obstructing an officer because the criminal complaint provides no facts to establish: (1) that the officer who instructed him over the intercom system had arrest authority; or (2) that he *knowingly* obstructed

[2] We may affirm a circuit court's order on grounds not relied on by the court. We do so here. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

an officer. We understand Gierczak to be arguing that there is an insufficient factual basis to show that he knowingly obstructed an "officer" within the meaning of WIS. STAT. § 946.41(2)(b).

¶8 Gierczak carries the heavy burden to establish by clear and convincing evidence that the withdrawal of his plea will correct a manifest injustice. *See* ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177. A manifest injustice may occur when the court fails to establish a sufficient factual basis that the defendant committed the offense to which the defendant pleads.[3] ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). However, "the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Broadie v. State***, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975). Nonetheless, the facts in the criminal complaint must be sufficient, together with the reasonable inferences to which they give rise, to allow a reasonable person to conclude that the defendant probably committed a crime. ***State v. Parr***, 182 Wis. 2d 349, 358, 513 N.W.2d 647 (Ct. App. 1994). The complaint is "evaluated in a common sense rather than a hypertechnical manner" to ensure that it is "minimally adequate." ***Id.*** Whether the complaint establishes a sufficient factual basis is a question of law subject to de novo review. ***State v. Payette***, 2008 WI App 106, ¶14, 313 Wis. 2d 39, 756 N.W.2d 423.

¶9 To determine whether the criminal complaint provides a sufficient factual basis to support Gierczak's no contest plea to obstructing an officer, we

[3] WISCONSIN STAT. § 971.08(1)(b) provides that, before a circuit court can accept a defendant's guilty or no contest plea, it must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged."

review the relevant statute. WISCONSIN STAT. § 946.41(1) provides that, "whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor." The crime consists of four elements: (1) the defendant obstructed an officer; (2) the officer was doing an act in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew that the officer was acting in an official capacity and with lawful authority and knew that his or her conduct would obstruct the officer. WIS JI—CRIMINAL 1766.

¶10 WISCONSIN STAT. § 946.41(2)(b) defines "officer" as a "peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment *to take another into custody*." WIS. STAT. § 946.41(2)(b) (emphasis added). Additionally, WIS. STAT. § 939.22(22) defines "peace officer" as "any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

¶11 As an initial matter, we observe that Gierczak makes no argument that the corrections officer does not qualify as either a "peace officer," "public officer," or "public employee." We also point out that the county sheriff, as the custodian of the county jail, has a duty to staff the jail with deputy sheriffs or jailers. WIS. STAT. § 59.27(1); *see also* ***DOC v. Kliesmet***, 211 Wis. 2d 254, 264, 564 N.W.2d 742 (1997). Deputy sheriffs are "peace officers." *See* WIS. STAT. § 59.28(1); *see also* ***State v. Barrett***, 96 Wis. 2d 174, 178, 291 N.W.2d 498 (1980). Even if the corrections officer was not a deputy sheriff, Gierczak makes no argument that a jailer cannot be a "peace officer" as a matter of law. Accordingly, Gierczak has not met his burden of establishing that the withdrawal of his plea will correct a manifest injustice, especially since courts are not required

to "go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Broadie***, 68 Wis. 2d at 423-24.

¶12 Moreover, Gierczak is incorrect that the corrections officer was required to have arrest authority to be an "officer" within the meaning of WIS. STAT. § 946.41(2)(b). Rather, the statute provides that an "officer" must have the authority by virtue of his or her office or employment "to take another into custody." WIS. STAT. § 946.41(2)(b). A person is in custody when an institution, institution guard or peace officer physically detains or has the power to physically detain him or her. *See* ***State v. Cobb***, 135 Wis. 2d 181, 185, 400 N.W.2d 9 (Ct. App. 1986); ***State v. Schaller***, 70 Wis. 2d 107, 110-11, 233 N.W.2d 416 (1975). A person is generally considered to be in custody when his or her "ability or freedom of movement ha[s] been restricted." ***State v. Adams***, 152 Wis. 2d 68, 75, 447 N.W.2d 90 (Ct. App. 1989). However, a person may be in custody, that is, his or her ability or freedom of movement may be restricted, without the person being under arrest. ***State v. Hoffman***, 163 Wis. 2d 752, 762, 472 N.W.2d 558 (Ct. App. 1991) ("A person can be 'in custody' … without being under 'legal arrest' … but a person cannot be under 'legal arrest' without being 'in custody.'").

¶13 Based on the above principles, we conclude that a reasonable inference may be drawn from the criminal complaint that the corrections officer, regardless whether a "peace officer," "public officer" or "public employee," had the authority "to take another into custody." WIS. STAT. § 946.41(2)(b). It is undisputed that, at the time of the incident, Gierczak was being monitored by the corrections officer. It would be absurd to conclude that the corrections officer who monitored and supervised Gierczak had no power to physically detain him by restricting his freedom of movement. *See* ***Adams***, 152 Wis. 2d at 75.

¶14 In an overlapping argument, Gierczak contends that the record does not support that he *knowingly* obstructed an officer because there are no facts to establish that he "knew he was being addressed by an 'officer' as opposed to a custodian, technician, or firefighter." Gierczak contends that, because he did not know who addressed him over the intercom system, he could not have *knowingly* obstructed an officer.

¶15 We conclude that the facts reasonably establish that Gierczak *knowingly* obstructed an officer. *See* ***State v. Lossman***, 118 Wis. 2d 526, 542-43, 348 N.W.2d 159 (1984) (providing that to determine whether the defendant knowingly obstructed an officer, "the defendant's subjective intent must be ascertained, based on the totality of the circumstances"). On the day of the incident, Gierczak was on suicide watch and had covered the security camera in his cell in an apparent attempt to thwart efforts to monitor him. Based on these facts, it is reasonable to infer that Gierczak knew that it was an "officer" who instructed him over the intercom system, even though the officer did not identify himself. Indeed, Gierczak presents no compelling reason to believe that Gierczak thought someone other than an "officer" was instructing him over the intercom system. Accordingly, we conclude that there is a sufficient factual basis to support that Gierczak knowingly obstructed an "officer" within the meaning of WIS. STAT. § 946.41(2)(b).

## CONCLUSION

¶16 For the reasons explained above, we conclude that Gierczak has not carried the heavy burden of establishing by clear and convincing evidence that the withdrawal of his plea will correct a manifest injustice. *See* ***Cain***, 342 Wis. 2d 1, ¶25. Therefore, we affirm.

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

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