COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1890-CR **Cir. Ct. No. 2009CF312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN P. RASSBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. John Rassbach appeals a judgment of conviction, entered on his pleas of guilty and no contest, for fourteen counts of theft by fraud. He also appeals an order denying his motion for postconviction relief. Five of the fourteen counts were charged as felonies because the victims' losses were alleged

to exceed threshold amounts. Rassbach argues there was no factual basis for felony charges because there was insufficient evidence of the amounts of loss. Rassbach also argues the court erroneously exercised its sentencing discretion by failing to adequately set forth its reasoning. We reject Rassbach's arguments, and affirm.

BACKGROUND

¶2 The State charged John Rassbach with fourteen counts of theft by fraud, contrary to WIS. STAT. § 943.20(1)(d).[1] Rassbach pled no contest to the felony charges, counts one through five. The alleged value of the defrauded property for counts one through four was greater than $2,500, and for the fifth count was greater than $5,000. Additionally, Rassbach pled guilty or no contest to the nine misdemeanor charges.[2]

¶3 The complaint alleges Rassbach used three fraudulent devices connected with his delivery of propane and diesel fuel to customers. First, he "shorted" customers by pumping diesel fuel back into his truck, and then leaving the transaction open so that, when he filled the customer's storage tank, the ticket printed from his truck would include the entire amount pumped.[3] Second,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Three of the misdemeanor counts were alleged as attempted crimes.

[3] The complaint also explained that law enforcement conducted three fuel "shorting" stings where fuel tank capacities were measured before and after a delivery by Rassbach. These stings provided the basis for the three attempt charges, counts 12-14. The complaint further explained that when a fueling transaction was left open longer than a predetermined length of time, the fuel ticket would be overprinted with the phrase, "multiple deliveries at one site." This designation was present on each of the fuel tickets in the sting operations, even though authorities witnessed that only a single delivery was made. The designation is also present on all of the tickets supporting the felony duplicate-ticket charges.

Rassbach overcharged when a third party delivered propane. He instructed the third party to send the pumping tickets directly to him, and he then wrote the invoices for more propane than was actually delivered. Third, Rassbach printed duplicate tickets for purported diesel fuel deliveries and submitted them to multiple customers. Being duplicates, the tickets stated identical fuel amounts and delivery times. It is this third scheme that pertained to the five felony counts, as well as several of the misdemeanors.

¶4 The fourteen counts alleged in the complaint corresponded to thirteen different customers.[4] Some of the counts, including all five felonies, alleged multiple fraudulent transactions. In those instances, the values of the alleged losses from each transaction were combined for each customer to determine the total value of fraudulent loss for each criminal charge. The complaint alleged the following theft amounts for each of the five felony charges, respectively: $2,612.50; $3,098.70; $4,400.55; $3,437.50; and $5,161.20. Subsequently, in the "Factual Basis" portion, the complaint set forth the details of each duplicate ticket, including the ticket number, delivery time, fuel amount, and names of customers who were billed pursuant to each. With respect to each ticket, the complaint alleged Rassbach had defrauded every customer who received it, for the full amount stated on the ticket.

¶5 At the preliminary hearing, each of the felony victims testified they received and paid the respective fuel tickets and would not have paid had they known that another customer received an identical ticket. On cross-examination,

[4] Counts 11 and 12 pertained to the same customer. Count 11 referred to a duplicate-ticket fraud, whereas count 12 referred to an attempt charge based on a "shorting" sting.

Rassbach's counsel attempted to get the victims to admit that, if they had actually received the fuel indicated on the ticket, they would have paid for it. Although two victims testified they would have paid for fuel that they actually received, most stated they would have questioned the ticket and there was no way they could have known if they actually received the fuel. The State argued:

> The fact of the matter is it not only … is it a reasonable inference that at least one of the customers received no fuel, it's an equally reasonable inference that neither customer received any fuel and that the fuel was delivered to some other person and then duplicate tickets were simply created and mailed off to the customers for purposes of billing.
>
> We know from the face of the delivery tickets that it's purporting an impossibility.

¶6 Ultimately, the circuit court accepted Rassbach's pleas and found "based upon the testimony and the evidence received at the preliminary hearing as well as the information attached to the original complaint there are sufficient facts to find you guilty …." Rassbach filed a postconviction motion seeking resentencing for two reasons: the record did not provide a factual basis for the felony charges, and the court failed to adequately set forth its sentencing rationale. The court denied the motion, and Rassbach appeals.

DISCUSSION

Factual basis for felony charges

¶7 Rassbach argues the circuit court erroneously denied his motion for plea withdrawal because the record lacks sufficient facts to conclude he committed a felony-level offense. Although he sets forth a single argument heading, Rassbach proffers several subarguments, which we address in turn.

¶8 Rassbach first contends this case is similar to ***White v. State***, 85 Wis. 2d 485, 493, 271 N.W.2d 97 (1978), where the court remanded for resentencing because there was no factual basis for the felony-level value of stolen property identified in the complaint. In ***White***, both the complaint and information stated, without explanation, that a stolen chainsaw had a value of $150. ***Id.*** at 489. The owner testified to the item's original $250 purchase price. ***Id.*** By statute, value was to be based on the property's market value at the time of the theft. ***Id.*** The circuit court had "acknowledged there was no testimony as to value of the saw at the time of theft, either at the preliminary examination or when the plea was accepted, and that [the court] had no knowledge of the value of chain saws." ***Id.*** at 490. Neither White nor his lawyer objected to the statement in the complaint and information that the value was $150. ***Id.*** Nonetheless, the supreme court reversed because there was no factual basis for the alleged value of the used chainsaw at the time it was taken. ***Id.***

¶9 This case is unlike ***White***. Here, the complaint explained how the values were calculated, to the penny. The duplicate fuel tickets state on their face the value of the fuel that was allegedly never delivered. Moreover, at the preliminary hearing, the tickets were presented to the victims, who testified they had paid the amounts charged, and would not have paid any amount had they known another customer received an identical ticket.

¶10 Rassbach similarly contends this case is comparable to ***State v. Harrington***, 181 Wis. 2d 985, 512 N.W.2d 261 (Ct. App. 1994). There, counsel stipulated that the complaint provided a factual basis for the plea, but the complaint never mentioned the stolen property's value. ***Id.*** at 991. As in ***White***, we remanded for resentencing as a misdemeanor. ***Harrington*** is distinguishable for the same reasons as ***White***.

¶11 Rassbach further argues, however, that the complaint could not support a factual basis because neither he nor his attorney agreed that it could be so used. To the contrary, Rassbach did agree, and he failed to object when the court stated it was relying on the complaint. At the plea colloquy, Rassbach indicated he had reviewed the Plea Questionnaire and Waiver of Rights Form with his attorney and had signed it. That form, together with an addendum, stated:

> I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.
>
> ….
>
> I understand that by pleading I am giving up my right to challenge the sufficiency of the complaint.

¶12 Rassbach next argues there was no factual basis because the duplicate tickets were improperly double counted as to multiple victims. That is, he suggests that in each instance one customer must have actually received the fuel as stated on each of the duplicated tickets. However, this is not truly a factual-basis argument. Rather, it is an argument that Rassbach had a defense to some of the alleged frauds. Had Rassbach wished to pursue this defense, as counsel attempted to do at the preliminary hearing, he could have exercised his right to a trial.[5]

> The purpose of requiring a trial court inquiry into the factual basis for a crime to which a plea of guilty or no contest is tendered … is *not* to resolve factual disputes about what did or did not happen at or before the time of the alleged offense—that is the function of a trial, which a

[5] Moreover, we note that with respect to two of the duplicate tickets supporting the felony charges, a customer received a duplicate ticket but no accompanying criminal charge was filed. Accordingly, there could have been no double counting in those instances.

> defendant who pleads other than not guilty expressly waives.

State v. Merryfield, 229 Wis. 2d 52, 60-61, 598 N.W.2d 251 (Ct. App. 1999).

¶13 The purpose of the factual basis requirement is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." ***McCarthy v. United States***, 394 U.S. 459, 467 (1969). Here, it is evident from the preliminary hearing record that Rassbach understood the State's theory for valuing the amount he defrauded each victim. It was clear the State was relying on the amount of the duplicate tickets without subtracting any amount for fuel that might have actually been delivered.

¶14 Further, we need not accept the inferences suggested by Rassbach. A "factual basis for a plea exists if an inculpatory inference can be drawn from the complaint ... even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. As the State emphasizes, there is no evidence that any of the victims received the fuel indicated on the tickets.

¶15 Finally, Rassbach suggests there was no factual basis as to three customers who prepaid for their fuel in advance of delivery. He asserts that because these customers "delivered money before the representations were made[,]" Rassbach "did not obtain their property (i.e. money) through a misrepresentation." This argument lacks merit. Once the customers paid, the fuel belonged to them. Therefore, once Rassbach failed to deliver the fuel and misrepresented that he had done so, he defrauded them.

Adequacy of sentencing explanation

¶16 Rassbach contends the court did not give adequate reasons for ordering near-maximum sentences and consecutive sentences. On counts one through four, the maximum sentence was three and one-half years of imprisonment. On each count, Rassbach was sentenced to one year confinement and two years of extended supervision, all counts to be served consecutively. On count five, Rassbach faced a six-year maximum. The court imposed the maximum, but stayed the sentence and placed Rassbach on probation for two years. On the nine misdemeanor counts, Rassbach faced a maximum of nine months' jail on six counts, and four and one-half months on three counts. The court withheld sentence on all misdemeanor counts and ordered two years of probation. Thus, out of a maximum sentence of just over twenty-nine years of imprisonment, Rassbach was ordered to serve twelve years of imprisonment—including four years of confinement—plus two years of probation.

¶17 Sentences are not disturbed unless the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42 ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The reasons for the sentence must be set forth on the record. WIS. STAT. § 973.017(10m). The sentence imposed in each case should be the minimum amount of custody or confinement that is consistent with three primary sentencing factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the defendant; and (3) the need to protect the public. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶23, 27; *see also* WIS. STAT. § 973.017(2). The weight given each of these factors lies within the circuit court's discretion, and the court may base the sentence on any or all of them. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

¶18 When imposing sentence, the circuit court must, "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Gallion***, 270 Wis. 2d 535, ¶46. "By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." ***Id.*** While it is an erroneous exercise of discretion for the circuit court to give an inadequate explanation, we "will not, … set aside a sentence for that reason …." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Rather, we are "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id.***

¶19 It appears the circuit court here failed to set forth the "linkage" between the sentencing factors and the component parts of the sentence. Nonetheless, the court sufficiently set forth its rationale for the global sentence imposed. Indeed, Rassbach acknowledges that the court identified and analyzed each of the three primary sentencing factors. In denying Rassbach's motion for resentencing, the court summarized the reasoning it had previously set forth on the record. The court recounted:

> This Court went through a lengthy explanation of its consideration of the presentence investigation, its own perceptions of Mr. Rassbach's character, information and statements submitted by the attorneys and victims. It is clear from the record that this Court based its decision on the fact that Mr. Rassbach's actions were premeditated and calculated, that he did not consider alternatives to theft when his business was struggling, the number of victims involved, and Mr. Rassbach's direct misstatements to victims.

¶20 The court further emphasized during sentencing that Rassbach's crimes involved loss of trust, explaining:

> Just because this isn't a crime in which somebody is physically struck does not mean it's not a serious offense. In many cases the loss of trust is just as serious.
>
> And also there was a sense of community. ... And it's obvious from the comments from the persons who are the victims they feel or felt this sense of community. And that sense of community has been gravely impacted, no question about it.
>
> ....
>
> [M]any of them said they had known you for their lifetimes. And trusted you for their lifetimes.

Focusing on the extent of the crimes and number of victims, the court observed, "when this occurs to the extent it has occurred[,] to grant probation to me would seriously depreciate the seriousness of the events." We are satisfied that the court's comments and the record as a whole adequately support the sentence imposed, which was far short of the maximum penalty Rassbach faced.

By the Court.—Judgment and order affirmed.

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