

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 13, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 97-2665-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**TERRY THOMAS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. Terry Lovell Thomas pled guilty to second-degree reckless homicide while armed with a dangerous weapon, see §§ 940.06 & 939.63(1)(a)2, STATS., and as an habitual criminal, see 939.62, STATS., in connection with the shooting death of Tyrone Doss. A judgment of conviction was entered on Thomas's guilty plea, and the trial court sentenced Thomas to a

fifteen-year period of incarceration. Some five and one-half months later, Thomas filed a motion with the trial court to withdraw his guilty plea. He claims that the transcript of his guilty-plea colloquy with the trial court demonstrates that he disputed the proffered factual basis for his plea. The trial court denied Thomas's motion in a written decision. Thomas appeals from both the judgment of conviction and from the trial court's order denying his motion for postconviction relief. We affirm.

## I.

The State filed an eight-page, single-spaced complaint against Thomas. It alleged that Doss, Thomas, and several others got into a dispute over some drug money, and that later, in a melee that is all-too-common in some of our neighborhoods, Thomas fired shots from an assault rifle that killed Doss. The prolix complaint quotes Thomas as recounting for the police his version of the drug-related dispute, and how he confronted one of the men with, according to Thomas, a "What's up man?" According to Thomas, the man pulled a handgun and pointed it at him. At that point, Thomas told the police, as related in the complaint, that he "shot at [the man] because he thought [the man] was going to shoot." When the man started to run, Thomas says he shot again in the direction the man was running, along the side of Doss's house. Thomas told the police, as alleged in the complaint, that he was not trying to hit the man, but, rather, he wanted to keep him running so he wouldn't turn around and shoot at Thomas. The complaint notes that Thomas said that he did "not know how many shots he fired, but stated that he held the trigger and the rifle kept firing."

Thomas also told the police that after he shot at the fleeing man, he walked back to his house where he encountered an associate who was shooting his

sawed-off shotgun at Doss's house. The complaint recites that Thomas then "started shooting through the bush he was behind, because he figured that [the associate] must have been shooting at somebody, or maybe someone from down by [Doss]'s house was shooting at [the associate], because [the associate] was shooting." Thomas said that he was not shooting at anyone in particular, but, rather, was "shooting wildly" and did not mean to kill Doss.

Thomas gave up his right to a preliminary examination, and, after the State, without objection, orally amended the Information to add a party-to-a-crime allegation to the second-degree-reckless-homicide charge, pled guilty:

THE COURT: First of all, to the charge of second degree reckless homicide while armed with a dangerous weapon, now party to a crime, what is your plea, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And to the charge felon in possession of a firearm, you're charged as an habitual criminal, what is your plea, guilty or not guilty?

THE DEFENDANT: Guilty.

The trial court also asked Thomas whether he signed the guilty plea questionnaire and the waiver of rights forms for both charges. Thomas replied: "Yes." The trial court then explored Thomas's background with him, and asked whether Thomas "read both these criminal complaints and the informations in this case?" Thomas replied: "Yes," noting that he had read the documents and that they were also read to him.

Thomas also admitted, among other things, that he understood that by pleading guilty he was giving up, as phrased by the trial court, "all possible defenses, including but not limited to self-defense." The prosecutor then spent several pages in the transcript going over the elements of second-degree reckless

homicide, as party to a crime, and Thomas said that he understood, as phrased by the prosecutor, that the “State would have to prove all those facts.”

The trial court asked Thomas’s defense lawyer whether he was willing “to stipulate to both criminal complaints and the attached prior convictions to serve as a basis for both pleas.” The defense lawyer indicated that he was, but that Thomas had some concern about what the defense lawyer characterized as “unverified statements of a number of alleged witnesses.” The prosecutor then read from the complaints. After some nine pages of trial transcript, which included colloquy between the defense lawyer and the prosecutor about the specifics of some allegations that were tangential to the plea’s factual basis, the trial court interrupted and asked if there were a way to establish a factual basis that would not take so long. After several more pages, and some additional colloquy between the lawyers about details that were also only tangentially relevant to the factual basis, the colloquy occurs upon which Thomas relies in his effort to withdraw his plea:

THE COURT: So you’ll stipulate to that as a basis for the plea?

[Defense lawyer]: Yes.

The prosecutor then suggested that the trial court get Thomas’s assent:

[Prosecutor]: Just like something stated by the defendant he also agrees with those facts.

THE COURT: Do you dispute anything that has just been said, sir?

THE DEFENDANT: Yes.

THE COURT: Yes. He stipulates. They both stipulate.

[Prosecutor]: Okay, and you read that complaint and you understood --

THE COURT: I went through that with him.

[Prosecutor]: Okay. He said he read them. He didn't say he understood them.

THE COURT: Of course he understood them, I asked if you read the complaints and that if he understood them. Are you willing to stipulate?

[Prosecutor]: Yes.

THE COURT: Hallelujah. The Court will find there's a basis for the plea.

The transcript of the plea hearing has another four or so pages. Yet, no one—including Thomas—either asserted that, or questioned whether, Thomas disputed the facts essential to his plea's factual basis. This is also true of the thirty-seven-page sentencing hearing, which took place a little more than one month later.

The trial court denied Thomas's motion for postconviction relief, and explained its reasoning in a written decision:

The defendant claims that the record shows he actually disputed what was said but that the court misinterpreted his response. The record may so show; however, the defendant does not divulge what it is he disputed at that time. The court believes it interpreted his response accurately under the circumstances. In the absence of any showing to the contrary, or what specifically it was that he disputed at the time, the defendant has not set forth a basis for withdrawal of his plea. A general assertion, absent more, is insufficient to establish that a manifest injustice has occurred. State v. Bentley, 201 Wis.2d 303 (1996).

## II.

After sentence has been imposed, “a defendant who seeks to withdraw a guilty or *nolo contendere* plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a ‘manifest injustice.’” *State v. Washington*, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993) (quoted source omitted). Thomas claims that he would suffer a “manifest injustice” if he cannot withdraw

his guilty plea because, he argues, he disputed the factual basis offered by the State at his plea hearing. Thomas's argument ignores the deference that we must give to the trial court's findings of fact, and, additionally, misinterprets the requirement that there be a factual basis for a guilty plea or one of its equivalents.

*A. Deference to the trial court's findings of fact.*

Under RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS., we may not overturn a trial court's findings of fact unless the findings are "clearly erroneous." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In assessing whether the trial court's findings of fact are "clearly erroneous," we must accept the reasonable inferences that the trial court draws from the evidence. *State v. Friday*, 147 Wis.2d 359, 370–371, 434 N.W.2d 85, 89 (1989). We defer to the trial court's findings of fact because the trial court sees who is saying what, assesses their demeanor, and, indeed, is privy to the whole ambiance of what is happening. See RULE 805.17(2) ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"). The trial court found that "it interpreted [Thomas's] response [that Thomas's "yes" was to the prosecutor's statement, and not to the trial court's question] accurately under the circumstances." The trial court thus found that Thomas did *not* dispute the factual basis for his plea. This finding is not clearly erroneous. Stated another way, "on the entire evidence," which here includes the entire plea-hearing colloquy and the sentencing-hearing proceedings, one cannot be "left with the definite and firm conviction that a mistake has been committed." See *United States Gypsum Co.*, 333 U.S. at 395.

B. *Factual basis.*

Thomas also misreads supreme court precedent when he contends that the State did not establish a factual basis for his guilty plea because, he claims (contrary to the trial court’s finding of fact), he did not agree to the facts essential to the homicide charge. Although it is a good idea to see if the defendant contests what is proffered as a factual basis for a plea, and, indeed, it is simpler and more probative to ask the defendant to say what he did, and then determine whether what the defendant admits constitutes a crime, it is *not necessary* under Wisconsin law to get the defendant’s agreement; Wisconsin routinely accepts pleas leading to conviction from defendants who not only do *not* agree with the proffered factual basis but, indeed, actively proclaim their *innocence*. See *State v. Garcia*, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

In arguing for reversal, Thomas relies on *State v. West*, 214 Wis.2d 468, 474, 571 N.W.2d 196, 198 (Ct. App. 1997):

Before a trial court can accept a guilty plea, it must personally determine that the conduct which the defendant admits constitutes the offense to which the defendant has pleaded guilty. See *State v. Johnson*, 200 Wis.2d 704, 708, 548 N.W.2d 91, 93 (Ct. App. 1996), *aff’d*, 207 Wis.2d [239], 558 N.W.2d 375 (1997).

In neither *West* nor *Johnson*, however, did the decision turn on whether the defendant *admitted* evidence proffered as a factual basis for the plea. See *West*, 214 Wis.2d at 475, 571 N.W.2d at 198 (“Because *no evidence* of a conspiracy with respect to count one was presented to the trial court, we conclude that the trial court’s finding was clearly erroneous, and reverse that portion of the judgment.”) (emphasis added); *Johnson*, 200 Wis.2d at 708–713, 548 N.W.2d at 92–94

(asportation is an element of armed robbery and, absent proof of asportation, there was no factual basis for defendant's guilty plea to the crime of armed robbery).

*Johnson* relied on *State v. Harrington*, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994), for the *dictum* statement that the defendant must admit to facts before those facts may serve as a factual basis for the defendant's plea. *Johnson*, 200 Wis.2d at 708–709, 548 N.W.2d at 93. In *Harrington*, however, as in *West* and *Johnson*, the defendant's admission, *vel non*, was not at issue. *Harrington*'s statement that the defendant must admit facts before they may be a factual basis for the plea comes from *Broadie v. State*, 68 Wis.2d 420, 423, 228 N.W.2d 687, 689 (1975). *Harrington*, 181 Wis.2d at 989, 512 N.W.2d at 263. In *Broadie*, too, however, the defendant's admission was not in issue.

The statement in *Broadie* that a trial court accepting a guilty plea “should personally determine that the conduct which the defendant admits constitutes the offense charged or an offense included therein to which the defendant had pleaded guilty” comes from *Ernst v. State*, 43 Wis.2d 661, 674, 170 N.W.2d 713, 719 (1969), *overruled in part by State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). *Broadie*, 68 Wis.2d at 423, 228 N.W.2d at 689. *Ernst* borrowed this from Rule 11 of the Federal Rules of Criminal Procedure. *Ernst*, 43 Wis.2d at 674, 170 N.W.2d at 719. Significantly, however, *Ernst* and the authorities upon which it relied predated the United States Supreme Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970), which permits a defendant to accept conviction while proclaiming innocence, and thus permits conviction even though the defendant *does not* admit the facts that form the factual basis for that conviction. See *Garcia*, 192 Wis.2d at 857–858, 532 N.W.2d at

115–116 (*Alford* pleas are permitted in Wisconsin).<sup>1</sup> Significantly, Wisconsin’s version of Rule 11 of the Federal Rules of Criminal Procedure, § 971.08, STATS., *does not* require that the defendant personally admit to the facts that form the basis for the trial court’s acceptance of the defendant’s plea: “Before the court accepts a plea of guilty or no contest, it shall do all of the following ... (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.” Section 971.08(1)(b), STATS. *See Garcia*, 192 Wis.2d at 857–858, 532 N.W.2d at 115–116 (“We conclude that in Wisconsin a trial court can accept an *Alford* plea of guilt without violating the factual basis rule of *Ernst v. State* where, despite defendant’s protestations of innocence, the trial court determines that the prosecutor’s summary of the evidence the state would offer at trial is strong proof of guilt.”) (quoted source omitted). *West* and its predecessors are inconsistent with *Garcia*; accordingly, *Garcia* governs. *See Hoffman v. Memorial Hospital*, 196 Wis.2d 505, 513, 538 N.W.2d 627, 629 (Ct. App. 1995) (where supreme court decisions are inconsistent with one another, we must follow the latest one). Moreover, there was ample “strong proof” of Thomas’s guilt—and, as the trial court noted in its written decision denying Thomas’s motion for postconviction relief, Thomas did not dispute that before the trial court, and, indeed, he does not dispute it here.

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<sup>1</sup> We are bound by the supreme court’s decision in *State v. Garcia*, 192 Wis.2d 845, 857–858, 532 N.W.2d 111, 115–116 (1995), that *Alford* pleas, where a defendant accepts conviction while simultaneously proclaiming his or her innocence, are permitted in Wisconsin. Nevertheless, as discussed elsewhere, we believe that it is an abomination for a criminal justice system, with “justice” supposedly the pivotal concern, to permit criminal defendants to accept conviction while simultaneously proclaiming their innocence. *See RALPH ADAM FINE, ESCAPE OF THE GUILTY* 97-98 (1986) (It is “unseemly for a civilized society to send self-proclaimed innocent people to prison without a trial.”).

**III.**

Thomas has not shown the requisite “manifest injustice” to withdraw his guilty plea. Accordingly, we affirm.

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

Publication in the official reports is recommended.

SCHUDSON, J. (*dissenting*). At Thomas's plea hearing, as the State was attempting to read several pages of the criminal complaint as the factual basis for the guilty plea, the following exchange occurred:

MR. MOLITOR: There has to be—there has to be a factual basis. I'm trying to establish it. If you don't want to stipulate to the complaint or the parts I've stated so far, tell me. We'll just keep going. I've left out certain parts. Do you agree that what I've testified to you stipulate to? Or I'll keep going if not.

THE COURT: I agree. Mr. Schnake, for some reason this thing is being dragged out. It's the longest guilty plea in history.

MR. SCHNAKE: It is a nine-page complaint.

THE COURT: I didn't want to sit here and listen to a nine-page complaint. What don't you agree with?

MR. SCHNAKE: As to the issue of whether the defendant got into—quote, got into Larry's face. We would stipulate probably—we would stipulate that Zorris would testify that Mr. Thomas, quote, got into Larry's face. There's also evidence that Larry, quote, got into Mr. Thomas's face. We would stipulate that there was a confrontation.

MR. MOLITOR: That's fine. Okay. Anything else?

MR. SCHNAKE: And for clarification, that the gun that was referred to on—that Zorris observed was the S—Norinco SKS 7.62 mm. semi-automatic, a different weapon than the AK which was identified as being in Mr. Thomas's possession and, in fact, that was the weapon that was identified as being in the victim's possession at the time of this incident.

MR. MOLITOR: Yes. I agree with that. Now, the remainder of the criminal complaint, the part I've gone up to so far, other than that do you stipulate to those facts that I've uttered here in court? This is just for the factual basis.

MR. SCHNAKE: Yes. We would stipulate to the statement to Larry as being "what's up now." The

expletive at the end we do not stipulate to and is contradictory.

MR. MOLITOR: Fine. That's fine.

THE COURT: Anything else? Do we need anything else as a basis?

MR. MOLITOR: We have to—more but—

MR. SCHNAKE: Yes.

THE COURT: Why don't we adjourn this at 1:30 and we'll finish it then.

MR. SCHNAKE: With the exceptions noted we're in agreement as to the elements that Mr. Molitor has delineated to this point.

MR. MOLITOR: Okay. Now, for the rest of the complaint.

THE COURT: What do you disagree with with the rest of the complaint? *It's 12:00. I have a felony judge's meeting. I have a jury trial. The attorney's waiting here to find out what's happening on that. I can't sit here. What I'm going to do is pass it and see if there's some disagreement you have and hear it at 1:30. I've never had such a difficulty stipulating to a criminal complaint before in my life.*

MR. MOLITOR: On Page 7 the further statement of Carla Brown, other than that do you agree that those facts from Pages 6 of the criminal complaint through the end are substantially true and correct?

MR. SCHNAKE: With the exception of the statement of Angela Rollins, which begins at Page 5 of the complaint, at the last paragraph of Page 5 and continues only to the first paragraph of Page 6.

MR. MOLITOR: That's fine.

THE COURT: So you'll stipulate to that as a basis for the plea?

MR SCHNAKE: Yes.

MR. MOLITOR: Just like something stated by the defendant he also agrees with those facts.

THE COURT: *Do you dispute anything that has just been said, sir?*

THE DEFENDANT: *Yes.*

THE COURT: *Yes. He stipulates. They both stipulate.*

MR. MOLITOR: *Okay, and you read that complaint and you understood—*

THE COURT: *I went through that with him.*

MR. MOLITOR: *Okay. He said he read them. He didn't say he understood them.*

THE COURT: *Of course he understood them. I asked if you read the complaints and that if he understood them. Are you willing to stipulate?*

MR. MOLITOR: *Yes.*

THE COURT: *Hallelujah. The Court will find there's a basis for the plea. Was there a preliminary hearing?*

MR. SCHNAKE: There was a waiver hearing.

MR. MOLITOR: No.

THE COURT: Okay.

(Emphasis added.)

The trial court determined that a stipulated factual basis existed to support Thomas's guilty plea. After being sentenced, Thomas filed a motion to withdraw his guilty plea, arguing that the trial court failed to establish a factual basis. The trial court denied the motion, finding that Thomas had stipulated to the factual basis offered by the State. The record, however, refutes the trial court's finding, and the State's four arguments in support of the trial court's conclusion fail to save this plea.

First, the State argues that the trial court, observing Thomas and enjoying an immediate sense of the hearing's circumstances, was entitled to conclude that when Thomas answered "Yes" following the court's question, "Do you dispute anything that has just been said, sir?", Thomas was really responding to the prosecutor's previous comment, "Just like something stated by the defendant he also agrees with those facts." As the State concedes, however, this argument asks this court either to adjust the order of the three statements, or to determine that Thomas's "yes" meant "no." We should not ignore the plain words and apparent meaning of the record.

Second, the State argues that the trial court was not required to gain Thomas's agreement to the factual basis submitted by the State. I disagree. Because Thomas waived his preliminary hearing, the record contains no factual record regarding the events of the night in question other than the allegations contained in the criminal complaint. Accordingly, absent Thomas's stipulation to the complaint or some other summary of the evidence, the trial court lacked an adequate factual basis for Thomas's guilty plea. See *State v. West*, 214 Wis.2d 468, 474-75, 571 N.W.2d 196, 198 (Ct. App. 1997).

Third, the State argues that the transcript of the sentencing hearing establishes that Thomas stipulated to the criminal complaint at his guilty plea hearing. Once again, the record refutes the State's argument. At sentencing, the prosecutor attempted to raise the matter of the adequacy of Thomas's plea:

THE COURT: Where are we, on the presentence?

MR. MOLITOR: Well, before we get to that, I just wanted to clarify two things from the last hearing. I talked to Mr. Schnake briefly about it. Mr. Thomas—Mr. Schnake correctly summarized the stipulation of facts that you agreed to last time in the guilty plea last time, is that correct?

THE DEFENDANT: Huh?

THE COURT: Are you talking to Mr. Schnake or the defendant?

MR. MOLITOR: I'm talking to the defendant.

THE COURT: Okay.

THE DEFENDANT: Yes.

MR. MOLITOR: And Mr. Schnake prior to the plea also explained to you, did he not, that there was a presumptive minimum three-year prison sentence if you're found to have committed the offense in this case, the second degree reckless homicide while using a dangerous weapon, unless the Court explains its reasons for doing less than that on the record, correct?

THE DEFENDANT: Yes.

MR. MOLITOR: That's all I have, Judge, on that.

Thus, at most, the sentencing hearing records the prosecutor's concern about the adequacy of the guilty plea. The brief and ambiguous exchange between the prosecutor and Thomas, however, does not establish Thomas's stipulation to any factual basis supporting his plea.

Fourth, the State asks this court to determine that Thomas's postconviction motion was inadequate under *State v. Bangert*, 131 Wis.2d 246, 274-75, 389 N.W.2d 12, 26-27 (1986), because Thomas failed to assert "that he in fact did not assent to the proffered factual basis for his plea." This principle, however, is inapplicable where a defendant disputes the existence of a factual basis for the plea at the plea hearing itself. Thomas did so.

A trial court must ascertain a factual basis for the plea "to make certain that the defendant is pleading guilty to a crime he committed." *Spinella v. State*, 85 Wis.2d 494, 499, 271 N.W.2d 91, 94 (1978), *overruled on other grounds by State v. Bartelt*, 112 Wis.2d 467, 334 N.W.2d 91 (1983). A manifest injustice exists if the trial court fails "to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads." *State v. Smith*, 202 Wis.2d 21, 25, 549 N.W.2d 232, 233-34 (1996).

Here, quite obviously, the trial court's many comments convey its considerable concern for a fast plea, not an adequate one. In its haste, and notwithstanding its triumphant "Hallelujah," the trial court failed to establish a factual basis for Thomas's guilty plea. Thus, I conclude that the trial court erred in denying Thomas's postconviction motion and, therefore, I respectfully dissent.

