COURT OF APPEALS
DECISION
DATED AND RELEASED

June 8, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0243-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. KELLY,

Defendant-Appellant.

APPEAL from order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. David Kelly appeals from an order denying his postconviction motion to vacate a no contest plea. He contends that the trial court accepted the plea without establishing a factual basis for the charge against him. He also contends that trial counsel ineffectively represented him by not recognizing and pursuing that issue before he entered his plea. We reject his contentions and affirm.

The State charged Kelly with causing more than $1000 damage to property, a Class D felony. *See* § 943.01(1) and (2)(d), STATS. The complaint alleged that Kelly's mother reported to police that Kelly went "berserk" and "trashed" her vacation home after a family fight, causing more than $1000 damage. The complaint described the damage in the following terms:

> [The investigator] reports that the damage was so extensive that it could not all properly be noted in his investigation. [He] reports that in the kitchen he observed many antique pieces of depression glass broken. [He] reports that he counted four plates, six stem ware pieces, one large bowl and one pitcher. [He] further reports that in the living room he observed a glass table top ... to be broken. [He] reports that David had thrown a table lamp through a window ... that the livingroom windows have separate panes and that 10 of these glass window panes were broken. [He] also reports that a mirror ... was broken as were two bedroom windows.

Had the complaint alleged damage less than $1000, the State could only have charged Kelly with a misdemeanor. *See* § 943.01(1).

Kelly agreed to plead no contest following plea negotiations. In exchange for his plea, the State agreed that Kelly could avoid conviction by successfully completing a first offender's program under § 971.39, STATS. The court approved the agreement and allowed Kelly to enter and complete the first offender's program as an alternative to conviction. The court found the complaint to be an adequate factual basis for the charge. Kelly expressly agreed that those facts were true.

Kelly subsequently failed to perform his first offender's program obligations. As a result, the court entered a judgment of conviction and sentenced Kelly to fifteen days in jail.

Kelly then moved to vacate his plea. At the hearing on his motion, he presented evidence that the felony charge was inappropriate because the damage he did cost far less than $1000 to repair. He also presented testimony that his trial counsel knew that fact but failed to pursue the issue or advise Kelly before he pleaded that he only faced misdemeanor jeopardy. The trial court denied relief and this appeal ensued.

The failure of the trial court to establish a factual basis for the charge entitles the defendant to withdraw his plea. ***White v. State***, 85 Wis.2d 485, 488, 271 N.W.2d 97, 98 (1978). Where the trial court has found a sufficient factual basis for the plea, we will not reverse that determination unless it is clearly erroneous. ***State v. Mendez***, 157 Wis.2d 289, 295, 459 N.W.2d 578, 580-81 (Ct. App. 1990). The defendant has the burden of proof on that issue. ***State v. Spears***, 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). The factual basis need not be as strong with a negotiated plea. ***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).

The trial court did not clearly err by finding a sufficient factual basis for the felony charge. The complaint alleged numerous specific items of damage to windows, furniture, and antiques. It also reported that all of the damage had yet to be inventoried. It described the defendant as "berserk," and the victim described her home as "trashed." The complaint stated that this damage exceeded $1000, and Kelly acknowledged on the record the truth of that assertion. Under these circumstances, the trial court could reasonably infer that the damage did, in fact, exceed $1000.

Trial counsel effectively represented Kelly. Ineffectiveness is measured by what a reasonably prudent attorney would do in similar circumstances. ***State v. Pitsch***, 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). Here, counsel testified that he did not pursue the charging issue because he believed that the plea bargain was more favorable to Kelly than a misdemeanor prosecution would have been because Kelly had no defense to the misdemeanor charge. In doing so, counsel made a reasonable strategic choice. Kelly had only to complete the first offender's program to avoid any conviction at all. Counsel cannot reasonably be charged with anticipating Kelly's failure to complete the program.

By the Court.—Order affirmed.

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