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

**October 6, 2016**

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



**Appeal No. 2015AP2062-CR** **Cir. Ct. No. 2012CM2861**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRANDON E. JORDAN,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Brandon Jordan appeals a judgment of conviction for violating a harassment injunction issued under WIS. STAT. § 813.125(7), as well as the circuit court's order denying his postconviction motion for plea

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

withdrawal. Jordan asserts that his conviction should be overturned because his termination from the Deferred Prosecution Program was not done in compliance with the terms of his deferred prosecution agreement and thus violated his due process rights. Jordan also asserts that he is entitled to withdraw his plea because the circuit court failed to ascertain whether a factual basis existed for his conviction. For the reasons discussed below, I affirm.

## BACKGROUND

¶2 In December 2012, Jordan was charged with one count of violating a harassment injunction. In exchange for his guilty plea to the charge, Jordan accepted an offer of deferred prosecution from the Dane County District Attorney's Office. Under the deferred prosecution agreement, the District Attorney's Office agreed to defer prosecution for nine months from the date of the deferred prosecution agreement, which was signed on June 12, 2013, and, if the terms of the deferred prosecution agreement were complied with within that time period, to dismiss the charge against Jordan. Under the terms of the agreement, Jordan was required to submit essay questions by July 12, 2013, complete a treatment assessment by September 12, 2013, check in with the Deferred Prosecution Program monthly, and pay a service fee for the program. The agreement expressly provided the following remedies in the event that Jordan failed to abide by the agreement's terms:

> If you violate any terms of this contract … the Dane County District Attorney may, during the period of deferred prosecution: (1) revoke or modify, add or delete conditions of this deferred prosecution contract to include changing the period of deferral or, (2) prosecute you for the offense(s). If a decision is made to terminate you from the program, you may follow the grievance procedure, which is provided to you at the time you sign the contract. The District Attorney may also resume prosecution at any time prior to a court's dismissal of the charge(s) for breach of a

> deferred prosecution agreement that occurred at any time during the term of the deferral period.

¶3 The circuit court approved the parties' agreement, and Jordan entered a guilty plea to violating a harassment injunction. Pursuant to the parties' agreement, the circuit court did not enter a judgment of conviction upon Jordan's plea, but instead suspended the proceeding.

¶4 In a July 2014 letter to the circuit court, the Deferred Prosecution Program informed the court that Jordan had not complied with the terms of the June 2013 deferred prosecution agreement and that in August 2013, Jordan had been issued a warning letter. The July 2014 letter stated that a meeting between Jordan and the Deferred Prosecution Program was held in March 2014, and they had mutually agreed to extend the deferred prosecution time period by six months.[2] The letter stated that in exchange for the extension, Jordan agreed to the following: (1) pay $150 per month in program fees by the last day of each month; (2) answer essay questions by April 30, 2014; (3) undergo a domestic violence assessment and complete any recommendations by September 12, 2014; (4) check in with the Deferred Prosecution Program monthly. The letter further stated that Jordan had not complied with any of the conditions of the extension of his deferred prosecution time period and that "[g]iven [Jordan's] persistent non-compliance, we have concluded that [] Jordan is no longer eligible to participate in our diversion program."

¶5 In a January 2015 letter, the Deferred Prosecution Program notified the circuit court that Jordan had been re-referred to the Program on July 17, 2014,

[2] A written agreement extending the June 13, 2013 deferred prosecution agreement is not in the record before this court on appeal.

that Jordan had been provided with information explaining the process to be considered for re-admission and directing him to respond with a letter of appeal and other requested documents. The Program stated that despite ample time to do so, Jordan had failed to provide verification of his enrollment and participation "in a certified abuser program," a requirement for re-admission, and that the Program had concluded that Jordan was not eligible for re-admission.

¶6 In March 2015, Jordan moved the court to dismiss the action with prejudice, or in the alternative, to "enforce … [Jordan's] due process rights under the Deferred Prosecution Agreement," including his rights under the Deferred Prosecution Program's grievance procedure.

¶7 The circuit court denied both of Jordan's motions. The court determined that Jordan's termination from the Program did not violate any provision in the deferred prosecution agreement or his due process rights. The court then found Jordan guilty based upon Jordan's earlier guilty plea and sentenced Jordan to fifteen days in jail. Jordan filed a postconviction motion to withdraw his plea on the basis that there was no factual basis to find that Jordan had violated a harassment injunction order. The court denied the motion. Jordan appeals.

## DISCUSSION

¶8 Jordan contends that his conviction should be overturned because his termination from the Deferred Prosecution Program violated the provisions of the deferred prosecution agreement and his due process rights. Jordan also contends that the circuit court erred in denying his motion to withdraw his plea, arguing that the court failed to satisfy the "factual basis" requirement under WIS. STAT. § 971.08(1)(b). I address each of these issues in turn below.

*A. Termination from the Deferred Prosecution Program*

¶9 Jordan argues that his termination from the Deferred Prosecution Program was not done in compliance with the terms of the deferred prosecution agreement or the Program's grievance procedure, which he asserts is "fundamentally unfair" and a violation of his due process rights.

¶10 Both parties discuss whether Jordan was properly or improperly terminated from the Deferred Prosecution Program under the principles of contract interpretation. I follow their lead and, therefore, draw upon principles of contract law in determining Jordan's rights under the terms of the deferred prosecution agreement. *See* ***State v. Roou***, 2007 WI App 193, ¶25, 305 Wis. 2d 164, 738 N.W.2d 173 (applying contract-law principles in the context of a plea agreement). The interpretation of a written contract is a question of law subject to de novo review. ***State v. Toliver***, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994).

¶11 The deferred prosecution agreement provides that "[i]f a decision is made to terminate [a participant] from the program, [the participant] may follow the grievance procedure, which is provided to [the participant] at the time [the participant] sign[s] the contract." The grievance procedure for the Deferred Prosecution Program provides:

> If [a defendant] … fail[s] to follow through with the agreed upon conditions, the following procedures will be followed by [the Deferred Prosecution Program]:
>
> (1) You will be sent a warning letter by your assigned counselor, which will outline your non-compliance. This letter will ask you to appear for a case review appointment. If the conflict is resolved, you will receive a letter summarizing the issues discussed and the agreed upon steps which will be taken to complete the contract within the program.

> (2) If you do not appear for the scheduled appointment and/or we are unable at the appointment to resolve the dispute over your contract, you will receive a letter stating you are to be terminated from the program.

The grievance further provides that if a defendant "do[es] not agree with the counselor's decision to terminate [him] from the Deferred Prosecution Program," the defendant may appeal that decision to the director of the Program in a manner outlined in the grievance procedure. If the defendant is unsatisfied with the director's decision, the defendant may appeal that decision to the Dane County District Attorney.

¶12 Jordan does not dispute that the Program sent him a warning letter in August 2013 outlining his noncompliance with the deferred prosecution agreement. He also does not dispute that he appeared for a case review appointment in March 2014, at which an agreement was reached that he would be given an additional six months to complete the conditions of his deferred prosecution agreement. Jordan argues, however, that under the terms of the deferred prosecution agreement and grievance procedure, he should have been issued another warning letter when he failed to comply with the agreement conditions during the six-month extension time period. Jordan asserts that the second warning letter would have then resulted in either: (1) a further resolution between Jordan and the Program, or (2) a letter notifying Jordan that he would be terminated from the Program and a right to appeal his pending termination to the director of the Program and the district attorney.

¶13 The grievance procedure provides that in the event that a participant does not satisfy the agreed upon conditions, the participant will be sent a "warning letter" outlining the participant's noncompliance. The Program did so. Jordan takes the position that because he reached an agreement with the Program to

extend the time he had to complete his agreed upon conditions, the Program was obligated to send him an additional warning letter when he still failed to comply with the conditions. However, Jordan does not direct this court to language in the deferred prosecution agreement or in the grievance procedure requiring an additional warning letter, and this court's review of those documents reveals none.

¶14 Jordan argues that "the only reasonable interpretation of" the deferred prosecution agreement and grievance procedure is that a new warning letter was required because "there was never a chance to" appeal his termination from the Program to the district attorney. However, Jordan does not argue that the documents are ambiguous. When the terms of a contract are unambiguous, this court construes the contract as it stands. ***Id.*** Nothing in the plain language of the agreement imposes an obligation on the Program to send Jordan a second warning of noncompliance.

¶15 In addition, even if Jordan is correct that the deferred prosecution agreement required that Jordan be sent a second warning letter when he failed to comply with the terms of the agreement during the extension time period, Jordan has not argued or made a showing that the failure to do so affected a substantial right. If an error does not affect the substantial rights of a party, the error is considered harmless. ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. Jordan has not argued or made a showing that had a second warning letter been sent, the Program would have agreed to a second extension, or that director of the Program or the district attorney would have determined that he should be given additional opportunity to complete the conditions despite Jordan's complete and utter failure to comply with any of the conditions in fifteen months. Accordingly, any failure in sending Jordan a second letter would have been harmless.

*B. Plea Withdrawal*

¶16 Jordan contends that he should have been permitted to withdraw his plea because the offense he was charged with and plead to, the violation of a harassment injunction, was not supported by a factual basis.

¶17 A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836; *see* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991).

¶18 WISCONSIN STAT. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, the court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." This is known as the factual basis requirement. *See* ***Thomas***, 232 Wis. 2d 714, ¶14. The obligation that the court establish a sufficient basis "'protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his [or her] conduct does not actually fall within the charge,'" and thus helps ensure that the defendant's plea is knowing and intelligent. ***State v. Lackershire***, 2007 WI 74, ¶35, 301 Wis. 2d 418, 734 N.W.2d 23 (quoted source omitted). If a court fails to establish that a sufficient factual basis exists as to the charge to which the defendant enters a plea of guilty, a manifest injustice occurs. *See* ***Thomas***, 232 Wis. 2d 714, ¶17.

¶19 "[E]stablishing a sufficient factual basis requires a showing that 'the conduct which the defendant admits constitutes the offense charged….'" ***Lackershire***, 301 Wis. 2d 418, ¶33 (quoted source omitted). The court's inquiry into whether the defendant committed the crime charged need only be sufficient to

satisfy the court that the defendant did in fact commit the crime charged. *See* ***State v. Black***, 2001 WI 31, ¶¶11-12, 242 Wis. 2d 126, 624 N.W.2d 363. When a no contest plea is entered pursuant to a plea agreement, the circuit 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) "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant …." ***Black***, 242 Wis. 2d 126, ¶16. "The determination of the existence of a sufficient factual basis lies within the [circuit court's] discretion … and will not be overturned unless it is clearly erroneous." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

¶20 Jordan argues that a factual basis was not established because the circuit court "did not review the facts, neither with counsel nor with defendant, and did not establish that the facts stated in the complaint constituted the offense." Jordan has not, however, directed this court to any legal authority obligating a circuit court judge to review the facts with the defendant or defense counsel in order for a factual basis to be established. To the contrary, the supreme court stated in ***Thomas***, that a circuit court judge is not required to make a factual basis determination in any one particular manner. ***Thomas***, 232 Wis. 2d 714, ¶21. "While a judge must ensure that a defendant realizes that his or her conduct does meet the elements of the crime charged, he or she may accomplish this goal through means other than requiring the defendant to articulate personally agreement with the factual basis presented." ***Id.*** (citations omitted).

¶21 Jordan, through his trial counsel, agreed at the plea hearing that the criminal complaint could be relied on as the factual basis for his plea. Where the facts set forth in the complaint meet the elements of the crime charged, those facts

may form the factual basis for a plea, and the circuit court need not look any further to establish a factual basis. ***Black***, 242 Wis. 2d 126, ¶14. In ***Thomas***, the supreme court stated that when counsel stipulates on the record to facts in the criminal complaint, a factual basis is established. ***Thomas***, 232 Wis. 2d 714, ¶21. Properly understood, this is a reference to defense counsel's agreement that the circuit court may look to facts in a criminal complaint and that such facts, if true, constitute the crime.

¶22 Relying on ***State v. Harrington***, 181 Wis. 2d 985, 512 N.W.2d 261 (Ct. App. 1994), Jordan points out that a stipulation as to the facts in the criminal complaint is not necessarily conclusive evidence that a factual basis has been established. In ***Harrington***, this court determined that in spite of defense counsel's stipulation that the facts in the complaint formed a factual basis, the defendant's plea was not supported by a factual basis. The defendant in ***Harrington*** plead no contest to felony theft of property valued over $1,000. ***Id.*** at 987. The maximum penalty for felony theft depended on the value of the property taken—the more valuable the property, the more sever the punishment. ***Id.*** at 988. However, the complaint did not reference the value of the property taken. ***Id.*** We stated that although the value was not an element, it was necessary to arrive at an appropriate penalty, and we held that because the complaint did not address the nature or the value of the property taken, which the defendant's sentence was dependent upon, the complaint was insufficient to form a factual basis. ***Id.*** at 990.

¶23 Unlike ***Harrington***, Jordan does not contend that the complaint in the present case omits any fact establishing an element of the charged offense, nor does he argue that the complaint is missing any facts that would have affected the severity of his sentence. Thus, the circuit court could properly look to the facts in

the complaint to determine the existence of the factual basis. *See* ***Thomas***, 232 Wis. 2d 714, ¶21.

¶24 To prove that a harassment injunction issued under WIS. STAT. § 813.125(4) was violated, the State had to prove: (1) an injunction was issued against Jordan in favor of another individual; (2) Jordan committed an act that violated the terms of the injunction; and (3) Jordan knew that the injunction had been entered and that his act violated its terms. *See* WIS. STAT. § 813.125(7); WIS JI—CRIMINAL 2040. The complaint alleged that J.H. has an active restraining order against Jordan, that Jordan, who was at the same bar as J.H., made eye contact with J.H. and got within five feet of J.H. three times, that Jordan was in violation of the restraining order, and that Jordan knew that J.H. had taken out a retraining order against him. The complaint thus shows that each element of the offense is met.

¶25 In summary, Jordan has failed to show that the circuit court was clearly erroneous in determining that a factual basis exists. Accordingly, I affirm the court's denial of his motion to withdraw his plea.

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

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