COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP511-CR **Cir. Ct. No. 2007CF934**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD E. CHERNOTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Donald E. Chernota has appealed from a judgment convicting him of one count of homicide by negligent operation of a motor vehicle

in violation of WIS. STAT. § 940.10(1) (2007-08).[1] Judgment was entered pursuant to Chernota's ***Alford*** plea.[2] Chernota has also appealed from an order denying his motion to withdraw his ***Alford*** plea. We affirm the judgment and order.

¶2 Withdrawal of a plea after sentencing is allowed only when necessary to correct a manifest injustice. ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708. A trial court's failure to establish a sufficient factual basis that the defendant committed the offense constitutes a manifest injustice. ***Id.*** Determining whether a sufficient factual basis exists lies within the discretion of the trial court. ***Id.*** Its determination will not be overturned unless it is clearly erroneous. ***Id.***

¶3 A sufficient factual basis for an ***Alford*** plea exists only if there is strong proof of guilt that the defendant committed the crime to which he is pleading. ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). Strong proof of guilt is required because the evidence must be strong enough to overcome the defendant's "protestations" of innocence. ***Id.*** at 27. Although strong proof of guilt is less than proof beyond a reasonable doubt, it is greater than what is needed to meet the factual basis requirement for a guilty plea. ***Id.*** However, a factual basis for a plea exists in an ***Alford*** situation if an inculpatory inference can be drawn from the evidence, even if an exculpatory inference could also be drawn. ***State v. Spears***, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988).

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[1] All references to the Wisconsin Statutes are to the 2007-08 version.

[2] An ***Alford*** plea is derived from ***North Carolina v. Alford***, 400 U.S. 25 (1970). It allows a defendant to enter a guilty or no contest plea while maintaining his innocence or refraining from admitting having committed the crime. ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995); ***State v. Spears***, 147 Wis. 2d 429, 433, 433 N.W.2d 595 (Ct. App. 1988).

¶4 Chernota was convicted of causing the death of another person by the negligent operation or handling of a motor vehicle. *See* WIS. STAT. § 940.10(1). "Criminal negligence" requires: (1) that the defendant's operation of a motor vehicle created a risk of death or great bodily harm, (2) that the risk of death or great bodily harm was unreasonable and substantial, and (3) that the defendant should have been aware that his operation of the vehicle created the unreasonable and substantial risk of death or great bodily harm. WIS JI—CRIMINAL 1170 (2009).

¶5 Chernota was convicted of negligently causing the death of a pedestrian, Burton Kintzler, by striking Kintzler with his minivan while driving through a parking lot in the early morning hours of July 13, 2007. Chernota does not dispute that his operation of his minivan created a risk of death or great bodily harm, or that the risk was unreasonable and substantial. However, he contends that nothing in the record provides a factual basis for concluding that he should have been aware that his operation of the minivan created the unreasonable and substantial risk of death or great bodily harm.

¶6 In making this argument, Chernota appears to contend that, to be criminally negligent, he had to be subjectively aware of the risk his conduct created.[3] However, this is not the law. Although criminal recklessness requires that the actor be subjectively aware of the risk, criminal negligence requires only that the actor should have been aware of the risk, which is an objective standard.

[3] Chernota contends that the record does not establish that he was, in fact, aware at the time he was driving that his conduct created a risk of death. He relies on his statement, made through his attorney, indicating that he had no memory of the incident itself. He also points out that nothing in the record establishes that he had been drinking alcohol on the day of the incident, or taking or abusing medication.

State v. Richard Knutson, Inc., 196 Wis. 2d 86, 110, 537 N.W.2d 420 (Ct. App. 1995).

¶7 The trial court properly rejected Chernota's postconviction argument that there was no factual basis for finding that he should have been aware that his operation of his minivan created an unreasonable and substantial risk of death or great bodily harm. At the plea hearing, the parties agreed that the trial court could rely upon the complaint and the preliminary hearing transcript as the factual basis for Chernota's plea.[4] Based upon this material, there was strong proof that Chernota should have been aware that his driving created an unreasonable and substantial risk of death or great bodily harm.

¶8 The complaint set forth statements by two witnesses to the accident, and information from the police officers who responded to the scene of the accident. One of the responding officers, who was also a traffic investigator, testified at the preliminary hearing, and stated that he had reviewed videotape of the incident that was recorded by a security camera in the parking lot. The complaint and preliminary hearing testimony indicated that Chernota accelerated after entering the parking lot, traveling through the parking lot at twenty-five to thirty miles per hour before striking Kintzler as he walked across the parking lot. Statements indicated that the minivan did not brake before striking Kintzler and that, upon striking him and throwing him into the air and onto the hood, the minivan kept going, striking first a Jeep Cherokee that was parked in the lot, and

[4] At the plea hearing, Chernota's counsel agreed that the trial court could rely upon the complaint and the transcript of the preliminary hearing as the factual basis for the plea. A defendant need not personally admit to the factual basis for a plea in his own words. ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. A factual basis can be established when defense counsel stipulates on the record to the facts in the criminal complaint. ***Id.***, ¶21.

then a parked Oldsmobile Cutlass. Kintzler was pinned between the minivan and the Oldsmobile Cutlass, and died of his injuries.

¶9 The evidence as to Chernota's speed, acceleration, and lack of braking, combined with the evidence that he continued traveling and struck two vehicles after striking Kintzler, constituted strong evidence that he should have been aware that his operation of his vehicle created an unreasonable and substantial risk of death or great bodily harm. A factual basis therefore existed for his ***Alford*** plea, and the trial court properly denied 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)5.