COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1061-CR

Cir. Ct. No. 00 CF 4336

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE M. KENDRICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Willie M. Kendricks appeals from an amended judgment of conviction for first-degree sexual assault while armed with a

dangerous weapon and aggravated battery, following his ***Alford*** pleas.[1] He also appeals from orders denying his motion to withdraw his pleas and denying his motion to vacate that order. Kendricks argues that: (1) the trial court erred in denying his motion to withdraw his ***Alford*** pleas; and (2) his due process rights were violated when the motion to vacate his pleas was decided by a different judge than the one who accepted his pleas. We affirm.

I. BACKGROUND

¶2 According to the complaint, on August 25, 2000, at approximately 1:00 a.m., Kendricks approached a female acquaintance who was walking down the street alone. He asked her if she would have sex with him. She replied, "No." Kendricks hit her a number of times with a board, dragged her through an alley into a yard, tied her up and sexually assaulted her. According to the complaint, Milwaukee police officers found the victim "lying on the grass … naked from the waist down [with] blood on the top of her head and a black strap … tied around her left wrist" with Kendricks beside her "on his knees attempting to put on a pair of jeans." Kendricks was arrested and charged with first-degree sexual assault while armed with a dangerous weapon and aggravated battery, contrary to WIS. STAT. §§ 940.225(1)(b) and 940.19(5) (1999-2000).[2] On May 1, 2001, when the State sought leave of the court to file an amended information to add a second count of first-degree sexual assault while armed and a charge of kidnapping, Kendricks entered ***Alford*** pleas to the two original charges and the State withdrew its motion to amend.

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[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

¶3 Judge Kitty K. Brennan presided over the plea hearing. During the plea colloquy, she explained the purpose of ***Alford*** pleas and questioned Kendricks' competency and understanding of the pleas. She then accepted the pleas and set a date for sentencing. Due to judicial rotation, Judge M. Joseph Donald presided over Kendricks' sentencing hearing.

¶4 After sentencing, Kendricks filed a motion to withdraw his pleas, contending that he did not understand the plea proceedings. Judge Donald denied the motion to withdraw, concluding that the colloquy at the plea hearing established that Kendricks "knowingly, intelligently and voluntarily entered a valid plea to the offenses for which he was convicted." Kendricks subsequently filed a motion to vacate the order denying his motion to withdraw his pleas. He contended that because Judge Donald had not presided over the plea hearing, he should not have handled the postconviction motion. Kendricks maintained that "the original trial judge who personally addressed the defendant should be the one who considers whether or not the plea should be withdrawn."

II. DISCUSSION

¶5 Kendricks argues that the trial court erred in denying his motion to withdraw his ***Alford*** pleas. We disagree.

¶6 A post-sentencing motion for plea withdrawal is addressed to the discretion of the trial court and we will not disturb the trial court's decision absent an erroneous exercise of discretion. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). On a challenge to the trial court's denial of a motion to withdraw, we look at the totality of the circumstances and review the entire record. ***State v. Thomas***, 2000 WI 13, ¶¶23-24, 232 Wis. 2d 714, 605 N.W.2d 836. To withdraw a plea, post-sentencing, a defendant "carries the heavy burden

of establishing, by clear and convincing evidence, that the trial court should [have] permit[ed] [him or her] to withdraw the plea to correct a 'manifest injustice.'" ***Id.*** at ¶16 (citation omitted). A plea is manifestly unjust if it is not knowingly, voluntarily or intelligently entered. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). To prove that withdrawal of the plea is necessary, the defendant must first make a prima facie showing that his or her constitutional or statutory rights were denied. ***State v. Van Camp***, 213 Wis. 2d 131, 140-41, 569 N.W.2d 577 (1997). The defendant must then allege lack of knowledge of the constitutional or statutory rights. ***Id.*** at 141. If the defendant satisfies these criteria, the burden shifts to the State to show by clear and convincing evidence that the plea complied with the statutory and constitutional guidelines. ***Id.***

¶7 Kendricks offers extensive arguments in support of his plea withdrawal request. Ultimately, however, they reduce to an assertion that he did not know that an ***Alford*** plea would result in a finding of guilt while he maintained his innocence. The record, however, conclusively establishes that Kendricks understood that he would be found guilty and convicted if he entered ***Alford*** pleas and that his pleas were entered knowingly and voluntarily.

¶8 At the ***Alford*** plea hearing, defense counsel advised the court that he had "explained to [Kendricks] his options." Counsel told the court that he and Kendricks "[had] discussed all four of the pleas that [were] available to him—guilty, not guilty, ***Alford***, no contest, the differences in the pleas, what their effects would be." The court then determined that Kendricks: (1) was mentally prepared to enter his pleas; (2) understood what his choices were; (3) was aware of the charges filed against him; and (4) was satisfied with his lawyer. Following WIS.

STAT. § 971.08,[3] the court advised Kendricks of the nature of the charges and the potential punishment for the convictions, and determined whether Kendricks voluntarily entered his pleas:

> THE COURT: What is your plea to these charges?
>
> DEFENDANT: ***Alford*** plea.
>
> THE COURT: Okay. Now, the ***Alford*** plea is a particular kind of plea. I can accept that plea, but I don't have to, so I have to ask you a couple questions that show me what you mean by that, okay? Do you understand?
>
> DEFENDANT: Yeah.
>
> THE COURT: All right. First of all, an ***Alford*** plea is a kind of plea where you're telling me, I didn't do it, Judge, but I want to enter a plea and wrap this up.
>
> Is that what you mean to be telling me?
>
> DEFENDANT: Yes.
>
> ….
>
> THE COURT: Okay. Do you believe the State has evidence—substantial evidence—that would convince a jury that you did both Counts 1 and 2?
>
> ….
>
> DEFENDANT: Yeah.

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[3] WISCONSIN STAT. §971.08 provides:

> **Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of guilty or no contest, it shall do the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

> THE COURT: And the other reason for doing this kind of plea is that you want to enter this kind of plea, take advantage of the offer that the district attorney is making. In this case they're making an offer for much less prison exposure than the amended information would give you. I think your lawyer correctly stated it would be a 195 years maximum exposure if they went ahead with the amended information. It's 75 years maximum with this information.
>
> Do you understand that?
>
> DEFENDANT: Yeah.
>
> THE COURT: So is it true for you that you're doing this to take advantage of the plea offer from the State?
>
> DEFENDANT: Yeah.
>
> THE COURT: Okay. Have you had enough time to think about this decision?
>
> DEFENDANT: Yeah, I have had time.
>
> THE COURT: Do you need any more time with your lawyer before we go further with the plea?
>
> DEFENDANT: No.

¶9 The court advised Kendricks of the rights that he was giving up with the entry of his pleas, determined that he understood, and ruled:

> I will accept these ***Alford*** pleas. I do believe they're being offered for the permissible purpose of an ***Alford*** plea. I do believe that the defendant understands what he is doing. I've reviewed again today the … competence report that was filed in this case … and although the defendant is clearly not happy about things this morning, and his affect is somewhat depressed, it is clear to me that his answers to my questions reveal that this is his choice. He understands his options. He's had able counsel … which he's satisfied with. I know [defense counsel] has reviewed the reports and complaints with him, and I am satisfied that the plea is free, knowing and voluntary.

¶10 The record also establishes the factual basis for Kendricks' ***Alford*** pleas. In ***State v. Smith***, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), the supreme

court explained, "When the plea entered is an ***Alford*** plea, the factual basis is deemed sufficient only if there is strong proof of guilt that the defendant committed the crime to which the defendant pleads." ***Id.*** at 25. Thus, "a trial court is required to find a sufficient factual basis, *i.e.*, strong evidence of guilt, in order to conclude that the defendant committed the crime to which he or she is entering the plea." ***Id.*** at 26. "The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." ***Id.*** at 25.

¶11 At the preliminary hearing, the victim described the assault and identified Kendricks as her assailant. In the complaint, a Milwaukee police detective reported that Kendricks was found kneeling beside the victim attempting to put on his pants when the police arrived at the scene. At the plea hearing, the parties stipulated to the criminal complaint, which plainly establishes "strong evidence of guilt," as the factual basis for Kendricks' pleas. Thus, the trial court concluded, "I find a factual basis stated in the criminal complaint, and, accordingly … I find [Kendricks] guilty…."

¶12 Clearly, the record establishes that Kendricks understood the charges and the potential punishment upon conviction. *See* WIS. STAT. § 971.08(1)(a). The record also establishes that Kendricks knowingly, voluntarily and intelligently entered his pleas. *See* ***Giebel***, 198 Wis. 2d at 212-14. Kendricks knew that upon entering his ***Alford*** pleas, he would be found guilty and convicted, even though he maintained his innocence.

¶13 Kendricks nevertheless argues that the trial court erred in denying his motion to withdraw his pleas because it was not established at the plea hearing whether his ***Alford*** pleas were "guilty" or "no contest." We disagree. While he

may be correct in arguing that the plea colloquy did not clarify which type of pleas he was entering; the plea questionnaire he signed unequivocally establishes that they were ***Alford*** "guilty" pleas. The plea questionnaire identified the charges first-degree sexual assault while armed with a dangerous weapon and aggravated battery. Following each charge were two check-off boxes for "guilty" or "no contest." Kendricks checked the "guilty" box next to each charge and "Alford" was handwritten next to each checked "guilty" box. Thus, although the words spoken at the plea colloquy, standing alone, do not clarify whether Kendricks' ***Alford*** pleas were "guilty" or "no contest," the full record clearly confirms that they were ***Alford*** "guilty" pleas. Consequently, we conclude that the postconviction court properly denied Kendricks' motion to withdraw his ***Alford*** pleas.

¶14 Kendricks argues that his "constitutional due process requirements of decency and fairness" were violated because Judge Donald, rather than Judge Brennan, decided his motion to withdraw his pleas. We are not persuaded.

¶15 Relying on WIS. STAT. § 971.08 and ***State v. Rivest***, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982), Kendricks contends that "only the trial judge who took the original plea[s] and who personally addressed the defendant when taking the plea[s] should be the judge who considers whether or not defendant's plea[s] should be withdrawn." We disagree. Nothing in the statute or in ***Rivest*** supports Kendricks' argument. WISCONSIN STAT. § 971.08 addresses the effect of a plea that has been withdrawn but it does not outline the procedure to be followed on a motion to withdraw a plea. Further, while ***Rivest*** reasonably observes that "the same judge who accepted the plea, [should hear the motion] *whenever possible*," ***id.*** at 414 (emphasis added), it does not support Kendricks' argument that the same judge *must* do so regardless of judicial rotation.

¶16 Milwaukee County Circuit Court Rule 428 provides:

> 428. ASSIGNMENT OF POST-CONVICTION MOTIONS
>
> ….
>
> (A) If the judge who presided over the trial and/or sentencing of a defendant is assigned to a felony calendar at the time a motion is filed, the motion shall be assigned to that judge….
>
> (B) If the trial and/or sentencing judge is not presently assigned to a felony calendar, the motion or petition shall be assigned to the Motion Calendar Judge, a position which will rotate every two weeks among the judges in the felony division.

Consistent with Rule 428, Kendricks' postconviction motion was properly assigned to Judge Donald because he had presided over Kendricks' sentencing and he was assigned to the felony calendar when the motion was filed, while Judge Brennan had rotated to a civil calendar. Accordingly, we conclude Kendricks' due process rights were not violated when Judge Donald decided his postconviction motion.

By the Court.—Judgment and orders affirmed.

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