COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1996

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, STATS.

NOTICE

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No. 95-1387-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMAL PURIFOY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

WEDEMEYER, P.J. Jamal Purifoy appeals from a judgment of conviction entered after he pled no contest to one count of attempted first-degree intentional homicide, while using a dangerous weapon, as party to a crime and one count of first-degree reckless homicide, while using a dangerous weapon, as party to a crime, contrary to §§ 940.01(1), 940.02(1), 939.63, 939.32, and 939.05, STATS. He also appeals from an order denying his postconviction

motion, which sought plea withdrawal. Purifoy claims the trial court erred in denying his motion to withdraw his plea because: (1) it failed to ascertain an adequate factual basis for accepting the plea; and (2) it denied the motion without holding an evidentiary hearing. Because there was an adequate factual basis for accepting Purifoy's plea, and because it was not error to deny the motion without holding an evidentiary hearing, we affirm.

I. BACKGROUND

In the early morning hours of July 10, 1993, Purifoy and a companion, Alonzo Peavy, entered a Milwaukee tavern and got into a confrontation with a bouncer. The bouncer was shot four times, but survived. The tavern owner was shot once and died from the wound. Purifoy and Peavy were both charged. Peavy went to trial and was found guilty. On the date for Purifoy's trial, he entered a no contest plea. The trial court accepted the plea and judgment was entered.

After sentencing, Purifoy filed a motion to withdraw his plea, alleging that a manifest injustice had occurred. The trial court denied the motion without holding a hearing. Purifoy now appeals.

II. DISCUSSION

A. Factual Basis for Plea.

Purifoy contends that there was an insufficient factual basis to accept his no contest plea and that this constituted a manifest injustice requiring the trial court to grant his motion for plea withdrawal. We reject this contention.

After sentencing, the trial court should only grant a motion for plea withdrawal if it is necessary to correct a manifest injustice. ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). Generally, we review this issue under the erroneous exercise of discretion

standard. ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App.), *cert. denied*, 115 S. Ct. 167 (1994).

Here, Purifoy claims the trial court accepted his plea without an adequate factual basis to support it. The record belies this assertion. The transcript from the plea hearing demonstrates that the prosecutor recited an adequate factual basis to allow the trial court's finding that Purifoy committed the crimes charged. The trial court based its finding on this recitation plus its own recollection of the facts of the case, which were still fresh in its mind because it recently presided over Peavy's trial. Moreover, Purifoy, through counsel, did indicate that he had no disagreement with the prosecutor's recitation of the facts and Purifoy personally acknowledged to the trial court that he was not disputing that the State had sufficient evidence to prove he was guilty of each of the crimes charged.

Accordingly, because the record provides an adequate factual basis for the trial court's finding that there was sufficient basis to support the no contest plea, we reject Purifoy's claim.

B. Evidentiary Hearing.

Purifoy also claims that the trial court erred in denying his motion for plea withdrawal without conducting an evidentiary hearing. We disagree. A defendant is not entitled to an evidentiary hearing on a motion for plea withdrawal, as a matter of right. ***Washington***, 176 Wis.2d at 214-15, 500 N.W.2d at 335-36.

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 215, 500 N.W.2d at 336.

After reviewing Purifoy's motion to withdraw his plea, we agree that he alleged only conclusory allegations and failed to allege sufficient facts to require a hearing. Purifoy's motion essentially asserts three allegations: (1) that his learning disability affected his ability to understand the proceedings; (2) that he repeatedly asserted his innocence and that he disagreed with some things that his lawyer said; and (3) that he offered a factual basis inconsistent with the intent element. Each assertion presents only a conclusory allegation.

First, he does not allege with any specificity what he did not understand. The mere allegation that a learning disability affected his ability to understand is insufficient. Second, he does not allege specifically what the disagreements were, or how the disagreements would have impacted on the case. His final claim also fails to allege any specific facts to raise a question of fact. Purifoy claims that he presented a factual scenario indicating that he was not guilty with respect to the intent element of the crime charged. He fails to allege, however, how this claim made his plea an involuntary or uninformed one. In addition, the record clearly demonstrates that after the prosecutor recited a factual basis for the plea, Purifoy acknowledged those facts. Accordingly, we conclude that Purifoy failed to allege sufficient facts in his motion to require an evidentiary hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). Denying Purifoy's postconviction motion to withdraw his guilty plea, the trial court stated that "the defendant recognized that even though his version of the facts may have varied, the State nevertheless had enough evidence to obtain a conviction." So what? This was not an ***Alford*** plea.

In its brief to this court, the State argues that "this court should reject [Purifoy's] assertion ... that an insufficient factual basis was established to overcome [his] initial testimony at the plea hearing that might be construed as a claim of self-defense.... [T]he prosecutor's recitation of facts did negate such a claim." So what? This was not an ***Alford*** plea.

The majority affirms, writing "that the prosecutor recited an adequate factual basis to allow the trial court's finding that Purifoy committed the crimes charged.... [A]nd Purifoy personally acknowledged to the trial court that he was not disputing that the State had sufficient evidence to prove he was guilty of each of the crimes charged." Majority slip op. at 3-4. So what? This was not an ***Alford*** plea.

As this court reiterated recently, before accepting a plea, a court must "'personally determine that the *conduct which the defendant admits* constitutes the offense.'" ***State v. Harrington***, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994) (emphasis added; quoting ***Broadie v. State***, 68 Wis.2d 420, 423, 228 N.W.2d 687, 689 (1975)). Further, "the 'failure of the trial court to establish a factual basis showing that the *conduct which the defendant admits* constitutes the offense ... to which the defendant pleads, is evidence that a manifest injustice has occurred,' warranting withdrawal of the plea." ***Id.*** (ellipsis in ***Harrington***; emphasis added). As Purifoy correctly argues on appeal, "[n]owhere does the record disclose Purifoy's adoption, either express or implied, of the facts which the District Attorney indicated it would prove should the case go to trial."

Remarkably, in an apparently desperate effort to preserve this conviction, the State argues that a no contest plea is the "functional equivalent" of an ***Alford*** plea. The State offers no authority to support this novel proposition and, indeed, no such authority exists.

Just as remarkably, the majority has abandoned an accurate reading of the record—indeed, the very reading made by this court only a few months ago. Rejecting the no-merit report filed in this case, this court declared:

> Here, Purifoy acknowledged that he understood the elements of the offenses and wished to plead no contest, but his version of the incident is inconsistent with intent to kill Jackson. He alleged self-defense in the Jackson shooting and denied any knowledge of, or involvement in, the shooting of Tina Terry, other than an admission that she was shot with a gun that he first produced during the altercation with Jackson. Thus, we are confronted with a "learning disabled" defendant entering a non-***Alford*** plea to complex charges despite continuing protestations of innocence.

State v. Jamal Purifoy, 94-1666-CR-NM, unpublished order at 4 (Wis. Ct. App. Dec. 2, 1994). This court's assessment was correct. Rejecting the no-merit report this court also explained that "[a]nother plea should not be converted into an ***Alford*** plea without an express, unequivocal decision to that effect on the part of the defendant." ***Id.*** at 3. Inexplicably, the majority has done so.

The record establishes that Purifoy never admitted conduct constituting the offenses for which he was attempting to plead no contest. Thus, the record confirms Purifoy's argument that a manifest injustice has occurred and, therefore, Purifoy is entitled to withdraw his pleas. ***Harrington***, 181 Wis.2d at 989, 512 N.W.2d at 263. Accordingly, I respectfully dissent.