COURT OF APPEALS DECISION DATED AND RELEASED

May 7, 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

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

No. 95-2525-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CALVIN MATTHEW,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Reversed and cause remanded for an evidentiary hearing on the postconviction motion*.

Before Sullivan, Fine and Schudson, JJ.

SULLIVAN, J. The State of Wisconsin, the respondent to this appeal, moves the court for an order reversing that portion of the trial court's order denying, without an evidentiary hearing, appellant Calvin Matthew's postconviction motion to withdraw his ***Alford*** plea. In support of the motion, the State explains that it believes the trial court erred in deciding not to hold an evidentiary hearing on the postconviction motion. The State requests that this case be remanded for an evidentiary hearing to resolve the merits of Matthew's

claim of ineffective assistance of trial counsel and any other issues regarding the adequacy of Matthew's ***Alford*** plea.[1] Matthew joins the request.

On January 9, 1995, Matthew entered an ***Alford*** plea to one count of first-degree reckless injury. During the plea colloquy, the circuit court did not explain the elements of the offense to Matthew or otherwise ascertain that Matthew possessed accurate information about the nature of the charge. *See* ***State v. Bangert***, 131 Wis.2d 246, 267, 389 N.W.2d 12, 23 (1986).[2] Similarly, the trial court did not make an adequate record of the "strong proof of guilt" required to accept an ***Alford*** plea. ***State v. Garcia***, 192 Wis.2d 845, 859-60, 532 N.W.2d 111, 116-17 (1995) (a court can accept an ***Alford*** plea where, despite a defendant's claim of innocence, the trial court concludes that the evidence the State is prepared to offer constitutes strong proof of guilt).

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[1] Matthew appeals from both a judgment of conviction and the order denying postconviction relief. This decision reverses only the order and remands for further proceedings.

[2] In ***Bangert***, the supreme court ruled that the trial court must determine whether a defendant understands the nature of the charge at the plea hearing by "following anyone or a combination of the following methods." ***State v. Bangert***, 131 Wis.2d 246, 267, 389 N.W.2d 12, 23 (1986).

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, *see*, WIS J I—CRIMINAL SM 32, PART IV (1985), or from the applicable statute. *See*, *e.g.*, ***Cechini***, 134 Wis.2d at 213. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charges established prior to the plea hearing. For example, when a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading. A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge.

Id., 131 Wis.2d at 268, 389 N.W.2d at 23-24. The supreme court noted that this was not an exhaustive list of the methods by which the trial judge may determine the defendant's understanding of the nature of the charges. ***Id***. at 268, 389 N.W.2d at 24.

We agree with the State that because the plea record itself does not rebut Matthew's postconviction claim that his plea was not knowingly and voluntarily made, the trial court must hold an evidentiary hearing. *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993) (the trial court must hold an evidentiary hearing where a postconviction motion to withdraw a plea after judgment alleges facts which, if true, would entitle the defendant to relief).

By the Court.—Order reversed and cause remanded for an evidentiary hearing on the postconviction motion.

Publication in the official reports is not recommended.

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FINE, J. (*dissenting*). The majority reverses because in its view the plea hearing record did not rebut Calvin Matthew's claim that his plea was not knowing and voluntary. Majority op. at 3. I respectfully disagree.

The majority contends that "[d]uring the plea colloquy, the circuit court did not explain the elements of the offense to Matthew or otherwise ascertain that Matthew possessed accurate information about the nature of the charge." Majority op. at 2. Additionally, the majority concludes that the trial court did not "make an adequate record of the `strong proof of guilt' required to accept an ***Alford*** plea." Majority op. at 2–3. Neither conclusion is supported by the record.

The trial court explained to Matthew that he was charged with "first degree reckless injury" for, as phrased by the trial court, "caus[ing] great bodily harm to another human being, Larry Kaiser, under circumstances which show utter disregard for human life." In response to the trial court's question, Matthew said that he understood the charge. Moreover, the parties stipulated to the facts alleged in the criminal complaint as a factual basis for the plea, and the trial court recited those facts in open court:

> I've reviewed the complaint. It describes an incident which occurred on October 7th of 1994 at 2624 W. Lisbon Avenue in Milwaukee where the defendant stabbed the victim, Larry Kaiser, in the arm in the midst of a dispute with a third person, Elana McGee, over food stamps apparently.

The trial court asked both the prosecutor and Matthew's lawyer whether its recitation was "a correct summary of the facts in this case." Both responded "yes."

Matthew told the trial court that he understood what an ***Alford*** plea was. The trial court explained it nevertheless:

> That means that you're maintaining your innocence but you wish to enter this guilty plea or no contest plea. In other words, not to contest the charges against you in exchange for the plea agreement in this case which calls for the State not to make a specific recommendation as to the sentence.

Matthew said that he understood. The trial court then ascertained that Matthew knew the maximum potential penalties, and in response to the trial court's questions, Matthew told the trial court that he was fifty-two, that he completed the twelfth grade, that he had never "been treated for any kind of mental health problem," that he was not currently taking any medication, and that he was not under the influence "of any alcohol or drugs today." Matthew also responded "no" to the trial court's question whether any person had "made any threats or promises to get [Matthew] to plead guilty pursuant to the Alford decision." Further, Matthew told the trial court that he had signed the guilty plea questionnaire, went over the questionnaire with his lawyer, and that he had no questions about it. The trial court also explained fully to Matthew the constitutional rights that he was giving up, and ascertained that Matthew wished to "waive those rights and proceed with the Alford plea at this time."

In my view, the record amply supports the trial court's conclusion that Matthew's plea was knowing and voluntary. Accordingly, no post-conviction hearing was necessary. I would affirm.