STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1771

State of Minnesota,
Respondent,

vs.

Mark Alan Peterson,
Appellant.

Filed October 16, 2017
Affirmed
Kirk, Judge

Polk County District Court
File No. 60-CR-14-731

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

Appellant asks the court to vacate his *Alford* plea to fourth-degree controlled-substance crime, arguing that (1) the district court erred in accepting his plea because it

was inaccurate and invalid; and (2) the district court abused its discretion in denying his presentence motions to withdraw his plea. We affirm.

FACTS

On April 22, 2014, law enforcement officers responded to reports of drug dealing in a truck in the Crookston Public Library parking lot. Officers located the suspect truck in the parking lot with three individuals inside. The driver was appellant Mark Alan Peterson, and the passengers were appellant's cousin D.S. and appellant's now-girlfriend V.Y. Appellant went inside the library, and officers made contact with D.S. and V.Y.

Appellant, D.S., and V.Y. came from a friend's house and had also been at a bar earlier that day. In speaking with law enforcement, V.Y. initially denied any drug dealing. But then she said that appellant had crushed and snorted pills earlier that day and that while they were sitting in the truck appellant gave D.S. a little white pill from a pill bottle in his pocket. V.Y. explained that D.S. took the pill, crushed it and snorted it, but did not pay appellant. V.Y. said that appellant did not give her any pills. In a later November 2015 statement, V.Y. said she could not remember what happened.

D.S. left the scene by bike but gave a recorded statement to law enforcement the next day. D.S. admitted that appellant gave him a white pill and that he ingested it. D.S. refused to give a urine sample to confirm controlled-substance use.

Appellant also spoke with law enforcement at the scene and provided inconsistent statements about what happened. Appellant initially denied drug dealing. Appellant said that he was on probation and that he had not consumed alcohol or taken controlled

substances. Appellant informed the officer that he had a prescription pill bottle with him, which was for ten 325 milligram (mg) hydrocodone-acetaminophen pills and said that he takes his pills as prescribed. There were nine full pills and four half-pills in the pill bottle, which was the equivalent of twelve 325 mg hydrocodone-acetaminophen pills. Appellant explained that he has many prescriptions and often combines leftover pills into one bottle. Appellant said that he may have given D.S. one of his pills because D.S. was complaining about back pain, but also said that he could not remember. When the officer asked appellant if he gave D.S. a pill for his back pain, appellant acknowledged that he had done so. But then, appellant again denied giving or selling D.S. a pill and said that D.S. may have taken a pill himself. He also said that the pill bottle was in the ashtray of his truck all day, and D.S. could have taken a pill without him knowing.

In another statement given at the scene, appellant said that D.S. took a pill from the bottle in appellant's ashtray for his back pain and swallowed it before appellant could stop him or try to stop him. Appellant reiterated that he was on probation and that it was illegal to give someone else his pills, but also said again that he could not remember what happened. When the officer pressed appellant to be honest and asked him if he had helped D.S. with his pain by giving him a pill, appellant agreed that was "pretty much" what had happened.

At the April 2016 plea hearing, the parties proposed an *Alford*-plea agreement. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970) (holding that a defendant may plead guilty, while maintaining his innocence, to take advantage of a plea

bargain if the defendant agrees that there is sufficient evidence for a jury to find him guilty at trial). The parties agreed that sentencing would be decided by the court at a later date, after hearing arguments from both parties. Based on appellant's criminal-history score and custody status, if convicted of a fourth-degree controlled-substance crime, he faced a presumptive prison commitment of 33 months and possible career-offender status.[1] The plea agreement provided that the state would not seek an aggravated sentence based on career-offender status, would not seek more than a 30-month prison sentence to run concurrent with appellant's parole, and that if the court ordered probation, the state would recommend five years instead of ten. Appellant's probation agent also agreed not to pursue a parole violation if appellant pleaded guilty. The agreement also provided that both parties could be heard at sentencing regarding a possible downward dispositional or durational departure, but that ultimately the court would decide whether appellant received probation, or went to jail or prison, and for how long.

The court accepted appellant's *Alford* plea, finding it to be knowing, intelligent, and voluntary. Following appellant's plea, but prior to sentencing, appellant twice moved the court to withdraw his plea, and the court twice denied his request. The court sentenced appellant to 29 months in prison in August 2016. This appeal follows.

[1] If he had been sentenced as a career offender, appellant could have faced an aggravated durational departure from the presumptive sentence up to the statutory maximum. Minn. Stat. § 609.1095, subd. 4 (2012); Minn. Sent. Guidelines II.D.3.b.(9) (2013). But the prosecutor indicated at the plea hearing that if the court concluded that he was a career offender, it could sentence him up to double the presumptive sentence, which here would have been 66 months. Instead, the state agreed not to seek career-offender status as part of the agreement.

D E C I S I O N

I. The district court did not err in finding that appellant's *Alford* plea was accurate and valid.

Appellant asks this court to vacate his conviction and allow him to stand trial because his *Alford* plea was inaccurate and invalid. Appellant does not claim that his plea was involuntary or unintelligent. Appellant argues that the district court erred in accepting his *Alford* plea because appellant did not clearly agree that there was a strong probability that he would be convicted at trial based on the state's expected evidence. Appellant also contends that he never agreed that V.Y. and D.S. would testify in accordance with their prior statements and that he only reluctantly agreed that a jury could find him guilty if they believed the evidence against him.

Whether a plea is valid presents a question of law that this court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). At any time, "the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent, and thus the plea may be withdrawn." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). To be accurate, a plea must be established on a proper factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

"[C]areful scrutiny of the factual basis for the plea is necessary within the context of an *Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence." *State v. Theis*, 742 N.W.2d 643, 648-49 (Minn. 2007). "[T]he court must be

able to determine that the defendant, despite maintaining his innocence, agrees that evidence the [s]tate is likely to offer at trial is sufficient to convict." *Id.* at 649. The preferred practice is to discuss the factual basis with the defendant on the record and for the defendant to acknowledge "that the evidence the [s]tate would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty of the offense to which he is pleading guilty." *Id.* An *Alford* plea may be accepted when the state offers "a strong factual basis for the plea and the defendant clearly expresse[s] his desire to enter the plea based on his belief that the [s]tate's evidence would be sufficient to convict him" at a trial. *Id.* at 647.

Based on our thorough review of the record, in particular the April 2016 plea hearing, we conclude that the district court did not err in finding that appellant's *Alford* plea was accurate and supported by a proper factual basis. Before accepting appellant's plea, the court and state explained the *Alford*-plea process, appellant's rights, and the proposed terms of the plea agreement, and appellant received additional time to discuss his options with standby counsel. Appellant said that he had entered *Alford* pleas before, and that he understood that if he wanted to proceed he would have to agree that the jury may find him guilty on the evidence and that there was enough evidence to convict him.

In establishing a factual basis for appellant's plea, the state said it would call the reporting officers, as well as V.Y. and D.S., to testify at a trial. Appellant agreed that V.Y. told law enforcement on the date of the offense that she saw appellant give D.S. a pill and saw D.S. take it. Appellant made counterarguments but ultimately acknowledged that if

V.Y. testified consistently with her prior statement that the jury would receive that evidence at trial. Appellant also agreed that if D.S. testified consistently with his prior statement, that D.S. would testify that appellant gave him a white pill, and that D.S. took the pill, which was hydrocodone. Appellant initially said that a white pill did not necessarily mean it was hydrocodone but then agreed that was what D.S. said. Thus, appellant acknowledged the anticipated evidence of the state at a trial.

Appellant indicated that he read the complaint and reviewed all of the evidence against him, including the police reports and the audio and video recordings. Appellant admitted telling the officer that he gave the hydrocodone pill to D.S. Appellant also conceded that he gave inconsistent statements to law enforcement and that the state would point out the inconsistencies at trial. Appellant acknowledged that if a jury concluded that there was sufficient evidence that he gave D.S. a hydrocodone pill, it would also conclude that he did so illegally. The court also accepted discovery evidence to support the factual basis for appellant's plea.

Appellant did not initially respond when the state asked if he believed that there was a substantial likelihood that the jury could conclude that he gave a hydrocodone pill to D.S. based on the evidence against him. The state clarified that it was not asking if appellant believed the evidence, but if he thought that a jury could conclude beyond a reasonable doubt that he gave D.S. the pill. Appellant then responded: "Yeah, yeah, . . . I'd say that some jurors might . . . find somebody guilty on that evidence." Appellant said that there

was "a lot of gray" but that "if [the jurors] believed that evidence, I do believe they would convict me."

Throughout the plea hearing, appellant questioned his decision to take the plea agreement and weighed his options. Ultimately, appellant acknowledged that it was a "fair" and "pretty gracious . . . offer," and noted that the case was putting a lot of strain on him; and even though he thought he had "as good a chance of winning as losing," that his counsel, girlfriend, and probation officer all thought he should proceed, and that it was probably in his "best interests to take the plea." When the court asked if appellant wanted to proceed and take advantage of the plea agreement, he replied, "yup."

The court accepted appellant's *Alford* plea and found that there was sufficient evidence for a guilty jury verdict based on the record facts and discovery evidence submitted. The court also acknowledged that it was not an easy decision for appellant to take the plea but that his plea was voluntary, knowing, and intelligent.

We conclude that the record shows that appellant's *Alford* plea was accurate and supported by sufficient evidence, as the district court determined. Appellant struggled with the decision to plead guilty, but he also actively participated in the plea hearing, answered and asked questions, explained the process and the terms of the plea agreement, and acknowledged the sufficiency of the evidence that the state expected to present against him. *See Theis*, 742 N.W.2d at 649. While appellant maintained his innocence and did not agree with the evidence against him, he did acknowledge that the evidence the state would likely

offer at a trial, if believed, was substantial enough for a jury to find him guilty, as required for a valid *Alford* plea.[2]

Thus, the record shows that the district court did not err in accepting appellant's *Alford* plea. We find no manifest injustice that would require this court to allow appellant to withdraw his plea under Minn. R. Crim. P. 15.05, subd. 1.

II. The district court did not abuse its discretion in denying appellant's presentence motions to withdraw his *Alford* plea.

Appellant argues that the district court abused its discretion in denying his motions to withdraw his guilty plea before sentencing. Prior to sentencing, the district court may allow a defendant to withdraw a plea if the defendant proves that "it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). "Although this standard is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea 'for simply any reason.'" *Theis*, 742 N.W.2d at 646 (quoting *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007)). A district court's decision to allow plea withdrawal under the fair-and-just standard prior to sentencing is

[2] In *Alford*, the significant benefit to defendant from taking the plea bargain, in addition to the overwhelming evidence against him, bolstered the intelligence of his plea. 400 U.S. at 37-38, 91 S. Ct. at 167-68. The United States Supreme Court found that defendant had "much to gain by pleading," and "absolutely nothing to gain by a trial," and that he "quite reasonably" decided to plead guilty to a lesser offense and receive 30 years in prison instead of going to trial and facing a possible death sentence. Here, the state proposed 30 months in prison instead of the presumptive 33 months, no career-offender status, and an opportunity to argue for a downward departure. As a career offender, the state would have sought a sentence of 66 months. Although the district court was not required to consider the extent of the benefit appellant would receive in determining the validity of his plea, we would suggest caution in accepting *Alford* pleas where, as here, the plea is tortured and the benefit of the plea bargain is less substantial than *Alford* contemplated.

discretionary. *Raleigh*, 778 N.W.2d at 97. The district court must consider the defendant's reasons for withdrawal and any prejudice to the state. Minn. R. Crim. P. 15.05, subd. 2. We review the district court's decision for an abuse of discretion, reversing only in a rare case. *Raleigh*, 778 N.W.2d at 97.

A. Appellant's first presentence motion to withdraw his *Alford* plea

In appellant's first motion to withdraw his guilty plea, appellant argued that he was set up, that D.S. and V.Y. both initially told officers that there were no drugs, and that when V.Y. gave her statement she was under the influence and was coached by law enforcement. At the June 2016 hearing on the motion, appellant said that he did not know there was a mandatory prison commitment and thought that he would receive a downward durational departure or probation. Appellant also claimed that he was not taking his pain medication at the time of the plea hearing, so he was not in "[his] right state of mind," and that he was forced to agree to the plea because he had no driver's license and no transportation to get to trial from out-of-state where he lives. Appellant also said that he was going to hire a private attorney. The state countered that a changed mind did not justify the withdrawal of a valid plea and said that appellant had known about the mandatory commitment since the date of the complaint two years earlier. The state also noted that appellant chose to represent himself with advisory counsel.

The court considered and rejected each of appellant's reasons and concluded that he had not sufficiently demonstrated a fair or just basis to withdraw his plea. The court said that appellant's request to hire counsel had been thoroughly addressed throughout the

proceedings and appellant had changed his mind several times before deciding to represent himself.[3] The court flatly rejected appellant's claim that he did not know about the mandatory commitment. The court recalled appellant's concern at the plea hearing about returning to prison, but noted that appellant was clearly facing a prison commitment. The court said that appellant understood that he would be able to argue for a downward departure, but that there was no agreement on sentencing, and that ultimately the judge would decide his sentence.

The court also refuted appellant's argument that he did not have a clear mind at the plea hearing and that he felt pressure to take the plea due to his pain and a lack of transportation. The court said that it had thoroughly questioned appellant about his decision and his state of mind at the time of the plea, including whether he was taking all of his medications as prescribed. The court said that it was confident that appellant knew what he was doing, had a clear mind, and was able to make a good choice at the time. The

[3] Appellant discharged the public defender's office in late 2014, intending to represent himself. The district court appointed advisory counsel for appellant based on concerns about the fairness of the process in a January 2015 order. The district court clarified the limited role of appellant's advisory counsel in a July 2015 order. The court noted at that time that appellant had the option to hire his own counsel, file a new application for a public defender, or proceed pro se with advisory counsel. The court explained the differences in these options to appellant at multiple hearings. Throughout the proceedings, appellant indicated that he intended to hire private counsel but never did so. At a March 2016 motion hearing, the court outlined appellant's history of requesting time to hire counsel but then failing to do so. The record shows that the court confirmed multiple times during the proceedings that appellant was choosing to represent himself. At his plea hearing, appellant requested, and the court appointed, his advisory counsel as his attorney going forward for the purposes of sentencing only. The attorney remained in an advisory capacity for appellant's motions to withdraw his guilty plea.

court added that all of the reasons presented by appellant to withdraw his plea had been previously addressed by the court at prior hearings or in prior written orders. The court also found that the state would be prejudiced by holding a trial so many months later.

The record supports the district court's determination that appellant understood the plea agreement and the possible outcomes, and that he freely and voluntarily chose to plead guilty via *Alford*. At the hearing on the motion to withdraw, the court weighed the reasons presented by appellant before concluding that he had not met his burden to show that it was fair and just to allow him to withdraw his plea. Because the district court concluded that appellant did not advance a valid reason in his motion or at the hearing on the motion why withdrawal was fair and just, the state was not required to show prejudice, and we need not consider the district court's finding of prejudice to the state. *State v. Cubas*, 838 N.W.2d 220, 224 (Minn. App. 2013), *review denied* (Minn. Dec. 31, 2013). The district court did not abuse its discretion in denying appellant's first motion to withdraw his plea prior to sentencing.

B. Appellant's second presentence motion to withdraw his *Alford* plea

Appellant filed a second motion to withdraw his guilty plea prior to sentencing, and the district court heard this request at the August 2016 sentencing hearing. Appellant argued that he was not guilty, that the state did not have enough evidence to convict him, and that he was in pain at the plea hearing, which influenced his decision. The state argued that appellant was repeating the same arguments that the court had previously considered and rejected. The court agreed and denied appellant's second motion to withdraw his plea.

The court reminded appellant that allowing him to withdraw his plea was discretionary and deferred to its analysis from the June 2016 hearing. The court summarily rejected appellant's concerns and reasons for withdrawal and found that appellant was intentionally delaying the case. The court again noted that it had discussed appellant's well-being at the time of the plea hearing and that appellant said he was ready and able to proceed. The court again acknowledged that appellant struggled with his choice but said that appellant had a clear understanding of the plea agreement and the possible outcomes before he accepted the plea agreement. The court again concluded that appellant had not provided a sufficient basis to show that it was fair and just to allow him to withdraw his plea, and the court again found prejudice to the state if the plea was withdrawn and a trial commenced. The court denied appellant's second motion to withdraw his plea and sentenced him to 29 months in prison and otherwise followed the plea agreement.

The district court's conclusion that appellant failed to present a valid reason under the fair-and-just standard to warrant withdrawal of his plea is supported by the record, and the court did not abuse its discretion in denying appellant's second presentence motion to withdraw his plea. Because the court again found no valid reason for withdrawal, this court need not consider the court's finding of prejudice to the state.

Affirmed.