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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1606**

State of Minnesota,
Respondent,

vs.

Chad Daniel Kottke,
Appellant.

**Filed August 13, 2012
Reversed and remanded
Hudson, Judge**

McLeod County District Court
File No. 43-CR-10-1399

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

Michael K. Junge, McLeod County Attorney, James A. Schaeffer, Assistant County Attorney, Glencoe, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from his conviction of aiding an offender, appellant argues that his guilty plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160

(1970) was invalid. Because appellant's plea lacked a sufficient factual basis and was therefore inaccurate, we reverse and remand.

FACTS

Appellant Chad Kottke lived in the home of his brother and his brother's girlfriend. At approximately 11:20 a.m. on August 5, 2010, Mario Mireles fled the McLeod County courthouse, wearing jail clothing and handcuffs. At approximately 2:30 p.m., law enforcement apprehended Mireles in the garage of the home where appellant was staying. When police apprehended Mireles, he was wearing a white T-shirt and shorts and had only one hand cuffed. Appellant was charged with aiding an offender, in violation of Minn. Stat. § 609.495, subd. 1(a) (2010). The case was tried to a jury in March 2011, but it ended in a mistrial.

In June 2011, appellant pleaded guilty to aiding an offender pursuant to *Alford*, 400 U.S. 25, 91 S. Ct. 160. In exchange for his plea, appellant was to be sentenced to a stay of imposition of sentence with two years of probation—the first year supervised and the second unsupervised, with 30 days in jail, 30 days in the sentence-to-service program, and a \$600 fine. At the *Alford* hearing, the prosecution outlined the evidence that would be presented should the case proceed to trial. The prosecutor stated that Mireles was convicted of a felony of escape from custody, Mireles would testify that appellant provided him clothing and helped him at least partially remove his handcuffs, and appellant's conduct occurred on August 5, 2010. The district court stated that it would ask appellant if he agreed “that if the State put all this evidence in, and the jury listens to all this evidence, that there's a significant likelihood that they are going to find you guilty

despite your claim of innocence.” However, the district court did not ask appellant at any point during the hearing if he agreed that the state’s proposed evidence would be sufficient. The district court sentenced appellant to a stay of imposition with two years of probation and stated that appellant’s second year of probation would be unsupervised so long as appellant did not violate his probation during the first year. This appeal follows.

D E C I S I O N

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). But a defendant may withdraw a guilty plea, even after sentencing, if “withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists where a guilty plea is invalid, which arises when a guilty plea is not accurate, voluntary, and intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (citations omitted). The appeal of a guilty plea can be made directly from a judgment of conviction if “the record made at the time the plea was entered is inadequate in one or more of these respects.” *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). We review the validity of a plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Appellant argues that his guilty plea to aiding an offender was inaccurate and therefore invalid because it lacked a sufficient factual basis. A guilty plea is accurate when it is established on the record that the defendant’s conduct met all elements of the charge to which he is pleading guilty. *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011). An *Alford* plea allows a defendant to plead guilty even if he believes he is innocent. *Theis*, 742 N.W.2d at 647 (citing *Alford*, 400 U.S. at 37–38, 91 S. Ct. at 167–

68).¹ District courts must carefully scrutinize the factual basis of an “*Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence.” *Id.* at 648–49; *see also State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (emphasizing district court’s responsibility to determine if *Alford* plea is valid and whether a sufficient factual basis exists to support it). The elements of aiding an offender in this instance are: (1) Mireles committed a felony; (2) appellant knew Mireles had committed a felony; (3) appellant harbored, concealed, or aided Mireles; (4) appellant intended for Mireles to avoid or escape arrest, trial, conviction, or punishment; and (5) appellant’s actions took place in McLeod County on August 5, 2010. Minn. Stat. § 609.495, subd. 1(a). A defendant’s intent is established either by showing he “has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4) (2010).

At appellant’s plea hearing, the evidence recited by the prosecution should the case go to trial included evidence of Mireles’s conviction of the felony of escape from custody, testimony from Mireles that appellant gave him clothing and helped remove his restraints, and that the harboring of Mireles took place in McLeod County on August 5, 2010. However, the record does not reveal any evidence regarding whether appellant knew Mireles had committed a felony or whether appellant intended for Mireles to avoid or escape arrest. The factual basis of an *Alford* plea is adequate when sufficient facts are “on the record to support a conclusion that defendant’s conduct falls within the charge to

¹ State law also permits the acceptance of a guilty plea when the defendant maintains his innocence under the same standard enunciated in *Alford*. *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977).

which he desires to plead guilty.” *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). The supreme court has suggested multiple ways to establish sufficient facts on the record, including on-the-record questions of defendant at the plea hearing regarding his conduct and the evidence likely to be presented at trial, introduction of witness statements or other documents at the plea hearing, or the presentation of abbreviated testimony from witnesses likely to testify at trial. *Theis*, 742 N.W.2d at 649. Here, the state indicated that it would offer Mireles’s statement to police, which addressed the harboring element of aiding an offender. But there is no indication that the statement also addressed appellant’s knowledge that Mireles had committed a felony or appellant’s intention for Mireles to avoid or escape arrest.² Therefore, appellant’s plea lacked a sufficient factual basis.

In addition to a sufficient factual basis, “the [district] court must be able to determine that the defendant, despite maintaining his innocence, agrees that evidence the State is likely to offer at trial is sufficient to convict.” *Id.* This requirement is “critical” to ensuring an accurate *Alford* plea and protecting “a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial.” *Id.* (quotation omitted). *Theis* further recognizes that the best practice for ensuring this protection is a specific acknowledgement at the plea hearing and on the record that the evidence likely to be offered by the prosecution at a trial would be sufficient for a jury to convict him of the charge to which he is pleading guilty. *Id.* Here, appellant did not

² To harbor a person is to furnish that person with shelter or food when the person is avoiding detection by law enforcement; to conceal a person is to make it more difficult for that person to be found. 10A *Minnesota Practice*, CRIMJIG 24.11 (2006).

make an on-the-record acknowledgment of the sufficiency of the evidence. In fact, appellant indicated that he disagreed that the evidence was sufficient when he objected to the state's summary of evidence it would offer at trial by asking the prosecutor if she had interviewed Mireles and why appellant did not receive a copy of Mireles's statement before the *Alford* plea hearing. Appellant stated, "Wait a minute, I still have never—I want to know what M[i]r[e]les was saying about me. Don't I have a right to hear what his argument is?" Appellant then attempted to plead no contest, which the district court did not accept; appellant then pleaded guilty.

Respondent argues that *Theis* does not require that a defendant specifically acknowledge on the record that the evidence offered would be sufficient to convict in order to demonstrate that he agrees that the evidence presented by the state is sufficient. Respondent provides no caselaw to support this assertion. Furthermore, *Theis* states that "the court must be able to determine that the defendant, despite maintaining his innocence, agrees that evidence the State is likely to offer at trial is sufficient to convict." *Id.* Here, appellant's agreement to waive his rights and the fact that appellant entered a plea did not provide the district court with adequate information to determine whether appellant agreed that the state could present sufficient evidence at trial.

We conclude that appellant's plea was inaccurate because a sufficient factual basis was not established for each element, including the elements of appellant's knowledge and intent, and the district court did not determine that appellant agreed that the evidence likely to be offered by the state was sufficient to convict. *See id.* at 648–49 (requiring an *Alford* plea be supported by a factual basis carefully scrutinized by the district court and a

determination that evidence likely offered was sufficient to convict). Accordingly, appellant's plea was invalid, resulting in a manifest injustice, and the district court erred in accepting the plea. Therefore, we reverse and remand for further proceedings.

Appellant additionally argues that he should be permitted to withdraw his guilty plea because the district court violated the terms of the plea agreement in sentencing. Appellant agreed to enter a guilty plea for a sentence of two years' probation with the first year supervised and the second year unsupervised. But when he was sentenced, the district court conditioned the second year of unsupervised probation on appellant not violating his probation in the first year. The parties do not dispute that the district court's condition violated the plea agreement. But respondent argues that the district court merely added a condition of probation that has not ripened and, therefore, cannot be considered by this court. Because we conclude that the plea was inaccurate, we need not reach the issue of whether the district court's alteration of the plea agreement provided a basis for withdrawing the plea.

Reversed and remanded.