COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 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. 95-1191-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALIL AZIZI,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Alil Azizi appeals from a judgment of conviction and an order denying his postconviction motion to withdraw his ***Alford*** pleas to two counts of second-degree sexual assault of a child and one count of first-degree sexual assault of a child. He also appeals from an order moving the trial court to recuse itself from the postconviction motion hearing. Azizi claims that the trial court erred in denying his motion to withdraw his ***Alford*** pleas

because: (1) the plea questionnaire did not convey the deportation consequences of his plea; (2) defense counsel did not read to him the paragraph regarding deportation upon such a plea; and (3) the trial judge refused to recuse himself from the motion hearing. The trial court did not erroneously exercise its discretion in denying the motion to withdraw the ***Alford*** pleas because the trial court's findings that Azizi did understand the consequences of his pleas and that defense counsel did read the entire plea questionnaire to Azizi were not clearly erroneous. We additionally conclude that the trial court did not err in failing to recuse itself; thus, we affirm.

I. BACKGROUND.

This case arises out of Azizi's ***Alford***[1] pleas to two counts of second-degree sexual assault of a child and one count of first-degree sexual assault of a child. The United States Immigration and Naturalization Service has since placed a detainer on Azizi, a citizen of Yugoslavia, as a result of his plea-based convictions in this case. The trial court denied Azizi's motion to withdraw his pleas on the ground that he was unaware that he could be deported as a consequence of his ***Alford*** pleas. Azizi appealed that order to this court. Concluding that the trial court failed to personally advise Azizi of the potential for deportation as a result of his pleas, we remanded the case to the trial court to determine whether Azizi did in fact know that his pleas subjected him to potential deportation. *See* ***State v. Azizi***, No. 94-1636-CR (Wis. Ct. App. Dec. 23, 1994) (unpublished order). An evidentiary hearing was held on April 20 and 25, 1995, after which the trial court denied Azizi's motion to withdraw his pleas.

II. DISCUSSION.

After sentencing, a defendant must establish "manifest injustice" to withdraw a plea. ***State v. Truman***, 187 Wis.2d 622, 624, 523 N.W.2d 177, 178 (Ct. App. 1994). The "manifest injustice" test requires a showing of a serious

[1] Pursuant to ***North Carolina v. Alford***, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970), pleas may be entered when a defendant accepts the conviction, but maintains innocence. *See generally* ***State v. Garcia***, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

flaw in the fundamental integrity of the plea. ***Libke v. State***, 60 Wis.2d 121, 128, 208 N.W.2d 331, 335 (1973). A defendant seeking to withdraw a plea after sentencing must show manifest injustice by clear and convincing evidence. ***Truman***, 187 Wis.2d at 624, 523 N.W.2d at 179. The trial court has wide discretion in denying a motion to withdraw a guilty plea. ***State v. Krieger***, 163 Wis.2d 241, 249-50, 471 N.W.2d 599, 602 (Ct. App. 1991). We will not find an erroneous exercise of that discretion if the trial court applied the proper law to the relevant facts to reach a rational conclusion. *See* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993).

Azizi first claims that he was unaware that he could be deported as a result of his ***Alford*** pleas. Azizi makes much of the fact that defense counsel deleted "guilty plea" with a pen on the plea questionnaire and inserted ***Alford*** plea in every paragraph but paragraph 12, which concerned deportation.[2] This, Azizi contends, led him to believe that potential deportation did not apply to ***Alford*** pleas.

On remand from this court, the trial court held an evidentiary hearing to determine whether Azizi was in fact aware of the potential deportation consequences of his ***Alford*** pleas. At that hearing, defense counsel stated that he had told Azizi that an ***Alford*** plea was a type of guilty or no-contest plea. Before accepting the pleas, the trial court also informed Azizi of the meaning of an ***Alford*** plea and that he would be found guilty if his plea was accepted. Also, prior to the trial court's acceptance of his pleas, Azizi stated that he had reviewed all paragraphs of the plea questionnaire and had no questions about the questionnaire.

There is ample evidence in the record to support the trial court's finding that Azizi was aware of the potential for deportation as a result of his

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[2] Paragraph 12 provided:

> Deportation: If I am not a citizen of the United States of America. I know that upon a plea of guilty or no contest and a finding of guilty by the Court for the offense(s) with which I am charged in the criminal complaint or information, I may be deported, excluded from admission to this country, or denied naturalization under federal law.

Alford pleas. *See* § 805.17(2), STATS. ("Findings of fact shall not be set aside unless clearly erroneous."). As such, the trial court could properly conclude that Azizi did not make the necessary showing of manifest injustice to withdraw his pleas. Accordingly, we conclude that the trial court applied the proper law to the relevant facts to reach a rational conclusion regarding Azizi's awareness of the consequences of his plea.[3]

Azizi next claims that the trial court should have recused itself because the trial court prejudged the issue in controversy. Whether a judge is a neutral and detached magistrate raises a question of constitutional fact which we review *de novo*. ***State v. Ledger***, 175 Wis.2d 116, 122, 499 N.W.2d 198, 200-01 (Ct. App. 1993).

At the outset, there exists a presumption that a judge is free of bias and prejudice. ***State v. McBride***, 187 Wis.2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994). To overcome this presumption, the defendant must make a showing of judicial bias or prejudice by a preponderance of the evidence. ***Id***. To make such a showing, the defendant must establish either of a two-prong test. ***State v. Rochelt***, 165 Wis.2d 373, 378-79, 477 N.W.2d 659, 661 (Ct. App. 1991). The first, the subjective component, involves the judge's own assessment of his or her impartiality. ***Id***. The second, the objective component, turns on whether the "trial judge in fact treated [the defendant] unfairly." ***Id***. "Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***McBride***, 187 Wis.2d at 416, 523 N.W.2d at 110.

Azizi claims that the subjective test is met by the trial court's failure to "unequivocally" deny partiality. Here, Azizi focuses on the trial court's statement that it did not "*think* it prejudged the matter ... or in any way *unduly* depreciated the credibility of the defendant ...." (Emphasis added.) Azizi argues that the trial court's use of the words "think" and "unduly" imply

[3] Azizi's second argument is that defense counsel did not read to him paragraph 12 of the plea questionnaire. Because we already decided that the trial court was not clearly erroneous in finding that defense counsel had read the entire plea questionnaire, we need not address this argument separately. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

that it *might* have prejudged the matter or *duly* depreciated the credibility of the defendant. We disagree.

This statement, made by the trial court, was in response to Azizi's motion that it recuse itself. Taken in the context with which it was made, this statement indicates that the trial court believed it was not biased. At best, the interpretation urged by Azizi strains the imagination. Therefore, we conclude that the first prong of the ***Rochelt*** test is not satisfied.

Azizi claims the second prong of ***Rochelt***, the objective test, is also met because a reasonable observer would conclude that the trial court appeared to have prejudged Azizi's motion to withdraw his pleas. Azizi relies on the following statements made by the trial court:

> The defendant is here saying look. I want to withdraw [my pleas] because I could be deported. He's serving a thirty year sentence. I'm sorry but part of me says he's not here because he might be deported. He's here because he doesn't want to serve a thirty year sentence. He's not going anywhere fast.
>
> He's not eligible for parole until what? About seven-and-a-half years, and there's no guarantee of being [paroled]. ... That's not on the immediate horizon for Mr. Azizi.
>
> I'm satisfied that there is -- at least a good part of me here that says [hey], wait a second. I'm suspicious that what he really doesn't like is the sentence in this case. This is just a back door, but typically -- and I think both counsel agree that typically what you have here is was the defendant aware of the collateral ramifications of his plea?

These statements by the trial court, Azizi contends, evince bias. We disagree.

As we have said, the mere appearance of partiality or speculation from the circumstances is not sufficient. ***McBride***, 187, Wis.2d at 416. Rather, the defendant must have "in fact" been treated unfairly by the judge. ***Id***. Here, the trial court's comments reveal its belief as to why the defendant was making a motion to withdraw his plea. Azizi makes no showing that the trial court did in fact prejudge the merits of his motion and thus treat him unfairly. Thus, the objective test, the second prong of ***Rochelt***, has not been satisfied.

By the Court.—Judgment and orders affirmed.

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