COURT OF APPEALS
DECISION
DATED AND RELEASED

December 18, 1996

No. 95-2864-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS RUDE,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Dennis Rude has appealed from judgments entered in three consolidated cases, convicting him upon no contest pleas of two counts of sexual assault of a child in violation of § 948.02(1), STATS., and one count of child enticement in violation of § 948.07(1), STATS. He has also appealed from an order denying his motion to withdraw his pleas to one of the sexual assault charges and the child enticement charge. We affirm the judgments and the order.

Rude contends that withdrawal of the two challenged no contest pleas should have been permitted because he always maintained his innocence in the two cases in which those pleas were entered, thus rendering them invalid ***Alford***[1] pleas. He also contends that he was deprived of his right to effective assistance of counsel because after he advised his trial counsel that he was innocent in the two cases, counsel failed to disclose to the trial court that the pleas were ***Alford*** pleas and erroneously told Rude that he could not proceed to trial in two cases while pleading no contest in the third case.

The trial court refused to permit the pleas to be withdrawn, concluding that Rude did not enter ***Alford*** pleas and therefore could not withdraw them on the ground that the specific procedures for that type of plea were not followed. It also found credible trial counsel's postconviction testimony that he did not tell Rude that if he pled no contest in one case, he could not go to trial in the other two cases.

After sentencing, a defendant who seeks to withdraw a plea of guilty or no contest must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). This court will sustain a trial court's order denying a motion to withdraw a plea unless the trial court erroneously exercised its discretion. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995).

A manifest injustice occurs when a plea is not knowingly, voluntarily and intelligently entered, ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App.), *cert. denied*, 115 S. Ct. 167 (1994), or where the trial court fails to establish a factual basis showing that the conduct which the defendant admits constitutes the offense to which he pleads, ***State v. Harrington***, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994). A manifest injustice also occurs if a defendant is denied effective assistance of counsel. ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996).

[1] An ***Alford*** plea derives its name from ***North Carolina v. Alford***, 400 U.S. 25 (1970).

Rude contends that there is no factual basis for his two challenged pleas because he has consistently maintained his innocence in those cases. He acknowledges that when he entered the no contest pleas, he never told the trial court that he denied committing the offenses. However, at the postconviction hearing, both he and his trial counsel testified that before entering the pleas, Rude told his trial counsel that he was innocent of those charges. Rude contends that this testimony conclusively establishes that his pleas were ***Alford*** pleas and that they were invalid because the record did not disclose strong evidence of his actual guilt and because the trial court failed to follow proper procedures for accepting ***Alford*** pleas.

Rude's argument fails because he entered no contest pleas, not ***Alford*** pleas. An ***Alford*** plea is a guilty or no contest plea where a defendant pleads to a charge but either protests his innocence or does not admit to having committed the crime. *See* ***Garcia***, 192 Wis.2d at 856, 532 N.W.2d at 115. In this case, Rude expressly entered no contest pleas, assenting to the trial court's representation that pursuant to his plea he was "not saying I did do it but I'm not saying I didn't do it." He also acknowledged that the trial court would make findings of guilt based on his pleas.

Before accepting a no contest plea, a trial court must ascertain that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). It must ascertain that the defendant understands the constitutional rights he or she is waiving. ***Id.*** at 265-66, 389 N.W.2d at 22. In addition, it must make such inquiry as satisfies it that the defendant has in fact committed the crime charged. ***Id.*** at 260, 389 N.W.2d at 20.

A guilty plea questionnaire and waiver of rights form signed by a defendant may be considered in determining whether a plea was knowing, voluntary and intelligent. ***Garcia***, 192 Wis.2d at 866, 532 N.W.2d at 119. In this case, the transcript of the plea colloquy and the plea questionnaire form executed by Rude clearly establish that Rude was aware of the rights he was waiving, the nature of the charges to which he was pleading, and the potential punishment faced by him. In addition, the allegations of sexual misconduct in the three criminal complaints provided an adequate factual basis for his no contest pleas. The trial court properly considered those allegations because in

the guilty plea questionnaire and waiver of rights form, Rude stipulated that they could be used in determining a factual basis for his pleas.[2]

Because the record indicates that Rude's no contest pleas were knowing, voluntary and intelligent, and supported by a factual basis, Rude's postconviction assertion to the trial court that he was in fact innocent in two of the cases does not demonstrate a manifest injustice warranting withdrawal of the pleas. In making this determination, we also note that Rude was put on notice at the plea hearing that his no contest pleas were, if not denials, at least not admissions of guilt. This occurred when the trial court explained to Rude that his no contest pleas meant he was "not saying [he] did do it but ...not saying [he] didn't do it." While this remark may not have explained the entire essence of an ***Alford*** plea, it clearly put Rude on notice that his pleas would lead to a finding of guilt without an admission of guilt. No basis therefore exists to conclude that the pleas were unknowing, involuntary or unintelligent.

The trial court also properly rejected Rude's ineffective assistance of counsel claim. Before a defendant will be permitted to withdraw a no contest plea based on ineffective assistance of trial counsel, the defendant must show that counsel's performance was deficient and that it prejudiced the defense.

---

[2] In his reply brief, Rude argues that the allegations of the complaints provided no factual basis for the child enticement conviction because nothing in them indicated that Rude caused the victim to go to a vehicle, building, room or secluded place for the purpose of having sexual contact with her. Arguments raised for the first time in a reply brief need not be considered by this court. ***Swartwout v. Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981). In any event, this conviction resulted from a plea bargain reducing a charge of first-degree sexual assault of a child to child enticement. When a defendant enters a plea of guilty or no contest pursuant to a plea bargain, the factual basis requirement is satisfied if a factual basis is shown for either the offense to which the plea was offered or to a more serious charge reasonably related to the offense to which the plea was offered. ***State v. Harrell***, 182 Wis.2d 408, 419, 513 N.W.2d 676, 680 (Ct. App.), *cert. denied*, 115 S. Ct. 167 (1994). Since the allegations of the complaint which led to the child enticement conviction provided a factual basis for the first-degree sexual assault charge, a factual basis for the no contest plea also existed.

In reaching this conclusion, we are aware that the Wisconsin Supreme Court has recently held that the ***Harrell*** standard does not apply to an ***Alford*** plea, which requires strong proof of guilt as to each element of the crime to which the defendant enters his or her plea. ***State v. Smith,*** 202 Wis.2d 21, 27-28, 549 N.W.2d 232, 235 (1996). ***Smith*** is inapplicable here because ***Alford*** pleas were not entered.

Bentley, 201 Wis.2d at 311-12, 548 N.W.2d at 54. The appropriate measure of attorney performance is reasonableness, considering all the circumstances. ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). To prove deficient performance, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong, a defendant seeking to withdraw a plea must show a reasonable probability that but for counsel's errors, he or she would not have pleaded no contest and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

Rude contends that his trial counsel rendered deficient performance because after Rude told him that he was innocent in two of the cases, counsel erroneously advised him that he could not proceed to trial on two of the cases while pleading no contest in the third case. He contends that because he wanted to spare the victim from testifying in the third case, he then entered the no contest pleas in all three cases. Rude further contends that his counsel should have disclosed to the trial court that he was maintaining his innocence in two of the cases, which would have resulted in the trial court following ***Alford*** procedures and advising him of his right to proceed to trial in the two cases. He contends that if this had been done, he would have entered pleas of not guilty and would have asked for a jury trial in the two cases.

Rude's argument fails because after hearing testimony from both Rude and his trial counsel at the postconviction hearing, the trial court specifically found that Rude was incredible and that counsel was credible when he denied telling Rude that he could not go to trial in two of the cases if he wanted to plead no contest in the third. In fact, counsel testified that he and

Rude discussed going to trial in two cases but not the third on several occasions. Based on this testimony and counsel's testimony concerning the factors relied on by Rude in entering the no contest pleas, the trial court found that Rude freely elected to plead no contest in all three cases, knowing that trial was not an all or nothing proposition.

The trial court's findings on these matters are not clearly erroneous and cannot be disturbed by this court. Consequently, no basis exists to conclude that trial counsel rendered deficient performance by erroneously advising Rude that he could not go to trial in two of the cases if he wanted to plead no contest in the third. Moreover, based on the trial court's finding that Rude elected to plead no contest in all three cases while knowing that he had the option of going to trial in two cases, counsel cannot be deemed ineffective for failing to tell the trial court that Rude was entering ***Alford*** pleas. The no contest pleas were knowingly and voluntarily entered, and no basis exists to believe that Rude would have elected to go to trial if an ***Alford*** plea had been explained to him. Deficient performance and prejudice therefore have not been shown.

By the Court.—Judgments and order affirmed.

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