COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1277

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN DARNELL NUNNERY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Shawn Darnell Nunnery appeals from two orders, one which denied his § 974.06, STATS., motion and the other denying his motion seeking sentence modification. He claims that he never actually entered an

Alford[1] plea to the three crimes he was convicted of: first-degree reckless injury while using a dangerous weapon, as party to a crime; first-degree recklessly endangering safety while using a dangerous weapon, as party to a crime; and endangering safety by use of a dangerous weapon, as party to a crime. As a part of this contention, he asserts that his appellate counsel, on his direct appeal, was ineffective for failing to assert this claim. In addition, he claims the fact that he was transferred to a Texas prison to serve a portion of his prison term constitutes a new factor, which requires modification of his sentence.

Because the record demonstrates that Nunnery did in fact enter an ***Alford*** plea to the charges on which he was convicted, and because his placement transfer to a Texas prison does not constitute a new factor, we affirm.

I. BACKGROUND

On August 30, 1990, while in the company of his co-defendant, Nunnery fired several shots into an occupied Milwaukee residence, seriously wounding infant Janice Jones in the head and wounding the child's mother, Melbertine Bonds, in the forearm. As a result of these actions, he was charged with first-degree reckless injury, while using a dangerous weapon, first-degree recklessly endangering safety, while using a dangerous weapon, and endangering safety by use of a dangerous weapon, all as a party to the crime. Pursuant to a plea bargain, Nunnery entered ***Alford*** pleas to the charges. Judgment was entered in December 1991, and the trial court sentenced him to consecutive prison terms of fifteen, nine and two years, on each charge, respectively.

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970).

In May 1992, Nunnery's appointed appellate counsel filed a notice of appeal from the judgment of conviction and also filed a no-merit report pursuant to RULE 809.32, STATS. This court affirmed the judgment of conviction concluding, after an independent review of the record, that there was "no arguable merit as to any issue that could be raised on appeal."

In March 1997, Nunnery filed a § 974.06, STATS., motion alleging that he never actually entered a plea to the crimes charged, and requesting that his pleas be vacated; in the alternative, he alleged that his appellate counsel provided ineffective assistance for failing to advance this claim. The trial court entered an order summarily denying the motion.

In April 1997, Nunnery filed a motion seeking sentence modification on the grounds that his transfer to a Texas jail constituted a new factor warranting re-sentencing because it interfered with his rehabilitative needs. The trial court entered an order summarily denying this motion.

Nunnery appeals from the trial court's orders denying these motions.

II. DISCUSSION

A. Alford Plea.

Nunnery claims his ***Alford*** pleas should be vacated because he never actually entered pleas to the charges against him and, in the alternative, his appellate counsel was ineffective for failing to assert this claim. We are not persuaded.

A review of the record pertinent to this issue reveals the following. The transcript from the plea hearing, which occurred in November 1991, reflects

that the prosecutor informed the trial court that the parties had reached a plea bargain under which Nunnery would tender ***Alford*** pleas to the three charges facing him. The record contains an Alford Plea Questionnaire and Waiver of Rights Form, wherein Nunnery states: "I … wish to enter a plea of Alford" to the three charged crimes; "I understand that by pleading Alford I will be giving up any possible defenses, including but not limited to self-defense, intoxication, insanity, alibi;" "I understand that by pleading Alford I will be giving up the following [enumerated] constitutional rights;" "I wish to give up these constitutional rights and plead Alford;" "No one has made any promises to me, outside of any plea agreement in this case, to get me to give up these rights and plead Alford;" and the form indicates that Nunnery read it himself and had the form read to him.

Further, both the trial court and the prosecutor questioned Nunnery at the plea hearing, where he personally acknowledged that he decided to proceed with an ***Alford*** plea, in lieu of a trial, and that he understood that his ***Alford*** plea was, in effect, the same as a guilty plea. Nunnery also acknowledged that he had entered an ***Alford*** plea in a prior case and Nunnery's counsel confirmed that Nunnery wanted to enter his ***Alford*** plea at this time.

Nunnery personally acknowledged that he wanted to enter an ***Alford*** plea, that he understood the effect of entering the ***Alford*** plea, and that he fully understood what the ***Alford*** plea means. Subsequently, at his sentencing hearing, Nunnery again acknowledged that he entered the ***Alford*** pleas to lessen the impact on the victims' family.

The state of the record reflects that Nunnery did, in fact, enter ***Alford*** pleas to the crimes charged. The adequate plea questionnaire, confirmed by the plea colloquy in this case, demonstrates that the pleas were entered knowingly,

intelligently, and voluntarily. Based on the totality of the circumstances, we reject Nunnery's claim that no pleas were entered because he never actually stated the magic words "I enter an ***Alford*** plea to the three charges." The record reflects that Nunnery fully intended to make such plea and fully believed and understood that he was doing so. This is sufficient to hold Nunnery to his plea. *See* ***State v. Salentine***, 206 Wis.2d 419, 426-27, 557 N.W.2d 439, 441-42 (Ct. App. 1996). Because the record demonstrates that Nunnery did in fact enter ***Alford*** pleas to the crimes charged, there is no basis to assert an ineffective assistance claim in this context.

B. New Factor/Sentence Modification.

Nunnery also claims that his transfer to a Texas prison constitutes a new factor, warranting sentencing modification because it interferes with his ability to be rehabilitated. The trial court denied the motion, concluding that the transfer was not a new factor. We agree.

A new factor is a:

> fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Kluck, 210 Wis.2d 1, 7, 563 N.W.2d 468, 470 (1997) (footnote omitted). Moreover, to justify sentence modification, the new factor must operate to frustrate the purpose of the sentencing court's original intent. *See* ***State v. Johnson***, 210 Wis.2d 196, 204, 565 N.W.2d 191, 195 (Ct. App. 1997). Whether a set of facts or circumstances constitutes a new factor is a question of law we review independently. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

Nunnery argues that his transfer to a prison in Texas constitutes a new factor and frustrates the purpose of the sentence because it interferes with his rehabilitative needs. We are not persuaded.

In reviewing the sentencing transcript, we note that the only reference to rehabilitation was: "whatever treatment [Nunnery] needs has to be done in a structured facility." There is no specific reference as to what rehabilitation programs should be made available to him. Thus, there is no indication that serving a portion of his term in a Texas prison, as opposed to a Wisconsin one, somehow frustrates the original intent of the trial court's sentence.

Additionally, placement of prisoners and program assignments are not within the purview of sentencing courts, but are matters properly left to the Department of Corrections. *See* ***State v. Gibbons***, 71 Wis.2d 94, 98, 237 N.W.2d 33, 35 (1976) (trial court not allowed to place conditions on the sentence). Challenging such a transfer in placement should be raised by writ of certiorari to the trial court, *see* ***State ex rel Lomax v. Leik***, 154 Wis.2d 735, 739, 454 N.W.2d 18, 20 (Ct. App. 1990), rather than raised in a motion for sentencing modification.

By the Court.—Orders affirmed.

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