COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1682-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. SOWLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

ANDERSON, J. Robert J. Sowle appeals a judgment of conviction for disorderly conduct contrary to § 947.01, STATS., and an enhancement for habitual criminality pursuant to § 939.62, STATS. Sowle also appeals an order denying his RULE 809.30, STATS., motion for postconviction relief that sought the court's reconsideration of its denial of Sowle's request to withdraw his plea. On appeal, Sowle contends that the record lacked a sufficient

factual basis for the trial court to sustain his ***Alford***[1] plea. We disagree and, accordingly, affirm.

FACTS

As a result of driving with a cracked windshield, Sowle was pulled over by the police. As the officer was approaching Sowle's car, he observed him "making furtive movements … he appeared to be putting items on the floor of the vehicle underneath his seat." The officer also noticed a "strong odor of intoxicants on [Sowle's] breath" and conducted field sobriety tests. During the stop, the officer also noticed "two small silver cylinders … used for smoking crack cocaine for a crack pipe." Sowle was then arrested and charged with one count of possession of drug paraphernalia and a habitual criminality enhancer in violation of §§ 961.573(1) and 961.50(1), STATS.

Later, the State offered to amend the charges against Sowle to one count of disorderly conduct and the habitual penalty enhancer contrary to §§ 947.01 and 939.62, STATS. Sowle entered an ***Alford*** plea to these amended charges.

Prior to sentencing, Sowle was again arrested; on this occasion, he was charged with felony drug delivery. Sowle then filed a Motion to Withdraw No-Contest Plea. A hearing was held on this motion on September 17, 1997. Sowle urged the court to allow him to withdraw his plea because the reason he agreed to it was to protect his commercial driver's license and "a conviction on the

[1] The term ***Alford*** plea is derived from the name of the defendant in the United States Supreme Court case that first upheld the constitutionality of this type of plea. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea "is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime." ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

charge, the original charge, would have forced him to lose that license, that commercial driver's license." Sowle explained that he entered his plea to protect his driving privileges, but because he was subsequently arrested his motivation for entering the plea—maintaining his job—is gone. Sowle's counsel explained at the hearing:

> He wishes to assert his innocence which he has asserted throughout this matter to the original charge and wishes to proceed with a jury trial on the original charge of the possession of the drug paraphernalia because the whole motivation of the—for the withdrawal of the original plea is gone.

Sowle's motion was denied. He was convicted and received a two-year sentence on the amended disorderly conduct charge with the habitual repeater enhancer.

Sowle then filed a motion for postconviction relief. At the motion hearing on May 14, 1998, Sowle contended that the amended charges lacked a factual basis of support in the record; therefore, he should be allowed to withdraw his plea. The argument at the hearing was:

> As I pointed out in my motion, both complaints, the original and the amended, have exactly the same factual basis. Not one word in the factual recitation section differs. The only differences are in the charging section. And I argue in my motion that the facts recited in the original and the amended complaint do support the charge of possession of drug paraphernalia, but they do not support the charge of disorderly conduct.

The motion was denied. Sowle appeals from this denial and from the judgment of conviction.

DISCUSSION

On appeal, Sowle argues that the trial court erred by "failing to properly determine the factual basis for the defendant's ***Alford*** plea, causing a manifest injustice to occur." Specifically, he argues that a strong proof of guilt did not exist for all of the elements of disorderly conduct per § 947.01, STATS.; therefore, the court erred when it denied his motion to withdraw his plea and convicted him of this charge. We disagree.

Once sentenced, a defendant may not withdraw his or her plea unless it is necessary to correct a manifest injustice. *See* ***State v. Rock***, 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979). One type of manifest injustice is if the trial court fails to establish a sufficient factual basis that the defendant committed the offense to which he or she pled. *See* ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 233-34 (1996). If the defendant enters an ***Alford*** plea, the factual basis is deemed sufficient only if there is strong proof of guilt that the defendant committed the crime to which he or she pled. *See* ***Smith***, 202 Wis.2d at 25, 549 N.W.2d at 234. If there is no evidence as to any of the crime's elements, the defendant's ***Alford*** plea cannot be accepted and the factual basis requirement cannot be met. *See* ***Smith***, 202 Wis.2d at 26, 549 N.W.2d at 234. Determining the existence of a sufficient factual basis lies within the discretion of the trial court and this determination will not be overturned unless it is clearly erroneous. *See* ***id.*** at 25, 549 N.W.2d at 234.

We will now examine whether the record reveals a strong proof of guilt for a disorderly conduct charge. Section 947.01, STATS., defines disorderly conduct as "[w]hoever, in a public or private place, engages in violent, abusive,

indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." This statute consists of two elements: (1) the defendant engaged in the previously mentioned types of conduct; and (2) the defendant's conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* WIS J I—CRIMINAL 1900. The catch-all clause "otherwise disorderly conduct" that tends to "provoke a disturbance" means conduct that has a tendency to disrupt good order. *See* ***State v. Givens***, 28 Wis.2d 109, 115, 135 N.W.2d 780, 783 (1965). "While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency …." ***Id.*** at 116, 135 N.W.2d at 784 (quoted source omitted).

In finding a sufficient factual basis to support a strong proof of guilt, the trial court stated:

> Now, disorderly conduct is that conduct which affects the good order and peace of the community. And someone operating a motor vehicle after having consumed alcoholic beverages and the presence of drug paraphernalia inside the motor vehicle with a cracked windshield in my opinion clearly is supportive of conduct which is offensive to the community and its good order ….

We agree with the trial court that these acts are reasonably offensive to the sense of decency or propriety of the community, *see* ***State v. Vinje***, 201 Wis.2d 98, 102, 548 N.W.2d 118, 120 (Ct. App. 1996), and thus satisfy the first element of the statute.

Next, we consider whether the defendant's conduct tended to cause or provoke a disturbance. *See* § 947.01, STATS.; *see also* ***State v. Zwicker***, 41 Wis.2d 497, 515, 164 N.W.2d 512, 521 (1969). It is not necessary for an actual disturbance to have resulted from the conduct. *See* ***City of Oak Creek v. King***, 148 Wis.2d 532, 545, 436 N.W.2d 285, 290 (1989). Rather, the law only requires that the conduct be of a type which tends to cause or provoke a disturbance. *See* ***id.*** We conclude that, under the circumstances, Sowle's conduct was of a type that tends to provoke or cause a disturbance. Therefore, we affirm the trial court's determination that a sufficient factual basis existed to support Sowle's ***Alford*** plea to disorderly conduct pursuant to § 947.01 because we are satisfied that Sowle's actions were "otherwise disorderly" and tended to "provoke a disturbance." Likewise, we affirm the court's denial of his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.