COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0249

Cir. Ct. Nos. 01CM000301
00CM001490

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY J. NETZER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Randy Netzer appeals an order denying his motion to withdraw his pleas to misdemeanor stalking and violating a harassment restraining order. He claims his pleas were invalid because (1) he did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

personally enter them, (2) his counsel was ineffective, and (3) the trial court failed to determine that there was "strong evidence of guilt" to support his ***Alford***[2] pleas. He also claims the trial court erroneously exercised its discretion, and that the prosecutor was biased and should have requested a special prosecutor. We conclude that most of Netzer's claims are barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and any that are not lack merit. We therefore affirm the appealed order.

BACKGROUND

¶2 The State charged Netzer with stalking, harassment and several counts of violating a harassment restraining order, and later with bail jumping. Approximately eight months after his initial appearance, Netzer, who is himself an attorney, retained counsel to represent him. Two months after obtaining counsel, Netzer entered ***Alford*** pleas to stalking and one count of violating a restraining order. All other charges were dismissed. The trial court sentenced Netzer to three years of probation with three weekends in jail, counseling, and certain contact restrictions as conditions.

¶3 At Netzer's request, his trial counsel filed on his behalf a Notice of Intent to Pursue Postconviction Relief. Netzer, proceeding pro se, then filed a motion to withdraw his pleas. In an attached affidavit, Netzer advanced three reasons why he should be permitted to withdraw his pleas: his attorney had not

[2] ***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 (1995). In order to accept an ***Alford*** plea, a court must ensure that there is a showing of "strong proof of guilt" by the State that the defendant committed the crime to which he or she pled. ***Id***. at 857-58.

contacted witnesses nor filed any motions; "prosecutorial abuse of discretion"; and the court's failure to ascertain "strong proof of guilt" when accepting his ***Alford*** pleas. The trial court heard argument on the motion and denied it without taking evidence, concluding that the motion contained only conclusory allegations and provided no factual basis to support Netzer's claims. Netzer did not appeal. Instead, some eight months later, Netzer filed another motion to withdraw his pleas.

¶4 Netzer's second postconviction plea-withdrawal motion cited the following grounds: "prosecutorial abuse of power and overstepping"; "abuse of discretion of court," an element of which was the court's failure to ascertain strong proof of his guilt; "inadequate counsel," citing counsel's failure to file motions, contact witnesses or otherwise prepare for a trial; and "lack of authorized plea" because his attorney had entered the pleas, allegedly without his authority. The trial court heard argument on Netzer's second motion and denied it without an evidentiary hearing. Netzer filed a notice of appeal but we dismissed the attempted appeal for lack of jurisdiction because no written order had been entered denying Netzer's second plea withdrawal motion. In our order, we noted that Netzer's "latest motion cannot be a direct appeal of the judgment of conviction but rather it is a postconviction motion under WIS. STAT. § 974.06."

¶5 Netzer then procured an order from the trial court denying his second plea withdrawal motion "without further hearing" because "said ***Alford*** Plea was not involuntary as it was freely, intelligently and voluntarily made," and Netzer's "claim of ineffective assistance of counsel has not been sufficiently supported in the documentation presented." Netzer appeals this order.

ANALYSIS

¶6 As the background summary indicates, the first three grounds Netzer raised in his second postconviction motion to withdraw his pleas were previously raised in his first postconviction motion. Netzer is not entitled to raise in a postconviction motion under WIS. STAT. § 974.06 grounds that were finally adjudicated in a prior postconviction motion, including a motion brought under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. ***Escalona-Naranjo***, 185 Wis. 2d at 181; ***State v. Braun***, 185 Wis. 2d 152, 167, 516 N.W.2d 740 (1994); WIS. STAT. § 974.06(4).

¶7 As the supreme court explained in ***Escalona***, "[w]e need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. The court's holding interpreting WIS. STAT. § 974.06(4) precludes Netzer from employing a motion under § 974.06 to renew the claims decided adversely to him in his prior WIS. STAT. § 974.02 motion. If Netzer believed that his original postconviction motion to withdraw his pleas was wrongly denied, his remedy was to appeal that denial—not to wait eight months and re-file a nearly identical motion. As we have noted, Netzer did not pursue a "direct" appeal under WIS. STAT. § 809.30 after his first postconviction motion was denied. Thus, the grounds raised in Netzer's original postconviction motion (ineffective assistance of counsel, prosecutorial bias, and the court's failure to ascertain "strong proof of guilt") became "finally adjudicated" within the meaning of § 974.06(4) when the time for appealing the trial court's order denying his original motion expired.

¶8 Accordingly, we conclude that Netzer's present claims regarding the prosecutor's alleged bias,[3] the ineffectiveness of his counsel for not filing motions or contacting witnesses, and the court's failure to ascertain strong proof of his guilt before accepting his ***Alford*** pleas, are not properly before us. It might also be argued that Netzer's remaining claim or claims are similarly precluded under ***Escalona*** on account of his failure to show "sufficient reason" for not raising them in his original motion. *See* WIS. STAT. § 974.06(4); ***Escalona-Naranjo***, 185 Wis. 2d at 186. We decline for two reasons, however, to apply ***Escalona*** to the one claim in Netzer's present motion that was clearly not raised in his first motion: that he should be allowed to withdraw his pleas because it was his counsel and not he that entered them. First, the ***Escalona*** bar against successive post-conviction motions was not raised in the trial court and, had it been, Netzer might have been able to establish sufficient reason for omitting this claim from his original motion. *See* ***State v. Avery***, 213 Wis. 2d 228, 247-48, 570 N.W.2d 573 (Ct. App. 1997). Furthermore, it appears that Netzer may not have had a transcript of the plea hearing at the time he filed his first motion.[4]

[3] It appears that the victim of Netzer's stalking and restraining order violation was a La Crosse County employee who worked in the courthouse.

[4] We have no similar reservations about applying the "finally adjudicated" prong of ***Escalona*** to the issues raised and disposed of in Netzer's first motion. The record clearly establishes the duplication of issues in Netzer's two postconviction motions and the court's denial of his first motion, both orally and by written order. These matters are unaffected by the State's failure to argue the ***Escalona*** bar during the trial court proceedings on Netzer's second motion. We also do not view the lack of a plea hearing transcript at the time Netzer filed his first motion as a sufficient reason for any inadequacies in the manner the duplicated issues were first raised. Netzer could have obtained the transcript prior to filing his first postconviction motion if he deemed it necessary for the claims he was making. *See* WIS. STAT. § 809.30(2)(c)2, (f), (g), and (h). He chose, perhaps unwisely, not to do so. He also could have requested the transcript after his first motion was denied and either moved the court to reconsider its denial or appealed the denial to this court. Finally, because Netzer represented himself at the time, he cannot cite ineffective assistance of postconviction counsel as grounds for avoiding the ***Escalona*** bar on the adjudicated issues.

¶9 Even though we accept it as properly before us, we reject Netzer's claim for relief from his pleas on the ground that his attorney responded on Netzer's behalf to the court's questions, "what is your plea?" by saying, "My client would enter an ***Alford*** plea, Your Honor." Prior to these questions and counsel's responses, the court had an extensive colloquy with Netzer personally, and he had signed both a "Plea Questionnaire/Waiver of Rights" form and a "Statement of Negotiated Plea," all of which plainly establish Netzer's intention to enter ***Alford*** pleas to the two offenses. For example, the court's personal colloquy included the following question to Netzer, "The issue is, Mr. Netzer, you wish to plead—you wish to enter an ***Alford*** plea to both counts?" To which Netzer replied, unequivocally, "Yes, Your Honor."

¶10 We conclude that the present facts are governed by the supreme court's holding in ***State v. Burns***, 226 Wis. 2d 762, 594 N.W.2d 799 (1999), that even though a defendant "did not expressly and personally articulate a plea … on the record in open court … the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest." ***Id***. at 764. Just as in ***Burns***, it is clear from the present record, "that is, from the written plea questionnaire and waiver of rights form and the plea colloquy, that the defendant intended to plead no contest [via an ***Alford*** plea] to the charged offense[s]." ***Id***. at 769-70.

¶11 Even if we had not concluded that most of the grounds for withdrawing his pleas that Netzer asserted in his present motion are barred under the holding in ***Escalona***, and to the extent that he could argue that some portions of his present claims were not subsumed within the previously adjudicated claims, we note that we would nonetheless affirm the trial court's denial of Netzer's second motion. Neither Netzer's claim that the prosecutor was biased and should

have requested a special prosecutor, nor his claim that the trial court erroneously exercised its discretion in certain regards, would constitute grounds under WIS. STAT. § 974.06 for Netzer to withdraw his plea. Only constitutional and jurisdictional issues may be addressed via a motion under § 974.06. *See* ***State v. Minniecheske,*** 223 Wis. 2d 493, 498, 590 N.W.2d 17 (Ct. App. 1998). Not only are the "bias and abuse" claims not of constitutional or jurisdictional dimension, neither do they speak to the issue of whether Netzer's pleas were freely and knowingly entered or, for some other reason, the product of some "manifest injustice."

¶12 Netzer's assertion of ineffective assistance of counsel, because it raises a Sixth Amendment claim, is a proper subject of a motion under WIS. STAT. § 974.06, and if the ineffectiveness of his counsel resulted in Netzer's entry of pleas other than not guilty, a manifest injustice would have occurred. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). As the trial court noted, however, Netzer failed to include in his moving papers any explanation of why or how his counsel's alleged shortcomings prompted him to enter the pleas that he did. Accordingly, he was not entitled to an evidentiary hearing on these allegations and the trial court did not err in denying his motion without a hearing. *See* ***id***. at 316-17, 319.

¶13 Finally, as to Netzer's claim that there was not "strong proof" of his guilt to support his ***Alford*** pleas, we note that the plea questionnaire Netzer signed includes the following statement: "I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint …." We have reviewed the criminal complaint and conclude it alleges sufficient facts that, if established at trial, would constitute grounds for finding Netzer guilty of stalking and violating a harassment

restraining order. Netzer's arguments in support of his claim that a sufficient factual basis for his pleas was not demonstrated confuses the State's ability to prove what it asserted in its complaint, which is what Netzer disputes, with the question of whether the factual allegations of the complaint encompass the elements of the offenses to which he pled. The entry and acceptance of his pleas precludes him from now denying the allegations. *See* ***State v. Merryfield***, 229 Wis. 2d 52, 60-62, 598 N.W.2d 251 (1999) (noting that the purpose of requiring a factual basis inquiry where a plea of guilty or no contest is tendered "is not to resolve factual disputes about what did or did not happen at or before the time of the alleged offense—that is the function of a trial, which a defendant who pleads other than not guilty expressly waives").

CONCLUSION

¶14 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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