COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP81-CR **Cir. Ct. No. 2007CM265**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYLE A. LAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: RAYMOND THUMS, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Lyle Lay appeals a judgment convicting him of causing injury while operating a motor vehicle under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant, and an order denying his motion to withdraw his plea. Lay contends (1) he did not understand the consequences of entering an ***Alford*** plea,[2] and (2) there was an insufficient factual basis for the court to accept the plea. We affirm.

BACKGROUND

¶2 On September 14, 2007, Lay crashed his motorcycle, throwing his passenger to the ground. A blood draw confirmed his blood alcohol concentration was .186. Lay was charged with one count each of causing injury while operating a motor vehicle under the influence of an intoxicant, and causing injury while operating a motor vehicle with a prohibited alcohol concentration.

¶3 On July 23, 2008, Lay appeared, pro se, for a plea hearing and indicated he would plead no contest to the first charge. A plea agreement provided the second charge would be dismissed and read in. The circuit court asked Lay if he believed there was a factual basis for the charge. Lay responded that he did not because he did not believe there was sufficient evidence the crash injured his passenger. He clarified that although he did not believe the charge was warranted, he would plead no contest because "I just want to get this over with ...." Because Lay denied there was a factual basis for the charge, the court suggested it be tried to a jury. But Lay again responded, "I'm willing to just get this over with. I can't keep coming up here. And I'm pleading no contest. I'm just going to ask for mercy. That's all I'm doing." The court declined to accept his plea and instead scheduled a hearing for the following day.

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

¶4 The next day, Lay affirmed he intended to plead no contest. The court then told him it could construe his plea as an ***Alford*** plea, which it explained, is "a name given to a type of plea where someone is entering a plea of no contest [and] is essentially maintaining their innocence, yet want[s] to proceed with the matter." It then confirmed Lay still believed there was no factual basis for the charge and concluded, "I'm going to view this as a[n] ***Alford*** plea of no contest on your behalf ...." The court then conducted a plea colloquy and asked Lay, among other things, if he understood that his ***Alford*** plea "will result in a conviction just as though you had pled guilty or ... no contest ...." Lay responded that he did. The court satisfied itself there was sufficient evidence to support a conviction on the charge and found him guilty.

¶5 Lay moved for postconviction relief, arguing he was entitled to withdraw his plea because he did not understand the consequences of entering an ***Alford*** plea, and because there was an insufficient factual basis for the court to accept the plea. After a hearing, the court denied Lay's motion.

DISCUSSION

¶6 On appeal, Lay again argues that his plea was not knowing and voluntary and that there was an insufficient factual basis for his plea. Whether a defendant's plea was knowing and voluntary is a question of constitutional fact, which we review under a mixed standard. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We accept the circuit court's findings of historical facts unless clearly erroneous, but "we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

¶7 Lay argues his plea was not knowing and voluntary because he did not understand the consequences of entering an ***Alford*** plea. He contends an ***Alford*** plea is a guilty plea and so when the court construed his plea "a[n] ***Alford*** plea of no contest," it treated it as a guilty plea.

¶8 Lay is mistaken that an ***Alford*** plea cannot be entered within the context of pleading no contest. "An ***Alford*** plea is a guilty *or* no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime." ***State v. Multaler***, 2002 WI 35, ¶4 n.4, 252 Wis. 2d 54, 643 N.W.2d 437 (emphasis added); *see also* ***State v. Williams***, 2000 WI App 123, ¶7, n.4, 237 Wis. 2d 591, 614 N.W.2d 11 ("***Alford*** plea is a plea in which the defendant pleads either guilty or no contest"); ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff'd* 219 Wis. 2d 615, 579 N.W.2d 698 (1998), ("***Alford*** plea is a plea in which a defendant pleads either guilty or no contest"); ***State v. Spears***, 147 Wis. 2d 429, 433, 433 N.W.2d 595 (Ct. App. 1988) (an ***Alford*** plea "allows a guilty (or no contest) plea to be entered by a defendant even when accompanied by protestations of innocence" (internal punctuation omitted)). We therefore reject Lay's argument that by construing his plea as "a[n] ***Alford*** plea of no contest," the circuit court transformed his plea into a guilty plea.

¶9 We also reject Lay's argument that he did not understand the consequences of his plea. At the plea hearing, the court informed Lay that if it accepted the plea, "I will find you guilty, and it will result in a conviction just as though you had pled guilty or pled no contest and admitted there was a factual basis for the plea.... So the consequences are the same. It's just that you're maintaining your innocence for purposes of the record." It asked Lay if he understood, and Lay said that he did. The court then repeated, "the consequences

are the same," and Lay responded "okay." The court reiterated, "I mean, you will be convicted of a crime and I will impose some type of sentence today. Do you understand that?" Lay replied, "Okay. Yeah. That's fine."

¶10 Finally, we reject Lay's argument that there was an insufficient factual basis for his plea. Lay argues a handwritten statement he brought to the plea hearing proved his passenger's injury was caused by a bar fight, not the accident. However, according to the criminal complaint, at least four witnesses reported Lay's passenger was thrown to the road and knocked unconscious when he crashed the motorcycle. Lay could have contested the credibility of these witnesses in a trial, but he chose not to. These accounts, on their face, amply support the charge Lay injured his passenger when he crashed his motorcycle.[3]

MOTION FOR THREE-JUDGE PANEL

¶11 When Lay filed this appeal, he also moved this court to transfer the case to a three-judge panel. That motion is denied.

By the Court.—Judgment and order affirmed.

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

[3] Lay also argues that courts should never accept ***Alford*** pleas from unrepresented defendants and that Wisconsin should abolish ***Alford*** pleas. We do "not possess any supervisory authority which would permit [us] to promulgate rules of criminal practice and procedure." ***State v. Perez***, 170 Wis. 2d 130, 137, 487 N.W.2d 630 (Ct. App. 1992). Rather, "Wisconsin's constitution and statutes limit such a law-developing or law-declaring function exclusively to the Wisconsin Supreme Court." ***Id.*** We therefore do not address these arguments.