COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0184-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VINCENTE MURILLO, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Vincente Murillo, Jr., appeals from a judgment convicting him of two counts of first-degree recklessly endangering safety while armed. We affirm the judgment.

A gun taken from Murillo when he was arrested was matched by ballistics tests with evidence collected at the scene of a shooting incident. The incident that formed the basis for the charges involved shots fired into a residence approximately two weeks before Murillo's arrest. Although Murillo claimed that he was out of the state on the day of the incident and that he had just been given the gun on the day of his arrest, a witness identified Murillo as the shooter. On the scheduled trial date, Murillo entered an ***Alford*** plea to the two counts, and an unrelated third count was dismissed.[1]

Prior to sentencing, Murillo filed a motion to withdraw his plea. He claimed that he entered the plea because he feared for his family's safety. He alleged that the actual perpetrators of the crimes had threatened to harm his family if he gave authorities information regarding the perpetrator's identity. At the hearing on his motion, however, he could identify only the person from whom he claimed to have obtained the weapon. He did not explain why the threats had not caused him to enter the plea earlier or how a trial would have identified the perpetrators as he did not plan to testify.

After hearing testimony from Murillo and trial counsel, the trial court denied the motion. The court indicated that it observed the witnesses and weighed "the credibility of the facts advanced by" Murillo. The court stated that "based on the entire record in this case, and the totality of the circumstances," it did not believe Murillo's asserted reasons for wanting to withdraw the plea. The court concluded that there was "nothing credible" in the record to support vacating

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

the plea, and it ruled that Murillo had not shown a fair and just reason to withdraw the plea.

On appeal, Murillo contends that the trial court erred when it accepted his ***Alford*** plea without establishing a sufficient factual basis for the plea. Murillo criticizes the trial court for relying on the complaint and not inquiring of Murillo whether the facts were true, not requiring the prosecutor to summarize the evidence, and not inquiring into the facts surrounding Murillo's claimed alibi. He argues that the complaint does not satisfy the criteria of strong proof of guilt, which is required when an ***Alford*** plea is entered. *See* ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 234 (1996).

This issue was not raised in Murillo's motion to withdraw his plea, nor was it raised in a postconviction motion. With this omission, Murillo waived his right to appellate review of the issue; except for challenges to the sufficiency of the evidence, the right to appellate review does not extend to issues raised for the first time on appeal. *See* ***State v. Gomez***, 179 Wis.2d 400, 407, 507 N.W.2d 378, 381 (Ct. App. 1993). Although this rule of judicial administration does not deprive this court of the power to address an issue, *see* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980), we conclude that, in this appeal, it is not appropriate to address the issue. While the trial court's failure to determine whether a factual basis existed for a plea may show a manifest injustice permitting a defendant to withdraw the plea, the supreme court has held that the deficiency may be cured by evidence presented at a hearing on a post-plea challenge. *See* ***Loop v. State***, 65 Wis.2d 499, 503, 222 N.W.2d 694, 696 (1974); ***Morones v. State***, 61 Wis.2d 544, 551-52, 213 N.W.2d 31, 35-36 (1973). By failing to raise the issue in

the trial court, Murillo deprived the court and the prosecution of the opportunity to cure any deficiency.[2]

Murillo also contends that he presented a fair and just reason for withdrawing his plea. When a motion to withdraw a plea is made prior to sentencing, a defendant should be allowed to withdraw the plea if the defendant presents a fair and just reason for withdrawal and if withdrawal would not substantially prejudice the prosecution. ***State v. Canedy***, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). The burden is on the defendant to offer a fair and just reason, ***id.*** at 583-84, 469 N.W.2d at 171, and the reason must be supported by evidence in the record, ***State v. Shanks***, 152 Wis.2d 284, 290, 448 N.W.2d 264, 267 (Ct. App. 1989). A fair and just reason "contemplates the mere showing of some adequate reason for the defendant's change of heart," ***id.*** at 288, 448 N.W.2d at 266, but it is more than a desire for a trial, ***Canedy***, 161 Wis.2d at 583, 469 N.W.2d at 170-71. The trial court is to take a liberal rather than a rigid view of the proffered reasons. ***Shanks***, 152 Wis.2d at 288, 448 N.W.2d at 266. Whether the reason offered is adequate, however, is up to the trial court in the exercise of its discretion. ***Id.***

The issue in this case, however, is not the adequacy of the reason but the inadequacy of Murillo's proof. The trial court rejected his reason because it did not view Murillo as a credible witness. Although the trial court, not this court, judges the credibility of the witnesses, *see* ***State v. Daniels***, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983), we view the trial court's conclusion as reasonable.

[2] We note that information in the complaint presents strong evidence of Murillo's guilt. It recites that ballistics tests conducted by the prosecution's firearms expert established that casings recovered at the scene of the shooting were fired from the gun seized from Murillo. It also recites that during a lineup, an eyewitness to the shooting identified Murillo as the shooter.

Murillo's testimony was contradictory. He testified that his parents did not know about the threats until after he pled, but he also testified that someone had previously fired shots at their house and thrown rocks through the windows. He testified that he did not know the identity of the perpetrators of the shooting or of the individuals who made the threats; he could only identify the individual who gave him the gun. Murillo did not explain why, if he feared for his family's safety, he did not enter the plea earlier rather than waiting until the day of trial when the prosecution's witnesses had arrived. Additionally, the individual who Murillo claimed had given him the gun told investigators that he had purchased the gun from an unknown individual the day Murillo was arrested and that he gave it to Murillo because Murillo claimed someone was "messing with" his family.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(dissenting)*. On appeal, Murillo challenges the sufficiency of the factual basis for his ***Alford*** plea. The majority points out, however, that Murillo, in his postconviction motions, failed to make that challenge. In a footnote, the majority also comments that the criminal complaint, which served as the factual basis, presented strong evidence of Murillo's guilt. Majority slip op. at 4 n.2. Although the majority is correct in both respects, I would not apply waiver to Murillo's challenge, and I certainly would not conclude that the parties' stipulation to the complaint provided an adequate factual basis for Murillo's ***Alford*** plea.

As the supreme court recently reiterated, "[a] circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the defendant's plea." ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). Further, as the supreme court also explained, a trial court's failure to establish a factual basis constitutes not only a fair and just reason for plea withdrawal prior to sentencing, but also a "manifest injustice" requiring plea withdrawal, even after sentencing. ***State v. Smith***, 202 Wis.2d 21, 25-26, 549 N.W.2d 232, 233-34 (1996).

Moreover, in recent cases involving ***Alford*** pleas, the supreme court has emphasized that the record supporting the factual basis must be more substantial than that which might be acceptable in cases involving non-***Alford*** guilty pleas:

> In ***Garcia***, we specifically approved the reasoning in [***State v.***] ***Johnson*** [105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981)] and cited the following language:
>
> > 'We conclude that in Wisconsin a trial court can accept an ***Alford*** plea of guilty without violating the factual basis rule of ***Ernst v. State*** where, despite the defendant's protestations of innocence, the trial court determines that the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt.'
>
> *The requirement of a higher level of proof in* ***Alford*** *pleas* is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's "protestations" of innocence. Although strong proof of guilt is less than proof beyond a reasonable doubt, it is *clearly greater than what is needed to meet the factual basis requirement under a guilty plea*.

Smith, 202 Wis.2d at 27, 549 N.W.2d 232, 234-35 (emphasis added) (citations omitted).

In this case, the record supporting Murillo's plea consisted of nothing more than Judge Jeffrey A. Wagner stating, "If there's no objections, then the Court will use the Criminal Complaint as a factual basis for Defendant's pleas, and waive any other testimony." The prosecutor and defense counsel each stated "no objection." Thus, this plea was significantly different from those supporting ***Alford*** pleas where, for example, "'the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt.'" ***Id.*** Although a criminal complaint, coupled with a defendant's and/or defense counsel's acknowledgment of the specific facts alleged in the complaint, could provide an adequate basis, in this case the reference to the complaint was minimal and perfunctory. Therefore, I conclude, this plea record failed to satisfy "[t]he requirement of a higher level of proof … clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Id.***

The majority correctly points out, however, that "[w]hile the trial court's failure to determine whether a factual basis existed for a plea may show a manifest injustice permitting a defendant to withdraw the plea, the supreme court has held that the deficiency may be cured by evidence presented at a hearing on a post-plea challenge." Majority slip op. at 3. Indeed, in one of the cases the majority cites, the supreme court explained that as early as 1968, it had "recommended that a post-plea inquiry should be held to insure the accuracy of a plea of guilty and suggested the evidence could consist of the district attorney's presenting the facts and introducing any statements, confessions or information given in any manner which the court deemed appropriate, including testimony of the defendant." ***Edwards v. State***, 51 Wis.2d 231, 236, 186 N.W.2d 193, 195 (1971).

In this case, the evidence presented at the trial court's post-plea inquiry provided nothing to cure the deficiencies of the plea. The majority no doubt would explain that the postconviction motion hearing may not have done so because postconviction counsel caused the hearing to move in a different direction. In fact, he stated: "There is no question that what was done form wise was appropriate. Voluntary is what we are here for."

Thus, I appreciate how tempting it is to apply waiver. As the majority acknowledges, however, this court is not required to do so and, in this case, I consider the application of waiver inappropriate for four reasons:

(1) Although the factual basis for and the voluntariness of a plea present distinct legal issues, *see* ***State v. Harrington***, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994), they are not necessarily unrelated when litigated at a

postconviction motion hearing. Their factual relationship may be particularly prominent where, as in this case, the defendant entered ***Alford*** pleas.

(2) The postconviction proceedings present obvious problems with the conduct of both postconviction defense counsel and the trial court. As noted, at the October 31, 1995 evidentiary hearing on Murillo's motion, defense counsel commented that "[t]here is no question that what was done form wise was appropriate." Given the clearly deficient plea proceeding, that comment alone raises a potential issue the majority merely postpones by invoking waiver. But that's not all. That counsel's comment may have been careless, and that the trial court may have been hopelessly confused, is all the more indicated in the proceedings that took place *seven months after the evidentiary hearing* when, on May 29, 1996, the trial court finally decided Murillo's motion, and when an associate of Murillo's postconviction motion counsel appeared for Murillo and had this exchange with Judge Wagner:

> THE COURT: The Court's had the opportunity to read the – ah – certainly read the briefs that were submitted, go over the – ah – *the factual basis for the* – ah – the wanting of the withdrawal of the plea. It also – um – ah – Court also recognizes, and I believe that there's *a stipulation, that the plea was taken voluntarily, knowingly and intelligently*, without any type of – ah – um – after I believe [plea proceeding counsel] had testified; and *there was a stipulation between the parties that the Defendant understood his rights and – ah – and, ah, he voluntarily and intelligently and knowingly entered into that plea*.
>
> Is that correct?
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> [COUNSEL FOR MURILLO]: That is correct.

(Emphasis added.) Was the trial court determining "the factual basis"? Was voluntariness no longer the issue? If the stipulation was as sweeping as counsel conceded, what was the issue? What was the trial court deciding?

(3) Even assuming that the trial court understood what the issue was, and even assuming the trial court understood the issue, the trial court failed to provide any meaningful decision reflecting any exercise of discretion we could review. After citing some of the relevant authorities, and after *not* finding that the State would be prejudiced by any inability to locate a witness (but, in a somewhat contradictory statement, also commenting that uncertainty about the witness "certainly [is] … in the background of this"), Judge Wagner stated:

> Um, the Court, based upon the entire record in this case, and the totality of the circumstances, ah, does not believe that the Defendant asserted reasons for withdrawal of the plea, and there's no, ah, fair and just, ah, reason to allow withdrawal of the plea, based upon the case law. And, ah, Court doesn't believe that there's any fair and just reason to withdraw that plea, as the Court said – stated.
>
> There's nothing credible, ah, in the record that would suggest the Court to vacate the plea. So that's the – position of the Court.

As Murillo argues, the trial court "did not provide a reason for its decision which would allow this Court to make a meaningful determination as to whether the decision was a result of a proper exercise of the circuit court's discretion."

(4) Because this court repeatedly has admonished Judge Wagner regarding his failure to provide adequate records on guilty pleas and other matters, and because his failures do substantial injustice, and because his failures result in countless appeals that otherwise would be unnecessary (indeed, it was Judge Wagner's ***Alford*** plea proceeding that the supreme court reversed in ***Smith***), invoking waiver to rescue yet two more of his clearly deficient proceedings (both the plea hearing and the post-plea hearing and decision) can only disserve the interests of justice. Invoking waiver to rescue this record undermines justice not only in this case, but also in countless others before Judge Wagner and any other judges who would take consolation from the thought of just how much this court can stomach.

Because the plea proceeding did not provide an adequate factual basis for any guilty plea, much less an ***Alford*** plea, because the post-plea evidentiary hearing did not cure the defects in the plea proceeding, because the trial court apparently did not understand what issue it was deciding in the postconviction motion, and because the trial court's postconviction motion decision did not reflect any substantive exercise of discretion, I conclude that the trial court erred in denying Murillo's motion to withdraw his ***Alford*** plea. Accordingly, I respectfully dissent.