COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0790-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES J. KEMPINSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. James J. Kempinski appeals from judgments convicting him of two counts of second-degree sexual assault of a child as a repeat offender and from an order denying his motion to withdraw his pleas. Because the circuit court did not err in denying the plea withdrawal motion, we affirm.

¶2 Kempinski was charged with six counts of second-degree sexual assault (by contact and intercourse) of a fifteen year old. He entered guilty pleas in January 1999 to two counts of intercourse (penis-vagina and digital); the other counts were dismissed but read in. At the plea colloquy, the court reviewed the charges and the elements of the crimes, which Kempinski acknowledged. While Kempinski denied having penis-vagina intercourse with the victim, he stated that he had made a strategic decision to plead guilty to that charge given the evidence against him. Furthermore, the State would only agree to a plea agreement if Kempinski pled guilty to penis-vagina intercourse. Kempinski wanted to avail himself of the plea to avoid a much lengthier prison term if he were convicted of all counts against him. The court explored this decision with Kempinski, who affirmed his understanding of the charge and his reasons for entering a plea to it. The court found a factual basis for the guilty pleas in the victim's version of events and Kempinski's inculpatory statement to police regarding sexual contact with the victim.

¶3 On the day of sentencing, Kempinski filed a motion to withdraw his pleas. Kempinski, who still maintained his innocence of the penis-vagina intercourse charge, alleged that his counsel had failed to inform the court that he wanted to enter ***Alford***[1] pleas which would have required the court to find strong proof of guilt. The court also did not elicit confirmation that Kempinski understood the nature of an ***Alford*** plea and its consequences.

¶4 The plea withdrawal motion was filed on the day of sentencing after sentencing had already been postponed. The victim was present for the sentencing

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

hearing. The court determined that the plea withdrawal motion would be considered at a subsequent hearing and proceeded to sentencing. During allocution, Kempinski denied having intercourse with the victim. The court sentenced Kempinski to thirty years in prison and thirty years of probation.

¶5 At the plea withdrawal hearing, the parties and the court agreed that the proceedings would be governed by the presentencing plea withdrawal standard of a "fair and just reason" for withdrawing a plea. Former trial counsel testified that he withdrew from representing Kempinski after the plea hearing because he might have been ineffective as he did not discuss the significance of an ***Alford*** plea with Kempinski. Counsel believed that Kempinski's pleas should have been handled as ***Alford*** pleas because Kempinski maintained his innocence even though he had agreed to plead guilty to two counts of intercourse.

¶6 On cross-examination, trial counsel testified that he believed Kempinski understood the elements of the charges to which he pled guilty and the maximum penalties. Counsel conceded that after reviewing the evidence, there was a substantial likelihood of conviction on at least one sexual contact charge because Kempinski had admitted sexual contact to the police. Counsel believed that Kempinski entered his pleas voluntarily.

¶7 The victim's mother testified that the victim had returned to Denmark, where she resides. The victim has epilepsy and endures seizures which are brought on by stress. These circumstances would complicate the victim's return to the jurisdiction for trial.

¶8 A police detective testified that there was strong evidence of Kempinski's guilt in the victim's statement. The victim told police that she and Kempinski were delivering pizzas together when Kempinski pulled the car over,

grabbed her and had sexual contact and intercourse with her without her consent. Kempinski also admitted to sexual contact with the victim that night (hand to breast), although he denied having intercourse with the victim.

¶9 In denying the plea withdrawal motion, the circuit court noted that "strong evidence" in an ***Alford*** plea setting is evidence which is sufficient to satisfy the court that the defendant committed the crime. The court found strong proof of guilt and noted that the victim was credible. The court found that Kempinski benefited greatly by entering ***Alford*** pleas and eliminating four other sexual assault counts. The court found a compelling reason to deny plea withdrawal because the victim had returned to Denmark and her health would make it very difficult for her to return for trial. The court inferred that the lengthy sentence recommended in the presentence investigation report (PSI) precipitated Kempinski's plea withdrawal motion.

¶10 On appeal, Kempinski claims that he did not understand the significance of what amounted to ***Alford*** pleas and that the record does not reveal strong proof of guilt. An ***Alford*** plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970); ***State v. Spears***, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988). The circuit court must ascertain that "the evidence the state would offer at trial is strong proof of guilt." ***State v. Johnson***, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981).

¶11 A motion to withdraw a plea prior to sentencing is addressed to the discretion of the circuit court. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). A defendant has the burden to show by a preponderance of the

evidence that there is a "fair and just reason" for plea withdrawal. ***Id.*** at 861-62. Plea withdrawal should be freely allowed unless the State has been substantially prejudiced by reliance on the plea. ***Id.*** at 861.

¶12 Even though the circuit court and the parties did not expressly consider Kempinski's pleas under ***Alford***, the record reveals that the plea hearing functionally complied with the requirements for accepting an ***Alford*** plea. Kempinski completed a guilty/no contest plea questionnaire which was accompanied by a description of the elements of the crimes. A plea waiver form is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Furthermore, the plea colloquy was sufficient to meet the requirements of WIS. STAT. § 971.08 (1999-2000) and ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986). The court reviewed with Kempinski the elements of the crimes, the penalties, and Kempinski's understanding of the proceedings and discussions with counsel.

¶13 The record also reveals strong proof of Kempinski's guilt as required for an ***Alford*** plea. A factual basis for acceptance of a guilty plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts. ***Spears***, 147 Wis. 2d at 435. The quantum of proof for an ***Alford*** plea is not that which would be proof of guilt beyond a reasonable doubt. ***Johnson***, 105 Wis. 2d at 664. Rather, it is that proof which would "substantially negate the defendant's claim of innocence." ***Id.*** Where there is a negotiated plea, the "court need not go to the same length to determine whether the facts would sustain the charge as it would when there is no negotiated plea." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 645-46, 579 N.W.2d 698 (1998) (citation omitted). Here, the court had before it the victim's version of events as set forth in the complaint and

Kempinski's inculpatory statement to the police. This constituted strong proof of guilt for ***Alford*** purposes.

¶14 Kempinski argues that the victim's version of events cannot constitute strong proof of guilt for purposes of an ***Alford*** plea. We disagree. A factual basis for acceptance of a guilty plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts. ***Spears***, 147 Wis. 2d at 435. Here, the jury would have heard from the victim, whom the prosecutor and the detective had found credible. The victim's version of events was set forth in the criminal complaint. Kempinski admitted that he and the victim were delivering pizzas at the time the victim claimed the assaults occurred. Kempinski admitted having sexual contact with the victim. Kempinski had the opportunity to have intercourse with the victim. The victim's testimony at trial, if deemed credible by the jury, would have been enough to convict Kempinski.

¶15 That Kempinski maintains his innocence is not inconsistent with his ***Alford*** pleas. Rather, alleged innocence is the hallmark of an ***Alford*** plea; an ***Alford*** plea allows a defendant to maintain his or her innocence, avoid a trial and enter into an advantageous plea agreement. ***Garcia***, 192 Wis. 2d at 857; ***Johnson***, 105 Wis. 2d at 661. An otherwise valid plea is not involuntary because it is induced or motivated by the defendant's desire to face a lesser penalty. ***Armstrong v. State***, 55 Wis. 2d 282, 288, 198 N.W.2d 357 (1972). The record reveals that this was the case with Kempinski.

¶16 The circuit court also properly concluded that the State would be prejudiced by plea withdrawal because the victim was no longer available to testify. Assuming that Kempinski presented a fair and just reason for plea withdrawal, the burden shifted to the State to demonstrate substantial prejudice

from plea withdrawal. ***State v. Bollig***, 2000 WI 6, ¶39, 232 Wis. 2d 561, 605 N.W.2d 199. The State offered the testimony of the victim's mother that the victim had returned to Denmark and had health problems which would make it difficult for her to return for trial. As the victim's testimony would be a crucial piece of evidence at trial, the State argued substantial prejudice. The circuit court concurred. This conclusion is supported by the record and by federal cases which have recognized the prejudice to the State when witnesses have returned to far-off locations and it would be difficult for them to return for trial. *See* ***United States v. Dixon***, 784 F.2d 855, 857 (8th Cir. 1986) (government would be prejudiced if defendant were allowed to withdraw plea because witnesses would have to be reassembled from Mexico and other states).

¶17 Kempinski argues that the circuit court erroneously relied upon the PSI at the plea withdrawal hearing for the factual basis of the pleas. We need not consider whether the court erred because we have already held that there was sufficient evidence of guilt adduced at the plea hearing regardless of subsequent discussions of the factual basis.

¶18 We also need not address Kempinski's complaint that the court relied upon the PSI to infer a reason for his plea withdrawal motion. The author recommended a lengthy sentence. We have already held that there was strong proof of Kempinski's guilt, Kempinski did not demonstrate a fair and just reason for plea withdrawal, and the State would have been prejudiced by plea withdrawal. These holdings are unaffected by the circuit court's reference to the PSI at the plea withdrawal hearing.

By the Court.—Judgments and order affirmed.

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