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State v. Wing Appellant's Brief Dckt. 38662

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 v.)
)
 MARK ANDREW WING,)
)
 Defendant-Appellant.)
 _____)

NO. 38662

APPELLANT'S BRIEF

COPY

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

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District Judge

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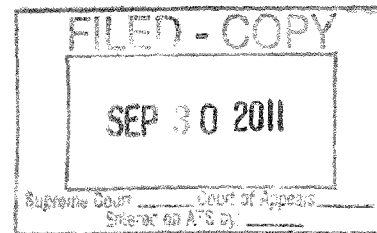


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STATEMENT OF THE CASE

Nature of the Case

Mark Andrew Wing appeals from his judgment of conviction for aggravated assault. Prior to sentencing, but after having an opportunity to review his presentence investigation report, Mr. Wing moved to withdraw his *Alford*¹ plea, which the district court denied. Mr. Wing now appeals, and he asserts that the district court abused its discretion when it denied his motion to withdraw his *Alford* plea.

Statement of the Facts and Course of Proceedings

On July 21, 2009, officers from the Coeur d'Alene police department responded to an incident at the Tamarack Trailer Park. (Presentence Investigation Report (*hereinafter*, PSI), p.2.) The park manager reported that Mr. Wing was chasing Aaron Fulk with a sword. (PSI, p.2.) The manager stated that Mr. Wing was trying to kill Mr. Fulk and would have succeeded had Mr. Fulk not fallen and avoided the sword. (PSI, p.2.) Mr. Fulk stated that he had got to Mr. Wing's trailer to confront him about how he had been treating Mr. Fulk's brother when the incident occurred. (PSI, p.2.) Mr. Fulk received no physical injuries. (PSI, p.3.)

Mr. Wing was charged with attempted murder in the first degree and obstructing a police officer. (R., p.61.) Counsel for Mr. Wing then moved for an evaluation pursuant to I.C. §§ 18-210 and 211 in order to determine whether Mr. Wing was competent to stand trial. (R., p.73.) The district court ordered the evaluation. (R., p.75.) Following the evaluation, Mr. Wing was involuntarily committed to the Department of Health and Welfare. (R., p.86.)

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

Once it was determined that Mr. Wing was competent, he proceeded to trial, where the district court declared a mistrial. (R., p.164.) Mr. Wing subsequently entered into a plea agreement in which he entered an *Alford* plea to an amended charge of aggravated assault. (Tr., p.13, Ls.11-15.)

Prior to sentencing, Mr. Wing filed a motion to withdraw his plea. (R., p.179.) Mr. Wing was appointed new counsel, who informed the court that prior counsel had told him that she had “discussed the PSI with Mr. Wing but that he did not have an opportunity to fully review it.” (Tr., p.27, Ls.9-15.)

Mr. Wing then testified at the hearing on his motion. He stated that he wished to withdraw his plea because he believed that he was not guilty of the crime. (Tr., p.30, Ls.11-13.) He also believed that his prior counsel did not investigate the case properly. He testified that he gave his attorney and her investigator a list of people and witnesses to contact and they told him that some of them they could not find and others would not be witnesses for him. (Tr., p.30, Ls.16-25.)

One of these witnesses was a reverend that was a neighbor of his, and his attorney stated that they had contact him and he stated that he would testify that he was reeking of alcohol and was drunk. (Tr., p.31, Ls.1-3.) Mr. Wing subsequently contacted this witness, who did not even know who his attorney was, so Mr. Wing knew that she actually had not contacted that witness. (Tr., p.32, Ls.3-7.) Mr. Wing testified that had his attorney actually contacted this witness and learned what he would testify about, he would not have entered his *Alford* plea. (Tr., p.32, Ls.11-16.)

On cross-examination, Mr. Wing acknowledged that, when he entered his *Alford* plea, he maintained that he was not guilty of the crime. (Tr., p.33, Ls.8-11.) Regarding what he knew about the PSI at the time he filed his motion to withdraw his plea,

Mr. Wing stated that he got in “hours before I came into court” and that his attorney “didn’t really go into anything. She just said she wasn’t happy with it. That’s all she said.” (Tr., p.34, L.19 – p.35, L.3.) When asked why the reverend was not present to testify, Mr. Wing stated that he hadn’t been able to call him. (Tr., p.37, L.1.)

The district court denied the motion to withdraw the plea. (Tr., p.45, Ls.9-10.) The court noted that it had not heard any testimony from the reverend. (Tr., p.45, Ls.9-20.) The court held that “the fact that Mr. Wing doesn’t feel he’s guilty isn’t a valid reason at least not at this point in time.” (Tr., p.46, Ls.8-10.) The court stated, “I don’t have the reverend’s testimony. I don’t have [trial counsel’s] testimony. I don’t have [the investigator’s] testimony, so I don’t have any good basis for the reason, let alone any proof that it’s a just reason. (Tr., p.46, Ls.13-16.) The court also noted that an enhancement was dropped in the plea agreement and, therefore, “there is no way that allowing a withdrawal of the guilty plea would inure to Mr. Wing’s benefit.” (Tr., p.47, Ls.1-5.)

The case proceeded to sentencing, where the district court imposed a unified sentence of five years, with four years fixed. (R., p.189.) Mr. Wing appealed, and he asserts that the district court abused its discretion by denying his motion to withdraw his *Alford* plea.

ISSUE

Did the district court abuse its discretion when it denied Mr. Wing's motion to withdraw his *Alford* plea?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Wing's Motion To Withdraw His *Alford* Plea

A. Introduction

After he entered his *Alford* plea, but prior to sentencing, Mr. Wing moved to withdraw his plea. The district court denied Mr. Wing's motion. Mr. Wing asserts that the district court abused its discretion by denying his motion to withdraw his *Alford* plea.

B. The District Court Abused Its Discretion When It Denied Mr. Wing's Motion To Withdraw His *Alford* Plea

A motion to withdraw a guilty plea is generally governed by the provisions of I.C.R. 33(c), which provides that such a motion, "may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the defendant's plea." I.C.R. 33(c). The district court's decision whether to grant a defendant's motion to withdraw his or her guilty plea is reviewed on appeal for an abuse of discretion. *See, e.g., State v. Arthur*, 145 Idaho 219, 222 (2008). However, the district court must act within the proper bounds of that discretion and consistent with the legal standards that are applicable to its determination. *State v. Warren*, 135 Idaho 836, 839 (Ct. App. 2001). The district court should liberally apply its discretion when presented with a motion to withdraw the defendant's guilty plea prior to sentencing. *Arthur*, 145 Idaho at 222.

The legal standards governing the district court's review of a defendant's motion to withdraw a guilty plea depend upon the timing of the defendant's motion. *Id.* When the defendant makes the motion prior to sentencing, he or she need only show "just

cause” to withdraw the plea. *Id.* Before sentencing, the inconvenience to the court and prosecution resulting from a change of plea is ordinarily slight as compared to protecting the right of the accused to trial by jury. *State v. Hanslovan*, 147 Idaho 530 (Ct. App. 2008). A district court may deny such a motion where the defendant fails to present and support a plausible reason for the withdrawal. *State v. Wyatt*, 131 Idaho 95, 97 (Ct. App. 1998). Denial is also proper where the state demonstrates that it would be prejudiced by the withdrawal of the guilty plea. *Id.*

Additionally, special considerations are permitted when the defendant’s motion to withdraw comes before sentencing, but after the defendant has had the opportunity to review the content of the presentence investigation report. In such cases, the district court “may temper its liberality by weighing the defendant’s apparent motive.” *Arthur*, 145 Idaho at 222.

In contrast, a much stricter standard applies when the defendant moves to withdraw his or her guilty plea after sentencing. In such cases, a defendant must demonstrate manifest injustice in order to be entitled to a withdrawal of the plea. *State v. Shook*, 144 Idaho 858, 859 (Ct. App. 2007). Manifest injustice is established if the plea was not taken in compliance with the due process requirements that the plea be made knowingly, intelligently, and voluntarily. *Id.*

While the first step in analyzing a defendant’s motion to withdraw a guilty plea is to examine whether the plea is constitutionally valid, this is not the last or necessarily dispositive analysis when the defendant’s motion is made prior to sentencing. *State v. Rodriguez*, 118 Idaho 957, 959 (Ct. App. 1990). Even if the plea itself is constitutionally valid, the district court is required to consider whether the reasons for seeking withdrawal of the guilty plea meet the lesser standard of just cause. *Id.*

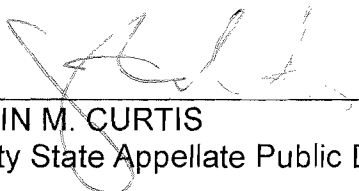
In this case, the record discloses that Mr. Wing's trial counsel told him that she was not happy with the PSI, but that Mr. Wing did not actually have a full opportunity to review it. (Tr., p.34, L.19 – p.35, L.3.) Therefore, Mr. Wing need only show "just cause" to withdraw his plea. Mr. Wing asserts that he demonstrated that his plea was not knowing, intelligently, or voluntarily given because the plea was made without him knowing that counsel did not contact his neighbor, the reverend. Mr. Wing was specifically told that his witness would not provide favorable testimony and Mr. Wing testified that he learned this was not true, and that but for that fact, he would not have entered his plea. While the district court is correct that it did not hear testimony from the reverend or from Mr. Wing's trial attorney and investigator, Mr. Wing testified to these facts and his testimony was uncontroverted by the State. The only evidence before the district court was Mr. Wing's testimony, which the State did not contradict. Mr. Wing therefore submits that his uncontroverted testimony that his attorney did not contact a favorable witness supplied a "just cause" for him to withdraw his *Alford* plea.

Finally, while the district court stated that was "not much of a factor" in its decision, the court noted that "there is no way that allowing a withdrawal of the plea would inure to Mr. Wing's benefit." (Tr., p.47, Ls.3-5.) Mr. Wing submits that this should not be a factor at all. First, withdrawal of the plea would certainly be in Mr. Wing's interest if he were to be found not guilty at trial. Second, whether the district court perceives the plea agreement to be a good deal is not a consideration. Mr. Wing is entitled to withdraw his plea if the plea was not knowingly, intelligently, or voluntarily given or if he shows "just cause," regardless of whether the district court, which was not a party to the negotiations, perceives the agreement to be in the defendant's interest.

CONCLUSION

Mr. Wing requests that the district court's order denying his motion to withdraw his *Alford* plea be reversed and his case remanded for further proceedings.

DATED this 30th day of September, 2011.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

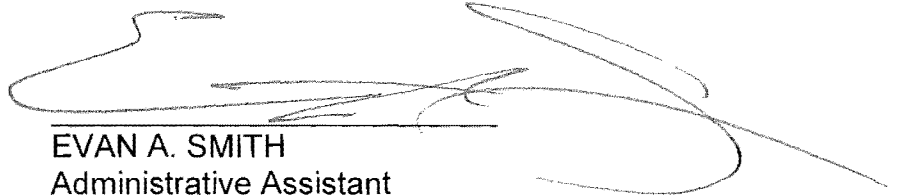
I HEREBY CERTIFY that on this 30th day of September, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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