SM-32A NO CONTEST AND ALFORD PLEAS

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I. The Pleas Compared

Guilty pleas are recognized as substitutes for the adjudication of guilt by trial for two reasons: the plea constitutes a waiver of trial by the accused (sometimes characterized as a consent to the entry of judgment); and the plea constitutes an express admission that the defendant committed the act charged. The no contest plea and the Alford plea both lack an express admission of guilt. With a no contest plea, the defendant refuses to admit guilt (or admits guilt solely for the purposes of the instant criminal proceeding). With an Alford plea, the defendant expressly maintains innocence while choosing to plead guilty.

The legitimacy of both pleas has been recognized by the courts. But special caution is required of the trial judge who considers accepting either a no contest or an Alford plea. It must be assured that the defendant knows what he or she is doing and that the apparent conflict between the refusal to admit guilt and the consent to entry of judgment is expressed on the record and acknowledged.

The terms "no contest plea" and "Alford plea" are sometimes used interchangeably. However, the Alford case clearly dealt with a guilty plea, not a plea of no contest, so there are two different entities. An Alford plea goes beyond a no contest plea in the sense that the former involves an outright claim of innocence while the latter involves something less than an express admission of guilt. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998).]

While there may be a conceptual difference between the two pleas, for purposes of accepting the pleas, any such difference "is of no constitutional significance . . ., for the constitution is concerned with practical consequences, not the formal categorizations of state law." North Carolina v. Alford, 400 U.S. 25, 37 (1970). [For reference to a complete hybrid, a "no contest plea with a claim of innocence," see Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).]

II. Plea Of No Contest

A. Description

Historically labeled "nolo contendere," the correct title for this plea is now "no contest." The essential characteristics of the no contest plea are:

1. when accepted by the court it constitutes an admission of guilt for the purposes of the case which supports a judgment of conviction and is in that respect equivalent to a plea of guilty; and
2. the plea cannot be used collaterally against the defendant, as, for example, in a later civil action.

Lee v. State Board of Dental Examiners, 29 Wis.2d 330, 334, 139 N.W.2d 61 (1966).

B. Effect Of A No Contest Plea

1. A no contest plea supports a fully effective criminal conviction

Whatever the distinction between a no contest plea and a guilty plea, it does not carry over to the conviction. "A judgment of conviction based on a plea of nolo contendere is a conviction which contains all the consequences of a conviction based on a plea of guilty or a verdict of guilty. There is no difference in the nature, character or force of a judgment of conviction depending upon the nature of the underlying plea." Lee, supra, 29 Wis.2d 330, 335. But see § 908.03(22) discussed below.

Thus, a conviction following a no contest plea is a full-blown criminal conviction for all purposes, such as later invocation of repeater statutes (State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928); State v. Brozosky, 197 Wis. 446, 222 N.W. 311 (1928)) and revocation of a professional license (State v. Lee, supra).

2. Collateral use of a no contest plea is prohibited

The usual distinction between a guilty plea and a no contest plea is that a guilty plea constitutes an express admission of guilt which can be used against the defendant in collateral proceedings while a no contest plea is an admission only for the purposes of the criminal case and cannot be collaterally used. This distinction is recognized and preserved in the Wisconsin Rules of Evidence.

Section 904.10 forbids the later use of no contest pleas, offers to plead no contest, and statements made in connection with those pleas or offers:

> 904.10 Offer to plead guilty; no contest; withdrawn plea of guilty. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in

> court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Section 908.03(22) recognizes that the hearsay rule does not exclude evidence of criminal judgments offered to prove facts essential to the judgment but provides an exception for judgments of conviction based on no contest pleas:

> 908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in §§ 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against person other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Evidence of criminal judgments not based on no contest pleas may be inadmissible in Wisconsin on other-than-hearsay grounds. See Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).

Thus, the defendant whose no contest plea is accepted is assured that the plea, statements made in connection with it, and the judgment entered upon it will all be inadmissible in later civil actions or other collateral proceedings. The conviction, however, is admissible to prove the fact of conviction itself. See discussion above.

C. Acceptance Procedures For No Contest Pleas

1. Guilty plea procedures apply

The same acceptance procedures are required for pleas of no contest as are required for guilty pleas. Section 971.08 applies to both types of pleas, requiring personal inquiry of the defendant to determine that the plea is made voluntarily and supported by a factual basis.

Wisconsin cases also tend to lump both pleas together when discussing acceptance procedures and the standards for withdrawing a plea. See, for example, State v. Galvan, 40 Wis.2d 679, 162 N.W.2d 622 (1968); State v. Schill, 93 Wis.2d 361, 286 N.W.2d 836

(1980); State v. Lee, 88 Wis.2d 239, 276 N.W.2d 268 (1979). If a no contest plea is accompanied by a refusal to answer the questions constituting the plea acceptance colloquy and a refusal to waive trial related rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

2. The court should assure that the defendant understands the consequences of the plea

It appears that some defendants view the no contest plea as an indication of lesser culpability than a plea of guilty. [See State v. Morse, 2005 WI App 223, ¶11, 287 Wis.2d 369, 706 N.W.2d 152, where the defendant sought to withdraw a no contest plea because the trial court failed to "dispel his misconception that he would receive a lesser sentence for pleading no contest." The motion was denied.] Trial courts accepting no contest pleas may be well advised to point out to the defendant that for purposes of the criminal case, the no contest plea is the basis for a criminal conviction that carries the full weight and force of a conviction resulting from a guilty plea or a jury finding of guilt. The conviction may be the basis for later criminal repeater charges or for collateral consequences such as revocation of professional license. See discussion above.

D. Court Authority To Reject No Contest Pleas

1. Court approval is required

Section 971.06 provides that a defendant may enter a no contest plea "subject to the approval of the court." This is consistent with Wisconsin case law, which has characterized the no contest plea as one which the defendant "may not interpose as a matter of right. It is received at the discretion of the court." State v. Suick, 195 Wis. 175, 177, 217 N.W. 743 (1928). Also see State v. Erickson, 53 Wis.2d 474, 476, 192 N.W.2d 872 (1972), where the court recognized the trial court's authority to refuse to accept a no contest plea because the offense was a felony with a possibility of imprisonment. At common law, there was apparently some dispute over the propriety of a no contest plea in cases involving imprisonment. There is now no doubt about the plea's suitability for even the most serious felonies. See State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928), and Hudson v. United States, 272 U.S. 451 (1926).

2. Guides to the exercise of discretion

Neither statutes nor case law identify the factors that are to guide the judge's exercise of discretion in deciding whether to receive a no contest plea. The practice in the state appears to vary widely. Some courts accept no contest pleas routinely without inquiring

into the reasons for the plea. Other courts discourage no contest pleas by requiring that a rational explanation support the offer of the plea. Some courts routinely accept the pleas in misdemeanors but require a reason in felonies.

Section 971.06(1)(c) recognizes that a defendant may plead no contest "subject to the approval of the court." It is likely that the court "approval" referred to in the statute requires an exercise of discretion which weighs the plea in light of the public interest and the interests of justice. As with any exercise of discretion, this requires the court to consider proper factors, reach a conclusion, and explain the basis for the conclusion.

The specific factors that may be considered cannot be exhaustively listed and are likely to depend on the facts and circumstances of each case. One consideration may be whether the preference for a no contest plea is based solely on a factual dispute that is relevant only to possible future civil litigation and not to the criminal charge (e.g., the exact value of stolen property). Another consideration may be whether the no contest plea might affect the defendant's eligibility for postconviction treatment programs. Some programs for sex offenders, for example, require a complete admission of guilt, evidenced by a guilty plea, as a precondition for acceptance into the treatment program. See, for example, State v. Carrizales, 191 Wis.2d 85, 528 N.W.2d 29 (Ct. App. 1995), where a defendant who had entered a no contest plea was terminated from a sex offender treatment program because he would not admit committing the sexual assault upon which his conviction was based. Also see State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998) discussed below, making the same point with respect to Alford pleas.

Section 971.095(2) requires the district attorney to confer with victims "concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The statute does not specify whether the victim's interest should influence the decision to accept a no contest plea.

Statements made in the context of the no contest pleas, the plea itself, and the judgment resulting from the plea are all inadmissible in later civil actions. §§ 904.10, 908.03(22). By contrast, the guilty plea is admissible in later civil actions, and the criminal judgment based on a guilty plea is not excluded by the hearsay rule. § 908.03(22).

III. The Alford Plea

A. Description

In North Carolina v. Alford, 400 U.S. 25 (1970), the U.S. Supreme Court recognized the constitutionality of accepting a guilty plea even though the defendant maintains innocence. Alford's guilty plea to second degree murder allowed him to escape the death penalty that might have been imposed if he had been convicted of first degree murder after a trial. His plea was found to be constitutional because the record showed he knew what he was doing and that there was a strong factual basis for the plea.

The term "Alford plea" is now used to identify the situation where defendants plead guilty but maintain their innocence. The legitimacy of the plea in Wisconsin was first recognized in State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981). In State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court noted that the plea gives the defendant a valuable option:

> A defendant may wish to plead guilty yet publicly maintain his innocence to avoid ridicule or embarrassment, such as where the charge is sexual assault of children. . . . Other times he might plead guilty while protesting his innocence because he does not think the jury will believe his claim of self-defense or accident.
> 192 Wis.2d 845, 857.

The court concluded that Alford pleas are acceptable as long as the defendant fully understands the consequences and the record shows the "strong evidence of guilt" that must support the plea. [See the discussion in section C., below.]

B. Effect

While statutes and case law address the effect of a no contest plea, there is no statutory authority describing the effect of the Alford plea. It seems logical to treat both pleas the same way.

1. An Alford plea supports a fully effective criminal conviction

There is no doubt that an Alford plea supports a fully effective criminal judgment. This is especially clear since a true Alford plea is a plea of guilty. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, footnote 9, 579 N.W.2d 698 (1998).] Thus, the arguments for treating differently a conviction following a no contest plea (which have been rejected in the no contest situation) do not even apply to an Alford plea.

2. What rules apply to the collateral use of an Alford plea?

If a defendant enters a true Alford plea, that is, a guilty plea joined with a claim of innocence, what limits are there on the collateral use of the resulting conviction? It could be argued that because the plea is technically one of "guilty," that the special rules dealing with no contest pleas do not apply.

Apart from the technical arguments that could be made, it appears to be the better practice to treat an Alford plea as a no contest plea for collateral purposes. The basis for treating a no contest plea differently than a guilty plea is the defendant's refusal to make a full admission of guilt. In an Alford plea, the defendant not only refuses to make a full admission of guilt but also expressly claims innocence. It would be illogical to restrict the collateral use of the no contest conviction, where there has been a limited admission of guilt, while placing no limits on the Alford conviction, where a claim of innocence has been made. .

Thus, the Alford plea conviction should be treated as follows:

1) the conviction is complete and unequivocal; it can be the basis for later repeater charges, suspension of a professional license, etc.
2) the plea is not an admission for collateral purposes;
3) statements made in connection with the plea are not admissible for collateral purposes; and
4) the conviction should be treated the same as a conviction following a no contest plea under sec. 908.03(22).

C. Acceptance Procedures

1. Guilty plea procedures apply

The rule for accepting Alford pleas is that regular guilty plea acceptance procedures apply, but special care must be taken. (See discussion below.)

The fact that an Alford plea is being submitted ought to be disclosed to the court as early as possible and usually is so disclosed. However, in a regular guilty plea case, the defendant may sometimes indicate hesitation about admitting guilt or may make statements that sound like claims of innocence. The court should fully explore such hesitation or statements, to assure that the defendant in fact understands what he or she is doing. A regular guilty plea should not be converted into an Alford plea without an express, unequivocal decision to that effect on the part of the defendant.

2. Special care is required

While Alford pleas are constitutionally acceptable and regular guilty plea procedures may be used, special care must be taken in two respects:

- it must be clear that the defendant fully understands the charge and the effect of the plea; and
- there must be strong evidence of guilt.

a. The defendant's understanding

Alford held that a guilty plea may be accepted in the absence of an express admission of guilt if the defendant "voluntarily, knowingly, and understandingly consent[s] to the imposition of a prison sentence . . . [and] intelligently concludes that his interests require entry of a guilty plea." 400 U.S. 25, 37. The regular guilty plea acceptance procedures are already designed to assure that any guilty plea is voluntarily and intelligently made. However, in the Alford situation, it is recommended that the court address special questions to defendants to assure that they understand that if the plea is accepted, an unequivocal criminal judgment will be entered – a judgment that will allow imposition of the same penalties that could follow a regular guilty plea.

The court should also ask defense counsel to make a statement on the record to show that the nature and consequences of the Alford plea were thoroughly discussed with the defendant and what the defendant's understanding of that discussion was.

In State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the court cited the preceding advice with approval:

> Competent counsel can easily explain the Alford plea. Moreover, defendants in Wisconsin are protected by procedural safeguards of sec. 971.08, Stats., and by material developed for the circuit courts by the Wisconsin Jury Instructions Committee specifically for Alford pleas. . . . [T]he Committee materials direct circuit judges to ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at note 6.

The following is included in the text of SM-32, Accepting A Plea of Guilty, to address these concerns:

> IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS:
>
> ["A plea of no contest means that you do not contest the state's ability to prove the facts necessary to constitute the crime."]
>
> ["An Alford plea is a guilty plea accompanied by a claim of innocence."]
>
> ["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]
>
> ["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]

b. "Strong evidence of guilt"

For all guilty pleas, a "factual basis" for the plea must be established. A precise evidentiary burden has never been assigned to "factual basis." The factual basis should be sufficient to satisfy the court that the defendant in fact committed the crime to which the plea is entered. § 971.08(1)(b). What it takes to so satisfy the judge will vary depending on the circumstances of each case, so the lack of a precise evidentiary standard is understandable.

With an Alford plea, the court must be satisfied that there is "strong evidence of actual guilt." North Carolina v. Alford, 400 U.S. 25, 37 (1970). This standard has been adopted in Wisconsin in State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981), where the court also observed that "'strong proof of guilt' to support an Alford plea is not the equivalent of proof beyond a reasonable doubt." 105 Wis.2d 657, 664.

The Johnson holding was adopted by the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 858, 532 N.W.2d 111 (1995): ". . . the plea is acceptable where the trial court determines that strong proof guilt has been shown." "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." State v. Smith, 202 Wis.2d 21, 27, 549 N.W.2d 232 (1996). Also see State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698 (1998).

The "strong proof of guilt" standard was applied in State v. Spears, 147 Wis.2d 429, 433 N.W.2d 595 (Ct. App. 1988), where a defendant had entered an Alford plea to two counts of what was then called second degree murder (now, first degree reckless homicide) and later attempted to withdraw the plea. The court cited the Johnson decision for two propositions: "strong proof" is not the equivalent of proof beyond a reasonable doubt; and, the inquiry is "whether the record 'indicates that a sufficient factual basis was established at the plea proceeding to substantially negate [the] defendant's claim of innocence.'" 147 Wis.2d 429, 435, citing State v. Johnson, supra, 105 Wis.2d 657, 664. [The Spears decision extensively discusses whether the "evidence" was sufficient to establish the "conduct evincing a depraved mind" element of old second degree murder. The majority and dissenting opinions disagree about whether "strong proof" of this troublesome element was presented, illustrating the difficulty in resolving the inherent contradiction presented by a guilty plea accompanied by a claim of innocence.]

c. "Heightened diligence" in sex offense cases

In State ex rel. Warren v. Schwarz, 219 Wis.2d 615 579 N.W.2d 698 (1998), the court called "for heightened diligence on the part of circuit courts in accepting Alford pleas—particularly in cases involving sex offenses . . . An inherent conflict arises when a charged sex offender enters an Alford plea: the offender cannot maintain innocence under the Alford plea and successfully complete the sex offender treatment program, which requires the offender to admit guilt." ¶72. The court added:

> ¶ 75. Should the circuit courts in their discretion decide to accept Alford pleas in such cases, we strongly advise them to give Alford-pleading defendants an instruction at the time of the plea that their protestations of innocence extend only to the plea itself, and do not serve as a guarantee that they cannot subsequently be punished for violating the terms of their probation which require an admission of guilt. Because of the unique nature of Alford pleas, circuit courts accepting such pleas should take extra care to ensure that defendants understand that in order to successfully complete the treatment program, they will be required to admit guilt. Such instructions will avert any misconceptions by

defendants that the Alford plea provides any "promises" or "guarantees" of what is constitutionally appropriate probationary treatment. ¶75.

D. Court Authority To Reject An Alford Plea

The Alford decision held that a guilty plea coupled with a claim of innocence was not unconstitutional. State v. Johnson and State v. Garcia both held that an Alford plea was not inconsistent with Wisconsin law relating to guilty pleas. However, Alford, Johnson, and Garcia do not require a court to accept an Alford plea.

1. Court approval is required

The Alford decision explicitly recognized that a trial court is not required to accept an Alford plea:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see Lynch v. Overholser, 369 U.S., at 719, 8 L Ed 2d 220 (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty. . . ." We need not now delineate the scope of that discretion. 400 U.S. 25, 38, n.11.

Garcia reaffirmed that a "circuit court may reject the plea if it concludes that the plea is contrary to the public interest or the interests of justice." 192 Wis.2d 845, 859 (citing this Special Material with approval). A concurring opinion by Justice Abrahamson advised circuit courts to seek "to resolve the conflict between the waiver of trial and the claim of innocence." 192 Wis.2d 845, 868. A concurring opinion by Justice Wilcox concluded that "an Alford plea is a troubling way to finalize the criminal judicial process. I recommend that the trial courts in this state act with great reticence when confronted with an Alford plea."
192 Wis.2d 845, 868.

2. Guides to the exercise of discretion

Wisconsin has not chosen to limit the court's authority to accept or reject Alford pleas. Thus, the trial judge confronted with an Alford plea is entitled to exercise

discretion in deciding whether to accept it. In many respects, this exercise of discretion will be like that involved in deciding whether to accept a no contest plea (see discussion above).

A refusal to accept an Alford plea should be supported by a clear statement of the factors that persuaded the court to exercise its discretion in that manner. In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

COMMENT

SM-32A was originally published in 1985 and revised in 1995. This revision was approved by the Committee in April 2019; it provided a general updating.

The primary changes made in the 1995 revision were those reflecting the decision of the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

