No. 42441-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHERRI BOSESKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

On January 8, 2009, the Tumwater Police Department received a report that a domestic dispute was heard coming from Ms. Boseski's apartment. Officers were dispatched to the apartment and knocked on Ms. Boseski's door. Ms. Boseski came to the door with a gun in her hand and the police tased her. CP 6.

The prosecution alleged that Ms. Boseski pointed her gun at the police. Ms. Boseski adamantly denies this allegation. She told her defense attorney, after her arrest and throughout her arraignment and plea negotiations, that she never pointed a gun at the police officers. CP 127.

The prosecution alleges that Ms. Boseski fought with the police officers after she recovered from the tasering.

The EMS assessment stated that she was suffering from a psychiatric disorder. CP 134. The police transported Ms. Boseski to jail, where she was booked and held. The EMS Report, asserts that she was transported to Providence St. Peter Hospital, but this is incorrect. She was taken straight to jail. CP 135.

On January 8, 2009, following Ms. Boseski's arrest, the court found probable cause for a charge of first-degree assault, based on the prosecution's assertion that Ms. Boseski allegedly said she would have shot the police officers if they had entered her home. CP 141, lines 23 and

24. Ms. Boseski was in jail and watched the hearing from a video monitor. Attorney Eric Pilon appeared on her behalf.

The deputy prosecutor asked the court to order a "safe-to-be-at large" evaluation, because "the State has got mental health concerns here...[due to] the fact that there wasn't anybody [else] in the apartment, that she was screaming and yelling as if somebody was there[.]" The Court ordered the evaluation. CP 143, lines 7-14.; CP 144, lines 20-21.

A second preliminary hearing was held on January 12, 2009, while Ms. Boseski still was in jail. Contrary to what is indicated on the transcript, Ms. Boseski was not present at this arraignment as evidenced by the fact that she made no statements and was not addressed by the judge. CP 151. She was again represented by Eric Pilon. Both prosecution and defense counsel asked for a referral to Lisa Kertzman at the jail, to work out special release conditions to address Ms. Boseski's mental health problems. CP 152, lines 18-25; CP 153, lines 1-2. The Court noted that the "safe-to-be-at large evaluation indicates concern about [Ms. Boseski's] safety and the safety of others, unless she is under controlled circumstances." CP 151, lines 14-21. Deputy Prosecutor Wheeler told the Court that charges had been filed for assault second in the degree with a deadly weapon, and assault in the third degree. CP 154,

lines 19-23. The Court set bail at $25,000, with return to court for special conditions, if posted. CP 154, lines 8-9.

Ms. Boseski appeared before Judge Gary Tabor on January 14, 2009, represented by Eric Pilon. As conditions of release from jail, the court ordered that she take any prescribed medications and that Pretrial Services provide supervision. CP 165, lines 7-9; lines 19-23. Ms. Boseski was then transferred to Madigan Army Medical Center for inpatient psychological evaluation. She remained there until her release approximately three weeks later. CP 169. Subsequent to her release she was ordered to be confined on base by Judge Tabor without any military hearing.

On February 10, 2009, Ms. Boseski appeared in court for arraignment, represented by attorney Kevin Trombold. Mr. Trombold acknowledged receipt of the information, waived formal reading, and entered a plea of "not guilty" to Counts I and II, on Ms. Boseski's behalf. CP 173, lines 12-14; CP 175, lines 22-24.

On June 22, 2009, the defendant entered a plea of guilty to assault in the second degree and assault in the third degree; she was again represented by Kevin Trombold. CP 177.

As part of the plea bargain, the State agreed to dismiss the firearm enhancement. Ms. Boseski was never arraigned on the amended charge of

Assault in the Second Degree. CP 191. The plea agreement which Ms. Boseski signed states that "On January 8, 2009 in Thurston County, I intentionally assaulted a person and inflicted (recklessly) substantial bodily harm." CP 184 Ms. Boseski denies that she inflicted substantial bodily harm on either of the officers who came to her apartment. The record contains no evidence that defendant inflicted substantial bodily harm on anyone. The Judgment and Sentence reflected that Ms. Boseski plead guilty to RCW 9A.36.021 (c) involving assault with a deadly weapon when the language reflected in the plea agreement cites RCW 9A.36.021 (a). CP 184.

The plea language in paragraph 11 of the plea form asking what she did in her own words merely recited the Assault 2 and Assault 3 statutes and gives a legal conclusion, rather than a factual basis for the plea as is required by CrR4.2(d). CP 184.

After serving her full sentence of six-and-a-half months in prison, defendant was released. She now lives in New Jersey. This Court should reverse and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. Ms. Boseski's plea was not knowing, voluntary and intelligent, because she suffered from mental illness.

2. The trial court erred in accepting the guilty plea because pursuant to CrR 4.2(d), the trial court did not have before it at the time of the plea hearing a sufficient factual basis upon which to accept defendant's guilty plea.

3. Ms. Boseski was denied effective assistance of counsel.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the doctrine of equitable tolling apply, so that the defendant's motion to vacate her guilty plea and sentence are not time-barred, even though the motion is filed more than one year after the court filed her guilty plea?

2. Does the doctrine of equitable tolling apply to the defendant's motion, because the trial court failed to inform the defendant about the one-year time limit for moving to vacate her plea, as required by RCW 10.73.110 and there is new evidence?

3. Should the court vacate defendant's plea on the ground that it was not knowing, voluntary and intelligent, because she suffered from severe mental illness?

4. Should the court vacate defendant's plea on the ground that she did not understand the charges against her, and therefore acceptance of the plea constituted manifest injustice?

5. Should the court vacate defendant's plea because counsel mistakenly informed her that the State had charged her with first degree assault and third degree assault, when actually the State had charged her with second degree assault with a deadly weapon and third degree assault?

6. Should the court allow defendant to withdraw her plea, on the grounds that counsel was ineffective?

7. Should the defendant be allowed to withdraw her guilty plea, because it was based on defense counsel's erroneous advice that the State had charged her with first degree assault, when in fact the charge was second degree assault with a deadly weapon?

8. Should the defendant be allowed to withdraw her guilty plea because pursuant to CrR 4.2(d), the trial court did not have before it at the time of the plea hearing a sufficient factual basis upon which to accept defendant's guilty plea, nor was she informed of the rights that she was waiving?

9. Should the defendant be allowed to withdraw her guilty plea because she was never arraigned on the charges that she faced?

D. STATEMENT OF THE CASE

On January 8, 2009, the Tumwater Police Department received a report that a domestic dispute was heard coming from Ms. Boseski's apartment. Officers were dispatched to the apartment and knocked on Ms.

Boseski's door. Ms. Boseski came to the door with a gun in her hand and the police tased her. CP 6.

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that she was screaming and yelling as if somebody was there[.]" The Court ordered the evaluation. CP 143, lines 7-14.; CP 144, lines 20-21.

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when the language reflected in the plea agreement cites RCW 9A.36.021 (a).

The plea language in paragraph 11 of the plea form asking what she did in her own words merely recited the Assault 2 and Assault 3 statutes and gives a legal conclusion, rather than a factual basis for the plea as is required by CrR4.2(d). CP 184.

After serving her full sentence of six-and-a-half months in prison, defendant was released. She now lives in New Jersey. This Court should reverse and remand for a new trial.

She was told by Counsel to swiftly sign the judgment and sentence, but never had the opportunity to read it and never received a copy of it.

E. ARGUMENT

A. Ms. Boseski's Motion to Withdraw Guilty Plea was not Time Barred Because of Equitable Tolling.

CrR 7.8(b)(2) and (5) provide:

> On motion and upon such terms as are just, the court may relieve a party from final judgment, order, or proceeding for the following reasons:
>
> ...
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
>
> ...
>
> (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8 further requires:

> "the motion shall be made within a reasonable time and for [reason in subsection(b)(2)] not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140."

RCW 10.73.090 provides that a motion for collateral attack on a judgment and sentence in a criminal case may not be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.100 enumerates specific reasons why the collateral attack may be brought outside the one-year time bar. If a petition is based on grounds not listed in RCW 10.73.100, the petition is subject to the one-year time bar of RCW 10.73.090 unless it qualifies under the exceptions to the time bar in RCW 10.73.090 itself. *In re Personal Restraint of Stoudmire*, 141 Wn.2d 342, 346, 5 P.3d 1240 (2000).

Washington law also recognizes equitable exceptions to the time bar of RCW 10.73.090. "When a statute requires that a court or DOC notify a defendant of a time bar and the notice is not given, this omission creates an exemption to the time bar and a court, therefore, must treat the defendant's position for collateral review as timely." *State v. Schwab*, 141 Wn.App. 85, 91, 167 P.3d 1225, 1228, *rev. den.* 164 Wn.2d 1009, 195 P.3d 86 (2008), *cert. denied* by *Schwab v. Wash.*, 129 S.Ct. 1348, (2009). RCW 10.73.110 requires the court to advise the defendant of the time

limit. The one-year time limit of RCW 10.73.090(1) for collateral attack on a judgment and sentence is conditioned on the court's compliance with RCW 10.73.110, requiring notice of its terms. *State v. Golden*, 112 Wn. App. 68, 78, 47 P.3d 587 (2002). "RCW 10.73.110 is unambiguous. It imposes the duty that the court shall advise the defendant at the time judgment and sentence is pronounced in a criminal case of the time limit specified in RCW 10.73.090. The general rule of statutory interpretation is that 'shall' is imperative." *Id.*, 112 Wn. App. at 78, *citations omitted.*

In *Golden,* the defendant filed his motion to vacate more than eight years after his guilty plea was entered, on the ground that the juvenile court which sentenced Mr. Golden, did not enter a written finding of capacity. Furthermore, it never informed Mr. Golden of his right to collaterally challenge the conviction, nor of the one-year time limit. *Golden,* 112 Wn. App. at 71.

The trial court granted Mr. Golden's motion to vacate the guilty plea, and the Court of Appeals affirmed. It held that eight and one-half years was not an unreasonable delay in seeking relief from judgment and granted the motion to withdraw the plea. *Golden*, 112 Wn.App. at 78.

In this case, the court accepted Ms. Boseski's guilty plea and entered a sentence without advising her, in writing or orally, of the one-year time limit in which to collaterally attack the sentence. A careful

review of the plea statement which Ms. Boseski signed shows that it did not advise her of the one-year time limit for a motion to withdraw the plea. CP 177 – CP 185. The report of proceeding for the sentencing hearing also shows that the court did not inform Ms. Boseski of the one-year time limit. CP 196-216. Ms. Boseski never had the opportunity to read the judgment and sentence and it was never addressed by the judge or her counsel. CP 127.

B. Ms. Boseski's Motion to Withdraw Guilty Plea was not Time Barred Because of New Evidence.

RCW 10.73.100 states that if there is new evidence and the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion, the one year limit is not applicable. Here, the EMT report was not known to Defense during the pendency of the case because it was filed under the wrong address of 2850 Crosby Blvd. SW, Tumwater, WA. Ms. Boseski's actual address was 2788 Danberry Lane, Tumwater, WA. The report states that Ms. Boseski went to the hospital, when in fact she did not. This report was material to Ms. Boseski's case because it revealed inconsistencies between the police officers' reports and EMT's report. Ms. Boseski acted with reasonable diligence by independently discovering this evidence and immediately hiring an attorney to file this motion. The EMT report therefore should be

considered new evidence making Ms. Boseski's motion to vacate her guilty plea timely.

C. The Court's Acceptance of Ms. Boseski's Guilty Plea Constitutes Manifest Injustice.

The voluntariness of a plea may be raised for the first time on appeal. *State* v. *Mendoza*, 157 Wash.2d 582, 589, 141 P.3d 49 (2006). The state bears the burden of proving the validity of a guilty plea. *State* v. *Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996). The defendant should be allowed to withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." *Zumwalt*, 79 Wn.App. at 128 (quoting CrR 4.2(f)). A "'manifest injustice' is 'an injustice that is obvious, directly observable, overt, not obscure.'" *Zumwalt*, 79 Wn.App. at 128 citing *State v. Saas*, 118 Wn. 2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn. 2d 564, 596, 521 P.2d 699 (1974)). Four nonexclusive instances of "manifest injustice" include: (1) ineffective assistance of counsel; (2) a plea not authorized or ratified by the defendant; (3) the prosecution's failure to keep a plea agreement; and (4) an involuntary plea. *Saas*, 118 Wn. 2d at 42. CrR 4.2(d) sets forth the standard for determining whether a plea was voluntarily, *Zumwalt*, 79 Wn.App. at 128; CrR 4.2(d) provides:

> The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

D. Ms. Boseski's Guilty Plea was not Knowingly, Intelligently, and Voluntarily Entered Because it Lacks a Factual Basis.

Due process requires that a plea be knowingly, intelligently, and voluntarily entered. U.S. Const. amends. V, XIV; Wash. Const. art. I, §§ 3, 22; *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1079, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297-98, 88 P.3d 290 (2004). Criminal Rule 4.2(d) clearly states in relevant part that "(t)he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." In interpreting that rule and its federal counterpart, *Fed.R.Crim.P. 11*, courts have frequently reiterated that the trial judge must develop on the record the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge, *Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)*; accord, *In re Keene, 95 Wash.2d 203, 209, 622 P.2d 360 (1980)*; or by other reliable sources made part of the record. *State v. Newton, 87 Wash.2d 363, 552 P.2d 682 (1976)*. The factual basis must be developed on the record at the time the plea is taken

and may not be deferred until sentencing. *State v. Iredale, 16 Wash.App. 53, 553 P.2d 1112 (1976).*

A 2004 Court of Appeals, Division II case, *State v. Kiper,* No. 30760-0 was filed on August 17, 2004, which dictates that Ms. Boseski should be entitled to withdraw her plea because the conduct admitted in her statement on plea of guilty did not constitute the crime with which she was charged.

In *Kiper,* the defendant was prosecuted for changing his address within Thurston County and failing to notify the Thurston County Sheriff, which was a violation of that portion of former RCW 9A.44.130(5)(a) (1999) that provided:

> If any person required to register pursuant to this section changes his or her address within the same county, the person must send written notice of the change of address to the county sheriff within seventy-two hours of moving.

But Kiper admitted to moving to another state without notice to the Sheriff's Office, which would be a violation of a different portion of former RCW 9A.44.130(5)(a) that provided:

> If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.

The Washington State Court of Appeals Division II ruled that if the admitted conduct does not constitute the charged crime, the plea of guilty lacks a factual basis. In re Personal Restraint Petition of Crabtree, 141 Wn.2d 577, 585, 9 P.3d 814 (2000). If a guilty plea lacks a factual basis, the defendant is entitled to withdraw the plea. *State v. Zumalt*, 79 Wn. App. 124, 132, 901 P.2d 319 (1995).

The Court vacated Kiper's judgment and sentence and remanded to the superior court to allow Kiper to withdraw his plea of guilty.

Here, Ms. Boseski admitted in her statement of defendant on plea of guilty and on the record to RCW 9A.36.021(a) that provided:

"I intentionally assaulted a person and inflicted reckless substantial bodily harm." 6 VP 3.

However, Ms. Boseski's judgment and sentence and the second amended information, which Ms. Boseski never had the opportunity to review, cited RCW 9A.36.021(c), that provided:

"I assaulted another with a deadly weapon."

Employing the same analysis as this Court used in *Kiper,* the conduct that Ms. Boseski plead to did not constitute the crime with which she was charged because nowhere in her plea statement was it mentioned that Ms. Boseski assaulted someone with a deadly weapon. Similar to Mr. Kiper who inaccurately plead to moving out of the state, Ms. Boseski

inaccurately plead to assaulting a person and inflicting reckless substantial bodily harm. Not only was inflicting reckless substantial bodily harm not on the judgment and sentence or the amended information, but Ms. Boseski did not do any reckless substantial bodily harm when looking at the facts even in the light most favorable to the State.

The Washington State Supreme Court has ruled that if the admitted conduct does not constitute the charged crime, the plea of guilty lacks a factual basis. *In re Personal Restraint Petition of Crabtree*, 141 Wn.2d 577, 585, 9 P.3d 814 (2000). If a guilty plea lacks a factual basis, the defendant is entitled to withdraw the plea. *State v. Zumalt*, 79 Wn. App. 124, 132, 901 P.2d 319 (1995).

The purpose behind the factual basis requirement is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. *McCarthy v. United States, 394 U.S. 459, 467, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418, 426 (1969)*, quoting from *Fed.R.Crim.P. 11*, Notes of Advisory Committee on Criminal Rules; accord, *In re Keene, 95 Wash.2d at 209, 622 P.2d 360.* The factual basis requirement of CrR 4.2(d) is satisfied if there is sufficient evidence for a jury to conclude that defendant is guilty, but the

trial court need not be convinced of an accused's guilt beyond a reasonable doubt. *State v. Durham, 16 Wash.App. 648, 653, 559 P.2d 567 (1977).*

Applying these principles to the facts of the present case, we conclude that at the time the trial court accepted defendant's plea of guilty the record did not contain a sufficient factual basis for the plea. During the colloquy between the trial judge and defendant, no attempt was made to orally elicit a description of either defendant's acts or state of mind which resulted in the charge to which she ultimately pled guilty. CP 190-191. The Statement of Defendant on Plea of Guilty, which was part of the plea hearing record, also fails to show a factual basis for the guilty plea. The closest that document comes to providing a factual basis, however, is the aforementioned paragraph 11, where defendant's attorney wrote, "I intentionally assaulted a person and inflicted (recklessly) substantial bodily harm. CP 177-CP 185. I also intentionally assaulted a police officer who was performing his official duties at the time of the assault." Because that statement is a mere conclusion of law, and, more importantly, merely recites the statute, it falls far short of fulfilling the factual basis requirement of CrR 4.2(d).

At the time that an accused enters a guilty plea, the trial court must comply with the requirements of CrR 4.2(d) by determining, on the record, that the acts admitted to by the accused constitute sufficient evidence from

which a jury could conclude that the accused was guilty of the charge." *In re Keene*, 95 Wn.2d 203, 206, 622 P.2d 360 (1980). The court must make direct inquiry either personally or by a written statement. *Id.* In *Keene,* the Supreme Court held that the trial judge was justified in relying upon a typewritten plea statement that the petitioner's attorney had prepared, because petitioner told the trial court that he had read it, and that the statements contained in it were true." *Id.*, 95 Wn.2d at 206-207.

Here, Ms. Boseski admitted in her statement of defendant on plea of guilty and on the record to RCW 9A.36.021(a) that provided:

> "I intentionally assaulted a person and inflicted reckless substantial bodily harm." CP 241.

However, Ms. Boseski's judgment and sentence and the second amended information, which Ms. Boseski never had the opportunity to review, cited RCW 9A.36.021(c), and provided:

> "I assaulted another with a deadly weapon." CP 241

The conduct that Ms. Boseski admitted to did not constitute the crime with which she was charged because nowhere in the charging document was it mentioned that Ms. Boseski inflicted substantial bodily harm. Ms. Boseski's case is similar to *State v. Zumwalt*, 79 Wn. App. 124, 132, 901 P.2d 319 (1995), where Mr. Zumwalt pled guilty to a charge which was factually not supportable in his case, Ms. Boseski inaccurately

pled guilty to assaulting a person and inflicting reckless substantial bodily harm. Not only was inflicting reckless substantial bodily harm not on the judgment and sentence or the amended information, but Ms. Boseski did not do any reckless substantial bodily harm even when looking at the facts even in the light most favorable to the State.

The court did have a discussion with Ms. Boseski and her attorney before she entered her plea. However, the transcript demonstrates that the acts to which she admitted did not meet *Keene's* requirement that "the acts admitted to by the accused constitute sufficient evidence from which a jury could conclude that the accused was guilty of the charge." The record shows the following discussion:

The Court: I intentionally assaulted a person and inflicted reckless substantial bodily harm. I also intentionally assaulted a police officer who was performing his official duties at the time of the assault. Now, have you gone over with Mr. Trombold what it means to plead guilty?

The Defendant: Yes, Your Honor.

The Court: Have you gone over with her do you think this plea is knowing, intelligent and voluntarily made?

Mr. Trombold: Yes, Your Honor.

The Court: Then we'll accept it find it to be so.

CP 192.

Ms. Boseski denies that she inflicted "substantial bodily harm" on any person at her apartment on the day in question, January 8, 2009. The record does not show that the prosecution presented any witnesses to support the charge that defendant had caused "substantial bodily harm" to a police officer or anyone else and no police officer or person's name is listed in the plea form in paragraph 11. Neither the prosecution, nor the plea form named any police officer who was allegedly injured, and did not describe any alleged injuries. Therefore, there is no factual basis to find that an assault which inflicted substantial bodily harm occurred, and Ms. Boseski's guilty plea must be withdrawn.

E. Ms. Boseski did not Plead Guilty to the Elements of 9A.36.021(c) and Notice of the Criminal Elements of the Offense is Required.

A defendant must be aware of the nature of the offenses to which he is pleading guilty for the plea to be voluntary. *State v. McCollum*, 88 Wn. App. 977, 983, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035, 980 P.2d 1285 (1999). Notice of every element of the crimes charged is not required for a plea to be voluntary, but notice of the "critical elements" of the offense is required. *State v. Rigsby*, 49 Wn. App. 912, 914-15, 747 P.2d 472 (1987). Further, "a defendant, in fairness, should be formally advised of the elements before the plea is accepted." *Rigsby*, 49 Wn. App.

at 914 (citing 2 W. LaFave & J. Israel, Criminal Procedure § 20.4 (1984) (quoting 3 ABA Standards For Criminal Justice § 14.1-4(a)(i) (2d ed. 1980))).

An explanation of the elements of the charge helps to assure that the defendant fully appreciates the nature of the offense to which the plea is tendered. Since a guilty plea is a formal admission of all elements of the charge, a defendant, in fairness, should be formally advised of the elements before the plea is accepted. 2 W. LaFave & J. Israel, Criminal Procedure § 20.4 (1984) (quoting 3 ABA Standards for Criminal Justice § 14.1-4(a)(i) (2d ed. 1980)). The record usually contains either an explanation of the charges by the trial judge or a representation by defense counsel that he has explained the nature of the offense to the defendant. *Henderson v. Morgan*, 426 U.S. 637, 647, 96 S.Ct. 2253, 2258 49 L.Ed.2d 108 (1976).

In *Rigsby*, the defendant contends that the plea was not voluntary because he was not informed of the nature of the crime to which he was pleading guilty or the acts which the State alleged constituted the offense.

The *Rigsby* plea language said the following:

> "On the 2nd of October, 1972, you did rob the Kaiser Hospital of the sum of $6,000.00, guilty or not guilty."
>
> *Rigsby*, 49 Wn. App. at 914.

The Court of Appeals Division I reversed and remanded for resentencing because there was no indication that Rigsby was informed either by the court or his attorney of any elements of the robbery. *Id.*

The Court ruled that "because it failed to establish that Rigsby knew the elements of robbery or that a factual basis for the plea existed, the 1973 conviction cannot be used to support the habitual criminal finding. We therefore reverse and remand for resentencing. There is no indication that in 1973 Rigsby was informed either by the court or his attorney of any of the elements of robbery. *In re Keene*, 95 Wash.2d 203, 209, 622 P.2d 360 (1980).

Here, there is nothing on the record to demonstrate that Ms. Boseski understood the elements of the crime that she actually plead guilty to. In addition to the fact that she was not competent at the time, the court only went over RCW 9A.36.021(a) regarding recklessly inflicting substantial bodily harm. The judgment and sentence clearly indicates that 9A.36.021(c) applies, but no mention of a deadly weapon was mentioned or any other elements of 9A.36.021(c). CP 244.

F. Ms. Boseskis's Plea was not Knowing, Voluntary, and Intelligent When Ms. Boseski Lacked Competency at Arraignment.

The United States Supreme Court has held that the Fourteenth Amendment's due process clause prohibits the conviction of a person who is not competent to stand trial. *Personal Restraint of Fleming,* 142 Wn.2d 853, 861, 16 P.3d 610 (2000), *citing Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) and others.

The constitutional standard for competency to stand trial is whether the accused has "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and to assist in his defense with 'a rational as well as factual understanding of the proceedings against him.'" *Fleming*, 142 Wn.2d at 861-862, *citing Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

RCW 10.77.050 provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.060(1)(a) provides that the court shall order a competency exam whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency. It states the following:

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to

examine and report upon the mental condition of the defendant.

RCW 10.77.060(3)(b) provides that the report of the examination shall include a diagnosis of the defendant's mental condition. Part (3)(c) provides that if the defendant suffers from a mental disease or defect or is developmentally disabled, the report shall include an opinion as to competency.

"Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Personal Restraint of Fleming,* 142 Wn.2d 853, 861-862, *citation omitted.*

The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial. Fleming, *Id.* at 862, citation omitted.

Procedures of the competency statute are mandatory and not merely directory. *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). "[I]ncompetency cannot be waived. RCW 10.77.050 provides, "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." It is apparent, therefore, that an incompetent person may not enter into any plea agreement." *Fleming,* 142 Wn.2d at 865.

The petitioner in *Fleming* was charged with two counts of burglary. The trial court accepted his guilty plea, imposed sentence, and denied his motion to withdraw that plea. The Supreme Court reversed, granted the petition and vacated the guilty plea and sentence. It held that the failure of petitioner's attorneys to advise the court of expert opinion regarding petitioner's incompetence constituted ineffective assistance of counsel. Therefore the plea could not be shown to have been entered into knowingly, intelligently, or voluntarily.

"The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the 'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *Fleming*, 142 Wn.2d at 863.

In this case, the court discussed the fact of defendant's mental illness with defense counsel and the deputy prosecutor. At the initial arraignment, the deputy prosecutor asked the court to order a "safe-to-be-at large" evaluation, because "the State has got mental health concerns here...[due to] the fact that there wasn't anybody [else] in the apartment, that she was screaming and yelling as if somebody was there[.]" CP 143,

lines 7-14. ; CP 144, lines 20-21). The defendant's commander told the court that the Army had ordered that the defendant be transferred directly to Madigan Army Medical Center for a mental health assessment when she was released from jail. CP 143, lines 15-23.

Although the court ordered a mental health evaluation, the purpose was to make sure that the defendant would not harm herself or others if she were released from jail. The court never requested an exam to determine whether Ms. Boseski was competent to stand trial, as required by RCW 10.77.060. The mental health concerns known to the court at this time should have necessitated a competency determination.

A second preliminary hearing was held on January 12, 2009, while Ms. Boseski still was in jail. Both prosecution and defense counsel asked for a referral to Lisa Kertzman at the jail, to work out special release conditions to address Ms. Boseski's mental health problems. CP 75. The Court noted that the "safe-to-be-at large evaluation indicates concern about [Ms. Boseski's] safety and the safety of others, unless she is under controlled circumstances."

Ms. Boseski was suffering from severe mental illness that caused her to be incompetent when she entered her guilty plea. The court was informed of her mental illness, and took no steps to determine whether

Ms. Boseski was competent. Therefore, the court abused its discretion by accepting the plea and entering a sentence.

G. Acceptance of Ms. Boseski's Plea, While She was Mentally Ill and Unable to Understand the Charges, Constituted Manifest Injustice.

A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept. *State v. Marshall,* 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

The injustice must be "obvious, directly observable, overt, [and] not obscure." *State v. Taylor,* 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The defendant's burden when seeking to withdraw a plea is demanding, because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea. *Taylor,* 83 Wn.2d at 596-97, 521 P.2d 699.

> A defendant's claim that he lacked competence to plead guilty is equivalent to claiming the plea was not voluntary. *Marshall,* 144 Wash.2d at 281, *citing State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984).

" 'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15).

The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *Fleming*, 142 at 863, *citing State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

Procedures of the competency statute (chapter 10.77 RCW) are mandatory and not merely directory. "Thus, once there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or her competency to stand trial." Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process. The competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial. *Fleming*, 142 Wn.2d at 862, *citing Godinez*, 509 US 389, 399, 113 S. Ct. 2680; 125 L. Ed. 2d 321 (1993).

In *Fleming*, the Supreme Court vacated petitioner's guilty plea and sentence because defense counsel failed to raise the issue of competency during any of the proceedings, despite expert opinion that petitioner was incompetent to stand trial. The case was remanded for further proceedings.

If a defendant supports his motion to withdraw a guilty plea with substantial evidence of incompetency, the trial court must either grant the

motion or hold a formal competency hearing under RCW 10.77.060. *See State v. Marsha*ll, 144 Wn.2d 266, 280-281, 27 P.3d 192 (2001).

A formal competency hearing under RCW 10.77.060 is required "whenever a legitimate question of competency arises." *Id.*, 144 Wn.2d at 279. These procedures are mandatory, not merely directory. *Id.*, *citing State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982), and *City of Seattle v. Gordon*, 39 Wn.App. 437, 441, 693 P.2d 741 (1985).

In *Marshall*, the defendant moved to withdraw his guilty plea, presenting undisputed testimony from a neurologist, a neuropsychologist, and a psychiatrist that he suffered from brain damage, bipolar mood disorder, and paranoid schizophrenia. One doctor concluded that the defendant was delusional and suffering from psychotic depression when he pleaded guilty. *Marshall,* 144 Wash.2d at 271-72, 27 P.3d 192. Even though the trial court acknowledged that the defendant clearly suffered from brain damage, the court ruled that he did not exhibit any signs of incompetency during the plea hearing and denied the motion. *Marshall,* 144 Wash.2d at 280, 27 P.3d 192.

The Supreme Court reversed. "We hold that where a defendant moves to withdraw a guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw the guilty plea or convene a formal competency

hearing required by RCW 10.77.060." *Marshall,* 144 Wash.2d at 281, 27 P.3d 192, citing Fleming, 142 Wn.2d at 863.

It should be noted that Ms. Boseski, like the defendant in *Marshall,* was diagnosed as suffering from "Depression with Psychotic Features" while she was hospitalized and before she entered her guilty plea.

In contrast, when an incompetency claim is not supported by substantial evidence, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing. *See State v. Calvert,* 79 Wash.App. 569, 576, 903 P.2d 1003 (1995) (rejecting a defendant's incompetency claim based on a head injury sustained nine days prior to the plea hearing where neither the defendant's medical records nor the doctor's testimony supported the defendant's claim that he was incompetent when he pleaded guilty). *See also State v. Hystad,* 36 Wash.App. 42, 45, 671 P.2d 793 (1983) (rejecting defendant's unsupported incompetency claim because "defendant's bald claim of methadone-induced confusion does not meet the demanding standard required to show manifest injustice"); *State v. Armstead,* 13 Wash.App. 59, 63-65, 533 P.2d 147 (1975) (rejecting a defendant's unsupported claim that he was "drunk off barbiturates" when he pleaded guilty).

A legitimate question of competency arises when a defendant

moves to withdraw a guilty plea and supports the motion with "substantial evidence" of incompetency. *See Marshall,* 144 Wn.2d at 281, 27 P.3d 192. Here, there was substantial evidence of incompetency. The court ordered a "safe-to-be-at-large" evaluation. The court was told that the defendant was a psychiatric patient in Madigan Army Medical Center during some of the preliminary proceedings, so it knew that there was a question of competency. The prosecutor has stated on the January 14, 2009 preliminary appearance:

> My proposal would be at least that the front end that you restrict to base at Fort Lewis. She is a captain in the Army. Her commanding officer is present, Lieutenant Colonel Paul Goymerac. In my discussions with them they are in a position where they can confine her to base pending the outcome. As you can see, this was a very dangerous situation, Your Honor. In my discussion with the Lieutenant Colonel, what the Army would like to do is have a 72-hour assessment period where she would be under their strict control for 72 hours to make a mental health assessment through their own process, and then after that the conditions would be released and she would be restricted to base pending these matters.

CP 158. These evaluations and concerns show that Ms. Boseski had psychological issues, suggesting that her competency was impaired.

Ms. Boseski was confined on the military base during the pendency of the case and shut off from the use of technology. She had no ability to do research or anything on her case. She was confined to base with no hearing by the court or the military. In the appendix is a letter

attesting to her confinement from Sergeant Finsness. Sergeant Finsness explains that Ms. Boseski was restrained on base and that he was responsible for transporting her. He provided this letter after the motion to withdraw was ruled on in trial court and it demonstrates that she did not have the ability to do any independent research on her own and that she was wrongfully confined on base without a hearing. See *Appendix*.

H. Ms. Boseski Received Ineffective Assistance from Counsel, Causing Manifest Injustice.

Effective assistance of counsel is necessary to ensure that the defendant receives a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Washington utilizes a two-prong test to determine whether there was ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Thomas, 109 Wn2d at 225 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

In plea bargaining, effective assistance of counsel requires that counsel "actually and substantially" assist the defendant in determining whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), *quoting State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981).

Ms. Boseski was represented by attorney Kevin Trombold, who advised Ms. Boseski that she was facing charges of first degree assault. This was also contained in Mr. Trombold's retainer agreement. CP 127. Mr. Trombold advised Ms. Boseski that she would likely be sentenced to twenty to forty years in prison if she was found guilty of first degree assault. CP 127. The prosecutor had actually charged Ms. Boseski with second degree assault. Also, Mr. Tombold may have been distracted because his father passed away during the proceedings. CP 127. Instead of providing competent, professional advice, Mr. Trombold insisted that Ms. Boseski plead guilty to speed the process along. CP 127.

Additionally, Ms. Boseski told Mr. Trombold that she never pointed a gun at the police officer, but he ignored her assertion of innocence. Mr. Trombold refused to develop a defense strategy, and railroaded Ms. Boseski into pleading guilty. CP 127.

Mr. Trombold also mistakenly advised Ms. Boseski that there was a no-contact order in place between Ms. Boseski and Keya Sotelo, the neighbor who had summoned the police. CP 127. Because of this mistaken advice, the defendant never tried to question Ms. Sotelo herself.

Lastly, Mr. Trombold failed to investigate whether Ms. Boseski suffered from mental impairment which rendered her incompetent to stand trial. The court discussed Ms. Boseski's mental illness with defense counsel and the deputy prosecutor at arraignment. CP 173.

The deputy prosecutor asked the court to order a "safe-to-be-at-large" evaluation because the "State has got mental health concerns here ... [due to] the fact that there wasn't anybody [else] in the apartment, that she was screaming and yelling as if somebody was there[.]" CP 163. Ms. Boseski's commanding officer told the court that the Army had ordered that Ms. Boseski be transferred directly to Madigan Army Medical Center for a mental health assessment when she was released from jail. CP 163, lines 4-9.

The failure to inform Ms. Boseski of the proper charge against her and the failure to properly evaluate and advise on a defense strategy constitute deficient performance. This deficiency prejudiced Ms. Boseski because she pled guilty due to Mr. Trombold's assertion that she was charged with first degree assault and would likely be incarcerated for

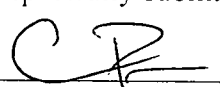
twenty years. Had she received effective assistance of counsel, she would have known that she was not charged with first degree assault, and she would have received meaningful advice about whether to pursue her constitutional right of a fair trial. Ms. Boseski received ineffective assistance of counsel, which is a manifest injustice requiring withdrawal of her guilty plea.

F. CONCLUSION

For the aforementioned reasons, Ms. Boseski respectfully requests that this Court allow her to withdraw her guilty plea and that her convictions be vacated.

DATED this 1st day of February 2012.

Respectfully submitted,



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Thu 2/2/2012 10:58 AM

THURSTON SUPERIOR COURT
THURSTON COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

SHERRI A. BOSESKI

Defendant,

CASE: 424410-0-II

CAUSE NO: 09-1-00034-8

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON

County of Thurston

That on the 2nd day of February, 2012, at the address of 2000 Lakeridge Dr SW Bldg #2 Olympia, WA 98502 within Thurston County, Washington, this affiant duly served a copy of Appellant's Opening Brief and exhibits via regular mail to the Thurston County Prosecutor's Office and personally emailed a true and correct copy thereof into the hands of the Thurston County Superior Court Prosecutor's Office.

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