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NO. 67609-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
FEB 01 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVIS,

Appellant.

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

The Honorable Sharon Armstrong, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to withdraw his plea.

Issue Pertaining to Assignment of Error

Where the evidence shows appellant's plea was involuntary because it was coerced by the alleged victim's death threats against the appellant and aggressive behavior towards the appellant's friends and family was the trial court's decision denying appellant's motion to withdraw his plea error?

B. STATEMENT OF THE CASE

1. Procedural Facts

On April 10, 2010 Jason Davis was charged with first degree assault with deadly weapon and burglary. CP 1-6. It was alleged that on April 3, 2010 Davis broke into Stacy Hill's home, his former girlfriend, and assaulted Chad Andrews with knife stabbing him a number of times. CP 4, 80. Pending trial the court ordered that Davis have no contact with Hill, who was a witness. CP 81.

On March 18, 2011 the state amended the information to charge an additional count of second degree murder based on the same allegations. CP 11-12. On April 22, 2011, over a year after the initial charges were

filed. Davis entered an Alford/Newton¹ plea to first degree assault with a deadly weapon enhancement and the state dismissed the murder and burglary counts. CP 13-34, 81. During the plea colloquy Davis denied anyone threatened him. CP 68, 81.

On June 10, 2011, before sentencing, Davis formally moved to withdraw his plea. CP 35-79. Davis argued his plea was not voluntary because the primary reason he pled was because the alleged victim, Chad Andrews, threatened to kill him if he were released from custody and threatened Hill and Davis' friends. Id.

On July 15th and 19th 2011 a hearing was held on the motion. Following the hearing the court denied the motion and entered a written decision. CP 80-89.

Based on an offender score of 0 Davis was sentenced to 93 months on the assault charge, the low end of the standard range, and an additional 24 months for the deadly weapon enhancement. CP 90-99. Davis filed a timely notice of appeal from the court's decision denying his motion to withdraw his guilty plea. CP 101-111.

¹ Under an Alford plea, a defendant may take advantage of a plea agreement without acknowledging guilt. North Carolina v. Alford, 400 U.S. 25, 36, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Alford was adopted in State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

2. Facts Pertaining to Motion to Assignment of Error

Stacy Hill testified that shortly following the alleged assault Chad Andrews was in the hospital with a breathing tube down his throat. Hill saw Andrews trace the letter K-I-L-L-H-I-M on his friend's hand. Andrews was referring to Davis. RP 5-6. Later, Andrews told Hill his father's friend, Butch, had connections to bad people and he was going to kill Davis. RP 7. He also told Hill he was going to cut Davis up into pieces and mail him to her. RP 8.

During the year Davis' trial was pending Andrews lived with Hill. Hill has an eight year son. Davis and Hill's son have a father/son relationship. RP 22. Hill testified that after the incident if her son mentioned Davis' name Andrews would get angry. Andrews told Hill she had to either chose between him or Davis or she would have blood on her conscience. RP 11.

In August 2010, Hill asked Davis' mother, Kim Myhre, to retrieve some of Davis' property at Hill's house. RP 8, 55. Myhre testified Andrews was at the house when she went to pick up the property. Andrews told Myhre to tell Davis to "beware" and she had better hope Davis stayed in prison for a long time because if he was out on the streets he (Andrews) and his "posse" were going to take care of him. RP 55-56.

Myhre called police and reported the threat but because Davis was in jail while waiting for trial, the police told her to contact the jail, which she did. RP 57. Myhre also called Hill and told Hill about Andrews' threat. RP 9. Hill then told Myhre about the earlier death threats Andrews made against Davis. Id. Hill also confronted Andrews who admitted he made the statements to Myhre and that Davis was going to get what he deserved. RP 10.

In late 2010, a detective contacted Andrews about obtaining a medical release for Davis' upcoming trial. RP 12. After that Andrews started carrying a gun. RP 13. Hill said that whenever Andrews was contacted by police or counsel about Davis' pending trial he would set the gun in front of him and tell Hill to back off. RP 14-15.

As Davis' trial date got closer, Hill said Andrews became more threatening and angry. Hill wrote Myhre an email on April 3, 2011, a few weeks before the scheduled trial. RP 21-23. In that email, Hill told Myhre that Andrews said he was not going to show up for Davis' trial and testify against Davis. He believed if he did not testify Davis would be released from jail and then he would have access to Davis and could cut Davis' body up into little pieces and send the pieces to Myhre. RP 21-22; Ex. 2. Hill in turn asked Myhre to warn Davis and to tell Davis to stay away from her and her son until she told Myhre it was safe. Id.

At one point Andrews also asked Hill for the names and contact information for Davis' friends and family. RP 17. Hill did not give him the information but she had a box in her house with the name and address of one of Davis' friends, John Mayfield. When she noticed the box had been moved, she called Myhre and sent Myhre an email on April 7, 2011 to tell her to warn Mayfield to be careful. RP 19- 20; Ex. 1.

Myhre and Hill spoke to each other a couple times a month from the time Davis was arrested until his plea. RP 58. Both Hill and Myhre testified that Hill told Myhre about all of Andrews' threats. RP 16, 58. During their conversations, in addition to telling Myhre about Andrews' threats to kill Davis, Hill also told Myhre she was afraid for herself and her son because of their relationship with Davis. RP 58. Myhre in turn told Davis about Hill's fears along with the threat Andrews made to her (Myhre) and the threats he made to Hill. She also told him that Andrews started carrying a gun and that he used it to threaten Hill. RP 59-64. 71.

Davis testified he initially learned Andrews was threatening to kill him when Myhre told him about her conversation with Andrews when she went to pick up his property at Hill's house. RP 90. Davis' attorney at the time also told him Andrews was carrying a gun and that he said he was going to show Davis that he (Andrews) was not a victim. RP 93-94.

Later, in the fall of 2010, Myhre told Davis that Hill was afraid of Andrews and that Andrews did not want Hill or her son to mention his name. RP 92-94. Davis became frustrated because he was in jail and could not do anything to protect them. Id.

In the spring of 2011, before his scheduled trial date, Davis heard from Hill's mother that Hill's son was too afraid to come out of his room when Andrews was home and he also heard Andrews had Mayfield's address. RP 95-96. He became worried Andrews might hurt Hill or her son because Andrews was angry with him. Id. As the date for the trial approached Myhre told Davis about Andrews' more recent threats and that he was becoming more dangerous and aggressive towards Hill. RP 96-97. Davis also learned from Myhre that Andrews said he was not going to attend the trial so Davis would be released and he could then kill him. RP 99-100.

Until he entered his plea Davis always maintained his innocent. RP 88-89. Davis decided to plead guilty for a number of reasons. It had been a year since the incident and he wanted closure, he missed Hill's son and knew if he pled guilty the order prohibiting him to have contact with Hill and her son would be lifted and his attorneys told him that his defense was weak. RP 97-99. But those were the minor reasons. RP 98.

His principle reason was he felt if he pled guilty it would placate Andrews and that if he prevailed at trial and was released, Andrews would try to kill him. RP 99-102. He also believed that if Hill, who was a witness, had to testify she would be in danger. RP 100. Davis entered an Alford plea because he did not believe he was guilty. RP 130. But, he pled guilty because of Andrews' threats and if those threats had not been made he would not have pled. RP 104-105, 130-131.

Shortly before entering the plea, Davis told Myhre he was going to plead guilty because of Andrews' threats against him and Hill and her son. RP 84. Myhre did not want Davis to plead guilty because she believed he had a valid self-defense claim. RP 68. She also tried to get Davis released on bail pending his trial. RP 74.

After his arrested Davis tried to bail out of jail. RP 124-125, 127. He believed if he could get out of jail he might be able to protect his family, Hill and her son. RP 126. He also believed that if he was released and Andrews killed him Andrews would be mollified and would not harm the others. RP 99-100, 111.

Davis' entered an Alford/Newton plea on April 22, 2011. CP 13-34. On the day he entered his plea he spoke on the phone from jail with Myhre. Davis told Myhre he pled guilty because his attorneys told him it was unlikely his self-defense claim would prevail. RP 82-83. Myhre

asked Davis if anyone threatened him to cause him to plead guilty. Although Davis did not mention Andrews by name, Davis responded he felt threatened by the prosecutor and “not just them” and he believed if Andrews hated him enough to want to kill him he would likely lie in court. RP 66; Ex. 9.

Davis admitted when he spoke to Myhre he did not mention Andrews threatened him and that was the reason he decided to enter the plea. RP 106, 119. He explained that in the jail other inmates could overhear telephone conversations and he did not want to appear weak because he would be beaten up or his property would be taken if other inmates perceived him as weak. RP 106-107. He said his “not just them” response to her statement that the prosecutor’s office could legally threaten him referred to Andrews. RP 114. In addition, when he was young Davis took beatings from his stepfather to protect his mother and brother. RP 109. He did not want to his family to know he was pleading guilty to protect them from Andrews because he did not want to make them feel guilty. Id.

As a result of the plea, the order prohibiting contact between Davis and Hill was lifted. RP 24. Shortly following his plea, Davis spoke with Hill for the first time since the incident. RP 26; Ex. 5. She told Davis that

Andrews told her to tell him (Davis) to remember Andrews' face because it would be the last thing he ever saw. RP 27.

On May 8, 2011, a few weeks after Davis entered his plea, he told Hill that he believed his attorneys misled him about her anticipated testimony at trial. RP 40-42; Ex 5. He also told Hill he believed his attorneys lied to him because they had too many cases and did not want to go to trial. Id. When Hill told Davis that Andrews was still threatening to kill him Davis realized his plea did not mollify Andrews. Davis became completely frustrated and felt that what he had done was worthless. RP 116. A few days later Davis took steps to move to withdraw his plea. RP 117-118.

On June 27 2011, a few days after Davis' assigned counsel filed the motion to withdraw the plea, Jim Ferrell, one of the prosecuting attorneys handling the case, spoke with Andrews. Ex. 10. Ferrell told Andrews Davis had moved to withdraw his plea. Id. Andrews told Ferrell that he had better tell Davis he (Davis) was safer in jail because if he gets out of jail he better "watch out." Id. Andrews's message relayed to Davis's counsel. Id.

Davis admitted he told the court at the plea hearing his plea was not a result of any threats. RP 129. He explained that he did that to protect the people he cared about but it did not work. Id. He testified that

if it were not for Andrews' threats to kill him and his threats against Hill, his family and friends, he would not have pled guilty. RP 104-105. 130.

C. ARGUMENT

THE COURT ERRED WHEN IT DENIED DAVIS' MOTION TO WITHDRAW HIS PLEA.

A criminal defendant's constitutional right to due process requires a guilty plea to be knowing, voluntary, and intelligent. In re Personal Restraint of Bradley, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. 14; Wash. Const. art. 1, § 3. Once the court accepts the guilty plea, it must allow the defendant to withdraw the plea if withdrawal appears necessary to correct a "manifest injustice." CrR 4.2(f). "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 defendant has the burden of showing that a manifest injustice has occurred. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). A trial court must examine the "totality of circumstances" when deciding whether a manifest injustice exists. State v. Stough, 96 Wn. App. 480, 485, 980 P.2d

298. rev. den., 139 Wn.2d 1011 (1999). Although permission to withdraw a guilty plea rests within the sound discretion of the trial court, such discretion should be "exercised liberally in favor of life and liberty[.]" State v. Saylor, 70 Wn.2d 7, 9, 422 P.2d 477 (1966). And, the timing of the motion withdraw a plea should be given weight when it is made promptly after discovery of the previously unknown consequences or the newly discovered information. State v. A.N.J., 168 Wn.2d 91, 107, 225 P.3d 956 (2010)

A manifest injustice occurs where a defendant's plea was involuntary. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). In State v. Frederick, 100 Wn.2d 550, 674 P.2d 136 (1983), overruled in part on other grounds, Thompson v. Dep't of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999), the Supreme Court held that third party coercion may render a guilty plea involuntary. Id. at 556.

We hold that coercion may render a guilty plea involuntary, irrespective of the State's involvement. While prevention of governmental misconduct is certainly a weighty concern, it is merely one means of advancing the most basic goal of our criminal justice system, protection of the innocent by assuring them a fair trial. To hold one in prison who, through no real choice of his or her own, has been denied a fair trial, indeed denied any trial at all, strikes us as the ultimate in injustice. The injustice lies not in the taint on our legal system, but in the more basic wrong of incarcerating one who

because of illegitimate threats has been denied any opportunity to prove his or her innocence.

Id. at 556-557.

The undisputed evidence shows and the state concedes (RP 149) that Andrews consistently told others, including Hill and Myhre, that he would kill Davis if Davis got out of jail. Andrews even said he was not going to testify at Davis' trial in the belief that Davis would be released from custody and he could then have access to him so he could kill him. Davis knew about those threats and that Andrews was becoming angrier as trial approached. He knew Andrews began carrying a gun, which lent credibility to Andrews' threats. Davis knew Andrews would show Hill the gun whenever Davis' name was mentioned. Davis knew that Hill, who was going to testify at Davis' trial, had become afraid of Andrews and what he might do to her or her son because of her connection with Davis and the incident and he believed Hill would be in danger if she testified. Davis also knew Andrews was trying to get information about his friends and family.

Although Davis consistently maintained his innocence, he entered an Alford/Newton plea because he did not believe he was guilty but because he reasonably believed that if he pled guilty it would mollify Andrews, Hill would not have to testify and he, his family members, Hill

and her son would be safe. Within days after entering his plea, however, Davis discovered Andrews was still threatening to kill him when he got out of prison and Andrews was still angry with Hill. It was then he realized Andrews was not satisfied. As soon as possible he moved to withdraw his plea.

Under these facts, Davis met his burden to show his plea was not voluntary but was coerced by Andrews' threats. Because his plea was not voluntary, withdrawal of the plea was necessary to correct the manifest injustice.

In its order the court gave five reasons for denying Davis' motion. CP 80-89. Those reasons are either unsupported by the facts or do not justify the court's decision.

The court found Davis' stated reason for pleading guilty to first degree assault was because he was facing an attempted second degree murder charge and a plea to first degree assault substantially reduced his standard range sentence. CP 88. The evidence does not support the court's reasoning.

If Davis had gone to trial on the attempted murder charge and was found guilty he was not looking at a substantially reduced standard range. The Standard range sentence for an attempt is 75% of the completed crime. RCW 9.94A.510(2). With his offender score of 0, the standard

range sentence for attempted second degree murder is 92 to 165 months. RCW 9.94A.510 (Table 1). The standard range sentence for first degree assault is 93 to 123 months. Id. Davis reasonably believed he would receive the low end of the standard range if found guilty at trial because he had no criminal history. RP 102. The low end of the standard range for both offenses is almost identical.

In his plea statement Davis does not admit he committed the offense but that there was a substantial likelihood he would be found guilty. CP 13-34. He acknowledged that was his reason for taking advantage of the state's offer to dismiss the murder and burglary charges in exchange for his plea to the assault charge. Id. Davis explained, however, that because of Andrews' threats he did what was required so his plea would be accepted. RP 102, 104-105. The evidence does not show Davis' "stated" reason for his plea was because of the difference of 42 months in the high end of the standard range sentence between the two offenses.

The court also concluded Davis did not perceive Andrews' threats as a danger because he tried to post bail pending trial. CP 88. Davis, however, explained he believed if he could get out of jail he might be able to protect his family, Hill and her son. He also believed that if he got out and Andrews killed him Andrews would be mollified and would not harm

Hill, her son or his family. When it became apparent he could not make bail, he reasonably believed by pleading guilty Andrews would be appeased and those he cared about would be safe. RP 130. That Davis attempted to get out of jail pending trial does not support the court's inference he did not feel threatened by Andrews and is consistent with Davis' testimony that he pled guilty in an attempt to mollify Andrews.

Other reasons the court gave for denying the motion was its conclusion Davis was not afraid of Andrews so it was not credible that he would agree to a 93 month sentence to avoid Andrews and that Andrews never threatened to harm Davis or anyone else unless Davis pled guilty. CP 88. This part of the court's reasoning misses the point and is flawed.

The evidence shows Davis was told all along that Andrews threatened to kill him if he were released from custody. Davis testified that he believed if he got out of jail Andrews would kill him and that he was afraid of Andrews. RP 99, 104.

Additionally, Davis never said he pled guilty because Andrews threatened to kill him or harm his loved ones if he did not plead guilty. Andrews threatened to kill him if he were released from custody. Davis was only safe in custody and he knew he would remain in custody if he pled guilty. The threat was not plead guilty or be killed. It was if you get out of custody you will be killed.

an Alford/Newton plea because he did not believe his was guilty. RP 130. Moreover, Davis pled guilty even after learning Andrews said he was not going to testify, which would have made the state's case difficult, if not impossible.

Davis never denied that his attorneys advised him that a self-defense claim would likely be rejected. RP 97-98. But, given that he disagreed and that if he was found guilty he did not believe he would receive a sentence substantially longer than the sentence he would receive if pleaded guilty, his attorney's advice was a "minor" reason for his plea. RP 98. His primary reason was because of Andrews' threats and but for those threats he would not have pled. RP 104, 105, 130-131.

In Osborne, the defendant alleged his plea was involuntary because his wife, the co-defendant, threatened to commit suicide if the case went to trial. Osborne, 102 Wn.2d at 92. At the plea hearing the defendant stated his plea was voluntary and free of coercion. Id. at 97. The Court held his bare allegation was insufficient to overcome that "highly persuasive" evidence his plea was voluntary. Id.

Here, unlike in Osborne, there is more than Davis' allegation he pled guilty because of Andrews' death threats. Moreover, when Davis found out the plea did not placate Andrews and Andrews was still threatening to kill him he began the process to move to withdraw the plea.

See, State v. A.N.J., 168 Wn.2d at 107 (particular weight is given to the timing of the motion to withdraw a plea if it is made before the defendant “roll the dice” on a favorable sentence and is disappointed). Davis also told the court at his plea hearing that his plea was voluntary and free of coercion but he had to do that to ensure his plea was accepted based on his reasonable but mistaken belief it would mollify Andrews. The unique facts of this case overcomes the same “highly persuasive” evidence the Osborne Court found showed the plea was voluntary in that case.

The court’s reasons for denying Davis’ motion to withdraw his plea miss the mark and have no evidentiary support. The court abused its discretion in denying Davis’ motion. See, State v. Dixon, 159 Wn.2d 65, 75–76, 147 P.3d 991 (2006) it is an abuse of discretion if the court's decision rests on untenable grounds and a decision rests on untenable grounds if it is unsupported by the facts or was reached by applying the wrong legal standard). The facts support a finding that Davis’ plea was not voluntary and that he met his burden to show withdrawal of his plea is necessary to correct a “manifest injustice.”

D. CONCLUSION

For the above reasons, the court's decision denying Davis' motion to withdraw his plea should be reversed.

DATED this 7 day of February, 2012

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
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| v. |) | COA NO. 67609-1-1 |
| |) | |
| JASON DAVIS, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF FEBRUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON DAVIS
DOC NO. 351804
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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF FEBRUARY 2012.

x Patrick Mayovsky

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