

FILED
September 22, 2016
Court of Appeals
Division I
State of Washington

No.74854-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

N.D.S.,

Appellant.

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

The Honorable Barbara Mack

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

1. Following his plea of guilty, N.D.S. was sentenced in excess of statutory authority when the court, over defense objection, included a facially invalid prior judgment in N.D.S.'s criminal history.

2. The juvenile disposition in N.D.S.'s case must be reversed and the case remanded.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is N.D.S.'s prior conviction by Alford¹ plea to a charge of attempted first degree extortion "facially invalid" where the order of disposition does not state the elements of the crime, the plea statement references the amended information which did not include the element of a threat, and where there was no factual basis in the affidavit of probable cause for a threat or attempted threat?

C. STATEMENT OF THE CASE

N.D.S. entered a guilty plea to a charge of residential burglary after allegedly taking some watches. CP 8. The juvenile court included a 2013 conviction (by Alford plea) for attempted extortion, in N.D.S.'s criminal history, over defense objection that the prior conviction was facially invalid. CP 9.

The 2013 amended information reads in part:

¹ North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

16 COMES NOW David Burke, Prosecutor for Pacific County and accuses the above named
17 Respondent of one count Attempted Extortion in the First Degree committed as follows:

18 **COUNT I**

19 The Respondent, Nicholas Scott, on or about May 13, 2013 in the County of Pacific,
20 State of Washington, with intent to commit the crime of Extortion in the First Degree, did an
21 act which was substantial step towards the commission of that crime, to wit: did knowingly
22 attempt to obtain or did obtain property or services from the owner thereof, to wit: Jordan
23 Hanson; contrary to Revised Code of Washington 9A.56.120(1), 9A.56.110, and
24 9A.04.110(25)(a), (b), or (c) and RCW 9A.28.020.
25
26
27

CP 37.

The originally-filed 2013 information, which was not a part of the present judgment or plea but which was relied on by the court below in rejecting N.D.S.'s Ammons argument, reads as follows:

15 COMES NOW David Burke, Prosecutor for Pacific County and accuses the above named
16 Respondent of one count Extortion in the First Degree and one count Assault in the Fourth
17 Degree committed as follows:

18 **COUNT I**

19 The Respondent, Nicholas Scott, on or about May 13, 2013 in the County of Pacific,
20 State of Washington, by means of a threat to cause bodily injury in the future to the person
21 threatened or to any other person and/or to cause physical damage to the property of
22 a person other than the Defendant, and/or to subject the person threatened or any other
23 person to physical confinement or restraint, did knowingly attempt to obtain or did obtain
24 property or services from the owner thereof, to wit: Jordan Hanson; contrary to Revised
25 Code of Washington 9A.56.120(1), 9A.56.110, and 9A.04.110(25)(a), (b), or (c).
26

CP 41 (original 2013 information, as attached to defense sentencing motion).

The trial court ruled that the original information charging first degree extortion had included all of the elements of that crime. RP 39. The court reasoned, although the amended information failed to include the language of the element of a threat, the original information did so, and statutory references in the amended information provided a “definition” of that element. RP 39-40. Additionally, the court stated that the original affidavit of probable cause, which was referenced in the 2013 plea, showed a factual basis for a threat. RP 39-40 (ruling); CP 37 (amended information in 2013 plea statement).

N.D.S. appealed from the disposition that included the attempted extortion in his criminal history. CP 92.

D. ARGUMENT

The 2013 conviction is facially invalid and therefore could not be included in N.D.S.’s criminal history.

While the State has the burden of proving prior convictions used to calculate an offender score, it is not responsible for proving the underlying constitutional validity of those convictions. State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986), cert. denied, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

However, a conviction that is not facially valid may not be included in the criminal history. Ammons, 105 Wn.2d at 187. A conviction is valid on its face unless it shows constitutional infirmities without further

elaboration. State v. Johnson, 150 Wn. App. 663, 678, 208 P.3d 1265 (citing Ammons, 105 Wn.2d at 187-88), review denied, 167 Wn.2d 1012, 220 P.3d 208 (2009). The defendant bears the burden of establishing the unconstitutionality of a prior conviction if he challenges its inclusion at a later sentencing. State v. Thompson, 143 Wn. App. 861, 865–66, 181 P.3d 858 (2008).

Here, the amended information that was a part of N.D.S.’s 2013 Alford plea (1) *affirmatively* misstated the crime by not including the element of a threat, and (2) there was no factual basis in the affidavit of probable cause for a threat or attempted threat. The amended information is the information to which N.D.S. entered his 2013 plea. The threat element is missing. RCW 9A.56.110 defines extortion as

knowingly to obtain or attempt to obtain by threat property or services of the owner, and specifically includes sexual favors.

RCW 9A.56.120(1) defines the crime of first degree extortion as committing extortion by means of a threat. The amended information contains no language regarding any threat or attempted threat.

This case is different than Ammons. There, the plea forms did not set forth all the elements of the crime. But because the defendant failed to show that he was not *otherwise* informed of the elements of the crime, he failed to establish the facial invalidity of the judgment and sentence.

Ammons, 105 Wn.2d at 189. Here, the amended information affirmatively misstated the elements.

Additionally, the affidavit of probable cause shows no factual basis for the threat element. A plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge – this is the “first and most universally recognized requirement of due process.” Henderson v. Morgan, 426 U.S. 637, 645, 96 S.Ct. 2253, 2257, 49 L.Ed.2d 108 (1976); U.S. Const. amend. 5, amend. 14.

In determining whether there is a factual basis for an Alford-type plea, in which the defendant does not admit facts, the court may look to the affidavit of probable cause in place of the defendant's admission of guilt. State v. D.T.M., 78 Wn. App. 216, 220, 896 P.2d 108 (1995); State v. Paul, 103 Wn. App. 487, 489 n. 1, 12 P.3d 1036 (2000). N.D.S. agreed to this procedure in his plea.

However, the affidavit, entitled “Assault Investigation Narrative,” indicated that N.D.S. and one Hanson were inmates at Naselle Youth Camp. N.D.S. had admitted in a written statement for the Camp that he had assaulted Hanson, and admitted the same in speaking with the affiant, Pacific County Sheriff's Deputy Rick Goodwin. CP 44. N.D.S. also described that people in his inmate pod are supposed to pay “rent” to him in the form of

commissary items like food, and “Hanson refused to pay rent so he beat him up.” CP 44.

This does not show a factual basis for any threat. State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976) (Alford plea rests on adequate factual basis “if there is sufficient evidence for a jury to conclude that he is guilty”).

For both of these reasons, the 2013 plea is facially invalid. CP 22, 31, 37 (order of disposition, guilty plea and amended information. The 2013 conviction should not have been included in N.D.S.’s criminal history.

E. CONCLUSION

Based on the foregoing, this Court should reverse N.D.S.’s disposition.

Respectfully submitted this 22nd day of September, 2016.

s/ Oliver Davis
Washington Bar Number 24560
Washington Appellate Project-91052
1511 Third Avenue, Suite 701
Seattle, WA 98102
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: Oliver@washapp.org

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

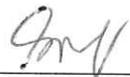
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74854-8-I
v.)	
)	
N.D.S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
[PAOJuvenileFiling@kingcounty.gov]	(X)	AGREED E-SERVICE
APPELLATE UNIT		VIA COA PORTAL
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] N.D.S.	(X)	U.S. MAIL
21007 SE 268 TH CT	()	HAND DELIVERY
COVINGTON, WA 98042	()	AGREED E-SERVICE
		VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF SEPTEMBER, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711