

Court of Appeals No. 34852-7-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Respondent,

v.

LARRY EDWARD TARRER,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
07 JAN 30 PM 10:25
BY  DEPT. OF JUSTICE

BRIEF OF APPELLANT

**APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY,
Cause No. 91-1-00712-0**

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Tarrer's motion to enter a guilty plea to the charges of Intentional Murder in the Second Degree and Assault in the First Degree as they existed in 1991.
2. The trial court erred in granting the State's motion to withdraw the Amended Information and to be allowed to proceed to trial under the initial information.

II. ISSUES PRESENTED

1. Is a defendant entitled to specific performance of a plea bargain where the crimes to which he pled guilty were later found to be nonexistent? (Assignment of Error No. 1)
2. Post *Andress* and *Hinton*, is a defendant who pled guilty to Murder in the Second Degree committed by Felony Murder entitled to have his plea modified to a plea of guilty to Murder in the Second Degree committed by the alternative means of intentional murder? (Assignment of Error No. 1)
3. Where a defendant seeks specific performance of his plea bargain following the Washington Supreme Court finding the charge the defendant pled guilty to nonexistent, is the State entitled to withdraw the Amended Information and to bring the defendant to trial under the initial Information? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Factual and Procedural Background

On May 20, 1991, Mr. Tarrer was charged with Murder in the First Degree, Attempted Murder in the First Degree, and Manslaughter in the First Degree. CP 1-3.

On November 21, 1991, Mr. Tarrer pled guilty to the amended charges of second degree felony murder based on assault and to first degree assault of a second victim. CP 4-5, 49-54. The Court of Appeals affirmed the convictions in an unpublished opinion and the mandate was issued on October 20, 1994. CP 49-54.

In October of 2002, the Washington Supreme Court issued its opinion in *In Re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that under former RCW 9A.32.050(1976), a conviction of second degree felony murder could not be based on the predicate offense of assault. CP 49-54.

On October 28, 2003, the Washington Supreme Court heard argument in *In re Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), on the issues of whether claims under *Andress* were subject to the one-year time bar of RCW 10.73.090(1), and whether *Andress*

applied to cases final before the *Andress* opinion was issued. CP 49-54.

On July 14, 2004, Mr. Tarrer, pro se, filed a CrR 7.8 motion in Superior Court, arguing that his felony murder conviction was invalid under *Andress*. CP 49-54. In addition to arguing the merits of his motion, Mr. Tarrer argued that the conviction was “void and invalid on its face,” that the sentence was therefore in excess of the trial court’s jurisdiction, and that his claim was not time barred under CrR 7.8. CP 49-54.

On August 18, 2004, the trial court denied the CrR7.8 motion, finding that it (1) was time barred by RCW 10.73.090 and Mr. Tarrer failed to show that any exception to the time bar applies; and (2) failed “to establish the legal criteria for granting a motion based upon CrR 7.8 and the relevant case law.” CP 49-54. Mr. Tarrer filed a timely notice of appeal from the trial court’s decision. CP 49-54.

In November of 2004, the Washington Supreme Court issued its decision in *Hinton*, holding that *Andress* applied to cases that were final before *Andress* was issued, that *Andress* applied to guilty pleas, and that *Andress* claims were not time barred under RCW 10.73.090(1)

because such convictions rendered the judgment and sentence facially invalid. CP 49-54.

In Mr. Tarrer's appeal from the trial court's denial of his CrR 7.8 motion, the Court of Appeals ruled that,

The portion of the trial court ruling denying the CrR 7.8 motion for failure to establish the legal criteria under CrR 7.8 and relevant case law is vague. To the extent the trial court meant that Tarrer failed to establish that he was entitled to relief under the law, Tarrer's felony conviction is clearly invalid under *Andress* and *Hinton*, and Tarrer is entitled to relief.

CP 49-54.

The Court of Appeals reversed the denial of Mr. Tarrer's CrR 7.8 motion and remanded the case to the trial court for proceedings "consistent with *Andress*, *Hinton*, and [the Court of Appeals'] opinion." CP 49-54.

On remand, Mr. Tarrer was represented by counsel. RP 1-2, 3-10-06.¹ On April 3, 2006, counsel for Mr. Tarrer filed a Memorandum re: Status of Case Post *Andress/Hinton* in which counsel argued: (1) a conviction of second degree felony murder cannot be predicated on

¹ The Report of Proceedings is not numbered continuously. Reference will be made by giving the RP page number followed by the date the proceeding was held.

assault; (2) RCW 9A.36.010(1)(a) was repealed effective July 1, 1988; (3) attempted second degree robbery is a nonviolent crime and should not have been included in the offender score; (4) and normally when a person is convicted of two serious violent offenses, neither serious violent offense is scored against the other and the sentences are run consecutive to each other. CP 55-67. Counsel for Mr. Tarrer explained that Mr. Tarrer was not asking that his plea of guilty be withdrawn, rather, Mr. Tarrer was asking that he keep the benefit of his bargain and have specific performance of the plea agreement by entering a plea to the alternative charge of intentional second degree murder and assault in the first degree under the statutes in effect in 1991. CP 55-67.

On April 18, 2006, the State filed a Response to Motions Relating to Conviction and Sentence and argued: (1) under RCW 10.73.150, Mr. Tarrer must represent himself at his Motion for Relief from Judgment under CrR 7.8; (2) Mr. Tarrer was entitled to relief, but only in the form of withdrawal of his entire plea of guilty, which would then entitle the State to proceed on the original charges; (3) and Mr. Tarrer, through his counsel, could not force the State to enter into the

same plea bargain and the trial court was precluded from becoming involved in plea negotiations. CP 68-81.

Argument on the motions was heard on May 5, 2006. RP 18-40, 5-5-06. Following argument by Mr. Tarrer, counsel for Mr. Tarrer, and the State, the trial court denied the State's motion to require Mr. Tarrer to represent himself (RP 23, 5-5-06), granted Mr. Tarrer's motion to vacate his sentence and conviction (RP 33, 5-5-06, CP 111-112), and granted the State's motion that the State be allowed to withdraw the amended information. RP 33 5-5-06.

Mr. Tarrer filed a petition for discretionary review in the Court of Appeals on May 22, 2006; requesting this court to review the Order Vacating Sentence Pursuant to Andress/Hinton, the Order Vacating Conviction by Withdrawal of Plea of Guilty; and the Order Granting State's Motion to Withdraw Amended Information, all filed on May 5, 2006. CP 115-122.

IV. SUMMARY OF TESTIMONY

No testimony was given at the trial court proceedings.

V. ARGUMENT

Mr. Tarrer's requested remedy of specific performance of the plea bargain was controlling of the trial court's remedy and it was error for the trial court to deny Mr. Tarrer's request for specific performance.

In *State v. DeRosia*, 124 Wn.App 138, 100 P.3d 331 (2004), this court held that *Andress* compelled the revocation of Mr. DeRosia's *Alford* plea to second degree felony murder predicated on second degree child assault. *DeRosia*, 124 Wn.App. at 150, 100 P.3d 331. However, *DeRosia* is distinguishable from Mr. Tarrer's case because Mr. DeRosia specifically sought the revocation of his sentence, while Mr. Tarrer seeks specific performance of his plea bargain. While revocation of his conviction is certainly Mr. Tarrer's right post - *Andress*, as discussed below, it is not his only remedy.

a. Mr. Tarrer is entitled to specific performance of his plea bargain.

“Where fundamental principles of due process so dictate, the specific terms of a plea agreement based on a mistake as to sentencing consequences may be enforced despite the explicit terms of a statute.” *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d 122 (1988), *citing State v. Cosner*, 85 Wn.2d 45, 530 P.2d 317 (1975).

Defendant's constitutional rights under plea agreements take priority over statutory provisions. We decline to hold here that withdrawal of a plea is the only legal remedy where the plea agreement clashes with the Sentencing Reform Act of 1981. Moreover...if the defendant does not wish withdrawal of the plea, that 'remedy' may be unjust, especially where the defendant has relied to his or her detriment on the plea bargaining process by giving evidence to the State. As this court stated in *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977):

To place the defendant in a position in which he must again bargain with the state is unquestionably to his disadvantage. The security he had gained as a result of the plea negotiation from being charged with the more grievous offense would be lost...The defendant is entitled to the benefit of his original bargain.

Miller, 110 Wn.2d at 533, 756 P.2d 122 (citations omitted), *citing State v. Tourtellote*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977).

b. Fundamental principles of due process require specific performance of Mr. Tarrer's plea bargain.

In *Tourtellotte*, Mr. Tourtellotte pled guilty to the charge of second degree arson. *Tourtellotte*, 88 Wn.2d at 580-581, 564 P.2d 799. In return, the State agreed not to pursue any larceny charges. *Tourtellotte*, 88 Wn.2d at 581, 564 P.2d 799. The trial court accepted the plea, but prior to sentencing, the State moved pursuant to then

current CrR 4.2 to withdraw the guilty plea on grounds that the alleged victims of the arson had not been informed of the plea negotiations.² *Tourtellotte*, 88 Wn.2d at 581-582, 564 P.2d 799. The trial court granted the State's motion and withdrew the plea of guilty. *Tourtellotte*, 88 Wn.2d at 581, 564 P.2d 799. Prior to the trial on the arson charges, Mr. Tourtellotte successfully moved for dismissal on grounds of double jeopardy. *Tourtellotte*, 88 Wn.2d at 582, 564 P.2d 799. Several months later, the prosecutor filed an information charging Mr. Tourtellotte with three counts of grand larceny, charges which were identical to those which were the subject of the plea-bargaining agreement. *Tourtellotte*, 88 Wn.2d at 582, 564 P.2d 799. Mr. Tourtellotte again moved for dismissal but was denied. *Tourtellotte*, 88 Wn.2d at 582, 564 P.2d 799.

The Washington Supreme Court held that the information for the three counts of grand larceny would be dismissed, the plea of guilty to second-degree arson would be entered, and that the trial court would sentence Mr. Tourtellotte on the plea. *Tourtellotte*, 88 Wn.2d at 586,

² The then applicable version of CrR 4.2 allowed, upon motion of the defendant, withdrawal of a plea to correct a manifest injustice. *Tourtellotte*, 88 Wn.2d at 584, 564 P.2d 799.

564 P.2d 799. In reaching this decision, the Washington Supreme Court reasoned that because Mr. Tourtellotte “had [his plea bargain] withdrawn from him after the court had previously fully considered the plea and had accepted it without equivocation or reservation,”

specific performance is the only adequate remedy available to [Mr. Tourtellotte]. To place [Mr. Tourtellotte] in a position in which he must again bargain with the state is unquestionably to his disadvantage. The security he had gained as a result of the plea negotiation from being charged with the more grievous offense would be lost.

Tourtellotte, 88 Wn.2d at 585-586, 564 P.2d 799.

Here, Mr. Tarrer detrimentally relied on the plea bargain in the same manner as Mr. Tourtellotte. Mr. Tarrer pled guilty and the plea was accepted and entered by the trial court. Through no fault of Mr. Tarrer’s or the State’s, Mr. Tarrer’s plea bargain subsequently became invalid, placing Mr. Tarrer in the same position as Mr. Tourtellotte--having either to face trial or again “bargain with the state.” As held in *Tourtellotte*, this position is unquestionably to Mr. Tarrer’s disadvantage, especially considering that at the time Mr. Tarrer filed his motion for specific performance of his plea agreement Mr. Tarrer had 8 years remaining on his sentence, but if he is convicted of first

degree murder he faces potential life imprisonment. Fundamental principles of due process require that the trial court be reversed.

It is ironic to note that had Mr. Tarrer been pled guilty to second degree murder and the information alleged both alternative means of committing second degree murder, Mr. Tarrer would not be eligible to have his sentence vacated.

In *In Re Personal Restraint of Mayer*, 128 Wn.App. 694, 117 P.3d 353 (2005), the Division Three Court of Appeals held that, where a defendant entered an *Alford* plea of guilty to Second Degree Murder and the information alleged both alternative means of committing second degree murder (felony murder and intentional murder), the defendant was not entitled to invalidation of his guilty plea under *Andress*, since, under *State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990), when the information alleges more than one means of committing a crime, a defendant's right to plead guilty is limited to the crime as charged and does not include the right to plead guilty to only one alternative means. *Mayer*, 128 Wn.App at 702-706, 117 P.3d 353. The *Mayer* court held that, post *Andress*, where a defendant has entered an *Aflord* plea of guilty to an information charging both

alternative means of committing second degree murder the charging document was facially invalid only insofar as it referenced second degree felony murder. *Mayer*, 128 Wn.App at 705, 117 P.3d 353.

Mr. Tarrer was in a position similar to that of Mr. Tourtellotte; through no fault of his own, the plea bargain which Mr. Tarrer had bargained for and detrimentally relied on was “withdrawn from him.” Under *Miller* and *Tourtellotte*, Mr. Tarrer is entitled to specific performance of his plea agreement because it was a validly entered plea agreement on which Mr. Tarrer detrimentally relied and which he did not violate.

Further, under *Mayer*, the remedy sought by Mr. Tarrer below was the same remedy as would have applied had the State included both alternative means of second degree murder in the amended information filed in this case. Such a minor difference in the charging document should not now operate to deprive Mr. Tarrer of the benefit of the plea bargain which was validly accepted by the trial court and which Mr. Tarrer was complying with.

Mr. Tarrer does not seek to go unpunished for his crimes and does not seek to put the State through the expense and effort of a new

trial. Rather, Mr. Tarrer simply seeks to have his plea bargain specifically enforced by means of a remedy which would have applied had the State charged Mr. Tarrer with both means of committing second degree murder.³

Not only was Mr. Tarrer entitled to the relief he requested, but public policy also required that the added expense and burden of a new trial for first degree murder be avoided, if possible. The trial court erred in denying Mr. Tarrer's motion for specific performance of his plea agreement. Further, forcing the vacation of Mr. Tarrer's conviction would be an unjust remedy as discussed in *Miller*, and the trial court should have follow Mr. Tarrer's wishes regarding the proper remedy.

Because the trial court erred in denying Mr. Tarrer's motion for specific performance of his plea bargain, it was also error for the trial court to allow the State to withdraw the amended information and

³ Several secondary issues related to Mr. Tarrer's request for specific performance of his plea bargain exist, but were not reached below since the trial court vacated Mr. Tarrer's whole sentence. At sentencing, Mr. Tarrer's offender score was miscalculated and Mr. Tarrer was charged under and pled guilty to the crime of assault in the first degree under a statute that was no longer in effect. Because the issues were not dealt with below, they technically are not the subject of this appeal. However, should this court grant Mr. Tarrer's appeal, these issues would still need to be resolved prior to Mr. Tarrer being resentenced.

proceed under the original information.

VI. CONCLUSION

This court should vacate the trial court's ruling denying Mr. Tarrer's request for specific performance of his plea agreement, vacate the trial court's ruling granting the State's motion to withdraw the amended information, and remand this case to the trial court for specific performance of Mr. Tarrer's plea agreement as requested by Mr. Tarrer.

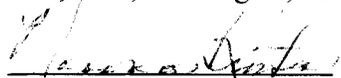
Respectfully Submitted this 30th day of January, 2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that on January 30, 2007, she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave.South, Tacoma, WA. 98402, and by U.S. mail to appellant, Larry Edward Tarrer, Pierce County Jail, County-City Building, 910 Tacoma Ave.South, Tacoma, WA. 98402, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on January 30, 2007.


Norma Kinter

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