

original

NO. 35845-0

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PETER LINDAHL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 00-1-04870-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the invited error doctrine preclude defendant from asking for specific performance of a plea agreement where it was defendant who petitioned this court to set-aside his conviction and where defendant agreed to withdrawal of his plea at the original hearing in this matter? (Appellant's Assignment of Error 1 and 2).
2. Where a defendant has pled guilty to a nonexistent charge, is the only remedy available withdrawal of the plea; or, after vacation of the judgment may the invalid plea still stand? (Appellant's Assignment of Error Number 1 and 2).
3. May defendant invoke the doctrine of equitable estoppel in a criminal case? (Appellant's Assignment of Error Number 1 and 2).

B. STATEMENT OF THE CASE.

1. Procedure

The defendant, PETER ANTON LINDAHL, is restrained pursuant to a judgment and sentence entered in Pierce County Cause Number 00-1-04870-1, for the charge of murder in the second degree. CP 112-122.

On October 10, 2000, the State originally charged the defendant with one count of murder in the second degree, alleging two alternatives,

intentional murder and felony murder predicated on assault, and a deadly weapon (knife) sentence enhancement. CP 1-2. In November of 2000, the State filed an amended information that dropped the intentional murder alternative. CP 3. In March of 2001, the State filed a second amended information that added a statutory citation for the predicate assault. CP 4.

As a result of plea negotiations, the State filed a third amended information that dismissed the deadly weapon sentence enhancement and allowed the defendant to plead guilty to one count of murder in the second degree (felony murder) predicated on a second degree assault. CP 15-16. The defendant's resulting standard range sentence was 123-220 months in prison, and the State agreed to recommend the low end of the standard range, with the defendant free to request an exceptional sentence below the standard range. CP 7-14. The defendant entered his guilty plea on May 22, 2001, the Honorable Vicki Hogan, presiding. CP 7-14.

At a sentencing hearing held on August 8, 2001, the defendant was sentenced to an exceptional sentence above the standard range, 330 months in prison. CP 17-34. The defendant appealed that sentence, which was affirmed by the court of appeals in State v. Lindahl, 114 Wn. App. 1, 56 P.3d 589 (2002), review denied, 149 Wn.2d 1013 (2003). The defendant's appeal was final on May 28, 2003, when the mandate issued from the court of appeals. CP 52-69.

The defendant filed a personal restraint petition seeking relief under Andress¹ and Hinton.² RP 11, 4/26/06, CP 70-71. The court granted defendant's petition and the matter was remanded to the trial court. CP 70-71 (Appendix A).

Both parties came before the Honorable Judge Hogan on August 10, 2005, on a re-arraignment calendar. RP 6, 8/10/05. At defendant's motion, the judgment was vacated under Andress and Hinton. CP 74-75. Without objection from defendant the court entered an ordering allowing withdrawal of the plea. CP 76-77.

On April 24, 2006, the matter came before the Honorable Judge Arend on various motions, including a motion to allow specific performance of the plea agreement rather than withdrawal of the plea. RP 1-9, 4/24/06. Judge Arend questioned whether Judge Hogan had already entered an order setting aside the plea, and defense conceded that she had but that it was a preliminary ruling and that they had reserved the issue. RP 9, 17, 19, 4/24/06. The defense also agreed that they had motioned the court under Andress to have defendant's conviction vacated, but that they

¹ In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) (holding that assault cannot serve as the predicate felony for felony murder)

² In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) (holding that the court's decision in Andress, invalidating felony murder predicated on assault applies retroactively).

did not wish to have his plea withdrawn. RP 11, 4/26/06. Defense further agreed with the court that unlike other cases that had come back under Andress, defendant was not charged with both alternatives of second degree murder (felony and intentional), but only under the felony murder alternative. RP 12, 4/26/06.

The court denied the motion:

It seems to me that the defense is seeking specific performance of a plea agreement to a crime that has been invalidated, and so the relief that's being requested can't be granted because the Court can't specifically enforce a contract that allows him to now or again plead to a crime that the Supreme Court says doesn't exist.

RP 26, 4/26/07, CP 87-89 (Appendix B).

The State motioned the court to withdraw the filing of the third amended information in the matter, which was filed at the time the defendant entered his now withdrawn guilty plea. CP 78. The court granted the motion to withdraw the amended information, thus leaving the charges as filed on October 10, 2000, (Second Degree Intentional Murder) as the charges that the case would proceed under, until or unless another information was filed in the matter. CP 79. On May 5, 2006, the State filed an amended information charging defendant with first degree murder. CP 90-91.

Following negotiations, the State reduced the charges to second degree murder, alleging the aggravating factor of an act of domestic

violence committed within sight or sound of the parties' minor child, and the parties proceeded to a stipulated bench trial. CP 96-97. In the "Prosecutor's Statement Regarding Amended Information," the prosecutor laid out the following understanding of the parties' negotiations:

The defendant has agreed to a stipulated facts trial that will result in the identical conviction as before Andress and Hinton. Further, the current stipulation will allow the State to seek the identical sentence he received in 2000, which was previously upheld on appeal and which was not subject to Blakely relief until Andress and Hinton, which means this defendant got a benefit others similarly situated exceptional sentence defendant did not. The defendant has also given up several issues on appeal that he would have kept by going to trial.

CP 98.

In the stipulated facts agreement, defendant waived his right to appeal factual issues, but reserved his right to appeal the trial court's ruling that denied his motion for specific performance. CP 140.

The court found defendant guilty of second degree murder. CP 102-111.

A sentencing hearing was held on January 26, 2007. RP 50, 1/26/07. The court found the aggravating factor as charged and imposed an exceptional sentence of 330 months. CP 99-101, RP 112, 1/26/07.

2. Facts³

The defendant and Sheri Wolf began a dating relationship in 1998. That relationship resulted in a child, C.L., a girl who was born in 1999. When Ms. Wolf was pregnant, she and the defendant began living together. CP 130.

The defendant was not happy in his relationship with Sheri Wolf. In July of 1999, the defendant wrote Ms. Wolf a letter and mailed it to her (probably from his job in Seattle). In that letter, the defendant said the reason he got “so mad” at times has “a lot to do” with his ex-wife, “but I feel extremely pressured with you too.” The defendant said his relationship with Ms. Wolf was “an abusive relationship based on fear and intimidation,” because Ms. Wolf had “threatened” more than once to get a lawyer and take both the defendant’s house and daughter from him. The defendant said of Ms. Wolf’s behavior: “It makes me hate you.” CP 131.

In the months leading up to the killing, the defendant complained about the victim to a number of his co-workers. He told them she did not keep the house clean and would not get a job. He also told them he wanted the victim to move out of his house, and he talked to them about how to make that happen. Within a few days of the killing, the defendant

³ These facts are taken from the “Agreement Relating to Stipulated Facts Trial,” as filed with the trial court and designated as CP 125-143.

was heard muttering to himself that he did not know what to do anymore.

CP 131.

In June of 2000, the defendant petitioned for an order of protection. In support of that petition, the defendant said he felt “threatened that she will take my daughter . . . and my house and belongings” away from him. He later said “I just want my house with her out and if it is my daughter that I be given as much visitations as possible.” The court (Judge James Orlando) refused to issue a protection order (“allegations” “not sufficient”). CP 132.

On a ski trip to Sun Valley, Idaho, in March of 2000, the defendant met Ellen Wright. Over the next few months, the defendant and Ms. Wright did several things together that could be described as dates. Ms. Wright then discovered the defendant lived with another woman and rebuffed any further attempts he made to have a relationship with her. On the morning of October 8, 2000, the defendant telephoned Ms. Wright and made another attempt to have a relationship with her. She rebuffed him again and told him she did not want further contact with him until his current situation was over. CP 132.

In the early evening of October 8, 2000, at approximately 6:30 p.m., the defendant went to a neighbor’s house for a birthday party. He had contact with several people, none of whom described his behavior as

unusual. The defendant had one beer to drink and left that party to walk home some time after 7:30 p.m. CP 133.

On the night she died, Ms. Wolf talked to her sister Monica Sharp on the telephone after 8:00 p.m. During their conversation, Ms. Sharp heard a “click” on the line and Ms. Wolf said “well, he’s starting it again.” That was the last time Ms. Wolf spoke to anyone. CP 133.

The incident that resulted in Ms. Wolf’s death started some time after the defendant returned home and before the first 9-1-1 call, which was approximately 8:15 p.m. The defendant and Ms. Wolf argued. The defendant struck Ms. Wolf repeatedly with his fists and stabbed her numerous times with a large knife. CP 133.

The defendant called 9-1-1. In the first call, the defendant said “somebody’s been stabbed in the stomach” and “needs to go to the hospital.” When asked what happened, the defendant said:

“There was a fight. I was, she was threatening to throw me out of my house and take my house. Take everything from me. Told me that it’s the law that she can take my house and take everything from me. And that’s what she’s going to do, goddamn it.”

He also said: “She’s going to destroy my life.” The defendant told the operator the knife was in the kitchen. The defendant hung up the phone. CP 133.

In the second call, the defendant could be heard talking directly to

Ms. Wolf:

What . . . I . . . where's your inhaler. Is it in your purse?
Oh, God. Oh, God, why did I do that? Why? Because you
trapped me. I live under fear, under constant God damn
fear. Here's your inhaler. You've just destroyed my life,
Sheri. You're just, thank you very much for ruining my
life. You just destroyed everything I have.

Police arrived at the residence at 8:24 p.m. and found the
defendant kneeling next to Ms. Wolf, who was lying on the ground in the
fetal position. She was covered in blood. Her left arm was covering her
face. Her shirt was pulled up to expose a stab wound on her left side. Ms.
Wolf was ashen in color, was not breathing, and had no pulse. Ambulance
personnel also at the scene confirmed Ms. Wolf was dead. CP 133-34.

Police moved the defendant to a couch and asked him to hold C.L.
While the defendant was sitting on the couch, he made the statement "she
was threatening me, to take my house and everything." He also said
"there wasn't anybody I could call for help." CP 134.

After observing the obvious stab wound on Ms. Wolf's chest, the
officers asked the defendant where the knife was and he pointed toward
the kitchen. The knife was found in a pot full of dirty water with the
handle sticking up. There was blood on the blade near the handle. The
knife was a butcher-style knife that was almost ten inches in length. The

blood on the knife was forensically tested using DNA technology and confirmed to be Sheri Wolf's blood. CP 134.

The Pierce County Medical Examiner, Dr. John Howard, performed an autopsy on Sheri Wolf. At the time of her death, Ms. Wolf was 31 years old, 5 feet, 5 inches tall, and weighed 107 pounds. During the autopsy, Dr. Howard noted Ms. Wolf had multiple blunt force injuries with contusions and lacerations, subdural bleeding on both sides of her brain, and multiple stab and cutting injuries. Dr. Howard concluded Ms. Wolf's death was caused by "multiple stab, cutting, and blunt injuries," and he classified the manner of her death as a "homicide." Ms. Wolf's injuries are described below. CP 134.

At the time of this incident, the defendant was a lieutenant in the Seattle Fire Department. He had been trained in anatomy and in emergency medical treatment. The defendant's medical knowledge and firefighter training were evident during the 9-1-1 calls. CP 137-138.

The defendant knew Ms. Wolf was asthmatic. He also knew that she carried an inhaler and used it when she had trouble breathing. The defendant can be heard talking about this inhaler on one of the 9-1-1 calls, and the inhaler was found on the floor near Ms. Wolf when she died. CP 138.

During the 9-1-1 calls, C.L. could be heard “crying hysterically.” When police arrived at the scene, C.L. was sitting on the floor next to her mother. She was extremely upset and crying. There was blood on C.L.’s face, arms, and legs. The officers asked the defendant where C.L. had been during the altercation and he said Ms. Wolf had been “holding her” “off and on” during the incident. CP 138.

C. ARGUMENT.

1. THE DEFENDANT MAY NOT APPEAL THE WITHDRAWAL OF HIS PLEA WHERE HE PETITIONED THE COURT FOR VACATION OF HIS CONVICTION AND AGREED TO WITHDRAWAL OF THE PLEA.

Defendant seeks review of the trial court’s withdrawal of his plea. However, this case came before the trial court on *defendant’s* motion to vacate his conviction. The record also shows that at the outset defendant agreed to withdrawal of his plea. Because it was the defendant who put this procedural ball into motion, he is prohibited under the invited error doctrine from seeking relief from the very thing he sought below.

The invited error doctrine prevents parties from setting up an error and then complaining of such error on appeal regardless of whether it was done intentionally or unintentionally. See City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The doctrine has been applied to errors of constitutional magnitude, including where an offense element

was omitted from the “to convict instruction.” Id. (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)).

In defendant’s appeal to this court, he asks for relief from the April 24, 2006, hearing, without addressing how this matter appeared in the trial court. Procedurally, it was the defendant’s personal restraint petition that set the process in motion, seeking vacation of his judgment under Andress and Hinton. CP 70-71. On remand, the defendant motioned the court for vacation of his judgment under Andress and Hinton. CP 74-75. This motion was granted on August 10, 2005, and without objection from defendant the court entered an ordering permitting withdrawal of the plea:

THE COURT: The next order is allowing Mr. Lindahl to withdraw his plea of guilty pursuant to the same cases, and anything further on this order, Mr. Whitehead?

MR. WHITEHEAD: You signed off on it?

MR NEEB: Yes, I did sign off on it.

RP 6, 8/10/05, CP 76-77. The court then entered the order without objection. CP 76-77. There was no timely motion for reconsideration from this ruling. See CrR 8.2; CR 8(b); CR 59(b) (motion for reconsideration must be filed within ten days of entry of order).

Eight months later, on April 24, 2006, the matter appears before another judge and the defendant for the first time makes the argument that he is entitled to specific performance. RP 8, 4/24/06. Judge Arend

correctly questioned the defense whether this motion should even be in front of her at all since there was an earlier ruling. RP 9, 4/26/06. It appears from the record that both the defense and the State could not recall the original posture of the motion in the October hearing. RP 9, 17, 19 20, 4/24/06. However, the transcription bears out that the defense agreed to the withdrawal of the plea. This position was consistent with the defense position from the outset, since it was the defense's motion to vacate the judgment and sentence under Andress. CP 70-71.

After requesting that the Court of Appeals vacate his conviction, and after agreeing to the withdrawal of his plea, the defendant's motion to request specific performance to the trial court was untimely. This court must honor his original request and position and deny defendant's request to reinstate his original plea.

2. THE ONLY REMEDY FOR A PLEA TO A NONEXISTENT CHARGE IS TO VACATE THE JUDGMENT AND SENTENCE, WITHDRAW THE PLEA, AND RETURN THE PARTIES TO THE STATUS QUO ANTE.

In Andress, our Supreme Court invalidated the felony murder statute with respect to any felony murder predicated on the felony of assault in the second degree. In doing so it rendered any judgment and sentence entered for felony murder via assault in the second degree invalid. Andress, 147 Wn.2d at 602; Hinton, at 860. Defendant comes before this court with the novel legal argument that while the judgment

and sentence for felony murder cannot stand, his plea may. This argument is without merit and the State requests this court to affirm defendant's conviction for murder in the second degree.

Where a defendant is held on a judgment that is based on a nonexistent crime, that defendant is entitled to vacation of the conviction. Hinton, at 860. "A plea agreement to plead guilty to a nonexistent crime does not foreclose . . . relief because a plea agreement cannot exceed the statutory authority granted to the courts." Id. (citing In re Thompson, 141 Wn.2d 712, 719, 10 P.3d 380 (2000)).

The case of In re Thompson, supra, is illustrative. In Thompson, the defendant pled guilty to a nonexistent crime - rape in the first degree.⁴ The court held that the conviction and plea could not stand because a plea is invalid where a person is not properly informed of the elements of a crime and the matter which he pled guilty to does not fall under a lesser included offense or an inferior degree.⁵ Id. (citing Wash. Const. art. I, sec. 22). The court refused to uphold the plea bargain to the invalid charge because "[A] plea bargaining agreement cannot exceed the statutory authority given to the court." Thompson, at 723 (In re Personal Restraint

⁴ The statute creating the offense Thompson pled guilty to (RCW 9A.44.073) was not enacted until 1988, nearly two years after the conduct occurred.

⁵ As in Thompson, there is not a lesser included offense that the court could enter in this matter. See State v. Gamble, 154 Wn.2d 457, 469, 114 P.3d 646 (2005) (holding first degree manslaughter is not a lesser included offense of second degree felony murder predicated on second degree assault).

of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)). Thus the only proper remedy the court concluded was to vacate his conviction without prejudice and to “return the parties to the status quo ante, that is, to the position they were in before they entered into the agreement.” Id. at 715.

State v. DeRosia, 124 Wn. App. 138, 100 P.3d 331 (2004), also lends guidance. In DeRosia the defendant entered an Alford⁶ plea to second degree felony murder via second degree assault. 124 Wn. App. at 140. The defendant sought vacation of his judgment and plea under Andress, supra, while the State sought to hold defendant to his plea bargain. The court accepted the defendant’s argument and rejected the State’s, finding that under Andress the sentencing court is deprived of subject matter jurisdiction to enter a judgment and sentence for second degree felony murder convictions predicated on assault and that “Andress compels [the court] to set aside his plea.” 124 Wn. App. at 147. The court further concluded that where the information charges an invalid conviction, the charging document is defective and therefore the proper remedy ““for a conviction based on a defective information is dismissal without prejudice to the State refileing the information,”” to any lawful charge. Id. (quoting In re Thompson, 141 Wn.2d 712, 10 P.3d 280 (2000), *other citations omitted*).

⁶ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

In the instant case, defendant crafts a legal fiction by arguing that on the one hand his conviction is invalid, but on the other hand his plea to this invalid charge should still stand. If a judgment and sentence for felony murder in the second degree based on assault in the second degree cannot stand, then the charging document and the plea to the same nonexistent charge cannot stand either. The proper remedy, as held in DeRosia, is vacation of conviction and dismissal of the felony murder charges. Following this the State is free to file any lawful charges.⁷

The cases defendant proffers to this court are inapposite. See Opening Brief of Appellant at 7-12 (citing State v. Tourtellote, 88 Wn.2d 579, 585, 564 P.2d 799 (1977); In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)).

Tourtellote, is limited to its unique facts. In Tourtellote, the defendant and State entered a plea bargain. At a sentencing hearing following the plea of guilty the victims appeared and objected to the deal. The State then moved to withdraw the plea and the court granted the

⁷ It is unclear which charges the defendant seeks “specific performance” on. In his issues presented he states that he was entitled to have his plea modified to a plea of guilty to the [uncharged] crime of intentional murder. (See Issue Presented 2, at Page 1 of the Opening Brief of Appellant). However, this argument is not presented later in the brief and is abandoned. State v. Goodman, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). Defendant also argues that “it was also error for the trial court to allow the State to withdraw the amended information and proceed under the original information.” (OBA at 15). Defendant makes this conclusory statement without any argument as to which charges should stand. If it was error to allow the State to withdraw the amended information, then defendant’s argument is that the invalid felony murder charge should remain. For the reasons argued in this section, the court could not allow the State to proceed on invalid charges.

motion under CrR 4.2(f). 88 Wn.2d at 581. On appeal the appellate court reversed the trial court, finding that CrR 4.2 by its plain language permits only a defendant to withdraw his plea and that the State's motion to withdraw broke its terms of the plea bargain. Id. The court further concluded that “*under the facts of this case, we find that specific performance in the only adequate remedy available to the defendant.*” Id. at 585.

In the instant case, neither party breached its terms of the agreement. A plea agreement is like a contract and is analyzed according to contract principles. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Specific performance is a remedy limited to breach of plea bargain. See In Re Lord, 152 Wn.2d 182, 189-90, 94 P.3d 952 (2004) (where State breaches a plea agreement the defendant may choose the remedy of either withdrawal of plea or specific performance). Here, the withdrawal of the plea or contract was necessary since its terms were null and void post Andress, supra.

In re Goodwin, does not address the issue here – an invalid conviction, but rather an invalid sentence, a much different predicament. See In re Goodwin (holding a sentence based on a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time, with certain exceptions). With an invalid conviction, the entire judgment is void and the parties must be returned to the status quo. However, with an invalid sentence, the validity of the

underlying conviction is not called into question and the courts are still free to fashion a remedy that allows for specific performance should the defendant so choose. Defendant relies on the invalid sentence argument in his brief to this court as well, thus missing the issue presented, which is one of an invalid judgment, not sentence.

Once a valid motion was made to vacate a conviction based on a nonexistent charge (felony murder), the court had a duty to withdraw the plea that was the basis for the invalid conviction and return the parties to the position before the plea was entered.

3. THE DOCTRINE OF EQUITABLE ESTOPPEL
DOES NOT APPLY IN THE CRIMINAL
CONTEXT.

Defendant asserts that the doctrine of equitable estoppel prevents the State from amending the charges to intentional murder and that instead the original charges of felony murder should remain. (Opening Brief of Appellant at 15-16).

The defense opening brief in this matter was filed prior to the Supreme Court's issuance of State v. Yates, ___ Wn.2d ___, 168 P.3d 359 (2007). Yates calls into question the use of the doctrine of equitable estoppel in the criminal context. As the court noted in its opinion, "No Washington case has applied the doctrine [of equitable estoppel] to criminal cases, and federal authority exists discrediting such application."

Yates, at 378. Thus the court concluded that a “criminal defendant may not rely on equitable estoppel to challenge a plea agreement.” Id.

The State submits that in this matter, absent any controlling authority to the contrary, the doctrine of equitable estoppel cannot apply. Defendant’s argument to this court underscores why the doctrine should not be applied in the criminal arena. Defendant argues that the “State’s decision to refile intentional murder charges against Mr. Lindahl are contrary to the State’s earlier “statement that such charges would not be brought.” (Opening Brief of Appellant at 16). The logical extension of this argument is that: (1) the felony murder charge cannot stand because of the Andress decision, and (2) the State is barred from filing any amended charges, which means no criminal charges at all.

Even if the doctrine may be invoked in this context, the doctrine is not met here. “The doctrine of equitable estoppel is grounded in the principle ‘that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.’” Yates, 168 P.3d at 377 (quoting, Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975)). A party seeking the protection of the doctrine in the government context must establish three elements: “(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting

the first party to contradict or repudiate such admission, statement, or act.”

Id. Application of equitable estoppel against the government is disfavored. Id. (citations omitted). In addition to the first three factors, defendant must also establish that equitable estoppel (1) is “necessary to prevent a manifest injustice” and (2) would not “impair” the exercise of governmental functions.” Id. A party must prove all required elements by clear, cogent, and convincing evidence. Id. at 744.

Here, defendant cannot establish “injury” from the repudiation of the original agreement. Defendant argues that the “injury” is that the defendant faced more serious charges (addition of a deadly weapon enhancement). (Opening Brief of Appellant at 16). The defendant assumes the wrong point of reference for his argument. Defendant did not detrimentally rely on the State’s promise. Once the contract or plea was nullified, the parties were returned to status quo ante and were free to renegotiate the charges.

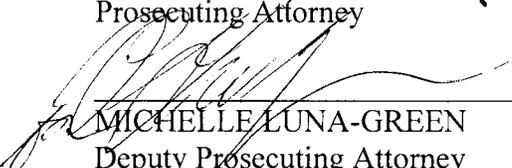
Nor can defendant show that the use of the doctrine would not result in impairment of government functions. As argued above, the possible outcome of defendant’s argument is that the State is prevented from filing *any* charges. Defendant’s argument also puts at stake the entire plea bargaining process and may force the State to choose an all or nothing approach in every case, doing away with negotiations all together. Such a result is not supported in the development of criminal law and should be rejected again as it was in Yates.

D. CONCLUSION.

The defendant was entitled to seek vacation of his conviction under Andress and Hinton. Once his conviction was vacated the court had to withdraw defendant's plea to the invalid charge and return the parties to the status quo ante. Defendant was not entitled to maintain a plea to an invalid charge and the trial court properly ordered withdrawal of the plea.

DATED: November 14, 2007.

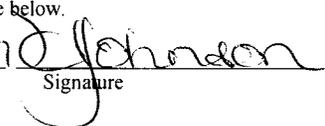
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MICHELLE LUNA-GREEN
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WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

11/14/07 
Date Signature

STATE OF WASHINGTON
COUNTY OF PIERCE
NOV 14 2007
CLERK OF COURT

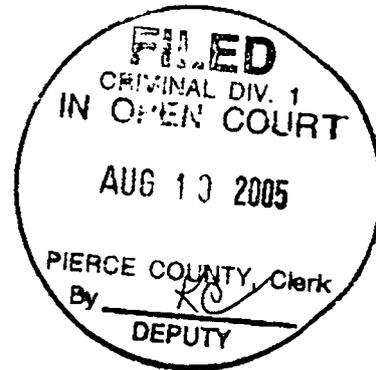
APPENDIX “A”

*Order Allowing Withdrawal of Plea of Guilty
Pursuant to Andress/Hinton*



00-1-04870-1 23523327 ORWP 08-10-05

ADDRESS



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

PETER ANTON LINDAHL,

Defendant.

CAUSE NO. 00-1-04870-1

ORDER ALLOWING WITHDRAWAL OF PLEA OF GUILTY PURSUANT TO ADDRESS/HINTON

On May 22, 2001, this defendant pled guilty to Felony Murder in the Second Degree. The defendant's plea was accepted by the Honorable Vicki Hogan, who sentenced the defendant on August 8, 2001.

After the defendant was charged, convicted, and sentenced, the Washington Supreme Court issued its decision in In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), wherein that court invalidated the felony murder statute when the underlying felony was assault. More recently, the Washington Supreme Court issued its decision in In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), wherein that court held Andress was retroactive to any defendant convicted under the felony murder statute as it had existed since 1976. The Washington Court of Appeals granted the defendant's personal restraint petition and remanded his case to the Pierce County Superior Court with an order to vacate the defendant's sentence and conviction and proceed from there.

On August 10, 2005, this matter was back before the Pierce County Superior Court for a hearing post-Andress and post-Hinton. The State of Washington was represented by John M. Neeb and/or Thomas Roberts, Deputy Prosecuting Attorneys, and the defendant was present and represented by his attorney, Richard Whitehead.

Being fully aware of the facts and proceedings in this case, and being fully informed in the law, particularly Andress and Hinton, the court hereby enters the following orders:

IT IS HEREBY ORDERED that the defendant's conviction is vacated and his plea of guilty is withdrawn pursuant to the Washington Supreme Court's decisions in Andress and Hinton.

IT IS FURTHER ORDERED that the defendant shall remain held in the Pierce County Jail under the Order Establishing Conditions of Release entered on August 10, 2005.

The court's oral ruling on this motion was given in open court in the presence of the defendant on August 10, 2005.

This order was signed in open court this 10th day of August, 2005.

Vicki L. Hogan
SERGIO ARMIBO, JUDGE
Vicki L. Hogan

Presented by:

Approved as to form and content:

John M. Neeb
JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322

Richard Whitehead
RICHARD WHITEHEAD
Attorney for Defendant
WSB # 2898

FILED
CRIMINAL DIV. 1
IN OPEN COURT
AUG 10 2005
PIERCE COUNTY, Clerk
By *KC*
DEPUTY

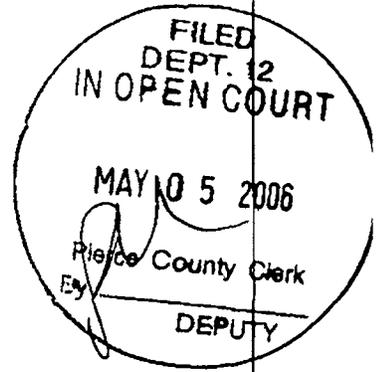
APPENDIX “B”

Order Denying Specific Performance of Plea Bargain

ADDRESS



07 MAY 11 2006 3:00
STATE OF WASHINGTON
BY: [Signature]



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

PETER ANTON LINDAHL,

Defendant.

CAUSE NO. 00-1-04870-1

ORDER DENYING SPECIFIC
PERFORMANCE OF PLEA BARGAIN

On April 24, 2006, this case came on for pre-trial motions, the Honorable Stephanie A. Arend, presiding. The State of Washington was represented by John M. Neeb and Michelle Luna-Green, Deputy Prosecuting Attorneys, and the defendant was present and represented by his attorney, Richard Whitehead. The court heard the defendant's motion for specific performance of the plea bargain. The court reviewed the pleadings filed by the parties, reviewed the cases cited therein, and heard arguments of counsel.

Being fully apprised of the issue and fully informed in the law, the court hereby makes the following findings of fact:

The crime of second degree murder can be committed two different ways: with intent to kill (intentional murder) and during the commission of a felony (felony murder). This defendant was originally charged with second degree murder under both alternatives. Approximately one month after the original charge was filed, the State's motion to amend the information was granted,

ORIGINAL

and the case proceeded from that point under the felony murder charge only. The defendant eventually entered a plea of guilty to a Third Amended Information that charged him with committing second degree murder under RCW 9A.32.050(1)(b), the felony murder subsection, with second degree assault alleged as the predicate felony.

The Andress and Hinton decisions invalidated the crime of second degree felony murder when the predicate felony was assault. After those cases were decided, the defendant filed a personal restraint petition seeking to have his conviction vacated. The court granted his petition and entered an order vacating his conviction and remanding this case for further proceedings consistent with Andress and Hinton.

Because the defendant's conviction was obtained by plea of guilty, the appellate court's order effectively invalidates the defendant's plea. Put another way, a conviction obtained via a guilty plea can only be vacated by the withdrawal of that plea. In addition, Andress and Hinton invalidated the crime of felony murder predicated on assault, so the charging document to which the defendant entered his plea was defective.

The charging document to which this defendant pled guilty lists only the elements of the felony murder alternative of second degree murder, and his plea form addresses only that crime. There were no documents filed at or near the time of the plea, or that were valid at the time of the plea, that gave the defendant notice that the crime of intentional murder was charged.

The defendant's argument that he pled guilty to the crime of "second degree murder," necessarily including intentional murder, cannot succeed because the charging document does not include intentional murder and there is no evidence the defendant was entering his plea of guilty to both alternative means of committing second degree murder. In addition, if the defendant's plea of guilty were to the general crime of second degree murder and not specifically second degree felony

murder, there would have been no reason for his conviction to be vacated by the court of appeals as the portion of the plea admitting intentional murder would still be valid.

The defendant requests to "keep the benefit of his bargain and have specific performance of the plea agreement by entering a plea to the alternative means of intentional second degree murder. He asks that the plea agreement be specifically enforced." The plea agreement, however, included only the crime of felony murder, so there is no agreement to enforce. Therefore, the defendant's current request to "maintain" his plea cannot be accomplished, and his motion for specific performance of his plea bargain must be denied.

Based on the above findings of fact, the court hereby enters the following orders:

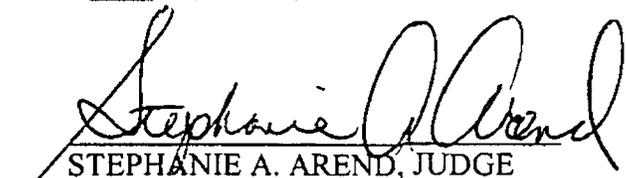
IT IS HEREBY ORDERED that the defendant's motion for specific performance of the plea bargain is denied.

IT IS FURTHER ORDERED that this written order incorporates by this reference the entirety of the court's oral ruling on this motion, given in open court on April 24, 2006.

The court's oral ruling on this motion was given in open court in the presence of the defendant on April 24, 2006.

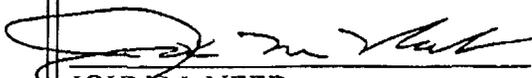
This order was signed in open court this 5th day of May, 2006.

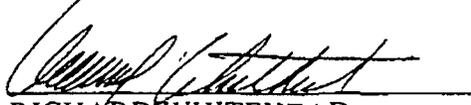
FILED
DEPT. 12
IN OPEN COURT
MAY 05 2006
Pierce County Clerk
DEPUTY


STEPHANIE A. AREND, JUDGE

Presented by:

Approved as to form:


JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322


RICHARD WHITEHEAD
Attorney for Defendant
WSB # 7896