

NO. 36412-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES EUGENE BAKER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 JAN 25 PM 1:47
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

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

The Honorable Sergio Armijo

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by accepting appellant's plea of guilty without independently determining whether appellant's plea was made voluntarily, competently, and with an understanding of the nature of the charges and the consequences of the plea.

2. The trial court erred by accepting appellant's plea of guilty without independently ascertaining a factual basis for the plea.

3. Appellant's plea of guilty is invalid.

Issue Pertaining to Assignments of Error

Did the trial court err by accepting appellant's plea of guilty without independently determining whether appellant was competent to plead guilty when there was evidence calling appellant's competency into question and without independently ascertaining a factual basis for the plea?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 6, 2006, the state charged appellant, James Eugene Baker, with four counts of child molestation in the first degree. CP 1-2; RCW 9A.44.083. On November 30, 2006, the court ordered examinations of Baker to determine whether he was competent to stand trial. CP 10-13, Supp CP ____ (Order Appointing Expert for Examination, 11/30/2006).

The Honorable Katherine M. Stolz found Baker competent to stand trial at a hearing on January 17, 2007. CP 14-15; 2RP¹ 3-4. On February 27, 2007, at a plea hearing before the Honorable Sergio Armijo, Baker pled guilty to four counts of child molestation in the first degree. CP 16-30; 3RP 8. On April 20, 2007, the court sentenced Baker to life in prison without the possibility of parole as a persistent offender. CP 41; 5RP 4-5. Baker timely filed this appeal. CP 51.

2. Substantive Facts

At Baker's plea hearing, defense counsel informed the court that Baker was pleading guilty against his advice:

This potentially is a most serious offense under Washington's two-strikes law. He has a prior strike. By pleading guilty to this, if the State is able to prove the validity of that first strike, he will be facing the sentence of life without parole. I've made it abundantly clear to my client. He still wishes to plead guilty over my objections, over my wishes, against my advice. I advised him that there are other alternatives to doing this, including a jury trial, a bench trial, or even a stipulated trial to the bench where police reports are put in, all of which would preserve his right to appeal.

3RP 2-3.

Defense counsel stated that he nonetheless had to ask the court to accept Baker's plea because it was his choice and he had been examined

¹ There are five volumes of verbatim report of proceedings: 1RP - 11/6/06; 2RP - 1/17/07; 3RP - 2/27/07; 4RP - 4/13/07; 5RP - 4/20/07.

and found competent to stand trial. Counsel emphasized that he expected the state to prove Baker's prior conviction "rather easily." 3RP 3.

Subsequently, the court conducted a colloquy with Baker by initially informing him that he had "the right to remain silent." 3RP 5. The court referred to Baker's statement of defendant on plea of guilty, which stated that Baker had sexual contact with A.J.D. on at least four occasions, and continued its colloquy with Baker:

THE COURT: -- "on at least four occasions with AJD, who was less than 12 years old at the time and not married to me. I was more than 36 months older than AJD at the time." And I see your initials, at least on two different places on this paragraph. By putting your initials next to the paragraph, you're accepting the paragraph as your own?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Anyone forcing you?

THE DEFENDANT: No.

THE COURT: Anyone making special promises to you?

THE DFENDANT: No.

THE COURT: The Court is satisfied that this plea is made freely and voluntarily with a complete understanding of the rights being waived and of the potential sentence that may be imposed.

3RP 6-8.

Thereafter, the court accepted Baker's pleas of guilty to four counts of child molestation in the first degree. 3RP 8.

C. ARGUMENT

THE TRIAL COURT ERRED BY ACCEPTING BAKER'S PLEA OF GUILTY WITHOUT INDEPENDENTLY DETERMINING WHETHER HE WAS COMPETENT TO PLEAD GUILTY WHEN THERE WAS EVIDENCE CALLING HIS COMPETENCY INTO QUESTION AND WITHOUT INDEPENDENTLY ASCERTAINING A FACTUAL BASIS FOR THE PLEA.

Remand is required because the trial court accepted Baker's plea of guilty without independently determining whether he was competent to plead guilty when there was evidence calling his competency into question and without independently ascertaining a factual basis for the plea.

Due process guarantees in the federal and state constitutions require that a guilty plea be made intelligently and voluntarily. State v. S.M., 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)(citing Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). U.S. CONST. amends. V, XIV; CONST. ART. I, sec. 3. Beyond this constitutional minimum, the court rules set forth requirements for guilty pleas:

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.

CrR 4.2(d).

CrR 4.2 is modeled after Federal Rule of Criminal Procedure 11, designed to accomplish two purposes. First, the rule is intended to assist the trial judge in the constitutionally required determination of voluntariness. Second, the rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Wood v. Morris, 87 Wn.2d 501, 509-11, 554 P.2d 1032 (1976)(citing McCarthy v. United States, 394 U.S. 459, 465, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)).

In State v. Ford, 125 Wn.2d 919, 891 P.2d 712 (1995), our State Supreme Court held that CrR 4.2(d) explicitly inserts the independent viewpoint of the trial court into the process of determining the voluntariness and factual basis of a guilty plea:

The mere representation by counsel and the defendant that a plea is voluntary does not relieve the trial court of its duty independently to assess the voluntariness and factual basis of the plea. Under the criminal rules, it is the trial court which ultimately must determine whether a guilty plea “is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). It is the trial court which is commanded not to “enter a judgment upon a plea of guilty unless it is

satisfied that there is a factual basis for the plea.”
CrR4.2(d).

Ford, 125 Wn.2d at 925-26.

Failure to comply fully with CrR 4.2 requires that the defendant’s guilty plea be set aside and his case remanded so that he may plead anew.

Wood, 87 Wn.2d at 511.

- a. The trial court failed to independently determine whether Baker was competent to plead guilty.

A person is not competent at the time of trial, sentencing, or pleading guilty if he is incapable of properly appreciating his peril and of rationally assisting in his own defense. State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). If a person was not competent to enter a plea of guilty, the plea would not be voluntary. To be voluntary, a plea of guilty must be freely, unequivocally, intelligently, and understandably made in open court with full knowledge of his legal and constitutional rights and the consequences of his act. State v. Harvey, 5 Wn. App. 719, 721, 491 P.2d 660 (1971).

In the case of an allegation of incompetency, the standard is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” State v. Calvert, 79 Wn. App. 569, 576, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996)(citing North Carolina v. Alford, 400 U.S. 25, 31,

91 S.Ct. 160, 27 L. Ed. 2d 162 (1970)). In determining the mental condition of the defendant, the “critical period is the time of the entry of the guilty plea.” State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984)(citing State v. Ashley, 16 Wn. App. 413, 416, 558 P.2d 302 (1976)).

At Baker’s plea hearing, defense counsel repeatedly stated that Baker was entering his plea of guilty against his advice. 3RP 2-4. Defense counsel stressed that Baker wanted to plead guilty despite his advice that he had other alternatives such as a jury trial or a bench trial, which would preserve his right to appeal. 3RP 2. Baker’s competency was called into question by defense counsel informing the court that Baker had undergone examinations. 3RP 3. The record substantiates that the court had grounds to be highly concerned about the full voluntariness of the plea.

Inexplicably, rather than engaging in a meaningful colloquy with Baker, the court told him that he had a “right to remain silent” and briefly asked questions that required only yes or no responses. 3RP 5. The court never asked Baker the logical question: why would he plead guilty when facing a certain life sentence without the possibility of parole. Moreover, the court made no further inquiry about Baker’s examinations or refer to the reports. The court’s cursory application of CrR 4.2 (d) was clearly

insufficient. “[T]he rule creates an obligation on the part of the trial court to be independently satisfied of the voluntariness and factual basis for the plea. The court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.” Ford, 125 Wn.2d at 924-25.

Remand is required because the court failed to fulfill its duty under CrR 4.2(d) to independently determine whether Baker was competent at the time of entering his plea.

- b. The trial court failed to independently ascertain a factual basis for the plea.

A guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” In re Personal Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980)(quoting McCarthy v. United States, 394 U.S. at 466). To satisfy the CrR 4.2(d) factual basis requirement, there must be sufficient evidence for a jury to conclude that the defendant is guilty and this evidence must be developed on the record at the time the plea is taken. State v. S.M., 100 Wn. App. at 414.

A trial court may consider any reliable source of information to determine whether sufficient evidence exists to support a plea of guilty, as long as it is made part of the record at the time of the plea. State v. Arnold,

81 Wn. App. 379, 382, 914 P.2d 762, review denied, 130 Wn.2d 1003, 925 P.2d 989 (1996). CrR 4.2 (d) makes the trial court an independent actor in the process and requires an independent weighing of the factual basis for the plea. Ford, 125 Wn.2d at 927.

Here, the trial court merely read the paragraph contained in the statement of defendant on plea of guilty and asked Baker if he accepted the paragraph as his own and Baker replied, “[y]es.” 3RP 7. The court never concluded on the record whether Baker’s statement established a factual basis for the plea. Importantly, the court never referred to the information or the declaration for determination of probable cause. The record reflects that the court was unaware that Baker was pleading guilty to the original information, which indicates that the court never reviewed the file. 3RP 4. The court made no factual inquiry beyond reviewing two sentences in the plea statement that Baker had sexual contact with A.J.D. on at least four occasions. 3RP 6-7.

Remand is required because the trial court failed to independently ascertain whether there was a factual basis for the plea as required under CrR 4.2(d).

D. CONCLUSION

For the reasons stated, and as due process requires, this Court should vacate Mr. Baker's guilty plea and remand to the superior court for him to plead anew because his plea is invalid.

DATED this 24th day of January, 2008.

Respectfully submitted,

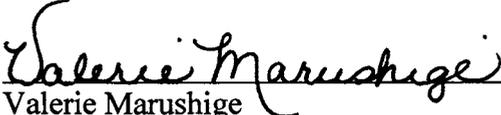

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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and James Baker, DOC # 958931, MCC-WSR, A-413-U, P.O. Box 777, Monroe, Washington 98272.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of January, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
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