

FILED
COURT OF APPEALS
DIVISION II

08 MAY 27 AM 10:10

NO. 36412-3-II

STATE OF WASHINGTON

BY

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES EUGENE BAKER,

Appellant.

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

The Honorable Sergio Armijo

REPLY BRIEF OF APPELLANT

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P.M. 5/23/08

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A. ARGUMENT IN REPLY

REMAND IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO INDEPENDENTLY ASCERTAIN WHETHER BAKER'S PLEA WAS MADE INTELLIGENTLY AND VOLUNTARILY AS DUE PROCESS REQUIRES.

The state argues that Baker's plea was constitutionally voluntary because he "assured" the court that he was entering his plea freely and voluntarily and he "assured" the court that no one was forcing him to plead guilty and that no one had made him any special promises. Brief of Respondent (BOR) at 7. The record, however, reflects that Baker made no such *assurances* to the court. During the court's brief colloquy, Baker made no substantive statements and only answered yes or no because the court never posed any questions that required a thoughtful response. 3RP 5-7. Furthermore, after asking for his complete name, the first question the court asked Baker was, "Do you understand you have the right to remain silent?" 3RP 5. It is apparent that the court's question, asked completely out of context, confusingly misled Baker to believe that it was not essential for him to speak beyond answering yes or no.

The state argues further that the trial court had no reason to question Baker's competency to plead guilty simply because Baker was evaluated earlier and found competent to stand trial. BOR at 9-10. However, the state overlooks the fact that the order of competency was

entered by a different judge and that the judge who accepted Baker's guilty plea never considered the evaluations. CP 14-15; 3RP 2-8. As the State Supreme Court concluded, 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)). Consequently, the state's argument fails because Baker's competency was brought to the attention of the court and the court made no effort to independently determine whether Baker was competent at the time of entering his plea.

The state mistakenly asserts that appellant argued that "the fact that a criminal defendant is disregarding the advice of his attorney, in and of itself, can be construed as a reason to doubt the competency of that criminal defendant." BOR at 10. Appellant never made such an argument, but argued that according to Baker's attorney, Baker disregarded his specific advice that Baker had better alternatives such as a jury trial or a bench trial. See Brief of Appellant at 6-8. Consequently, contrary to the state's argument, the record establishes that Baker's competency was called into question under the standard set in State v. Calvert, 79 Wn. App. 569, 576, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996)(quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.

Ct. 160, 27 L. Ed. 2d 162 (1970)(in the case of an allegation of incompetency, the court reviews “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant”).

The state argues finally that appellant has waived any claim regarding an insufficient factual basis for his guilty plea under CrR 4.2(d). BOR at 11-12. The state’s argument is highly misguided. A guilty plea constitutes a waiver of constitutional rights and therefore the trial court has a constitutionally mandated duty to ascertain that a guilty plea is voluntary before accepting it. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Our State Supreme Court reasoned that CrR 4.2 is intended to assist the trial judge in the constitutionally required determination of voluntariness and 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)). Accordingly, the trial court’s failure to ascertain a factual basis for Baker’s guilty plea to ensure voluntariness constitutes manifest error affecting a constitutional right that may be raised for the first time on appeal. RAP 2.5(a)(3).

Contrary to the state's argument, there is no presumption of voluntariness that is "well nigh refutable" in this case. See State v. Branch, 129 Wn.2d 635, 642 n. 2, 919 P.2d 1228 (1996). The record substantiates that the trial court failed to independently determine whether Baker was competent to plead guilty and whether his plea was voluntary. The court merely heard from defense counsel, conducted a quick colloquy, and accepted Baker's plea without any indication on the record that it considered the evaluations, the information, or the declaration for determination of probable cause. 3RP 2-7.

The voluntariness of a guilty plea is determined by considering the relevant circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The trial court clearly failed to consider the relevant circumstances surrounding Baker's plea. As emphasized by the State Supreme Court, the trial court is part of the guilty plea proceeding and is not just a "potted-palm functionary." State v. Ford, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). The trial court's acceptance of Baker's guilty plea without ensuring that it was made intelligently and voluntarily constitutes an unconscionable dereliction of its judicial duties, particularly in light of the fact that Baker was only 36 years old and facing a life sentence without the possibility of parole.

B. CONCLUSION

For the reasons stated here and in the opening brief, and to avoid a manifest injustice, this Court should remand Mr. Baker's case and he should receive new counsel who will properly represent his best interests.

DATED this 23rd day of May, 2008.

Respectfully submitted,


VALERIE MARUSHIGE
Attorney for Appellant
WSBA No. 25851

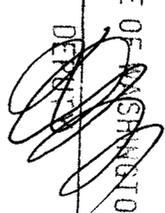
DECLARATION OF SERVICE

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.

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

DATED this 23rd day of May, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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