

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 36506-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicholas J. Lee,

Appellant.

Pierce County Superior Court

Cause No. 06-1-00992-6

The Honorable Judge Kathryn J. Nelson

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by accepting Mr. Lee's *Alford* and *In re Barr* guilty pleas.
2. The record does not establish that Mr. Lee's guilty pleas were voluntary.
3. The trial court erred by failing to exercise "special care" in determining whether or not Mr. Lee's guilty pleas were voluntary.
4. The trial court erred by accepting Mr. Lee's guilty pleas in the absence of a sufficient factual basis in the record for the original charges.
5. The trial court erred by entering the following finding:

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

CP 7.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Nicholas Lee was charged with possession with intent to deliver cocaine. Prior to trial, the Information was amended to add a firearm enhancement and a felony bail jumping charge. After trial had commenced, Mr. Lee and his two codefendants pled guilty as part of a package deal that required each codefendant to plead guilty and accept the prosecution's recommended sentence. Mr. Lee's plea hearing took place with both his codefendants present, and the trial judge did not ask if either codefendant had influenced his plea.

In order to take advantage of the prosecutor's offer, Mr. Lee pled guilty to a charge for which there was no factual basis, and agreed that the trial judge could examine the prosecutor's declaration of probable cause. The declaration, filed with the original Information, did not provide a sufficient factual basis for the amended charges.

1. Does the trial court's failure to exercise "special care" in accepting Mr. Lee's guilty pleas require reversal of his convictions? Assignments of Errors Nos. 1, 3, 5.

2. Is the record insufficient to establish that Mr. Lee's guilty pleas were voluntary? Assignments of Errors Nos. 1, 2, 5.

3. Did the trial court fail to adequately develop a factual basis for Mr. Lee's guilty pleas? Assignments of Errors Nos. 1, 4, 5.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Nicholas Lee was charged with Possession of Cocaine with Intent to Deliver, which was later amended to include a Firearm Enhancement and a charge of Bail Jumping. CP 1-2, Supp. CP. Mr. Lee had two codefendants: Aaron Barnes and Karreim Shaheed. RP (6/18/07) 300-333.

The court denied the defense motion to suppress. RP (12/1/06) 3-6. Jury trial for the three codefendants began, and after four days, the parties told the court that they had reached a global agreement. RP (6/18/07) 300. The agreement covered all three parties: Mr. Lee was to plead to Possession of Cocaine with Intent to Deliver and Unlawful Possession of a Firearm in the Second Degree, Mr. Barnes was to plead to Possession of Cocaine with Intent to Deliver and Unlawful Possession of a Firearm in the First Degree, and Mr. Shaheed, who was said to have the least involvement, was to plead to Possession of Cocaine. RP (6/18-07) 300-301. The state indicated that the gun charges were “legal fictions”, since neither defendant had ever been convicted of a charge that could form the basis of an Unlawful Possession of a Firearm charge. RP (6/18/07) 303, 314, 317.

Another Amended Information was filed, and Mr. Lee filed a Statement of Defendant on Plea of Guilty to the charges. CP 8-9, 4-7. The following colloquy took place:

...THE COURT: You understand that the Court doesn't have to follow the sentencing recommendation but can sentence you in accordance with law?
DEFENDANT LEE: Yes, ma'am.
THE COURT: And you understand that, by pleading guilty today, you do give up important constitutional rights, such as the right to have a trial?
DEFENDANT LEE: Yes, ma'am
THE COURT: Now, did anyone threaten you in order to get you to plead guilty today?
DEFENDANT LEE: No, ma'am.
THE COURT: Other than what's written in these documents, did someone make some promises to you to enter a guilty plea?
DEFENDANT LEE: No, ma'am.
THE COURT: In Paragraph 11, it says pursuant to In re: Barr and Alford/Newton cases, I've reviewed the evidence against me with my attorney and believe there is a substantial likelihood I will be convicted of a more serious charge at trial, and I agreed to the legal fiction of a prior felony conviction to facilitate the plea. I am entering this plea to take advantage of the State's offer. Is that your statement?
DEFENDANT LEE: Yes, ma'am.
THE COURT: I will incorporate as a further factual basis for these pleas the facts contained in the declaration for determination of probable cause.
What is your plea today: Guilty or not guilty?
DEFENDANT LEE: Guilty. ...
RP (6/18/07) 318-319.

During the court's above colloquy with Mr. Lee, while the other two codefendants were apparently still present, he wasn't asked if he'd

been coerced by either or both of them. RP (6/18/07) 317-320. The court accepted his plea and made the following finding:

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

CP 7.

This timely appeal followed. CP 23.

ARGUMENT

I. THE TRIAL JUDGE FAILED TO EXERCISE "SPECIAL CARE" IN ACCEPTING MR. LEE'S GUILTY PLEA.

Due process requires that guilty pleas be knowing, voluntary, and intelligent. *In re Isadore*, 151 Wn.2d 294 at 297, 88 P. 3d 390 (2004). A guilty plea is involuntary if obtained by actual or threatened harm, or by "coercion overbearing the will of the defendant." *Brady v. United States*, 397 U.S. 742, 750, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). Package deals, in which multiple defendants plead guilty, can "pose particular problems with regard to voluntariness." *U.S. v. Abbott*, 241 F.3d 29 at 34 (1st Cir., 2001). The danger arises because it is possible that "one defendant will be happier with the package deal than his codefendant(s); looking out for his own best interests, the lucky one may try to force his codefendant(s) into going along with the deal." *U.S. v. Carò*, 997 F.2d 657 at 659-60 (9th Cir. 1993). Linking codefendants' pleas together "might

pose a greater danger of inducing a false guilty plea by skewing the assessment of the risk a defendant must consider.” *Bordenkircher v. Hayes*, 434 U.S. 357 at 364 n.8, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978) (*dicta*).

Because of this, the court hearing a plea must “probe as deeply as needed into the possibility that one defendant is pleading guilty against his will in order to make it possible for his co-defendant to obtain the benefit of a favorable plea and sentencing recommendation.” *Abbott, supra*, at 34. “Package plea deals... impose special obligations [on the judge, who] must carefully ascertain the voluntariness of each defendant's plea.” *U.S. v. Martinez-Molina*, 64 F.3d 719 at 732-733 (1st Cir., 1995).

In Washington, “special care” must be taken when a guilty plea is made in exchange for a promise of lenient treatment toward a third party. *State v. Williams*, 117 Wn. App. 390 at 400, 71 P. 3d 686 (2003).

Taking special care means that when a court is informed that a plea is part of a package deal, the court must specifically inquire about whether the codefendant[s] pressured the defendant to go along with the plea and carefully question the defendant to ensure he is acting of his own free will. The most crucial inquiry is whether the codefendant[s] pressured the defendant into going along with the plea. It is also important to determine whether the defendant has had sufficient opportunity to meet and discuss the case and alternatives with his attorney.
Williams, at 402, footnote omitted.

In this case, there is no indication that the trial judge took “special care” in assessing the voluntariness of Mr. Lee’s guilty plea, despite being informed that it was part of “a package resolution that is contingent upon all [codefendants] pleading guilty.” RP 300. Instead, the trial judge asked the same questions about threats and promises that are part of an ordinary plea colloquy. RP (6/18/07) 317-320.

Furthermore, these questions were posed in front of Mr. Lee’s codefendants. RP 300-333. This deprived Mr. Lee of the opportunity to give an answer free from pressures that might have been exerted by Mr. Shaheed and/or Mr. Barnes.

The trial judge’s failure to specifically ask whether Mr. Shaheed or Mr. Barnes coerced Mr. Lee into pleading guilty precludes a finding that the plea was voluntary. Because the record does not establish that Mr. Lee’s plea was voluntary, the conviction must be reversed and the case remanded to the trial court. *Williams, supra*.

II. THE PROBABLE CAUSE STATEMENT UPON WHICH THE TRIAL COURT RELIED WAS INSUFFICIENT TO SUSTAIN MR. LEE’S GUILTY PLEA.

In order for a guilty plea to satisfy the requirements of due process, the accused must understand the law, the facts, and the relationship between the two:

A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements... Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

State v. R.L.D., 132 Wn. App. 699 at 706, 133 P.3d 505 (2006).

To ensure that the accused understands the elements and their relationship to the charged conduct, the judge must determine on the record that the accused's conduct constitutes the charged offense. *In re Keene*, 95 Wn.2d 203 at 209, 622 P.2d 360 (1980). An accused may plead guilty to amended charges for which there is no factual basis, so long as the court develops facts on the record sufficient to sustain the original charges. *State v. Bao Sheng Zhao*, 157 Wn.2d 188 at 190, 200, 137 P.3d 835 (2006).

In either case, the factual basis for the plea must be developed on the record at the time the plea is taken. *State v. S.M.*, 100 Wn. App. 401 at 415, 996 P.2d 1111 (2000). Failure to sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge. *State v. R.L.D.*, 132 Wn. App. 699 at 706, 133 P.3d 505 (2006).

In this case, Mr. Lee was charged with Possession of a Controlled Substance with Intent to Deliver (to which was added a firearm enhancement), and Felony Bail Jumping. Supp. CP. He pled guilty to

amended charges for which there was no factual basis. The parties and the court characterized his plea as a “legal fiction.” RP (6/18/07) 303, 314, 317. Mr. Lee’s Statement on Plea of Guilty included the following provisions:

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: PERMANENT TO F.N.R.R. BARR & ALFRED/NEWTON
I HAVE REVIEWED THE EVIDENCE AGAINST ME WITH MY
ATTORNEY & BELIEVE THERE IS A SUBSTANTIAL LIKELIHOOD
I WILL BE CONVICTED OF A MORE SERIOUS CHARGE AT TRIAL.
I AGREE TO THE LEGAL FICTION OF A PLEA OF GUILTY TO
of my statement is a Newton or Alfred Plea. I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.
12. I was given a copy and I read this plea statement. My lawyer read this plea statement to me. OFFER
Also, my lawyer has explained to me, and we have fully discussed, all of the above paragraphs. IF I HAVE ANY MORE
questions about it, I understand I can and need to ask the judge when I enter my plea of guilty.

CP 7.

The prosecution did not supply “police reports and/or a statement of probable cause,” other than the probable cause statement filed with the original information. CP 3. However, the original probable cause statement was insufficient to establish a factual basis for the charges Mr. Lee faced at trial, in that there was no indication that Mr. Lee was guilty of bail jumping. CP 3. Mr. Lee did not stipulate to any other factual basis for the original charges, and the trial judge did not find any alternate factual basis for those charges in the record. RP (6/18/07) 300-333. Accordingly, the record fails to establish that Mr. Lee’s plea was made knowingly, voluntarily, and intelligently. The convictions must be vacated and the case dismissed with prejudice. *State v. R.L.D., supra.*

CONCLUSION

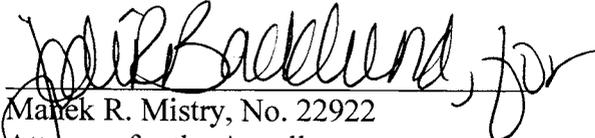
For the foregoing reasons, Mr. Lee's conviction must be vacated and the case dismissed with prejudice. In the alternative, Mr. Lee's case must be remanded to the trial court for a new trial.

Respectfully submitted on November 26, 2007.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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I certify that I mailed a copy of Appellant's Opening Brief to:

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Airway Heights Correctional Center
P.O. Box 1899
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 26, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 26, 2007.



Jodi R. Backlund, No. 22917
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