

NO. 36506-5 II

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

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS JERMAINE LEE, APPELLANT

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 06-1-00992-6

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**Brief of Respondent**

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

1. Did the trial court properly determine that defendant's guilty plea was knowingly, voluntarily, and intelligently entered when defendant received a reduced sentence in exchange for his guilty plea, and defendant stated that he was not forced into pleading guilty, and where defendant did not present any evidence that he was in fact coerced into pleading guilty, and was any error harmless?

2. Did a factual basis for defendant's guilty plea exist when the declaration for determination of probable cause supported the original charges and the trial court relied in part on the declaration for determination of probable cause as the factual basis to support defendant's guilty plea, and defendant was made aware that he was pleading guilty to a "legal fiction"?

B. STATEMENT OF THE CASE.

1. Procedure

On March 2, 2006, the Pierce County Prosecutor's Office filed an information in Cause No. 06-1-00992-6, charging NICHOLAS JERMAINE LEE, hereinafter "defendant," with one count of unlawful possession of a controlled substance with intent to deliver, cocaine. CP 1-

3. The State filed an amended information on June 11, 2007, adding a firearm enhancement to the original charge and one count of bail jumping<sup>1</sup>. CP 28-29. The matter proceeded to trial before the Honorable Kathryn J. Nelson on June 11, 2006, along with the trial of two co-defendants, Aaron Barnes on Cause No. 06-1-00994-2, and Karreim Ahkeen Shaheed, on Cause No. 06-1-00993-4. 3RP<sup>2</sup> 3.

On June 18, 2006, all three co-defendants, including defendant, reached a plea agreement with the prosecutor. 3RP 300-01, 314; CP 4-7. This plea was a “package resolution” contingent on all three co-defendants agreeing to the deal. 3RP 300. The State filed a second amended information in this matter on that day, eliminating the firearm enhancement to the unlawful possession of a controlled substance with intent to deliver, cocaine, charge, dismissing the bail jumping charge, and adding one count of second degree unlawful possession of a firearm for defendant. 3RP 314, CP 8-9. The State also filed separate amended informations for defendants Barnes and Shaheed, in which they received

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<sup>1</sup> The amended information is referred to in the clerk’s papers and on the document itself as the “2<sup>nd</sup> amended information.” It is the second information, but the first amended information.

<sup>2</sup> There are three volumes of verbatim reports of proceedings: 1RP, 11/29/06; 2RP, 12/1/06; 3RP, 6/11/07-6/29/07.

reduced charges in exchange for their guilty pleas<sup>3</sup>. 3RP 300-01.

Defendant entered a plea in accordance with *Alford/Newton* and *In re Barr* to both charges<sup>4</sup>. CP 4-7; 3RP 315, 319.

In the statement of defendant on plea of guilty, defendant stated that he was aware that the second degree unlawful possession of a firearm charge was a “legal fiction,” and that it existed in order to “facilitate a plea.” CP 4-7. Defendant also stated in paragraph 8, “No one has threatened harm of any kind to me or to any other person to cause me to make this plea,” and in paragraph 10, “No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.” *Id.* Defendant stated that he was “entering this plea to take advantage of the State’s offer.” *Id.*

Judge Nelson took the pleas from each co-defendant in succession, with defendant’s plea hearing occurring second. 3RP 303-26. At the plea hearing for defendant, defense counsel stated that he believed defendant

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<sup>3</sup> Defendant Barnes pled guilty to unlawful possession of a controlled substance with intent to deliver, cocaine, and first degree unlawful possession of a firearm. RP 300-01, 303, 310. Defendant Barnes also agreed to a joint recommendation that his sentences run consecutively. RP 304-05, 340-4.1 At trial, he faced a firearm enhancement on the unlawful possession of a controlled substance, cocaine, charge and second degree unlawful possession of a firearm. RP 303. Defendant Shaheed pled guilty to unlawful possession of a controlled substance, cocaine, a reduced charge based on defendant Shaheed’s involvement, and the prosecution recommended that he receive a sentence of time served with 12 months of community custody. RP 300-01, 326, 328.

<sup>4</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976); *In re Barr* 102 Wn.2d 265, 269, 684 P.2d 712 (1984).

“understands his rights,” and that his plea was “knowing, intelligent, and voluntary.” 3RP 316. Judge Nelson inquired whether defendant had an adequate opportunity to go over his statement on plea of guilty with his attorney, and whether his attorney had answered all of his questions satisfactorily. *Id.* Judge Nelson asked defendant whether he understood the charges against him, and the elements of each crime. 3RP 317. Judge Nelson asked defendant if he knew that the second degree unlawful possession of a firearm was a legal fiction. *Id.* Defendant answered affirmatively to all of these questions. 3RP 16-17. Judge Nelson also inquired whether or not defendant had been coerced into entering a guilty plea:

THE COURT:	Now, did anyone threaten you in order to get you to plead guilty today?
DEFENDANT:	No, ma'am.
THE COURT:	Other than what's written in these documents, did someone make some promises to you to cause you to enter a guilty plea?
DEFENDANT:	No, ma'am.
THE COURT:	In Paragraph 11, it says pursuant to <u>In re: Barr</u> and <u>Alford/Newton</u> , 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: Yes, ma'am.

3RP 318-19.

Judge Nelson incorporated "as a further factual basis for these pleas" the declaration for determination of probable cause. 3RP 319, CP 1-3. The declaration for determination of probable cause stated, in relevant part:

"Tacoma PD Officers served a search warrant on an apartment at 6410 S. 10<sup>th</sup> St. #702 and located [co-defendants] and NICHOLAS LEE inside the apartment... Inside the bedroom... was 24.2 grams of crack cocaine that field tested positive. A handgun was also located under the bed... Officers located drugs in a closet near where SHAHEED and LEE were sitting. In the pocket of a jacket were 20 pieces of crack cocaine that field tested positive. Also inside the closet was... a copy of a search warrant with LEE's name on it."

CP 1-3.

The trial court accepted defendant's guilty plea. 3RP 319-20. The trial court sentenced defendant to 20 months on the unlawful possession of a controlled substance with intent to deliver, cocaine, charge and eight months on the second degree unlawful possession of a firearm charge, to be served concurrently in the Department of Corrections, and nine to 12 months of community custody. 3RP 338-39, CP 10-22. From entry of this judgment, defendant filed a timely notice of appeal. CP 23-24.

2. Facts

On March 2, 2006, Tacoma Police Department Officers served a search warrant at 6410 S. 10<sup>th</sup> St. #702. CP 1-3. The Officers were looking for someone they believed to be “Shun Von Baker” at that address. CP 30-32. Inside the apartment, defendant and Shaheed were sitting on the couch. *Id.* Barnes was also in the apartment, and when he saw the Officers enter the apartment, he went into the back bedroom and shut the door. *Id.* Barnes eventually emerged, and the Officers searched the bedroom, finding 24.2 grams of crack cocaine that field tested positive, as well as a handgun located under the bed. *Id.*

The officers also searched the closet near where defendant and Shaheed were sitting. *Id.* Inside the pocket of one of the jackets in the closet was 20 pieces of crack cocaine that field tested positive. *Id.* Inside the closet was a USPS Express package in Shaheed’s name and a copy of a search warrant in defendant’s name. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED BECAUSE DEFENDANT RECEIVED A REDUCED SENTENCE IN EXCHANGE FOR HIS GUILTY PLEA, DEFENDANT STATED THAT HE WAS NOT FORCED INTO PLEADING GUILTY, AND DEFENDANT DOES NOT NOW PRESENT ANY EVIDENCE THAT HE WAS IN FACT COERCED INTO PLEADING GUILTY; AND ANY POTENTIAL ERROR COMMITTED BY THE COURT WAS HARMLESS.

Due process requires that when a criminal defendant pleads guilty, his plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969)). “When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness.” *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982), *reversed on other grounds*, 87 Wn. App. 293, 941 P.2d 704 (1997) (citing *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, 28 Wn. App. 631, 633, 626 P.2d 13 (1981); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)). When the judge goes on to orally inquire of the defendant and satisfies himself on the record of the existence of various criteria of

voluntariness, the presumption of voluntariness is well nigh irrefutable. *Perez*, 33 Wn. App. at 261-62; *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

“[A guilty plea] cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception.” *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *cert. denied*, 385 U.S. 905, 87 S. Ct. 215, 17 L.Ed.2d 136 (1966). CrR 4.2(f) states in relevant part, “The court shall allow a defendant to withdraw [his] plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” A manifest injustice is one that is obvious, directly observable, overt, and not obscure. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). The burden is on the defendant to show a manifest injustice. *Id.* More than the mere allegation of a defendant is necessary to overcome highly persuasive evidence that a guilty plea was voluntarily entered. *Id.* A defendant’s guilty plea is not involuntary if it is a calculated move to avoid what he considers a worse fate. *State v. Cameron*, 30 Wn. App. 229, 231 633 P.2d 901 (1981) (*citing Missouri v. Turley*, 443 F.2d 1313, 1317 (8th Cir. 1971)).

Defendant has not met his burden of showing that he was coerced into entering a plea. In fact, defendant received reduced charges and a lenient sentence compared to the terms of confinement he faced if found guilty at trial. At trial, defendant was facing unlawful possession of a controlled substance with intent to deliver, with a firearm enhancement,

and bail jumping, but agreed to plead guilty to amended charges where the firearm enhancement and the bail jumping charge were dropped in exchange for a guilty plea to unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a firearm in the second degree. CP 8-9, 28-29; 3RP 314-320.

In *State v. Williams*, 117 Wn. App. 390, 401, 71 P.3d 686 (2003), *review denied*, 151 Wn.2d 1011, 89 P.3d 712 (2004), the court held that when "... there is no evidence of any promises or threats to the defendant other than those represented in the written plea agreement, where the defendant signs the written plea agreement acknowledging guilt in his own words, and where the defendant states that no promises were made other than those in the plea agreement, the trial court properly accepts the plea as being the result of the defendant's own volition and freely and voluntarily made." Williams and his son were charged as co-defendants with third degree assault of a child. *Williams*, 117 Wn. App. at 394. Both Williams and his son reached plea agreements with the State and pled guilty to the reduced charge of fourth degree assault. *Id.* at 394-95. The prosecutor, however, failed to inform the trial court that Williams's plea was part of a package deal. *Id.* at 398-99. The day before sentencing, Williams moved to withdraw his guilty plea, claiming that he had been coerced into pleading guilty. *Id.* at 396. Williams argued that the State had forced him to plead guilty by telling him that the only way the State would offer his son a plea bargain is if Williams also agreed to enter a

guilty plea. *Id.* at 396-97. Williams stated in an attachment to his motion that he only agreed to plead guilty in order to spare his son from the third degree assault of a child. *Id.* The trial court ruled that Williams had not suffered a manifest injustice, and denied his motion. *Id.* at 397.

The trial court's ruling was affirmed, and the court held that Williams had not presented any evidence that he had been coerced into entering his guilty plea. *Id.* at 401-02. The court took note that federal courts had become increasingly concerned with package deals, and that "they pose an additional risk of coercion not present when the defendant is dealing with the government alone." *Id.* at 399 (*quoting United States v. Caro*, 997 F.2d 657, 659 (9<sup>th</sup> Cir. 1993)). The increased concern on the part of the federal courts, the court concluded, was primarily regarding plea bargaining where the defendant would plead guilty in exchange for a lenient sentence for a third party. *Id.*

Therefore, the special care standard in *Williams* applies principally when a defendant pleads guilty in exchange for lenient treatment of a third party. *Id.* at 400<sup>5</sup>. Implicitly, the court also held that Williams was not

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<sup>5</sup> Division One defines "special care" as follows:  
"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 co-defendant 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 co-defendant 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*, 117 Wn. App. at 400 (*citing Caro*, 997 F.2d at 660).

harmful by the court going through the standard plea colloquy, because the court determined that the trial court was aware that Williams was pleading guilty as part of a package deal and gave the standard plea colloquy anyway. *Id.* at 395, 400-01. The court further held that because: (1) Williams had signed a written statement on plea of guilty that no one had made promises or threatened harm to him or someone else that would cause him to plead guilty, (2) that he had affirmed he had not been forced to plead guilty during his plea colloquy, (3) that Williams's attorney told the court that he believed Williams was entering a knowing, voluntary, and intelligent guilty plea, and (4) that Williams was not claiming that he had not had sufficient opportunity to meet with his attorney and discuss alternatives to pleading guilty, the evidence "clearly indicate[s] that the guilty plea was freely and voluntarily made." *Id.* at 401.

The present case is analogous to *Williams*. Here, defendant and his defense counsel made all of the same statements to the court that Williams made. 3RP 314-20. Defendant does not claim that he was denied sufficient opportunity to meet with his defense counsel, nor did he make any allegation to the trial court after his plea that he was coerced. At the time of the pleas, the court also inquired as to whether or not defendant had been threatened or promised anything in order to induce his guilty plea. 3RP 318-19. Defendant indicated that no one had made any threats or promises. *Id.* Furthermore, the two main distinguishing characteristics between *Williams* and the present case are that here the prosecutor made

the trial court aware at the outset that the plea agreement was part of a “package resolution” and that defendant pled guilty in exchange for his own leniency. 3RP 300, 314-20; CP 4-7. Both of these factors make it less likely that defendant was coerced in the present case, because the court went through what it determined was the necessary plea colloquy after being informed that it was a “package resolution,” and defendant had a strong personal incentive to take a deal.

Errors of constitutional magnitude that are harmless beyond a reasonable doubt do not require reversal. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986).

Even if this court determines that the trial court should have exercised special care when it took defendant’s guilty plea, that error was harmless. Defendant pleaded guilty in order to take advantage of the State’s offer. Defendant signed a written statement on plea of guilty that stated he had not been forced to plead guilty through threat or promise. The trial court confirmed that defendant had not been coerced into pleading guilty at his plea hearing, and defense counsel also stated at the hearing that he believed defendant was entering a guilty plea knowingly, voluntarily, and intelligently. Defendant also received a personal benefit in the form of a reduced sentence compared to the one he faced at trial in exchange for his plea. Finally, defendant presented no evidence that he

was actually coerced into pleading guilty. Therefore, the trial court's acceptance of defendant's guilty plea should be affirmed.

2. A FACTUAL BASIS FOR DEFENDANT'S GUILTY PLEA EXISTS BECAUSE THE DECLARATION FOR DETERMINATION OF PROBABLE CAUSE SUPPORTS THE ORIGINAL CHARGES, THE TRIAL COURT RELIED IN PART ON THE DECLARATIONS, AND DEFENDANT WAS MADE AWARE THAT HE WAS PLEADING TO A "LEGAL FICTION."

Defendant challenges the factual basis supporting his *Alfred/Newton* plea for the first time on appeal. Generally, issues cannot be raised for the first time on appeal unless the issue involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). The requirement in CrR 4.2(d) that there be a factual basis for the plea is procedural. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592 n.2, 714 P.2d 983 (1987); CrR 4.2(d). "The procedural requirements of CrR 4.2 are not constitutionally mandated." *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citing *Wood v. Morris*, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976); *In re Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985)). Defendant has waived this issue on appeal because he did not raise it at the trial court level.

Assuming, *arguendo*, that this court finds defendant's failure to challenge the factual basis for his plea at trial did not constitute a waiver of this issue on appeal, defendant's argument still fails because a review of

the record shows a factual basis to support the original charge. See *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006).

The Supreme Court recently held that, "...a defendant can plead guilty to amended charges for which there is no factual basis, but *only* if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole." *State v. Zhao*, 157 Wn.2d 188, 200. [emphasis in original]. "[T]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty'; there must only be sufficient evidence, from any reliable source, for a jury to find guilt." *Zhao*, 157 Wn.2d at 198 (quoting *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976)). The trial court may rely on any facts it has at its disposal, as long the material upon which the court relies is made part of the record. *State v. Newton*, 87 Wn.2d 363, 369-70, (citing *Irizarry v. United States*, 508 F.2d 960, 967 (2d Cir. 1974); *United States v. Davis*, 493 F.2d 502, 503 (5th Cir. 1974)). "The trial court may rely, for example, on... the prosecutor's affidavit of probable cause." *In re Hilyard*, 39 Wn. App. at 725-26 (citing *State v. Osborne*, 35 Wn. App. 751, 669 P.2d 905 (1983); *State v. Norval*, 35 Wn. App. 775, 669 P.2d 1264 (1983)).

Defendant was originally charged with one count of unlawful possession of a controlled substance, cocaine, with intent to deliver. CP 1-

3. A person commits the crime of unlawful possession of a controlled substance with intent to deliver when he manufactures, delivers, or possesses with intent to manufacture or deliver, a controlled substance. RCW 69.50.401(1). Cocaine is a controlled substance. RCW 69.50.101(d), RCW 69.50.206(b)(5).

The trial court incorporated the declaration for determination of probable cause “as a further factual basis for [defendant’s] pleas.” 3RP 319. Defendant agreed that the court could consider the probable cause declaration. CP 4-7. The declaration includes the information that police found 20 pieces of crack cocaine in the pocket of a jacket inside the apartment closet, near where defendant and co-defendant Shaheed were sitting at the time of the search. CP 1-3. A search warrant with defendant’s name on it was also found inside the closet. *Id.* These assertions in the declaration provide the factual basis for the original charge. Therefore, the declaration of probable cause provided a sufficient factual basis for defendant Lee’s guilty plea.

Defendant was also aware that he was entering an *Alford/Newton* plea to amended charges that did not necessarily have a factual basis to support them. Defendant stated that he was pleading guilty in order “... to take advantage of the State’s offer.” CP 4-7. The trial court inquired as to whether or not defendant knew that he was entering a guilty plea to a “legal fiction,” regarding the unlawful possession of a firearm charge:

THE COURT: ... You are also charged with unlawful possession of a firearm in the second degree?  
DEFENDANT: Yes, ma'am.  
THE COURT: And you understand the elements of that crime?  
DEFENDANT: Yes, ma'am.  
THE COURT: You understand that this is a legal fiction, as explained by the prosecutor, and is part of the plea bargain?  
DEFENDANT: Yes, ma'am.

3RP 317.

Defendant argues, "... The original probable cause statement was insufficient to establish a factual basis for the charges Mr. Lee faced at trial." Br. of Appellant Lee at 7. Defendant's argument is premised on the lack of a factual basis in the declaration of probable cause to support the bail jumping charge defendant faced at trial. *Id.* Defendant, however, was not charged with bail jumping in the original information. CP 1-3. Defendant's argument that the factual basis for the plea must support the charges defendant faced at trial is mistaken. The Supreme Court was explicit in *Zhao* that the legal standard is only that "there at least exists a factual basis for the *original* charge, thereby establishing a factual basis for the plea as a whole." *Zhao*, 157 Wn.2d at 200 [emphasis added].

The trial court established the factual basis for the original charge, and entered the relied upon material into the record. Defendant was aware that he was entering an *Alfred/Newton* plea to one charge that was a legal

fiction. Therefore, defendant's assertion, that the trial court did not establish that his plea was entered knowingly, voluntarily, intelligently, is without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: April 24, 2008.

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*[Handwritten Signature]*

Steven P. Johnson, Jr.  
Legal Intern

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.

*4-25-08 Michelle K*  
Date Signature

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