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COURT OF APPEALS  
DIVISION II

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NO. 38237-7-II

STATE OF WASHINGTON

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

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STATE OF WASHINGTON,

Respondent,

v.

SHALAMAR H. JANUARY,

Appellant.

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

The Honorable Kitty-Ann Van Doorninck, Judge

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BRIEF OF APPELLANT

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PM 2-20-09

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A. ASSIGNMENT OF ERROR

Appellant's guilty plea was not knowing, intelligent and voluntary, as required by due process, because it was coerced by threats against his family.

Issue pertaining to assignment of error

Appellant was charged with possession of a controlled substance found under the floor mat of the borrowed car he was driving. He planned to present an unwitting possession defense but at the last minute entered an Alford plea, telling the court the man who owned the car had threatened to kill his family if he got out of jail. Where appellant's plea was not voluntary but coerced by threats against his family, must he be permitted to withdraw it?

B. STATEMENT OF THE CASE

On November 6, 2007, a Tacoma police officer saw appellant Shalamar January drive through a red light, and he conducted a traffic stop. 2RP<sup>1</sup> 15, 17. January informed the officer he did not have a driver's license, nor did he have any valid identification with him. 2RP 20. The officer then placed January under arrest for misdemeanor driving without a license. 2RP 20. In a search incident to the arrest, the officer found

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<sup>1</sup> The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—6/5/08; 2RP—7/7/08; 3RP 7/8/08; 4RP—7/25/08.

drug paraphernalia in January's pockets and cocaine under the passenger side floor mat of the car. 2RP 24-25; CP 3.

January was charged with unlawful possession of a controlled substance and driving without a valid operator's license. CP 1-2; RCW 69.50.4013(1); RCW 46.20.005. Two charges of bail jumping were added after January failed to appear for subsequent court proceedings. CP 10-11; RCW 9A.76.170.

The case proceeded to trial before The Honorable Kitty-Ann Van Doorninck. Against his attorney's advice, January filed pro se motions to suppress evidence and dismiss the charges. 2RP 4, 8-9. After a combined CrR 3.5 and CrR 3.6 hearing, the court denied January's motions. 2RP 34. In response, January asked for a continuance so that he could hire a private attorney and asked to take a lie detector test and to examine the physical evidence for fingerprints. 2RP 37-38. When the court denied these requests, January said he would plead guilty because he was being railroaded and nobody was helping him. 2RP 38-40.

The court recessed, but the parties were unable to come to an agreement about a plea, and the court proceeded with voir dire. 2RP 42. January asked to represent himself because he did not feel his attorney was doing enough for him, and he felt he should present his own defense. 2RP 47-49. The court disagreed, noting that defense counsel was planning to

present an unwitting possession defense at trial. 2RP 50-51. January again asked for a lie detector test or to test the evidence for fingerprints. 2RP 52.

When the case was called the next day, January indicated he wanted to plead guilty, and the court recessed so the parties could draw up an agreement. 3RP 56. The state agreed to drop the no valid operator's license charge, and January agreed to enter an *Alford* plea to the remaining counts. 3RP 57-59. The court then examined January as to the voluntariness of his plea. When the court asked January if he wanted to give up his rights by pleading guilty, January responded, "That's what I'm a have to do, yes, ma'am." 3RP 62. The following exchange took place:

Q Has anybody made any threats to you to get you to plead guilty?

A (No response.)

Q Has anybody threatened you to get you to plead guilty?

A Somebody in the courtroom? Somebody in the courtroom you talking about?

Q No. I'm just saying, has anybody made a threat to you to say, "I'm going to do something bad to you unless you plead guilty"?

A (Defendant nods affirmatively.)

Q Tell me about that.

A Can I write it down?

Q You need to tell me. This needs to be something that you're doing of your own free will. If you are being threatened by somebody, I need to know who's doing that.

A Guy who owned the car I was driving.

Q The guy who owned the car? When has he had contact with you?

A Said he gon' kill my family because he had drugs – more drugs and money in the trunk, and the car got towed. And then when – he was scared to go get it. He was scared to go get it because he had –

Q Okay. I've lost track here. Did he threaten you and say you have to plead guilty to this?

A He told me, I'm gon' kill your family. I got to get out the way.

Q He's threatened you about the situation with the car; I understand that.

A He wants money, wants drugs –

Q I'm talking about the plea of guilty. Did somebody threaten you?

A Told me I better not get out of jail.

[Defense Counsel]: Did he tell you if you didn't plead guilty he would kill you?

THE DEFENDANT: No, he didn't tell me that. He told me I better not come out of jail. I better have his money.

THE COURT:

Q Okay. We're talking about – I need to make a determination whether you're pleading guilty of your own free will.

A I didn't give him my car, Your Honor.

Q Okay. I'm talking about the plea of guilty. I understand there are circumstances with the gentleman with the car when this took place.

A Yes, ma'am.

Q And there are problems associated with that. That's a separate thing, and you can tell me about that a little bit later. Right now I'm talking about pleading guilty. Has somebody threatened you and said you have to plead guilty, as opposed to continue –

A No, ma'am. No, ma'am.

3RP 64-66. The court then accepted January's guilty pleas as knowing, intelligent, voluntary, and supported by a factual basis. 3RP 67. It imposed standard range sentences of 12 months plus one day on each count. CP 48. January filed this timely appeal. CP 60.

C. ARGUMENT

JANUARY MUST BE PERMITTED TO WITHDRAW HIS GUILTY PLEA BECAUSE IT WAS COERCED BY ILLEGITIMATE THREATS AGAINST HIS FAMILY.

Due process requires an affirmative showing that a guilty plea is voluntary, knowing, and intelligent. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The state bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at 287.

A defendant is entitled to withdraw a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). A manifest injustice exists if the plea was involuntary. Marshall, 144 Wn.2d at 281. And under RAP 2.5(a)(3), an involuntary plea may be challenged for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001).

A guilty plea that is the product of, or is induced by, coercive threat, fear, persuasion, promise, or deception is involuntary in violation of due process. Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601, cert. denied, 385 U.S. 905 (1966). Coercion may render a plea involuntary, regardless of the state's involvement. State v. Frederick, 100 Wn.2d 550, 556-557, 674 P.2d 136 (1983)<sup>2</sup> (evidence that former cell mate threatened to kill defendant unless he pleaded guilty was relevant to voluntariness of plea). As the Supreme Court explained in Frederick:

While prevention of governmental misconduct is certainly a weighty concern, it is merely one means of advancing the most basic goal of our criminal justice system, protection of the innocent by assuring them a fair trial. To hold one in prison who, through no real choice of his or her own, has been denied a fair trial, indeed denied any trial at all, strikes us as the ultimate in injustice.

Frederick, 100 Wn.2d at 556-57. Thus, a plea may be involuntary if coerced by illegitimate threats from outside forces. Frederick, 100 Wn.2d

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<sup>2</sup> overruled on other grounds by Thompson v. Department of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999).

at 557. A threat of harm to the defendant's family is such an illegitimate threat. Id., (citing United States v. Colson, 230 F. Supp. 953, 960 (S.D.N.Y. 1964)).

In this case, January told the court he was going to have to waive his constitutional rights and plead guilty, even though he believed he was innocent. 3RP 62-63. When the court asked January if anyone had threatened him to get him to plead guilty, January nodded his head affirmatively. 3RP 64. He told the court twice that the man whose car he was driving at the time of his arrest had threatened to kill his family and told him he better not get out of jail. 3RP 65.

Defense counsel and the court apparently assumed that this threat to January's family was not relevant to the voluntariness of his plea. Counsel asked if the man had threatened to kill January unless he pleaded guilty. 3RP 65. January said no, but the man had said January better not come out of jail. 3RP 65. The court told January that his problems with that man were separate from the plea and asked again if anyone had told him he had to plead guilty. At that point January said no. 3RP 66.

January's plea was clearly coerced by the threat that his family would be killed if he got out of jail. Even if the man making the threat did not specifically refer to a guilty plea, the only way January saw to prevent the threat from being carried out was to plead guilty. In fact, it was only

when the court told January that it considered his problems with the man who threatened him to be “a separate thing” that January indicated no one had threatened him and said he had to plead guilty. 3RP 66. Contrary to the court’s belief, the threat was not separate from January’s decision to plead guilty but responsible for it.

This Court must consider all relevant surrounding circumstances in determining whether January’s plea was voluntary. See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L. Ed. 2d 747 (1970). There were no apparent reasons, other than the threat, for January’s decision to plead guilty. In Frederick, the Supreme Court noted that when the defendant states in open court that his plea is voluntary, it may be difficult to convince a court that it was coerced, especially when there are other apparent reasons for the plea, such as a generous plea bargain or virtually incontestable evidence of guilt. Frederick, 100 Wn.2d at 558. Here, however, defense counsel was prepared to present an unwitting possession defense, and the terms of the plea offer were not particularly generous, in that the state dropped only the misdemeanor charge and made no promise regarding a sentencing recommendation. 2RP 50; 3RP 57-58.

Moreover, there were other indications in the record that the plea was a product of coercion. Up until that day, January had adamantly maintained his innocence, and even his plea did not admit guilt. 3RP 63.

January had fought to present motions to the court he felt were important and to represent himself when he felt counsel was not doing an adequate job. 2RP 4-6, 47, 47. He repeatedly asked to take a lie detector test and to test the physical evidence for fingerprints, apparently confident that such testing would prove his innocence. 1RP 9; 2RP 38, 52. Although he claimed once in frustration that he might as well plead guilty because he was being railroaded and receiving no help from counsel, no agreement was reached at that time. 2RP 39-40, 42.

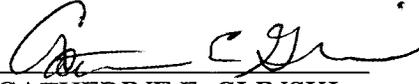
January's plea was involuntary, and thus a manifest injustice, because it was coerced by threats against his family. "The injustice lies not in the taint on our legal system, but in the more basic wrong of incarcerating one who because of illegitimate threats has been denied any opportunity to prove his or her innocence." Frederick, 100 Wn.2d at 556-57. January must be permitted to withdraw his plea.

D. CONCLUSION

January's guilty plea was not voluntary as required by due process because it was coerced by threats against his family. January must be permitted to withdraw his involuntary plea to correct a manifest injustice.

DATED this 20<sup>th</sup> day of February, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,  
properly stamped and addressed envelopes containing copies of the Brief of Appellant in  
*State v. Shalamar H. January*, Cause No. 38237-7-II, directed to:

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



Catherine E. Glinski  
Done in Port Orchard, WA  
February 20, 2009

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