

NO. 39856-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WAYNE WILSON,

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

BY  DEPUTY

STATE OF WASHINGTON

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DIVISION TWO

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A. ASSIGNMENT OF ERROR

The trial court erred in including facially invalid convictions in appellant's criminal history when calculating his offender score.

Issue pertaining to assignment of error

A guilty plea may be involuntary, rendering the ensuing conviction invalid on its face, where the defendant does not understand how his conduct satisfies the elements of the charged offense. Where the documents supporting appellant's prior convictions do not establish the factual bases for his guilty pleas, does inclusion of these facially invalid convictions in appellant's offender score require remand for resentencing?

B. STATEMENT OF THE CASE

On March 3, 2009, the Pierce County Prosecuting Attorney charged appellant Richard Wayne Wilson with nine counts of first degree unlawful possession of a firearm. CP 1-5. Wilson pleaded guilty to the charged offenses, with an agreement that the State would file no additional charges and would recommend a sentence at the low end of the standard range. CP 15. Wilson maintained his right to challenge his criminal history and the calculation of his offender score. CP 21-24.

At the sentencing hearing before the Honorable Ronald E. Culpepper, the State alleged the following prior convictions: destruction of property and riot from Lewis County in 1974 (Exhibits 1 and 2);

burglary from Benton County in 1977 (Exhibit 3 and 4); theft from Provo, Utah, in 1982 (Exhibits 5, 6, 7); statutory rape from Benton County in 1985 (Exhibits 8 and 9); possession of stolen property from Benton County in 1988 (Exhibits 10 and 11); grand theft from Pinellas County, Florida, in 1988 (Exhibits 12, 13, 14); receiving stolen property from Mobile, Alabama, in 1987 (Exhibits 15, 15A, 16, 17, 18); robbery from the United States District Court in Seattle in 1990 (Exhibits 19, 21, 22); and false claim of tax refund from the United States District Court in Portland, Oregon, in 1995 (Exhibits 20, 21, 22). RP 18-25.

The defense did not dispute that each of the prior alleged convictions pertained to Wilson or that the out-of-state convictions were comparable to Washington felonies. RP 19, 21, 22, 23, 48. Defense counsel argued, however, that nine of the convictions were facially invalid and should not be included in Wilson's criminal history, because the plea documents for those convictions did not contain a sufficient factual basis. RP 27.

Counsel pointed out that the documents relating to the Lewis County destruction of property charge did not include the amount of damage, a required element of that offense. The Court agreed and declined to include that conviction in Wilson's criminal history. RP 57. As for the riot charge, counsel pointed out that while Wilson stated in the

guilty plea statement that he “did riot,” there was no indication that he was acting with others, which is necessary to the definition of riot. Thus, the guilty plea statement was insufficient to support a constitutionally valid conviction. RP 34. The court ruled that the riot conviction was valid, however, because the term riot was defined in the information. RP 67.

Next, defense counsel argued that the Benton County burglary conviction was invalid because Wilson’s factual statement in the plea form did not include the element of intent to commit a crime. RP 37. The court disagreed, ruling that Wilson’s statement that he broke into a house and took a stereo raised the inference that he entered the building with intent to commit a crime therein. RP 69-70.

Counsel did not challenge the Benton County possession of stolen property conviction, but she argued that the statutory rape conviction was facially invalid. RP 42. Counsel pointed out that Wilson’s factual statement did not indicate that he was not married to the victim, an essential element of the offense. RP 42-43. The court ruled that, although the factual statement omitted that element, it indicated that the victim was 13 years old. Since it would be illegal for a 13 year old to be married, the court found the conviction valid. RP 72-73.

Next, defense counsel argued that the Florida grand theft conviction was facially invalid because there was no indication in the

record of the evidence on which it was based. RP 44. At first the court agreed. It noted that Wilson had pleaded “no contest,” indicating he would not contest the evidence against him. Because the record failed to set forth that evidence, the conviction was invalid. RP 74-75. When the State argued that just the judgment and sentence were enough to establish a valid conviction, however, the court reversed its ruling and said it could not find the conviction invalid without going beyond the face of the documents. The court thus included that offense in Wilson’s offender score. RP 83-85.

Finally, defense counsel challenged the Utah conviction, the Alabama conviction, and both federal convictions, on the basis that no plea documents were submitted. Without these documents, counsel argued there was no proof the pleas were knowing and voluntary. RP 39, 46, 48, 51. The court ruled, however, that the documents that were submitted established valid convictions. RP 70-71, 76-77, 78-79.

The court calculated Wilson’s offender score as 9 and imposed a low-end standard range sentence of 87 months. CP 53, 55. Wilson filed this timely appeal. CP 61.

C. ARGUMENT

BECAUSE THE DOCUMENTS SUPPORTING WILSON'S GUILTY PLEAS FAIL TO SET FORTH A FACTUAL BASIS FOR THE PLEAS, THE ENSUING CONVICTIONS ARE FACIALLY INVALID. INCLUSION OF THESE INVALID CONVICTIONS IN WILSON'S OFFENDER SCORE REQUIRES REMAND FOR RESENTENCING.

At the sentencing hearing, the State has the burden of proving the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500; State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). The State is not required to prove the constitutional validity of a prior conviction, but if the conviction is invalid on its face, it cannot be included in the offender score. Ammons, 105 Wn.2d at 187-88. The defense bears the burden of demonstrating that a conviction is facially invalid. In re Pers. Restraint of Williams, 111 Wn.2d 353, 368, 759 P.2d 436 (1988).

All the convictions challenged by the defense were based on guilty pleas, and defense counsel argued that the convictions were facially invalid because the plea documents established that the pleas were involuntary. RP 62. The State argued that the court need only consider the judgment and sentence when determining whether each conviction was valid on its face. RP 28, 42, 44, 52. It is well established, however, that when a conviction is based on a guilty plea, the phrase "on its face" includes all the documents signed as part of a plea agreement. In re

Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). A prior conviction based on a plea agreement is constitutionally invalid on its face when the judgment and sentence and the documents signed as part of the plea agreement reveal infirmities of a constitutional magnitude. Ammons, 105 Wn.2d at 188; State v. Thompson, 143 Wn. App. 861, 867, 181 P.3d 858 (2008).

The documents submitted with the challenged convictions in this case establish that the convictions are invalid. Due process requires an affirmative showing that a guilty plea is knowing, intelligent, and voluntary. 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). Unless the defendant is aware of the rights being waived, the essential elements of the offense, and the direct consequences of pleading guilty, the plea is constitutionally invalid. State v. Holsworth, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980).

A plea is neither intelligently nor voluntarily made unless the defendant is made aware of the “true nature of the charges against him.” Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). To constitute a voluntary and intelligent waiver of the constitutionally afforded trial rights, a guilty plea must establish that the defendant was aware of the nature of the constitutional protections being

waived and that the defendant “in fact understood the charge.” Henderson, 426 U.S. 645 n.13. A plea “cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Thus, the Washington Supreme Court has held that a guilty plea is invalid unless the defendant is informed of the elements of the charged offense and understands that his conduct satisfies those elements. Personal Restraint of Hews, 108 Wn.2d 579, 589, 741 P.2d 983 (1997).

Requiring a factual basis for a guilty plea fulfills the constitutional requirement that a guilty plea be made voluntarily. In re Keene, 95 Wn.2d 203, 206, 622 P.2d 360 (1980) (citing McCarthy, 394 U.S. 459; Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976)). The factual basis requirement protects the defendant who may understand the nature of the charge but may not realize that his conduct does not actually constitute the crime charged. See Keene, 95 Wn.2d at 206, 209, 213 (vacating plea to forgery as constitutionally invalid where conduct admitted by petitioner did not amount to forgery).

Here, the State failed to provide the plea statements for several convictions, and those it did provide demonstrate an insufficient factual basis to support the conviction. Wilson’s factual statement in the Lewis

County riot plea fails to indicate that he acted with another person. His statement that he “did riot” is a legal conclusion, which cannot support a factual basis. See State v. Zumwalt, 79 Wn. App. 124, 131, 901 P.2d 319 (1995), overruled on other grounds in State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006). The remaining convictions either contain factual statements which omit elements or no factual statements at all. Each of these convictions is facially invalid, as there is nothing in record from which the sentencing court in this case could conclude that Wilson “in fact understood the charge.” Henderson, 426 U.S. at 645 n.13.

Moreover, the court’s ruling that it could not find the convictions invalid without going behind the face of the convictions is incorrect. In Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), the Supreme Court held,

The invalidity of the petitioners' judgments and sentences is clearly shown by related documents, i.e., charging instruments, statements of guilty pleas, jury instructions, and the judgments and sentences themselves. Such documentation sufficiently establishes the facial invalidity of the judgments and sentences.

Hinton, 152 Wn.2d at 858. Thus, the judgments, plea documents and factual statements were sufficient to establish their facial invalidity, as argued by the defense.

This Court should conclude that the sentencing court erred in finding the challenged convictions valid and including them in Wilson’s

offender score. Wilson's sentence should be vacated and the case remanded for resentencing.

D. CONCLUSION

This Court should vacate Wilson's sentence and remand for resentencing based on his criminal history excluding the facially invalid convictions.

DATED this 15th day of March, 2010.

Respectfully submitted,



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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 Designation of Exhibits and Brief of Appellant in *State v. Richard Wayne Wilson*, Cause No. 39856-7-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
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