

No. 42356-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DATRION NEWTON,

Appellant.

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

The Honorable Brian Tollefson, Judge

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A. ASSIGNMENT OF ERROR

Appellant Datrion Newton should be allowed to withdraw his Alford¹ plea because it was not knowing, voluntary and intelligent.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

To be knowing, voluntary and intelligent, an Alford plea must be the product of a reasoned decision, based upon full and fair consideration of all of the risks and benefits of the available options.

Was Newton's Alford plea not knowing, voluntary and intelligent where he entered a plea to a crime which was nonexistent under a proper interpretation of the relevant law?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Datrion Newton was charged with first-degree murder with a firearm enhancement and a gang aggravator, first-degree assault with a firearm enhancement and a gang aggravator, and first-degree unlawful possession of a firearm. CP 3-5; RCW 9A.32.030(1)(b); RCW 9A.36.011(1)(a); RCW 9.41.010; RCW 9.41.049; RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.535(3)(aa). On June 15, 2011, pursuant to a plea agreement, an amended information was filed, charging only second-degree murder with a firearm enhancement. CP 11; RCW 9A.32.050(1)(b); RCW 9.41.010; RCW 9.94A.530; RCW 9.94A.533. That same day, Newton entered an Alford plea to the amended charges, before the Honorable Judge Brian Tollefson. CP 11, 14-22; RP 1-2. Judge Tollefson then sentenced

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Newton to 254 months plus 60 months “flat time” for the firearm enhancement, for a total of 314 months. CP 26-38; RP 16.

Newton appealed and this pleading follows. See CP 39-40.

2. Allegations regarding the crimes

Newton was alleged to have shot his friend, Donald McCaney, during a fight with rival gang members. CP 6-7. McCaney was being beaten up and someone fired shots, after which Newton drew a gun and fired, accidentally hitting McCaney. CP 6-7. Newton did not initially know that he had been the one who had shot his friend and, instead of running like others, Newton stayed with his friend until police arrived. CP 7.

Newton was 17 years old at the time. CP 7.

3. Amendment of the charges and entry of the plea

Newton was originally charged with first-degree murder with a firearm enhancement and a “gang motivation” aggravator, first-degree assault, also with the same enhancement and aggravator, and first-degree unlawful possession of a firearm, with the same aggravator. CP 3-5. The amended information charged him with a single count of second-degree felony murder, with assault in the second-degree as a predicate and with a firearm enhancement. CP 11.

The prosecutor filed a statement explaining why he was filing the amended information in the “interests of justice,” as follows:

The victim, Donald McCaney, was Defendant’s close friend. The victim was in a fist fight and Defendant intervened with deadly force, firing a pistol at two young men (gang rivals) who were fighting with McCaney. A bullet inadvertently struck McCaney, killing him. The victim’s mother, who is well acquainted with

Defendant and has been visiting him at the jail, has told [the] Detective. . . that she has forgiven Defendant and does not want to see him incarcerated for the equivalent of a life term.

CP 12-13. In his Statement of Defendant on Plea of Guilty, Newton said he did not believe he had committed the crime but was taking advantage of a plea offer to reduce the charges and for “the favorable sentence recommendation,” understanding there was a “substantial likelihood” he would be convicted of the crime at any trial. CP 21.

At the hearing on the amended information and plea, counsel told the court he had gone over “each and every paragraph” of the plea form with his client and that he believed his client was making a knowing, intelligent waiver of the important constitutional rights “that he’s giving up by entering this[.]” RP 2-4. Mr. Newton said his counsel had read him the form and that he did not have questions about what was on the form. RP 5. The court went through a colloquy and then found that Newton had made a knowing, intelligent and voluntary plea. RP 9.

The prosecutor argued for a “high end” sentence because the prosecutor thought Newton had already gotten “more than sufficient leniency” in the plea deal and because of Newton’s “significant record.” RP 11.

Counsel told the court that all of Newton’s prior crimes were property crimes and that Newton suffers from a disability for which he receives Social Security. RP 12. He said it was a tragic case because Newton had seen people beating up his friend and panicked, shooting without intent to kill anyone - “least of all his best friend.” RP 13. He said Newton and others in the gang were having a meeting when a rival gang

came up and began beating up the victim, after which the incident happened with Newton accidentally shooting his best friend. RP 13.

Newton told the court he never thought in his life he would kill anyone, get locked up, and face “this much time out of . . . life,” and that he “never for a minute meant for this to happen.” RP 15-16. The court ordered a high end sentence of 254 months in custody as a base sentence, plus 60 months “flat time;” for 314 months, total. RP 16.

D. ARGUMENT

THE ALFORD PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT BECAUSE SECOND-DEGREE FELONY MURDER CANNOT BE BASED ON AN ASSAULT PREDICATE UNDER A PROPER INTERPRETATION OF THE PLAIN LANGUAGE OF THE RELEVANT STATUTE

Under the state and federal due process clauses, a plea is only valid if it is knowing, voluntary and intelligent. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Where a plea does not meet those standards, this Court must reverse and remand to the trial court with instructions to allow withdrawal of the plea. See State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Put another way, allowing withdrawal is required in order to correct a “manifest injustice.” Id.

In this case, this Court should reverse and remand with instructions to allow Newton to withdraw his plea, because it was not knowing, voluntary and intelligent.

As a threshold matter, it is significant that Newton entered an Alford plea, not only because it means he never admitted guilt but also because of the standards this Court therefore applies. See, In re Montoya,

109 Wn.2d 270, 280, 744 P.2d 340 (1987). Because Alford pleas are considered “inherently equivocal,” courts are required to use special caution in ensuring that there is a “strong factual basis” for entry of such a plea. See Montoya, 109 Wn.2d at 280-81.

Further, this Court applies a different standard to determining whether the defendant’s plea is knowing, voluntary and intelligent when evaluating an Alford plea as opposed to the standard used in straight guilty plea cases. An Alford plea is valid only if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993), quoting, Alford, 400 U.S. at 31; see also, State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1970). Thus, issues like whether the defendant was fully informed of significant facts take on extra weight, because of the nature of the plea.

In other words, an Alford plea is entered after the defendant has engaged in a cost/benefit analysis, based upon all of the available information, of which option is best for him, i.e., to go to trial or accept a plea bargain the prosecutor has offered. State v. D.T.M., 78 Wn. App. 216, 219, 896 P.3d 108 (1995); see also Montoya, 109 Wn.2d at 280.

It is therefore especially crucial that the defendant have sufficient understanding of such things as “the likelihood of conviction” if he rejects the plea offer and instead exercises his constitutional right to go to trial, because the “risk-benefit analysis” he undertakes requires such consideration. See D.T.M., 78 Wn. App. at 219.

In this case, Newton was not given such full understanding and this

Court should reverse and remand with instructions to allow Newton to withdraw his plea as not knowing, voluntary and intelligent. Newton entered an Alford plea to second-degree felony murder with a predicate felony of second-degree assault. CP 11, 14-22. But in doing so, he entered a plea to a crime under a statute that did not criminalize his acts as felony murder, because a fair reading of the relevant statute indicates that the predicate assault and the act causing death must be **separate**.

The second-degree felony murder statute provides, in relevant part:

- (1) A person is guilty of murder in the second degree when:
 - ...
 - (b) He or she commits or attempts to commit a felony, including assault. . . and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050. The plain language of this statute is ambiguous about whether a predicate felony which is an assault must be separate from the act causing the death. On the one hand, the statute uses the broad term “assault.” On the other, however, the death must occur in “furtherance” of the assault or in “immediate flight therefrom,” which leads to the conclusion that the statute should apply only where the predicate assault is *separate* from the act causing death, because, as the Supreme Court has noted, “it is nonsensical” for the statute to refer to the death as being “in furtherance of” an assault if the act causing death and the assault were the very same act. See In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

Under the rule of lenity, where a statute is subject to multiple, reasonable interpretations, the Court is required to adopt the interpretation most favorable to the defendant. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). In addition, when this Court construes a statute, it is required to try to do so in order to effect the statute's purpose, but must nevertheless avoid "strained, unlikely, or absurd consequences resulting from a literal reading." State v. Leech, 114 Wn.2d 700, 708-709, 790 P.2d 160 (1990), quotations omitted.

It is further presumed that the Legislature does not intend "absurd" results, so courts will not construe a statute in order to permit such a result. Andress, 147 Wn.2d at 610.

Thus, in Andress, the Supreme Court examined the language of the felony murder statute requiring that the death had to be "in the courts of and in furtherance of" the predicate felony or in "immediate flight therefrom" and concluded that it must not include assault as the predicate felony. 147 Wn.2d at 610. First, the Court noted that, in Leech, it had previously interpreted the language "in furtherance of" in the context of the felony murder statute and had held that it meant the death had to be "sufficiently close in time and place" to the underlying felony so as "to be part of the *res gestae* of that felony." 147 Wn.2d at 610. The Andress Court then noted that, as a matter of logic, it was "nonsensical to speak of a criminal act - - an assault, that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same." Id.

In response to Andress, the Legislature amended the second-degree

felony murder statute to provide as it does now, that the crime occurs when someone “commits or attempts to commit any felony. . .including assault[.]” RCW 9A.32.050(1)(b). But the Legislature did not remove the “in furtherance of” language which the Supreme Court had found rendered the use of an assault as a predicate felony improper if the assault and the death were caused by the same act. See Laws of 2003, ch. 3, § 1.

Thus, while the amendments now indicate quite clearly that the Legislature *does* intend for assault to be a potential predicate felony for second-degree felony murder, by keeping the same “in furtherance of” language in the statute that perplexed the Andress Court and rendered the idea of assault as a predicate “nonsensical,” the Legislature appears to have placed a limitation of sorts on the assaults which will apply. Logic has not changed since Andress and the language which caused the confusion was retained by the Legislature in amending the statute.

Put simply, if the amended statute is applied to *all* assaults - including those in which the assault is the act which results in the death - despite the “in furtherance of” language, the amended statute is no less nonsensical than the original. But it cannot be assumed that retaining the language was akin to scrivener’s error; instead, it is assumed the Legislature is aware of judicial interpretations of its enactments - here, the holding of Andress that it was nonsensical to conceive of a predicate of assault given the other language of the statute. See, State v. Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007). It is thus not at all clear that the Legislature’s intent was to include *all* assaults. See, e.g., State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000).

Assuming the Legislature does not intend absurd, nonsensical results, as this Court must do, there is an alternative interpretation which not only saves the statute but does so consistent with the rule of lenity and the Legislature's choice to keep the "in furtherance of" clause in the statute even after Andress. See Leech, 114 Wn.2d at 708-709; Roberts, 117 Wn.2d at 586. The statute must be interpreted to provide that those assaults which are *separate from* the act causing death may be predicate felonies for second-degree felony murder, but not to include assaults which are the very conduct which caused the death.

With this interpretation, the "in furtherance of" language is not rendered superfluous. The statute does not get interpreted to require a result the highest court in our state has declared "nonsensical." And the rule of lenity is honored, as well as the rule that criminal statutes are to be "narrowly construed," with the court resolving all doubts against including conduct which may or may not be included. See In re Carson, 84 Wn.2d 969, 973, 530 P.2d 331 (1975). In contrast, interpreting the statute broadly to hold that even those assaults which are the conduct which result in death can serve as predicate for felony murder runs contrary to the plain language of the statute, renders the "in furtherance of" language superfluous, results in absurdity, does not follow the rule of lenity and fails to properly, narrowly construe the statute.

Under the proper interpretation of the second-degree felony murder statute, therefore, only those assaults which are conduct separate from that causing the death can serve as predicate felonies, because it is only those for which the "in furtherance of" requirement can be met. As a result,

Newton entered a plea to a nonexistent crime. The assault in this case was the shooting, the very same conduct which resulted in the death. Because the death did not occur “in furtherance of” or “close in time and proximity to” the assault but rather was the same conduct as the assault, the charge of felony murder could not be based upon the act.

In response, the prosecution may attempt to rely on Division One’s decision in State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), reversed in part and on other grounds, 172 Wn.2d 671, 223 P.3d 519 (2011). Any such reliance would be misplaced, because that case was wrongly decided and did not properly address all the issues.

First, the Court in Gordon declared, without explanation, that the amended felony-murder statute was “not ambiguous.” 153 Wn. App. at 524-27. Second, Gordon ignored the very language of the statute in reaching that conclusion, because the statute *still includes the “in furtherance of” language* which the Andress Court said rendered the idea of inclusion of assault as a predicate felony “nonsensical.” See Gordon, 153 Wn. App. at 524-27; Andress, 147 Wn.2d at 610.

Third, Gordon ignored that the Legislature specifically chose to include the language requiring the act causing death to be committed “in the course and in furtherance of a felony,” which meant death had to be “sufficiently close in time and proximity to the predicate felony.” Laws of 2003, ch. 3, § 1; Gordon, 153 Wn. App. at 524-27. Fourth, the Gordon Court failed to apply the rule of lenity. 153 Wn. App. at 524-27.

And finally, the Gordon Court ignored the declaration of the Supreme Court in a completely different case which specifically declared

that the “felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act.” In re Bowman, 162 Wn.2d 325, 331, 172 P.3d 681 (2007) (emphasis added). The holding of Gordon allowing felony murder to be charged when the underlying felony (assault) is the same act which results in death ignores this concept and the plain language of the statute, which still requires that the act causing death be “in the course and in furtherance” of the assault. The decision in Gordon does not withstand scrutiny and should not be followed by this Court. Instead, this Court should give effect to all of the words of the felony murder statute and give the statute the only interpretation that makes sense by limiting its application to cases in which the assault and the death are caused by separate acts. And because, under that interpretation, Newton entered a plea under a statute which did not criminalize his behavior, he should be allowed to withdraw his plea in order to correct a manifest injustice. See In re Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand with instructions to allow Newton to withdraw his Alford plea, because it was not knowing, voluntary and intelligent.

DATED this _____ day of _____, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Datrion Newton, DOC 350307, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this _____ day of _____, 2012.

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