

NO. 46539-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NAITAALII TOLEAFOA,

Appellant.

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

The Honorable Jack Nevin, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
TOLEAFOA SHOULD BE PERMITTED TO AMEND HIS STATEMENT ON PLEA OF GUILTY.	5
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Marriage of Littlefield</u> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	5
<u>In re Pers. Restraint of Cross</u> 178 Wn.2d 519, 309 P.3d 1186 (2013).....	7
<u>State v. Hendrickson</u> 165 Wn.2d 474, 198 P.3d 1029 (2009).....	8
<u>State v. Hubbard</u> 106 Wn. App. 149, 22 P.3d 296 (2001).....	5, 6, 7
<u>State v. Newton</u> 87 Wn.2d 363, 552 P.2d 682 (1976).....	2, 4, 6, 8
<u>State v. Osborne</u> 35 Wn. App. 751, 669 P.2d 905 (1983) <u>aff'd</u> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	6
<u>State v. Rosenbaum</u> 56 Wn. App. 407, 784 P.2d 166 (1989).....	5, 6
<u>State v. Ryan</u> 146 Wash. 114, 261 P. 775 (1927)	8
 <u>FEDERAL CASES</u>	
<u>North Carolina v. Alford</u> 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).....	2, 4, 7, 8
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 4.2.....	6

A. ASSIGNMENT OF ERROR

The court erred in denying appellant's motion to change the factual basis for his guilty plea.

Issue Pertaining to Assignment of Error

Did the court err in denying appellant's motion to amend his statement on plea of guilty?

B. STATEMENT OF THE CASE

Appellant Naitaalii Toleafoa pled guilty to being present and ready to assist when Juan Ortiz murdered Juan Zuniga. 2RP¹ 19. The plea statement reads, "I was present at the Zuniga residence when Ortiz shot and killed Zuniga." 2RP 19; CP 18.

According to the certification for probable cause, Toleafoa was an eyewitness and accomplice to a well-planned execution of a gang leader by rivals. CP 4. The court at sentencing described the murder as "as sophisticated as these things go." 3RP 25. The prosecutor described the crime as "a straight up execution of a gang leader." 3RP at 11. The court recognized Toleafoa was likely not a leader, but "a frontline soldier" in this organization. 3RP at 25. He was 15 years old at the time. 3RP 14.

¹ There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 27, June 11, 2014; 2RP – June 16, 17, 2014; 3RP – June 27, 2014; 4RP – July 11, 2014.

Afterwards, he escaped to Mexico for two years, but was arrested there and extradited. 3RP 21-22. The statement written for him, by his attorney, in order to take advantage of the plea offer essentially accuses Juan Ortiz of having been the shooter. CP 18; 2RP 19. Juan Ortiz is still at large. 3RP at 17.

At the plea hearing, Toleafoa was asked “whether you wrote this or whether you adopt this as being what happened.” 2RP 19. The court read the statement from the plea documents and asked, “Is that a correct statement, sir?” 2RP 19. Toleafoa replied, “It was written by my attorney.” 2RP 19. The court asked again, “Is it correct?” 2RP 19. Toleafoa answered, “It is correct.” 2RP 19. The Court asked again, “Is that what happened?” 2RP 19. Toleafoa answered, “I mean, I don’t – me, pleading guilty to it, is the reason why he told me that pleading guilty to it that that was the statement needed to proceed with the plea bargain.” 2RP 19. The court stated, “Okay,” and Toleafoa continued, “But, I mean, yeah, I agree with it. But it is a statement we both agreed upon to take the plea bargain.” 2RP 20.

The court next inquired if the prosecutor was satisfied. 2RP 20. The prosecutor answered, “Well, the statement has to be a statement in his own words of what makes him guilty, not something just to satisfy the State. If this was an Alford plea or a Newton plea, that would be different. So he needs to say that’s what happened.” 2RP 20. Toleafoa interjected, “It’s

correct.” 2RP 20. The court repeated, “He said it is a correct statement. And in fact, is this what happened on that day?” 2RP 20. Toleafoa answered, “It’s correct.” 2RP 20.

Approximately one week after the plea was entered, Toleafoa filed a pro se motion to withdraw his guilty plea on the grounds that counsel had ineffectively failed to investigate his case and had intimidated him into accepting the plea by threatening him with a life sentence. CP 22-26.

When the date for sentencing came around, defense counsel moved to continue because he was investigating, along with the Department of Assigned Counsel, whether new counsel needed to be appointed. 3RP 2-4. As a result, he was unprepared to go forward with sentencing. 3RP 7-8. The State opposed the continuance, pointing out that Toleafoa accepted the plea after trial began and after requesting that the offer be kept open one more day so he could consult with his family overnight. 3RP 6. The court reluctantly agreed to set over sentencing for two weeks. 3RP 9.

At sentencing, counsel filed a motion to amend the Statement of Defendant on Plea of Guilty, Nunc Pro Tunc. CP 37-39. Counsel explained he had consulted with Toleafoa, who did not actually want to withdraw his plea. He merely wanted to delete the factual statement and permit the court to find a factual basis for the plea based on the probable cause certification. 4RP 3-4. Toleafoa’s declaration stated, “Despite the claims that I made in

the motion to withdraw my guilty plea, as to pressure from my attorney or lack of meeting time with him prior to trial, the only matter which is of concern for me is the statement written out in paragraph 11, as to what I did, in my own words, that make me guilty of Murder in the First Degree.” CP 38. He stated that he told his attorney, “my only concern with my guilty plea was the statement which I had adopted as my own in paragraph 11 of the Plea.” CP 38. He explained, “I clarified and emphasized to Mr. Quillian that I had no issue whatsoever with his services as my attorney and had not felt pressured by him at all to change my plea.” CP 38-39.

The court found the probable cause certification did indeed establish a factual basis for the plea. 4RP 5. However, the prosecutor objected to the proposed amendment, arguing it had bargained for Toleafoa’s actual acceptance of responsibility, not an Alford or Newton plea. 4RP 5-6. The State also argued there was simply no legal mechanism for replacing the already filed plea statement with the amended version. 4RP 6.

The court concluded it could not amend the factual statement without withdrawing the plea entirely, and there was no basis to do so. 4RP 8. The court reasoned that to permit the amendment nunc pro tunc would be “setting myself up for appellate issues, I would be unnecessarily creating appellate issues.” 4RP 9. The court then moved on to sentencing. 4RP 9.

C. ARGUMENT

TOLEAFOA SHOULD BE PERMITTED TO AMEND HIS STATEMENT ON PLEA OF GUILTY.

The interests of justice require permitting Toleafoa to delete his personal statement and check the box allowing the court to rely on the probable cause certification. The court abused its discretion in denying his motion to amend the statement of defendant on plea of guilty nunc pro tunc.

Generally, whether to permit a change of plea after arraignment is a matter of trial court discretion. State v. Hubbard, 106 Wn. App. 149, 153, 22 P.3d 296 (2001). The issue in this case does not actually involve withdrawal of the plea, but simply a nunc pro tunc substitution of a different, but equally valid, factual basis for the plea. The court's power to enter nunc pro tunc orders is similarly discretionary. State v. Rosenbaum, 56 Wn. App. 407, 410, 784 P.2d 166 (1989). An abuse of discretion occurs when the court's decision is based on untenable grounds. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The court's reasons in this case were untenable.

The superior court concluded it could not substitute a different factual basis for the plea without permitting Toleafoa to withdraw his plea entirely. 4RP 8. Since the court saw no basis to withdraw the plea, it denied his motion to modify the factual basis. Id. This was manifestly

unreasonable because Toleafoa specifically informed the court he was *not* seeking to withdraw his guilty plea. CP 39; 4RP 4-5. He simply wanted to delete his statement and allow the court to find a factual basis from the probable cause certification. Id.

Nothing prevented the court from permitting the substitution. The court has discretion to enter a nunc pro tunc order when the interests of justice require. Rosenbaum, 56 Wn. App. at 410-11. Criminal Rule 4.2, governing pleas, does not mandate any specific procedure for establishing the factual basis for the plea. State v. Newton, 87 Wn.2d 363, 369, 552 P.2d 682 (1976) (discussing CrR 4.2). “The factual basis may be established from any reliable source.” Id. The rule does not prohibit granting Toleafoa’s motion to substitute a new, but equally valid, factual basis.

A plea relying on the probable cause determination, rather than Toleafoa’s statement would be no less valid. The factual basis for a guilty plea may be established by sources other than the defendant’s own admissions. See, e.g., State v. Osborne, 35 Wn. App. 751, 669 P.2d 905 (1983), aff’d, 102 Wn.2d 87, 684 P.2d 683 (1984). A defendant’s failure to admit guilt does not prevent him or her from taking advantage of a beneficial offer by the State. Hubbard, 106 Wn. App. at 155-56. A guilty plea that occurs because the defendant believes there is a great danger he will be convicted and wishes to take advantage of a plea offer, under Newton, 87

Wn.2d 363, and North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970) is a guilty plea like any other: “There is no reason to treat [an] Alford plea any differently than a straight guilty plea.” Hubbard, 106 Wn. App. at 157. “An *Alford* plea is a type of guilty plea.” In re Pers. Restraint of Cross, 178 Wn.2d 519, 527, 309 P.3d 1186 (2013).

As for the facts of this case, the court had already determined the probable cause certification established a valid factual basis for Toleafoa’s plea. 4RP 5. Therefore, there was no concern the plea would be left without the required factual basis.

The Court was also concerned that permitting the substitution would somehow create an appellate issue. 4RP 9. This reason is untenable because it ignores what should be the court’s primary concerns: the factual basis and the voluntariness of the plea. Hubbard, 106 Wn. App. at 155-56. It is also unreasonable because permitting the substitution would make the plea less vulnerable to attack on appeal. Allowing Toleafoa to convert to an Alford plea would make his plea more voluntary because it would be more in line with his express wishes and his needs. This would make him less likely to even try to attack his plea on appeal and would make any such attack less likely to succeed.

Indeed, the colloquy that occurred at the plea indicated that Toleafoa was reluctant to make a statement about what had happened, but agreed to

accede to what his lawyer had written only in order to take advantage of the State's plea offer. 2RP 19-20. Toleafoa's actual statements at during the plea colloquy indicate he believed he was entering into an Alford-type plea, wherein the description of what happened was not written by him, but by his attorney. 2RP 19-20.

The court's reasoning was untenable because, in fact, there was a legal mechanism to correct the factual basis for the plea. Toleafoa reasonably proposed an amended statement nunc pro tunc. CP 37. A nunc pro tunc order is used to "make the record speak the truth." State v. Hendrickson, 165 Wn.2d 474, 478, 198 P.3d 1029 (2009) (quoting State v. Ryan, 146 Wash. 114, 117, 261 P. 775 (1927)). It is not used to remedy an omission or resolve substantive issues differently. Id. Here, the proposed nunc pro tunc amendment to Toleafoa's plea statement was proper because it would make the record more accurately reflect Toleafoa's actual intent with his plea. It would not alter the plea, would not add any action that was not already taken, and would not resolve any substantive issue differently. It would simply "make the record speak the truth."

"An intelligent and voluntary counselled plea should not be refused simply because the defendant who is willing to enter a plea of guilty is unable or unwilling to testify to his guilt in factual terms. Newton, 87 Wn.2d at 371. "The entry of such a plea of guilty in such a situation is not contrary

to the interests of justice.” Id. Permitting the amendment in this case would serve the interests of justice. It would not violate the rules governing pleas, would not diminish the factual basis for the plea, and would not diminish the voluntariness of the plea. Under these circumstances, it was manifestly unreasonable not to permit Toleafoa to delete his personal statement and rely on the probable cause certification instead.

D. CONCLUSION

For the foregoing reasons, Toleafoa requests this Court reverse the lower court’s ruling and permit him to amend his statement on plea of guilty.

DATED this 13th day of January, 2015.

Respectfully submitted,

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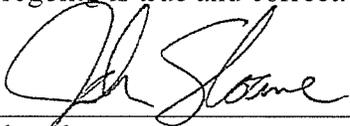
On January 13, 2015, I e-served and or mailed the Brief of Appellant directed to:

Kathleen Proctor
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Via Email per agreement PCpatcecf@co.pierce.wa.us

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Re: Naitaalii Toleafoa
Cause No. 46539-6-II, in the Court of Appeals, Division II,

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



John Sloane
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