

No. 49641-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JONATHAN DANIEL HARRIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-02431-2
The Honorable Susan Serko, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The trial court failed to determine whether Jonathan Harris was aware of the relationship between his conduct and the greater charge of premeditated first degree murder or aware of the evidence available to the State to convince a jury of his guilt when it accepted Harris' guilty plea to two fictitious lesser charges.
2. The trial court failed to determine whether Jonathan Harris understood the nature and consequences of the plea bargain and whether he believed that the plea was in his best interest.
3. The trial court exceeded its sentencing authority when it included Jonathan Harris' two current assault convictions in his offender score calculation.
4. The trial court's inclusion of Jonathan Harris' two current assault convictions in his offender score calculation violates the sentencing statute and double jeopardy clauses of the Federal and State constitutions.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court adequately determine whether Jonathan Harris was aware of the relationship between his conduct

and the greater charge of premeditated first degree murder or that he was aware of the available evidence that could convince a jury of his guilt when it accepted Harris' guilty plea to two fictitious lesser charges, where there was no discussion either in plea documents or at the plea hearing regarding the elements of or facts available to prove premeditated first degree murder, where there was no admission by Harris that he believed a jury would convict him of premeditated first degree murder, and where the plea documents only refer to a factual basis for the "original charge" of second degree murder. (Assignment of Error 1)

2. Is this record sufficient to assure the court that Jonathan Harris understood the nature and consequences of the plea bargain, where the guilty plea statement only includes nonspecific declarations that he is pleading guilty to take advantage of the State's offer and to avoid conviction on a greater charge, but where the risk of conviction on the greater charge is minimal compared to the burden of waiving valuable constitutional rights and adding two fictitious offenses to his permanent criminal history? (Assignment of Error 2)

3. Did the trial court exceed its sentencing authority and violate the double jeopardy clauses of the Federal and State constitutions by including Jonathan Harris' two current assault convictions in his offender score calculation and entering judgment on those two convictions, where the assault charges were created by the State simply to multiply punishment for the same criminal act that established the current second degree murder conviction? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

The State filed an Information charging Jonathan Daniel Harris with one count of second degree murder (RCW 9A.32.050(1)(b)). (CP 1-2) The probable cause declaration alleged the following:

On June 6, 2015, Nicole White was seen leaving a bar in Spanaway with Jonathan Harris, the defendant. When White did not return home June 7, 2015, she was reported missing. White's vehicle was found abandoned near the defendant's residence.

...

Detectives contacted the bar and obtained video footage of Harris and White together. Harris was wearing a dark hooded sweatshirt. A sweatshirt was recovered at the defendant's residence that appeared to be the same as depicted in the video. Detectives located blood on the sweatshirt, and the blood was analyzed and determined to be White's

blood. Detectives processed the defendant's residence and located several areas of blood[.]

...

While searching the defendant's residence detectives contacted his neighbor. The neighbor reported that a woman matching White's description arrived at her residence on June 6, 2015, at approximately 10 pm and asked for the defendant. The same neighbor told detectives that she heard a female screaming at the defendant's residence at 4 am on June 7, 2015. The screaming stopped abruptly.

. . . On June 20, 2015, detectives located a body around the area that the defendant's phone was registering.

The body was located at the bottom of an embankment and was wrapped in a canvass and the canvass was wrapped in a green tarp. The body was badly decomposed, but there was a visible tattoo on one of the legs. . . . White's family confirmed that the tattoo that was visible was White's. White had a skull fracture, an orbital fracture, a fractured sternum, and several broken ribs.

(CP 3-4)

The State filed an Amended Information charging one count of premeditated murder in the first degree (RCW 9A.32.030). (CP 5) In support of the amended charge, the State filed a declaration detailing the findings of the medical examiner indicating multiple injuries to White's skull and an injury to her sternum that the medical examiner said was "consistent with stomping." (CP 6-7)

As a result of negotiations between the State and the defense, Harris agreed to plead to a Second Amended Information

charging one count of second degree murder (RCW 9A.32.050(1)(a)), one count of second degree assault (RCW 9A.36.021) and one count of third degree assault (RCW 9A.36.031(1)(f)). (CP 8-9) Harris acknowledged that the facts alleged in the probable cause declarations formed a factual basis to support a second degree murder conviction. (CP 13, 29; 1RP 20)¹

Harris also agreed to plead guilty to the two counts of assault even though there was no factual basis for those charges “in order to take advantage of the plea agreement reached with the State” and “to avoid the risk of conviction on the greater charges [he] would face at trial.” (CP 13-14, 29; 1RP 8, 20)

At the plea hearing, Harris’ attorney explained that he had gone over the plea agreement “in detail” and that Harris understands the elements of the three crimes he was pleading to. (1RP 6-8) The trial court also inquired into his understanding of the three crimes and his understanding of the consequences of the plea. (1RP 14-21) The trial court found that there was a factual basis for the “original charge” and the second degree murder charge, and accepted Harris’ plea. (1RP 20-22)

¹ The transcripts labeled volumes 1 through 6 will be referred to by their volume number (1RP). The other transcript is not referred to in this brief.

Harris subsequently filed a motion to proceed pro se and to withdraw his guilty plea. (CP 43-63, 64, 90-91) Harris was granted pro se status but his motion to withdraw his plea was denied. (2RP 3-10; 3RP 41-43) New counsel was later appointed to represent Harris at sentencing, and his new attorney filed a motion disputing the validity of the assault convictions and disputing Harris' offender score calculation. (4RP 3, 8; CP 183-84, 185-254) The trial court rejected Harris' arguments and proceeded to sentencing. (6RP 16)

With the two additional assault charges now included in his offender score calculation, Harris faced sentencing with an offender score of seven and a standard range of 216-316 months for the second degree murder conviction. (CP 31-32) The trial court sentenced Harris to concurrent sentences totaling 316 months, and imposed restitution and mandatory legal financial obligations. (6RP 43; CP 460-62) This appeal follows. (CP 470)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT FAILED TO ENSURE THAT HARRIS' PLEA TO TWO FICTITIOUS COUNTS OF ASSAULT WAS MADE WITH THE REQUIRED UNDERSTANDING OF THE NATURE AND ELEMENTS OF THE GREATER CHARGE HE WAS AVOIDING BY PLEADING GUILTY AND OF THE NATURE AND CONSEQUENCES OF THE PLEA AGREEMENT.

Washington's court rules set forth the requirements for the

acceptance of a guilty plea:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d). A guilty plea is invalid if it is made without “an understanding of the nature of the charge.” CrR 4.2(d). And a guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). “At a minimum, ‘the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.’” State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting Keene, 95 Wn.2d at 207).

Due process also requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). “Real notice of the nature of the charge is ‘the first and most universally recognized

requirement of due process.” Osborne, 102 Wn.2d at 92-93 (quoting Henderson, 426 U.S. at 645). The defendant must understand that his alleged criminal conduct satisfies the elements of the offense. State v. R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006). “Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State’s case and thus make a knowing and intelligent guilty plea.” R.L.D., 132 Wn. App. at 705-06.

A defendant can choose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense. See In re PRP of Barr, 102 Wn.2d 265, 270, 684 P.2d 712 (1984). In Barr, the Court held:

The choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused. What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest. For the trial court to make the proper evaluation, the plea bargain must be fully disclosed. The trial court must find a factual basis to support the original charge, and determine that defendant understands the relationship of his conduct to that charge. Defendant must be aware that the evidence available to the State on the original offense is sufficient to convince a jury of his guilt.

102 Wn.2d at 269-70 (citations omitted) (emphasis added). The record in the present case falls far short of what is required by Barr.

The original Information filed in this case charged Harris with second degree murder. (CP 1-2) The State subsequently amended the Information to charge premeditated first degree murder. (CP 5) So Harris faced a premeditated first degree murder charge at the time that the plea was being negotiated.

However, there is nothing in the record to show that Harris understood the nature of the crime of premeditated murder, or the facts the State would have to prove for a jury to find him guilty. "Premeditation" means "the deliberate formation of and reflection upon the intent to take a human life." State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982). Premeditation "involves the mental process of thinking over beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short, after which the intent to kill is formed." State v. Bingham, 40 Wn. App. 553, 555, 699 P.2d 262 (1985) (citing State v. Brooks, 97 Wn.2d 873, 651 P.2d 217 (1982)). However, it must involve more than a moment in point of time. RCW 9A.32.020(1). Furthermore, "the State is required to prove both intent and premeditation, which are not synonymous." State v. Sargent, 40 Wn. App. 340, 352, 698 P.2d 598 (1985). There is nothing in the plea documents to show that Harris understood these requirements.

Furthermore, it is not even clear from the record that Harris understood that premeditated first degree murder was the greater original charge he was attempting to avoid. In the pleading signed by Harris titled Addendum to the Plea Form for In Re Barr, it states that Harris agrees that:

[T]here is a factual basis to support the charge of *Murder in the Second Degree as charged in the original Information* filed in this case. The evidence available to the State in this case is sufficient to prove my guilt beyond a reasonable doubt for *Murder in the Second Degree as charged in the original Information*. . . . My attorney has discussed with me all of the elements of the *original charge* and the elements of the amended charges, and I understand them all. There is a factual basis for the *original charge*.

(CP 29-30, emphasis added) This Addendum repeatedly refers to the “original” charge of second degree murder.

At the plea hearing, Harris’ attorney states that they have discussed the three charges he is pleading to, but he never mentions whether they have discussed the elements of premeditated first degree murder, the charge Harris would face if he did not plead. (1RP 6-8) Later, when the court questions Harris, the court states that it has read “the original declaration that supports the original charges,” and that it finds a factual basis for the plea and for “more serious charges.” (6RP 20-21) It is not

clear whether the court is referring to the original charge of second degree murder, or whether the court is actually referring to the current greater charge of premeditated first degree murder. Again, there is no mention of premeditated first degree murder, its elements, or the proof required for a conviction. (6RP 20-21)

Nowhere in the colloquy regarding the plea is there any discussion of Harris' understanding of the evidence needed to prove premeditated first degree murder or any discussion regarding whether Harris believes he would probably be convicted of that crime if he went to trial. The charge of premeditated first degree murder is simply not addressed, as required by Barr.

Lastly, there is no evidence that Harris had any understanding of the benefit, if any, of pleading to the fictitious assault charges. In the written Plea Agreement, Harris states that he is pleading guilty to the fictitious assault charges "to take advantage of the plea agreement reached with the State." (CP 14) In the Addendum, Harris simply states that pleading to the fictitious charges "will allow me to avoid the risk of conviction on the greater charges I would face at trial." (CP 29) However, there is no discussion of what that risk is, and no discussion of how adding two additional fictitious convictions to his criminal history is a benefit

that outweighs the risk. There is no discussion anywhere in the record showing that Harris understood the true nature and consequences of the plea bargain or that he believes the plea is the course of action that is in his best interest.

This discussion is especially important in a case like this, where the plea agreement does not provide a readily apparent benefit. If Harris was convicted of premeditated first degree murder as charged in the Amended Information, he would have an offender score of four and a standard range of 281-374 months. See RCW 9A.32.030(2), 9.94A.510, 9.94A.515. But under the plea agreement, Harris has an offender score of seven, giving his second degree murder conviction a standard range of 216-316 months. (CP 31-33) Thus, by pleading guilty, Harris avoided at most 58 months of potential incarceration. But in return he waived valuable and important constitutional rights, and is now saddled with two additional offenses that will forever increase his offender score. He does not even receive the benefit of avoiding a strike offense, as both second degree murder and second degree assault count as strikes. RCW 9.94A.030(33)(38). Without some explanation, it is impossible to say that Harris understood these consequences, weighed the potential risk and reward, and still

believed that a plea to two fictitious assault charges was in his best interest.

There is simply nothing in the record to show that Harris “understands the relationship of his conduct to” the premeditated first degree murder charge or that he is “aware that the evidence available to the State on the original offense is sufficient to convince a jury of his guilt.” Barr, 102 Wn.2d at 269-70. And there is nothing in the record to show that Harris’ decision to enter this agreement was “based on an informed review of all the alternatives before” him and that he “has determined the course of action that he believes is in his best interest.” Barr, 102 Wn.2d at 269-70. The plea agreement does not meet the requirements of due process and of Barr, and Harris must be allowed to withdraw his plea.

B. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY AND VIOLATED HARRIS’ DOUBLE JEOPARDY RIGHTS WHEN IT INCLUDED HARRIS’ TWO CURRENT ASSAULT CONVICTIONS IN HIS OFFENDER SCORE CALCULATION AND IMPOSED SENTENCES ON THOSE TWO CONVICTIONS.²

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A

² Harris challenged the use of these assault convictions at sentencing, arguing that the plea did comport with Barr that their use violated both sentencing statutes and constitutional provisions. (CP 188-94; 6RP 6-13) Nevertheless, “a defendant cannot waive a challenge to a miscalculated offender score ... waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence[.]” In re PRP of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (emphasis in original).

RCW, requires the sentencing court to calculate a defendant's offender score based on his or her prior offenses and criminal history. RCW 9.94A.525; State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The court may rely on the defendant's stipulation or acknowledgement of prior convictions to calculate the offender score. RCW 9.94A.441; RCW 9.94A.530(2); In re PRP of Cadwallader, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005).

But the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; Ross, 152 Wn.2d at 229. A sentence based on an incorrect offender score calculation is a sentence in excess of that authorized by statute. In re PRP of Goodwin, 146 Wn.2d 861, 872, 50 P.3d 618 (2002).

"[A] defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute." Goodwin, 146 Wn.2d at 872. Our State Supreme Court has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence. See Goodwin, 146 Wn.2d at 869-70; In re PRP of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980) ("a plea bargaining agreement cannot exceed the statutory authority given

to the courts”); In re PRP of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991) (“the actual sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the Legislature has allowed for”).

In this case, Harris agreed to plead guilty to one count of second degree murder, one count of second degree assault, and one count of third degree assault. Harris agreed that his offender score for the second degree murder conviction would be seven points, three of which resulted from the inclusion of his current assault convictions. (CP 12-18, 31-33) But the trial court should not have held Harris to this agreement because the inclusion of the two assault convictions in his offender score violated the SRA and both the State and Federal constitutions, and is therefore not authorized.

The double jeopardy clauses of the Federal and Washington constitutions protect defendants from multiple punishments for the same offense.³ State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155

³ The Fifth Amendment to the United States Constitution provides “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” Article I, section 9 of the Washington Constitution mirrors the federal constitution stating “[n]o person shall be ... twice put in jeopardy for the same offense.” Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. See In re PRP of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003). RCW 10.43.050 also affords defendants protections against double jeopardy.

(1995). “[I]t is unjust and oppressive to multiply punishments for a single offense[.]” State v. Johnson, 92 Wn.2d 671, 678, 600 P.2d 1249 (1979); see also Calle, 125 Wn.2d at 776 (courts may not exceed legislative authority by imposing multiple punishments for the same offense).

It is well settled that an assault that ends in murder is punished only once, as murder. State v. Read, 100 Wn. App. 776, 791-92, 998 P.2d 897 (2000). That is because the assault and murder statutes are directed at the same evil--assaultive conduct. The essential difference between them “is the grievousness of the harm caused by the conduct. When the harm is the same for both offenses, as in this case, it is inconceivable the Legislature intended the conduct to be a violation of both offenses.” Read, 100 Wn. App. at 792.

It is the trial court’s duty and responsibility to assure the integrity of the SRA’s scoring process. The court cannot allow the State to inflate an offender score with additional fictitious crimes simply for the purpose of multiplying punishment for a single act. Neither the court nor the prosecutor should be allowed to manipulate or contrive an offender score that does not comport with the SRA or with constitutional standards. See State v. Gronnert, 122 Wn. App.

214, 93 P.3d 200 (2004).

The offender score used at sentencing in this case clearly violates double jeopardy protections because it punishes Harris multiple times for the same criminal act. In such circumstances, this Court should find that the purpose of the SRA, together with constitutional and judicial doctrines regarding double jeopardy, requires the trial court to merge all three counts into one for purposes of determining Harris' appropriate offender score and standard range.

V. CONCLUSION

The record is void of any discussion or acknowledgement of the elements of the greater premeditated first degree murder charge, or of the evidence necessary to establish that charge, or that Harris understood the relationship of his conduct to that charge. The record is also void of any evidence that Harris understood the nature and consequences of the plea bargain, which would enable him to determine the course of action that he believed was in his best interest. The plea agreement, and the trial court's acceptance of the agreement, do not comport with the requirements of Barr, and Harris must therefore be allowed to withdraw his plea.

Alternatively, the trial court's inclusion of the assault convictions in Harris' offender score violates the SRA and the State and Federal constitutions. They are simply contrived lesser offenses that were based on the same criminal act that provided the factual basis for Harris' second degree murder conviction, and were charged for the sole purpose of multiplying his punishment for that crime. Harris' sentence should be vacated and his case remanded for resentencing using his actual offender score of four.

DATED: February 28, 2017



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Jonathan D. Harris

CERTIFICATE OF MAILING

I certify that on 02/28/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jonathan D. Harris, DOC# 335452, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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