

FILED
Court of Appeals
Division II
State of Washington
3/29/2019 4:30 PM
No. 52941-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

COLEMAN JOSEPH NEESER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-02502-3
The Honorable Timothy Ashcraft, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it accepted Coleman Neeser's guilty plea without adequately determining whether he understood the nature of the charge to which he was pleading.
2. The trial court erred when it denied Coleman Neeser's motion to withdraw his guilty plea despite evidence that he did not understand the nature of the charge to which he was pleading.
3. Coleman Neeser's Judgment and Sentence contains cost provisions that are no longer authorized after enactment of House Bill 1783.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Should Coleman Neeser be allowed to withdraw his plea to second degree assault with a firearm where he clearly did not understand that he could commit the crime even if the victim was not touched or injured, and where there was no explanation or discussion in the Information, the plea documents, or on the record at the plea hearing regarding the facts and elements the State would have to prove to convict Neeser of that crime? (Assignments of Error 1 & 2)

2. Should Coleman Neeser's case be remanded to the trial court to amend the Judgement and Sentence to strike cost provisions that are no longer authorized after enactment of House Bill 1783? (Assignment of Error 3)

III. STATEMENT OF THE CASE

On June 20, 2016, the State charged Coleman Joseph Neeser by Information with one count of second degree assault while armed with a firearm (RCW 9A.3.021, RCW 9.94A.530). (CP 3-4) According to the probable cause statement, Neeser went onto the property of a neighbor, Ralph Carroll, and pointed a shotgun at him. (CP 1)

After several mental health evaluations, multiple commitments to Western State Hospital for treatment, and an order directing the administration of psychotropic drugs, Neeser was declared mentally competent to stand trial on May 10, 2017. (CP 5-10, 11-20, 21-23, 25-26, 27-37, 38-46, 47-5, 53-59, 60-62, 63-75, 76-80, 81-82, 83-84, 85-94; 149-50, 151-53)

On June 21, 2017, Neeser agreed to plead guilty as charged to one count of second degree assault with a firearm sentence enhancement. (CP 2-3, 95-104; 06/21/17 RP 2-3) As part of the plea bargain, the State agreed to recommend the following terms:

Set sentencing over – if defendant complies with treatment in the community, maintains [law abiding behavior], and has no contact with the victim/victim's property, State will agree to allow defendant to withdraw plea and plead guilty to an amended information to Assault 2 (no [firearm] enhancement), credit for time served. If defendant fails to comply, State will recommend anything within standard range.

(CP 98)

The plea statement does not list the elements of second degree assault but refers to the original Information as containing the elements. (CP 95) Neeser also states that he does not acknowledge that he committed the acts, but that he is pleading guilty to take advantage of the State's offer. (CP 103) Neeser agreed that the court could review the police reports and probable cause declaration to establish a factual basis for the crime. (CP 103)

At the plea hearing, the trial court engaged in the standard colloquy with Neeser. (06/21/17 RP 3-10) The court asked Neeser if he was aware of the elements of second degree assault, and Neeser answered "yes." (06/21/17 RP 5)

The trial court accepted the plea and entered an order with the requested conditions of release. (06/21/17 RP 9-10; CP 108-09) But Neeser did not comply with the conditions of his release.

(CP 154-64; 11/09/18 RP 6, 19-21)

When Neeser returned for sentencing, he moved to withdraw his guilty plea on the grounds that his attorney misled him and did not properly inform him of the elements of the crime or the consequence of his plea, that his speedy sentencing rights were violated, and that there was no factual basis for a finding of guilt.

(CP 121-24; 09/12/18 RP 11-13; 09/28/18 RP 3-4; 10/12/18 RP 3-4, 7-8; 11/09/18 RP 3, 5-6, 7, 8-10)

The trial court denied the motion, and sentenced Neeser to a standard range sentence of three months plus a 36-month firearm enhancement. (11/09/18 RP 18-19; 25, 26-28; CP 32) The court stated that all non-mandatory fees and legal financial obligations (LFOs) should be waived. (11/09/18 RP 25) Neeser filed a timely Notice of Appeal. (CP 141)

IV. ARGUMENT & AUTHORITIES

A. NEESER SHOULD BE ALLOWED TO WITHDRAW HIS PLEA BECAUSE HE DID NOT UNDERSTAND THE NATURE OF THE CHARGE TO WHICH HE WAS PLEADING.

Neeser's guilty plea was invalid, and he should have been allowed to withdraw his plea, because he did not understand the nature of the crime of second degree assault.

Washington's Criminal Rule 4.2(d) sets forth the

requirements for the acceptance of a guilty plea. It states, in relevant part:

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.

CrR 4.2(d). Thus, 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).

Under the criminal rules, “[t]he court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). The denial of a motion to withdraw a guilty plea is generally reviewed for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91,

106, 225 P.3d 956 (2010) (citing *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

But 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); *In re PRP of Barr*, 102 Wn.2d 265, 270, 684 P.2d 712 (1984). “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.

The appellate court reviews whether a defendant's guilty plea was intelligent and voluntary de novo because it is a constitutional issue. *State v. Harris*, ___ Wn. App. ___, 422 P.3d 482, 486 (2018) (citing *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004)).

In this case, the record does not establish that Neeser understood the nature of the crime of second degree assault or the acts the State would have to prove for a jury to find him guilty.

The Information accused Neeser of committing the crime of second degree assault pursuant to RCW 9A.36.021. (CP 3) The Information then lists out the seven different means by which a person can commit that crime.¹ The Information does not specify which means Neeser used. Though never stated, presumably the State was relying on the means listed in RCW 9A.36.021(1)(c), which makes it a crime to “[a]ssault[] another with a deadly weapon.”

Three definitions of criminal assault have been recognized in

¹ RCW 9A.36.021 states that:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

Each of these seven subsections represents an alternative means of committing the crime of second degree assault. See *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988); see also WPIC 35.50. Neither the Information nor the plea statement define or explain the definitions of assault, or what the State would have to prove to establish that an “assault” with a deadly weapon occurred.

At the plea hearing, the conversation about the elements and nature of the charge is limited to the following exchange:

THE COURT: According to the Original Information and the Statement of Defendant on Plea of Guilty, you are charged with one count of Assault 2 with a firearms enhancement. Is this your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Are you aware of the elements of that charge that the State would have to prove beyond a reasonable doubt at trial?

THE DEFENDANT: Yes, sir.

(06/21/17 RP 5) The trial court did not inquire into whether Neeser understood what an “assault” is, or whether he understood what acts the State would have to prove to convict Neeser at trial of assaulting Carroll.

During the hearing on Neeser's motion to withdraw his plea, it became quite clear that Neeser did not understand the nature of the assault charge he was pleading guilty to. Neeser repeatedly states that he does not understand how he can be guilty of second degree assault when he never physically touched Carroll. (11/09/18 RP 10, 14) Neeser told the court the he was once convicted of fourth degree assault for spitting on someone, so he cannot be guilty of a higher degree assault when he did not touch Carroll. (11/09/18 RP 10, 14)

It is clear that Neeser did not understand that, to be guilty of second degree assault with a deadly weapon, he did not have to actually touch or injure Carroll with the deadly weapon. Neeser's simple "yes" response at the plea hearing acknowledging that he understands the elements does not overcome this evidence, and does not show that Neeser truly understood the nature of the allegations and the elements the State would be required to prove at trial. See *State v. S.M.*, 100 Wn. App. 401, 415, 996 P.2d 1111 (2000) (the defendant's "simple 'yes' response to the court's oral question about the meaning of sexual intercourse" is not adequate).

Accordingly, "the record does not affirmatively show" that Neeser "understood the law in relation to the facts or entered the

plea intelligently and voluntarily.” *S.M.*, 100 Wn. App. at 415. The court violated Neeser's right to due process when it accepted the plea and, consequently, it erred when it denied his motion to withdraw his plea. *S.M.*, 100 Wn. App. at 415. Neeser must be permitted to withdraw his plea. *In re PRP of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

B. NEESER’S JUDGMENT AND SENTENCE CONTAINS COST PROVISIONS THAT ARE NO LONGER AUTHORIZED AFTER ENACTMENT OF HOUSE BILL 1783.

Neeser was sentenced on November 9, 2018. The trial court found that Neeser should only pay mandatory LFOs. (11/09/18 RP 25) The trial court imposed a \$500.00 crime victim assessment fee, a \$100.00 DNA database fee, and a \$200.00 criminal filing fee. (CP 29) The Judgment and Sentence also includes a boilerplate provision stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]” (CP 30) The trial court found that Neeser did not have the financial resources to pay for his appeal and signed an Order of Indigency. (CP 145-46)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. The Bill

amended several statutes related to the imposition of discretionary costs on indigent defendants and interest on such costs. Laws of 2018, ch. 269; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). House Bill 1783's amendments were effective as of June 7, 2018.

The trial court imposed a \$200.00 criminal filing fee. (CP 29) But after HB 1783, RCW 36.18.020(2)(h) now provides: "Upon conviction or plea of guilty, . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)." See also Laws of 2018, ch. 269, § 17(2)(h). Neeser was found indigent at sentencing. (11/09/18 RP 25; CP 145-46)

The Judgment and Sentence states that interest on all costs and fines shall begin accruing immediately. (CP 30) But House Bill 1783 eliminated interest accrual on all non-restitution portions of LFOs. The portion of the amendments pertaining to interest accrual amended RCW 10.82.090. That statute now provides, in relevant part, that "[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). Jenkins was sentenced after June 7, 2018, but the trial court failed

to strike the improper interest accrual language. (CP 30)

The criminal filing fee and non-restitution interest accrual provision are no longer authorized under the amended LFO statutes, and must be stricken.

V. CONCLUSION

This Court should remand Neeser's case to the Superior Court so that he can withdraw his plea. Alternatively, Neeser's case should be remanded to the trial court to strike the criminal filing fee and interest accrual provision from the Judgement and Sentence.

DATED: March 29, 2019



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CERTIFICATE OF MAILING

I certify that on 03/29/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Coleman J. Neeser, DOC# 412230, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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March 29, 2019 - 4:30 PM

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