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Court of Appeals
Division II
State of Washington
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JACKLYNN CUBA WILSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 18-1-04345-1
The Honorable Stephanie Arend, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated due process when it accepted Jacklynn Wilson's guilty plea without insuring that she understood the nature and consequences of the plea bargain.
2. The trial court violated due process when it accepted Jacklynn Wilson's guilty plea without determining whether her decision to plead guilty to a crime she did not commit was rationally based on the alternatives before her.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where Jacklynn Wilson pleaded guilty to a fictitious greater charge rather than a true lesser charge, but the trial court did not inquire into whether she understood that the fictitious charge was more serious or into whether her decision was based on an informed review of all her alternatives, was Wilson's plea rendered involuntary and in violation of due process? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The State filed an original Information charging Jacklynn Cuba Wilson with one count of first degree theft (count 1) and 32 counts of forgery (counts 2 thru 33). (CP 4-15) According to the

affidavit of probable cause, Wilson was employed as a bookkeeper at a business called Mattress Makers from August 31, 2015 thru April 27, 2017. (CP 1) As a result of an investigation triggered by a tax audit of the Mattress Makers business, it was discovered that Wilson had written and cashed 33 checks from the Mattress Makers' account without permission. (CP 1-2) The amount of the checks, written to Wilson and her daughter, totaled \$53,995.61. (CP 1-2)

Wilson subsequently agreed to plead guilty to an Amended Information charging one count of first degree theft (count 1), one count of first degree identity theft (count 2), and 10 counts of forgery (counts 4, 8, 11, 13, 14, 15, 17, 28, 29, and 30). (CP 17-21, 28)

Wilson's factual admission in her written plea agreement appears as follows:

The judge has asked me to state what I did in my own words that makes me guilty of this crime.
This is my statement
Between April 29, 2016 and March 8, 2017, in Pierce County Washington, I did unlawfully obtain the property of another with a value which exceeded \$5,000 and did intend to deprive the true owner thereof. ~~Between April 29, 2016 and March 8, 2017 in Pierce County Washington I did unlawfully possess or use the identification or financial information of another with the intent to commit a crime and did obtain or attempt to obtain goods or services with a value which exceeded \$1,500 in value.~~ On the following dates, in Pierce County Washington I did unlawfully alter a written instrument and did put off as true such written instrument: August 4, 2016, August 12, 2016, August 23, 2016, September 13, 2016, October 12, 2016, October 24, 2016, October 28, 2016, January 24, 2017, February 16, 2017, and February 17, 2017.

As to count 2, please incorporate the attached statement.

(CP 36) Wilson's statement pertaining to count 2 reads:

As to Count II, I make the following statement:

In addition to my factual admissions in the plea form, I recognize that I am entering a plea of guilty to a crime that I in fact did not commit. My attorney has discussed with me all of the elements of the original charges and the elements of the amended charges, and I understand them all. There is a factual basis for the original charge. I understand that the prosecution would be unable to prove the amended charges at trial, but I see pleading guilty to the amended charge as beneficial to me because it will allow me to avoid the risk of conviction on the charges I would face at trial. Based upon a review of the alternatives before me, I have decided to plead guilty to a crime I did not commit in order to take advantage of the state's offer. I understand the consequences of this plea agreement and I am making a voluntary and informed choice to enter into it.

I understand that the court must find a factual basis for the original charges and I agree that the court may consider the declaration for determination of probable cause and any other information presented by the prosecutor at the time of this plea to support the factual basis for the original charge.

In re Barr, 102 Wn.2d 265 (1984)

(CP 26)

At the plea hearing, the court engaged with Wilson in the usual colloquy about her understanding of her rights, the charges, and the consequences of the plea. (CP 4-18) In regards to Wilson's plea to identity theft charged in count 2, the following limited exchange took place:

THE COURT: [S]o I'm sure [counsel] explained to you, did she not, that *In Re Barr* stands for the proposition that if there's a substantial likelihood you're going to be convicted as originally charged, you can plead guilty to something else, even if everybody in the courtroom agrees that's not what you really did, right, in order to facilitate resolving a criminal

...

So the original charge was forgery, Count 2, and you agree there was a substantial likelihood that you would have been found guilty of that charge had that charge gone to trial?

THE DEFENDANT: Oh, yes.

THE COURT: And the Court has reviewed the Declaration for Determination of Probable Cause and finds that there is a substantial likelihood that she would be found guilty under Count 2, forgery, and therefore under *In Re Barr* can accept a plea to an amended charge. And you understand that whether you admit you committed identity theft in the first degree or not, when you plead guilty to it, it's the same thing; it becomes a conviction on your record, you get sentenced just as if you admitted that that's what you committed? Do you understand that?

THE DEFENDANT: Yeah. I've been fighting this for three months. I got it.

(06/04/19 RP 16-18) The court found that Wilson's plea was knowing, voluntary and intelligent and accepted the guilty plea.

(06/04/19 RP 18)

Wilson stipulated to her criminal history, and that her offender score for each count was over 9 points. (CP 38-42) She also stipulated that her standard range sentence was 43 to 57 months for theft, was 63 to 84 months for identity theft, and was 22 to 29 months for forgery. (CP 41-42)

The trial court rejected Wilson's request for a special drug offender sentence. (06/04/19 RP 25-26) The court adopted the State's recommendation and imposed the maximum term for each offense, to run concurrent with each other and with other cause numbers from Pierce and King Counties. (06/04/19 RP 30; CP 31, 50) Wilson filed a timely notice of appeal. (CP 58)

IV. ARGUMENT & AUTHORITIES

Wilson's plea was not intelligent and voluntary because the trial court did not insure, and the record does not establish, that Wilson's decision to plead guilty to one count of identity theft instead of an additional count of forgery was made after an informed review of all the alternatives before her.¹

Due process 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). The defendant must have notice and an understanding of the nature of the charge, and must understand that her alleged criminal conduct satisfies the elements of the offense. *Henderson*, 426 U.S. at 645; *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.

¹ 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 (2018) (citing *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004)).

In *In re PRP of Barr*, the Washington Supreme Court held that “[a] plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense.” 102 Wn.2d 265, 296-70, 684 P.2d 712 (1984). Thus, while a person may enter a plea to an amended charge that lacks a factual basis in order to take advantage of a favorable plea offer, due process is satisfied only “if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge[.]” *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006).

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.

Barr, 102 Wn.2d at 70 (citations omitted). The record in the present case falls short of what is required by *Barr*.

It is important to note Wilson did not plead guilty to a lesser charge in order to avoid certain conviction on a greater charge. The identity theft charge replaced the forgery charge of count 2. (CP 4, 17, 28, 36; RP 16-18) Forgery is a class C felony. RCW 9A.60.020(3). Wilson's standard range sentence for a forgery conviction was 22 to 29 months. (CP 29, 31, 47) First degree identity theft is a class B felony. RCW 9.35.020(2). Wilson's standard range sentence for the identity theft conviction was 63 to 84 months. (CP 29, 31, 47) So identity theft is actually the greater offense, and carries with it a greater punishment than the original forgery charge.

And the trial court sentenced Wilson to the maximum 84 months of confinement for the identity theft conviction. (CP 50) But the maximum sentence Wilson could have received if count 2 remained a forgery charge was 57 months (based on the theft conviction charged in count 1). (CP 29, 31, 47) So pleading to the fictitious identity theft charge exposed Wilson to 27 additional months of confinement.

Finally, in addition to replacing count 2's forgery charge with the identity theft charge, the Amended Information deleted several other forgery charges. But this reduction in the number of charges

did not result in a reduction of Wilson's offender score. Wilson's offender score was 9-plus points with or without the additional forgery counts. (CP 29, 31, 47)

It is impossible to determine from this record what benefit Wilson obtained by agreeing to plead guilty to a crime she did not commit. And the trial court made no effort to inquire into whether Wilson understood that she was pleading to a nonexistent greater crime, and whether she understood any risks or benefits to doing so.

There is nothing in the record to show that Wilson's decision to enter this plea agreement was "based on an informed review of all the alternatives before" her and that she "has determined the course of action that [s]he believes is in h[er] best interest." *Barr*, 102 Wn.2d at 269-70. The plea agreement does not meet the requirements of due process and of *Barr*, and cannot be deemed truly voluntarily and intelligently made.²

Superior Court Criminal Rule (CrR) 4.2(f) allows a defendant

² Even though Wilson's plea agreement contains a waiver of her right to appeal (CP 29), that waiver is invalid because her entire plea is invalid. *Harris*, 422 P.3d 482, 487 (2018) ("If a plea agreement is not intelligent and [is] involuntary, then any waiver contained in the plea is similarly flawed.") (citing *State v. Smith*, 134 Wn.2d 849, 853, 953 P.2d 810 (1998); *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 594, 316 P.3d 1007 (2014)).

to withdraw his or her plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001); *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Manifest injustice includes instances where the plea was not voluntary. See *Zhao*, 157 Wn.2d at 197. Wilson’s involuntary plea resulted in a manifest injustice, and she must be allowed to withdraw her plea.

V. CONCLUSION

Without any explanation, it is impossible to say that Wilson understood the consequences of her plea, weighed the potential risk and reward, and still believed that a plea to a fictitious identity theft charge was in her best interest. Wilson’s convictions must be reversed, and this Court should remand so that Wilson may be permitted to withdraw her guilty plea.

DATED: November 20, 2019



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Jacklynn C. Wilson

CERTIFICATE OF MAILING

I certify that on 11/20/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jacklynn C. Wilson, DOC# 910462, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, WA 98332-8300.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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Transmittal Information

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