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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 288153 -III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

City of Spokane, Respondent,

v.

Joe Taylor, Jr., Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
I. Rebuttal Argument.....	1
A. The purpose of the factual basis requirement of CrRLJ 4.2(d) is to ensure the defendant entered into the plea knowingly and intelligently.	1
B. A plea does not become invalid when a defendant pleads to a lesser degree crime to avoid being convicted of a greater degree crime..	3
V. Conclusion	6

TABLE OF AUTHORITIES

Table of Cases

United States Supreme Court Case

United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085,
60 L.Ed.2d 634 (1979)..... 1, 2, 5

Washington State Cases

In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984)..... 1, 2, 3, 4, 5

State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008) 2, 5

In re Hews, 99 Wn.2d 579, 741 P.2d 983 (1987)..... 1

In re Keene, 95 Wn.2d 203, 206, 622 P.2d 360 (1980) 1

State v. Mendoza, 157 Wn2d 582, 141 P.3d 49 (2006)..... 2, 5

State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976) 5

State v. Padilla, 84 Wn.App. 523, 928 P.2d 1141 (1997) 3, 4

State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974)..... 1, 2, 5

Washington Court Rules

CrR 4.2(d) 1

CrR 4.2(f) 2

CrRLJ 4.2(d)..... 1, 2, 3

CrRLJ 4.2(f)..... 1,2

Statutes

RCW 10.04.0175 1

RCW 10.43.050 3

I. REBUTTAL ARGUMENT

- A. The purpose of the factual basis requirement of CrRLJ 4.2(d) is to ensure the defendant entered into the plea knowingly and intelligently.

The factual basis requirement of CrRLJ 4.2(d)¹ is to ensure the defendant's plea is voluntary and intelligent. In re Barr, 102 Wn.2d 265, 269, fn 2, 684 P.2d 712 (1984); see, In re Keene, 95 Wn.2d 203, 206, 622 P.2d 360 (1980). It is not intended to serve as a basis for appeal when the City fails to amend a charge *before* a defendant pleads guilty to the crime for which he is being arraigned.

"[A] factual basis is not an independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea." In re Hews, 99 Wn.2d 579, 591, 741 P.2d 983 (1987); see also, In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984); United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979).

In State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974), the defendant sought to withdraw his guilty plea before sentencing. The trial court allowed the withdrawal based on RCW 10.40.175 which allowed a trial court to permit a withdrawal of a guilty plea anytime before judgment. The Supreme Court of Washington granted the State's

¹ CrRLJ 4.2: PLEAS AND PRETRIAL DISPOSITION

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. When the complaint or the citation and notice charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity; Claiming Incompetency. Written notice of an intent to rely on the insanity defense must be filed at or within 10 days of the time of arraignment, or at such later time as the court may for good cause permit. A claim of present incompetency to stand trial shall be raised at arraignment or as soon as possible thereafter. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77 or any applicable ordinance.

(d) Voluntariness. **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.** (emphasis added)

(e) Agreements. If a plea of guilty is based upon an agreement between the defendant and the prosecuting authority, such agreement must be made a part of the record at the time the plea is entered. No agreement shall be made which specifies what action the court shall take on or pursuant to the plea, or which attempts to control the exercise of the courts discretion, and the court shall so advise the defendant.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw his or her plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

petition for a writ of certiorari to review the trial court's order authorizing the defendant to withdraw his guilty plea in light of the new Superior Court Criminal Rule (CrR) 4.2(f). CrR 4.2(f) limited the trial court's authority to allow withdrawal of guilty pleas to cases where it appeared withdrawal was necessary to correct a manifest injustice.

The Court examined the reason behind the Washington Judicial Council's Task Force on Criminal Rules' adoption of CrR 4.2(f). It found the task force specifically rejected a dual standard which would grant liberal discretion to a trial judge if the motion to change a plea was made prior to sentencing and a more stringent test if the motion was made thereafter. Instead, the task force adopted CrR 4.2(f) creating a standard that applied equally whether the defendant moved to withdraw his plea of guilty before or after sentencing. The safeguards set up in CrR 4.2 were adopted to ensure the rights of the defendant are carefully protected during a guilty plea; thus lessening the likelihood of a withdrawal.

[CrR] 4.2(d), (e), and (g) are carefully designed to insure that the defendant's rights have been fully protected before a plea of guilty may be accepted... Greater safeguards have been thrown around a defendant at the critical time of accepting his plea of guilty. Every effort has been made to ascertain that the plea of guilty is made voluntarily, with understanding and with reasonable knowledge of the important consequences. That being the case, trial courts should exercise greater caution in setting aside a guilty plea once the required safeguards have been employed.

Taylor, 83 Wn.2d at 566, 521 P.2d 699.

The factual basis requirement set forth in CrRLJ 4.2(d) is to protect the defendant's constitutional due process right to enter into a plea knowingly, intelligently and voluntarily. Taylor, 83 Wn.2d at 521 P.2d 699; see also, United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984); State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008); citing, State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). There is no

doubt but that Mr. Taylor entered into this plea knowingly, intelligently, and voluntarily, thus satisfying the purpose of CrRLJ 4.2(d). Mr. Taylor was represented by counsel, and makes no claim that his plea was defective. The City now attempts to use a rule created to protect the rights of defendants as a way of correcting its own mistake.

Moreover, there are sufficient facts in the record to support this charge. As argued in the Brief of Appellant, the crime is driving while license suspended. There is ample evidence the defendant's license was suspended, that he knew his license was suspended, and that he drove in the City of Spokane. Since the CrRLJ 4.2(d) factual basis requirement is significant where it relates to the defendant's understanding of the plea, and since there is no disputing that Mr. Taylor entered this plea knowingly, intelligently, and voluntarily, the City's argument fails.

B. A plea does not become invalid when a defendant pleads to a lesser degree crime to avoid being convicted of a greater degree crime.

Mr. Taylor pled guilty to DWLS 3rd to avoid being convicted of DWLS 1st. In State v. Padilla, 84 Wn.App. 523, 928 P.2d 1141 (1997), based on a single incident, the State charged Mr. Padilla with two offenses in the alternative: first degree assault, and second degree assault with a deadly weapon enhancement. Over the State's objection, Mr. Padilla pleaded guilty to Count 2. The trial court accepted Mr. Padilla's plea and found prosecution on Count 1 was barred pursuant to RCW 10.43.050 because it is the same crime in a different degree.

In State v. Barr (supra), the defendant was initially charged with one count of second-degree statutory rape and one count of third-degree statutory rape. He ultimately plead guilty to one count of indecent liberties. During the plea hearing, there was an erroneous assumption made that the indecent liberties statute required the

victim to be 14 or less, when in actuality, the statute read less than 14. The minor with whom Mr. Barr engaged in sexual contact was 14 at the time of the contact. Mr. Barr later challenged his plea alleging the trial court failed to find a factual basis for the plea and that the plea was not knowing and voluntary because he was not informed of a critical element of the charge. “*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.*” Barr, 102 Wn.2d at 269-70, 684 P.2d 712 (emphasis added). “What must be must be shown is that the accused understand the nature and consequences of the plea bargain and has determined the course of action that he believes in his best interest.” Id. 270.

These cases are analogous to the instant case. In Padilla, the defendant took advantage of an opportunity to plead to a lesser degree charge even though the prosecutor had only charged Count 2 (second-degree assault with a deadly weapon enhancement) to give notice of its intent to seek a deadly weapon enhancement if the jury found him guilty of the lesser offense. The State objected to Mr. Padilla’s plea on the lesser charge. Over the State’s objection, the court, with a full understanding of the circumstances, accepted the defendant’s plea.

Here, Mr. Taylor took advantage of an opportunity to plea to a lesser degree crime. This opportunity arose solely based on the City’s own failure to make a timely amendment. The City now attempts to use a rule, promulgated to ensure that the rights of the defendant are protected, to invalidate this plea. The trial court did not abuse its discretion in accepting the plea as the rights of the defendant were not compromised,

and the City implicitly waived whatever right it had to amend, by failing to do so in the timeframe required.

Similarly in Barr, the defendant took advantage of an opportunity to plea to a lesser offense. The defendant later challenged his plea after discovering an element to the indecent liberties was that the child be *under* 14. He argued the plea wasn't knowing and voluntary, and that no factual basis existed. The Court held "[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." Barr, 102 Wn.2d at 269-70, 684 P.2d 712. In the present case, there were no errors later discovered, nor is there any evidence that the plea wasn't knowing and voluntary. The City merely alleges that a factual basis cannot be established, therefore the plea is invalid. The Court in Barr did not invalidate based on a mutual error², and this court should not invalidate the plea in this case where the error rests solely on the City.

A factual basis is not constitutionally required for a valid plea. The only requirement is that the plea is knowing, intelligent, and voluntary. State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974), United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984), State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008); citing, State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). A trial court is not required by CrR 4.2(d) to make a specific finding in the record that it was "satisfied" a factual basis existed. State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976).

² Both parties believed the statute required the victim to be 14 or less.

II. CONCLUSION

The trial court did not abuse its discretion when it accepted Mr. Taylor's plea of guilty to the charge for which he was being arraigned. The court held two hearings to consider this matter. It allowed both sides to extensively brief the issue, and made its determination based on the *specific* facts of this case. The specific facts were that the prosecutor knew Mr. Taylor was being arraigned on a DWLS 3rd charge, the prosecutor had plenty of time to amend the charge, the prosecutor failed to make the amendment, and Mr. Taylor plead guilty to the charge *before* the City made *any* attempt to amend.

The City created this situation and is now asking for a re-do. There is no legal basis for vacating Mr. Taylor's plea. Therefore, the defendant's plea of guilty, which was made knowingly, intelligently, and voluntarily, should be reinstated.

RESPECTFULLY SUBMITTED this 17th day of February, 2011.



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I, Michiko Fjeld, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

That Michiko Fjeld served and filed the Appellant's Reply Brief on February 17, 2011. That on this date, Ms. Fjeld also served a copy of this Motion on Mrs. Harrington, Mr. Beggs, Ms. Beavers, and Mr. Taylor by leaving a copy of the foregoing at counsel's address of record:

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On this date, Michiko Fjeld also served the Appellant's Reply Brief on Mr. Taylor by mailing a copy of the brief to his address of record.

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