

No. 299511

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
NOVEMBER 14, 2011
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

PAUL SCOTT BICKLE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WHITMAN COUNTY
THE HONORABLE DAVID FRAZIER

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred when it entered Finding of Fact (FF) 7:

The defendant has not supported his motion with an Affidavit of Declaration under oath. (CP 134).

B. The court erred when it entered FF 10: There is no credible evidence of ineffective assistance of counsel. (CP 135).

C. The court erred when it entered FF 14: Even if all of defendant's statements in support of his motion to withdraw guilty plea had been made under oath, the defendant would not have met his burden of proof to justify granting any part of his motion, nor to hold a formal evidentiary hearing on the motion. (CP 135).

D. The court erred when it entered Conclusion of Law (CL) 1: The defendant did not comply with the requirements of CrR 7.8, for consideration of his motion because he did not support his motion with an affidavit or sworn declaration. (CP 135).

E. The court erred when it entered CL 2: Even if all defendant's statements made in support of his motion were made under oath, it would not merit a fact finding

hearing, as none of his allegations are credible. (CP 135).

F. The court erred when it entered CL 3: The defendant's motion to withdraw his guilty plea should be denied. (CP 135).

G. The court erred when it denied Mr. Bickle's motion to withdraw his guilty plea.

H. The court erred when it imposed attorney costs and a \$10,000 fine without considering Mr. Bickle's ability to pay the fees.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the court err when it concluded that the affidavit supporting the motion to withdraw guilty plea was improper?
2. Did the court err when it denied Mr. Bickle's motion to withdraw guilty plea?
3. Did the court err when it imposed attorney costs, and a \$10,000 fine without first considering Mr. Bickle's ability to pay those fees?

II. STATEMENT OF FACTS

Paul Bickle was charged with twenty-one crimes that occurred between July 22, 2010 and August 9, 2010. The charges included seven counts of burglary in the second degree, four counts of malicious mischief in the second degree, three counts of theft in the first degree, two counts of theft of a motor vehicle, two counts of possession of stolen property in the second degree, and two counts of attempted burglary in the second degree. For each count, the State gave notice it would seek an exceptional sentence. (CP 1-15).

In a letter to defense counsel, dated August 26, 2010, the prosecutor offered to amend the information to only four counts of burglary second degree and forego any request for an exceptional sentence. In return, Mr. Bickle was required to plead guilty to the four counts, pay restitution for all crimes committed in Whitman County including the dismissed charges, and stipulate to an offender score of 22 points. (CP 68-70).

On October 6, 2010, defense counsel filed a motion to suppress all the evidence obtained as the result of a search warrant. (CP 26-30). Although hearing date was set for October 22, 2010, the hearing did not occur. (CP 26).

On October 29, 2010, Mr. Bickle entered a plea of guilty to the counts in the amended information on October 29, 2010. (RP 11-16; CP 56-58). At that hearing the prosecutor informed the court he believed the state was at a significant risk of having evidence suppressed, and had, therefore, offered the plea deal. (RP 20-21). After colloquy with the court Mr. Bickle pleaded guilty to the four charges. The court found the plea was knowing, voluntary, and intelligent. (RP 10-16).

On December 3, 2010, the court sentenced Mr. Bickle to 68 months of incarceration, and imposed \$ 27,885.00 in restitution, a \$10,000 fine, and \$2,500 in attorney costs, as well as \$800.00 in statutory fees. (CP 73-80). The judgment and sentence included the following paragraph:

“2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds: That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.” (CP 75).

Mr. Bickle filed a pro se motion to withdraw guilty plea on March 10, 2011. (CP 87-93). In the supporting documents he indicated, among other things, that defense counsel had cancelled the suppression hearing that would have excluded evidence obtained by an illegal search. (CP 91). Additionally, he represented in the documents that he was not of sound mind at the time he entered the guilty pleas, and felt threatened and coerced by his attorney. (CP 91; 96).

Appearing in person at a motion hearing on April 29, 2011, Mr. Bickle told the court he received ineffective assistance of counsel during the plea process and at the time he entered the plea was incompetent because of alcohol and methamphetamine withdrawal. (RP 48). The court reviewed the paperwork, acknowledging that Mr. Bickle had made allegations of wrongdoing by the trial attorney, the prosecutor and the court, and stated:

“You filed a motion, you filed a document that was entitled ‘affidavit’, but it, when you review it carefully, as Mr. Tracy argued, it’s not an affidavit. You just filed a written unsworn statement, making a number of allegations. And as such it doesn’t comply with Criminal Rule 7.8, and the factual allegations that you make, which for the most part are very general...not sworn to, there’s been no oath taken, it’s not in the form of a declaration, those things aren’t admissible, and as a technical matter of law, under Rule 7.8, before the court can proceed with your motion, really even has

jurisdiction to hear the motion, those things would have to be in the form of a declaration that's sworn to. And they weren't. And based on that and that alone I do not feel it would be proper for the court to schedule a hearing on the motion or let alone to grant the motion that was made, here.

So on that basis, the motion to withdraw the guilty plea, on that basis alone, must be and will be denied.” (RP 62-63).

On May 10, 2011, at the presentment hearing, Mr. Bickle again explained the conversation he had with his trial counsel regarding the plea agreement. (RP 83-84). Mr. Bickle told the court he had not wanted to go through with a plea agreement, but felt he had no choice because his attorney told him the suppression motion “would not work”. (RP 84). Even after Mr. Bickle had signed the plea agreement and before sentencing, Mr. Bickle wanted to withdraw his guilty plea, but reported that his attorney said, “You can't; you already signed on the dotted line.” (RP 84).

The court denied the motion to withdraw guilty plea. (RP 72; CP 104-107). This appeal follows. (CP 110).

III. ARGUMENT

A. The Court Erred When It Concluded That The Affidavit Supporting The Motion To Withdraw Guilty Plea Was Improper And Denied The Motion On That Basis.

CrR 7.8 (c)(1) requires that a motion to withdraw a guilty plea “shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of facts or errors upon which the motion is based.” An affidavit is “a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.” *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005).

Mr. Bickle made a *pro se* motion to withdraw a guilty plea and attached a document labeled “Affidavit in Support of Motion to Withdrawal of Guilty Plea” and another entitled, “Affidavit In Support Of Motion To Withdrawal of Guilty Plea, Addendum”. (CP 87-96; 99-100). In its oral decision and the written findings and conclusions, the court ruled Mr. Bickle had not supported his motion with an affidavit or declaration under oath, and on that basis alone the court should and did deny his motion. (CP 105-105; RP 62-63).

The beginning of the Affidavit read as follows:

“I, Paul Scott Bickle, defendant, *pro se*, *affirm under penalty of perjury* that I am acting Pro Se and make this affidavit in support of my motion to withdrawal (sic) my guilty plea entered into the record on the 29th day of October 2010, in Whitman County Superior

Court of Washington in front of the honorable Judge David Frazier.” (CP 89). (Emphasis added).

RCW 9A.72.085 provides a substitute for a sworn affidavit, allowing a party to submit an unsworn written statement that recites that it is certified or declared by the person *to be true under penalty of perjury*. RCW 9A.72.085; *Forest*, 125 Wn.App. at 706. (Emphasis added).

The affidavit submitted by Mr. Bickle met the necessary technical requirements and was properly before the court. A trial court’s ruling on the denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Olivera-Avila*, 89 Wn. App. 313, 317, 949 P.2d 824 (1997). A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). Here, the court abused its discretion when it denied the motion on the basis that the affidavit had not been made under oath.

B. The Court Erred When It Denied Mr. Bickle’s Motion To Withdraw A Guilty Plea.

Due process requires that a defendant’s plea of guilty be voluntarily, knowingly, and intelligently made. *State v. McDermond*,

112 Wn. App. 239, 243, 47 P.3d 600 (2002). To prevail in his appeal of the court's ruling on the CrR 7.8 motion, Mr. Bickle must show the trial court abused its discretion. *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997), *rev. denied*, 134 Wn.2d 1026 (1998).

Under a post-judgment CrR 7.8 motion, the court may allow withdrawal of a plea on certain bases, including "any other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5). The denial of effective assistance of counsel or an involuntary plea may be a reason justifying relief from the operation of the judgment. *State v. Martinez-Lazo*, 100 Wn.App. 869, 873, 999 P.2d 1275 (2000).

In a plea bargaining context, effective assistance of counsel requires that counsel actually and substantially assist the client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Rule of Professional Conduct 1.2(a) pointedly states, "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered."

Mr. Bickle presented the court with a declaration that he had received ineffective assistance of counsel because counsel

canceled the suppression of evidence hearing. (CP 90). At the presentment hearing, Mr. Bickle further explained to the court that suppression hearing was canceled against his wishes. (RP 82-84). This was especially pertinent in light of the state's explanation for the substantially reduced charges:

"Its my belief, your Honor, that the state—was at a significant risk. Mr. Martonick [defense counsel] did an extensive job reviewing the search warrant and – had a very credible argument that the evidence from the search warrant should have been suppressed. And so, based on my review of that information I believe the state was at a significant risk to have the evidence suppressed. I by no means think that was a certainty, but I would suggest to the court that the result of that hearing could have gone the defendant's way." (RP 21).

CrR 7.8 provides:

(1): Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a *concise statement of the facts or errors* upon which the motion is based.

(2)Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition *unless* the court determines that the motion is not barred by RCW 10.73.090 *and either* (i) the defendant has made a substantial showing

that he is entitled to relief *or* (ii) resolution of the motion will require a factual hearing. (Emphasis added).

Thus, the superior court may only rule on the merits of a motion when the motion is timely filed and either the defendant has made a substantial showing he is entitled to relief *or* the motion cannot be resolved without a factual hearing. *State v. Smith*, 144 Wn. App. 860,863, 184 P.3d 666 (2008).

Mr. Bickle's motion was not untimely. Further, resolution of the motion did require an evidentiary hearing to determine whether Mr. Bickle had, in fact, been told it was not his decision whether to cancel the suppression hearing and agree to plea guilty. Ignoring the state's admission of a weak case and Mr. Bickle's contention he wanted the suppression hearing, the court held no factual hearing. Rather, it ruled "there is no credible evidence of ineffective assistance of counsel." (CP 135). This court should reverse the trial court's ruling and remand for a factual hearing.

C. The Court Erred When It Imposed Legal Financial Obligations Without Considering Whether Mr. Bickle Had A Present Or Future Ability To Pay.

At the sentencing hearing the court imposed financial legal obligations on Mr. Bickle. These included the agreed upon restitution amount, a \$10,000 fine and various statutory costs of \$800.00, totaling \$41,185.00.

In imposing legal financial obligations the court is not required to make *specific formal findings* regarding a defendant's ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, the court shall not order payment of costs *unless* the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court is required to take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. RCW 10.01.160 (3).

Here, at the sentencing hearing, the court did not consider the financial resources available to Mr. Bickle nor did it consider the nature of the burden any payment of costs would impose on him.

In fact, the court stated:

"I'm going to impose \$2,500 of attorney's fees. And I'm going to impose \$10,000 in fines. I think you need to be hit financially sir, 'cause that's what you like to do to everyone else, is try to nail them financially and try to gain financially through criminal means. And I think some financial consequences, here, are in order as well..."

And I'm not going to set up a date for payment, since he does have a lengthy period of time to serve. But it will be monitored by the clerk's office *and it will be a judgment that will be enforceable against him that bears interest until it gets paid.*" (RP 44). (emphasis added).

Further, the judgment and sentence provided:

"2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. *The court finds: That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.*" (CP 75). (emphasis added).

Mr. Bickle challenges the legal financial obligation order on appeal because (1) the court never considered his ability, or likely future ability to pay the imposed amounts and (2) the court made a specific finding he would have the ability to pay.

The court's understanding, based on the record, was that Mr. Bickle had spent a large portion of his adult years in prison (RP 5) and had only a 9th grade education. (CP 60). No evidence of any significant work history was presented to the court. Further, Mr. Bickle was given a court-appointed attorney, affirming that he qualified as indigent.

It is important to note that interest on non-restitution amounts are subject to a possible 12% interest rate, accruing from the date of sentence and compounded until paid in full. RCW 10.82.090; RCW 4.56.110(4). In just the five years Mr. Bickle is incarcerated, the \$10,800 financial obligation, with compounded interest, will almost double to \$19,678.88. Combined with the restitution amount, after five years, Mr. Bickle, who will likely not be a high-wage earner when released, will owe over \$40,000 in legal financial obligations.

There is insufficient evidence to support the trial court's finding that Mr. Bickle had the present or future ability to pay the legal financial obligations.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bickle respectfully urges this Court to reverse the denial of his motion to withdraw guilty plea and remand for further proceedings.

Dated this 14th day of November, 2011.

Respectfully submitted,

s/ Marie Trombley

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the brief of appellant was sent by first class mail, postage prepaid, on November 14, 2011, to Paul S. Bickle, DOC # 743245, Washington Corrections Center, PO Box 900, Shelton, WA 98584; and Denis P. Tracy, Whitman County Prosecutor, PO Box 30, Colfax, WA 99111.

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