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DEC 05, 2011

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30081-1-III

STATE OF WASHINGTON, Respondent,

v.

DEBRA LYN HONG, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Debra Lyn Hong appeals from the judgment and sentence entered following her guilty plea to first degree theft by means of welfare fraud. At her first appearance to enter guilty pleas on June 6, 2011, she disputed the factual basis of the charge and protested that a Housing Authority investigation had exonerated her. The trial court refused to accept her plea at that time and continued the hearing for two days because of her emotional state. On June 8, 2011, defense counsel presented the State with a letter from the Housing Authority which the State acknowledged reported an investigation in which the agency found Hong had not acted fraudulently. Without further investigation and notwithstanding that willfully deceptive conduct is an essential element of welfare fraud, Hong entered a guilty plea. Because of the circumstances surrounding the plea and the issues raised by the Housing Authority letter, the plea lacked a factual basis and defense counsel was ineffective for failing to investigate Hong's innocence.

In addition, the information did not state all of the essential elements of first degree theft by welfare fraud because it did not state the amount of benefits that Hong allegedly wrongfully obtained. Lastly, at sentencing, the trial court ordered restitution in the amount of $6,684.84

although there is no factual basis in the record establishing the amount of the loss or its causal connection to Hong's alleged misconduct.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Hong's plea was not knowing, intelligent and voluntary when the State conceded on the record that there was an insufficient factual basis to establish Hong's guilt.

ASSIGNMENT OF ERROR 2: Hong received ineffective assistance of counsel when, after receiving exculpatory evidence, counsel did not investigate Hong's innocence.

ASSIGNMENT OF ERROR 3: The information is defective in that the amounts alleged to be wrongfully taken do not support the degree of the charged theft crime.

ASSIGNMENT OF ERROR 4: Insufficient evidence supports the trial court's restitution award.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State acknowledged, on the record, that an administrative investigation had concluded the Defendant had not committed fraud, is there a sufficient factual basis to support a conviction for welfare fraud?

2. When defense counsel receives exculpatory evidence and, within two days, assists the defendant in entering a guilty plea, has counsel rendered a deficient performance by failing to conduct an investigation into the charges such that the defendant can knowingly and intelligently evaluate the plea offer?
3. Must an information charging a defendant with first degree theft by welfare fraud specifically allege that the amount of benefits wrongfully obtained exceeds $5,000.00?
4. Should the restitution award be vacated when there is no evidence in the record establishing the amount or that it is causally connected to the charged crime?

IV. STATEMENT OF THE CASE

Debra Lyn Hong was charged with first degree theft, RCW 9A.56.030(1)(a) and RCW 74.08.331, based on allegations of welfare fraud. CP 9. The information alleged that Hong wrongfully obtained public assistance in an amount exceeding $1,500.00, by means of willful statements or omissions or other fraudulent device. CP 6-7.

Hong appeared to enter a guilty plea. At the first hearing on entry of plea, Hong denied the factual basis for the plea and stated that the

Housing Authority's investigation showed she did not falsify any records. RP 12-13. The trial court refused to accept her guilty plea and continued the hearing two days. RP 14. At the second hearing, defense counsel produced a letter from the Housing Authority stating that Hong's custodial situation with her children was in flux, they knew about her efforts to obtain custody, and they granted her the housing voucher. RP 15-16. The State stated, "It's my understanding that she wishes to proceed with pleading guilty on the 11-1-15-7, which was the fraudulent obtaining of welfare. But the housing authority may have to dismiss since by their own review process she did not commit fraud." RP 16.

Notwithstanding the State's concession that the results of the Housing Authority's investigation undermined the factual basis for the charge of first degree theft, the trial court accepted Hong's guilty plea to first degree theft with no further discussion as to Hong's culpability. RP 18-19.

Hong had no prior convictions. CP 22. She was sentenced to thirty days' incarceration and ordered to pay $6,684.84 in restitution together with fees, costs and assessments. CP 23-24, 26. Hong did not stipulate to the amount of restitution to be awarded and no basis for the amount ordered appears in the record. Hong timely appeals. CP 36.

V. ARGUMENT

Counsel for Hong assisted her in pleading guilty to a Class B felony, her only criminal history of record, even though a Housing Authority investigation had previously been conducted that found she had not committed fraud. Counsel failed to adequately promote and protect the best interests of the client by assisting in the entry of a guilty plea without any further investigation of the Housing Authority findings, even though the prosecuting attorney admitted that the Housing Authority had found no fraud committed. In failing to investigate the matter and in assisting in entering the plea, in spite of Hong's repeated insistence that she did not agree with the facts alleged to support the conviction, counsel's assistance was ineffective.

In addition, the record does not support the conviction for first degree theft because it was neither pleaded nor proven that the amount of benefits allegedly obtained by Hong exceeded $5,000.00. Lastly, the trial court's restitution award is completely unsubstantiated by the record below, and there is no indication that Hong agreed to the amount claimed by the State. Accordingly, Hong's conviction should be vacated and the case remanded for further proceedings.

I. Hong's plea was not knowing, intelligent and voluntary because, by the State's admission, the plea lacked a factual basis.

Hong was convicted of first degree theft, which requires proof that she committed theft of property or services exceeding five thousand dollars in value. RCW 9A.56.030(1)(a). A theft is defined as:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1). By extension, it is a defense to a theft that "The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a).

Moreover, the crime of welfare fraud is defined as a theft under RCW 74.08.331(1), which states:

> Any person who by means of a willfully false statement, or representation, or impersonation, or a willful failure to reveal any material fact, condition, or circumstance affecting eligibility or need for assistance, including medical care, surplus commodities, and food stamps or

> food stamp benefits transferred electronically, as required by law, or a willful failure to promptly notify the county office in writing as required by law or any change in status in respect to resources, or income, or need, or family composition, money contribution and other support, from whatever source derived, including unemployment insurance, or any other change in circumstances affecting the person's eligibility or need for assistance, or other fraudulent device, obtains, or attempts to obtain, or aids or abets any person to obtain any public assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030 and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than fifteen years.

Thus, under both the theft statutes and the welfare fraud statute, some evidence of wrongful action with the intent of defrauding the agency is required to sustain a conviction.

According to the State, the letter from the Housing Authority indicated that according to their internal review, Hong did not commit fraud. RP 16. Hong was also aware of the administrative investigation that exonerated her and clearly expressed her lack of understanding as to how the prosecution could proceed in light of the Housing Agency's investigation. RP 13. Nevertheless, the trial court accepted her guilty plea without further colloquy, allocution, or other consideration of the factual basis for the charge. RP 18-19.

It is a requirement of due process that a person's guilty plea be knowing, voluntary and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). A guilty plea cannot be truly voluntary unless the defendant understands the law in relation to the facts. *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1981) (*quoting McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)). Thus, under CR 4.2(d), the trial court may not accept a guilty plea "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" and may not enter a judgment unless there is a factual basis for the plea. A factual basis exists if there is sufficient evidence for a jury to conclude the defendant is guilty. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). Any material relied upon by the trial court in establishing the factual basis for the plea must be made a part of the record. *Id.* (citing *Irizarry v. United States*, 508 F.2d 960, 967 (2d Cir. 1974); *U.S. v. Davis*, 493 F.2d 502, 503 (5th Cir. 1974)).

Here, the State conceded on the record that a prior investigation by the Housing Authority found that Hong did not act fraudulently. RP 16. Accordingly, the evidence of wrongful action taken with the intent to

deprive the agency of property necessary to sustain the conviction was lacking. Absent wrongful conduct, there is no theft or welfare fraud.

It is abundantly clear from the record that Hong did not understand the application of the law to the facts in her case, in light of her protestations concerning the Housing Authority investigation and her frank admission that she did not understand. RP 13. Under such circumstances, her plea was not "voluntary" because it did not reflect an understanding of how the law applied to the facts – specifically, that the State would have to prove some "fraudulent device" to convict her notwithstanding the administrative finding that she did not commit fraud. It was, accordingly, a violation of due process for the trial court to accept her plea without further exploration of the factual basis.

II. Counsel rendered ineffective assistance by failing to investigate Hong's defense after receiving evidence that exonerated Hong of fraud

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686,104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). 37 P.3d 280 (2002). There is a strong presumption that counsel

was effective at the trial level, but this can be overcome by showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and Article I, Section 22. *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992). "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. Actions by trial counsel which constitute "legitimate trial strategy or tactics" cannot serve as a basis for a claim of ineffective assistance. *State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004). However, deference owed to those strategic trial judgments is centered on the adequacy of the investigation supporting those judgments:

> [S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), *quoting Strickland*, 466 U.S. at 690-91.

Recently, in the case of *State v. ANJ*, 168 Wn.2d 91, 225 P.3d 956 (2010), the Washington State Supreme Court held that courts may look to the standards set by professional regulatory organizations within the Bar to adjudge the effectiveness of counsel. *State v. ANJ*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010). In that case, the Supreme Court used the Washington Defender's Association Standards for Public Defense Services to aid them in their analysis of an attorney's representation of a juvenile client[1]. Those standards emphasize the importance of pretrial investigation to a prepared defense. *See*, *WDA, Standards for Public Defense Services*, Std. 6 & Cmt. at 52-53 (2006)[2]. This is because a defense attorney cannot properly evaluate the merits of a plea offer without fully evaluating the State's evidence. *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J. concurring).

Here, the course of events unfolded as follows. On June 6, 2011, Hong appeared to enter guilty pleas to two separate cases arising from

[1] The Washington Defender's Association is a non-profit, private, voluntary membership organization for attorneys providing public defense services in Washington, and is not a state agency or branch of the Washington State Bar Association.
[2] The standards are available at http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense.

allegations of welfare fraud. She disputed the facts alleged to establish the charge, and protested that a Housing Authority investigation had exonerated her, finding she did not commit fraud. RP 13. Two days later, defense counsel provided the State with a letter from the Housing Authority apparently establishing that upon review, the agency had determined no fraud had occurred. RP 15-19. Immediately that same day, Hong entered a guilty plea to a class B felony of welfare fraud. RP 18.

No reasonable investigation could have occurred in the two days between Hong's first appearance to enter guilty pleas and the second hearing when the letter was presented. Clearly, the letter raised issues as to whether Hong had willfully engaged in any deceptive behavior constituting welfare fraud; yet, counsel did not take *any* time to investigate those issues including whether the Housing Authority's investigation could have negated an essential element of the charge against Hong, or established the defense that she obtained benefits openly and under claim of right, even if mistaken. While the decision to enter a guilty plea *may* have been strategically sound, it is impossible to knowingly and intelligently evaluate a plea offer without a reasonable investigation into exculpatory facts. That did not happen here, and the conviction should be vacated so that the exculpatory evidence can be investigated prior to any decision to enter a guilty plea.

III. The information was defective because it failed to state all the essential elements of first degree theft, namely, that the value of goods or services wrongfully taken exceeds $5,000.00

A crime of theft is elevated to the first degree when the value of property or services taken exceeds five thousand dollars. RCW 9A.56.030(1)(a). In the information, the State alleged that the value of benefits wrongfully obtained by Hong exceeded $1,500.00. CP 6. The sum alleged is insufficient to establish theft in the first degree.

A charging instrument must set forth all the essential elements of a crime and be written in a manner that enables laypersons to understand what is intended. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). "The rule ensures that the accused is apprised 'with reasonable certainty of the nature of the accusation'" so that a defense can be prepared. *Id.* (quoting *State v. Leach*, 113 Wn.2d 679, 388, 782 P.2d 552 (1989)). Insufficiency of a charging document is of constitutional magnitude and can be raised for the first time on appeal. *Id.*

It is anticipated that the State will argue that commission of welfare fraud in *any* amount constitutes first degree theft under the plain language of RCW 74.08.331(1). Before 2003, the statute provided that a person committing the acts enumerated in the statute shall be guilty of grand larceny. S.B. No. 5758, 58th Leg. (WA 2003) (2003 c. 53 § 368).

Under the previous statute, the crime of welfare fraud was a theft, the degree of which depended upon the monetary amount involved. *Campbell*, 125 Wn.2d at 799 (holding amount of benefits obtained is an essential element of welfare fraud); *State v. Delcambre*, 116 Wn.2d 444, 446, 805 P.2d 233 (1991) (citing *State v. Sass*, 94 Wn.2d 721, 725, 620 P.2d 79 (1980)).

In an act entitled "Technical Reorganization of Criminal Statutes," the "grand larceny" language was stricken and the language "theft in the first degree under RCW 9A.56.030" was inserted. But in its statement of intent, the legislature stated specifically that it was not intended "that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington." S.B. No. 5758, 58th Leg. (WA 2003) (2003 c. 53 § 1). Yet, construing any wrongful taking of welfare benefits, *in any amount*, as a first degree theft represents a marked substantive departure from previous law, in which the degree of the crime depended upon the amount of benefits wrongfully obtained. These conflicting statements can best be reconciled by construing RCW 74.08.331(1) as elevating welfare fraud to theft in the first degree *only* when the value of goods and services obtained exceeds $5,000.00, as required by the first degree theft statute.

Because the information did not allege that the value of benefits unlawfully taken by Hong exceeded $5,000.00, it did not fully apprise her of all the essential elements of the charge sufficient to support a conviction for first degree theft. Accordingly, the conviction should be vacated and the cause remanded for dismissal without prejudice. *See, generally, Campbell*, 125 Wn.2d 797.

IV. The restitution order entered by the trial court is unsupported by substantial evidence in the record

As part of the sentence, the trial court ordered Hong to pay restitution in the amount of $6,684.84. CP 23. No basis whatsoever appears in the record for this order.

Restitution assessments are within the trial court's discretion and are reversed when the trial court abuses its discretion, or its supporting findings are not supported by substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution is only allowed for losses that are causally connected to the crime charged. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The causal connection is determined by applying a "but-for" test – but for the charged crime, the loss would not have occurred. *Griffith*, 164 Wn.2d at 966.

Here, there is no evidence in the record from which the trial court could have found that "but for" Hong's actions, a loss of $6,684.84 would have occurred. Nor is there any evidence in the record that Hong stipulated to the amount of restitution to be ordered. Because substantial evidence does not support the order, the sentence should be vacated and the case remanded for re-sentencing.

VI. CONCLUSION

Hong's case is an example of how innocent persons can be wrongfully convicted simply because defense counsel does not take the time to properly investigate the allegations. Even though Hong clearly disputed the factual allegations against her, and even though she subsequently provided exculpatory evidence relating to her lack of willful conduct, counsel did not take the time to follow up on the new evidence. Instead, two days later, counsel assisted Hong in entering a guilty plea to a class B felony, even though Hong had no previous record of conviction. Because, as the State acknowledged in open court, the Housing Authority letter undermines an essential element of the charge, there is no factual basis for the plea and counsel's performance was deficient in supporting the entry of the plea notwithstanding the defects in the State's case. The conviction should be vacated, and the cause remanded for further proceedings.

In the alternative, the conviction should be vacated and the cause remanded due to the deficiency of the charging document, which failed to set forth all of the essential elements of the charged crime. Lastly, the restitution order is unsupported by any evidence, let alone substantial evidence, and should be vacated.

RESPECTFULLY SUBMITTED this 5th day of December, 2011.

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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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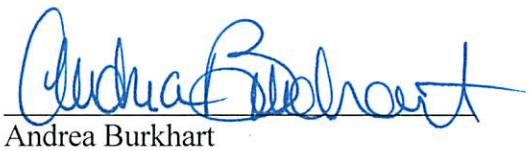
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 5th day of December, 2011 in Walla Walla, Washington.



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