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MAY 19, 2015

Court of Appeals
Division III
State of Washington

No. 32390-1-III consol. w/
32391-9-III and 3292-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LYZETTE VARGAS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by not allowing Lyzette Vargas to withdraw her guilty plea.

Issue Pertaining to Assignment of Error

A. Did the court err by not allowing Ms. Vargas to withdraw her guilty plea? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Ms. Vargas was charged by information with unlawful possession of clonazepam (32390-1-III), possession of methamphetamine with intent to deliver (32391-9-III), and theft of a motor vehicle (32392-7-III). (CP 1, 112, 189). On October 9, 2013, she pleaded guilty to all the charges pursuant to a plea agreement where, if she pleaded to the three charges and entered into and satisfied an agreement with Metro, she would receive a State recommendation of a reduced and concurrent sentence. (10/9/13 RP 6-9; CP 30, 124, 208). Further references to clerk's papers will be from those in 32392-7-III as identical documents were filed in these three consolidated cases.

Ms. Vargas later moved to withdraw her guilty pleas to all three charges because her guilty plea to theft of a motor vehicle

was involuntary in that it lacked a factual basis. (CP 135). At the hearing on the motion, the State agreed that if Ms. Vargas were allowed to withdraw her plea to theft of a motor vehicle, she could withdraw her pleas to the other two charges as well since the plea agreement was a global one resolving all three cases. (3/21/14 RP 10-11). The court denied the motion and entered findings and conclusions. (CP 247). The findings state in relevant part:

1. On October 9, 2013, the defendant pled guilty to Theft of a Motor Vehicle in the instant matter.
2. In her Statement of Defendant on Plea of Guilty to Non-Sex Offense (Felony) in section 11, where it states, "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:", the defendant wrote,

On 8/16/13 I had borrowed a 1997 Ford Explorer + I did not return it when requested.
3. As part of plea negotiations with the State, the defendant also pled guilty to Possession with Intent to Manufacture/Deliver a Controlled Substance – Methamphetamine and Unlawful Possession of a Controlled Substance in Benton County Superior Court Cause Nos. 13-1-01077-5 and 13-1-00715-4 on October 9, 2013.
4. On that same date, the defendant also signed a Cooperation and Plea Agreement with the Tri-City Metro Drug Task Force to work as a confidential informant.

5. The terms of said contract were as follows: . . .
6. After pleas to the above referenced matters were accepted by the court, the defendant was released from jail pending sentencing to complete the terms of her Metro contract as listed above.
7. The defendant failed to complete the terms of her Metro contract.
8. Prior to sentencing in the three matters listed above, the defendant filed a Motion to Withdraw Plea asserting that her guilty plea to Theft of a Motor Vehicle was involuntary as it lacked a factual basis.
9. All three of the defendant's cases included in the Metro contract were part of a global plea resolution and thus, if the defendant is allowed to withdraw her guilty plea in one case, she would be allowed to withdraw her plea on all. (CP 247-49).

From the findings, the court made these conclusions of law:

1. The Theft of a Motor Vehicle statute requires that the State prove the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle and that the defendant intended to deprive the other person of the motor vehicle.
2. Wrongfully obtained has a statutory definition set forth in RCW 9A.56.010 that may be proven by "Having any property or services in one's possession, custody or control as a bailee, . . . or person authorized by agreement or competent authority to take or hold such possession, to . . . withhold . . . the same to his or her own use. . ."
3. Thus, a defendant is in violation of the Theft of

a Motor Vehicle statute if they had been granted authority to use a vehicle and then exceeded that authority.

4. With regard to the intent to deprive requirement, the court in State v. Goodman, 150 Wash.2d 774, 781, 83 P.3d 410, 413 (2004), held that, “Specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.”

5. Additionally, the State need not show that a defendant intended to permanently deprive the owner of the automobile. State v. Komok, 113 Wash.2d 817, 783 P.2d 1061, 1064 (1989).

6. Thus, when the defendant failed to return the vehicle when requested by the owner of said vehicle and therefore that requirement of the statute has been met as well. Furthermore, the defendant was properly charged under the Theft of a Motor Vehicle statute as opposed to Taking a Motor Vehicle Without Permission based upon the Court’s holding in State v. Clark, 96 Wn.2d 686, 691, 638 P.2d 575 (1982). (CP 249-50).

Based on the findings and conclusions, the court entered an order denying the motion to withdraw guilty plea “because the statement of what she believes makes her guilty written in her Statement on Plea of guilty satisfied all the required elements of the charge of Theft of a Motor Vehicle.” (CP 250). Judgment and sentence in the three cases were entered thereafter. (CP 79, 169, 234). This appeal follows.

III. ARGUMENT

A. The court erred by not allowing Ms. Vargas to withdraw her guilty plea.

CrR 4.2(f), Withdrawal of Plea, provides in relevant part:

The 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. . .

It is a violation of due process to accept a guilty plea without an affirmative showing the plea was made intelligently and voluntarily. *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985) (quoting *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980)). The term "manifest injustice" means an injustice that is obvious, directly observable, overt, and not obscure. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). A manifest injustice exists when a plea is involuntary. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

CrR 4.2(d) provides in pertinent part:

The court shall not enter a judgment on a plea of guilty unless it is satisfied that there is a factual basis for the plea.

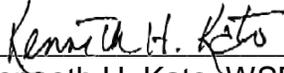
Ms. Vargas's guilty plea was involuntary because there is no

factual basis for her pleading guilty to theft of a motor vehicle. Failure to comply with CrR 4.2(d) requires that the guilty plea be set aside. *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000). She obtained the Explorer by borrowing it, but did not return it when requested. (CP 215). That is the only factual basis for the plea that is reflected in the record and it is insufficient to show she had any intent to deprive the owner of the vehicle. *But see State v. Clark*, 96 Wn.2d 686, 691-92, 638 P.2d 572 (1982); *State v. Walker*, 75 Wn. App. 101, 107-08, 879 P.2d 957 (1994); *State v. Tewee*, 176 Wn. App. 964, 970, 309 P.3d 791 (2013), *review denied*, 179 Wn.2d 1016 (2014) (defendant had permission to use vehicle but exceeded scope of permission). Ms. Vargas must be permitted to withdraw her guilty pleas to all charges. *S.M.*, 100 Wn. App. at 413; *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003).

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Vargas respectfully urges this court to reverse her convictions and remand for withdrawal of her guilty pleas.

DATED this 16th day of May, 2015.



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CERTIFICATE OF SERVICE

I certify that on May 16, 2015, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Lyzette Vargas, # 838199, 9601 Bujacich Rd NW, Gig Harbor, WA 98332; and by email, as agreed by counsel, on Andrew K. Miller at prosecuting@co.benton.wa.us.

