

FILED
May 14, 2015
Court of Appeals
No. 32666-7-III Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PAUL CHARLES HOLLAND, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

1. The court erred by not allowing Paul Holland to withdraw his guilty plea.

Issue Pertaining to Assignment of Error

A. Did the court err by not allowing Mr. Holland to withdraw his guilty plea? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Holland was charged by information with one count of felony harassment – threat to kill. (CP 1). If convicted, he was facing a standard range sentence of 22-29 months based on his offender score. (CP 103).

The case went to jury trial. (5/14/14 RP 3). It lasted two days and the jury began deliberations. (*Id.*; 5/15/14 RP 256). A jury note was received, stating in part that “[w]e cannot come to a unanimous decision.” (CP 86; 5/15/14 RP 259). While the court and the attorneys discussed how to respond to the note, defense counsel alerted the court that his client was not feeling well and was ill. (5/15/14 RP 260). Mr. Holland said “I just don’t want to get sick,” whereupon the court granted him leave to excuse himself if necessary. (*Id.* at 261).

While still dealing with the first jury note, a second one arrived asking how much time had elapsed since a 911 call and when deputies arrived. (CP 87; 5/15/14 RP 261). Dealing with the second note first, all agreed the court would tell the jury it had all the evidence and no further response could be made. (CP 87; 5/15/14 RP 262). With the approval of all parties, the court decided as to the first note that the jury would be told to continue its deliberations. (5/15/14 RP 268-69).

The court then notified the parties:

We'll go on the record. On the record, the jury has advised the bailiff that they've reached a verdict. (*Id.*).

Defense counsel immediately advised the court the case had been resolved:

Your Honor, following the initial questions of the jurors, the State and Mr. Holland and I started discussing a potential resolution of this case recognizing that the jurors initially indicated that they were hung and they didn't know which way to go in terms of proceeding forward.

So we have resolved this case. We'd ask the Court to consider that and permit Mr. Holland to enter a plea. It would be an unranked felony. He has agreed to do four months in Grant County Jail. The State is in agreement in terms of entering a No-Contact Order with – (5/15/14 RP 270).

The court, however, was more interested in not wasting the jurors' time in light of the eleventh hour plea deal. (5/15/14 RP 273, 274-75, 276). It therefore fashioned a process to deal with it:

What would counsel think about me bringing the jury out – please listen carefully because it's kind of an elaborate procedure – have them read the verdict form without announcing it; and by way of polling each juror, without disclosing what that verdict is, would announce whether or not that's their verdict and the verdict of the unanimous jury. And if they do, then I'd take the verdict form. The jury could then be released so they wouldn't have to wait any longer. I wouldn't announce the verdict. I've been thinking this through step by step. If I announce the verdict, one side or the other might say, Oh, I don't like this deal anymore. (*Id.* at 276).

The prosecutor said, Yeah;" Mr. Holland said, "No." (*Id.*). The court went on to say:

So then we proceed with the guilty plea, and then I would hold onto the verdict until, I guess, sentencing. But, I mean, that's up to the parties to agree to. (*Id.* at 277).

The State had no objection to the court's proposal. Mr. Holland advised the court that he understood he was not going to know what the verdict was and that it was fair. (*Id.*). Defense counsel stated he and his client were in agreement "because we want to effectuate that guilty plea." (*Id.*).

The court then took the verdict before any guilty plea was accepted, but did not announce the verdict. (5/15/14 RP 277-78). The court polled the jury. (*Id.* at 278-80). Although the verdict had been taken, the court advised the parties it would not be filed until after the guilty plea was taken. (*Id.* at 281). Ready to do the guilty plea, the court explained to Mr. Holland:

I'll address again to Mr. Holland that you're agreeable to this process, you have agreed to this process wherein I don't announce the verdict, and the verdict form will be filed after I accept your guilty plea. Do you understand that? (*Id.* at 282).

Mr. Holland answered that he understood. (*Id.* at 283).

The court accepted his *Alford* plea to the amended charge of criminal mischief while armed, an unranked felony. (5/15/14 RP 283-95). After accepting the plea, the court advised the parties it was filing the verdict form and revealed, at defense counsel's request, that the verdict was not guilty of felony harassment. (*Id.* at 296).

Mr. Holland subsequently filed a motion to withdraw his guilty plea because it was not voluntary. (CP 103). The motion was denied. (7/22/14 RP 38). The court sentenced Mr. Holland to

four months with 15 days converted to 120 hours of community service. (CP 113-14). This appeal follows.

III. ARGUMENT

A. The court erred by not allowing Mr. Holland to withdraw his guilty plea.

Initially, it should be noted the verdict of not guilty was not filed until after the guilty plea was accepted so jeopardy was not terminated. *State v. Strine*, 176 Wn.2d 742, 752, 293 P.3d 1177 (2013).

The motion to withdraw guilty plea was supported by Mr. Holland's declaration stating that waiting for the decision and verdict of the jury caused his stomach to hurt and he felt sick the entire time the jury was deliberating. (CP 105). He acknowledged he told the judge he had enough time to think about it, but "all I kept on thinking was that I needed to take the deal and tell the judge what he wanted to hear so that I could get out of the courthouse." (*Id.*). He claims his plea should be withdrawn because it was not voluntary.

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).

Mr. Holland's guilty plea was involuntary because he was in mental as well as physical distress, which the trial court readily observed and acknowledged on the record before the plea was taken. (5/15/14 RP 260-61). The court's decision denying the motion to withdraw guilty plea is reviewed for an abuse of discretion. *State v. Conley*, 121 Wn. App. 280, 284, 87 P.3d 1221 (2004). As to the voluntariness of a plea, the determination is a question of fact and the trial court's decision accorded deference. *State v. McLaughlin*, 59 Wn.2d 865, 870, 371 P.2d 55 (1962).

Mr. Holland was aware a verdict had been reached, but was so sick with a hurting stomach that all he could think about was getting out of the courthouse and surrounding area. (CP 105). His thoughts were clouded to the point that he felt the only way he could get away was to accept the plea. (*Id.*). He was not thinking clearly and took the plea just to get out of the courthouse even though his case was resolved anyway because a verdict had been reached and he knew it. His mental and physical distress was clearly obvious and severe enough for the court to inquire about it in the guilty plea colloquy. (5/15/14 RP 291-92). Mr. Holland just felt compelled to tell the judge what he wanted to hear so he could get out of the courthouse. (*Id.*; CP 105).

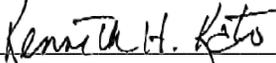
Moreover, the timing of the State's offer to plead the case when prior discussions had stalled long ago was suspect and it took advantage of a vulnerable defendant. This was subtle coercion rendering the plea involuntary on this basis as well. *State v. Frederick*, 100 Wn.2d 550, 674 P.2d 136 (1983), *overruled in part on other grounds, Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). In these circumstances, the court abused its discretion by accepting the plea. *Conley, supra*. Mr.

Holland was in such plain and obvious duress that his guilty plea was not voluntary and he must be allowed to withdraw it. *State v. Hurt*, 107 Wn. App. 816, 832, 27 P.3d 1276 (2001).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Holland respectfully urges this court to reverse his conviction and remand for withdrawal of his guilty plea.

DATED this 14th day of May, 2015.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on May 14, 2015, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Paul Holland, c/o Georgia Holland, 7930 Dahl Rd, # 56, Moses Lake, WA 98837; and by email, as agreed by counsel, on Garth Dano at kburns@grantcountywa.gov.