

FILED
October 21, 2015
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32717-5-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GUILLERMO GOMEZ,

Defendant/Appellant

AMENDED Respondent's Brief

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....4

B. ISSUES PRESENTED4

C. STATEMENT OF THE CASE.....4

D. ARUGMENT.....8

E. CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Boykin v. Alabama, 395 U.S. 238, 242 (1969).....

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1998).....

State v. Walsh, 143 Wnd. 2d 1, 6; 17 P.3d 591, 593 (2001).....

Statutes

Court rules

CrR 4.2(d).....

CrR 4.2(f).....

A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The court correctly sentenced the defendant when his offender score was a five at the time of the sentencing, even though the offender score noted in his statement on plea was incorrect as the defendant knew about the mistake and failed to object at the time of sentencing.

B. ISSUES PRESENTED

- a. Can a defendant raise the voluntariness of his plea for the first time on appeal when he is sentenced with a greater score than that which is listed in the Statement on Plea when the mistake about his offender score was known to the defendant before the time of sentencing and he did not object?

C. STATEMENT OF THE CASE

The defendant was charged via information on March 19, 2014 with five counts: Count One: Burglary in the Second Degree, Count Two: Theft in the Second Degree, Count Three: Malicious Mischief in the Third Degree, Count Four: Vehicle Prowling in the Second Degree, and Count Five: Theft in the Third Degree. (CP at 2). Negotiations between defense counsel and state's attorney resulted in a resolution short of trial where the defendant entered into a plea of guilty to counts one and two and counts three, four, and five were dismissed (CP at 32). The defendant

entered a statement on plea on June 6, 2014 which included an offender score of 1 for each count and a sentencing range consistent with that score for each count. (CP at 5).¹

One day before this change of plea hearing, the defendant had entered a plea and was sentenced in Yakima County in case 13-1-00931-1. In the Yakima County case, he plead guilty to one count of Residential Burglary and one count of Intimidating a Witness, both felony convictions. The defendant had a prior felony conviction for Assault in the Second Degree out of Yakima County (case 09-1-02089-8) committed on July 22, 2009 and sentenced on June 25, 2010. In Felony Judgment and Sentence in the Yakima County case, the defendant acknowledged having an offender score of two for the crime of Residential Burglary and Intimidating a Witness.² (CP at). Despite the information contained in the Judgment and Sentence in the Yakima County case, the defendant indicated to the court his offender score was a one for purposes of his plea hearing in this case. (CP at). The case was set for sentencing on June 9, 2014. (CP at).

¹ The statement on plea has several inaccurate statements. In section 6(b), the criminal history statement (as written in defense attorney's handwriting) references three felony crimes (2014 Yakima Residential Burglary and Intimidating a Witness and 2009 Assault 2). Based on this statement AND the fact the defendant was pleading to two separate assaults the stated offender score of 1 in section 6(d) could not have been one. This error was not seen or corrected by the defendant, the defense counsel, the prosecutor, or the judge at the time of the change of plea.

² This score appears to be based on each count counting against each other count for one point AND for a felony prior (Assault, 2nd) counting as the second point.

On June 9, the defendant appeared with his attorney and immediately upon the hearing starting; the prosecutor informed the judge that his score is “one higher. He pled in Yakima.” (SROP at 3). This was the first time any of the parties indicated to the court the score calculated at the time of the change of plea might have been miscalculated. His attorney asked about his score and the prosecutor indicated she didn’t know but would have to look it up. (Id.) The court asked if the parties needed additional time to look that up and his attorney indicated that yes, they did need additional time. (Id.) They agreed to re-set the matter for four days and Mr. Gomez’ attorney told the court they would “have the score.” (Id. at 4).

On June 13, the case was again called for sentencing with the defendant present with his attorney. (SROP at 6). His attorney filed a formal motion... At this hearing, the prosecutor informed the court that she and defense counsel had been in communication about the defendant’s offender score should he be sentenced in Yakima County first. (SROP at 11). The prosecutor specifically stated that if the defendant was sentenced in Yakima first, his offender score would go up. (Id.) Mr. Linn indicated he did not communicate that information to Mr. Gomez. (Id.) The hearing was then continued again to June 23, 2014.

On June 23, the defense counsel again requested the case be re-set so he could discuss concurrency with the prosecutor. (Id. at 14). The case was re-set again to June 30, 2014.

On June 30, Mr. Gomez' defense attorney raised an issue with the sentencing court about whether the two counts Mr. Gomez was convicted of in Yakima County should count as a single course of conduct³. (Id. at 16). The court indicated that it was Mr. Gomez who needed to be sure about his offender score. (Id at 17). The hearing was again re-set to July 25, 2014. (Id. at 22)

On July 25, the defendant had not been brought to court when the case was called by the defense attorney, who indicated to the court he was still not ready for sentencing as he was trying to correctly calculate the defendant's offender score. (Id. at 23). The hearing was re-set again, this time to August 4, 2014.

On August 4, 2014 the defendant was sentenced in this case. His criminal history was listed on the Felony Judgment and Sentence for this case.⁴ Because his prior Residential Burglary conviction from Yakima County counted as two points in Count One, his offender score for Count One was listed as a five. His

³ The Felony Judgment and Sentence from the Yakima County case clearly indicates the crimes there were not the same course of conduct as a special finding marked by the judge. CP at 10; SROP at 16-17.

⁴ The criminal history in his judgment and sentence does contain an error. It includes a crime, "Harassment" from Yakima County (case 12-1-00226-1, crime committed on February 3, 2012; sentenced on July 20, 2012) as a felony, when in fact it is a gross misdemeanor.

offender score for Count Two was also incorrectly listed as a five. His offender score was not correct.

The defendant was sentenced to the low end of the range for Count One to seventeen months in prison. For Count Two, the offender was sentenced to the top end of the range to twelve months prison. The confinement time for each count was ordered to be served concurrently with each other as well as concurrently with the Yakima County case 13-1-00931-1.

D. ARGUMENT

- a. Can the defendant raise the voluntariness of his guilty plea for the first time on appeal when he is notified of the change in his offender score that would affect the voluntariness of his plea before the time of sentencing?

Due process requires that a defendant's plea be knowing, voluntary, and intelligent. CrR 4.2(d); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). Once a guilty plea is accepted the court must allow withdrawal of the plea only "to correct a manifest injustice." CrR 4.2(f). A defendant may challenge the voluntariness of a guilty plea when the defendant was misinformed about sentencing consequences resulting in a more onerous sentence than anticipated. State v. Miller,

110 Wn.2d 528, 756 P.2d 122 (1998). A defendant may raise the issue of voluntariness of his plea for the first time on appeal when he is unaware of the change to his score prior to or at the sentencing hearing. State v. Walsh, 143 Wn. 2d 1, 6; 17 P.3d 591, 593 (2001).

In State v. Walsh, the court was clear that the problem was that the record did not support a finding that the defendant knew about the change to his offender score. 143 Wash.2d at 5. The defendant plead guilty to a reduced charge in exchange for the agreement from the prosecutor to recommend the low end of the range. Id. at 3. Both the defense and the prosecution mistakenly understood that based upon an incorrect belief the defendant had only one point the prosecutor would recommend an eighty-six month sentence. Id. Prior to sentencing it was discovered by a community corrections officer that the defendant had two points for his prior felony conviction and the low end of the range would be ninety-five months. Id. at 4. At sentencing this change in score was not addressed at the prosecutor recommended ninety-five months based on the newly calculated score. Id. The court noted that nothing in the record supported a finding that the defendant knew about the change to the score and

was given the opportunity to withdraw his plea once the change was discovered. Id. at 5.

This case is clearly distinguished from Walsh, in that here the record clearly supports that the defense attorney and the defendant clearly knew about the change in his score. In fact, the sentencing was continued on more than one occasion by the defense attorney. His noted reasoning on more than one occasion was to clear up any misunderstandings about what the defendant's correct offender score was. The defendant was present in court for several of the continuances requested by his attorney on his behalf. Unlike Walsh, the record shows the defense attorney and the defendant knew about the change to the score. It is true that the court did not advise the defendant at the time of his sentencing that his score was different and at that point give him the opportunity to withdraw. This is the preferred practice for many obvious reasons, most of all include ensuring defendants are given the opportunity to withdraw their plea if it was made in error.

Although the record does not show this notice from the court, the record clearly establishes the defendant and his attorney had information about the change in score and were given many opportunities to object, make a

record, or ask for withdrawal; none of these remedies were employed. Walsh holds that a defendant who does not know that there has been a change in his score should be allowed the opportunity to withdraw his plea. In this case, the defendant clearly knew about the change in his score prior to his sentencing. Because the record is clear he knew about the change, the proper remedy afforded to him was to object at the time of sentencing. His failure to do so has waived the argument.

CONCLUSION

For the reasons stated, the case should be remanded for re-sentencing consistent with the correct offender score as a miscalculation occurred regarding the defendant's offender score.

Respectfully submitted October 21, 2015,

/s/
/s/ Jodi M. Hammond
Attorney for Respondent
WSBA #043885

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on October 21, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Amended Respondent's Brief:

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,)	Court of Appeals No. 32717-5-III
Respondent.)	
)	
GUILLERMO GOMEZ,)	AFFIDAVIT OF SERVICE
Appellant.)	
_____)	

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 21st day of October, 2015, affiant an electronic copy directed to:

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containing copies of the following documents:

- (1) Affidavit of Service
- (2) Amended Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 21st day of October, 2015, by THERESA BURROUGHS.



Lorraine A Hill

NOTARY PUBLIC in and for the State of Washington.

My Appointment Expires: 09-10-17