

**FILED**

MAY 29, 2015

Court of Appeals  
Division III  
State of Washington

NO. 32963-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

HENRY CAMPOS-GONZALEZ

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable John Hotchkiss, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied the appellant's motion to withdraw his guilty plea.

Issue Pertaining to Assignment of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Washington courts have held the requirement that a plea have a factual basis to be primarily a procedural requirement. But the factual basis may be constitutionally significant where it relates to the defendant's understanding of, and therefore the voluntariness of, the plea.

The appellant entered an Alford<sup>1</sup> plea to possession of cocaine. The only factual basis for appellant's plea was a field test result, which provides insufficient evidence to support such a charge. Where there is no indication the appellant understood such evidence was insufficient to support the charge, must the appellant be permitted to withdraw his guilty plea?

B. STATEMENT OF THE CASE

The State charged Henry Campos Gonzalez (Campos) with possession of a controlled substance, cocaine, and driving under the influence (DUI). CP 1-3. The probable cause affidavit stated that on May 27, 2013, officers stopped Campos's car for passing another vehicle in a

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

no-passing zone. Once out of his car, Campos showed signs of intoxication. As police were arresting Campos for DUI, they found an oddly-folded \$10 bill in his pocket. The folded bill contained a white powder that, according to the affidavit, “NIK<sup>2</sup>] tested positive for cocaine.” CP 75. The affidavit provides no indication of the officer’s training and experience in drug recognition. CP 75.

On July 22, 2013, Campos pled guilty to DUI, but he entered an Alford plea to possession of cocaine. CP 13; RP 6-7. Campos’s “Statement of Defendant on Plea of Guilty” states:

I drove a motor vehicle when I was under the influence of alcohol. *My plea to the cocaine is an Alford plea. I didn’t know I had it but I choose to plead guilty anyway.*

CP 13 (emphasis added).

Campos agreed the court could consider the probable cause affidavit to supply the factual basis for the Alford plea. RP 7. The court found the affidavit contained a factual basis for both charges. RP 7-8.

On the cocaine charge, the court sentenced Campos to a first-time offender waiver<sup>3</sup> sentence of 20 days of incarceration plus 12 months of

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<sup>2</sup>“NIK” stands for “Narcotics Identification Kit.” See <http://www.safariland.com/forensics/field-drug-tests/> (last accessed May 18, 2015).

<sup>3</sup> RCW 9.94A.650.

community custody. RP 8. The court noted, however, that Campos had an immigration “hold” and was likely to be deported. RP 3, 9-10.

Exactly one year later, Campos, represented by a new attorney, moved to withdraw the plea to possession of cocaine. CP 26. Campos, a longtime United States resident and the father of a three-year-old United States citizen, was in the process of being deported. RP 9, 62, 65; CP 68. He argued that under Padilla v. Kentucky<sup>4</sup> and State v. Sandoval<sup>5</sup> he had received ineffective assistance as to the immigration consequences of his plea. Primarily, Campos argued that his original defense counsel, Paul Cassel, had failed to familiarize himself with appropriate immigration-safe plea negotiation options. CP 26-34 (Motion to Vacate Guilty Plea); CP 35-38 (Campos declarations); CP 39-50 (Motion for Pre-Hearing Orders); CP 60-63 (Washington Defender Association Immigration Project materials submitted by the defense).

The court held a hearing on the motion to withdraw the plea. Campos and Cassel testified. RP 17-88 (transcripts of plea hearing). The court denied the motion, finding Cassel had advised Campos of the immigration consequences of the plea and that the prosecutor had flatly

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<sup>4</sup> 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

<sup>5</sup> 171 Wn.2d 163, 249 P.3d 1015 (2011).

rejected Cassel's attempt to negotiate the plea down to a lesser charge.<sup>6</sup> CP 67-69.

Campos timely appealed. CP 70-74. He now challenges the voluntariness of his plea on different grounds.

C. ARGUMENT

THIS COURT SHOULD PERMIT CAMPOS TO WITHDRAW HIS ALFORD PLEA BECAUSE THE PLEA LACKS A FACTUAL BASIS.

In entering a plea of guilty, an accused necessarily waives important constitutional rights, including the right to a jury trial, the right to confront one's accusers, and the privilege against self incrimination. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). To be valid, a guilty plea must be intelligently and voluntarily made and with knowledge that certain rights will be waived. Id. at 505-06.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (citing State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980)). Whether a plea is knowingly,

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<sup>6</sup> At the time he made the offer, however, Cassel did not understand the reduced charge he sought would likewise result in deportation. RP 34, 76-77.

intelligently, and voluntarily made is determined from a totality of the circumstances. Wood, 87 Wn.2d at 506.

Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea where withdrawal is necessary to correct a manifest injustice. An involuntary plea constitutes a manifest injustice. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). If the motion to withdraw is made after entry of the judgment, however, it is also governed by CrR 7.8(b), which states that a court “may relieve a party from a final judgment” for several reasons including mistake, newly discovered evidence, fraud, a void judgment, or any other reason justifying relief. In re Stockwell, 179 Wn.2d 588, 601, 316 P.3d 1007 (2014).

1. Campos’s plea to possession of cocaine lacked a factual basis.

CrR 4.2(d) provides that “[t]he court shall not accept a plea of guilty, 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.” CrR 4.2(d) also requires the court to be satisfied that a factual basis exists for the plea.

Campos entered the type of plea that is authorized by Alford, 400 U.S. 25 and State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). Under these cases, a defendant may voluntarily, knowingly, and intelligently

plead guilty even if he is unable or unwilling to admit that he participated in the acts constituting the crime. Alford, 400 U.S. at 37. When a defendant enters an Alford plea, however, the trial court must exercise extreme caution to ensure that the plea satisfies constitutional requirements. Newton, 87 Wn.2d at 373.

In order to find a factual basis exists, the court need not be convinced beyond a reasonable doubt that the defendant is guilty. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (citing Newton, 87 Wn.2d at 370). Instead, a factual basis exists if the evidence is sufficient for a jury to conclude that the defendant is guilty. Newton, 87 Wn.2d at 370 (quoting United States v. Webb, 433 F.2d 400, 403 (1st Cir. 1970)). The plea court may consider any reliable source of information to determine whether there is sufficient evidence, as long as it is made part of the record at the time of the plea. State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (citing In re Keene, 95 Wn.2d 203, 210 n. 2, 622 P.2d 360 (1980)).

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged, all reasonable

inferences from the evidence must be drawn in favor of the State and interpreted against the defendant. Id.

A laboratory test for a controlled substance “is not vital to uphold a conviction for possession of a controlled substance.” State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). “Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug.” State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). In determining whether, in the absence of a laboratory test, circumstantial evidence proves the substance’s identity beyond a reasonable doubt, courts have looked to the following, non-exhaustive, factors:

- (1) [T]estimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible;
- (2) corroborating testimony by officers or other experts as to the identification of the substance;
- (3) references made to the drug by the defendant and others, either by the drug’s name or a slang term commonly used to connote the drug;
- (4) prior involvement by the defendant in drug trafficking;
- (5) behavior characteristic of use or possession of the particular controlled substance; and
- (6) sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. at 801.

In Colquitt, an officer searched Colquitt’s clothing during the jail booking process and found in Colquitt’s pants pocket a small plastic bag containing several white, rock-like items. An officer then examined the items. In his report, he stated that the substance “appeared to be rock

cocaine.” Id. at 793 (internal quotation marks omitted). The officer then conducted a field test, which was positive for the presence of cocaine. Id. Colquitt declined to make any statement about the substance. Id.

The State charged Colquitt with unlawful possession of cocaine. Colquitt filed a petition to participate in a diversion program, which the trial court granted. Id. Colquitt signed an agreement under which the trial court agreed to dismiss the charge against him if Colquitt completed the program. Id. at 793-94. But if Colquitt failed to complete the program, he agreed to proceed with a bench trial based solely on the facts in the police report and the laboratory reports. The State never conducted any laboratory tests. Id. at 794.

Colquitt failed to comply and the trial court terminated him from the program. Based on the evidence contained in the police report, the trial court found Colquitt guilty of unlawful possession of the controlled substance. Id.

Colquitt appealed, arguing the evidence was insufficient to support his conviction. Id. Division Two of this Court agreed, stating “[w]e agree with Colquitt that speculation [by the police officer] and an unverified field test, with nothing more, is insufficient to support a conviction.” Id.

Unlike the Colquitt defendant, Campos was found guilty by the court following the entry of an Alford plea. But the situation is analogous.

While a court need not be convinced beyond a reasonable doubt that the defendant is guilty, a factual basis for such a plea exists only if the evidence is sufficient for a reasonable jury to conclude that the accused is guilty. Newton, 87 Wn.2d at 370.

Here, the factual basis must have been present in Campos's statement or the law enforcement affidavit, the only materials the court considered. Osborne, 102 Wn.2d at 95. But it can be found in neither. Campos's statement that "I didn't know I had it" fails to acknowledge that the substance in question was cocaine. CP 13. As for the affidavit, the only evidence the substance was in fact cocaine was a field test result. CP 75. This is less substantial than the evidence found inadequate in Colquitt.

Under the rationale set forth in Colquitt, the factual basis for the plea was insufficient. Campos's plea therefore lacked a factual basis, and he should be permitted to withdraw it under CrR 4.2 and CrR 7.8(b) (permitting court to grant relief from judgment based on specified reasons as well as "any other reason justifying relief").

2. Campos may raise this issue for the first time on appeal because the absence of a factual basis undermines the voluntariness of his plea.

A plea's voluntariness is a constitutional requirement. In this case, the absence of a factual basis suggests the plea was involuntary. Because

the voluntariness of a plea is of constitutional magnitude, and because the insufficient factual basis is obvious from the record, Campos may raise this issue for the first time on appeal. RAP 2.5(a)(3) (a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right).

The CrR 4.2(d) requirement of a factual basis for a plea is considered procedural. In re Pers. Restraint of Hews, 108 Wn.2d 579, 592 n.2, 714 P.2d 983 (1987). Failure to adhere to the technical requirements of CrR 4.2 does not in itself result in a constitutional violation. See State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (holding lack of signature on a plea statement in violation of CrR 4.2(g) does not constitute a manifest injustice so long as the totality of the circumstances demonstrates the defendant's plea and waiver of rights is intelligently and voluntarily made).

Nonetheless, CrR 4.2 requires that the record of a plea hearing show the plea was entered voluntarily and intelligently. Branch, 129 Wn.2d at 642 (citing Wood, 87 Wn.2d at 511). The factual basis for a plea may be constitutionally significant where it relates to the accused's understanding of his plea. Hews, 108 Wn.2d at 591-92. In other words, for a plea to be voluntary, the accused must understand the law in relation to the facts to the extent that he can make an informed decision regarding

whether to plead guilty. Id. at 592 (citing United States v. Johnson, 612 F.2d 305, 309 (7th Cir. 1980)).

Here, there is nothing in the record to indicate Campos understood that a field test was insufficient to support a conviction for possession of a controlled substance. Moreover, Campos's "Statement of Defendant" indicates he was unaware he was in possession of the controlled substance. Yet there is nothing in the record to indicate Campos understood that unwitting possession was a defense to the charge. See State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998) ("Unwitting possession is [an] affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute.").

In this case, the lack of factual basis undermined the voluntariness of Campos's guilty plea. This Court should permit Campos to withdraw his plea.

D. CONCLUSION

For the foregoing reasons, this Court should remand with instructions that Campos be permitted to withdraw his guilty plea.

DATED this 29<sup>th</sup> day of May, 2015.

Respectfully submitted,

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State v. Henry Campos-Gonzales

No. 32963-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29<sup>th</sup> day of May, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Douglas County Prosecutor  
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Signed in Seattle, Washington this 29<sup>th</sup> day of May, 2015.

x   
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