

FILED
December 23, 2015
Court of Appeals
Division III
State of Washington

NO. 33106-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MATTHEW HENRY DE VORE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-1-01303-9

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court correctly allowed the State to file an amended information that was given to the court prior to the court reviewing the guilty plea and engaging in a colloquy with the defendant.**
- B. The defendant never pleaded guilty and never provided a factual basis of establishing the elements of second degree murder.**

II. STATEMENT OF FACTS

The defendant allegedly stabbed and killed Thomas Christian on November 24, 2014. The defendant was arrested and placed on a 72-hour hold. On November 26, 2014, based on oral briefings but without the benefit of written police reports, the State filed an information charging Murder in the Second Degree. CP 1-2.

Arraignment was held on Wednesday, December 4, 2014.

Immediately prior to arraignment, the Court Administrator's Office came into the courtroom to discuss trial dates. Prosecutor Andy Miller and the court administrator asked defense counsel, Scott Johnson, if a trial date of January 26, 2015, would work for him. Mr. Johnson replied that it would. CP 69, Finding of Fact ("FF") Number 24.

At arraignment, immediately after defense counsel told Court Administration and the prosecutor that the January 26, 2015, trial date would work for him, defense counsel stated, "at this time, we wish to enter a guilty plea." RP 12/04/2014 at 7. At that time, the State moved to amend

the information to Murder in the First Degree. *Id.* at 7-8; CP 15-16. The defendant said he had already handed the guilty plea to the court. RP 12/04/2014 at 8. The State noted that it had not reviewed the factual basis or guilty plea. *Id.* at 9. The court continued the arraignment to December 10, 2014. *Id.* at 11.

The proposed written guilty plea included the following factual basis:

On the date charged in Benton County, Washington, I saw Thomas Christian, the man that was living with and dating my wife, at a business in Kennewick. I went to the business early in an attempt to avoid seeing Mr. Christian. When I unexpectedly saw Mr. Christian, I became overcome with emotion and stabbed Mr. Christian once. As a result of my stabbing Mr. Christian, Mr. Christian died. I also acknowledge that my acts caused a destructive and foreseeable impact on others, including my wife.

CP 12; CP 70, FF Number 35.

The next day, on December 5, 2014, the State filed a legal memorandum which noted that the factual basis was inadequate because there was no mention of intent, that nowhere did the defendant admit that he intended to cause the death of Mr. Christian. CP 70, FF Number 36.

The court then continued the arraignment to December 22, 2014. The court initially ruled that the State could not amend the information. RP 12/22/2014 at 16. The defendant was then allowed to supplement the

factual basis for the plea. RP 12/22/2014 at 22-24. The defendant's entire oral statement is as follows:

THE DEFENDANT: Yes, sir. I never, I never intended to – for what happened happen. I was under a lot of duress for some number of months and I tried to avoid Mr. Christianson [sic].

And on the date that – on the 24th, when I went there, I was trying to get there early to avoid him. And I did not intend to meet him in any way, but rather to avoid him.

And I was under a lot of, a lot of emotional duress, missing my children. And unfortunately I tried to confront him to talk to him about it. And, and I don't know what happened, sir, but – just our conversation was an ongoing conversation between us that always seemed to go wrong.

And I just – at that moment, I – something came over me. It was like getting hit by a lightning bolt.

And after it happened, I didn't even really recognize what had happened until later. I was in shock, I think, for an entire week. But I told Mr. Johnson, as soon as I saw the charges –

MR. JOHNSON: I don't want him to say what he told me, your honor.

THE DEFENDANT: All right. And that moment when I was standing there, I tried to talk to him and tell him – I was basically trying to tell him that I wanted to see my kids, but unfortunately it came out wrong and I was angry.

And when we started talking, and I felt like he was treating me like a dog and told -- just bushed [sic] me off and kind of motioned a kick at me and – I don't believe for any intent but other than just to belittle me. And that was kind of an ongoing thing. And I just, I snapped and I drew my, I drew a knife and, and I stabbed him. I attempted to kill him.

THE COURT: Pardon me?

THE DEFENDANT: In a – an attempt to kill him. That is not true.

THE COURT: Anything else you'd like to say, sir –

THE DEFENDANT: No, sir.

CP 71-72, FF Number 43; RP 12/22/2014 at 23-24.

Before deciding whether to accept the defendant's guilty plea, the court continued the hearing until December 29, 2014. CP 73, FF Number 52; RP 12/29/2014 at 30-32.

On December 29, 2014, the trial court reversed its decision and allowed the State to file the amended information, stating in part, "this court cannot . . . properly find that allowing the State to amend the charge from second degree murder to first degree murder in this case [is] anymore prejudicial than the amendment allowed by *Ford*." RP 12/29/2014 at 65.

III. ARGUMENT

A. The trial court did not err by allowing the State to file an amended information.

The trial court's decision to allow the State to file an amended information was correct pursuant to *State v. Ford*, 125 Wn.2d 919, 891 P.2d 712 (1995). The trial court's initial reluctance to not allow the filing of the information was done without the benefit of briefing on *State v. Ford*.

In *State v. Ford*, a triple murder occurred on April 24, 1994. *Ford*, 125 Wn.2d at 921. The defendant was charged with first degree murder on April 27, 1994. *Id.* The defendant was arraigned on April 29, 1994. *Id.* At

arraignment, defense counsel stated that defendant Ford had instructed him to plead guilty to all three counts. *Id.* at 922. “The prosecutor immediately requested a continuance of the arraignment on the grounds that the State had not given the defendant any discovery and that the State was in possession of *Brady* information.” *Id.* The trial judge continued the arraignment at the State’s request. *Id.* “During that week, further potentially inculpatory evidence was discovered. At the continued arraignment, the State asked for, and was granted, permission to amend the information to charge aggravated murder.” *Id.* The Supreme Court held that the continuance and amendment of the information were properly granted. *Id.* at 927, 929.

The *Ford* Court first noted that there was no constitutional right to plead guilty and that any right to plead guilty is created by court rule and its scope can be limited or qualified by them. *Id.* at 923-25. It then cited *State v. Martin*, 94 Wn.2d 1, 4, 614 P.2d 164 (1980), noting that nothing in that decision compels automatic and immediate acceptance of a proffered guilty plea. *Ford*, 125 Wn.2d at 924. To the contrary, *Ford* noted, *Martin* makes the trial court’s acceptance of the guilty plea contingent on the trial court’s independent evaluation of voluntariness. *Id.*

The *Ford* Court then cited CrR 4.2(d) as also recognizing the independent obligation of the trial court:

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

Ford, 125 Wn.2d at 924.

The Court found that *Martin* and CrR 4.2(d) made it clear that the court is part of the proceedings and “is not a potted-palm functionary, with only the attorneys having a defined purpose.” *Id.* at 924-25. Therefore, it is clear that in the present case, the defendant had not pleaded guilty at the time the State filed its amended information.

The *Ford* Court then found the State’s filing of an amended information was proper. *Id.* at 928-29. It cited CrR 2.1(d) that states, “the court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” *Id.* at 928. The *Ford* Court found that the filing of the amended information did not prejudice any rights of the defendant. *Id.* at 928-29. It noted that defendant Ford’s proffered plea could not be used against him in any subsequent trial. *Id.* at 928.

The facts in the present case are even more compelling for allowing the filing of the amended information. While in both cases the defendant had not received any discovery, in the present case, the State had the amended information prepared and ready to present at the

arraignment without the need of any continuance. There is no prejudice to the defendant in the present case by allowing the filing of an amended information.

The lack of prejudice in the present case is also shown by the defendant's actions at the initial arraignment. Immediately prior to the arraignment, Court Administration and the prosecutor asked the defendant if a trial date of January 26, 2015, would work. CP 69, FF Number 24. The defendant did not answer that the trial date issue was moot because he intended to plead guilty. He did not hand the guilty plea to the prosecutor to review, including a review for factual basis, as had been done in every case in Benton County for years. Instead, he said that the trial date would work. Clearly, the defendant was not relying on the State's representations.

Instead, the defendant rushed to attempt a guilty plea without discovery or any plea negotiation. The defendant may have a right to attempt that, but he does not have the right to object to an information being timely filed before the court meets the requirements of CrR 4.2(d). Indeed, the defendant's appellate brief never discusses CrR 4.2(d) or its requirements.

The defendant never shows any actual prejudice. Page sixteen of his appellate brief includes some nebulous arguments of prejudice which were articulately rejected by the trial judge:

7. Now considering the court's holding in Ford, I also considered the arguments Mr. Johnson just made regarding the defendant having already admitted guilt, given up his right to remain silent; certainly those factors were present, although not specifically addressed as I recall reading the case, not specifically addressed, but certainly had to have been present since he had proffered his plea in the Ford case. The right to remain silent, as far as the information not being used against him was in fact addressed. I don't think that is something that supports substantial prejudice to Mr. DeVore's rights.

Due process was essentially the primary issue of the matter, and the court, at least in my opinion, impliedly decided that the court could – I mean the State could have amended the plea following the proffer prior to the court accepting. So the court does not believe that is a prejudice that would preclude the State from filing an amended information, nor is the court persuaded that the mental health impacts on Mr. DeVore are such that they prejudice his substantial rights.

As I said, the issue – I mean the charge in the Ford case was amended from first degree to first degree aggravated murder, three counts, I believe. And the court found that allowing that amendment did not substantially prejudice Mr. Ford's rights.

8. Allowing the State to amend the charge from Murder in the Second Degree to Murder in the First Degree in the present case is not any more prejudicial than the amendment allowed in Ford.

9. The Court does not find that allowing the State to amend the information to Murder in the First Degree after Mr. DeVore pled guilty to Murder in the Second Degree is a violation of procedural due process.

10. The Court does not find that the mental anguish Mr. DeVore has endured by the State being

allowed to amend the information to Murder in the First Degree after Mr. DeVore pled guilty to Murder in the [Second] Degree prejudiced Mr. DeVore.

11. Because there was no prejudice to Mr. DeVore, the State is allowed to amend the information to Murder in the First Degree.

CP 74-75, Conclusions of Law Numbers 7-11; RP 12/29/2014 at 64-66.

B. The defendant had not pleaded guilty at the time of the filing of the amended information because there was no factual basis for the plea and the requirements of CrR 4.2(d) had not been met.

The filing of the amended information was also timely because the defendant never actually pleaded guilty. CrR 4.2(d) states that the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there was a factual basis for the plea. Here, the defendant never established an adequate factual basis. He repeatedly refused to say that he intended to kill Mr. Christian. *See* RP 12/22/2014 at 23-24.

While the trial court did find that there was a factual basis, the State objected to that finding. RP 12/22/2014 at 26-27.

More importantly, *State v. S.S.*, 67 Wn. App. 800, 812, 840 P.2d 891 (1992) held that “[a] trial court’s correct ruling will not be disturbed on appeal merely because it was based on an incorrect or insufficient reason.” (quoting *State v. Byrd*, 25 Wn. App. 282, 289, 607 P.2d 321 (1980)). In other words, if Judge Mitchell’s decision to allow the filing of the amended information was correct because at least in part the defendant

never established a sufficient factual basis, the trial court ruling should be affirmed, even if it incorrectly concluded that there was a sufficient factual basis.

In the present case, there was no factual basis in the written plea that the defendant intended to kill Thomas Christian. In fact, he contradicts the element of intent by writing, “when I unexpectedly saw Mr. Christian, I became overcome with emotion and stabbed Mr. Christian once.” CP 70, FF Number 35.

The defendant’s oral statement to the court similarly denied intent. The entire statement is included in the Statement of Facts, the Findings of Fact and Conclusions of Law, and the verbatim report of proceedings. CP 71-72, FF Number 43; RP 12/22/2014 at 23-24. His description of his mental state was, “And I just – at that moment, I – something came over me. It was like getting hit by a lightning bolt. And after it happened, I didn’t even really recognize what had happened until later.” CP 71-72, FF Number 43; RP 12/22/2014 at 23-24.

The insufficiency of the defendant’s statements to establish a factual basis is shown by two cases.

In *State v. Powell*, 29 Wn. App. 163, 167, 627 P.2d 1337 (1981), the Court of Appeals reversed the trial court’s refusal to allow the withdrawal of a guilty plea because there was no description of the

defendant's acts or state of mind, which resulted in the charge to which he ultimately pleaded guilty.

In *Matter of Taylor*, 31 Wn. App. 254, 259-60, 640 P.2d 737 (1982), the Court of Appeals granted the personal restraint petition because there was an insufficient factual basis for the guilty plea because there was no description of the defendant's acts or state of mind.

In other words, a defendant cannot plead guilty to second degree murder without stating that he intended to kill the victim. Since the defendant repeatedly refused to say he intended to kill Mr. Christian, he never pleaded guilty.

IV. CONCLUSION

The defendant had not pleaded guilty when the State handed the amended information to the court. This is because the trial court had not completed the requirements of CrR 4.2(d) and because the defendant never admitted that he intended to kill Thomas Christian.

There was no prejudice to the defendant as evidenced by the defendant, immediately before his attempted guilty plea, telling Court Administration and the prosecutor that the trial date of January 26, 2015, worked for him. The trial court correctly found that the defendant's allegations of prejudice did not constitute prejudice.

RESPECTFULLY SUBMITTED this 23rd day of December,

2015.

A handwritten signature in cursive script, appearing to read "A. Miller", written in black ink.

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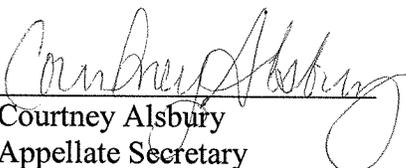
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 23, 2015.


Courtney Alsbury
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