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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34533-5-III

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STATE OF WASHINGTON, Respondent,

v.

TARA J. AMMONS, Appellant.

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RESPONDENT'S BRIEF

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## **I. INTRODUCTION**

The trial court granted Tara Ammons' motion to vacate the judgment of conviction and sentence in her case because only after she waived her right to a jury trial to enter a drug court agreement did the parties discover that she was not a citizen of the United States. Because the trial court acted within its discretion in determining that a mutual mistake of fact was grounds to rescind the drug court agreement and in applying equitable tolling, the ruling should be affirmed.

## **II. ASSIGNMENTS OF ERROR**

1. The State assigns error to the trial court's findings of fact, arguing they are not supported by substantial evidence and the trial court improperly shifted the burden of proof to the State.
2. The State assigns error to the trial court's ruling allowing Tara Ammons to withdraw her drug court agreement and vacate her judgment and sentence under CrR 4.2.
3. The State assigns error to the trial court's ruling allowing Tara Ammons to withdraw her drug court agreement and vacate her judgment and sentence under CrR 7.8(b)(1) and (5).
4. The State assigns error to the trial court's ruling allowing Tara Ammons to withdraw her drug court agreement and vacate her

judgment and sentence, arguing that the ruling violates the separation of powers doctrine.

5. The State assigns error to the trial court's application of the equitable tolling doctrine.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Whether sufficient evidence supports the trial court's finding that Tara Ammons was not able to opt out of drug court after it was discovered she was not a U.S. citizen when that fact was attested to by Ammons's former counsel.

**ISSUE 2:** Whether CrR 4.2 authorizes the relief granted.

**ISSUE 3:** Whether CrR 7.8 authorizes the relief granted.

**ISSUE 4:** Whether the trial court's exercise of equitable powers to rescind a drug court agreement based upon a mutual mistake of fact usurps the pardon power of the Executive.

**ISSUE 5:** Whether the trial court is justified in applying equitable tolling to Ammons's post-judgment motion when (1) prior judicial action caused Ammons to remain in drug court; (2) Ammons was found incompetent in immigration court as a result of mental illness dating to Ammons's participation in drug court; and (3) Ammons was not advised of the

possibility of adverse immigration consequences at the time of entering the drug court agreement.

#### **IV. STATEMENT OF THE CASE**

In November 2007, the State charged Tara Ammons with two counts of possessing a controlled substance with intent to deliver, one count of third degree theft, and one count of second degree theft. CP 193-96. The controlled substance charges are considered aggravated felonies under the Immigration and Nationality Act, rendering noncitizens permanently inadmissible to the United States. CP 83.

Ammons was adopted by U.S. citizen parents and brought to the U.S. from Mexico in her early childhood. CP 77. Based upon advice from her parent's adoption attorney, Ammons and her family believed for her entire life that she was a U.S. citizen as the result of the adoption. CP 77-78, 94-95.

The State offered Ammons a plea deal in which she would plead guilty to one count of possessing a controlled substance without intent. Rather than taking the offer, Ammons elected to enter a drug court agreement, still under the assumption that she was a U.S. citizen. CP 91. Likewise, her attorney at the time did not advise her of any immigration consequences resulting from entering the drug court agreement. CP 93.

The agreement required Ammons to waive her right to a speedy trial, her right to a jury, her confrontation and cross-examination rights, and her right to present other evidence or witnesses than the police reports submitted by the prosecuting attorney on the issue of guilt. CP 185-86.

Shortly after entering drug court, Ammons learned that she was not a U.S. citizen after all. CP 73-74, 95. Her non-citizenship rendered her ineligible for drug court; however, for reasons that are not clear, the drug court judge chose to ignore the citizenship policy and she remained in the program. CP 53-54. The parties disputed whether Ammons was given the option to withdraw her drug court agreement at the time; the prosecuting attorney asserted that she was, her former defense attorney asserted that she was not. CP 14, 57.

Subsequently, Ammons was terminated from drug court and found guilty of all four original charges. CP 181. Thereafter, Ammons was subjected to removal proceedings in immigration court. CP 82. During those proceedings, she underwent a mental evaluation and was determined to be mentally incompetent to represent herself. CP 148, 164. That evaluation considered previous mental health assessments dating back to December 2008, at which time she was diagnosed with bipolar disorder. CP 149. Despite the diagnoses, Ammons did not consistently take

psychiatric medications until she was detained for the removal proceedings. CP 152. She also appeared to suffer from cognitive deficits and poor memory functioning. CP 154.

On March 14, 2016, Ammons moved to vacate her drug court agreement and the judgment and sentence. CP 166. The State opposed the motion, arguing that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), did not apply because the drug court agreement was not a guilty plea. CP 61. Following a hearing, the trial court found that Ammons was not advised of immigration consequences before entering drug court, and that her decision to enter into drug court was not knowing. CP 10. Agreeing that *Padilla* applies only to guilty pleas and not the drug court agreement, the court concluded that Ammons did not receive ineffective assistance of counsel but concluded that due to the mutual mistake of fact about her citizenship status, she was entitled to vacate her judgment and sentence and set aside the drug court agreement. CP 11. Citing CrR 7.8(b)(1) and (b)(5), and applying equitable tolling, the trial court granted the motion. CP 12. The State now appeals. CP 2.

## V. ARGUMENT

The State's appeal arises from the trial court's grant of Ammons's CrR 7.8 motion, which is reviewed for abuse of discretion. *State v. Slanaker*, 58 Wn. App. 161, 163, 791 P.2d 575 (1990). A much stronger showing is required to overturn a decision granting such a motion than a decision denying the motion. *Id.* (citing *State v. Brent*, 30 Wn.2d 286, 290, 191 P.2d 682 (1948)). Because the trial court acted within its discretion when it resolved disputed questions of fact in Ammons's favor, concluded the facts supported relief under CrR 7.8(b)(1) and (b)(5), and determined the motion was not time-barred, the ruling should be affirmed.

A. Sufficient evidence supports the trial court's findings because they rest upon the court's credibility determinations.

The State contends that the trial court's finding that Ammons was not given an opportunity to "opt out" of drug court is not supported by sufficient evidence. *Opening Brief of Appellant*, at 8. But the finding is supported by the declaration of Ammons's former counsel, and the trial court's credibility determination is not disturbed on appeal. Because substantial evidence supports the finding, the order should be affirmed.

The trial court entered findings of fact and conclusions of law supporting its ruling. CP 3-7. A trial court's factual findings are reviewed

for substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 968, 195 P.3d 506 (2006). Substantial evidence exists if it is found “in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963). If substantial evidence is present, the Court of Appeals will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The reviewing court defers to the fact finder on questions of witness credibility and evidence weight. *In re Welfare of Seago*, 82 Wn.2d 736, 739–40, 513 P.2d 831 (1973).

The State has not assigned error to any specific findings of fact, and the court therefore need not review them. RAP 10.3(g); *see also generally State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) (discussing application of rule). Unchallenged findings of fact are verities on appeal. *State v. Harris*, 106 Wn.2d 784, 790, 725 P.2d 975 (1986). Courts will excuse a failure to properly assign error only when the nature of the challenge is perfectly clear. *Slanaker*, 58 Wn. App. at 165.

Here, the State points to Findings of Fact 15 and 23, which it argues conflict. *Opening Brief of Appellant*, at 9-10. Those findings state:

15. The record is unclear as to whether Ms. Ammons was given an option to voluntarily leave Drug Court and return.

...

23. Ms. Ammons did not knowingly enter into the Drug Court Agreement. She entered the Drug Court program mistakenly thinking she was a U.S. citizen, and when it was discovered that she was not a U.S. citizen, she was not advised of the consequences of her failure to complete the program successfully or given an opportunity to opt out of the program.

CP 5-6.

Reviewing the findings as a whole makes it clear that the trial court was simply acknowledging that the parties disputed what had transpired in drug court, and its own record did not shed any light on the question.

Finding 16 describes the differing accounts of the prosecuting attorney and Ammons's counsel, and Finding 17 reiterates that the court's record does not clearly reveal how the citizenship problem was addressed one way or the other. CP 5. The drug court minutes and the case docket submitted with the State's materials show only that the parties became aware that Ammons's citizenship was an issue early on, but shed no light on how the parties and the court handled it at the time. CP 18-23. The trial court's findings merely acknowledge the ambiguous state of the record in making its determination.

In light of the record, the court was entitled to determine which version of events it thought was more credible and to weigh the evidence as it thought appropriate. In his supplemental declaration, Ammons's attorney stated, "Contrary to the statements in the Declaration of Karl Sloan dated 5/ 6/ 2016, Ms. Ammons did not have the opportunity to leave the drug court track and contest her charges through the normal criminal track." CP 14. This testimony sufficiently supports the trial court's finding that Ammons was not given the chance to "opt out" of drug court.

Because Ammons's evidence supports the trial court's findings of fact, and because the findings are not in conflict, the ruling should be affirmed.

**B. The trial court did not improperly shift the burden of proof.**

The State argues that the trial court shifted the burden of proof to the non-moving party to show that she was given the opportunity to opt out of drug court once her citizenship was discovered. *Opening Brief of Appellant*, at 18. But the trial court did not shift the burden of proof, it simply examined conflicting evidence and resolved the dispute in Ammons's favor by relying on her prior attorney's testimony. Accordingly, there was no error.

Under CrR 7.8, the party seeking relief has the burden to support its motion with affidavits setting forth the factual basis for request. If the affidavits fail to set forth sufficient grounds to support relief, then the motion may be denied without a hearing. If the affidavits establish grounds for relief, then the court will require the opposing party to appear and show cause why the relief requested should not be granted. *State v. Hardesty*, 129 Wn.2d 303, 316-17, 915 P.2d 1080 (1996) (discussing procedural requirements of CrR 7.8).<sup>1</sup> This procedure serves to filter out requests for relief that are inadequately supported by sworn testimony, or in which the proffered facts do not support relief, advancing for hearing only those motions in which the moving party has made a *prima facie* showing of entitlement to relief.

Here, Ammons's motion was supported by affidavits that showed a material mutual mistake of fact affecting the drug court agreement, a lack of advisement of the citizenship-related risks of waiving her constitutional rights to enter drug court, and a reasonable likelihood that had the mistake not occurred or had the agreement been contemplated in full knowledge of

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<sup>1</sup> Although CrR 7.8 was subsequently amended in 2007, the basic procedural outline remains the same – the trial court orders the opposing party to appear and show cause if it determines either that (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing. CrR 7.8(c).

her status and the potential consequences, the outcome would have been different. CP 13-14; 81-84, 91-96. Having made her *prima facie* case for relief, it was not improper for the trial court to require the State to show cause why the requested relief should not be granted. That the trial court considered disputed facts surrounding the discovery of Ammons's citizenship status after she entered drug court and resolved those questions in favor of Ammons's evidence does not mean that the court shifted the burden of proof to the State. *See* Section A, *supra*.

To the contrary, the trial court found from all the evidence presented that the parties did not learn Ammons was not a citizen until after she had already entered drug court. CP 4. Although her citizenship status rendered her ineligible, she was not removed from the program, and she was not allowed to opt out. CP 4-6. Because the State did not challenge them, those findings are verities. *Harris*, 106 Wn.2d at 790. These findings support the trial court's conclusions that a mutual mistake of fact warranted rescission of the agreement under CrR 7.8(b)(1), and the procedural irregularities (including the inadequate record) as well as the lack of prior knowledge that she would be exposed to a risk of deportation consequences supported relief on equitable grounds under CrR 7.8(b)(5). CP 6-7. The State shows no error.

C. CrR 4.2 does not authorize the relief granted; but because CrR 7.8 does, the error is harmless.

The State contends, and Ammons concedes, that to the extent the trial court's order concluded that CrR 4.2 authorized the relief requested, that portion of the order is erroneous. CP 7. CrR 4.2 applies on its face to guilty pleas, and Ammons did not plead guilty when she entered into the drug court agreement. However, the order independently concludes that CrR 7.8 allows her to vacate her judgment and sentence. CP 6-7. Because this conclusion is supported by the findings of fact and is not clearly unreasonable, reversal is not required.

Although CrR 4.2's procedural requirements do not apply to Ammons' drug court agreement, CrR 7.8(b)(1) permits the trial court to vacate the judgment and sentence due to "Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Where, due to a mutual mistake of fact, the defendant waives critical rights without full knowledge of the consequences, courts have applied contract principles to permit either rescission or enforcement of the agreement. *See State v. Walsh*, 143 Wn.2d 1, 9, 17 P.3d 591 (2001) (plea agreement is involuntary where based upon mutual mistake of fact;

defendant may elect remedy). Here, the same contract principles support the trial court's conclusion that the highly unusual circumstances surrounding Ammons' entry into drug court and subsequent discovery that she was not a U.S. citizen warranted relief from the drug court agreement. CP 4. This conclusion was not manifestly unreasonable and should be affirmed. *See State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) ("A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons.") (internal quotations omitted).

Additionally, the State contends that the trial court erred in granting the motion under CrR 7.8 because Ammons invited the error by staying in drug court. *Opening Brief of Appellant*, at 27. But this argument is necessarily dependent on the State's contention that the court erred when it found Ammons was not able to opt out of drug court based upon the representations of her former attorney. Because substantial evidence supports the trial court's finding that Ammons was not able to opt out of drug court after the mistake was discovered, the State's argument necessarily fails. *See Section A, supra*.

D. Granting the motion to vacate the judgment and sentence was not a judicial pardon and was within the trial court's discretion.

The State contends that the trial court's ruling constitutes a judicial pardon, analogizing to the ruling in *State v. Aguirre*, 73 Wn. App. 682, 871 P.2d 616 (1994). *Opening Brief of Appellant*, at 31-34. In *Aguirre*, the trial court relied solely on CrR 7.8(b)(5) to vacate the judgment and sentence, stating that the defendant could not get a fair asylum hearing if the conviction stood. 73 Wn. App. at 686. No facts supporting relief under CrR 7.8 appeared other than the defendant's personal history and the posture of his asylum proceedings. *Id.* at 684-87. The Court of Appeals reversed, holding that the trial court's invocation of CrR 7.8(b)(5) for the sole reason of affecting his deportation status violated the separation of powers that vested pardoning powers in the Governor. *Id.* at 688-89.

Here, unlike in *Aguirre*, the trial court concluded Ammons was entitled to relief under both CrR 7.8(b)(1) and 7.8(b)(5). While *Aguirre* stands for the proposition that a court may not vacate a conviction solely on grounds that it considers the conviction unfair, the present case is not like *Aguirre* because the trial court determined that relief was independently justified due to the mistake of fact underlying the drug

court agreement. Where the *Aguirre* court identified only the defendant's personal circumstances and the harshness of the immigration consequences when it granted relief, here, the trial court cited the mutual mistake of fact about Ammons' citizenship that led to her entering drug court, the procedural irregularities that kept her case on the drug court track even though her citizenship should have been disqualifying, and her lack of knowledge prior to entering the drug court agreement that it could result in her deportation, in support of its conclusion that Ammons established grounds for relief under the rule. CP 4-7.

Because the defects in the process by which Ammons's conviction was obtained independently justify the relief granted under CrR 7.8(b)(1), the grant of relief in this case is not the kind of decision that amounts to a judicial pardon as in *Aguirre*, where the court sought only to forgive the defendant's crime and identified no substantive or procedural defect with the conviction. The trial court did not violate the separation of powers when it granted her motion pursuant to CrR 7.8(b)(1) and (5).

E. The trial court did not err in concluding Ammons's motion was not time-barred.

Lastly, the State contends the trial court erred in granting Ammons's motion because it was not filed within one year of the

judgment and sentence becoming filed, and is therefore time-barred.

*Opening Brief of Appellant*, at 35-36. But because the trial court acted within its discretion to equitably toll the filing period as permitted by *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), no error occurred.

The State acknowledges that *Littlefair* permits the trial court to apply equitable tolling to a motion to withdraw a judgment and sentence when the defendant was not advised of immigration consequences and did not know that the plea would result in deportation. 112 Wn. App. at 765. Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” *Id.* at 759 (quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). Examples of circumstances where equitable tolling is appropriate may include instances where the court or counsel have contributed to the error, and the party seeking relief has acted with reasonable diligence. *See, e.g., In re Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) (defendant had attempted to raise specific enforcement of plea agreement in prior appeal); *Duvall*, 86 Wn. App. 871 (court’s reliance on defense counsel’s stipulation to agreed restitution order excused State’s failure to conduct a restitution hearing within the time required); *Littlefair*, 112 Wn. App. 749 (commencement of immigration proceedings justified

equitable tolling as to noncitizen who was not advised that deportation would result from conviction).

The State contends that Ammons failed to show circumstances of bad faith, deception, or false assurances, and therefore is not entitled to equitable relief. *Opening Brief of Appellant*, at 39. But the State here overlooks the original trial court's decision not to enforce the drug court rules prohibiting non-citizens from participating, or to give Ammons an option to back out of the drug court agreement at the time. CP 4-6, 14, 54. Subsequently, after deportation proceedings were commenced, Ammons was found incompetent to participate in the process without the assistance of counsel. CP 164. The evaluator noted that Ammons had been repeatedly assessed and diagnosed with mental health disorders beginning in December 2008, while she was still participating in drug court. CP 4-5, 149. After a representative was appointed to assist her in July 2015, her motion was filed promptly thereafter in March 2016. CP 84, 166.

A trial court has broad discretion in equitable matters, and will not ordinarily be reversed unless that discretion is abused. *Sac Downtown Ltd. Partnership v. Kahn Eyeglasses*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994). Here, it was not unreasonable for the trial court to place the primary fault for the failure to address the discovery of Ammons's

citizenship at the appropriate time on itself, when the discovery did not result in Ammons's disqualification from participating in drug court. RP 64, 68. Nor was it unreasonable for the court to consider that the record did not show Ammons was ever advised of the immigration consequences that would result from a conviction. RP 39, 65. In light of these procedural irregularities, the trial court reasonably concluded that the only way to correct the unfairness resulting from not initially giving Ammons an option to decide about participating in drug court with full knowledge of the potential immigration consequences was to restore her to her original position. RP 69.

These circumstances are consistent with the requirements of governmental error and reasonable diligence and support the trial court's application of equitable tolling to Ammons's motion. Because the court's exercise of discretion to craft an equitable remedy was not clearly unreasonable, the decision should be affirmed.

## **VI. CONCLUSION**

For the foregoing reasons, Ammons respectfully requests that the court AFFIRM the order granting her motion to vacate the judgment and sentence.

RESPECTFULLY SUBMITTED this 13 day of February, 2017.

A handwritten signature in black ink, appearing to read "Andrea Burkhardt". The signature is written in a cursive style with a large initial "A".

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**DECLARATION OF SERVICE**

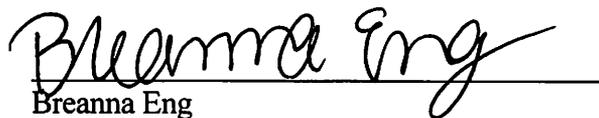
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Respondent's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13<sup>th</sup> day of February, 2017 in Walla Walla,  
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Breanna Eng