

62461-0

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NO. 62461-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

MARLOW EGGUM,

Appellant.

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in denying appellant's motion to withdraw his plea to felony harassment where there was no factual basis for the plea.

Issue Pertaining to Assignment of Error

Felony harassment requires proof that the accused knowingly threatened to kill the person harassed. Where appellant agreed the court could consider the certification for determination of probable cause as a factual basis for his guilty plea, but the certification failed to allege a threat to kill, did the certification fail to establish a sufficient factual basis for the plea? If so, did the trial court err in denying appellant's motion to withdraw his plea?

B. STATEMENT OF THE CASE

On July 20, 2005, the Whatcom County Prosecutor charged appellant Marlow Eggum with one count of stalking his ex-wife Janice Gray and one count of stalking her friend Jerry Hemple. CP 197-98. The state moved to amend the information on multiple occasions. On the first, it added a third count of felony harassment allegedly committed against Gray, as well as multiple additional counts of stalking, harassment and no contact order violations. CP

187-90. The state also gave notice of its intent to seek an exceptional sentence on a number of the counts. CP 172-177.

The parties ultimately reached an agreement, however, and the state filed a fourth amended information charging Eggum with: (1) stalking Gray; (2) stalking Hemple; and (3) felony harassment of Gray on May 8, 2006. CP 153-55. The state alleged a number of aggravating factors for each count. CP 153-154.

On January 4, 2007, Eggum pled guilty to the offenses charged in the fourth amended information. CP 151. Instead of making a statement, Eggum agreed the court could “review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 151.

The most recent probable cause statement filed (Third Amended Affidavit of Probable Cause Determination, filed 7/20/06)¹ alleged the following occurred on May 8, 2006:

On May 8, 2006, Marlow Eggum sent a letter to Lisa Fasano. In that letter he told Lisa Fasano that if Janice takes his money, “it will be the biggest mistake of her life, so my advice to you would be for you to tell her what cost she is going to end up paying.” He further went on to say, “you should be telling her to

¹ Appellant is contemporaneously moving to transfer the record in Eggum’s prior appeal (COA No. 60667-1-I) to this appeal, because it has a transcript of the plea hearing held on January 24, 2007. The transcript indicates the court considered the previously filed probable cause statement as a basis for the plea. RP (124/07) 3, 6.

walk away from the fire. Here's some more advice. If she's going to be stupid enough to steal it, then at least advise [sic] her to spend it quickly." At the end of his letter Eggum stated, "you are playing your last hand now. Once your hand is played, I still get to play the cards left in my hand, and my hand will be the last hand, and there is a trump card in my hand. At this state, it is only a matter of when I get to go next." Janice Gray learned of the letters and believes that this is a threat to kill her and she believes that Eggum will carry out the threat.

CP 170-71. This is the only occurrence described in the affidavit for May 8, 2006.

As part of the plea agreement, it was understood the state would recommend an exceptional sentence of 72 months on each count to run concurrently. CP 148. The plea recited Eggum's understanding that the court could impose an exceptional sentence above the standard range, based on the agreement of the parties or if the judge found the aggravators proven beyond a reasonable doubt. CP 149.

At the plea and sentencing hearing on January 24, 2007, defense counsel asserted 72-months was an agreed recommendation between the parties. RP (1/24/07) 10.² The court accepted the parties' sentencing recommendation and sentenced Eggum to an exceptional sentence totaling 72 months. CP 134.

² See note 1, supra.

Eggum subsequently filed a motion to withdraw and/or dismiss count 2 and for sentencing review. His motion was denied and the court's order affirmed by this Court. State v. Eggum, 2009 WL 297321 (Wash. App. Div. 1). The mandate issued May 22, 2009. Supp. CP ___ (sub. no. 199, Mandate, 5/26/09).

Meanwhile, on May 6, 2008, Eggum wrote to the Whatcom County Superior Court Clerk about a motion to withdraw his plea to count 3 (felony harassment of Gray), which he asserted he filed on December 5, 2007. Supp. CP ___ (sub. no. 133A, Letter, 6/6/08). Apparently, the clerk had recently written Eggum stating the court did not receive the motion. Id.

Attached to Eggum's letter was a Department of Corrections postage transfer receipt dated "12-5/6-2007" indicating Eggum was mailing to the Superior Court a "Withdraw[a] Plea Count-III – Notice of Appeal Included." Id. Eggum explained he included the notice of appeal in case Judge Steven Mura denied the withdrawal motion. Eggum requested the Clerk continue looking for the motion. In the meantime, Eggum would draft a new one. Id.

Eggum re-filed his motion on July 3, 2008. CP 34-51. Eggum asserted he should be allowed to withdraw his plea to count 3, because there was no death threat alleged and therefore no

factual basis for the plea. CP 37-38. As Eggum reasoned, a defendant cannot plead to “something that does not exist.” CP 42.

For example:

Such as, the defendant cannot agree to plea guilty to robbing a bank on May 8th 2006 in Bellingham, if no banks in Bellingham were robbed on that particular day. If there had been a plea, and no banks robbed on that day, the trial court judge would be obligated by law to vacate the plea[.]

CP 43.

A hearing was held on the motion before Judge Mura on July 29, 2008. Based on the postage receipt and the statements of a corrections officer, the court found Eggum’s motion was timely filed within the one-year collateral attack deadline. RP (7/29/08) 6-9. Eggum reiterated the statement of probable cause failed to allege a death threat. He further explained that at the time he wrote the letter to his ex-wife’s attorney Lisa Fasano, Fasano had motioned in the divorce case to force Eggum to sell his house. What Eggum attempted to convey in the letter was that if forced to sell his house, he would make up the loss by selling “sex movies” featuring his ex-wife. CP 38; RP (7/29/08) 14.

The court denied Eggum's motion to withdraw, reasoning he admitted the offense by pleading guilty and his statements were open to interpretation:

You pled guilty to that offense admitting that you communicated a threat of death. You come now and argue that the language that is contained within the affidavit in support of probable cause cannot reasonably be interpreted as a threat of death but rather as a threat to publish movies involving your ex-wife. Those words, in this court's view, are capable of being interpreted, depending upon the intent of the speaker either in support of what you're saying or in support of an intent to harm or to kill. And when you come in and you plead guilty to that and acknowledge to me that that's in fact what you intended to do, that's in fact what you did, was communicate a threat as alleged in the information and the words contained in that communication could be indirectly interpreted as communicating that threat, then this court found you guilty.

To come in then a year-and-a-half later and say no, there wasn't anything there to support it, I can't accept that argument. It could be interpreted either way and I'm not going to go back now and reinterpret in a way that's contrary and inconsistent to what you admitted to me at the time of the plea you did. Therefore I will deny.

RP (7/29/08). The court directed the prosecutor to prepare an order denying the motion. RP (7/29/09) 17.

Eggum filed a motion for reconsideration on August 5, 2008. CP 26-33. Eggum maintained there was no factual basis for his plea. Eggum also alleged his attorney at the time of the plea, Alan

Chalfie, told him he heard Judge Mura was sexually involved with Fasano. Eggum argued Judge Mura was not objective and should recuse himself. CP 26-27.

Judge Mura called for Chalfie's presence at the hearing on the motion for reconsideration on September 2. Chalfie explained the only statement he heard regarding a connection between the judge and Fasano was when "the court itself said that it owned the building that Ms. Fasano was using as a law office and gave the lawyers the opportunity to request that the court recuse itself for that purpose." RP (9/2/08) 9. Chalfie and the prosecutor had both declined the opportunity. RP (9/29/08) 9.

The court declined to rule and recused itself from the motion to reconsider,³ based on Eggum's allegations, which the court denied. RP (9/2/08) 9-10, 13-15; RP 9/5/08) 10-10-11.

On September 5, the court entered an order indicating Eggum's motion, heard on July 29, 2008, to withdraw his plea to count 3 was denied. CP 23; RP (9/5/08) 12-13. Eggum filed a notice of appeal on September 11, and this firm was appointed. CP 16-20; Supp. CP ___ (sub. no. 166, Letter, 12/24/08).

³ The court felt obligated, however, to continue to act in the case with respect to entering findings and conclusions regarding certain property held in connection with the case, the ownership of which was disputed. RP (9/2/08) 15; see also CP 24-25.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING EGGUM'S MOTION TO WITHDRAW HIS PLEA TO COUNT 3, AS THERE WAS NO DEATH THREAT AND THEREFORE NO FACTUAL BASIS TO SUPPORT HIS PLEA TO FELONY HARASSMENT.

Due Process requires that a defendant enter a guilty plea knowingly, intelligently, and voluntarily. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Boykin v. Alabama, 395 U.S. 238, 243-44, 23 L. Ed. 2d 274 (1969); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The State bears the burden of demonstrating the validity of a guilty plea, either from the record of the plea hearing or by clear and convincing extrinsic evidence. Ross, 129 Wn.2d at 287 (citing Wood v. Morris, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976)).

A defendant is entitled to withdraw a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). A manifest injustice exists if the plea was involuntary. Marshall, 144 Wn.2d at 281. And under RAP 2.5(a)(3), an involuntary plea may be challenged for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001).

A guilty plea cannot be truly voluntary "unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). While the Constitution does not expressly require that the record establish a factual basis for a plea, the failure to do so leaves the plea open to challenge that it was involuntary and therefore violated due process. In re Hews, 108 Wn.2d 579, 592, 741 P.2d 983 (1987); State v. Rigsby, 49 Wn. App. 912, 916, 747 P.2d 472 (1987).

Therefore, as it relates to voluntariness, "[t]he necessity for the record to contain a factual basis for a guilty plea is as much a constitutional requirement as it is mandated by the applicable guilty plea rule. CrR 4.2(d)." In re Taylor, 31 Wn. App. 254, 256, 640 P.2d 737 (1982); CrR 4.2(d) ("The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.")⁴ There is not a sufficient factual basis unless the record contains sufficient evidence from which a jury could find the defendant guilty. State v. Newton, 87 Wn.2d 363, 370, 552

⁴ Compare In re Hilyard, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) (no constitutional requirement for factual basis, but absence thereof factor in determining whether plea voluntary).

P.2d 682 (1976); State v. Zumwalt, 79 Wn. App. 124, 130, 901 P.2d 319 (1995).

The purpose behind the factual basis requirement is to protect a defendant who may enter a plea with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge. Ferguson, 13 Washington Practice, § 3613 (2d ed. 1997); In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (factual basis necessary to prevent conviction where evidence does not warrant it).

Under RCW 9A.46.020(1), a person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

Harassment is a class C felony – as opposed to a gross misdemeanor – if the person harasses another person under

subsection (1)(a)(i) of the statute by threatening to kill the person threatened or any other person. RCW 9A.46.020(2)(b).

Eggum was charged with felony harassment, based on a purported threat to kill Janice Gray. CP 154; RCW 9A.46.020(1)(a)(i) and (2)(b). Thus, the state was required to prove, as an element of the offense, that Eggum threatened to kill Gray. It follows that Eggum's plea cannot be sustained unless the record contains sufficient evidence from which a jury could find this essential element of the offense. Zumwalt, 79 Wn. App. at 130 (there is not a sufficient factual basis unless the record contains sufficient evidence from which a jury could find the defendant guilty).

Contrary to the trial court's reasoning below, Eggum did not admit to making a death threat. On the contrary, he made no admissions in the Statement of Defendant on Plea of Guilty. Rather, he agreed the court could consider the affidavit of probable cause as a factual basis for the plea.

But the affidavit of probable cause, the only record Eggum agreed the court could consider, does not establish a threat to kill Janice Gray. It alleges merely that Eggum wrote Fasano indicating that stealing his money would be the biggest mistake of Janice's

life, and that if she did in fact accomplish that goal, she should spend the money quickly. At most, these statements can be interpreted as a warning that Eggum would respond with legal action, which might also induce Gray to spend the money quickly. The card-playing metaphor can be similarly interpreted. Or, as Eggum explained at the hearing, he was warning he would sell movies of Gray to make up for any loss resulting from the forced sale of his house.

In response, the state may point out the felony harassment statute does not require a "literal threat" of death. State v. C.G., 150 Wn.2d 604, 610-11, 80 P.3d 594 (2003). Granted, the nature of the threat depends on all the facts and circumstances. C.G., 150 Wn.2d at 611. But Eggum's statements in the letter are far too amorphous to be taken as a threat to kill.

Other cases where non-literal threats were interpreted as threats to kill or cause physical harm involved language indicating violence, such as "[d]on't make me strap you ass." State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001); see also State v. Hosier, 124 Wn. App. 696, 709-10, 103 P.3d 217 (2004) (although note Hosier left Bartell employee did not explicitly threaten physical harm, evidence of harassment was sufficient

because the sexually graphic, aggressive content of the note would constitute physical harm if the acts contemplated were carried out).

Eggum's letter contained neither an explicit death threat nor any violent or graphic language that could be interpreted as one. The court erred in holding otherwise and denying Eggum's motion to withdraw count 3.

In response, the state may argue that no factual basis for count 3 was required because it was part of a plea deal. See e.g. In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984). In Barr, the court noted, "[a]" plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense." Barr, 102 Wn.2d at 269-70. Accordingly, where the record established a factual basis for the two crimes originally charged and revealed Barr's understanding of his complicity in those crimes, the failure to state a basis for all the elements of the substituted offense after plea-bargaining did not render the plea involuntary. Barr, 102 Wn.2d at 271; see also State v. Zhao, 157 Wn.2d 188, 137 P.3d 835 (2006) (defendant could plead guilty to amended charges for which there was no factual basis so long as there was a factual

basis for the original charges and the plea was knowing, intelligent and voluntary).

In contrast to Barr and Zhao, however, Eggum did not plead guilty to a related lesser charge. Rather, he pled guilty to the original charge. And unlike the record in Barr and Zhao, the record here – the affidavit for determination of probable cause – did not establish a factual basis for that original charge. Nor did the record reveal an understanding of complicity by Eggum. Accordingly, Barr and Zhao are inapposite to the case at bar.

Finally, the state may also attempt to argue that Eggum is precluded from challenging count 3, on grounds his plea to it was part of an indivisible package deal. Assuming arguendo the state can establish indivisibility, the Supreme Court has recently rejected a similar argument in the double jeopardy context. State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008) (guilty plea entered as part of supposedly indivisible package deal did not waive the double jeopardy violation). Similarly, Eggum's plea, even if entered as part of a package deal, did not waive the factual basis violation.

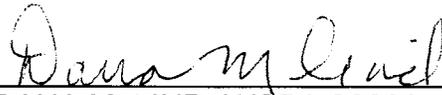
D. CONCLUSION

The trial court erred in denying Eggum's motion to withdraw his plea to count 3, where there was no factual basis to support the plea. This Court should reverse.

Dated this 30th day of June, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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DECLARATION 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 30TH DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
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- [X] MARLOW EGGUM
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE, 2009.

x Patrick Mayovsky