

63532-8

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NO. 63532-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALI SALIM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREG CANOVA, JUDGE

CORRECTED BRIEF OF RESPONDENT

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A. ISSUES ON APPEAL

1. The trial court properly found that the defendant waived his statutory right to proceed in juvenile court because he willfully misrepresented his date of birth throughout his contact with the legal system and when he entered his pleas.

2. This case should not be remanded for a Dillenburg hearing because the trial court provided the appellant with the equivalent of a Dillenburg hearing when it held two post-conviction hearings to determine whether he waived his right to have his case adjudicated in juvenile court.

B. STATEMENT OF THE CASE

1. APPELLANT'S MISREPRESENTATIONS

On February 19, 2009, appellant pled guilty to vehicle prowling in the second degree under King County Cause Number 08-C-12384-3 SEA. This charge was filed from King County Sheriff's Office case number 08-27248, which listed the defendant's date of birth as January 1, 1990. CP 96-104; Exhibit B (sub #38). Appellant indicated on the plea form that he was born on January 1, 1990. During the plea colloquy, the defendant confirmed that he was born on January 1, 1990. RP 5. The defendant was

represented by an experienced and competent attorney who had appeared several times before the trial court. RP 68.

During the same plea hearing, appellant also pled guilty to residential burglary under King County Cause Number 08-1-11708-8 SEA. The defendant indicated on the plea form that he was born on January 1, 1990. During the plea colloquy, appellant confirmed that he was born on January 1, 1990. RP 5. Appellant was represented by a different experienced attorney who had also appeared before the trial court several times. RP 68.

Prior to entering his plea, the defendant repeatedly represented to authorities that he was born on January 1, 1990. On September 7, 2007, the defendant applied for a Washington identification card and represented that his date of birth was January 1, 1990. CP 134-37; Exhibit F (sub #38); RP 47. On November 28, 2007, the defendant appeared at first appearance hearing in juvenile court and represented that his date of birth was January 1, 1990. CP 127-33; Exhibit E (sub #38); RP 47-48.

The defendant continued to represent that he was born on January 1, 1990, even after he entered the guilty pleas that are the subject of this appeal. On April 8, 2009, the defendant pled guilty to felony charges under Snohomish County Cause Number

09-1-00126-4. The appellant indicated on the plea form that he was 19 years old based on his representation that he was born on January 1, 1990. RP 56-57; CP 142-49; Exhibit G (sub #38).

2. HEARING TO WITHDRAW PLEA

On April 17, 2009, the court heard appellant's motion to transfer the case to juvenile court. In support of his motion, appellant submitted a faxed document that he alleged was his birth certificate with a date of birth of April 20, 1991. CP 81-83; Exhibit 1 (sub #37). Counsel for appellant argued that the case should be transferred to juvenile court to determine his true age because the alleged birth certificate raised an issue as to the appellant's true age. RP 18. Counsel for appellant conceded that according to the alleged birth certificate, the appellant was turning 18 on the next court day. RP 17. Counsel for appellant also noted that the hearing date was the last day that anything could be done without losing juvenile court jurisdiction. RP 17. Counsel conceded that there was a factual dispute about the validity of the birth certificate and about the appellant's true age but he argued that the juvenile division of the court should decide those issues. RP 17.

The trial court indicated that it had serious concerns about the validity of the alleged birth certificate. The trial court stated that, "I can't consider this document as being evidence of in fact Mr. Salim's birth date." RP 24. Appellant was unable to produce additional evidence at the hearing in support of his motion because he was not able to obtain an interpreter. The trial court found that it could only transfer appellant's case to juvenile court if it found that there was a legal and factual basis for allowing the guilty pleas to be withdrawn. RP 34. The trial court denied appellant's motion to transfer based on its finding that there was not a sufficient factual basis to show that he was a juvenile when he entered the pleas that are the subject of this appeal. RP 34. In reaching its decision, the court also noted that it was not factually possible to route the case back to juvenile court because the defendant would turn 18 before the case could be re-filed in juvenile court. RP 35-37. The trial court continued the hearing to April, 24, 2009, so that the appellant could present testimony in support of his motion to withdraw his plea. RP 38-39.

On April 24, 2009, the trial court held an evidentiary hearing. The appellant and his mother testified at the hearing. Appellant's mother testified that the appellant was born on April 20, 1991.

RP 42. She testified that their family moved to the United States on December 15, 1997. RP 42. She testified that when appellant entered the United States, the appellant's father mistakenly provided the appellant's date of birth as January 1, 1990.

RP 43-44. Appellant's mother testified that when appellant enrolled in public school, she provided that appellant's date of birth was January 1, 1990. RP 45. Appellant's mother said that they provided the January 1, 1990 date of birth because they were concerned that they would be deported if they provided his real date of birth. RP 45. The appellant's mother testified that she used the January 1, 1990 date of birth when she helped appellant apply for a driver's license. RP 47. She also testified that she remembered when appellant was arrested and appeared in juvenile court on November 27, 2007. RP 47. She agreed that the order which appellant signed in juvenile court listed the appellant's date of birth as January 1, 1990. RP 47.

Appellant testified at the hearing that his true date of birth was April 20, 1991. RP 52. The defendant testified that he had known that April 20, 1991, was his true date of birth since he came to the United States. RP 51-52. Appellant testified that he provided the January 1, 1990 date of birth when he applied for

public school and when he applied for a driver's license. RP 53. The appellant admitted that he provided the January 1, 1990 date of birth on the plea forms that are the basis of this appeal. The appellant admitted that he said he was 19 years old when he pled guilty to felony charges in Snohomish County. RP 56-57.

The court denied appellant's motion to withdraw his plea based on its finding that "throughout the record before the Court at this time, ample evidence that there was a willful misrepresentation by the defendant as to his real age, that that misrepresentation is continued throughout the course of his dealings with the legal system." RP 70. The court noted that when analyzing the issue of whether a juvenile waives juvenile court jurisdiction, Sheppard v. Rhay, 73 Wn.2d 734, 440 P.2d 422 (1968), does not require that the defendant's misrepresentations "be willful in order to gain an advantage." RP 67.

The court made the following findings in determining that the appellant willfully misrepresented the court:

Here, based on all of the evidence, the court finds conclusively that this was an intentional misrepresentation of Mr. Salim's age made by Mr. Salim at the time of his pleas on this case and at the time of the plea on the Snohomish County case, at the time he applied for a driver's license, at the time he was adjudicated in juvenile court. At all times, he

maintained this false date of birth knowingly. And again, it may well be based completely on the fact that his understanding was that he'd be deported if he tried to change it to what he was also told by his mother was his real birth date. That doesn't make it any less a *willful misrepresentation* for the purpose of this court's analysis.

RP 67 (emphasis added).

The court stressed that it does not have the burden to determine a defendant's true age, when a defendant makes intentional misrepresentations regarding their true age. RP 70.

C. ARGUMENT

1. APPELLANT WAS NOT ENTITLED TO WITHDRAW HIS PLEA BECAUSE HE WAIVED HIS STATUTORY RIGHT TO PROCEED IN JUVENILE COURT.

A juvenile waives their statutory right to a declination hearing when they willfully deceive the trial court into believing that they are more than 17 years old and they do not correct their deception until after being found guilty. Sheppard v. Rhay, 73 Wn.2d 734, 739-40, 440 P.2d (1968); Nelson v. Seattle Mun. Court, 29 Wn. App. 7, 10, 627 P.2d 157, *review denied*, 96 Wn.2d 1001 (1981).

In Sheppard, the Washington Supreme Court found that the defendant waived his right to be adjudicated as a juvenile by

misrepresenting to the trial court that he was 18 years of age. Sheppard, 73 Wn.2d at 739, 440 P.2d at 422. The Sheppard Court noted that the defendant had been arrested several times prior to his arrest and had provided a birth date that made him 18 years old; that he signed two documents under oath and swore in each that he was under the age of 18; that he was subsequently charged and pled guilty to another felony; and that at all times the defendant was represented by competent counsel. Id. The Court recognized that to hold otherwise would place an "unconscionable burden on the state courts" and give minor defendants an unfair advantage.

The Sheppard Court stated:

To hold otherwise would place an unconscionable burden on the state courts. To uphold Petitioner's claim would require the state courts to conduct an independent investigation to determine the true age of every defendant. Any minor defendant would be able to mislead a court and take his chances on being tried as an adult, and then if unsatisfied with the result, the minor defendant could assert his minority and set the conviction aside.

Id.

Here, the evidence shows that appellant had always misrepresented that he was born on January 1, 1990. When appellant applied for public school, he used the January 1, 1990 date of birth. When he applied for an identification card with the

Washington State Department of Licensing, he used the January 1, 1990 date of birth. In 2007, when appellant was arrested and attended a hearing in juvenile court, he used the January 1, 1990 date of birth. When appellant was arrested on the separate charges that are the subject of this appeal, his date of birth was listed as January 1, 1990. When appellant pled guilty under the two separate cause numbers that are the subject of this appeal, he indicated on each plea form that he was born on January 1, 1990. On April 8, 2009, subsequent to the entry of his pleas on this case, the appellant pled guilty to felony charges in Snohomish County. Appellant indicated on the plea form that he was 19 years old based on his date of birth being January 1, 1990.

Appellant argues that there was no evidence that he attempted to deceive the court despite his testimony that he used the wrong date of birth to avoid deportation. This conduct was a willful misrepresentation. Under these facts, the court properly found that the defendant willfully misrepresented his age when he pled guilty to the charges that are the basis of this appeal.

2. THE TRIAL COURT WAS NOT REQUIRED TO DETERMINE WHETHER JUVENILE COURT WOULD HAVE DECLINED JURISDICTION.

This case should not be remanded to the trial court for a Dillenburg hearing because the trial court already provided the appellant with a post-conviction hearing to determine whether adult jurisdiction had been proper. See In re Personal Restraint Petition of Dalluge, 152 Wn.2d 772, 778, 100 P.3d 279 (2004), where the court noted that "...in both Sheppard and Nelson, the only cases in which waiver was found to have occurred, both juvenile petitioners underwent a post trial hearing to determine whether adult criminal court Jurisdiction would have been proper." Id.

The hearing provided to the appellant was the same type of hearing provided by the trial court in Sheppard. In Sheppard v. Rhay, the defendant was tried and convicted as an adult. Sheppard, at 735. Nine years after his conviction, he filed a writ of habeas corpus alleging that at the time of his arrest, trial and conviction, he was 17 years old. The defendant petitioned that he was not afforded a decline hearing as required by RCW 13.04, by Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), and by In re Dillenburg v. Maxwell, 70 Wn.2d 331, 413 P.2d 940, 422 P.2d 783 (1967). The case was remanded to

Pierce County Superior Court and the defendant was provided a hearing as provided for in Dillenburg to inquire into all of the circumstances relating to him having been tried as an adult. At the hearing, the defendant was represented by counsel and prior to the hearing, counsel for appellant was provided with the exhibits that were admitted at the trial. Sheppard, at 736. The trial court found that the defendant waived his right to a transfer hearing based on his misrepresentations that he was 18 years of age. Sheppard, at 738.

In the present case, the appellant was afforded a hearing to determine whether he should have been dealt with as a juvenile. Appellant was represented by counsel who had access to the court files including the two guilty plea forms. The appellant was allowed to present testimony to the trial court in support of his argument that these cases should have been adjudicated in juvenile court. After hearing all of the evidence, the trial court found that he waived his right to be tried as a juvenile because of his willful misrepresentations that he was an adult. This case should not be remanded to determine if the juvenile court would have waived jurisdiction because the trial court's post-trial hearing met the requirements of Sheppard and Dalluge.

D. CONCLUSION

For the above reasons, the trial court's denial of the appellant's motion to withdraw his plea should be affirmed. In addition, appellant's request to remand this case for a Dillenburg hearing should be denied.

DATED this 8th day of February, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Corrected Brief of Respondent, in STATE V. ALI SALIM, Cause No. 63532-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

Sandra Atkinson
Sandra Atkinson
Done in Seattle, Washington

2/8/10
Date

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