

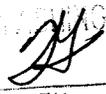
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STATE OF WASHINGTON

BY


DEPUTY

No. 34488-2-II

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

IN RE THE
PERSONAL RESTRAINT
OF

MICHAEL JESSE GONZALES

SUPPLEMENTAL BRIEF OF RESPONDENT
(as required by order of the Court)

MONTY D. COBB
Attorney for Respondent
WSBA # 23575

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 fax

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1. Gonzales has not shown that his plea of guilty was not made knowingly, intelligently and voluntarily or that the questioned evidence formed the sole basis for his conviction.

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TABLE OF AUTHORITIES

CASES

In re Crabtree, 141 Wn.2d 577, 9 P.3d 814 (2000). 4-5

State v. Arnold, 81 Wn.App. 379, 914 P.2d 762 (1996)6

A. PETITIONER’S SUPPLEMENTAL ASSIGNMENT OF ERROR

As his “Fifth Ground” Gonzales asserts that the declaration of Dustin Jeffery, wherein Jeffery asserts his testimony was perjured, requires reversal of the convictions.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Whether the declaration by Jeffery is sufficient to show that Gonzales’s plea of guilty was not knowing, intelligent and voluntary.

C. STATEMENT OF THE CASE

Michael Gonzales was charged in Mason County Superior Court with Murder in the First Degree with a firearm enhancement. The information was amended prior to trial with the charges at the time of trial being: Count I, Murder in the First Degree with a firearm enhancement with Count II being the alternative of Murder in the Second Degree also with a firearm enhancement; Count III, Robbery in the First Degree with a firearm enhancement; Count IV, Unlawful Possession of Controlled Substance; and Count V, Conspiracy to commit Robbery in the First Degree. These events occurred on June 14, 2002.

During trial, an agreement was reached and Gonzales entered a plea of guilty to one count of Murder in the Second Degree. The

remaining charges were dismissed. Sentence was imposed on June 13, 2003 and received a sentence of 265 months which was top end of the standard range as calculated with an offender score of 4.

Gonzales appealed, asserting that the State violated the plea agreement and that his offender score had been miscalculated. In a Statement of Additional Grounds, Gonzales also asserted ineffective assistance of counsel.

The Court of Appeals remanded for recalculation of offender score based on the State's concession that two adult offenses had washed, resulting in an offender score of 2 rather than 4. The Court of Appeals declined to address Gonzales's arguments about same criminal conduct (which was based on the two washed-out offenses) and the plea agreement violation. The Court of Appeals did address the assertion of ineffective assistance of counsel, finding that Gonzales had not met his burden in proving the assertion. [COA opinion 30756-1-II].

Gonzales was resentenced on January 15, 2005 with an offender score of 2 and received a standard range sentence of 242 months. Gonzales was present and was represented by Adrian Pimentel at the hearing. The Court considered argument of counsel as well as the written transcript, including the victim impact statements, from the original hearing. No appeal was initiated.

This Personal Restraint Petition was filed January 11, 2006.

Gonzales subsequently filed a “Fifth Ground” to his personal restraint petition, which the Court of Appeals forwarded to the State and requested an answer.

D. ARGUMENT

GONZALES HAS NOT SHOWN THAT HIS PLEA OF GUILTY WAS NOT MADE VOLUNTARILY, INTELLIGENTLY AND KNOWINGLY OR THAT THE QUESTIONED EVIDENCE FORMED THE SOLE BASIS FOR HIS CONVICTION.

Gonzales pled guilty during trial to Count II with several additional charges and enhancements being dismissed. He did so to take advantage of a negotiated plea bargain. [RP 1442-1444].

While Gonzales couches his argument in his petition in terms of Jeffrey’s declaration affecting the outcome of the trial, this case never went to the jury because of the plea. The proper consideration is whether Gonzales’s plea was knowing, intelligent and voluntary.

The Washington Supreme Court addressed, and rejected, a nearly identical argument in *In Re Crabtree*, 141 Wn.2d 577, 9 P.3d 814 (2000). The petitioner in *Crabtree* asserted that, based on a declaration by the victim recanting, he should be allowed to withdraw his plea of guilty. The Court rejected Crabtree’s arguments, stating:

To obtain a new trial based on newly discovered evidence, a defendant must prove the evidence could not have been discovered before trial by the exercise of due diligence. Crabtree offers no reason for waiting 9 years to challenge his plea and to obtain this statement from the victim. He has thus failed to establish due diligence.

Furthermore, because he pleaded guilty, his argument is without merit. He does not complain he was tricked, coerced or threatened to plead guilty. The plea form, which Crabtree signed, states he was making the plea freely and voluntarily, without threats or promises. Finally, Crabtree provides no support for his bald assertion that the only evidence of sexual intercourse was the victim's statement.

Pet'r's Supplemental Br. at A-69 (footnotes omitted) (citing *State v. Macon*, 128 Wash.2d 784, 803, 911 P.2d 1004 (1996); *State v. Arnold*, 81 Wash.App. 379, 386-87, 914 P.2d 762 (victim's recantation insufficient to grant new trial in part because he admitted guilt, rather than pleading not guilty or entering a plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)), *review denied*, 130 Wash.2d 1003, 925 P.2d 989 (1996)). Crabtree has not proven that this evidence could not be discovered before trial with the exercise of due diligence and therefore his claim to withdraw his guilty plea should be denied.

In re Crabtree at 588-589. (footnote omitted)

Like Crabtree, Gonzales gives no explanation for the delay in obtaining the recanting declaration.

Like Crabtree, Gonzales pled guilty and does not complain that he was tricked, threatened or coerced.

Like Crabtree, Gonzales signed plea forms which clearly state the pleas were made freely and voluntarily. Further, the transcript of Gonzales's plea reflects that the pleas were made freely and voluntarily

and that the trial court gave Gonzales every opportunity to continue with trial or ask questions. [RP 1442-1447].

Gonzales also stipulated to the police reports and statement on probable cause as a factual basis for the plea. [RP 1447]. Even if one entirely discounts Jeffery's testimony, there is still sufficient evidence in the probable cause statement on its own to support the plea. See Appendix Supp-A. This is a satisfactory factual and procedural basis for a trial court accepting a plea of guilty:

CrR 4.2(d) requires the judge to be satisfied that a factual basis exists for the plea being given. In order to determine that a factual basis exists for a plea, the judge need not be convinced beyond a reasonable doubt that the defendant is guilty. *State v. Saas*, 118 Wash.2d 37, 43, 820 P.2d 505 (1991) (citing *State v. Newton*, 87 Wash.2d 363, 370, 552 P.2d 682 (1976)). Instead, a factual basis exists if the evidence is sufficient for a jury to conclude that the defendant is guilty. *Newton* at 370, 552 P.2d 682. The court may consider any reliable source of information to determine whether sufficient evidence exists to support the plea, as long as it is made part of the record at the time of the plea. *State v. Osborne*, 102 Wash.2d 87, 95, 684 P.2d 683 (1984) (citing *In re Keene*, 95 Wash.2d 203, 210 n. 2, 622 P.2d 360 (1980)).

State v. Arnold, 81 Wn.App. 379, 382, 914 P.2d 762 (1996).

Additionally, prior to Gonzales's mid-trial plea, there was testimony from co-defendants (in addition to Dustin Jeffery) that Gonzales helped plan the robbery of the victim [RP 712-715, 860]; that Gonzales provided the taser used on the victim before his murder [RP 860]; that

Gonzales gave the order to tase the victim [RP 869]; that Gonzales was armed [RP 710, 869] and present when the murder occurred [RP 727-730].

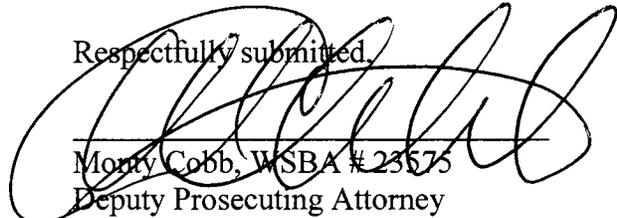
Even if one accepts Dustin Jeffrey's recantation at face value, Gonzales pled guilty and stipulated to facts sufficient to support his plea. Dustin Jeffery's testimony was only a part of the evidence against Gonzales and Gonzales cannot show that the result of the trial would have been any different (had the trial gone to completion) without Jeffery's testimony.

E. CONCLUSION

Based on the foregoing, and the previously filed response, the personal restraint petition should be dismissed.

DATED this 30th day of October 2006.

Respectfully submitted,



Monty Cobb, WSBA # 23575
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX SUPP-A

TO

STATE'S SUPPLEMENTAL REPSONSE
TO
PERSONAL RESTRAINT PETITION OF
MICHAEL JESSE GONZALES

RECEIVED & FILED IN
CO. CLERK'S OFFICE

2002 OCT 26 P 5:08

MASON CO. WA.
PAT SWARTOS, CO. CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
MICHAEL JESSE GONZALES,)
)
Defendant.)
_____)

NO. 02 1 00415-6 BY DEPUTY

ORDER DETERMINING EXISTENCE OF
PROBABLE CAUSE, DIRECTING
ISSUANCE OF WARRANT AND FIXING
BAIL

I. BASIS

This court has considered a motion and affidavit for the determination of probable cause filed by the Prosecuting Attorney of this county.

II. FINDINGS

The court finds that probable cause exists for the arrest (and detention) (release on personal recognizance) of the defendant.

III. ORDER

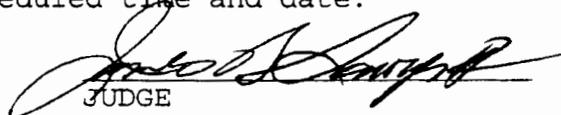
IT IS ORDERED that:

- 3.1 [] That probable cause has been determined and a summons will be issued for ARRAIGNMENT.
- 3.2 [X] The clerk of this court issue a warrant for the arrest of the defendant.
- 3.3 [] The warrant may be served by teletype or telegraph in accordance with RCW 10.31.060.

3.4 Bail

- [X] Is set at \$ 1,000,000.00 surety or ~~property bond~~, or cash.
- [] Will not be accepted.
- [] The defendant, after booking, will be released on is/her personal recognizance and promise to appear for arraignment at a scheduled time and date.

Dated: 10-24-02


JUDGE

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CO. CLERK'S OFFICE

2002 OCT 24 P 4: 58

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

MASON CO. WA.
PAT SWARTOS, CO. CLERK
BY: [Signature] DEPUTY

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

MICHAEL JESSE GONZALES,)

Defendant.)

NO. 02 1 00415 6

MOTION AND DECLARATION FOR ORDER
DETERMINING EXISTENCE OF
PROBABLE CAUSE, DIRECTING
ISSUANCE OF WARRANT, AND FIXING
BAIL

I. MOTION

The Deputy Prosecuting Attorney:

1.1 informs the court that an Information was filed accusing the defendant of the crime of:

COUNT I: MURDER IN THE FIRST DEGREE (WITH FIREARM ENHANCEMENT)

1.2 moves the court for:

- [] an order determining the existence of probable cause, and/or a summons for Arraignment.
- [X] an order directing the issuance of a warrant for the arrest of the defendant based on the attached affidavit.
- [] an order fixing the bail of the defendant in the amount of _____, surety or property bond, or cash.
- [] an order directing the release of the defendant, after booking, on his/her personal recognizance and promise to appear for arraignment at a scheduled time and date.

Dated: ^{65R} 10/24/02

[Signature]
GARY P. BURLESON, #4632
Mason County Prosecutor

2

SHELTON POLICE DEPARTMENT
CASE # 02-5496

02 1 00415 6

Associated Case # Thurston County Sheriff's Office 02-23186-06
Yakima County Sheriff's Office 02-09181

Probable Cause/Request for Arrest Warrant

RE: Michael Jesse Gonzales

AKA: Mickey or Moke or Moke Dawg

H/M, DOB 12-25-75, Bro, Blk, 5-05, 170

SS#534-76-2282

FBI # 732042VA9

SID # WA14896056

LKA: 1121 Ledwich Avenue, Yakima WA

2405 S. 81st Avenue, Yakima WA

RECEIVED

OCT 24 2002

MASON COUNTY
PROSECUTOR

In the AM hours of 06-14-02, Oscar Luis Abundiz was killed at 631 Park Street in Shelton Washington. Abundiz was lured to the house to sell seven pounds of marihuana. During the course of what was preplanned as a robbery and kidnapping, Abundiz was killed by what was initially believed to be trauma to the chin breaking the neck. The pathologist now indicates the damage to the chin could be the result of a gunshot wound. Abundiz' body was loaded in the trunk of his car, driven to a remote location in Thurston County and set on fire.

To date, five persons have been taken into custody related to Abundiz murder. Those who have provided statements indicate the subject known as Draws who has been positively identified as Walter Jesse Barbee, shot and killed Abundiz at point blank or nearly point blank range. Walter Jesse Barbee is currently incarcerated and charged with the murder of Abundiz. Information received from persons not related to the incident whom Barbee has spoken to reference the incident, indicate that Barbee admits to shooting Abundiz in the face and killing him.

Persons in Yakima whom Barbee talked to about the murder, say that, according to Barbee's version of what happened, Abundiz was shot with a tazer at which time he produced his own handgun and shot "Mikey" Gonzales in the leg. In Barbee's version he shoots Abundiz in the face, in defense of "Mikey".

Investigation has revealed that Gonzales and Barbee are business partners in a Rap band named the Play a Pimps, and have recorded at least two CD's under that label, in the Yakima area.

Gonzales' cousin, Antonio Moreno, is also in custody and has pled guilty in Mason County Superior Court to the murder of Abundiz. Moreno provided a signed statement regarding the incident via his attorney on 102202. In his statement, Moreno said that Gonzales was involved in the planning, and in the discussion of the planning, leading up to the robbery and murder of Abundiz, in particular asking Moreno if Barbee had explained the plan to the others and being present when Moreno explained the plan to the other residents, Wies and Anderson. Moreno also stated that he observed Gonzales

conceal himself in the kitchen of the residence with Barbee and Calfrobe to insure that the victim was not alarmed or alerted by their presence, as well as concealing his face with a bandana immediately prior to and during the incident. While waiting for Abundiz to arrive, Moreno observed Gonzales armed with a gun along with Barbee and Calfrobe, as well as the three of them exiting the kitchen together to attack Abundiz upon his arrival at the residence once he sat down on the couch. After Abundiz had been assaulted, shot and killed, his keys were removed from his pocket and given to Barbee. Gonzales was seen by Moreno leaving the residence with Barbee with Abundiz' keys. Moreno also contacted Gonzales the following day in Yakima, WA at Gonzales' father's residence, and discussed the murder and robbery with him, at which time Moreno told Gonzales he wanted to notify police which Gonzales refused to do. Gonzales also apologized to Moreno for getting them involved in the incident, stating that it was just supposed to be a robbery.

Gonzales was subsequently arrested and released on bail on a material witness warrant regarding the murder of Abundiz. At this time Gonzales reportedly has returned to the Yakima area pending trial.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated this 24th day of October, 2002, at Shelton, Washington.

Detective S. Brown #2D3

A handwritten signature in black ink, appearing to read "S. Brown #2D3", written over a horizontal line.

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 34488-2-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 MICHAEL J. GONZALES,)
)
 Appellant,)
)
 _____)

I, TRICIA KEALY, declare and state as follows:

On October 31, 2006, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (SUPPLEMENTAL BRIEF OF RESPONDENT), to:

Michael Jesse Gonzales
#724909
Airway Heights Corr Ctr
P.O. Box 1809
Airway Heights, WA 99001

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

Dated this 31st day of October, 2006, at Shelton, Washington.



Tricia Kealy

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COURT OF APPEALS
06 NOV -2 PM 1:06
STATE OF WASHINGTON
BY  IDENTITY