

NO. 39789-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

HALEY WILSON,

Appellant.

FILED
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STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

- I. IT IS A MANIFEST INJUSTICE NOT TO PERMIT WILSON TO BENEFIT FROM A CHANGE IN THE LAW SIMPLY BECAUSE SHE ENTERED A GUILTY, WHILE SOMEONE FOUND GUILTY BY A JURY GETS THE BENEFIT OF THAT DECISION.

In her opening brief, appellant Haley Wilson argues the trial court abused its discretion when it denied her post-guilty plea, pre-sentence motion to withdrawal her plea based on the change of the law ushered in by Arizona v. Gant, --- U.S. ---, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009). Brief of Appellant (BOA) at 1-6. In response, the State suggests that since appellant admitted to the facts necessary to establish guilt and waived her right to appeal that finding of guilt, her case was final and she cannot show a manifest injustice in support of her motion to withdraw. Brief of Respondent (BOR) at 6-9. The State's argument is not supported by case law.

The question of Wilson's timing in moving to withdraw her plea is the central issue in this case because it remains undisputed that, generally, United State Supreme Court decisions announcing new constitutional rules governing criminal prosecutions apply retroactively to all criminal cases not yet final. Griffith v. Kentucky,

479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 144-45, 812 P.2d 483 (1991).

Appellant cited several cases for the proposition that a criminal case is not final unless a judgment and sentence has been entered by the trial court and all avenues of direct appeal have been exhausted. BOA at 6. In response, the State attempts to distinguish these cases on the ground that they did not involve a plea agreement and pertained to persons found guilty. BOR at 6. This distinction is artificial, however.

First, there are cases involving plea bargains that also stand for the proposition a criminal judgment is not final until it has been entered and the defendant has been sentenced. E.g., State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (holding that remand for resentencing destroyed the finality of judgment despite the fact the guilty plea was still valid); Kitsap County Republican Central Commission v. Huff, 94 Wn.2d 802, 809, 620 P.2d 986, 989 (1980) (holding for purposes of a disqualification from public office,

a case is final when a judgment and sentence has been entered regardless of the entry of a plea).¹

Second, from a procedural standpoint, there is little difference between one who has been found guilty of a crime by a jury but is not yet sentenced, and one who has admitted guilt via a plea and is not yet sentenced. Both stand waiting for a final judgment and sentence to be entered. Thus, the fact that guilt has been established prior to a change in the law announced by the United States Supreme Court has no bearing on whether a defendant may benefit from that change. Both stand similarly situated. See, Griffith, 479 U.S. at 327-28 (explaining that notions of equal protection demand that new case law that is a clear break from past law must be applied to all cases not yet final).

Just as the State's argument hinges on this artificial distinction, so did the trial court's ruling. The State points to a lengthy passage from the trial court's ruling suggesting that withdrawal due to Gant was not appropriate because, when a defendant pleads guilty, that person's guilt is determined and it is no longer a matter of what evidence is held. BOR at 8-9 (citing 08-

¹ Additionally, Blacks Law Dictionary defines "Final decision or judgment" as follows: "In criminal case, is imposition of sentence. Black's Law Dictionary 629 69th ed.1990).

03-09 RP 16). As explained above, however, this can also be said of one who has been found guilty and awaits sentence.

Because Wilson was procedurally in the same position as someone who had been found guilty but was not yet sentenced, it is a manifest injustice to permit the person found guilty to benefit from Gant while disallowing Wilson that same benefit simply because she pled guilty. See, e.g., United States v. Ortega-Ascanio, 376 F.3d 879 (9th Cir.2004); United States v. Presley, 478 F.2d 163, 167-68 (5th Cir.1973).

II. THE TIMING OF APPELLANT'S MOTION ALSO SUPPORTS PERMITTING THE WITHDRAWAL OF HER PLEA.

As indicated in appellant's opening brief, Wilson promptly moved to withdraw her plea after Gant was announced. BOA 2. The State ignores the importance of this timing and instead resorts to a generalized position that CrR 4.2 provides all the safeguards necessary to protect against a manifest injustice. BOR at 1-2. However, recent case law suggests the timing of Wilson's motion is an important factor that should have been given considerable weight by the trial court.

The Washington Supreme Court recently reviewed CrR 4.2, specifically addressing the issue of timing. State v. A.N.J., 168

Wn.2d 91,106, 225 P.3d 956 (2010). The Court began by noting that, historically, Washington courts had applied a more liberal standard if the defendant moved to withdraw before sentencing. Id. It went on to explain, although adoption of CrR 4.2(f) brought the more stringent “manifest injustice” standard into effect, the timing of a defendant’s withdrawal motion was still an important consideration when a motion to withdraw is promptly made:

...the timing of a motion may be considered by the court together with all other evidence bearing on the issue. However, the timing of the motion should be given weight only when it is made promptly after discovery of the previously unknown consequences or the newly discovered information. Timing should be given particular weight if the motion is made before any other benefit to the defendant or detriment to the State is known, and if the motion is grounded in the core concerns recognized in Taylor,^[2] whether the plea was voluntary, knowingly and intelligently made, and made with an understanding of the nature of the charge and the consequences of the plea.

Id.

A.N.J. is applicable.³ Wilson’s motion to withdraw her plea was filed promptly after the previously unknown consequence and newly discovered information (i.e. the Gant decision) was made

² State v. Taylor, 83 Wn.2d 91, 225 P.3d 956 (2010).

³ Notably, A.N.J., was not decided until after the trial court issued its ruling her.

known. At that time, Wilson had not yet benefited in any way from the plea bargain and no other detriment to the State was known. Additionally, as explained below, Wilson's motion is grounded in the core concerns that appellant did not affirmatively and intelligently give up her right to challenge the admissibility of the State's evidence on grounds it was obtained illegally.

III. THE SAFEGUARDS FOR INSURING PLEAS ARE MADE KNOWINGLY AND INTELLIGENTLY POINTED TO BY THE STATE DID NOT EXTEND TO THE ISSUE RAISED BY APPELLANT.

The State argues withdrawal of Wilson's plea is unwarranted because the parties and court followed the procedures set for in CrR 4.2, and Wilson thus knowingly gave up any chance to challenge the admissibility of the State's evidence. BOR at 1-2. The State's argument should be rejected because it is not supported by the record.

The State points to the following section of CrR 4.2:

(d) Voluntariness. 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 the consequences of the plea. 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.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting

attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

...I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime was allegedly committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me;

(d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

(e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty;

(f) The right to appeal a finding of guilt after a trial.

BOR at 2.

In accordance with CrR(g), the face of Wilson's Statement of Plea of Guilt affirmatively list the rights Wilson agreed to give up. CP 10-11. There is nothing on the face of the documents or within the rule that directly or indirectly suggests Wilson understood she had a right to challenge the admissibility of the State's evidence on the grounds that it was unconstitutionally obtained and that she was affirmatively giving this right up. While the concept of suppressing illegally obtained evidence might be viewed by attorneys and judges as inherent in the right to trial, one cannot assume that an ordinary citizen would understand he has such a right and is waiving that right when pleading guilty. Yet, that is what the State suggests.

Based on this record, it cannot be said Wilson knowingly and intelligently gave up the right to challenge the admissibility of the State's evidence. Hence, this Court should permit her to withdraw her plea.

IV. THE STATE'S ARGUMENT AGAINST INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT ON POINT.

The State devotes a large portion of its brief to address why appellant's claim that she was denied effective assistance of counsel should be denied. BOR 3-5. This Court need not address

this issue, for it is nothing more than a straw man. Appellant never raised an ineffective assistance of counsel claim on appeal. In fact, appellant argued just the opposite when she noted that neither defense counsel nor the State could have anticipated the change in the law. BOA at 9.

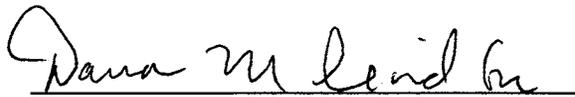
B. CONCLUSION

For the reasons stated herein and all those stated in appellant's opening brief, this Court should find the trial court erred in not permitting Wilson to withdraw her plea.

DATED this 27th day of July, 2010.

Respectfully submitted,

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DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39789-7-II
)	
HALEY WILSON,)	
)	
Appellant.)	

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 27TH DAY OF JULY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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BY 

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JULY 2010.

x 