

NO. 46539-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NAITAALII TOLEAFOA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 13-1-04718-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the defendant had already entered a valid guilty plea, did the trial court abuse its discretion in denying the defendant's later motion to amend the Statement from a factual plea to a *Newton* plea?

B. STATEMENT OF THE CASE.

1. Procedure

On December 6, 2013, the Pierce County Prosecuting Attorney (State) charged the defendant, Naitaalii Toleafoa, with one count of murder in the first degree, one count of assault in the first degree, and one count of Unlawful Possession of a Firearm in the first degree (UPF1). The murder and assault counts included firearm sentencing enhancements (FASE). CP1-2. The matter was assigned to Hon. Jack Nevin for trial. 5/27/2014 RP 3.

After a two-week recess, the trial began with motions and jury selection. *See* 6/11 and 6/16/2014 RPs. Before the jury selection was finalized, the defendant decided to accept the State's plea offer of one count of murder in the first degree. 6/17/2014 RP 6.

The State filed an amended Information. CP 20. After a proper colloquy, the court accepted the defendant's plea of guilty. 6/17/2014 RP

25, CP 10-19. The following week, the defendant filed a *pro se* motion to withdraw his guilty plea. CP 25-26. Shortly after that, the defendant, through his attorney, clarified that the defendant really only wished to amend, not withdraw, his Statement on Plea of Guilty. CP 38-39.

The case proceeded to sentencing. There, after hearing argument, the trial court denied the defendant's motion. 7/11/2014 RP 8-9. The court went on to sentence the defendant within the standard range. CP 49. The defendant filed a timely appeal. CP 59.

2. Facts

The substantive facts are not an issue in this case. They are significant regarding the serious nature of the case and the potential resulting consequences for the defendant.

The defendant and a companion, Juan Ortiz, went to the home of Juan Zuniga. CP 3. All were members of the same street gang. CP 4. They accompanied him out to the garage with Dean Salavea. *Id.* There, Ortiz shot Zuniga and Salavea. *Id.* Zuniga died at the scene and Salavea's wounds resulted in paralysis. *Id.* The shootings were the result of a dispute over drugs and internal gang dynamics. CP 4-5.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO AMEND HIS STATEMENT ON PLEA OF GUILTY.

A defendant may plead guilty as charged at arraignment. *See* CrR 4.2; *State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990); *State v. Martin*, 94 Wn.2d 1, 4, 614 P.2d 164 (1980). However, defendants do not have a constitutional right to plead guilty. *See, e.g. State v. Brett*, 126 Wn.2d 136, 155, 892 P. 2d 29 (1995). The trial court has the discretion to accept or reject the defendant's plea to an amended information. *Id.*

A plea bargain is essentially a contract. *State v. Hardesty*, 129 Wn. 2d 303, 318, 915 P. 2d 1080 (1996). As the party making the offer in that contract, the State may dictate the terms required for the defendant's acceptance. Therefore, as here, the State may insist upon a factual or "straight" plea, and exclude a *Newton* or *Alford*¹ plea. 7/11/2014 RP 6. The defendant does not get to choose one or the other, because the defendant either pleads as required under the agreement, or he does not. *See, Bowerman, supra.*

Here, the trial court made sure that the defendant was agreeing to the factual statement in the plea. It was a factual plea statement, not a *Newton* plea. This colloquy took place:

¹ *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976), and *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[THE COURT:] I'm going to read to you now what I see in paragraph 11. And in paragraph 11, I'm going to read it, and then you can tell me either whether you wrote this or whether you adopt this as being what happened. Says here, On May 12, 2010, in Pierce County Washington, I was aware of a plan whereby Juan Ortiz was to shoot and kill Juan Zuniga. On that date, I was present at the Zuniga residence when Ortiz shot and killed Zuniga. By my presence, I was ready to assist in the commission of that crime, and was thereby an accomplice to Murder in the First Degree. Is that a correct statement, sir?

A [THE DEFENDANT]: It was written by my attorney.

Q: *Is it correct?*

A: *It is correct.*

Q: *Is that what happened?*

A: I mean, I don't -- me, pleading guilty to it, is the reason why he told me that pleading guilty to it that that was the statement needed to proceed with the plea bargain.

Q: Okay.

A: But, I mean, yeah, *I agree with it*. But it is a statement we both agreed upon to take the plea bargain.

THE COURT: [Prosecutor], are you satisfied with that providency or do you wish the court to inquire further?

[Prosecutor]: Well, the statement has to be a statement in his own words of what makes him guilty, not something just to satisfy the State. If this was an Alford plea or a Newton plea, that would be different. *So he needs to say that's what happened.*

THE DEFENDANT: *It's correct.*

THE COURT: He said it is a correct statement.

Q: (By the Court) And, *in fact, is this what happened on that day?*

A: *It's correct.*

6/17/2014 RP 19-20 (emphasis added). Perhaps detecting some equivocation, later in the same proceeding, the court asked again:

THE COURT: You understand the consequences of this, Mr. Toleafoa, so *I'm going to ask you one more time, is it your desire to move forward with this?*

THE DEFENDANT: *Yes.*

6/17/2014 RP 25 (emphasis added). There is no doubt that the defendant endorsed and adopted the factual statement contained in the Plea.

As the acceptance of a guilty plea is within the court's discretion, so is the decision whether to permit the defendant to withdraw a guilty plea. See *State v. Lamb*, 175 Wn. 2d 121, 127, 285 P. 3d 27 (2012).

Here, the defendant decided to withdraw his motion. 7/11/2014 RP 3-4. Although that was the case, the court still considered his motion to amend the Statement in the same context. *Id.*, at 8. The court even supplemented the factual basis for the plea, by saying that the court had reviewed the Declaration for Probable Cause and found that it did provide a factual basis for the plea. 7/11/2014 RP 5, 8. Considering the issues of invited error and the State's opposition to a *Newton* plea, the court wisely denied the defendant's motion. *Id.*, at 9.

D. CONCLUSION.

The defendant entered a valid guilty plea. He did not and does not wish to withdraw it. The State had required that the defendant enter a "straight" plea. The court properly denied the defendant's motion to

amend his Statement on Plea. The State respectfully requests that the conviction be affirmed.

DATED: March 16, 2015.

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Prosecuting Attorney



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/16/15 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR

March 16, 2015 - 3:45 PM

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