

COA No. 28905-2-III



COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

JON JASON KING, Appellant.

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BRIEF OF APPELLANT

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(509) 220-2237



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## I. ASSIGNMENT OF ERROR

A. The court erred by denying Jon Jason King's motion to withdraw guilty plea.

### Issues Pertaining to Assignment of Error

1. Should Mr. King be allowed to withdraw his guilty plea when he relied on the State's erroneous calculation of his offender score? (Assignment of Error A).

2. Should Mr. King be allowed to withdraw his guilty plea because of prosecutorial misconduct? (Assignment of Error A).

3. Should Mr. King be allowed to withdraw his guilty plea because there is no factual basis for it? (Assignment of Error A).

## II. STATEMENT OF THE CASE

Mr. King was charged by second amended information on April 6, 2009, with one count of vehicular assault and one count of tampering with a witness. (CP 106-107). The charges arose from a one-vehicle crash that injured La'Ticia Wilks. (4/6/09 RP 6-7). The statement of defendant on plea of guilty reflected Mr. King's offender score as 10 for vehicular assault and 9 for tampering with a witness. (CP 110). In exchange for his guilty plea, the State amended the vehicular assault to a violation of RCW 46.61.522 to dismiss the aggravating factors and dismissed two counts of

witness tampering. (CP 112). For the plea's factual basis, Mr. King stated:

I have no recollection of how this occurred. I ask the court to review the police reports or statement of probable cause to establish a factual basis for my plea. (CP 116).

The court accepted Mr. King's guilty plea. (4/6/09 RP 9-10; CP 115). The State recommended a 55-month sentence. (*Id.* at 6). The court advised Mr. King he had an offender score of 10 for the vehicular assault and 9 for the tampering. (*Id.* at 5). The court also went over the prosecutor's recommendation:

The prosecutor in this case will make the following recommendation. That the aggravating factors in two counts of witness tampering were dismissed and that you plead to the amended charge of vehicular assault and the one count of tampering with a witness.

55 months, standard court costs, fees, fines. Restitution, if any. Credit for time that you have served. And no further charges with regards to this particular police report number. (4/6/09 RP 6).

For the factual basis, the court reviewed the affidavit in support of probable cause:

[Mr. King], that affidavit indicates that on or about the 4<sup>th</sup> day of January, 2009, officers responded to Edison Street and Clearwater Avenue for a one-vehicle collision. The defendant and La'Ticia Wilks were on-scene and Miss Wilkes had suffered multiple fractures to her leg and was transported to the hospital.

A witness to the accident identified you, Mr. King, as the driver of the vehicle. The witness observed you drag Wilks from the passenger seat to the driver's seat and asked the witness to lie and say that you were not driving. That you admitted to drinking seven alcoholic beverages before driving.

Officers observed that your eyes were bloodshot and watery and could smell the odor of intoxicants emanating from your breath. (4/6/09 RP 6-7).

When asked by the court if he understood what the probable cause statement indicated, Mr. King said, "That I was in physical control at the time of the accident." (4/6/09 RP 7).

As for the witness tampering count, the State said:

Your Honor, I left the witness tampering count with regards to La'Ticia Wilks, so I would ask to be able to supplement the record.

During the pendency of this case the State requested a pretrial no contact order preventing the defendant from contacting Miss Wilks.

However, in violation of that no contact order, he wrote her letters and called her. He violated it approximately 90 times. During those jail calls, he asked her to revoke the medical release, so the State would not be able to have her medical records to prove her leg was, in fact, fractured. He asked her not to cooperate, to come to court and not to testify. In fact, they had a conversation where the police were outside trying to serve her and she admitted that she was hiding, and he told her that she was doing a good job.

So, during all these calls, we have tape recorded jail calls and Detective Aguirre searched the defendant's cell and found letters between him and Miss Wilks indicating that they were both conspiring to have her not appear for trial.

So we did have to, in fact, have her personally served.  
(4/6/09 RP 7-8).

Mr. King's lawyer pointed out to the court that the State amended from a DUI prong of vehicular assault to the non-strike prong of the statute. (4/6/09 RP 9).

The court accepted his guilty pleas:

Sir, based on your pleas on today's date, I do find that there is a factual basis for your pleas and that your pleas have been knowingly, intelligently and voluntarily made. I am signing your Statement of Defendant of Plea of Guilty. (4/6/09 RP 9-10).

A DOSA presentence investigation was ordered. (4/6/09 RP 10).

Mr. King's lawyer filed a motion to withdraw guilty plea based on an incorrect offender score and prosecutorial misconduct. (12/16/09 RP 56-59; CP 130). Mr. King subsequently filed a pro se motion on those grounds as well as his being misidentified in a photo montage shown to a witness. (CP 181-189, 198). He was allowed to proceed pro se with backup counsel. (12/16/09 RP 48-49, 51). The court denied Mr. King's motion to withdraw guilty plea. (1/8/10 RP 46-55; CP 459).

Mr. King was sentenced to 55 months on vehicular assault and 55 months on witness tampering, to run concurrently. (1/8/10 RP 62; CP 349-358). This appeal follows.

### III. ARGUMENT

A. Mr. King must be allowed to withdraw his guilty plea because his offender score was miscalculated.

The court must allow a defendant to withdraw a guilty plea whenever it appears the withdrawal is necessary to correct a manifest injustice. CrR 4.2(f). A “manifest injustice” is obvious, directly observable, overt, not obscure. *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). The defendant bears the burden of showing manifest injustice. *Id.* On the other hand, the State bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

Mr. King’s criminal history was to be attached to his statement on plea of guilty, but it was not. (CP 110). His criminal history does appear in the felony judgment and sentence. (CP 351). He had three juvenile convictions that counted in his offender score, consisting of two residential burglaries and one first degree burglary. (*Id.*). Mr. King’s adult convictions counting towards his offender score for vehicular assault were a DUI, second degree theft, second degree burglary, bail jumping, residential burglary, and an Oregon first degree burglary. (*Id.*). The DUI did not count in his criminal history for witness tampering. The court also found

he had committed the current offense while on community placement/community custody, thus adding one point to the score. (*Id.*).

The State calculated Mr. King's offender score at 10 for the vehicular assault. (CP 351). He argued in his motion to withdraw plea that the State originally said his score was 9, but changed it to 10 after he had pleaded guilty and unbeknownst to him until well after the fact. (1/8/10 RP 27). In any event, however, his offender score was incorrect.

Mr. King's three juvenile convictions counted ½ point each, for a total of 1 ½ points. RCW 9.94A.525(11). The six adult convictions counting in the calculation of the offender score for vehicular assault totaled 6 points. *Id.* One point was added since Mr. King was purportedly on community placement when he committed the current offense. RCW 9.94A.525(19). The "offender score is the sum of points accrued under this section rounded down to the nearest whole number." RCW 9.94A.525. Assuming arguendo those points were correct, Mr. King's offender score was 8 as the total points were 8 ½, which must be rounded down.

But there is nothing in the record showing that Mr. King was on community placement at the time of the present offense. He

was not on any Washington DOC community supervision as contended by the State. (1/8/10 RP 43; CP 204). In the Oregon first degree burglary conviction, Mr. King was put on post-prison supervision. (CP 283). His Benton County judgment and sentence for the vehicular assault and witness tampering does not state an offense or sentence date for the Oregon conviction. (CP 351). Nothing was proffered by the State regarding community placement until its response to Mr. King's motion to withdraw guilty plea. (CP 201-348).

There is no indication that "post-prison supervision" in Oregon is comparable to "community placement" in Washington. RCW 9.94A.525(3). In conducting a comparability analysis, the determination is made by considering the information before the sentencing court at the time of the original sentencing. *State v. Labarbera*, 128 Wn. App. 343, 115 P.3d 1038 (2005). The trial court here had no information other than there was an Oregon conviction for first degree burglary. The record reflects no Oregon community placement information was provided to the sentencing court, which not only determines the fact of a prior conviction, but also those facts that are intimately related to the prior conviction such as defendant's community custody status. *State v. Jones*,

159 Wn.2d 231, 341, 149 P.3d 636 (2003). The court does so by reviewing the court records. 159 Wn.2d at 243. There were no court records on the Oregon conviction at the time of sentencing. Accordingly, the additional point cannot be counted. See *State v. Crandall*, 117 Wn. App. 448, 71 P.3d 701 (2003).

Mr. King's offender score for vehicular assault was thus 7, not 10. His offender score for witness tampering was 6, not 9, for the same reasons. Sentencing courts act without statutory authority when imposing a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997). This is a manifest injustice permitting Mr. King to withdraw his guilty plea. *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

B. Mr. King must be allowed to withdraw his guilty plea because of prosecutorial misconduct.

Mr. King sought to withdraw his guilty plea based on misconduct by the prosecutor. La'Ticia Wilks, who was injured in the crash, submitted a letter/affidavit to the court stating she was asked to lie in Mr. King's case:

. . . I have been identified as the victim in a case I believe you are presiding over. The defendant is Jon King and the charge is vehicular assault. On

February 18, 2009, I was offered a plea agreement from the prosecutor . . . in my case that I did not accept because it involved me perjuring myself and I am still very bothered by what she asked me to do. The plea agreement that was offered to me is: in exchange for my testimony against Jon King the charges against me would be dropped after two years. I told my attorney . . . I would accept the deal as long as I was going to be allowed to testify as to what was true and I was not going to be fed testimony or asked to say anything else. I also told him that if the prosecutor wanted to ask me questions first to see what information I had she was welcome to do so because my testimony would not include me saying that Jon was the driver because I do not know if he was. My attorney then went over and talked to the prosecutor, when he came back he told me she said that I would have to say Jon was driving as part of the agreement. I told him I could not take the deal because I do not know if Jon was the driver and they are asking me to lie on the stand. . . (CP 8).

Ms. Wilk's allegations were made under oath. (CP 8). But the court determined there was no manifest injustice:

So really, all I have is Miss Wilk's statement that she submitted saying that that was her impression, that she was being asked to lie. And your argument.

Again, that's not evidence sufficient to meet the high burden of proof that you're required to meet in this particular case. (1/8/10 RP 53).

Mr. King argued there was prosecutorial misconduct, leading to a violation of his due process rights, in offering Ms. Wilks a plea agreement on the condition she testify falsely in the vehicular assault case that he was the driver.

Because my name was plastered all over the police reports, I was under the impression that I may have committed a crime. . .

Well, after reviewing everything and taking my time to actually review all the evidence that I have now – I don't know if I have everything, I'm pretty sure I do. I hope I do. But nothing in here shows me with the evidence that I actually committed this crime. (1/8/10 RP 33).

In essence, his plea was coerced. If a guilty plea is indeed coerced, it cannot be voluntarily made. See CrR 4.2(d); *United States v. Gwiazdzinski*, 141 F.3d 784, 787-88 (7<sup>th</sup> Cir. 1998), *cert. denied sub nom. Dreyer v. United States*, 525 U.S. 880 (1998). This is also a manifest injustice justifying the withdrawal of his guilty plea. *Id.*; *Taylor*, 83 Wn.2d at 598.

C. The guilty plea should be set aside because there is no factual basis for it.

CrR 4.2(d) provides:

(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.

A trial court accepting a guilty plea may rely on any facts at its disposal in finding a factual basis for the plea so long as the material relied on is made a part of the record. *State v. Norval*, 35

Wn. App. 775, 669 P.2d 1264 (1983). The court need not be convinced beyond a reasonable doubt, but the evidence must be such that a jury might reach this conclusion. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976).

Mr. King's plea was in the nature of an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970). Such a plea allows the defendant to plead guilty in order to take advantage of a plea bargain even if he is unwilling to admit guilt. 400 U.S. at 91. Mr. King could not remember the accident. (CP 116). The trial court's recollection was Mr. King entered an *Alford* plea. (1/8/10 RP 52). But the record of the plea hearing makes no mention of *Alford*. (4/6/09 RP 4-10).

It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was knowing, intelligent, and voluntary. *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985). A defendant's plea is so made if the record establishes he was aware he was pleading guilty to a charge for which there was no factual basis in order to receive the benefit of a plea bargain. See *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006). There is no such showing here. Indeed, contrary to the court's

recollection, the guilty plea colloquy made no reference to an *Alford* plea. (4/6/09 RP 4-10).

In his motion to withdraw guilty plea, Mr. King argued there was no factual basis for the vehicular assault charge as no one could put him behind the wheel. (1/8/10 RP 28-30). The witness who allegedly identified him as the driver could not even pick him out from a photo montage. (1/8/10 RP 29; CP 181-189). The State acknowledged the witness did not do so. (1/8/10 RP 38). Had he known of the issues with the photo montage, Mr. King said he would not have pleaded guilty and would have taken his chances at trial. (1/8/10 RP 36).

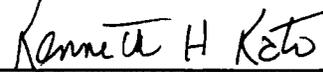
In these circumstances, Mr. King's guilty plea was not knowing, intelligent, and voluntary as there was no factual basis for it. His plea was therefore invalid and must be set aside. *Zhao*, 157 Wn.2d at 203.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. King respectfully urges this Court to set aside his guilty plea and remand for trial.

DATED this 3<sup>rd</sup> day of November, 2010.

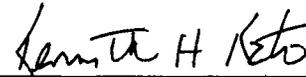
Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on November 3, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl. – Bldg. A, Kennewick, WA 99336-2359; and Jon J. King #775517, Airway Heights Corr. Ctr. C-5-E-8-2, PO Box 2049, Airway Heights, WA 99001-2049.



Kenneth H. Kato