

NO. 289052-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

JAN 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

JON JASON KING, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00018-6

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

JULIE E. LONG, Deputy
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STATEMENT OF THE CASE

On January 4, 2009, Kennewick Police officers were dispatched to an injury collision. (CP 24). When officers arrived on the scene, they found the defendant outside of the vehicle and Laticia Wilks sitting in the driver'S seat with her legs across the passenger seat. (CP 24). The defendant was wearing jeans, a blue zip-up light jacket over a white muscle shirt. (CP 25, 204). Ms. Wilks told officers that a Hispanic male named Hector Ortiz was driving the vehicle, but had fled prior to officers arriving on the scene. (CP 24).

Two eyewitnesses at the scene identified the defendant as the driver. (CP 25, 204). One witness, Shelley Covey, advised officers that she arrived on the scene immediately following the collision. (CP 25). Ms. Covey observed a black female in the front-passenger seat, and a male in the driver's seat who was unable to get out because the driver's side door was damaged. (CP

25). The male was described as wearing jeans and a blue zip-up light jacket over a white muscle shirt. (CP 25).

Ms. Covey stated that the defendant then exited the vehicle and contacted her. (CP 25). The defendant asked Ms. Covey not to tell the police he was driving. (CP 25). When Ms. Covey refused, the defendant told her he would go to prison. (CP 25). The defendant then began pulling Ms. Wilks from the passenger seat into the driver's seat. (CP 25). Ms. Wilks was screaming in pain due to the fact that her leg was fractured. (CP 25). During a 911 call placed by one of the eyewitnesses, the defendant can be heard yelling that he can't go back to prison, and to say he wasn't driving. (CP 205). Additionally, the defendant asked the 911 caller to say that he was the driver of the vehicle. (CP 205-206).

When contacted by law enforcement, the defendant told officers that he was in another

vehicle following Ms. Wilks at the time of the collision, and that Hector Ortiz was driving Ms. Wilks's vehicle at the time of the collision. (CP 25). Officers could smell the strong odor of intoxicants on the defendant's person, and he had watery-bloodshot eyes and admitted to drinking seven alcoholic beverages. (CP 190). The defendant was then arrested on two outstanding felony warrants, Driving With a Suspended License 1st Degree and Vehicular Assault. (CP 25-26). During a search incident to arrest, Ms. Wilks's car keys were found in the defendant's jacket pocket. (CP 25).

During the pendency of the case, the defendant contacted Laticia Wilks in violation of a Pre-Trial No Contact Order over 90 times in both written correspondence and recorded jail telephone calls. (CP 26-103). During these contacts, the defendant and Ms. Wilks conspired about the case. (CP 26-103). This contact

resulted in the defendant being charged with Tampering With a Witness. (CP 106-107).

During the contact between Ms. Wilks and the defendant, Ms. Wilks urges the defendant to tell the truth about what happened. (CP 27). The defendant advises Ms. Wilks to revoke her medical consent form so the State cannot have access to her medical records. (CP 27). When Ms. Wilks advises the defendant she has done so, the defendant thanks her for doing so and tells her she is doing everything "perfect." (CP 27). The defendant then advises Ms. Wilks that the State will be unable to proceed with charges if she does not testify at trial. (RP 04/06/09, 8). In one jail-recorded conversation, the process server is at Ms. Wilks's residence attempting to serve her with a trial subpoena and she admits to hiding in the home to avoid service. (RP 04/06/09, 8). The defendant congratulates her, and tells her she is doing a good job. (RP 04/06/09, 8).

The defendant pled guilty to Vehicular Assault, and Tampering With a Witness on April 6, 2009. (CP 109-117). On May 14, 2009, the defendant filed a Motion to Withdraw Plea alleging denial of his constitutional right to due process and prosecutorial vindictiveness. (CP 130-144). The defendant then filed another Motion to Withdraw Plea by Defendant on December 15, 2009, alleging denial of his constitutional right to due process. (CP 181-200)

A hearing was held on January 8, 2010, and the defendant's motions to withdraw his guilty plea were denied. The defendant was sentenced on January 8, 2010, to 55 months on each count to run concurrent. (CP 349-359). The defendant timely filed this appeal on February 8, 2010. (CP 458-460).

ARGUMENT

A defendant may plead guilty if he or she understands the nature of the charges, there is a factual basis for the plea, and the defendant

makes the plea voluntarily. *State v. Ford*, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). However, a defendant may withdraw his or her plea only to correct a manifest injustice. CrR 4.2(f). The defendant must demonstrate that a manifest injustice occurred. *State v. Hurt*, 107 Wn. App. 816, 829, 27 P.3d 1276 (2001).

A manifest injustice occurs when (1) the plea is not voluntary; (2) the defendant does not understand his sentencing consequences in entering the plea; (3) the defendant does not ratify the plea; (4) the defendant is denied ineffective assistance of counsel; or (5) the State violates the plea agreement. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

In determining whether a plea is voluntary, a defendant's signature on a plea agreement is "strong evidence" that it is voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). When the trial judge has inquired into the voluntariness of the plea on the record, the

Court engages in a presumption of voluntariness that is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

1. THE DEFENDANT'S OFFENDER SCORE WAS NOT MISCALCULATED, AND THUS, HE SHOULD NOT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA.

To establish a defendant's criminal history for sentencing purposes, the State must prove the existence of prior convictions by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). The best evidence of a prior conviction is a certified copy of a judgment. *State v. Descoteaux*, 94 Wn.2d 31, 36, 614 P.2d 179 (1980), overruled on other grounds by *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). However, the State may introduce other documents of record in a prior proceeding to establish the defendant's criminal history. *State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987). The Court may also consider a FBI Rap Sheet, in conjunction with other evidence, for

purposes of determining a defendant's offender score. *State v. Reinhart*, 77 Wn. App. 454, 891 P.2d 735, review denied, 127 Wn.2d 1014, 902 P.2d 164 (1995).

The defendant's criminal history set forth in the Judgment and Sentence entered is an accurate reflection of the defendant's offender score. The defendant's criminal history includes:

1. Residential Burglary in Franklin County Juvenile Court Cause Number: 91-8-50166-6 (1/2 point) (CP 209-210);

2. Burglary in the First Degree in Franklin County Juvenile Court Cause Number: 93-8-50184-1 (1/2 point) (CP 212-213);

3. Residential Burglary in Franklin County Juvenile Court Cause Number: 93-8-50152-2 (1/2 point) (CP 215-216);

4. Theft in the Second Degree in Benton County Superior Court Cause Number: 97-1-00590-0 (1 point) (CP 218-225);

5. Residential Burglary in Franklin County Superior Court Cause Number: 98-1-50322-9 (1 point) (CP 227-240);

6. Bail Jumping in Benton County Superior Court Cause Number: 03-1-0107806 (1 point) (CP 242-250);

7. Burglary in the Second Degree in Franklin County Superior Court Cause Number: 05-1-50266-4 (1 point) (CP 252-265);

8. Theft in the Second Degree in Benton County Superior Court Cause Number: 06-1-00053-0 (1 point) (CP 267-276);

9. Driving Under the Influence in Grant County District Court Cause Number: C355715 (1 point toward the Vehicular Assault charge only) (CP 278-280); and

10. Burglary in the First Degree in Circuit Court of the State of Oregon for Umatilla County, Oregon Cause Number: CF050101 (1 point). (CP 282-286).

11. The defendant also has an additional point for committing the current charges while under the Department of Corrections Community Supervision. (1 point).

12. The two felony convictions the defendant was charged with, Vehicular Assault and Tampering With a Witness, also count as a point against each other as "other current offenses" pursuant to RCW 9.94A.525(1) and RCW 9.94A.589. (1 point).

The State provided certified copies of all of the Judgment and Sentences listed above to the sentencing court, as well as the Defendant's Case History and the National Crime Information Center's Interstate Identification Index (hereinafter referred to as Triple I). (CP 288-293, 294-348).

These documents provided by the State confirm the point calculation and show that none of the defendant's criminal points wash because the defendant has been unsuccessful in remaining in the community for five consecutive years

without committing any new offenses. RCW 9.94A.525(2).

Additionally, the defendant's Judgment and Sentence on his Oregon Burglary in the First Degree conviction in Cause Number: CF050101 provided to the sentencing court confirm that the defendant was placed on Post-Prison Supervision for a period of three years following his 19-month term of confinement. (CP 283). The fact that the defendant was on Post-Prison Supervision was also confirmed by the defendant's Triple I. (CP 347).

RCW 9.94A.03 defines "community custody" as meaning, "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department."

The Oregon Revised Statute, Volume 4, Chapter 144.102 sets forth the conditions of Post-Prison Supervision:

(1) The State Board of Parole and Post-Prison Supervision or local supervisory authority responsible for correctional services for a person shall specify in writing the conditions of post-prison supervision imposed under ORS 144.096 (Release plan). A copy of the conditions shall be given to the person upon release from prison or jail.

(2) The board or the supervisory authority shall determine, and may at any time modify, the conditions of post-prison supervision, which may include, among other conditions, that the person shall:

(a) Comply with the conditions of post-prison supervision as specified by the board or supervisory authority.

(b) Be under the supervision of the Department of Corrections and its representatives or other supervisory authority and abide by their direction and counsel.

(c) Answer all reasonable inquiries of the board, the department or the supervisory authority.

(d) Report to the parole officer as directed by the board, the department or the supervisory authority.

(e) Not own, possess or be in control of any weapon.

(f) Respect and obey all municipal, county, state and federal laws.

(g) Understand that the board or supervisory authority may, at its discretion, punish violations of post-prison supervision.

(h) Attend a victim impact treatment session in a county that has a victim impact program. If the board or supervisory authority requires attendance under this paragraph, the board or supervisory authority may require the person, as an additional condition of post-prison supervision, to pay a reasonable fee to the victim impact program to offset the cost of the person's participation. The board or supervisory authority may not order a person to pay a fee in excess of \$5 under this paragraph. . . .

2009 ORS § 144.102.

Additionally, the defendant's Post-Prison Supervision General Conditions of Supervision were attached to his Burglary in the First Conviction under Oregon Cause Number CF050101 provided to the sentencing court. (CP 285). Therefore, in looking at both statutes, it is clear the Oregon Post-Prison Supervision is comparable to Washington State Community Custody.

Consequently, the defendant was properly given one point on his offender score for committing the underlying offenses while on Community Custody.

Thus, the defendant's offender score for Count I of the Information was ten (10) with a standard range of 51 to 68 months, and nine (9) for Count II with a standard range of 51 to 60 months. The defendant signed his guilty plea with that information contained therein, and there have been no changes since the date of plea on April 6, 2009. (CP 404-412).

However, in the event this Court finds the defendant's offender score was not calculated correctly when he was given a point for being on community custody, the defendant's standard range for the Vehicular Assault would not change. If this Court finds the defendant had only nine points instead of ten, his standard range would still be 51 to 68 months on the Vehicular Assault charge, and the defendant was given a 55-month

sentence in that same standard range when sentenced on January 9, 2010. (CP 349-359).

The court in *State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50 (2007), held that "Where the standard sentencing range is the same regardless of a recalculation of the offender score, any calculation error is harmless." Thus, any error in the original offender score in the instant matter should be found harmless and the defendant should not be allowed to withdraw his guilty plea because the recalculation results in the same standard range.

2. NEITHER THE DEPUTY PROSECUTING ATTORNEY OR THE ASSISTANT CITY ATTORNEY COMMITTED MISCONDUCT AT ANY TIME DURING THE PENDENCY OF THIS CASE, LATICIA WILKS'S CASES, OR AT ANY OTHER TIME.

Neither the Deputy Prosecuting Attorney or the Assistant City Attorney asked Ms. Wilks to testify falsely in any proceeding. Any statement to the contrary is completely false and offensive.

Laticia Wilks's letter to the court was a complete fabrication and should be disregarded. During the pendency of the defendant's criminal case, Ms. Wilks proved herself to be deceptive and dishonest with law enforcement and the court. Her main objection was to aid the defendant in escaping criminal prosecution by any means necessary.

Ms. Wilks gave at least three different statements as to who was the driver of her vehicle the night the defendant crashed it injuring her leg. At the scene, Ms. Wilks told law enforcement that a Hispanic male named Hector Ortiz was the driver of her vehicle and left on foot prior to the officers arriving on the scene. (CP 24). Ms. Wilkes later provided a letter to the court indicating she was unsure who the driver of her vehicle was at the time of the collision. (CP 8). However, Ms. Wilkes later gave a tape-recorded statement to her insurance carrier stating that in fact the defendant was

the driver of her vehicle at the time of the collision. (RP 01/08/10, 40-41).

Additionally, despite Ms. Wilks's claim, her pending criminal charge for False Reporting was dismissed by the City Attorney without any conditions attached. (RP 01/08/10, 40). The defendant was aware of this fact as evidenced in his jail phone calls to Ms. Wilks. There was no coercion involved in entry of his guilty plea. He had the option of proceeding to trial in this matter or pleading guilty. He voluntarily chose the latter. The State had abounding evidence of the defendant's guilt in this matter to secure guilty verdicts on both counts even without Ms. Wilk's testimony.

3. MORE THAN SUFFICIENT EVIDENCE EXISTS IN THIS MATTER TO SUPPORT A FACTUAL BASIS FOR THE DEFENDANT'S PLEA OF GUILTY.

The defendant's plea in the instant case was an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). In an *Alford* plea, the defendant does not admit

guilt, but concedes that a jury would most likely convict him based on the strength of the State's evidence. *Id.* at 37.

Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. However, with an *Alford* plea, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt. *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995).

In the instant case, the defendant's statement on plea of guilty states, "[I] ask the court to review the police reports or statement of probable cause to establish a factual basis for my plea," and the court did just that.

The court relied on the State's affidavit of probable cause with regard to the Vehicular Assault charge, which states:

On or about the 4th day of January, 2009, officers responded to Edison Street and Clearwater Avenue for a one-vehicle collision. The defendant and

Laticia 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 the defendant as the driver of the vehicle. The witness observed the defendant drag Ms. Wilks from the passenger seat to the driver's seat and the defendant then asked the witness to lie and say that he was not driving. The defendant admitted to drinking seven alcoholic beverages before driving.

(RP 01/08/10, 6-7).

When the court inquired of the defendant if he understood what the probable cause statement indicated, the defendant stated, "That I was in physical control of the vehicle at the time of the accident." (RP 01/08/10, 7). The defendant's assertion that there is no factual basis for his plea because no one could put him behind the wheel is completely inaccurate and against what he advised the court what the State's affidavit of probable cause established.

The defendant claims that he had no knowledge that one of the State's eyewitnesses was unable to pick him out of a photomontage. He

claims that if he had knowledge of that fact, he would not have pled guilty.

However, the defendant was aware of that fact well before entry of his plea. The defendant was provided a copy of all of the police reports in his case which contained that information, as well as the photomontage itself well in advance of his plea of guilty. (RP 06/18/08, 23; RP 01/09/10, 39-40, 53-54).

Furthermore, although one of the eyewitnesses was unable to pick the defendant out of a photomontage, she was prepared to testify at trial that she observed an African-American male wearing jeans, a blue zip-up light jacket over a white muscle shirt driving the vehicle at the time of the collision. (CP 25). When contacted by law enforcement, the defendant was wearing the same clothing items the eyewitness described. (CP 25).

Thus, there was no error or misstatement of fact in the State's Affidavit of Probable Cause

when they set forth the evidence that two eyewitnesses were able to identify the defendant as the driver of Ms. Wilks's vehicle at the time of the collision. Additionally, the eyewitness would have testified that the defendant was observed pulling Laticia Wilks from the passenger seat of the vehicle to the driver's seat and then asked Shelly Covey to lie to law enforcement and say he was not the driver.

Thus, the State presented more than enough evidence to prove all of the elements of Vehicular Assault and Tampering with a Witness. There was sufficient evidence for the court to find a factual basis for the defendant's plea and to find the defendant's plea was done knowingly, intelligently, and voluntarily.

CONCLUSION

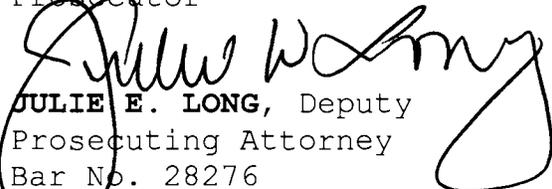
Based upon the aforementioned rationale, the defendant should not be allowed to withdraw his guilty plea because no manifest injustice occurred. The defendant's offender score was

calculated correctly, no prosecutorial misconduct occurred, and there was more than sufficient evidence to support the defendant's plea of guilt. Thus, the defendant's guilty plea and convictions should stand.

RESPECTFULLY SUBMITTED this 6th day of
January 2011.

ANDY MILLER

Prosecutor


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