

FILED

SEP 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 29258-4-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CARL EUGENE ADAMS JR.,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENT OF ERROR

1. The trial court failed to establish the existence of a factual basis for the guilty plea entered by Carl Eugene Adams Jr.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Should Mr. Adams's guilty plea be declared involuntary due to the lack of a factual basis in the record?

STATEMENT OF CASE

An Information was filed on April 8, 2010 charging Mr. Adams with 1st assault, felony harassment and unlawful imprisonment. A domestic violence (DV) tag was attached to each count. (CP 5).

A probable cause affidavit was also filed in connection with the Information. (CP 1).

An Amended Information was filed on May 3, 2010. The first three counts remained the same. The State added counts of witness tampering and violation of a no contact order. These two counts also carried a DV tag. (CP 8).

A Second Amended Information was filed on June 30, 2010. The five counts remained the same. However, the State added deadly weapon enhancements to counts 1, 2 and 3. (CP 24).

Mr. Adams plead guilty to a Third Amended Information which was filed on July 7, 2010 (CP 39).

Mr. Adams entered a plea on July 6, 2010 to 2nd assault with a deadly weapon enhancement and a DV tag; felony harassment with a DV tag; unlawful imprisonment with a deadly weapon enhancement and DV tag; witness tampering with a DV tag; and violation of a no contact order with a DV tag. The plea was an *Alford*¹ plea. (CP 28; RP 9, ll. 13-16).

Judgment and Sentence was entered on July 29, 2010. Mr. Adams filed his Notice of Appeal the same date. (CP 49; CP 65).

SUMMARY OF ARGUMENT

When a trial court fails to establish the factual basis for a guilty plea, especially if the plea is an *Alford* plea, then the appropriate remedy is withdrawal of the plea and remand for trial.

ARGUMENT

When Mr. Adams entered this *Alford* plea on July 6, 2010 the trial court failed to establish any factual basis for the plea. The trial court conducted a colloquy with Mr. Adams, but did not ask the prosecuting attorney to provide a factual basis. (RP 1, l. 21 to RP 11, l. 1; RP 11, ll. 4-5).

¹ *North Carolina v. Alford*, 400 U.S. 25,91 S. Ct. 160,27 L. Ed. 162(1970)

CrR4.2(d) states:

The courts shall not accept the 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.**

(Emphasis supplied).

The record is devoid of any factual basis to support an *Alford* plea.

Mr. Adams concedes that a probable cause affidavit is in the record. However, the probable cause affidavit contains no facts relating to Counts 4 and 5 of the Third Amended Information.

Moreover, insofar as the offense of 2nd° assault is concerned, the probable cause affidavit contains no information to show substantial bodily harm to Mr. Adams wife.

Mr. Adams concedes that the probable cause affidavit, **if it was reviewed by the trial court**, contains a factual basis to support his *Alford* plea to felony harassment and unlawful imprisonment. However, there is no indication in the record that the trial court considered the probable cause affidavit.

The *Alford* plea does not contain any factual statements. It merely recites, in part: "In doing so I acknowledge the facts the prosecutor is prepared to offer against me."

The prosecuting attorney offered no facts at either the guilty plea hearing or the sentencing hearing to support entry of the plea.

“...[I]nvoluntariness of a guilty plea is a constitutional error that a defendant can raise for the first time on appeal.” *State v. Knotek*, 136 Wn. App. 412, 422-23, 149 P. 3d 676 (2006).

The Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 pertain to due process. By accepting a plea, without first laying the factual foundation for its entry, a trial court denies a criminal defendant due process of law.

Due process requires that a guilty plea be voluntary, knowing, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L.Ed. 2d 274 (1969); *State v. McDermond*, 112 Wn. App. 239, 243, 47 P. 3d 600 (2002). A guilty plea cannot be knowing and intelligent when the defendant has been misinformed about the nature of the charge. *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 140 L.Ed. 2d 828 (1998). A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements. *In re Pers. Restraint of Hews*, 99 Wn. 2d 80, 88, 660 P. 2d 263 (1983), *aff'd*, 108 Wn. 2d 579, 741 P. 2d 983 (1987); *see also: McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct.1166, 22 L.Ed. 2d 418 (1969) (guilty plea “cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts”). Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State’s case and thus make a knowing and intelligent guilty

plea. *State v. Chervenell*, 99 Wn. 2d 309, 317-18, 662 P. 2d 836 (1983).

State v. R.L.D., 132 Wn. App. 699, 705-06, 133 P. 3d 505 (2006).

Relying upon the *R.L.D.* case Mr. Adams contends that under no scenario can his guilty plea be determined to be an informed and voluntary plea.

“The State bears the burden of proving the validity of the guilty plea,” including the defendant’s “[k]nowledge of the direct consequences” of the plea, which the State may prove from the record or by clear and convincing extrinsic evidence. *State v. Ross*, 129 Wn. 2d 279, 287, 916 P. 2d 405 (1996). A defendant, in contrast, bears the burden of proving “manifest injustice” defined as “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wn. 2d 37, 42, 820 P. 2d 505 (1991) (quoting *State v. Taylor*, 83 Wn. 2d 594, 596, 521 P. 2d 699 (1974)).

State v. Knotek, *supra*. 423.

Only the presence of the probable cause affidavit in the record indicates that the trial court may have had some factual basis for considering and accepting a plea to Counts 2 and 3 of the Third Amended Information. No facts were presented to the Court to support a plea to Counts 1, 4 or 5.

As set forth in *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P. 2d 108 (1995):

A defendant considering an *Alford* plea undertakes a risk benefit-analysis. After considering the quantity and the quality of the evidence against him, and acknowledging

the likelihood of conviction if he goes to trial, he agrees to plead guilty despite his protestation of innocence to take advantage of plea bargaining. *Duran v. Superior Court*, 162 Ariz. 206, 782 P. 2d 324, 326 (Ariz. Ct. Ap. 1989). **Because the defendant professes innocence, the court must be particularly careful to establish a factual basis for the plea.** Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. **With an *Alford* plea, however, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt.** *Curtis J. Shipley, The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1070-71 (1987).

(Emphasis supplied.)

Even though the Court conducted an extensive colloquy at the time Mr. Adams entered his *Alford* plea, there was no discussion concerning the factual basis for the plea. In the absence of that independent factual basis, the plea is involuntary/invalid.

An *Alford* plea is valid if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *In re Pers. Restraint of Montoya*, 109 Wn. 2d 270, 280, 744 P. 2d 340 (1987) (quoting *Alford*, 400 U.S. at 31). Such a choice occurs where the defendant “intelligently concludes that his interests require entry of the guilty plea and the record before the judge contains strong evidence of actual guilt.” *Montoya*, 109 Wn. 2d at 280 (quoting *Alford*, 400 U.S. at 37). **The establishment of a sufficient factual basis of guilt is not an independent constitutional requirement, but an inadequate factual ba-**

sis may affect the constitutional voluntariness of the plea because some information about the facts is necessary to the defendant's assessment of the law in relation to the facts. See: *In re Pers. Restraint of Hews*, 108 Wn. 2d 579, 592, 741 P. 2d 983 (1987) (quoting *United States v. Johnson*, 612 F.2d 305, 309 (7th Cir.1980)).

Pers. Restraint of Clements, 125 Wn. App. 634, 645, 106 P. 3d 244 (2005)

(Emphasis supplied.).

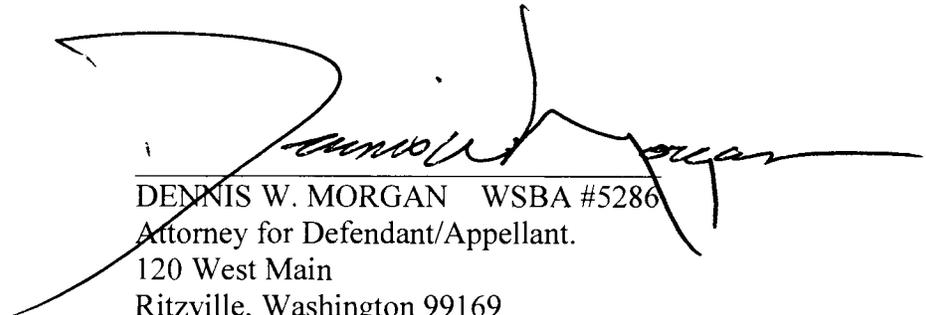
CONCLUSION

In the absence of a sufficient factual basis to support an *Alford* plea Mr. Adams' convictions must be vacated and dismissed. See: *State v. R.L.D.*, *supra*. 706.

Alternatively, if the Court determines that a sufficient factual basis exists as to Counts 2 and 3, then the convictions on Counts 1, 4 and 5 should be vacated and dismissed and the case remanded for resentencing.

DATED this 20th day of September, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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STATE OF WASHINGTON,)
) WALLA WALLA COUNTY
 Plaintiff,) NO. 10 1 00110 4
 Respondent,)
) **AFFIDAVIT OF MAILING**
 v.)
)
 CARL EUGENE ADAMS JR.)
)
 Defendant,)
 Appellant.)
_____)

STATE OF WASHINGTON)
 : ss.
County of Adams)

CONNIE HILLE, being first duly sworn upon oath, deposes and says:

That on this date I mailed in the mails of the United States of America a properly
stamped and addressed envelope directed to:

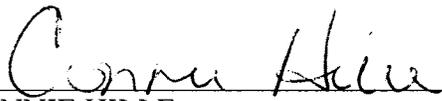
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TERESA CHEN
Attorney at Law
PO Box 40
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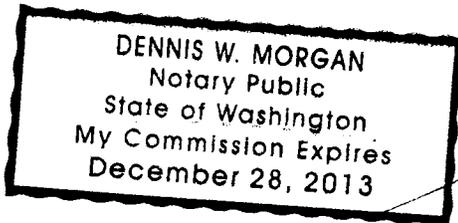
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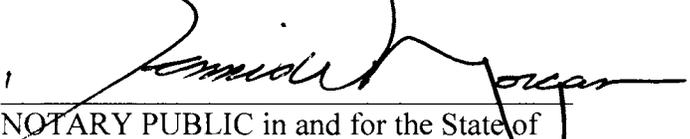
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CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 20th day of September, 2010.





NOTARY PUBLIC in and for the State of
Washington, residing at Ritzville.
My commission expires: 12/28/2013.