

FILED

MAR 02 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29435-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

KATIE WAITE,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

---

APPELLANT'S OPENING BRIEF

---

NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
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A. ASSIGNMENTS OF ERROR.

1. Kaite Waite's guilty plea was not voluntarily entered because it was not supported by a factual basis that she committed the charged crime of second degree robbery.

2. The court erred by finding a factual basis supported the guilty plea for second degree robbery.

3. The court lacked authority to impose a community custody condition prohibiting access to alcohol when it was not crime-related.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A guilty plea is not knowing, intelligent and voluntary when it is not supported by a factual basis establishing the accused person committed the charged offense. Waite entered an Alford<sup>1</sup> plea to second degree robbery, in which she did not admit her guilt. To prove the factual basis, the State alleged that another person stole property while Waite was present and her presence distracted the complaining witness. The State did not allege Waite knew about the robbery beforehand and did not charge her with accomplice liability. Did the State prove the necessary factual basis for the plea when it did not charge Waite as an accomplice,

and did not present evidence that she participated in the robbery with knowledge that she was aiding in it?

2. A court may impose conditions of community custody that are authorized by statute or are reasonably related to the offense of conviction. Waite was not accused of abusing alcohol and the court made no finding that using, possessing, or selling alcohol contributed to the offenses. Did the court abuse its discretion by prohibiting Waite from having any access to alcohol as a condition of community custody?

C. STATEMENT OF THE CASE.

Kaite Waite entered an Alford plea to three offenses: second degree robbery, possession of methamphetamine, and possession of drug paraphernalia. CP 13-24. Her statement on plea of guilty said, "I wish to take advantage of the offer made by the prosecuting attorney and therefore plead guilty. If I went to trial the original charge could be proven beyond a reasonable doubt." CP 20. At the plea hearing, the court asked Waite to explain what she did in her own words but she did not supply any additional facts. RP 2.

The court relied on the probable cause certification to determine the factual basis of the plea. RP 3. The judge stated, "I

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 36, 91 S.Ct. 160, 27 L.Ed.2d 162

have reviewed the probable cause affidavit. I will accept her plea based on plea negotiations.” RP 3.

According to the probable cause certification, Waite was visiting Bruce Williams’ home with her boyfriend John Owen. CP 4. While Waite was using the bathroom, Owen took Williams’ wallet. CP 5. Williams grabbed it back as Waite returned from the bathroom. CP 5. For an unexplained reason, Waite told Williams she was going to report that he raped her. CP 5. Owen took Williams’ mini laptop computer and, to prevent Williams from trying to get it back, Owen brandished a knife. CP 5.

Owen and Waite left together in a car. CP 4-5. The police stopped the car and found the computer somewhere inside the car. CP 5. When searching a bag of Waite’s belongings, the police found methamphetamine and drug paraphernalia. CP 5-6.

The amended information charging Waite with second degree robbery did not include any mention of accomplice liability. CP 10-11. The court’s determination of the factual basis for Waite’s guilty plea did not mention accomplice liability. RP 3.

The court sentenced Waite to a standard range jail sentence, including 12 months community custody. RP 8; CP 27-

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(1970); State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

31. At sentencing, the court suggested Waite could be a pretty lady if she wore makeup. RP 10. As a condition of community custody, the court ordered Waite not use, possess, or sell alcohol. CP 33. The court did not explain the reason to believe Waite should be forbidden from accessing alcohol.

Pertinent facts are explained in further detail in the relevant argument sections below.

D. ARGUMENT.

1. THERE WAS AN INSUFFICIENT FACTUAL BASIS TO ACCEPT WAITE'S ALFORD PLEA TO SECOND DEGREE ROBBERY

a. The court must independently verify the factual basis supporting an *Alford* plea. A criminal defendant's waiver of her right to trial by jury and agreement to enter a guilty plea must be an intentional relinquishment of a known right, indulging in every presumption against waiver. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). An involuntarily entered plea establishes a manifest injustice permitting withdrawal of the plea. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); CrR 4.2(f).

The State bears the burden of demonstrating the validity of a guilty plea based on the record before the trial court at the time of

the plea. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A guilty plea cannot be truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); CrR 4.2(d) (“court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.”).

Establishing the factual basis for a charged offense is an essential component of an accused person’s understanding of her plea. In re Hews, 108 Wn.2d 579, 592, 741 P.2d 983 (1987).

“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” McCarthy, 394 U.S. at 466. The purpose of the factual basis requirement is to ensure that a defendant who is pleading guilty understands both the nature of the charge and whether her conduct actually falls within the charge. State v. Berry, 129 Wn.App. 59, 65, 117 P.3d 1162 (2005).

When an accused person enters an Alford plea, “the court must be particularly careful to establish a factual basis for the plea.” State v. D.T.M., 78 Wn.App. 216, 220, 896 P.2d 108 (1995). In the

Alford plea context, the defendant does not simultaneously admit she committed the alleged offense when entering her plea, and therefore does not supply the court with any additional information to support the factual predicate for the conviction. Id.; see In re Personal Restraint of Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987) (“An Alford plea is inherently equivocal in the sense that the defendant pleads guilty without admitting guilt.”). The record before the court accepting an Alford plea must contain “strong evidence of actual guilt.” Alford, 400 U.S. at 37.

In Berry, the defendant entered an Alford plea to a charge of identity theft. 129 Wn.App. at 65. The court used the probable cause certification as a factual basis for the allegation. The certification contained no reference to whether Berry used the identification of a real person, which is a necessary requirement of the offense. Id. at 68.

The certification did not provide a factual basis for the plea without evidence supporting each element that the State must prove. Id. at 68. The Berry Court held, “[w]ithout that factual basis, the plea was not truly voluntary.” Id.

Similarly to Berry, Waite entered an Alford plea and the court relied on the probable cause certification as the factual basis

for the plea. RP 3; CP 20. In order to accept an Alford plea, the court must find an independent factual basis showing the defendant committed the charged offenses that substitutes for an admission of guilt. The probable cause certification did not establish all the necessary elements of second degree robbery.

b. The record does not establish the factual basis required to prove Waite committed second degree robbery. To convict Waite of second degree robbery, the State had to prove she unlawfully took personal property “from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” RCW 9A.56.210; RCW 9A.56.190.

i. Waite was charged and convicted as a principal. Waite was not charged with committing robbery as an accomplice. CP 10; RCW 9A.08.020(3)(a). She did not plead guilty as an accomplice and the court did not find there was a factual basis establishing accomplice liability. RP 2-3; CP 13, 20. Where the State did not allege accomplice liability and the court did not find Waite was guilty as an accomplice, Waite's plea must

support the factual basis required for liability as a principal.<sup>2</sup> See Berry, 129 Wn.App. at 67-68 (factual basis required for all essential elements).

Yet the State did not allege Waite personally took property, demanded property, or used force to further the taking of property from another. CP 4-6. Waite did not commit robbery as a principal. The record does not contain strong evidence she is guilty of second degree robbery. Alford, 400 U.S. at 37. Thus, her Alford plea is does not establish the necessary factual basis for second degree robbery. Berry, 129 Wn.App. at 67-68.

ii. Alternatively, the State did not present a factual basis establishing accomplice liability. To find accomplice liability for a crime, the court must find that a defendant solicited, commanded, encouraged, or requested another person to commit a crime, knowing that his actions would facilitate the commission of that crime or that the defendant aided in the crime or its planning. State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993); RCW 9A.08.020(3)(a). Mere presence at the scene of a crime, even if coupled with knowledge of it, is not sufficient to prove complicity.

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<sup>2</sup> Although the State is not required to explicitly charge accomplice liability to obtain a conviction based on accomplice liability, accomplice liability is an essential element that must be proven where necessary for a conviction. State v.

In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (“we do not believe Wilson's presence, knowledge of the theft, and personal acquaintance with active participants is sufficient to support a finding of abetting”); State v. Robinson, 73 Wn.App. 851, 857, 872 P.2d 43 (1994) (insufficient evidence of accomplice liability where no proof defendant knew about friend’s robbery until after taking complete).

Although accomplice liability does not have to be charged in the information to be alleged at trial, it essential that the fact-finder determine that the accused person was liable as either the principle or the accomplice. Cronin, 142 Wn.2d at 579-80; see also State v. Davenport, 100 Wn.2d 757, 764-65, 65 P.2d 1213 (1984) (reversing conviction after prosecutor implied during closing that defendant could be guilty as accomplice when jury instructions included no accomplice liability instruction).

To be liable as an accomplice, “a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged.” State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); State v. Trout, 125 Wn.App. 403, 410, 105 P.3d 69 (2005) (“[I]t is also clear now that the culpability of an

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Cronin, 142 Wn.2d 568, 579-80, 14 P.3d 752 (2000).

accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge.”). In a robbery case, the evidence must show that the accomplice agreed to aid a cohort in taking property from another person and did so knowing that the taking would be accomplished by the use of force or threatened use of force. Trout, 125 Wn.App. at 410 (“a defendant cannot be convicted of robbery as an accomplice if he intends merely that the principal commit theft”); State v. Grendahl, 110 Wn.App. 905, 911, 43 P.3d 76 (2002) (same).

The probable cause certification describes efforts by another person, identified as Waite’s boyfriend John Owen, to take Bruce Williams’ property. CP 4. While Waite was in the bathroom and Williams had his back turned, Owen took Williams’ wallet. CP 5. After Williams grabbed the wallet back, Waite returned from the bathroom. CP 5. Williams claimed that Waite distracted him by alleging she would call the police and report Williams had raped her; and Owen took Williams’ laptop computer and brandished a knife. CP 5. Waite fled with Owen. CP 5.

The certification does not explain efforts by Waite to further the robbery after fleeing from Williams’ home,. The police stopped Owen and Waite in a car nearby, but the certification does not say

who was driving or who owned the car. CP 4-5. The police found Williams' laptop computer "under one of the seats in the vehicle," without mentioning whether it was anywhere near Waite. CP 5. Other people were also in the car when the police stopped them. CP 5.

Waite was not charged as an accomplice. CP 10-11. If the court could consider accomplice liability as the factual basis for the plea even without it being charged, the certification does not show she agreed to help take Williams' property or knew that they would use force to accomplish the taking.

According to the certification, Waite was not present while Owen tried to take Williams' wallet but was present when he took the computer. CP 5. She fled after Owen stole Williams' property and brandished a knife. Id. Her presence alone does not make her guilty as a principle or accomplice. See Wilson, 91 Wn.2d at 491; Grendahl, 110 Wn.App. at 911.

The certification characterizes Waite as "distracting" Williams while Owen took Williams' computer, but does not explain how Waite's behavior was intended to further Owen's forcible taking. CP 5. There is no claim that Waite knew Owen was planning on taking property. CP 4-6. There is no evidence of any

discussion between Waite and Owen. Id. There is no allegation Waite knew Owen had a knife. Waite's comments threatening to report being raped are far afield from Owen's efforts to take Williams' belongings and are not inherently part of that effort. Waite did not threaten to call the police unless Williams cooperated with the robbery. CP 5. She did not say that if Williams complied, she would not tell the police about her allegations.

Waite did not participate in the robbery by taking property or threatening to take property. She did not brandish a weapon. She did not try to block Williams from retrieving his property. The certification does not establish that Waite knowingly aided in the robbery. The court did not find the evidence demonstrated she was guilty as an accomplice. RP 3. Without a court finding that Waite was guilty as an accomplice or evidence establishing Waite's liability as an accomplice, her Alford plea is not supported by the necessary factual basis. Berry, 129 Wn.App. at 68; CrR 4.2,

2. THE CONDITIONS OF COMMUNITY CUSTODY RESTRICTING INTERNET USE, ALCOHOL POSSESSION, AND REQUIRING NON-CRIME RELATED RESTITUTION ARE NOT AUTHORIZED BY LAW

There was no evidence presented at the plea or sentencing that demonstrated alcohol use contributed to Waite's offenses.

The trial court nonetheless entered a special condition of community custody forbidding Waite from possessing, using, or selling alcohol. This condition is not authorized by the sentencing statutes.

a. The SRA authorizes the sentencing court to require an offender to comply with sentencing conditions that are crime-related. When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). RCW 9.94A.505; In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature).

RCW 9.94A.703(1) sets forth the mandatory standard conditions of community custody, such as reporting to the Department of Corrections (DOC). Special discretionary conditions include having no contact with the crime victim or a class of

individuals, participating in crime-related treatment or counseling, not consuming alcohol, or other “crime-related prohibitions.” RCW 9.94A.703(3); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). In addition, RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9<sup>th</sup> Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

Here, a condition of community custody imposed by the sentencing court is not crime-related and should be stricken.

Erroneous sentences may be challenged for the first time on appeal, so White may challenge conditions of community custody even if he did not pose an objection in the trial court. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

b. The sentencing court lacked authority to enter orders forbidding Waite from possessing, consuming or selling alcohol. The court ordered Waite not to “use, possess, or sell alcohol.” CP 34. The court did not find and the State did not assert the basis for the requirement.

There was no evidence in the plea or charging documents that Waite was under the influence of alcohol during the offenses. CP 4-6. Although Waite had methamphetamine in her possession and conceded having a drug problem, the same was not true for alcohol. RP 5.

A similar issue was before the federal appellate court in United States v. Betts, 511 F.3d 872 (9<sup>th</sup> Cir. 2007). There, a defendant sentenced for conspiracy was ordered to abstain from illicit drugs and alcohol as a condition of supervised release. Id. at 874, 877. There was, however, nothing in the record to suggest alcohol played any role in the defendant’s crime or that he had any past problems with alcohol. Id. at 878. The trial court did not

believe the defendant had an alcohol problem, but imposed the condition as part of his routine, finding the defendant had the burden of convincing the court that the discretionary condition was not required. Id. at 880.

The Betts Court found the condition was improper because the government did not meet its burden of demonstrating prohibiting the defendant from consuming alcohol was appropriate in his individual case, as the condition did not meet the statutory goals of rehabilitation, protection of the public, or deterrence of future criminal behavior. Betts, 511 F.3d at 878, 880.

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probable exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

Id.

The SRA provides even more limited power to the sentencing court to prohibit conduct as a condition of community custody than does the federal statute at issue in Betts. In Washington, prohibitions must be crime-related, although

affirmative conduct may be imposed as needed for rehabilitation or community protection. RCW 9.94A.505(8); RCW 9.94A.030(10). As this Court explained in State v. Jones, 118 Wn.App. 199, 204, 76 P.3d 258 (2003), it is error to mandate alcohol counseling without evidence to indicate the requirement of alcohol counseling was crime related. Likewise, the prohibition on use, possession, or sale of alcohol is not crime related.

There is no indication or finding that alcohol played a part in the offenses Waite committed. Thus, the condition of community custody forbidding her from using, possessing or selling alcohol is not authorized by the SRA.

This Court should vacate the portions of the Judgment and Sentence requiring Waite to comply with unauthorized conditions of community custody. State v. Riles, 135 Wn.2d 326, 353-53, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and therefore not authorized by statute).

E. CONCLUSION.

For the reasons stated above, Ms. Waite respectfully asks this Court to remand her case for further proceedings, allowing her the opportunity to withdraw her plea and imposing only crime-related sentencing conditions for the remaining offenses.

DATED this 28th day of February 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy Collins", written over a horizontal line.

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 29435-8-III
v.	)	
	)	
KATIE WAITE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BROEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHELLE MULHERN, DPA	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2011.

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