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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADAM CHARLES BOUCK, Appellant.	No. 46134-0-II UNPUBLISHED OPINION

LEE, J. —Adam Charles Bouck appeals the superior court's denial of his motion to withdraw a guilty plea, claiming that (1) he should have been allowed to withdraw his guilty plea because he received ineffective assistance of counsel; (2) his plea to the third degree assault of Jason Weitman lacked sufficient factual basis in the record; (3) his guilty plea to second degree robbery involving Michael Delzell and the first third degree assault of Delzell violated his right to be free of double jeopardy; and (4) the sentencing court erred in calculating his offender score or, alternatively, he received ineffective assistance of counsel based on counsel's failure to object to his offender score. We hold there is an insufficient factual basis in the record to support Bouck's plea to the third degree assault of Weitman, and therefore, the superior court erred in denying

Bouck's motion to withdraw his guilty plea. Accordingly, we reverse and remand with instructions for the superior court to allow Bouck to withdraw his plea to all charges.[1]

FACTS

Michael Delzell, a Walmart security guard, tried to stop Bouck from shoplifting at a Walmart store in Cowlitz County, Washington on March 9, 2013. When Delzell tried to stop Bouck, Bouck "clenched [his] fist showing a threat of force." Clerk's Papers (CP) at 11. After that, Bouck "pushed security to break free." CP at 11. In the parking lot, Bouck encountered a Chevrolet Suburban being driven by Jason Weitman. Weitman stopped the Suburban, accelerated as Bouck passed in front of the car, and knocked Bouck to the ground. Bouck got up and ran, with Weitman in pursuit. Bouck stopped running, pulled out a knife, brandished it towards Weitman, and made a throwing motion at Weitman. Weitman retreated, and Bouck was arrested by police a short time later.

A. GUILTY PLEA

The State charged Bouck with two counts of first degree robbery and one count of third degree theft. One robbery count was for Bouck's conduct toward Delzell as the victim and the other robbery count was for Bouck's conduct toward Weitman as the victim. The charge for Bouck's conduct towards Weitman included a deadly weapon enhancement and a Good Samaritan aggravator.

[1] Because we reverse, we do not address the other issues Bouck raises on appeal.

The State and Bouck entered into a plea agreement. In the plea agreement, Bouck pleaded guilty to one count of second degree robbery and two counts of third degree assault, and the State recommended an aggravated sentence of 34 months. That same day, the State filed an amended information. The amended information charged Bouck with one count of second degree robbery involving Delzell, one count of third degree assault involving Delzell, and one count of third degree assault involving Weitman.

At the same time the State filed an amended information, Bouck and his attorney signed and presented to the superior court a statement of defendant on plea of guilty to non-sex offense (plea statement). The plea statement, the amended information, and the plea agreement were attached together. In the plea statement, Bouck pleaded guilty to one count of second degree robbery and two counts of third degree assault as charged in the amended information. Bouck acknowledged that he was informed of and fully understood the elements of the charges: "I: D[efendant], in Cowlitz, on 3/9/13, w/intent to commit theft did unlawfully tak [sic] property in [the] presence of Michael Delzell by use or threat of force," and "II & III[:] D[efendant], in Cowlitz on 3/9/13, with intent to prevent apprehension assaulted Michael Delzell & Jason Weitman." CP at 3. Bouck's attorney wrote, and Bouck adopted, the following on the plea statement:

> In Cowlitz County, on 3/9/13 I shoplifted from Walmart. When security stopped me I tried to break free, had a clenched fist showing a threat of force, [and] I pushed security to break free. While fleeing, Mr. Weitman hit me with his car [and] chased me, so I pulled a knife. I give up self[-]defense for benefit [sic] of the offer.

CP at 11.

At the plea hearing, Bouck confirmed to the superior court that he had reviewed the plea statement with his attorney; that he understood that if he went to trial, the State would have the burden to prove the charges beyond a reasonable doubt; that the standard ranges for the charges were based on his offender score; and that his offender score was 3. The superior court reminded Bouck that the State was requesting an exceptional sentence of 34 months, but that the superior court did not have to follow that recommendation. The superior court then read aloud Bouck's statement from the plea statement, and Bouck affirmed that the statement was an accurate account of the incident. The superior court again asked Bouck if he had any questions regarding the plea, and Bouck said he did not have any questions. Then, Bouck orally pleaded "Guilty" to each of the three counts—second degree robbery, third degree assault, and third degree assault. Verbatim Report of Proceedings (VRP) at 9. The court accepted the plea, "[f]inding Defendant's plea of guilty to be knowingly, intelligently and voluntarily made, Defendant understands the charges and the consequences of the plea and there is a factual basis for this plea." VRP at 9. The superior court sentenced Bouck to 34 months.

B. MOTION TO WITHDRAW

Approximately four months later, Bouck filed a motion to withdraw his guilty plea. The superior court appointed him a new attorney.

At the evidentiary hearing on the motion, Bouck's former attorney testified that he had advised Bouck that both of the robbery counts charged in the original information could lead to

convictions. Specifically, Bouck's prior attorney testified that, at the time, he did not realize that an individual had to have a possessory interest in the stolen property in order to be the victim of a robbery. The prior attorney also testified that while his analysis of the law on that point may have been incorrect, he had explained to Bouck the sentencing ranges he was looking at for his offenses, and that even if the State amended its charges from first degree robbery to second degree assault before it rested its case, Bouck would still have been facing approximately the same standard sentencing range.

Bouck's prior attorney further testified that he had reviewed the plea agreement with Bouck first in the jail, then in the courthouse hallway, and then in front of the judge, and that it "was clear that the amount of time the State was asking for was 34 months and that that was higher than the range of his offences." VRP at 44-45. The attorney testified that he told Bouck that an "exceptional sentence is agreeing to a sentence outside the standard range, in this case to get the benefit of reduced charges." VRP at 52. Bouck's former attorney testified that he remembered that Bouck was open to negotiating a plea and did not have questions related to the plea that was negotiated.

Bouck also testified at the evidentiary hearing. Bouck testified that if he had known that after trial he might have only gotten 36 months—the low end of the standard range if he had been convicted without the erroneous robbery charge—he would not have taken a deal for 34 months. Bouck repeatedly testified that the reason he wanted to withdraw the guilty plea was that he did not understand what he was agreeing to or thought he was agreeing to a sentence of 13-17 months. However, Bouck also testified that his attorney explained the plea deal to him, he read and signed

the plea agreement, he agreed to go through with the plea, and he told the judge that "yes," he understood his plea. VRP at 71.

The superior court denied Bouck's motion to withdraw guilty plea. The superior court found that Bouck's "testimony was not credible and his statements that he didn't understand the nature and consequences of the plea were not credible." CP at 89. The superior court also found that "there's no question that [Bouck] was properly advised, that both sides were agreeing to 34 months, that it was a strike offense." VRP at 101-02. The court further found that there was no question that his attorney was deficient in telling Bouck that he could be convicted of robbing Weitman, but Bouck could not have been prejudiced by the deficient advice. In finding no prejudice could have resulted, the superior court considered the two possible scenarios that could have played out if a plea had not been entered. First, the superior court noted that the defense could have brought a *Knapstad*[2] motion, which would have allowed the State "to amend the information and Mr. Bouck would have been looking at exactly the same standard range." VRP at 102. Second, the superior court noted that "the best case scenario, if the motion was granted [and the charge was dismissed], was that Mr. Bouck would be only facing 36 months . . . . He pled to an agreement for 34 months. So he did better than that best case scenario." VRP at 103.

Bouck appeals the superior court's denial of his motion to withdraw the guilty plea.

ANALYSIS

A. INSUFFICIENT FACTUAL BASIS FOR THE PLEA

Bouck claims that his plea to the third count, third degree assault of Weitman, was involuntary "because the record does not affirmatively establish that he understood the law, the

[2] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

facts, and the relationship between the two." Br. of Appellant at 15. Bouck argues that his statement in his plea statement, "'[w]hile fleeing, Mr. Weitman hit me with his car and chased me, so I pulled a knife,'" "does not make any mention of the requirement that the state prove intent to prevent lawful apprehension" and "does not show that Weitman attempted to make a lawful apprehension." Br. of Appellant at 17 (alteration in original). We agree and hold there was not a sufficient factual basis for Bouck to plead guilty to a third degree assault of Weitman.

Bouck would have committed third degree assault if he had assaulted Weitman with the "intent to prevent or resist . . . the lawful apprehension or detention of himself." RCW 9A.36.031(1)(a); *State v. Garcia*, 146 Wn. App. 821, 829, 193 P.3d 181 (2008), *review denied*, 166 Wn.2d 1009 (2009). In *Garcia*, the defendant set off the theft security alarm in a Ranch and Home store and then fled into a neighboring Shopko store. *Id.* at 825. The Ranch and Home employees asked the Shopko employees for help. *Id.* When the Shopko security guard approached the defendant and asked him to stop, the defendant pushed the Shopko security guard and left the store. *Id.* at 825-26. The defendant was convicted of third degree assault for pushing the Shopko security guard. *Id.* at 826.

On appeal, Division Three of this court held that the defendant in *Garcia* could not be convicted of third degree assault because the Shopko security guard's attempt to apprehend or detain the defendant was not lawful. *Id.* at 829. The court reasoned that there was nothing in the record to indicate an agency relationship between the Shopko security guard and the Home and Ranch store; nor was there a basis for a citizen's arrest by the security guard.

Id. at 828-29. As the court explained, a "private person may arrest another for a misdemeanor if it (1) constitutes a breach of the peace and (2) is committed in that person's presence." *Id.* at 829. Therefore, because the Shopko security guard was not an agent of Home and Ranch and because the defendant did not commit the theft in the Shopko security guard's presence to give him the right to make a citizen's arrest,[3] the court held the defendant "was not resisting a lawful arrest when he assaulted [the security guard]." *Id.*

Bouck's case presents the same problem. Here, Bouck's statement, "While fleeing, Mr. Weitman hit me with his car [and] chased me, so I pulled a knife," does not provide a basis for a "lawful apprehension or detention." RCW 9A.36.031(1)(a); CP at 11. In fact, nothing in the plea statement, the plea agreement, or the plea hearing establishes that Weitman's attempts at detaining Bouck were lawful. The record does not show that Weitman was an agent of Walmart, which is required for a lawful detention by an agent. *Garcia*, 146 Wn. App. at 826-28. The record also does not show that Weitman was attempting to detain Bouck as a citizen's arrest for a misdemeanor that was a "breach of the peace" committed in Weitman's presence. *Id.* at 828-29. Therefore, we hold there was an insufficient factual basis for Bouck's guilty plea to third degree assault of Weitman.

B. WITHDRAWAL OF THE ENTIRE PLEA AGREEMENT

Because Bouck's plea for third degree assault of Weitman was involuntary, Bouck should be allowed to withdraw the entirety of his plea agreement. Our Supreme Court in *State v. Turley*,

[3] The *Garcia* court also pointed out that there was not Washington case law holding theft constituted a "breach of the peace." *Garcia*, 146 Wn. App. at 829.

149 Wn.2d 395, 399-401, 69 P.3d 338 (2003), held that a plea agreement was an indivisible "package deal" when the pleas to multiple counts were made at the same time, described in one document, and accepted in a single proceeding. *Id.* at 400 ("a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding."); *see also In re Pers, Restraint of Bradley*, 165 Wn.2d 934, 941-42, 205 P.3d 123 (2009) (holding the same). Pursuant to its holding in *Turley*, the Supreme Court decided *State v. Bisson*, 156 Wn.2d 507, 518-20, 130 P.3d 820 (2006). In *Bisson*, the Court of Appeals had allowed a defendant to partially withdraw his plea based on involuntariness, due to the defendant misunderstanding the consequences of his plea. *Id*. at 519. The Supreme Court reversed the Court of Appeals and held:

> In light of the bright-line rule stated in *Turley*, we hold that if Bisson initially elects the remedy of withdrawal of the plea agreement, the remedy is restricted to the withdrawal of the plea in its entirety. Under *Turley*, Bisson's plea agreement can be regarded only as "indivisible"—"a 'package deal'"—since the pleas to the eight counts and the five weapon enhancements were made contemporaneously, set forth in the same document, and accepted in one proceeding.

Id.

Here, Bouck's pleas were charged in the same amended information, were set forth in the same documents, and were accepted in one proceeding. Consequently, the agreement, and the all pleas within it, are indivisible. Therefore, Bouck's withdrawal of his pleas should be to all charges within the plea agreement.

In conclusion, we hold there was an insufficient factual basis for Bouck's guilty plea to third degree assault of Weitman. Consequently, the superior court erred in denying Bouck's

motion to withdraw. We reverse and remand with instructions for the superior court to allow Bouck to withdraw his plea to all charges.

A majority of this panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Bjorgen, A.C.J.

Melnick, J.