

FILED
JULY 19, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 30081-1-III
)	
Respondent,)	
)	
v.)	
)	
DEBRA LYN HONG,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Brown, J. • Debra Lyn Hong appeals her first degree theft conviction. She contends (1) her plea lacks a factual basis, (2) her counsel was ineffective for failing to investigate her defense, (3) the information was defective, and (4) insufficient evidence supports the restitution order. We do not reach Ms. Hong’s restitution contention raised for the first time on appeal and we reject her other contentions. Accordingly, we affirm.

FACTS

In 2009, Ms. Hong moved to Washington after Oregon Child Protective Services removed her children from her care. She had separated from her husband, was unemployed, and homeless. On April 20, 2009, Ms. Hong applied in Washington for

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cash, food, and medical benefits through the Department of Social and Health Services (DSHS). As part of her application, she was advised of her reporting rights and responsibilities. Ms. Hong reported she had no income of any kind, except for food assistance in Oregon. DSHS verified the Oregon food assistance grant would be terminating effective April 30, 2009. Ms. Hong was granted and she received assistance. In June 2009, Ms. Hong reunited with her husband and she applied for benefits on his behalf as well, reporting he had no income. DSHS confirmed Mr. Hong's unemployment claim had been denied in the State of Washington such that he was not receiving unemployment income. The couple was granted additional assistance for Mr. Hong.

Over the next several months, DSHS frequently interviewed the Hong's. Ms. Hong was repeatedly advised of her responsibility to provide complete and truthful information upon penalty of prosecution. She stated she understood and had no questions. And she continued to report she had no income of any kind. As a result of Ms. Hong's representations, she and her husband received benefits of food assistance and general assistance, which were recertified repeatedly upon renewed representations.

In April 2010, DSHS contacted the Walla Walla Housing Authority and learned Ms. Hong had reported she was receiving unemployment income from the State of Oregon. Ms. Hong had never reported the income to DSHS. DSHS contacted the State of Oregon and determined Ms. Hong had been receiving unemployment income from

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June 15, 2009, and through the date of investigation. Later in 2010, federal housing agents interviewed Ms. Hong as part of a separate housing investigation.

In 2011, Ms. Hong was charged in two separate cases. In no. 11-1-00015-7, she was charged with first degree theft, second degree perjury, and false verification of a welfare form. The first degree theft count is described as welfare fraud under RCW 74.08.331(1); the basis of this appeal. In no. 11-1-00061-1, Ms. Hong was charged with housing fraud crimes.

The parties agreed Ms. Hong would plead guilty to one count in each case and all other charges would be dismissed. Ms. Hong signed separate guilty plea statements. At the June 6 plea hearing, after the court recited the factual basis for each case, Ms. Hong explained the housing authority had conducted an investigation and found she had not falsified records. She disagreed that the State could prove its case, but wanted to enter a plea anyway. The trial court refused to take her plea and continued the hearing two days. On June 8, 2011, defense counsel presented a letter to the prosecutor resulting from a Housing Authority hearing that exculpated Ms. Hong. Apparently, the Housing Authority had failed to communicate this conclusion to the prosecutor. The prosecutor promptly dismissed the housing fraud charges in case no. 11-1-00061-1. The court modified the criminal history form and offender score to reflect Ms. Hong was no longer pleading to both charges and she pleaded guilty to first degree theft by welfare fraud in case no. 11-1-

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00015-7.

On June 20, 2011, the court sentenced her to 30 days' confinement and ordered \$6,664.84 restitution to DSHS. No objection was made to the imposition of restitution at the sentencing hearing. Ms. Hong appealed.

ANALYSIS

A. Welfare Fraud Plea

The issue is whether a factual basis exists for Ms. Hong's welfare fraud guilty plea. She contends her plea was involuntary because the supporting facts were insufficient.

A "court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." CrR 4.2(d). The constitutional significance in determining whether a factual basis exists relates to a defendant's understanding of their plea and, thus, to the voluntariness of the plea. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987). Constitutional challenges are questions of law reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). A factual basis exists if there is sufficient evidence from which a jury could conclude the defendant is guilty. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). "[W]hen a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions." *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108

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(1995).

Ms. Hong signed the guilty plea statement reciting she had obtained public assistance to which she was not entitled by means of a willfully false statement or representation, or a willful failure to reveal a fact affecting eligibility or need for assistance, or a willful failure to promptly notify the office of a change affecting eligibility or need for assistance. She acknowledged she had signed the statement after going over it with her attorney. Ms. Hong related she understood the statement and had no questions. She further openly acknowledged she was entering the pleas freely and voluntarily. When a defendant completes a plea statement and admits to reading, understanding, and signing it, it creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Further, when a trial court verifies the criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Ms. Hong’s arguments confuse the dismissal of her housing fraud case with her guilty plea in the remaining welfare fraud case. She was convicted of misrepresenting her income in order to obtain cash, food, and medical assistance from DSHS. The lack of factual basis for the housing fraud case does not undercut the factual basis for the welfare fraud case. The court noted:

I will simply hold this plea statement that we completed earlier on 61-1

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until we receive the order of dismissal, and then I will destroy that and sign the order of dismissal in that cause.

Report of Proceedings (RP) at 16-17. It continued, “In 15-7, you still wish to proceed with that; is that correct; ma’am?” RP at 17. Ms. Hong agreed she did. Contrary to Ms. Hong’s assertion, the State made no undermining concession regarding the facts of this welfare fraud case. The factual basis for the first degree theft conviction is evident from the guilty plea statement, together with Ms. Hong’s acknowledgment on the record of going over the statement with counsel, signing it, and understanding it.

B. Ineffective Assistance Claim

The issue is whether trial counsel was ineffective for failing to properly assist Ms. Hong after counsel received evidence that exonerated her of housing fraud.

We review a challenge to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A defendant possesses the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). To prove ineffective assistance of counsel, Ms. Hong must show (1) defense counsel’s representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

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Ms. Hong claims her attorney was deficient because she did not further investigate her welfare fraud defense after receiving the exculpatory evidence regarding the separate housing fraud case. The State aptly argues Ms. Hong’s assistance of counsel claim is based on her misunderstanding of the factual separation of the housing fraud and welfare fraud cases. Ms. Hong fails to show defense counsel’s representation was deficient. If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong. *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991).

C. Sufficiency of Information

The issue is whether the information properly apprised Ms. Hong of the charges against her. Ms. Hong contends the information was defective because it failed to allege the value of goods or services wrongfully taken exceeded \$5,000.

An information must allege all essential elements of a crime. *State v. Brown*, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). The reviewing court first looks to see whether the elements are listed on the charging document. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Here, the information charged “THEFT IN THE FIRST DEGREE–WELFARE FRAUD, RCW 9A.56.030(1)(a) and 9A.56.020(1)(a) and 74.08.331(1).” Clerk’s Papers at 6. Under RCW 74.08.331(1):

Any person who by means of . . . [fraud] . . . obtain[s] . . . any public

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assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030.

The statute unambiguously indicates welfare fraud in any amount constitutes first degree theft. “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). No specific dollar amount is required. Ms. Hong cannot create an ambiguity when none exists. Thus, while we acknowledge her references to legislative history, we do not consider them. In sum, the information properly listed the first degree theft by welfare fraud elements. Accordingly, she was properly apprised of the charges against her.

D. Restitution

We do not reach Ms. Hong’s contention that no evidence supports the restitution amount because, as the State aptly argues, her challenge is untimely and should not be considered. “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The purpose for this rule is that “the trial court, if given the opportunity, might have been able to correct to avoid an appeal.” *Id.* Ms. Hong did not object to the restitution amount at sentencing. And, as the State argues, DSHS records would have been easily ascertainable to Ms. Hong.

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Affirmed.

A majority of the panel has determined this opinion will not be printed in the

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Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.