No. 44142-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MELVIN ALBERT KIMBREL,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause Nos. 10-1-00610-2; 11-1-00050-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Kimbrel's pleas of guilty were entered knowingly, intelligently, and voluntarily.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

> The record shows that Kimbrel entered valid guilty pleas that were knowing, intelligent, and voluntary. The trial court did not abuse its discretion in denying his motion to withdraw those pleas.

1. The record indicates that Kimbrel understood the consequence of entering an Alford[1] plea.

Kimbrel asserts that the trial court incorrectly found that he understood the consequences of the Alford pleas. The fact that these pleas were entered pursuant to North Carolina v. Alford is not critical to his arguments; the same constitutional requirements apply to all pleas of guilty.

The right to plead guilty exists by court rule; it is not constitutional in nature. State v. Hubbard, 106 Wn. App. 149, 153, 22 P.3d 296 (2001); CrR 4.2(a). CrR 4.2 provides the procedures for the entry of guilty pleas. In particular, CrR 4.2(d) requires that the court make certain determinations:

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)

(d) Voluntariness. The court shall not accept a 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.

Motions to withdraw guilty pleas are governed by CrR 4.2(f) and CrR 7.8.

CrR 4.2(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 7.8(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

A trial court's denial of a defense motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006).

The State bears the burden of proving the validity of the guilty plea, but the defendant bears the burden of proving manifest injustice. "'[M]anifest injustice' is defined as 'an injustice that is obvious, directly observable, overt, not obscure.'" State v. Knotek, 136 Wn. App. 412 423, 149 P.3d 676 (2006), (cites omitted). Referring to CrR 4.2(f), Washington courts have said that "There are four possible indicia of 'manifest injustice': (1) the denial of effective counsel, (2) the pleas was not ratified by the defendant or one authorized by him to do so, (3) the plea was involuntary, or (4) the plea agreement was not kept by the prosecution." State v. McCollum, 88 Wn. App. 977, 981, 947 P.2d 1235 (1997) (citing to State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974)). A person pleading guilty waives the right to claim constitutional violations except those related to either the circumstances of the plea or the power of the government to prosecute. In re the Pers. Restraint of Reise, 146 Wn. App. 772, 782, 192 P.3d 949 (2008).

To satisfy the due process requirement of the Fourth Amendment, a guilty plea must be knowing, intelligent, and voluntary. In re the Pers. Restraint of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). A defendant may knowingly, intelligently, and voluntarily plead guilty to a crime, even though he maintains he is not guilty, provided that there is strong evidence to support the plea and the defendant concludes it is in his best interest to plead guilty. Alford, 400 U.S. at 37; Hubbard, 106 Wn. App. at 155, fn 5.

> *Alford* pleas should be examined to determine whether the defendant has made an intelligent and voluntary choice between his or her alternative courses of action. . . . [T]he court must be assured that the guilty plea is voluntary.

Hubbard, 106 Wn. App. at 156.

Kimbrel argues that he showed confusion about the plea when he said that the assault was an accident. Appellant's Opening Brief at 12-13. But an Alford plea by definition means that the defendant does not admit guilt. Kimbrel could maintain that he lacked the requisite intent for the crime while still pleading guilty. He must have understood that intent was an element of the crime or he would not have explained that he did not have that intent, i.e., it was an accident. 02/16/11 RP 14-15. In fact, the declaration

Kimbrel filed in support of his motion to withdraw his plea shows that he discussed with his attorney the fact that he did not intentionally injure his wife, and his attorney explained that he could accept the plea offer without admitting intent. CP 28.

The record shows that the court discussed the nature of the Alford plea with Kimbrel. After Kimbrel told the court he knew the meaning of an Alford plea, the following exchange occurred:

> THE COURT: An *Alford* plea allows you to not admit the elements of an offense, nevertheless to plead guilty in order to take advantage of a plea offer or charging decision that you feel is appropriate by the State. However, if I do find you guilty—I should say if I do accept the *Alford* plea, I would find you guilty just as though you had pled guilty or been convicted by a jury. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: An *Alford* plea requires that the Court review the statement of probable cause to determine whether or not there are sufficient facts, had the matter gone to trial, for a trier of fact to find guilt beyond a reasonable doubt. Do the parties agree that the probable cause declaration in each case is appropriate for me to consider?

Both attorneys responded in the affirmative. 02/16/11 RP 12-13. Kimbrel then affirmed that he was making free and voluntary Alford pleas and the court accepted them. 02/16/11 RP 13-14. Kimbrel acknowledged that even though he was claiming

the assault was an accident, he understood that there were sufficient facts to permit a court to find him guilty beyond a reasonable doubt. 02/16/11 RP 15. In essence, Kimbrel acknowledged that even though he denied having the intent to assault, a judge or jury would likely find that he did. He cites to Wood v. Morris, 87 Wn.2d 510, 554 P.2d 1032 (1976), for the proposition that the trial court must "fully comply" with CrR 4.2 or the plea is invalid. Appellant's Opening Brief at 14. "Full compliance," however, consists of making a record that the plea was entered voluntarily and intelligently. Wood, 87 Wn.2d at 511. A plea can be made voluntarily and intelligently, even if the prosecutor did not sign the plea agreement or if the defendant maintains he is not guilty of the crime to which he is pleading. Although Kimbrel finds significant the failure of his attorney to sign the plea form for the second degree assault, Appellant's Opening Brief at 13, CP 17, it is not clear how the defense attorney's signature impacts the voluntariness of the plea. Kimbrel did sign the form, CP 16, and it is with the defendant that the court is concerned. The attorney's attestation only says that he has read and discussed the statement with the defendant and believes that the defendant is both competent and understands the statement.

CP 17. Defense counsel told the court that very thing at the first hearing. 02/14/11 RP 3-4.

> [The trial judge is not required to question the defendant before accepting the plea; a written plea statement is sufficient. . . . This court has previously stated that a signed guilty plea form is prima facie evidence of voluntariness. . . . Only if the plea form is itself deficient must the State offer other evidence to counter the assertion. . . . "The best evidence is that the defendant was expressly advised of [his] right, either orally by the trial judge at the plea hearing, or by reading a plea form explaining the right." . . .

State v. Lujan, 38 Wn. App. 735, 737, 688 P.2d 548 (1984) (internal cites omitted).

The record does not support a conclusion that Kimbrel did not understand the nature of an Alford plea. The court explained it to him and he acknowledged that he understood it.

2. Kimbrel was advised that he would lose the right to appeal a finding of guilt.

Kimbrel argues that he was never advised that by pleading guilty he was giving up the right to appeal the finding of guilt. Appellant's Opening Brief at 16, 22. It is true that the court did not orally advise him of that waiver, but he was advised in the plea forms he signed for both offenses. In the forms for both the second degree assault and second degree unlawful possession of a firearm, Section 5 begins with the heading, "I Understand I Have

the Following Important Rights, and I Give Them Up by Pleading Guilty." CP 9-10, 144. The final right in that list, labeled (f) in both cases, is "The right to appeal a finding of guilt after trial." CP 10, 144. Kimbrel signed both of those forms. CP 16, 151. In his declaration in support of his motion to withdraw his pleas, he asserted that although he signed the form he did not read it carefully. CP 28.

It is an easy thing to claim after the fact that one signed a form one did not read.[2] The general rule is that whether a defendant knew the consequences of his plea is a fact to be determined from all of the circumstances. State v. Harvey, 5 Wn. App. 719, 724, 491 P.2d 660 (1971) (citing to Miesbauer v. Rhay, 79 Wn.2d 505, 507, 487 P.2d 1046 (1971). Even if the defendant fails to sign the Statement of Defendant on Plea of Guilty, the totality of the circumstances may still support a finding that he entered his plea intelligently and voluntarily. State v. Branch, 129 Wn.2d 635, 644, 919 P.2d 1228 (1996).

Looking at this record, there is no reason to believe that Kimbrel did not understand the rights he was waiving. He complains that the court never asked him if he had read and signed

[2] In his declaration in support of his motion to vacate the judgment, Kimbrel asserted that he did read the form. CP 28.

the plea forms. Appellant's Opening Brief at 12. However, as the court pointed out in its ruling, it did not get the chance. 05/10/12 RP 13. Counsel informed the court that he had gone over the forms with Kimbrel and he fully understood the consequences. 02/14/11 RP 3-4. There is no reason for the court to ask a question that had just been answered. It is true that the hearing was interrupted for two days, and on the second day the court essentially considered that it was dealing with a continuation of the original hearing. 02/16/11 RP 7. Two days is not such a long period of time that the parties would have forgotten what was discussed at the first hearing.

In its Findings of Fact, to which Kimbrel has not assigned error, the court included Finding No. 3: "The court relies, in large part, on a very comprehensive change of plea form that has been adopted statewide." CP 163. The form to be used by a defendant pleading guilty is specified in CrR 4.2(g). If the court were required to orally cover every advisement included in that form, the form would be redundant and plea hearings would be very lengthy. Kimbrel appears to be arguing not that the written form is inadequate per se, but was inadequate in his case because he didn't read it. But a court must be able to rely on the assurances of

counsel that the defendant has reviewed a form and understands it, and that the signature of the defendant on the form means the same thing. If the court cannot believe what counsel tells it or depend on the plea form to advise the defendant of his full rights, not only is the entire foundation of our plea system suspect, but it permits a defendant to challenge any ruling at any time. That cannot be constitutionally required.

There is no due process requirement that the trial court orally question a defendant so as to determine his understanding of the consequences of pleading guilty. "The case requires only that courts canvass the matter with the accused to make sure that he or she fully understands what the plea connotes and its consequences." In re the Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980) (citing to Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). Here a reading of the entire hearing, plus the guilty plea statement forms, shows that under a totality of the circumstance test, Kimbrel understood the pleas he was entering. He didn't like it, but he understood it.

3. The Statements of Defendant on Plea of Guilty adequately informed Kimbrel of the community custody consequences of a conviction for the offenses.

Kimbrel correctly argues that the trial court did not address the term of community custody that follows a conviction for second degree assault until after sentence had been pronounced but before the judgment and sentence was entered. 02/16/11 RP 17. There was no community custody condition for the unlawful possession of a firearm conviction. CP 156-57, 02/16/11 RP 17.

As with the advisement that he was waiving his right to appeal a finding of guilt, Kimbrel was informed by the guilty plea statement that a term of community custody would follow the in-custody portion of his sentence for second degree assault. At the third page of the form, the advisements read, in pertinent part:

> For crimes committed on or after July 1, 2000: In addition to sentencing me to confinement, under certain circumstances the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart. . . If the total period of confinement ordered is more than 12 months, and if the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the term established for that offense type unless the judge finds substantial and compelling reasons not to do so. . . .

CP 11. Following this advisement is a list of categories of offenses and the terms of community custody that follow when the defendant is sentenced to more than one year in custody. One of the categories in the list is "Crimes Against Persons as defined by RCW 9.94A.411(2); second degree assault is included in that statute. Also on the list is "violent offenses," of which second degree assault is one. RCW 9.94A.030(53)(a)(viii).

On page 2 of the same plea agreement, in section 6, the standard sentencing range is entered as six to twelve months, with "12+" months of community custody. CP 10. At page 4 of the plea form, the prosecutor's recommendation is for six months of confinement.[3] CP 12. Kimbrel initialed a paragraph on page 5 of the form which advised him that he was pleading guilty to a most serious, or strike, offense and described the consequences for accumulating three of those convictions.

The court sentenced Kimbrel to six months in custody and 12 months of community custody for the second degree assault. CP 22, 02/16/11 RP 17.

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[3] The prosecutor's recommendation is followed by a statement that the prosecutor would follow the plea agreement which is incorporated by reference. CP 12. That agreement is not part of the record before this court. It is unclear if it was filed with the trial court.

It is apparent from the form that Kimbrel knew he would not be sentenced to more than one year in custody, and therefore would be facing a maximum of one year of community custody. His attorney told the court he had discussed the plea form with Kimbrel. Kimbrel is not an uneducated man; he has had two years of post-secondary education. CP 9, 143.

A defendant may move to withdraw his guilty plea unless he was correctly informed of all of the direct consequences of his plea. State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). A mandatory period of community custody is a direct consequence of pleading guilty. State v. Ross, 129 Wn.2d 279, 280, 916 P.2d 405 (1996). The State's burden of proving a valid guilty plea includes showing that the defendant had knowledge of the direct consequences of the plea, which "the State may prove from the record or by clear and convincing extrinsic evidence." State v. Acevedo, 137 Wn.2d 179, 193, 970 P.2d 299 (1999).

The record in this case demonstrates that Kimbrel was advised that he faced a maximum of 12 months of community custody, which is what he received. Nothing in his declaration or pleadings in the trial court indicate that the community custody

condition had any impact on his decision to plead. CP 27-30, 31-38, 68-70. His concern was his right to appeal. CP 30, 68-70.

4. Whether or not the prosecuting attorney signed the plea forms is immaterial to the voluntariness of Kimbrel's pleas. That signature was unnecessary to confirm the plea agreement.

Kimbrel finds it significant that the prosecutor failed to sign the statement of defendant on plea of guilty and argues that there was no oral confirmation at the plea hearing. Appellant's Opening Brief at 18-19. On the contrary, the court read the State's recommendation from the plea form with no objection or clarification from the prosecutor. 02/16/11 RP 9. The silence of the prosecutor can certainly be taken as ratification of the conditions listed by the court. The State would be hard-pressed to argue, on this record, that its recommendation was misrepresented. The critical signatures on a guilty plea statement are those of the defendant and the judge. Those signatures are in place.

5. Kimbrel indicated he understood the significance of a "strike."

Kimbrel maintains that the court did not ascertain whether or not he understood the nature of a "strike" offense. Appellant's Opening Brief at 20. During the first of the two plea hearings, the court explained that accruing three strikes would result in life in

prison without the possibility of parole, and that because Kimbrel had no prior criminal history, it would not be a problem as long as he didn't acquire more strikes. He then asked, "Do you understand that?" Kimbrel replied, "Yeah, . . ." and then talked about having a chance to prove he wasn't guilty. 05/14/11 RP 5. The record supports the conclusion that Kimbrel did understand what a strike is, but it wasn't of particular concern to him. As argued above, a court must be able to rely on the assurances of a defendant and his counsel, or virtually every guilty plea is subject to attack.

6. The State agrees that both guilty pleas should be treated as a unit.

Kimbrel argues that he should be able to withdraw both pleas, although his complaints deal primarily with the second degree assault charge, because they are "inter-locked." Appellant's Opening Brief at 23-24. The State maintains that neither plea should be withdrawn, but if the court does grant relief on the assault plea, the other plea should be treated similarly. The record is not particularly clear, but there are indications that the two pleas were the result of one agreement. Kimbrel's declaration in support of his motion in the trial court asserts that his attorney told him the State had offered to recommend concurrent time for the two charges if he

pled to both. CP 28. The Statement of Defendant on Plea of Guilty to the charge of unlawful possession of a firearm indicates a prosecutor recommendation that the sentences run concurrently. CP 146. Where two pleas are reached in such a plea agreement, the agreement is indivisible, and either all pleas are withdrawn or none are. *See generally* State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013).

The State maintains that neither plea should be withdrawn, for all of the reasons argued above.

D. CONCLUSION.

The record of Kimbrel's guilty pleas shows he entered them knowingly and voluntarily. He was not pleased about the result, but that does not is not the same as an involuntary plea. The State respectfully asks this court to deny his appeal.

Respectfully submitted this 5th day of June, 2013.

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Attorney for Respondent

THURSTON COUNTY PROSECUTOR

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