Supreme Court No. 90540-1
COA No. 44142-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELVIN ALBERT KIMBREL,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Melvin Kimbrel, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Kimbrel seeks review of Division Two's Order Denying Motion to Modify, filed June 10, 2014, and of the ruling of the Court Commissioner, granting the State's motion on merits, in *State v. Kimbrel*, No. 44142-0-II (filed June 11, 2014). A copy of the Order and the Commissioner's Ruling Granting Motion on the Merits (filed March 7, 2014) are attached hereto.

C. ISSUE PRESENTED FOR REVIEW

1. The trial court denied Kimbrel's motion to withdraw his *Alford* pleas. Did this ruling constitute probable error that violates Kimbrel's right to due process.

D. STATEMENT OF THE CASE

On March 7, 2013, Kimbrel filed a brief alleging that the trial court had erred in regards to the above-indicated issue. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

E. PROCEEDINGS ON APPEAL.

On appeal, Kimbrel argued that the trail court abused its discretion by denying a motion to withdraw his *Alford* pleas. Brief of Appellant at 10. The Court Commissioner rejected Kimbrel's argument and granted the State's motion on the merits on March 7, 2014. Kimbrel timely moved to modify the Court Commissioner's ruling. The Court denied Kimbrel's Motion to Modify the Commissioner's ruling on June 11, 2014. For the reasons set forth below, he seeks review.

F. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. **THE COURT OF APPEALS ERRED IN DENYING KIMBREL'S MOTION TO MODIFY THE COURT'S RULING GRANTING THE STATE'S MOTION ON THE MERITS**

Criminal Rule 4.2 governs guilty pleas, and sets forth procedural safeguards designed to insure that a defendant's constitutional rights are protected. *State v. Taylor*, 83 Wn.2d 594,

596-97, 521 P.2d 699 (1974). The rule requires the trial court to permit a defendant to withdraw his guilty plea to correct a "manifest injustice." CrR 4.2(f).[1] The court shall allow a defendant to withdraw a plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. *Id.*

A "manifest injustice" is one that is "obvious, directly observable, overt, not obscure." *Ross*, 129 Wn.2d at 284, quoting *State v. Sass*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). The Washington Supreme Court has identified four non-exclusive situations that meet the "manifest injustice" standard: (1) ineffectiveness of trial counsel; (2) a plea not ratified by the defendant, (3) an involuntary plea; and (4) the prosecutor's breach of a plea bargain. *Taylor*, 83 Wn.2d at 597. On appeal, this Court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

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[1]CrR 4.2(f) reads in full:
The court shall allow a defendant to withdraw the defendants [sic] 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 the judgment, it shall be governed by CrR 7.8.

The totality of the circumstances reflected in the record of proceedings, when combined with the documents used to accomplish the procedure of entering a plea agreement in the Court demonstrate that there was error on the part of the Court to conclude that the Defendant had been properly advised of his rights under CrR 4.2, including his right of appeal. Here, the record does not demonstrate that the strong presumption of voluntariness arising from the signature of the defendant on the forms requiring a voluntary, intelligent and knowing waiver of those rights existed. In particular, the court did not inquire of the defendant if he had read the Change of Plea forms. [CP 39-57] The Court did not inquire of the defendant if he had discussed the Change of Plea forms with his attorney (other than the inquiry concerning the nature of a "strike offense"). Defendant's attorney did not execute the Change of Plea form, on page 9, to attest that he had discussed the statement with the Defendant and that the Defendant was competent and understood the statement; nor, did the Court inquire of the Defendant's attorney whether he had discussed the statement with his client or whether he was competent and understood the statement. Mr. Kimbrel's attorney stated on the 14th that he had 'gone over the statement" and that Kimbrel

"understood" the statement and consequences, but, subsequent colloquy with the court demonstrated that was not correct. [RP 41-42]

Moreover, the Court did not determine on the record that the Defendant had signed the Change of plea forms. The Court did inquire whether the Defendant was aware of the recommendation of the State concerning potential sentencing upon plea of guilty. The Court did not advise the Defendant that there was a requirement for community custody for one year when the standard sentencing range was addressed. That requirement was not included in the text of the written plea offer set forth in Paragraph 6(g) on each form. [RP 47]

The Court did not inquire whether the defendant had signed the change of plea forms voluntarily and whether he understood the nature of the charges or the full consequences of the pleas. [CP 39-57]

The colloquy between the Court and Defendant evinces that there was confusion on the part of the Defendant when he addressed the intentional element of the offense(s) by stating that it was an "accident". RP at 52-53.

The pleas recommendation does not state that there would

be an imposition of community custody. CP 146. Nor did the Court advise the Defendant that the Court would impose community custody after the finding of guilt on each offense. when the Court addressed the potential sentence reflected in the Change of Plea Statement. RP 46-47, 55. Before entering a plea of guilty, defendant must be advised of all direct consequences of his plea, including the possibility of restitution. *State v. Raleigh,* 50 Wn.App. 248, 253, 748 P.2d 267, *review denied,* 110 Wn.2d 1017 (1988).

A second direct consequence of the plea was that the appellate rights of the defendant be waived. Although there was the recitation in Paragraph 5(f) of the Change of Plea Statement, [CP 10/14] no discussion was held by the Court with the Defendant about that waiver. The Defendant's attorney did not execute the Change of Plea form attesting that he had discussed the form with the Defendant. [CP 17] And, the Defendant has averred that there was no discussion with him about the loss of his right of appeal by his attorney at any point as a consequence of the change of plea. [CP 68-69.

In this case, Kimbrel, argues that his plea was affected by the lack of specific knowledge of the potential imposition of community placement; by the lack of knowledge of the waiver of a

right of appeal; by the failure of his attorney to inform him of these consequences,

An involuntary forfeiture of the right to a criminal appeal is never valid. *State v. Kells,* 134 Wn.2d 309, 313, 949 P.2d 818 (1998). The burden the State faces in this cause is that the plea form is deficient. Neither attorney executed the Statement on Change of Plea form for the Assault in the second degree charge. [CP 17] The form is not, *prima facie,* sufficient. *State v. Lujan,* 38 Wn. App. 735, 737, 688 P.2d 548 (1984). The State has the burden of proving validity of the guilty plea under a totality of the circumstances test. *State v. Ross,* 129 Wn.2d 279, 287, 916 Pl.2d 405 (1996).

The defendant has the burden of shown that manifest injustice has occurred – one that is "obvious, directly observable, over [and] not obscure." *State v. Turley,* 149 Wn.2d 395, 398, 60 P.3d 228 (2003). Here, Kimbrel contends that the deficiencies of the procedure robbed him of the certain knowledge that his rights of appeal would be lost upon entry of a plea. The overt deficiencies were the lack of execution of the Change of Plea form by his attorney attesting his advice and information concerning the consequences of the plea (except as to the strike law) to the

defendant. The second overt deficiency was the failure of the prosecutor to execute the Change of Plea to conclude a plea bargain contract with the defendant.

Mr. Kimbrel submits that the Court Commissioner's ruling affirming the order denying withdraw of the pleas overlooked these arguments and is in error, and that CrR 4.2(f) requires that the Court allow Mr. Kimbrel to withdraw his pleas in this cause.

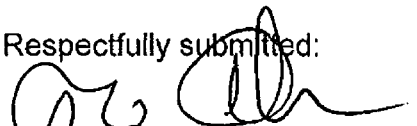
In light of the foregoing, the Court of Appeals raises a significant question of law under the Washington Constitution and the United States Constitution. RAP 13.4(b).

F. CONCLUSION

For the foregoing reasons, Kimbrel respectfully requests this petition for review be granted.

DATED this 10th day of July 2014.

Respectfully submitted:



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I certify that I sent by JIS link to the Clerk of the Court of Appeals, Division II, a copy of the Petition for Review, and mailed a copy, postage prepaid on July 10, 2014, to the following:

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Dated: July 10, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MELVIN ALBERT KIMBREL,

Appellant.

No. 44142-0-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated March 7, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 11th day of June, 2014.

PANEL: Jj. Hunt, Melnick, Worswick

FOR THE COURT:

Hunt, J.
PRESIDING JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MELVIN KIMBREL, Appellant.	Cons. Nos. 44142-0-II 44149-7-II RULING GRANTING MOTION ON THE MERITS

Marvin Kimbrel appeals the trial court's denial of his motion to withdraw his *Alford*[1] pleas. This court affirms.[2]

FACTS

The State charged Kimbrel with three felonies: two counts of second degree assault with domestic violence and one count of unlawful possession of a

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Our courts adopted the *Alford* holding in *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

[2] A commissioner of this court is considering this appeal as a court-initiated motion on the merits under RAP 18.14.

firearm (the assaults were charged in one information and the unlawful possession in another). On February 14, 2011, Kimbrel appeared in the superior court to change his pleas. At the start of the hearing, the State amended the assault information to drop one of the assault charges. Kimbrel's attorney assured the court that he had been provided with the amended information and that Kimbrel intended to plead guilty to the charges. He then stated:

> Your Honor, Mr. Kimbrel and I have gone over a Statement of Defendant on Plea of Guilty fully to the charge. He fully understands the consequences. He understands you don't have to follow the recommendation of the prosecutor, and he wishes the Court to accept his plea.

Report of Proceedings (RP) at 3-4. The trial court then reviewed the maximum sentence for assault and informed Kimbrel that it was a "strike" offense. RP at 4-5. Kimbrel appeared confused and the trial court directed his attention to the written plea statement where Kimbrel "did initial where it is checked." RP at 5. Kimbrel then responded, "Yeah, I know that." RP at 5. Kimbrel then told the court, "you're taking away, waiving all my rights, and I've never had a chance to prove that I'm not guilty." RP at 5-6. The trial court then stopped the proceedings to allow Kimbrel to confer with his attorney and counsel informed the court that Kimbrel wished to go to trial. The trial court continued the matter.

On February 16, 2011, the trial court held a second hearing. The court asked if the parties were ready to proceed with the change of pleas discussed on February 14, 2011, and Kimbrel's counsel expressed, "I'd like to continue where we left off." RP at 9. Kimbrel confirmed he had discussed the strike issue with his attorney. The trial court then reviewed possible assault sentences and the

prosecutor's recommendation and confirmed that Kimbrel understood the court did not have to follow the sentencing recommendation. It also reviewed the unlawful possession sentence. The court, however, neglected to discuss the community custody component of the potential assault sentence, although the community custody ranges were set out in the assault guilty plea statement.

The trial court then reviewed Kimbrel's statement regarding the crimes. For each plea he stated, "I do not believe I'm guilty. However, there is a substantial likelihood that a jury would find me guilty. . . . Therefore, I wish to take advantage of the prosecutor's offer." RP at 113. Kimbrel confirmed that he had conferred with his attorney about the entry of an *Alford* plea. The court also explained the plea. The court reviewed the probable cause declarations for each charge and found they contained sufficient factual bases for the trier of fact to find Kimbrel guilty of both charges. The trial court then proceeded to sentencing.

On February 15, 2012, Kimbrel moved to withdraw his pleas. In May 2012, the trial court held a hearing and denied the motion. After the parties could not agree on proposed findings of facts and conclusions of law, the trial court entered a written order on October 11, 2012. Kimbrel appeals.

ANALYSIS

The trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Zhoa*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). A defendant may withdraw his guilty plea if it was invalidly entered or if its enforcement would result in a manifest injustice. CrR 4.2(f); CrR 7.8(b); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). A "manifest

injustice" is "an injustice that is obvious, directly observable, overt, [and] not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

Constitutional due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). The defendant must enter the plea competently and with an understanding of the nature of the charge and the consequences of the plea, including the understanding that he or she necessarily waives important constitutional rights. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); *Codiga*, 162 Wn.2d at 922. A plea statement signed by a defendant carries a strong presumption that the plea is entered voluntarily.[3] *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Likewise, an information that notifies the defendant of the nature of the crimes to which he or she is pleading creates a presumption that the plea was knowing, intelligent, and voluntary. *In Re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). A court determines voluntariness on the basis of the totality of the circumstances. *Branch*, 129 Wn.2d at 642.

Kimbrel first argues that the trial court failed to inquire whether Kimbrel read his change of plea forms. However, on February 14, 2011, Kimbrel's counsel informed the court, without any objection from Kimbrel, that he and Kimbrel reviewed the written pleas and Kimbrel understood the consequences. Later in the same hearing, Kimbrel expressed his understanding that a guilty plea

[3] In his motion to withdraw his pleas, Kimbrel confirmed that he read the form.

has consequences when he stated, "You're taking away, waiving all my rights." RP at 5-6.

Kimbrel argues that because his attorney did not execute the plea forms that it means his attorney did not review the forms with him. However, as previously set out, the attorney confirmed in open court that they reviewed the forms. Thus, the totality of the circumstances supports Kimbrel reviewed his plea forms. For this same reason, Kimbrel's argument that he failed to appreciate that he was waiving his appellate rights is meritless. Paragraph 5(f) of his change of plea forms contain this waiver.

Kimbrel also argues that his statement that the assault was accidental shows his level of misunderstanding of the plea. An *Alford* plea, however, is valid despite the defendant's assertion of innocence. *See In Re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). Consequently, simply because Kimbrel maintained his innocence—as permitted by the pleas he entered—does not mean his *Alford* pleas were defective. His belief that the crime was accidental is consistent with Kimbrel's written statement highlighted by the trial court during the colloquy that "I do not believe I am guilty." RP at 13.

Kimbrel next argues that the trial court failed to advise him of the 12-month community custody term it imposed for the assault charge.[4] The prosecutor agreed to recommend a 6-month sentence. Kimbrel was sentenced to 6 months in custody and 12 months of community custody but the court did not

[4] Kimbrel did not make this argument to the trial court.

mention the community custody term during the plea colloquy. CP at 22. His assault plea form, however, provided that the standard sentencing range was "6/12" months plus "12+" months in community custody. Clerk's Papers (CP) at 10. The form further provided that if Kimbrel received a sentence of not more than 12 months, the trial court may sentence him to a community custody term of up to 1 year if the offense committed falls into a listed category. The categories included "crimes against persons," which set out a community custody term of 12 months. CP at 11.

A mandatory term of community custody is a direct consequence of a guilty plea that a defendant must be informed of when pleading guilty. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006); *State v. Ross*, 129 Wn.2d 279, 280, 916 P.2d 405 (1986). The plea form advised Kimbrel of the 12-month community custody term. The plea listed the community custody term as "12+" months and he knew that the prosecutor was recommending a 6-month sentence and the form set out that the court had the ability to impose a 12-month community custody term for sentences of not more than 12 months. A detailed colloquy is not mandatory. *See In re Pers. Restraint of Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980). In addition, Washington courts have held that "[k]nowledge of the direct consequences of a guilty plea can be satisfied . . . by the plea documents." *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001) (citing *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976)).

Kimbrel also contends that the failure of the prosecutor and defense counsel to sign the assault change of plea form also demonstrates that his plea was defective. He argues that the missing signatures prohibit the State from relying on the information in the form to show that Kimbrel's guilty plea was knowing, voluntary, and intelligent. A plea statement signed by a defendant carries a strong presumption that the plea is entered voluntarily. *Smith*, 134 Wn.2d at 852. *Smith* imposes no other signatory requirements.

Finally, he maintains that he did not understand the meaning of a strike offense because the court never confirmed his understanding. The record shows that the trial court noted that Kimbrel initialed his change of plea form "where it [was] checked." RP at 5. In addition, the following exchange occurred:

> THE COURT: Okay. Well, let me just tell you about a strike. In the state of Washington one accruing three strikes on three separate occasions would be subject to life imprisonment without the possibility of parole. As I understand it, looking at -- well, I want to look at the criminal history. Has that been handed up to me?
>
> MR. JURIS: Yes, Your Honor.
>
> THE COURT: You have no prior criminal history, so while this would be your first strike, so long as it is not your last, it should not be a problem. Do you understand that?
>
> THE DEFENDANT: Yeah, but . . .

RP at 5. When the court reconvened on February 16, 2011, it further inquired whether Kimbrel had another chance to discuss the meaning of a strike with his attorney, and Kimbrel confirmed they had spoken. Because Kimbrel both confirmed that he initialed his plea form and understood the court's strike explanation, as well as had additional time to discuss the matter with his attorney, the record does not support his argument regarding any confusion

about the meaning of a strike offense. Accordingly, it is hereby

ORDERED that the court-initiated motion on the merits to affirm is granted.

DATED this 14th day of March, 2013.

Aurora R. Bearse
Court Commissioner

cc: Peter Tiller
Jennifer Lord
Honorable Gary R. Tabor
Melvin Kimbrel

TILLER LAW OFFICE

July 10, 2014 - 4:29 PM

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