No. 44329-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PAUL S. BICKLE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

On December 20, 2010 the State charged Bickle with, Count I: Theft of a Motor Vehicle, Count II: Theft in the First Degree, Count III: Theft of a Motor Vehicle, Count IV: Burglary in the Second Degree, Count V: Theft in the Second Degree. CP 1-4. The crimes were alleged to have occurred on or about and between March 19, 2010 and March 22, 2010. CP 1-3. Bickle was alleged to have stolen a Ford Ranger pickup, an excavator, a stereo out of a tow truck, and a number of items from Rusty Gill including tires, headache racks, a tilt trailer, and a generator. CP 5-10. Bickle had to go inside an enclosed fenced off business lot to break into the tow truck and steal the stereo and other items out of it. CP 6-7.

Bickle elected to plead guilty to all the charges on February 16, 2011. 1RP[1] 1-15; CP 12-29. Bickle was serving a sentence for unrelated crimes committed in Whitman County when he pled guilty to the Lewis County matters. 1RP 7. The State agreed to recommend the sentence run concurrent with the Whitman County matters. 1RP 7-8, 12. The judge declined to follow the sentence recommendation and ordered the 68 month sentence to run consecutive to the Whitman County matters. 1RP 14. After the judge pronounced the sentence, Bickle told the sentencing court, "I'll go to trial on this." 1RP 14. The judge informed Bickle he was not going to trial because he had already pled guilty. 1RP 14. Bickle attempted to argue the point with the judge and the judge told Bickle his time to speak was over, he pled guilty, and not to say another word or the judge would figure out a way to make the sentence longer. 1RP 15.

Bickle filed a CrR 7.8 motion to withdraw his guilty plea and a brief in support of the motion. CP 47-48, 55-368. The State filed a response and the matter was set for a hearing in front of the sentencing judge. 2RP 2-4; CP 383-411. Bickle did not call any

[1] There are three volumes of the verbatim report of proceedings. The State will cite to the VRP as follows: 1RP – 2/16/11 Change of Plea/Sentencing Hearing, 2RP – 8/26/12, 9/6/12, 11/1/12 Motion Hearings, 3RP 11/21/12 Motion Hearing.

witnesses to testify at the hearing for his motion to withdraw his guilty plea. 3RP. The judge questioned Bickle why he would plead guilty if he had all of the defenses Bickle was now claiming to possess. 3RP 8. Bickle claimed his attorney had told him to plead guilty. 3RP 8. Bickle also claimed that his attorney told him that the judge was required to follow the agreed recommendation and run the sentence concurrent with the Whitman County sentence. 3RP 8-9. The judge questioned Bickle about his change of plea, the colloquy the judge and Bickle had at the time of the change of plea and questioned Bickle's truthfulness. 3RP 9-16. The judge denied Bickle's motion to withdraw his guilty plea. 3RP 18; CP 420. Bickle timely appeals the denial of his CrR 7.8 motion. CP 421-22.

The State will supplement the facts as needed throughout its brief.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE THE APPEARNCE OF FAIRNESS DOCTRINE.

Bickle claims the trial court violated the appearance of fairness doctrine at two different hearings in his case. Brief of Appellant 5-8. Bickle argues that the judge violated the doctrine at his plea hearing and during the hearing on his motion to withdraw

his plea. Brief of Appellant 5-8. Reviewing the statements made by the judge in the context of the entire hearing, the judge did not violate the appearance of fairness doctrine.

1. Standard Of Review.

The appearance of fairness doctrine and whether a judge should be disqualified based upon if the judge's impartiality may reasonably be questioned is an objective test. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). An appearance of fairness claim will not succeed without evidence of actual or potential bias because the claim would be without merit. *Id.*

2. The Trial Court Did Not Violate The Appearance Of Fairness Doctrine During The Guilty Plea Hearing.

A criminal defendant has a constitutional right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The law requires more than just impartiality, the law requires a judge to also appear impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quotations and citations omitted). It is presumed that a judge acts without prejudice or bias. *Swenson*, 158 Wn. App. at 818. Judges are also required to disqualify himself or herself from a proceeding if the judge's impartiality may reasonably be questioned or they are biased against a party. CJC

2.11(A);[2] *Swenson*, 158 Wn. App. at 818. Under the Code of Judicial Conduct:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyers, or personal knowledge of facts that are in dispute in the proceeding.

CJC 2.11(A)(1).

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997). A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they

[2] The State is citing to the current citation under the CJC that was in effect in 2011 when the plea was taken. Much of the case law and Bickle's briefing cite to former CJC 3(D)(1).

wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe the judge should be disqualified. *Id*.

Bickle claims the judge violated the appearance of fairness doctrine when the judge threatened Bickle with a longer sentence after Bickle requested to go to trial when the judge refused to follow the agreed sentencing recommendation. Brief of Appellant 8. Bickle characterizes the judge as, "rude, inappropriate and bullying." Brief of Appellant 8. Bickle asks this court to reverse his conviction and remand for a new trial in front of a different judge. Brief of Appellant 8.

The judge conducted a colloquy with Bickle during Bickle's guilty plea hearing. 1RP 3-6. Bickle also signed the Statement of Defendant on Plea of Guilty (SDPG) form. CP 12-21. The plea was a straight plea of guilty on all counts. 1RP 5-6; CP 12-29. The SDPG included a written statement by Bickle's attorney, written at Bickle's request, stating what Bickle did to be guilty of the charged crimes. CP 20. Bickle even told the judge, "I was involved in this, but I have to take what I have." 1RP 13. After the pleas of guilty

were taken, and the judge found the pleas were "knowingly, intelligently, and voluntarily made..." the judge handed down a sentence that departed from the agreed recommendation of the State and Bickle. 1RP 13-14. After the judge pronounced sentence, the following exchange occurred:

> THE DEFENDANT: I'll go to trial on this.
>
> THE COURT: No, you're not, you already pled guilty.
>
> THE DEFENDANT: That's not right, I didn't do it.
>
> THE COURT: I don't care.
>
> THE DEFENDANT: I - -
>
> THE COURT: Wait a minute, your time to speak is over, all right, you pled guilty. You understood at the time that I didn't have to accept this recommendation and I'm not accepting the recommendation. You're going to be doing this time consecutively. And I don't want to hear another word out of you. If you do, we will figure out a way to make it longer, do you understand that?

1RP 14-15.

The judge is allowed to control his courtroom and determine whose turn it is to speak. The judge went through a detailed colloquy with Bickle, who affirmatively answered that he understood the plea, understood that judge did not have to follow the plea deal, and he still wished to plead guilty to the charges. 1RP 3-6. Bickle had ample opportunity to state he did not wish to go through with

the plea and wanted to assert his right to a trial prior to pleading guilty. 1RP 3-6. The judge, who displayed some displeasure with Bickle, was not required to entertain Bickle's buyer's remorse after the judge pronounced a sentence contrary to that which Bickle had hoped to be given.

The judge also has statutory and inherent authority to impose sanctions for contempt of court. RCW 7.21.020; *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2006). The judge is able to punitively sanction a party, including a defendant in a criminal action, for acts of contempt of court. RCW 7.21.020; RCW 7.21.050; *Berty*, 136 Wn. App. at 84-85. The judge had already given Bickle high end of the standard range, the maximum sentence authorized by law without an exceptional finding. *See* RCW 9.94A.535; 1RP 7-8, 14; CP 22-29. The judge is allowed to hold Bickle in contempt of court and give Bickle a punitive sanction for speaking out of turn. RCW 7.21.020; RCW 7.21.050; *Berty*, 136 Wn. App. at 84-85. The judge was warning Bickle that he would be looking at more time if he continued to speak out of turn.

A disinterested party who witnessed the plea hearing would not believe Bickle did not receive a fair and impartial hearing. The hearing was a standard plea of guilty hearing until Bickle heard the

pronouncement of his sentence and demanded to take the case to trial. The judge had given Bickle an opportunity to speak and state anything and everything that was on his mind prior to the judge pronouncing the sentence. It was no longer Bickle's turn to speak and the judge's actions in quieting Bickle did not violate the appearance of fairness doctrine.

3. The Trial Court Did Not Violate The Appearance Of Fairness Doctrine During Bickle's Motion To Withdraw His Guilty Plea.

Bickle argues that the judge's conduct during the CrR 7.8 hearing on Bickle's motion to withdraw his guilty plea is evidence of impartiality. Brief of Appellant 8. If Bickle believed the judge was not impartial due to the exchange at the plea and sentencing hearing, Bickle had a duty to raise the issue prior to his motion to withdraw his guilty plea. *See Swenson*, 158 Wn. App. at 818. Bickle should not be able to raise any issue regarding violations of the appearance of fairness doctrine during his CrR 7.8 motion because he simply sat back and waited for an adverse ruling.

Nevertheless, the State will answer the issue regarding Bickle's allegation that the appearance of fairness doctrine was violated during his CrR 7.8 motion hearing. Bickle argues that the judge called him a liar when he was explaining that his attorney told

him the judge must follow the plea recommendation. Brief of Appellant 8. Bickle over simplifies the exchange between the judge and Bickle at the CrR 7.8 motion. Bickle also does not acknowledge that the trial judge gave Bickle a break because he was pro se and heard the motion even though Bickle did not comply with the required rules. 3RP 3-5. The judge did not violate the appearance of fairness doctrine when he questioned Bickle regarding Bickle's contradictory statements.

Bickle filed a written motion to withdraw his guilty plea, an affidavit and a brief in support of his motion. CP 47-51, 55-368. Bickle supplied an argument that the evidence for the case was unlawfully obtained and his attorney told him that the judge would agree to a concurrent sentence. CP 55-65. Bickle also alleged he refused to sign the plea agreement and was threatened into signing the SDPG by a jail guard. CP 66.

At the beginning of the CrR 7.8 hearing the judge informed Bickle of the standard he must meet to get the relief he was seeking, stating, "[y]ou can proceed, but right now you have to show me that there's a sufficient basis to proceed with this matter in the manner in which you think you are going to do it." 3RP 2-3. The judge explained to Bickle that the State's position was Bickle had

not provided any statements, declaration, or affidavits under oath that contained evidence supporting his motion. 3RP 3-4. The judge informed Bickle he would hear the actual substance of Bickle's argument, stating, "I'm trying to give you a break here if you are not following me. Just get to the point why you think your showing there is sufficient to get a withdrawal of your guilty plea." 3RP 4-5.

Bickle next asked to read a statement and the judge informed Bickle he had read everything Bickle had already filed, so there was no need to read it aloud in court. 3RP 5. The judge then allowed Bickle to argue there was newly found evidence and he had not been allowed to see the evidence, even though Bickle had requested the evidence. 3RP 5-6. The following exchange occurred:

> THE DEFENDANT: ...I asked them [the prosecutor's office] for the same surveillance video to be present at this hearing. And I have not received anything.
>
> THE COURT: That's because you are actually asking to have a hearing now. I haven't ordered the hearing yet. You have to make a sufficient showing to justify that an evidentiary hearing should take place, and so far, I haven't heard anything.
>
> THE DEFENDANT: I'm pro se, Your Honor. I'm not too good at this at all.
>
> THE COURT: That's why I gave you relief for not complying with the rules to have this all in affidavit

> form from the people who are going to be testifying, not from you.
>
> THE DEFENDANT: I wrote a letter to the Court Clerk of the court asking for the surveillance video.
>
> THE COURT: The Court Clerk does not keep evidence…

3RP 6. The judge then explained to Bickle that the Clerk's Office only keeps documents that have been filed and evidence that was marked during a hearing or trial and because this matter had not had a hearing, there was no surveillance video marked into evidence. 3RP 7. A disinterested party listening to the hearing would reasonably believe the judge was attempting to assist Bickle by allowing Bickle to present his claim and explain to Bickle, on more than one occasion, what his burden was to obtain the relief he was requesting. The judge also explained how the system worked and why the Court Clerk had not given Bickle the items he requested.

Next Bickel explained to the judge that there were problems with the search warrant in his case and the evidence obtained from the search warrant should not be admissible. 3RP 8. The judge asked Bickle why he pleaded guilty if he knew of this evidentiary issue. 3RP 8. Bickle told the judge his attorney told him to plead guilty because Bickle would be found guilty after a trial. 3RP 8. The

judge then asked, "you elected to plead guilty, you went through the form, you pled guilty, you were sentenced, right? And now you are coming back and saying, oh, but I had all these defenses." 3RP 8. Bickle gave the following explanation to the judge:

> And I told [my attorney], no, I would like to pretty much proceed to trial. He goes no, Paul, if you go to trial, you will be found guilty because of your criminal history. What I am going to do is I am going to get it ran concurrent for you, but you are going to have to sign this. and it will be in - - I'm lost [sic] of words. But he says, if you sign guilty - - I mean, if you sign to all counts and say you did this, I will get it ran concurrent. and the prosecuting attorney - - I mean, the prosecuting attorney is agreeable with this. I go, can't the judge give me a consecutive sentence? he goes, no, once I sign and agree and the prosecuting attorney signs and agree, the judge cannot go - - give you a consecutive sentence.

3RP 8-9. The judge responded by telling Bickle what he was claiming was ridiculous because Bickle signed a document which stated the judge did not have to follow anyone's recommendation and further, the judge specifically went over that aspect of the guilty plea with Bickle in open court and Bickle stated he understood the judge was not bound by any plea recommendation. 3RP 9. The judge then stated:

> So you cannot come now and say, oh, the paper I signed was wrong, and I lied to the Court when I said I understood that the Court could impose any sentence that was authorized by law. You can't do it. Just because you change your mind on whether you

> think you are guilty or not, you don't get to come in and say, oh, I changed my mind, let's go back and do all the things that I said I give up.

3RP 9-10. The judge next explained, once again, what Bickle's burden is at the hearing and informs Bickle that he has not said anything to the judge that would overcome his burden. 3RP 10.

The judge then had the following exchange with Bickle:

> THE COURT: You said that you understood that I could not impose any sentence other than what was agreed to. And I'm not - - not only does the document say I can, but I asked you if you understood that I could do that, and you said, yes. And then I asked you, do you still - - understanding that, do you still wish to enter pleas of guilty. And you said what? Yes. And then, when I asked you what your pleas was to these charges, you said you were guilty. And I also asked you before that, whether it was the result of any threats or promises on the part of anyone, and you said no to both of those questions.
> Now, you are coming in and saying, oh, he was threatening me, and they told me I had to plead guilty and all the other things that are contrary to what it was that you did when you were in court entering your plea.
> …
> [Y]ou also said you were promised something that was contrary to what you had signed and contrary to what I asked you. And now you are saying, without any support at all, other than you saying so, oh that was all wrong and I deserve a new trial.
>
> THE DEFENDANT: I never said that, Your Honor. What I said is he told me he would get it ran concurrent if I sign to all charges.
>
> THE COURT: Okay. You did that, and I told you that that's not correct. And you didn't say, oh, I didn't

understand. You said, yes, I understand that, and I still want to plead guilty.

THE DEFENDANT: But he also said if I say anything about that, the judge would not - - the honor would not agree to my - -

THE COURT: That's right. Because then it wouldn't have been your plea, but you didn't do that. ...Now you are saying, oh, that's all wrong because some attorney who has not given a statement under oath, as required, told me different.

THE DEFENDANT: He was my advisor, Your Honor, and I believed what he said.

THE COURT: More that it was - - so he told you to lie then? He told you to lie that when I said: Do you understand that I have the - - I'm not bound by any plea agreement that you agreed to with the prosecutor, and I have the authority to sentence you to any legal sentence authorized by law? And you said, yes, I understand that, and still wanted to plead guilty, then you were lying to me: is that right?

THE DEFENDANT: No. My understanding was when he told me that - - it would be agreeable if - - once I signed this plea, it would be ran concurrent. I said, what about the Honor, he goes - - he could give me a consecutive sentence. he goes once it's agreeable, when the prosecuting attorney signs and I sign, then it's agreeable. The judge cannot give you a consecutive sentence.

THE COURT: Okay. But, Mr. Bickle, what I'm telling you is the plea form says that I can, and I told you that I can, and you said okay.

THE DEFENDANT: But he says, if I sign to this and it's agreeable with my attorney and the prosecuting attorney, even if - -

> THE COURT: So then I lied to you then, right?
>
> THE DEFENDANT: I didn't say you were lying to me.
>
> THE COURT: Well, somebody is lying here because you signed the document saying you understood that…

3RP 11-13. The judge tells Bickle his claim does not make any sense, that an attorney who has been practicing for over 30 years would tell a defendant that the judge was bound by an agreed plea deal. 3RP 14. Bickle replies, "I was just trying to get it ran concurrent." 3RP 14. Bickle again asserts his attorney told him the judge had to follow the agreed deal and the judge asks Bickle to show the judge where that statement can be found in the plea document. 3RP 14. Bickle then admits that there is no such statement in the SDPG. 3RP 18.

A disinterested third party would believe Bickle received a fair and impartial hearing. The judge allowed Bickle to make his arguments, helped Bickle with the process, and asked Bickle to show the judge the evidence that supported Bickle's claim. For Bickle's claim to be true, that his attorney told him that the judge must follow the plea recommendation of the parties, Bickle had to lie during his plea hearing and on the SDPG, otherwise his argument would not make sense. Either the plea form and the

judge, both stating the judge did not have to follow any agreement of the parties, were wrong, or Bickle was not truthful when he told the judge he understood the judge was not required to follow any plea recommendation. *See* 1RP 4; CP 12-29. Considered in the context of the entire CrR 7.8 hearing, the judge's questions and statements regarding Bickle's possible untruthfulness are not evidence in which the judge's impartiality might be questioned.

There is nothing in the appearance of fairness doctrine that requires a judge refrain from stating his or her opinion about the truthfulness of a claim or testimony. Further, there is nothing in the doctrine that requires a judge to be silent when he or she believes a claim is without merit and ridiculous. *See e.g. State v. Bradford*, COA No. 68568-6-I, Slip Op. page 2 (August 12, 2013) ("Close analysis of this claims reveals that it is, put mildly, silly."). The judge did not violate the appearance of fairness doctrine and his plea and sentence should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BICKLE'S MOTION TO WITHDRAW HIS GUILTY PLEA.

In Bickle's case he is claiming that the trial court erred when it denied his motion to withdraw his guilty plea. Brief of Appellant 8-12. Bickle's argument fails because the trial court did not abuse its

discretion when it denied Bickle's CrR 7.8 motion to withdraw his guilty plea and vacate his judgement.

1. Standard of Review.

The trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966).

2. Bickle's Plea Was Voluntarily Made.

After a defendant enters a guilty plea in the trial court, he or she may motion the court to be allowed to withdraw the guilty plea. *See* CrR 4.2(f), CrR 7.8(b). A trial court then determines if it should allow the plea to be withdrawn due to a manifest injustice. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). Manifest injustice has been defined by a list of four, nonexclusive, factors including, "(1) the plea was not ratified by the defendant, (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept." *Zhao*, 157 Wn.2d at 197. A motion to withdraw guilty plea raised after judgment was entered must also meet the requirements of CrR 7.8. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). CrR 7.8 allows for a withdrawal of a guilty plea when a defendant provides sufficient proof of:

> (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.

CrR 7.8(b).

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted). The court rule requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Prior to acceptance of a guilty plea, "[a] defendant must be informed of all the direct consequences of his plea." *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations

omitted). A defendant need not show a direct consequence in which he or she was uninformed about was material to his or her decision to plead guilty. *In re Isadore*, 151 Wn.2d 294, 301, 88 P.3d 390 (2004).

The signature of a defendant on the statement of defendant on plea of guilty form is strong evidence of the plea's voluntariness. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

> When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted). To meet his or her burden that a guilty plea was not voluntarily made, a defendant must present some evidence of involuntariness beyond his self-serving allegations. *State v. Osbourne*, 102 Wn.2d 87, 97, 684 P.2d 683, 690 (1984).

If the technical requirements of CrR 4.2(g) are not adhered to, that in and of itself does not mean a manifest injustice was committed. *Branch*, 129 Wn.2d at 642. The heavy burden placed upon defendants to satisfy the requirements of CrR 4.2(f) are not

met by showing that the error, was at most, a technical error committed when the plea was taken. *State v. Osborne*, 35 Wn. App. 751, 759, 669 P.2d 905 (1983), *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984), (citations omitted).

> The constitution does not require that the defendant admit to every element of the charged crime. An information which notifies a defendant of the nature of the crime to which he pleads guilty creates a presumption that the plea was knowing, voluntary and intelligent. A defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime. In addition, a court may examine written statements to ascertain the defendant's understanding of the charges and may rely on the defendant's plea statement.

In re Ness, 70 Wn. App. 817, 821, 855 P.2d 1191, 1194 (1993).

In *Osbourne*, the Washington Supreme Court upheld a denial of a motion to withdraw a guilty plea and ruled that the Defendants were made sufficiently aware of the nature of the charge against them despite the fact that the Defendants were not specifically apprised of an element of the crime to which they plead:

> Petitioners argue that they were unaware at the time their pleas were taken that the State had to prove the "knowledge" element common to these alternative methods of proving the underlying felony. It is true that petitioners were not specifically advised during the plea proceedings that knowledge is an essential element of the underlying felony of second degree assault. Nevertheless, we are not convinced that petitioners' pleas were made absent an understanding

> of the nature of the charge. It is clear from the record that petitioners were, at the time their pleas were taken, aware of facts gathered by the State from which a trier of fact could easily find the requisite "knowledge".

Osbourne, 102 Wn.2d at 93-5.

Bickle signed his SDPG, which contained the following on page 8:

> 7. I plead guilty to:
> count I & 3 Theft of a Motor Vehicle, count II – Theft 1, count IV – Burglary 2, count V – Theft 2 in the original information. I have received a copy of that Information.
>
> 8. I make this plea freely and voluntarily.
>
> 9. No one has threated harm of any kind to me or to any other person to cause me to make this plea.
>
> 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
>
> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: Between March 19-22, 2010, I wrongfully obtained property from a vehicle belonging to another valued in excess of $5000.00 and in excess of $750.00 from another vehicle with the intent to deprive the owner. I also wrongfully obtained 2 other motor vehicles with the intent to deprive the owner. To obtain the property in excess of $750.00 I entered an enclosed, fenced lot with the intent to commit a crime. All of this occurred in Lewis County. This statement was written by my attorney at my request.

> 12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 20. Bickle signed the SDPG as did his attorney, the deputy prosecuting attorney and the judge. CP 20-21.

At the plea and sentencing hearing the judge engaged in a colloquy with Bickle regarding his change of plea. 1RP 2-6. Bickle indicated that he had heard, understood, and agreed with everything his attorney said. 1RP 2. He acknowledged that he was pleading guilty to all five counts contained in the original information. 1RP 2-3. Bickle said he had gone over each and every line of the plea form with his attorney and understood it completely. 1RP 3. He said he had reviewed the elements of each count with his attorney and understood them. 1RP 3. Bickle had also reviewed the rights which were listed on the first and second pages of the SDPG and understood that he was giving them up by pleading guilty. 1RP 3-4. He indicated that he had read and understood the prosecutor's sentencing recommendation, but also understood that the judge did not have to follow the recommendation. 1RP 4. Bickle indicated he wanted to enter pleas of guilty even though he knew he was giving up his rights and the judge was not required to follow

the plea agreement. 1RP 4. Bickle said that no one was forcing him to plead guilty, nor had anyone threatened him with harm or promised him anything (other than a sentencing recommendation) to do so. 1RP 4-5. Bickle adopted the statement on the plea form detailing what he had done to be guilty of two counts of Theft of a Motor Vehicle, one count of Theft in the First Degree, one count of Theft in the Second Degree, and one count of Burglary in the Second Degree. 1RP 5; CP 20. He represented that this statement was true. 1RP 5. Only at that point did he plead guilty to each count. 1RP 5-6. The Court found Bickle's pleas knowing, voluntary, and intelligent. 1RP 6.

At the CrR 7.8 motion Bickle failed to present any evidence, beyond self-serving allegations, that his guilty plea was not voluntarily made. 3RP. Bickle did not present an affidavit or testimony from his attorney stating he had misinformed Bickle that the judge was required to follow the plea agreement. *See* 3RP; CP 55-368. Bickle's pleas were knowingly and voluntarily made. Bickle presented no evidence to the contrary and the trial court did not abuse its discretion when it denied Bickle's motion to withdraw his guilty pleas.

3. Bickle Did Not Make The Requisite Showing That His Guilty Plea Should Be Withdrawn To Correct A Manifest Injustice.

Bickle does not have an absolute right to withdraw his guilty plea. Bickle, as any defendant attempting to withdraw his or her plea, must meet the strict requirements of CrR 4.2(f) and CrR 7.8(b). Bickle was unable to meet his burden and the sentencing court correctly ruled that Bickle's guilty plea could not be withdrawn because there was not a manifest injustice.

There is no constitutional right to withdraw a guilty plea. *Olmsted*, 70 Wn.2d at 118. Under the criminal court rules "[t]he 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." CrR 4.2(f). The defendant bears the burden of proving manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-4, 916 P.2d 405, 408 (1996). Due to the numerous safeguards in place surrounding a defendant's plea of guilty, the manifest injustice standard is a demanding one. *State v. Arnold*, 81 Wn. App. 379, 385, 914 P.2d 762 (1996), *review denied*, 130 Wn.2d 1003, 925 P.2d 989 (1996). Manifest injustice is defined as "obvious, directly observable, overt, not obscure." *Id.* A motion to withdraw a guilty plea "is addressed to the sound discretion of the court."

Olmsted, 70 Wn.2d at 118. A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *Id.* "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

As argued above, Bickle presented no evidence to the trial court beyond self-serving allegations. The colloquy the judge went through with Bickle during his guilty plea coupled with the SDPG are competent and substantial evidence that Bickle made a knowing, voluntary and intelligent decision to plead guilty after being told he was giving up his rights and the judge was not bound by any agreement and could sentence Bickle up to the maximum authorized by law. *See* 1RP 3-6; CP 12-29. The judge was not required to find Bickle's self-serving statements credible. *See State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). Given the lack of evidence presented to the judge regarding Bickle's claim that his attorney misinformed him that the trial court was not bound by the plea agreement contrasted with the SDPG and colloquy the judge had with Bickle at the time of the plea

which evidenced the knowing and voluntariness of Bickle's plea, the trial court did not abuse its discretion when it denied Bickle's motion to withdraw his guilty plea. Bickle did not make the requisite showing under CrR 4.2(f) that the court must allow the plea to be withdrawn due to a manifest injustice. Bickle also did not meet any of the requirements of CrR 7.8. Bickle did not present competent evidence of mistakes, surprise, excusable neglect or some irregularity in the obtainment of the judgment and sentence. CrR 7.8(b)(1). Bickle failed to make a showing that there was newly discovered evidence or that the judgment was void. CrR 7.8(b)(2), (4). Bickle did not demonstrate his conviction was obtained by misconduct by the State, misrepresentation, or fraud. CrR 7.8(b)(3). Finally, Bickle did not give any other reason that would justify relief from his judgment. CrR 7.8(b)(5). The trial court's ruling was not based on unreasonable or untenable grounds or reasons. Therefore, this Court should affirm the trial court's ruling denying the motion to withdraw the guilty plea.

C. BICKLE RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY DURING HIS CHANGE OF PLEA HEARING.

Bickle's attorney provided competent and effective legal counsel throughout the course of his representation. Bickle asserts his attorney was ineffective for misinforming him that the judge was

required to follow the agreed plea deal, which was a direct sentencing consequence. Brief of Appellant 13. Bickle's assertion that his attorney was ineffective is false.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Bickle's Attorney Was Not Ineffective During His Representation Of Bickle During The Plea Hearing.

To prevail on an ineffective assistance of counsel claim Bickle must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the

assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Bickle alleges his attorney misinformed him regarding direct consequence of his sentence, that the judge could run his Lewis County sentence consecutive to his Whitman County sentence. The only evidence Bickle has of such a conversation is contained in his argument to the trial court during Bickle's CrR 7.8 motion. *See* Brief of Appellant 13; 3RP; CP 55-368. Bickle's recall of his attorney's statements were hearsay. Bickle presented no competent evidence that his attorney ever told him the sentences would be required to run concurrent. The evidence from the plea hearing is contrary to Bickle's argument because he agreed he was

informed that the judge was not bound by any plea agreement, as argued above. Without more, Bickle's claim fails. Bickle received effective assistance from his attorney and his conviction should be affirmed.

IV. CONCLUSION

The judge did not violate the appearance of fairness doctrine during any of Bickle's hearings. The trial court did not abuse its discretion when it denied Bickle's motion to withdraw his guilty plea. Bickle also received effective assistance from his counsel. For the foregoing reasons, this court should affirm the trial court's ruling denying Bickle's motion to withdraw his guilty plea and affirm Bickle's convictions for two counts of Theft of a Motor Vehicle, one count of Theft in the First Degree, one count of Theft in the Second Degree, and one count of Burglary in the Second Degree.

RESPECTFULLY submitted this 3rd day of September, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. PAUL SCOTT BICKLE, Appellant.	)))))))	NO. 44329-5-II DECLARATION OF MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On September 3, 2013, the appellant was served with a copy of the **Respondent's Brief** by emailing to the attorney for Appellant at the following email address:

Liseellnerlaw@comcast.net.

DATED this 3 day of Sept, 2013, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

September 03, 2013 - 4:27 PM

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