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ORIGINAL

NO. 71127-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FERDI DeGUZMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KEN SCHUBERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

When a defendant is fully advised during a plea colloquy that he is facing a standard range sentence of 120-148 *months,* is advised that he has a right to go to trial, and the defendant testifies that he was advised as such and was told by his attorney that he was facing a potential sentence of *years* in prison, does the trial court abuse its discretion in denying the defendant's motion to withdraw his plea of guilty when the defendant now argues that he thought he was facing a sentence of *days* in jail?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On September 26, 2011, Ferdi DeGuzman was charged with one count of Child Molestation in the First Degree and two counts of Rape of a Child in the Second Degree. CP 1-2. On April 24, 2013, DeGuzman pled guilty to two counts of Rape of a Child in the Second Degree. CP 15-29; RP 7-21.[1]

Plea Colloquy: The State did a colloquy with the defendant, going over the entire plea form. RP 7-21. The defendant was

[1] The verbatim report of proceedings consists of one consecutively-numbered transcript containing hearings from 4/23/13, 4/24/13, 6/3/13, 6/6/13, 8/9/13, 9/17/13, 10/4/13, 10/18/13 and 11/1/13. The State will refer to them as "RP."

advised that his decision to plead guilty is a "final one and that you cannot change your mind in the future?" RP 10. The defendant responded, "Correct, yes." RP 10.

The State informed the defendant that the standard sentencing range for each count was 120-158 months, and that the maximum term was life in prison and a $50,000 fine. RP 10. The defendant responded, "Yes." RP 10. The defendant was informed that it was an indeterminate sentence and that if the court did not impose a Special Sex Offender Sentencing Alternative (SSOSA), which is what the defendant was asking for, that the court will order "that you serve a minimum term of confinement in the Department of Corrections . . . and then will go before the Indeterminate Sentencing Review Board and they will determine whether or not you are to be released. Do you understand that?" RP 12. The defendant responded, "Yes." RP 12. The defendant was informed that the State was not recommending a SSOSA. RP 12-13. The defendant responded, "Yes." RP 13.

The defendant was informed that the State will make a recommendation and the defense will make a recommendation but that the judge does not have to follow that. RP 13. The defendant responded, "Yes." RP 13. The defendant was informed that unless

the court found substantial and compelling reasons to deviate from the standard range that the court would impose a sentence within the standard sentence range and the defendant stated, "Yes." RP 13-14.

The defendant was asked if his plea was made freely and voluntarily and he responded, "Yes." RP 18. He was asked, "Do you understand that we could tear up this plea form right now and go to trial on this case if that's what you wanted?" RP 18. He responded, "Yes." At the end of the colloquy he was asked if he had any questions and he stated, "No." RP 19-20. The court found that the defendant had entered the plea knowingly, voluntarily and intelligently and accepted the plea. RP 21.

Motion to Withdraw Plea: On September 17, 2013, the defendant moved to withdraw his guilty plea, stating that he and his attorney had not had good communication and that he had thought he was facing 124-148 *days not months* of confinement. RP 46, 68. The defendant acknowledged, however, that his attorney told him that if he took the case to trial he would get 17 years, and that the State was going to recommend 13 to 17 years.[2] RP 70. The

[2] The range of 13 to 17 years was prior to the State, as part of the plea deal, dismissing the count of Child Molestation in the First Degree, which made the defendant eligible for a SSOSA.

defendant acknowledged that the prosecutor had gone through the plea form with him but that he didn't know what he was doing. RP 71. The defendant conceded that he had previously been charged with two felony crimes, possession of stolen property and forgery, had pled guilty to those crimes, and had gone through a plea form that was strikingly similar to the one used in the instant case. RP 80-81. The defendant conceded that he did not tell the prosecutor, the judge or his attorney at the plea hearing on April 24th that he had any questions. RP 88-89.

Jail phone calls between the defendant and his girlfriend from May 2, 2013 through May 6, 2013 were played in court and admitted as evidence. RP 55. In one of the jail calls the defendant discussed possibly getting out of jail in just a few months. RP 133.

The State pointed out in argument that the defendant had had his attorney for over a year and had never made any complaints about her or their communication. RP 147.

The judge denied the defendant's motion to withdraw his guilty plea. RP 155. The judge stated "[i]f we allowed a defendant to withdraw a plea simply on the kind of testimony that Mr. DeGuzman has offered, almost no plea would stand." RP 150. "And I simply don't find his statements credible and I don't find them

persuasive, and . . . in many instances they are contradictory." RP 150. The judge stated that he saw the defendant's statements to his girlfriend as simply a defendant trying to diminish what he's done and trying to diminish the consequent that he could be in jail for over a decade. RP 151. The judge concluded:

> I was the judge that saw Mr. DeGuzman the day I accepted the plea. He did not appear to me in the slightest to be someone that was under coercion, that was in fear of his attorney, that didn't think he could proceed to trial.

RP 152.

Sentencing: On November 1, 2013, the court rejected the defendant's request for a SSOSA and sentenced the defendant to an indeterminate sentence with a minimum of 144 months of confinement. CP 112.

2. SUBSTANTIVE FACTS

On May 16, 2011, thirteen-year-old AZ told her therapist that she was being molested by her mother's boyfriend, Ferdi DeGuzman. CP 4. AZ reported to police that beginning when she was about 9 years old, DeGuzman began to masturbate in front of her. CP 4. This progressed to DeGuzman trying to take AZ's clothes off, touching her under her clothes, and eventually touching

her vagina. CP 4. AZ stated that DeGuzman licked her vagina and asked her to perform oral sex on him. CP 5. AZ stated the sexual abuse by DeGuzman occurred multiple times until she was 11 years old and reported the abuse to her therapist. CP 4-5.

DeGuzman was interviewed and stated that AZ was the one who acted inappropriately by exposing her breasts to him and dancing around with her friend in a sexual manner. CP 5. He stated that AZ made him touch her and acknowledged licking her vagina. CP 7. He denied ever doing anything that AZ did not want. CP 7.

C. ARGUMENT

THE DEFENDANT'S PLEA WAS KNOWING, VOLUNTARY AND INTELLIGENT AND THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

The defendant argues that the trial court abused its discretion in refusing to allow him to withdraw his guilty plea when he testified that he misunderstood that he was facing *years* in prison, rather than days. He further argues that he wanted to go to trial and his attorney pressured him to take the plea. This argument should be rejected as the record clearly establishes that the

defendant was properly advised in the paperwork and at the plea hearing of the sentence range, and the defendant himself testified that in discussions with his attorney regarding the plea offer from the State that he was facing 13 to 17 years confinement. The record also shows that the defendant was advised at the plea hearing that the plea paperwork could be torn up and he could go to trial. The trial judge who presided over the hearing found the defendant's testimony that he had not been properly advised to be lacking in credibility and denied the motion to withdraw the plea.

A defendant may withdraw a guilty plea if it is "necessary to correct a manifest injustice." CrR 4.2(f). The defendant must show that the manifest injustice was "obvious, directly observable, overt, [and] not obscure." State v. Smith, 74 Wn. App. 844, 847, 875 P.2d 1249 (1994) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The defendant bears the burden of proving that a manifest injustice has occurred. State v. Ross, 129 Wn.2d 279, 283, 916 P.2d 405 (1996).

A "manifest injustice" exists where (1) the plea was not ratified by the defendant, (2) the plea was not voluntary, (3) counsel was ineffective, or (4) the plea agreement was not kept. State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001), abrogated on

other grounds by State v. Sisouvanh, 175 Wn.2d 607 (2012). A defendant must be informed of all of the direct consequences of his plea. State v. A.N.J., 168 Wn.2d 91, 113, 225 P3d. 956 (2010).

When a trial court has exercised its discretion on a motion to withdraw a guilty plea, the reviewing court will set aside the trial court's order *only upon a clear showing of abuse of discretion.* State v. Olmsted, 70 Wn.2d 116, 119, 422 P.2d 312 (1966).

In the present case, the defendant was fully informed at his plea hearing that the sentence range he faced was 120 to 158 *months*. RP 10. The defendant acknowledged, in his testimony at the plea withdrawal hearing, to going over the form with the prosecutor and not having any questions after the colloquy. RP 86. He acknowledged that his attorney had informed him that at trial he was facing 13 to 17 *years*. RP 70. He also acknowledged that he was aware that with the plea deal the State was offering that he was facing 13 to 17 years. RP 123.

The defendant now argues that he thought he was facing only *days* in jail, not *months* and that his attorney forced him to accept a plea rather than go to trial. It is not uncommon for a defendant to regret having pled guilty but, as the trial court stated below, "if we allowed a defendant to withdraw a plea based simply

on the kind of testimony that Mr. DeGuzman has offered, almost no plea would stand." RP 150. The trial judge pointed out that the State and the defendant's attorney were ready to go to trial and the defendant could have done that if he wished. RP 154. In fact, during the plea colloquy the prosecutor specifically stated that the plea paperwork could be torn up at that moment and the trial could proceed if DeGuzman wished. RP 18.

The defendant cited his phone calls with his girlfriend in which he discussed possibly being out in a few months as proof that he was misadvised. RP 73. However, as the prosecutor pointed out in argument, there is no evidence that his girlfriend even knew what he had been convicted of. RP 145. The defendant could easily have been trying to downplay the seriousness of what he was facing to placate his girlfriend – a not uncommon phenomenon in jail phone calls. The jail calls are not evidence that the defendant was misadvised of the consequences of his plea or denied his right to trial.

The trial court found the defendant's testimony about being misadvised as to the consequences of his plea not credible and stated that it was his belief that DeGuzman was simply regretting that he might be facing a decade in prison. RP 150-51. In a case

with similarities to the present one, the Court of Appeals rejected a defendant's motion to withdraw his guilty plea when he argued that he did not know the State was not recommending a SSOSA. State v. Blanks, 139 Wn. App. 543, 550-51, 161 P.3d 455 (2007). The record indicated that his attorney explained the plea in detail to Blanks and thus he apparently understood the State would not be recommending a SSOSA. Id. The trial court found the defendant's motion to be a case of "buyer's remorse" and the Court of Appeals agreed. Id. at 551.

A defendant cannot be allowed to withdraw a guilty plea simply because he later has regrets that he pled to crimes that could result in years in prison. The record in this case establishes that the defendant was fully advised of the direct consequences of his plea, including his standard range sentence, and that the plea was made knowingly, voluntarily and intelligently.

D. CONCLUSION

The defendant was advised at his plea hearing that he was facing a standard sentence range of 120-158 months. The record also reflects that he was clearly aware he could proceed to trial if he wished. The trial court did not abuse its discretion in denying

the defendant's motion to withdraw his guilty plea and this appeal should be rejected.

DATED this 27th day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FERDI DEGUZMAN, Cause No. 71127-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C B C — 6-27-14

Name Carla B. Carlstrom 27521 — Date 6-27-14

Done in Seattle, Washington