No. 46108-1-II

(consolidated with 46115-3-II and 46118-8-II)

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

HARVEY MADDUX,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court erred when it entered Finding of Fact 1.19 because that finding is not supported by substantial evidence.

2. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and violated CrR 4.2(f) when it refused to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered.

3. The state's breach of the plea agreement in the assault case entitles the defendant to withdraw his guilty plea on those charges.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters a finding of fact unsupported by substantial evidence?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and does that court violate CrR 4.2(f) if it refuses to allow that defendant to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered?

3. Does a defendant's unsuccessful attempt to withdraw a guilty plea free the state from it's sentencing recommendation obligation made under a plea agreement?

STATEMENT OF THE CASE

On July 2, 2013, the Lewis County Prosecutor charged the defendant Harvey Maddux with one count of possession of methamphetamine. CP1 1-2.[1] By separate information filed August 23, 2013, the Lewis County Prosecutor charged the defendant with first degree assault with a deadly weapon enhancement and fourth degree assault. CP2 1-3. At first appearances for each case the court appointed the same attorney to represent the defendant. RP 22-24.[2] The defendant's attorney later worked out a joint plea bargain with the prosecutor whereby the state would amend the first degree assault to second degree assault without a deadly weapon enhancement upon the defendant's plea to that charge along with the companion fourth degree assault charge and the possession charge from the first cause number. RP 33-34; CP1 7-15; CP2 10-18. Under the plea

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[1]The case at bar includes the consolidated appeals from three Lewis County cases: (1) 13-1-00444-0 (appellate number 46108-1-II, referred to herein as the "possession case"); (2) 13-1-00554-3 (appellate number 46118-1-II and referred to herein as the "assault case"); and (3) 14-1-00114-7 (appellate number 46115-3-II, referred to herein as the "malicious mischief case.") Clerk's Papers in these cases are referred to herein as "CP1," "CP2" and "CP3" respectively.

[2]The record on appeal includes two volumes of verbatim reports. The first continuously numbered volume includes transcripts of the hearings held on 9/30/13, 3/21/14 and 4/2/14 and is referred to herein as "RP [page #]." The second volume includes the transcript of the hearing held on 12/10/13 and is referred to herein as "RP 12/10/13 [page #]."

agreement the state would ask for concurrent time of 24 months on the possession charge, 364 days on the fourth degree assault charge, and 63 months on the second degree assault charge on a standard range of 63 to 89 months. *Id.* In the assault case paragraph (6)(g) of the Statement of Defendant on Plea of Guilty set out the plea agreement. CP2 13. It states:

> The prosecuting attorney will make the following recommendation to the judge: 63 months, credit for time served, court costs, attorney fees, 12 months community custody, Ct II - 364 days credit for time served with Count I. Both counts concurrent with cause # 13-1-444-0.

CP2 13.

The prosecutor signed this document along with the defendant and his attorney. CP2 18. The plea agreement as reflected in the guilty plea form did not bind the defendant to any recommendation and the parties specifically understood that the defendant would be asking to set a future sentencing date at which he would seek a sentence below the standard range. RP 41-42.

Based upon this agreement the prosecutor filed an amended information on 9/30/13 reducing the charge in Count I from first to second degree assault as well as striking the deadly weapon enhancement. CP2 8-9. The parties appeared before the court on that day and the defendant pled guilty to possession of methamphetamine, second degree assault and fourth degree assault pursuant to the plea agreement. RP 1-18. Without objection from the state or the court the defendant entered his guilty plea on the assault

charges under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). *Id.* After accepting the defendant's pleas the court put sentencing over at the defendant's request and without objection from the state. *Id.*

On December 10, 2013, the parties appeared before the court with the defense again asking to continue the sentencing date in order to obtain documents to support a request for an exceptional sentence below the standard range. RP 12/10/13 4-5. At that time the defendant also argued a *pro se* motion to dismiss based upon the jail's failure to provide him with access to the law library or legal materials. RP 12/10/13 1-16. In the alternative the defendant argued a motion for release. *Id.* The court granted the motion to continue sentencing and denied both the defendant's *pro se* motion to dismiss and the defendant's *pro se* motion for release. RP 12/20/13 5, 16-17; CP1 20; CP2 57.

Following this hearing the defendant became convinced that his attorney had misinformed him about the law of assault and that but for this misinformation he would not have entered a guilty plea. RP 98-100. Based upon this belief the court granted his original counsel's motion to withdraw and appointed new counsel for the defendant in order to pursue a motion to withdraw guilty plea. CP1 23-28; CP2 61-64. On February 14, 2014, the defendant filed his own Motion to Withdraw Guilty plea in his assault case.

CP2 66-87. Two days later defendant's new counsel filed a memorandum in support of the defendant's motion. CP2 89-92. The gravamen of the defendant's argument was as follows: (1) that he had not intended to assault or scare either of the complaining witnesses, (2) that he did not display a knife for the purpose of scaring either complaining witness, (3) that his attorney had misinformed him about the law by stating that the only relevant inquiry was into the apprehension of the complaining witnesses and that the defendant's intent was irrelevant, and (4) had he known that the state had to prove that he acted with the intent to assault he would not have pled guilty and would have gone to trial. CP2 66-87, 89-92.

Five days after the defendant filed his motion to withdraw his guilty plea in his assault case the state filed a third information against the defendant alleging that on 2/18/14 the defendant committed the crime of second degree malicious mischief by knowingly damaging a computer kiosk screen in the jail. CP3 1-3. At arraignment on this new charge the court appointed the same attorney to represent the defendant who was representing him on the motion to withdraw guilty plea. CP3 4.

On 3/21/14 the court called the cases for hearing on the defendant's motion to withdraw his guilty plea. RP 1. The defense then presented two witnesses in support of the motion: the defendant's original appointed attorney and the defendant. RP 22-83, 83-129. During that testimony the

defendant's prior attorney testified that the reason he believed the defendant wanted to withdraw his guilty plea was that the defendant had erroneously become convinced that a knife with a blade under three inches in length, as the defendant was accused of displaying, could never be considered a deadly weapon for either the purpose of the first degree assault statute or for the purpose of a deadly weapon enhancement. RP 71-74.

The defendant testified that his attorney spent little time with him, that he did not interview witnesses, and that he pressured him into accepting a plea bargain at the last minute without letting him read the guilty plea form. RP 87-96. In addition, the defendant testified that his attorney misinformed him about the law of assault by stating that the defendant's intent was irrelevant. RP 96-99, 122-123. In fact, the defendant claimed that he had never intended to assault anyone and that had he known that the law required that the state prove intent he would not have pled guilty and would have gone to trial. *Id.*

Following this testimony and argument from counsel the court denied the defendant's motion. RP 137-147. The court later entered the following findings of fact and conclusions of law in support of its ruling:

I. FINDINGS OF FACT

1.1 The defendant, HARVEY MADDUX was convicted, by way of an Alford plea on September 30, 2013 of Assault in the Second Degree and Assault in the Fourth Degree under Lewis County

Superior Court Cause Number 13-1-00554-3.

1.2 Also on September 30, 2013, the Defendant was convicted, by way of guilty plea, of VUCSA-Possession of a Controlled Substance (Methamphetamine) under Lewis County Superior Court Cause Number 13-1-00444-0.

1.3 Prior to sentencing in either matter, the defendant filed a motion seeking to withdraw his plea and to exonerate him under Lewis County Cause Number 13-1-00554-3.

1.4 The defendant filed extensive pleadings in support of his motion.

1.5 New counsel was appointed to represent the defendant for purposes of this motion because, among other issues, the defendant claimed ineffective assistance of counsel.

1.6 A hearing was held on the defendant's motion on March 21, 2014.

1.7 At the hearing, the defendant's prior attorney, J.P. Enbody, testified.

1.8 At the hearing, prior to the testimony of Mr. Enbody, the defendant, after consulting with his attorney, agreed to allow Mr. Enbody to testify regarding the representation of the defendant in these matters.

1.9 During the testimony of Mr. Enbody, he related the fact that he and the defendant had reviewed the discovery and, in fact, that the discovery had been left at the jail for the defendant to review on his own as well.

1.10 Mr. Enbody testified that he also provided the defendant with copies of information explaining legal terms such as assault.

1.11 Mr. Enbody testified that he explained to the defendant the difference between a deadly weapon per se and an implement being classified as a deadly weapon based upon how it is used in a particular circumstance.

1.12 Mr. Enbody also provided copies of letters written to the defendant explaining the concepts, which letters were dated after the plea.

1.13 Mr. Enbody also explained the extensive negotiations that occurred in this matter.

1.14 Mr. Enbody explained that the defendant's main concern during the case was not the issue of guilt, but rather the issue of time to be served.

1.15 The court also heard testimony regarding the extensive colloquy that occurred between the court and the defendant prior to the guilty pleas being accepted.

1.16 The defendant testified in this hearing as well.

1.17 The defendant argued during his testimony that he only understood the "common law" definition of assault, not the statutory definition.

1.18 The defendant argued that the apprehension of an assault cannot be an assault under the current law.

1.19 The defendant was informed by his attorney of the proper definition of assault.

1.20 The defendant argued during his testimony that the knife used in this matter could not be a deadly weapon because a knife, to be defined as a deadly weapon, must have a blade longer than three (3) inches.

1.21 The defendant was informed of the proper definition of a deadly weapon.

1.22 The defendant was not misled by his attorney.

1.23 The defendant also argued that he was denied access to a law library during the pendency of these cases.

1.24 The defendant showed no apprehension during the change

of plea hearing.

1.25 The defendant admitted that, pursuant to the *Alford and Newton* doctrines, sufficient evidence existed that made it highly likely that the defendant would be convicted if the evidence to be presented by the state were presented to a finder of fact.

1.26 The defendant admitted he was pleading guilty.

1.27 The state argued that, because the defendant filed the motion in this matter, the defendant violated the terms of his plea agreement and, as a result, the state was relieved of the obligation to recommend a particular sentence.

II. CONCLUSIONS OF LAW

2.1 Because this motion was heard prior to sentencing, the standard to be applied is governed by CrR 4.2.

2.2 The defendant has failed to show that his plea was not done voluntarily pursuant to CrR 4.2 (d).

2.3 Pursuant to RCW 9.95.050, the question of a knife being a deadly weapon is a question of fact.

2.4 The defendant received effective assistance of counsel throughout this matter.

2.5 The defendant was aware of his rights and knowingly, voluntarily and intelligently gave up those rights by pleading guilty.

2..6 The defendant has failed to show there was a manifest injustice in this matter.

2.7 There is no basis in law or fact for the defendant's assertions in this matter.

2.8 The filing of the motion is a repudiation of the agreement by the defendant.

2.9 The defendant was not denied access to legal materials

because he was adequately represented throughout the pendency of his criminal matters in Lewis County.

III. ORDER

3.1 The defendants motion filed in this matter is hereby denied.

CP 184-187.

On 4/12/14 the defense and the state appeared before the court on all three cases. RP 165. The defendant then entered an *Alford* plea on the new malicious mischief charge. CP3 10-18. Paragraph (6)(g) of the defendant's guilty plea stated the following concerning the state's agreed recommendation:

> The prosecuting attorney will make the following recommendation to the judge: 29 mo., $200 filing fee, $500 CVA, $600 attorney fee, $89/day jail fee up to $1,000, $100 DNA fee, $100 DV fee, subpoena service fee TBD, restitution $1,046.00.

CP3 13.

Following the court's acceptance of the defendant's plea to this new charge the court proceeded to sentencing on all three cases. RP 177-210. The state began its recommendation to the court by repudiating its agreed recommendation of 63 months on the defendant's second degree assault case. RP 178. The prosecutor stated the following to the court on this issue:

> So based on the defendant's new conviction, the State believes that it is free to recommend whatever sentence it feels is appropriate. We also feel we are free to recommend anything that we see is appropriate, based upon the clear violation of the Plea Agreement, by the defendant's filing of a Motion to Withdraw his guilty plea and be

quote, unquote, "exonerated."

RP 178.

The prosecutor then recommended 84 months on the defendant's second degree assault charge even though it had agreed to recommend 63 months. RP 178-180. The prosecutor then asked for 364 days on the fourth degree assault charge, 24 months on the drug charge, and 29 months on the new malicious mischief charges, with the assault and drugs sentences running concurrent to each other but consecutive to the malicious charge. *Id.* The defendant asked for 63 months on the second degree assault charge pursuant to its agreement with the state, 364 days on the fourth degree assault charge, 24 months on the drug charge, and 29 months on the malicious mischief charge with all sentences run concurrently. RP 182-185.

Following argument by counsel and allocution by the defendant, the court sentenced the defendant to concurrent sentences of 24 months on the drug charge, 75 months on the second degree assault charge, and 364 days on the fourth degree assault charge. CP1 84, CP2 196. The court then imposed 22 months on the malicious mischief charge, which was within the standard range, but ran that time consecutive to the other terms of incarceration as an exceptional sentence. CP3 44. The court entered the following findings of fact in support of its decision to impose an exceptional sentence on the malicious mischief charge by running the time consecutive to sentences also

imposed that same day:

> (a) The defendant has committed multiple concurrent offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).
>
> (b) The defendant committed this crime while incarcerated pending sentencing on two other criminal matters (Lewis County Cause Numbers 13-1-444-0 and 12-1-554-3).

CP3 49.

Following imposition of these sentences the defendant filed timely notices of appeal. CP1 205-218, CP2 95, CP3 51-64.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT 1.19 BECAUSE THAT FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to Finding of Fact No. 1.19 in the order denying the defendant's motion to withdraw his guilty plea. This finding states:

> 1.19 The defendant was informed by his attorney of the proper definition of assault.

CP 185.

The defendant's first attorney testified at length during the motion to withdraw guilty plea on a number of issues relevant to the motion. This testimony included the claim that the defendant appeared fixated upon the belief that since the knife he possessed had a blade under three inches in length he could not be found guilty of an assault with a deadly weapon or a deadly weapon enhancement. The defendant's first attorney stated during his testimony that he had extensive discussions with the defendant both orally and in writing trying to explain that this view was incorrect to the extent that finding of fact 1.19 reflects this facet of explaining the definition of second degree assault there is evidence in the record to support its entry.

However, this conclusion ignores the real crux of the defendant's argument, which was that the attorney failed to explain to him that both first and second degree assault require the state to prove an intent to assault. Neither did the defendant's attorney claim that he had specifically informed the defendant of this requirement under the law for conviction on any level of assault. Thus, to the extent that Finding of Fact No. 1.19 is interpreted to include a finding that the defendant's attorney explained the law on the *mens rea* required under the assault statute there is insufficient evidence in the record to support it. Consequently, the trial court erred when it entered Finding of Fact No. 1.19 because it is not supported by the record.

II. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND VIOLATED CrR 4.2(f) WHEN IT REFUSED TO ALLOW HIM TO WITHDRAW A GUILTY PLEA THAT WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). For example, guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996). The reason that due process is violated when a defendant fails to enter a plea knowingly, voluntarily, and intelligently is that a plea of guilty to a criminal charge constitutes a combined waiver of a series of fundamental constitutional rights, including the right to jury trial, the right to the presumption of innocence, the right to confront the state's witnesses, the right to testify, the right to call exculpatory witnesses, the right to compel witnesses to appear, and the right to present

exculpatory evidence, among other rights. *Boykin v. Alabama*, *supra*; *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Indeed, the purpose of the court mandated guilty plea form and mandated guilty plea colloquy is to assure that a defendant who gives up so many fundamental constitutional rights is acting knowingly and voluntarily. *State v. James*, 138 Wn.App. 628, 158 P.3d 102 (2007). As with all constitutional rights, waivers will not be implied and will only be sustained if knowingly, voluntarily, and intelligently entered. *State v. Riley*, 19 Wn.App. 289, 294, 576 P.2d 1311 (1978).

The withdrawal of guilty pleas that are not made knowingly, voluntarily and intelligently is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." A plea that is not knowingly, voluntarily and intelligently entered constitutes a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with First Degree Kidnaping, First Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's

agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntary, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

> Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally

> the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.
>
> The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. *See also, State v. Kissee*, 88 Wn.App. 817, 947 P.2d 262 (1997) (Mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the defendant did not voluntarily and knowingly enter his plea because his attorney misinformed him on the requisite *mens rea* element for assault in general. The following addresses this argument.

In the case at bar the defendant pled guilty in the assault case to an amended information charging second degree assault under RCW 9A.36.021(1)(c). This statute states:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> . . .
>
> (c) Assaults another with a deadly weapon; or

RCW 9A.36.021(1)(c).

In Washington the term "assault" is defined as "an attempt, with

unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented." *Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942); *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983). It is a specific intent crime and requires proof of an intent to assault. *State v. Walden*, 67 Wn.App. 891, 841 P.2d 81 (1992).

In this case the defendant's first attorney spent a great deal of time explaining that the defendant did not understand the definition of a "deadly weapon" in regard to a knife with a blade under three inches. However, this was not the defendant's only or even primary complaint in his motion to withdraw his guilty plea. Rather, the primary complaint was his argument that (1) he had specifically informed his attorney that he had not intended to assault anyone, (2) that his attorney told him that his intent was irrelevant because the state only had to prove the reasonable apprehension of the complaining witnesses, (3) that this advise was in error, and (4) that had his attorney properly informed him that the state had to prove the intent to assault or cause apprehension he would have gone to trial. This claim remained unanswered by the defendant's first attorney and essentially ignored by the trial court. This claim does provide a basis for withdrawing the plea and the trial court erred when it denied the defendant's motion based upon this argument concerning the trial attorney's erroneous definition of assault. As

a result this court should reverse the trial court's ruling and remand with instructions to grant the defendant's motion.

III. THE STATE'S BREACH OF THE PLEA AGREEMENT IN THE ASSAULT CASE ENTITLES THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA ON THOSE CHARGES.

Under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, due process in a criminal case requires that the state adhere to the terms of the plea agreements it enters with a defendant. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997) (the state may not present an argument that under cuts a plea agreement); *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d 122 (1988) (since the breach of plea agreement impinges upon a defendant's fundamental due process rights, the terms of a plea agreement may override an otherwise contradictory statute). In other words, once the trial court accepts a defendant's guilty plea, the plea bargain is binding upon the state much in the same fashion as a contract. *State v. Schaupp*, 111 Wn.2d 34, 757 P.2d 970 (1988).

If the state breaches a plea agreement, the defendant usually may elect one of two possible remedies: (1) specific enforcement, or (2) withdrawal of the guilty plea. *In re James*, 96 Wn.2d 847, 640 P.2d 18 (1982). The only exception would be for cases in which the state could prove that the defendant induced the state to enter the agreement through prejudice, fraud,

or deceit. *State v. Lake*, 107 Wn.App. 227, 27 P.3d 232 (2001).

For example, in *State v. Shineman*, 94 Wn.App. 57, 971 P.2d 94 (1999), the defendant pled guilty to fourth degree assault, upon the agreement of the state to do the following after one year if the defendant met certain conditions: (1) allow the defendant to withdraw his plea, (2) move to dismiss, and (3) expunge the defendant's record of the conviction. Following one year, the defendant moved to withdraw his guilty plea, to dismiss the charge, and to expunge his record. The state agreed to the withdrawal of the guilty plea and to the dismissal, conceding that the defendant had met the conditions of the plea bargain.

However, the state argued that the court did not have authority to order the state to have the defendant's record expunged. The trail court agreed and denied the defendant's request for expungement. The defendant then appealed, requesting specific performance of the state's agreement to expunge his record. In addressing the arguments presented, the Court of Appeals first stated the following concerning plea agreements:

> When a criminal defendant's guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Due process requires that the prosecutor adhere to the terms of the plea bargain agreement reached with the criminal defendant.

State v. Shineman, 971 P.2d at 96 (citations omitted).

Noting that the state conceded that the defendant had met the requirements of the plea agreement, the court stated the following concerning the remedies available to the defendant:

> Where the prosecutor attempts to avoid the plea agreement, the defendant is permitted to choose his remedy: withdrawal of his plea or specific enforcement of the plea agreement. The State must show prejudice, or fraud or deceit on the part of the defendant, before the court will disallow the defendant's choice of remedy for the State's breach of a plea agreement. Here, the State has shown no such prejudice, fraud, or deceit. Therefore, Shineman is entitled to choose between specific enforcement of the plea agreement, i.e., expungement of the charge from his record, or withdrawal of his guilty plea.

State v. Shineman, 971 P.2d at 97 (citations omitted); *cf State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011) (defendant not entitled to specific performance of a pleas agreement term that is contrary to law, overruling *State v. Miller*, 110 Wn.2d, 756 P.2d 122 (1988)).

In the case at bar the prosecutor specifically repudiated the plea agreement it entered with the defendant and refused to recommend 63 months on the second degree assault charge. Rather, the state argued for 84 months in prison. The prosecutor justified this action on two bases, given just prior to making the 84 months recommendation. The prosecutor stated:

> So based on the defendant's new conviction, the State believes that it is free to recommend whatever sentence it feels is appropriate. We also feel we are free to recommend anything that we see is appropriate, based upon the clear violation of the Plea Agreement, by the defendant's filing of a Motion to Withdraw his guilty plea and be quote, unquote, "exonerated."

RP 178.

The prosecutor's argument ignored two salient facts concerning the agreement it entered with the defendant. The first is that plea bargains are unilateral contracts that can only be accepted by full performance. In *State v. Wheeler*, 95 Wn.2d 799, 631 P.2d 376 (1981), the Washington Supreme Court first squarely addressed the issue concerning the nature and enforceability of plea bargains. In this case the state had charged the defendant with second degree assault with a firearm enhancement and kidnapping out of a single incident. The defendant's attorney later met with the prosecutor and offered to plead the defendant to second degree assault with a deadly weapon enhancement if the state would dismiss the kidnapping charge. The prosecutor in charge of the case accepted this offer and the parties then put the matter on for the defendant to enter the plea. However, just prior to the defendant's entry of the plea the prosecutor revoked her acceptance of the offer.

After the prosecutor repudiated the offer she had initially accepted the defendant moved for specific performance of the agreement. The trial court denied the motion and the defendant later went to trial and was convicted on the original charges. The defendant then appealed, arguing in part that the prosecutor's acceptance of the defendant's plea offer created an enforceable contract which prevented the prosecutor from withdrawing her acceptance.

As a matter of first impression the court in *Wheeler* recognized that ultimately plea agreements are offers for unilateral contracts that may only be accepted by the defendant's entry of a guilty plea. Thus, the court rejected the defendant's argument. The court held:

> The weight of authority is that, absent some detrimental reliance by the defendant, the State may withdraw from any plea agreement prior to the actual entry of a guilty plea. That result has been reached by strictly applying contract principles and characterizing the plea bargain as a unilateral contract. That is, only the defendant's plea, or some other detrimental reliance upon the arrangement, constitutes an acceptance of the agreement; and consequently the bargain can be revoked if neither has occurred. Those courts have further reasoned that enforcing bargains made before the plea would inhibit the prosecutor's use of plea bargaining; and that the defendant, because she or he can still get a jury trial, has an adequate remedy for the State's revocation.
>
> . . .
>
> We conclude that absent a guilty plea or some other detrimental reliance by the defendant, the prosecutor may revoke any plea proposal. Since the defendant has alleged only "psychological" reliance on the prosecutor's offer, and without a showing that the prosecutor has abused its discretion by routinely rescinding its offers, the trial court correctly declined to enforce it

State v. Wheeler, 95 Wn.2d at 803-805 (citations omitted).

In the case at bar, as in *Wheeler*, the parties to each case entered into a plea agreement. In the case at bar the state's agreement was set out as follows:

> The prosecuting attorney will make the following recommendation to the judge: 63 months, credit for time served, court costs, attorney fees, 12 months community custody, Ct II - 364 days

credit for time served with Count I. Both counts concurrent with cause # 13-1-444-0.

CP2 13.

In addition, in the case at bar, as in *Wheeler*, the plea bargain was no more that an offer to a unilateral contract the defendant could only accept by pleading guilty. However, in the case at bar, unlike *Wheeler*, the defendant did accept the offer by pleading guilty. As the terms of this agreement make clear, the defendant's entry of the guilty plea constituted full performance on the state's offer to a unilateral contract. There were no further requirements for the defendant to fulfill.

The second salient fact that the state ignored in this case when it repudiated the unilateral contract the defendant accepted by pleading guilty is the fact that it is not legally possible for a performing party to repudiate a unilateral contract after full performance has been rendered. While the defendant did attempt to withdraw his guilty plea, he was ultimately unsuccessful. Thus, his requirement of performance, which he fulfilled when it initially pled guilty, continued to the point of sentencing. As such the state had no basis to claim that it could repudiate a contract that the defendant had fulfilled, regardless of how hard the defendant had attempted to withdraw his guilty plea.

In this case the state also argued that it was entitled to repudiate its

requirement under the plea agreement "based on the defendant's new conviction." The state did not present any argument in support of this claim because there is none in our case law or in logic. The plea offer by the state did not contain a term that freed the state of the requirements of the contract based upon the defendant's commission of a future crime any more than it contained a term that freed the state of the requirements of the contract based upon an attempt by the defendant to withdraw his guilty plea.

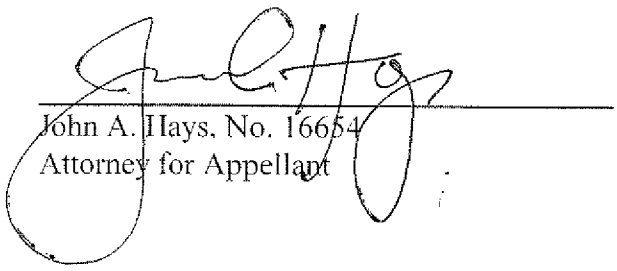
As the foregoing explains the state in this case violated its agreement with the defendant when it recommended 84 months on the second degree assault charge instead of 63 months as it had promised to recommend. Thus, under the law as is set out previously in this brief the defendant is entitled to chose his remedy between a new sentencing with specific performance or the withdrawal of his plea. The defendant in this case chooses the latter remedy and requests that this court order it.

CONCLUSION

The trial court erred when it denied the defendant's motion to withdraw his guilty plea. As a result this court should vacate the defendant's conviction and remand with instructions to grant the defendant's motions.

DATED this 29th day of July, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

CrR 4.2

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(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.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(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.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty: ...

COURT OF APPEALS OF WASHINGTON, DIVISION II

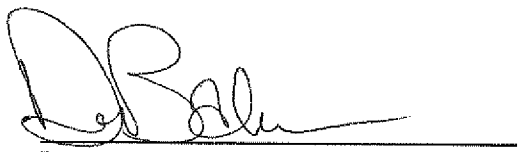
STATE OF WASHINGTON, **Respondent,**	**No. 46108-1-II** **46115-3-II** **46118-8-II**
vs.	
HARVEY MADDUX, **Appellant.**	**AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Jonathan Meyer
   Lewis County Prosecuting Attorney
   345 West Main Street
   Chehalis, WA 98532
   appeals@co.lewis.wa.us

2. Harvey Maddux, No. 908861
   Monroe Correctional Complex
   P.O. Box 777
   Monroe, WA 98272

Dated this 29th day of July, 2014, at Longview, Washington.



Donna Baker

HAYS LAW OFFICE

July 29, 2014 - 11:32 AM

Transmittal Letter

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Court of Appeals Case Number: 46108-1

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Personal Restraint Petition (PRP)

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