Supreme Court No. 98785-8

NO. 80183-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

TERVEYON CURTIS.

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Terveyon Curtis, appellant below, seeks review of the Court of Appeals decision designated in Part B.

II. COURT OF APPEALS DECISION

Mr. Curtis appealed his King County convictions for one count of burglary in the first degree and one count of robbery in the first degree, with deadly weapon sentencing enhancements of 24 months for each conviction. On June 15, 2020, the Court of Appeals affirmed the convictions in an unpublished opinion, but remanded for the costs of community supervision to be stricken. Appendix. This motion is based upon RAP 13.4(b)(1).

III. ISSUE PRESENTED FOR REVIEW

Due Process requires a guilty plea be entered knowingly, intelligently and voluntarily. If a defendant has been misadvised about the applicable sentence for the offense, the resulting plea is not entered knowingly, intelligently, and voluntarily. Mr. Curtis was not properly advised that the sentencing enhancements for possession of a deadly weapon would run consecutively with his sentence and with each other. Does this misadvisement about the terms of the sentence demonstrate Mr. Curtis's plea was not voluntarily entered, and therefore, did the Court of

Appeals decision conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

Mr. Curtis was barely 20 when he was charged with the offenses below in February 2017. CP 69. He and a few friends were charged with an armed robbery and an armed burglary during the same week; the latter incident involved a recording studio containing an apartment, so it was charged as a first degree burglary. CP 62.

Before these isolated events, Mr. Curtis had never committed a felony and had no juvenile record. CP 49-51. He awaited trial for more than two years, and through no fault of his own, his original attorney was discharged from the case due to a legal conflict of interest. RP 48-49. Almost two years following Mr. Curtis's arrest, he was appointed a new attorney, Daniel Felker. RP 48-49.

Four months into this representation, Mr. Curtis repeatedly expressed to the trial court the breakdown of communication with Mr. Felker. RP 41. "He has so much animosity with me. Don't let me say nothing." RP 41. Mr. Curtis told the court he had spoken with a private attorney and wanted Mr. Felker removed from his case. RP 41.

The court informed Mr. Curtis it would reserve on his motion to discharge Mr. Felker until a private lawyer filed a notice of appearance and set the case for trial. RP 42.

At the next appearance ten days later, Mr. Curtis again moved to discharge counsel. RP 48. Since private counsel had not filed a notice of appearance, the court heard Mr. Curtis's motion on its merits. Id. Mr. Curtis informed the court of the difficulties he had communicating with Mr. Felker – that counsel "argues with [his] family," had not visited him or given him discovery, and that they simply did not get along. RP 48-49. The State objected to permitting Mr. Felker to withdraw, arguing that Mr. Felker had negotiated a "phenomenal deal" on Mr. Curtis's behalf. RP 50. Mr. Felker replied, "I don't know if I'd call it phenomenal." RP 50.

The court denied Mr. Curtis's motion to discharge counsel. RP 51. The court found Mr. Curtis had been awaiting trial for two years, and the trial date was imminent. Id. The court also noted Mr. Felker's level of experience and expertise. Id.

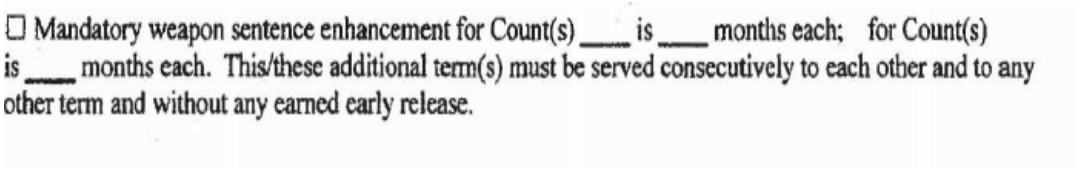
A few days later, the case was sent out for trial. Mr. Curtis suddenly found himself entering a plea in open court, going over a lengthy written Statement of Defendant on Plea of Guilty that detailed the plea agreement. RP 55-56. Among other terms of the agreement, the State

moved to amend the firearm enhancements to deadly weapon enhancements on both counts. RP 56. Mr. Curtis was informed that a second degree escape charge with which he was previously charged would run concurrently with these two robbery/burglary cases. RP 56.

Mr. Curtis answered the prosecutor's and the court's questions about his guilty plea, his educational background, and his understanding of his sentencing range. RP 57-62. When he was asked whether he understood that deadly weapons enhancements of 24 months for each count – 48 months in total – would be served consecutively to the rest of his sentence, Mr. Curtis suddenly stopped the colloquy, asking, "What'd you say? Can you repeat that?" RP 62. Mr. Felker did not satisfactorily clarify for him what this essential term meant, but Mr. Curtis replied, "Alright. Whatever." RP 62. The plea colloquy continued.

Following his plea, Mr. Curtis immediately requested new counsel and filed a motion to withdraw his plea pursuant to CrR 4.2. RP 73-74; CP 54-65. Mr. Curtis argued his plea was involuntary and that he did not understand the sentencing consequences of his plea. CP 64-65. He informed the court that the felony plea agreement he signed did not reflect the mandatory sentence enhancement; nor that any enhancement was to be served consecutively. CP 48, 57. The plea form signed by Mr. Curtis, his

original attorney Mr. Felker, as well as the prosecutor and the court, left this section blank:


☐ Mandatory weapon sentence enhancement for Count(s) ____ is ____ months each; for Count(s) is ____ months each. This/these additional term(s) must be served consecutively to each other and to any other term and without any earned early release.

CP 48, 57.

Despite these errors and Mr. Curtis's statements that he did not understand the consequences of his plea, the trial court denied Mr. Curtis's motion to withdraw his guilty plea. CP 66; RP 90-94.

Mr. Curtis appealed, and on June 15, 2020, the Court of Appeals affirmed the convictions in an unpublished opinion. The Court accepted the State's concession as to Mr. Curtis's second argument, that community supervision fees should be stricken upon remand to the trial court.

Mr. Curtis respectfully seeks this Court's review as to the first issue, because Mr. Curtis did not understand the direct consequences of his guilty plea, and the court should have permitted him to withdraw it. RAP 13.4(b).

V. ARGUMENT

This Court should grant review, because the Court of Appeals should have reversed the trial court's order denying Mr. Curtis's motion to withdraw his guilty plea.

The trial court erred when it denied Mr. Curtis's motion, filed by new counsel and supported by Mr. Curtis's declaration, to withdraw his plea. The Court of Appeals decision is in conflict with this Court's jurisprudence, and thus, review should be granted. RAP 13.4(b)(1).

a. Due process requires a defendant be properly advised of the direct consequences of a guilty plea.

Due process requires that a defendant's plea of guilty be knowing, voluntary, and intelligent. U.S. Const. amend. 14; Const. art. I, sec. 3, 21, 22; Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); see also In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences."). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

"Where a plea agreement is based on misinformation … generally the defendant may choose . . . withdrawal of the guilty plea." State v.

Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). Under Walsh, a guilty plea is not voluntary and cannot be valid if it is made without an accurate understanding of the consequences. 143 Wn.2d at 8.

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. Boykin, 395 U.S. at 242; Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

b. Because Mr. Curtis was not properly advised of the direct consequences of his plea, the plea was not knowingly or voluntarily entered.

When a defendant enters a plea agreement where he has been misadvised concerning the penalty he faces, he is entitled to withdraw the plea because it was invalidly entered. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591. In Mendoza, this Court found a defendant's understanding of the direct consequences of his plea to be so essential that even where the ultimate sentence resulted in less time than expected, the defendant is entitled to withdraw his plea. Id. at 584.

Here, Mr. Curtis moved to withdraw his plea immediately upon discovering he had been misadvised of its terms – well before sentencing. RP 73-74; CP 64-65. As in Mendoza, Mr. Curtis's motion to withdraw should have been granted, and thus, the Court of Appeals decision is in conflict with this Court's decision. RAP 13.4(b)(1).

First, there were internally contradictory statements regarding the deadly weapon sentencing enhancements made by the deputy prosecutor and defense counsel at the time of the guilty plea. On Page 6 of the Statement of Defendant on Plea of Guilty, a paragraph indicates that Counts I and II include a deadly weapon sentence enhancement of 24 months each, which is mandatory and must be served consecutively to any other sentence. CP 28 (Sec. 6(l)). Mr. Curtis was not asked to sign or initial this paragraph. Likewise, on Page 2 of the Felony Plea Agreement, the paragraph referring to "mandatory weapon sentence enhancements" was left blank. CP 48. No box was checked, and no additional time was added to his sentence. CP 48.

☐ Mandatory weapon sentence enhancement for Count(s) ____ is ____ months each; for Count(s) is ____ months each. This/these additional term(s) must be served consecutively to each other and to any other term and without any earned early release.

CP 48.

Mr. Curtis also expressed his confusion about the deadly weapon enhancements during the plea colloquy, interrupting the deputy prosecutor

during the questions regarding the enhancements. When the prosecutor asked Mr. Curtis whether he understood that the deadly weapon enhancements of 24 months for each count – 48 months in total – would be served consecutively to the rest of his sentence, Mr. Curtis stopped the colloquy, asking, "What'd you say? Can you repeat that?" RP 62. The prosecutor did not clarify the meaning of this essential term, and neither did defense counsel nor the court. RP 62. Mr. Felker said to Mr. Curtis, "It's the 94 to 109. That's based (inaudible)." Mr. Curtis replied, "Alright. Whatever." RP 62. The prosecutor then asked Mr. Curtis, "You understand that?" Mr. Curtis replied, "Yeah."

This exchange was inadequate to clarify the inconsistencies contained in the oral and written plea agreements. Mr. Curtis did not understand the consecutive nature of the sentencing enhancements, particularly in light of the errors in the written plea agreement.

As reflected in the motion to withdraw his guilty plea and his declaration, Mr. Curtis did not clearly understand the terms and consequences of the agreement. RP 81-83, 89-90; CP 54-64, 64-65. Because he was not properly informed of the direct consequences of his guilty plea – specifically the length of his sentence, including mandatory

deadly weapons enhancements – Mr. Curtis's plea was not knowingly and voluntarily made. Isadore, 151 Wn.2d at 298.

c. Because Mr. Curtis's motion to withdraw his plea should have been granted, the Court of Appeals decision is in conflict with decisions of this Court, and review should be granted.

Where a defendant is misadvised of the direct consequences of his guilty plea, the plea is involuntary and he is entitled to withdraw the plea. Isadore, 151 Wn.2d at 303; Walsh, 143 Wn.2d at 8.[1] Because the State failed to meet its burden to demonstrate that Mr. Curtis's guilty plea was knowing, intelligent, and voluntary, his motion to withdraw should have been granted.

The Court of Appeals should have reversed and permitted Mr. Curtis to withdraw his plea and proceed to trial, in light of the circumstances. The Court of Appeals decision was thus in conflict with decisions of this Court and merits review. RAP 13.4(b)(1).

VI. CONCLUSION

For the reasons set forth above, Mr. Curtis respectfully requests that this Court grant review under 13.4(b)(1).

[1] Unlike the defendants in State v. Knotek, 136 Wn. App. 412, 426, 149 P.3d 67 (2006), rev. denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007), and Mendoza, 157 Wn.2d at 582, Mr. Curtis moved immediately to withdraw his guilty plea when he realized the error.

DATED this 15th day of July, 2020.

Respectfully submitted,

s/ Jan Trasen

_____

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERVEYON T. CURTIS, Appellant.	No. 80183-0-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Terveyon Curtis appeals the denial of his motion to withdraw his guilty plea. Curtis contends that the trial court abused its discretion because he did not enter his guilty plea voluntarily and with an understanding of the consequences of the plea. Specifically, Curtis asserts that he did not understand that two mandatory deadly weapon sentence enhancements would run consecutively to each other.

We conclude that because the totality of the circumstances demonstrates that Curtis understood the applicable sentencing range—and therefore, the consequences of his plea—the trial court did not abuse its discretion when it denied Curtis' motion. However, we hold that the trial court erred in imposing discretionary community supervision fees. Therefore, we affirm but remand to the trial court with directions to strike the community supervision fees.

FACTS

On March 7, 2017, the State charged Curtis with robbery in the first degree (count 1) and burglary in the first degree (count 2). And on April 1, 2019, Curtis pleaded guilty to both counts. The State's sentence recommendation for the plea specified that the standard sentencing range for count 1 was 46 to 61 months and count 2 was 31 to 41 months to be served concurrently. Additionally, each count carried a mandatory deadly weapon sentence enhancement of 24 months, which would run consecutively to the standard range and to each other.

On April 1, 2019, the day of the scheduled trial, the State announced to the court that the parties had reached a plea agreement. During the hearing that followed, the State ran through a series of questions intended to ensure that Curtis understood the terms of his plea agreement. The State summarized the sentence enhancements and provided the State's recommended sentence. But when the State asked Curtis to confirm his understanding, Curtis asked the State, "What'd you say? Can you repeat that?" Curtis' attorney then spoke to Curtis—part of which was on the record—stating, "It's the 94 to 109." Following Curtis' attorney's explanation, the State again asked whether Curtis understood, and Curtis said, "Yeah." The court later accepted Curtis' guilty plea.

Pursuant to Curtis' plea of guilty, the parties submitted three documents to the court: (1) Curtis' statement of defendant on plea of guilty, (2) the State's sentencing recommendation, and (3) the plea agreement. Curtis' statement, which he and his attorney signed and initialed, specified that both counts

included a sentence enhancement of 24 months each. The statement also included a chart, which provided the sentence enhancements that would be added to the standard range and the standard sentencing range for both of the charges. Similarly, the State's sentence recommendation specified that the sentence would include two consecutive 24-month sentence enhancements and that the State recommended the high end of the sentence range, 109 months. The signed felony plea agreement included a check box for the sentence enhancements. However, the parties failed to check the box or write in the amount of time for each enhancement.

Following the plea hearing but prior to sentencing, Curtis filed a motion to withdraw his guilty plea. After a hearing on the motion, the trial court denied Curtis' motion. The trial court found that the record provided sufficient evidence to demonstrate that Curtis knowingly and voluntarily entered his guilty plea. The trial court further determined that the unchecked box on the plea agreement was a harmless clerical error.

Thereafter, the court sentenced Curtis to 101 months in custody, and 18 months of community supervision. The trial court found Curtis indigent and waived all discretionary legal financial obligations. However, appendix H to the felony judgment and sentence required Curtis to pay fees to the Department of Corrections for community supervision.

Curtis appeals.

ANALYSIS

Motion To Withdraw Guilty Plea

Curtis asserts that the trial court abused its discretion when it found that he entered into his guilty plea voluntarily and with an understanding of the direct consequences of his plea. We disagree.

On appeal, we review "[a] trial court's order on a motion to withdraw a guilty plea . . . for abuse of discretion." State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court abuses its discretion when its decision is "'manifestly unreasonable or based upon untenable grounds or reasons.'" Lamb, 175 Wn.2d 127 (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A decision is manifestly unreasonable if it is "'outside the range of acceptable choices given the facts and applicable legal standard'" and is untenable if its "'factual findings are unsupported by the record.'" Lamb, 175 Wn.2d at 127 (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

"Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily." State v. Robinson, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citing State v. A.N.J., 168 Wn.2d 91, 117, 225 P.3d 956 (2010)). "[T]he record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea," Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976), "determined from a totality of the circumstances." State v. Branch, 129 Wn.2d

635, 642, 919 P.2d 1228 (1996). And under CrR 4.2(f), a defendant is allowed to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice is an "'injustice that is obvious, directly observable, overt, not obscure.'" Branch, 129 Wn.2d at 641 (quoting State v. Sass, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). A per se manifest injustice occurs when the defendant makes an involuntary plea. State v. Paul, 103 Wn. App. 487, 494, 12 P.3d 1036 (2000). "A guilty plea is considered involuntary if the State fails to inform a defendant of a direct consequence of his plea." State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003) (citing State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). And "the length of the sentence is a direct consequence of pleading guilty." State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

The record demonstrates that Curtis entered his guilty plea voluntarily and knowingly and that he understood the full consequences of his plea. The plea agreement stated that the standard sentencing ranges for both counts were included as an appendix and specified that there were special deadly weapon findings. While the parties failed to check the box and fill out the text of the sentence enhancement section of the plea agreement, the agreement did provide the sentence range for each count based on Curtis' offender score. Furthermore, the State's sentence recommendation specified the standard sentence range for each count and provided that the State would recommend, "including all counts and enhancements," 109 months. And while the total sentence range did not break down the calculations, Curtis' statement indicated

he had obtained a 12th grade education, and he therefore could have determined that, with a total of 109 months, the enhancements were to be served consecutively. Moreover, in the recommendation, the State did check the box for weapons enhancements and provided that each sentence enhancement would require 24 months and would be "served consecutive to any other term of confinement." Both the plea agreement and the State's sentence recommendation were incorporated into Curtis' statement of defendant on plea of guilty.

In Curtis' signed statement, there was a table that included the standard sentencing range for both counts, 46 to 61 months for count 1 and 31 to 41 months for count 2, and indicated that an enhancement of 24 months would be added to the sentence for both counts. It also specified that both counts included deadly weapon sentence enhancements of 24 months each and that "[t]his additional confinement time is mandatory and must be served consecutively to any other sentence and any other enhancement."

At the plea hearing, the State confirmed that Curtis had gone over the plea agreement with his counsel and that Curtis' counsel had answered all of his questions. The State told Curtis that it would recommend a 61-month sentence for count 1 to be served concurrently with a 41-month sentence for count 2. Curtis stated that he understood. In addition, the State asked Curtis:

> [STATE]: Do you also understand that there is a mandatory enhancement that will be added to the standard range of 24 months for each count?
>
> [CURTIS]: Yeah.

Thereafter, the following exchange took place:

> [STATE]: . . . There's also a weapons enhancement which I've discussed, 24 months for count 1 and 24 months for count 2, which are served consecutively. Those are mandatory.
> I said what the State's going to recommend, the 61 months and the 41 months. However, your attorney is free to ask for less time within the standard range. Do you understand that?
>
> [CURTIS]: What'd you say? Can you repeat that?
>
> [DEFENSE COUNSEL]: It's the 94 to 109. That's based [inaudible].
>
> [CURTIS]: Alright. Whatever.
>
> [STATE]: So you understand that?
>
> [CURTIS]: Yeah.

Therefore, at the hearing, Curtis affirmatively stated that he understood both the enhancements and the standard sentencing range.

During the hearing, the trial judge "did not perceive the defendant to be confused during the hearing." The trial judge presided at both the plea hearing and the hearing on Curtis' motion to withdraw his guilty plea and was in the best position to determine Curtis' demeanor during the hearings. See, e.g., State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984) (sustaining the trial court's denial of the petitioner's motion to withdraw her guilty plea because the trial court "had ample opportunity to observe petitioner's conduct, appearance and demeanor" to determine her competency). And the trial court determined that the failure to indicate the sentence enhancements on the plea agreement was a harmless scrivener's error, and we agree. See State v. Adcock, 36 Wn. App. 699, 701-02, 676 P.2d 1040 (1984) (holding that when the State left the standard

sentencing range blank on one form, but defendant's counsel provided the standard sentencing range on numerous other occasions, the failure to indicate the sentencing range was a technical error and did not require reversal).

In short, the record affirmatively demonstrates that Curtis understood that the sentence enhancements would be served consecutively to one another because he understood the potential length of his sentence. Based on the numerous written references, Curtis' oral confirmation of his understanding, and the trial court's characterization of Curtis' demeanor during the hearing, the totality of the circumstances establishes that Curtis made the plea knowingly, intelligently, and with an understanding of the direct consequences of his plea. Accordingly, the trial court did not abuse its discretion in denying Curtis' motion to withdraw his guilty plea.

Curtis disagrees and contends that his question, "What'd you say? Can you repeat that?," demonstrated that he did not understand the sentence enhancements or the direct consequences of his plea. However, as discussed above, both the State's sentence recommendation and Curtis' statement on his guilty plea specified the correct sentencing range, and Curtis confirmed both orally and through his signature that he read and understood the plea documents. Therefore, we are not persuaded. Cf. State v. Walsh, 143 Wn.2d 1, 4, 8-9, 17 P.3d 591 (2001) (holding that where the State and the plea agreement specified an incorrect standard range for the defendant's sentence, the defendant entered into the plea involuntarily and without full knowledge of the consequence of his plea).

Additionally, Curtis cites Mendoza for his proposition that the State's failure to check the box on the plea agreement adjacent to the sentence enhancement evinces that he misunderstood the sentencing consequences of his plea. But Mendoza is distinguishable. There, the State erred in calculating Hector Mendoza's offender score, which provided the standard sentencing range that the State used in Mendoza's plea agreement. Mendoza, 157 Wn.2d at 584-85. Mendoza agreed to the plea agreement with the incorrect standard range. Mendoza, 157 Wn.2d at 584. And during the sentencing proceeding, the State acknowledged that it erred. Mendoza, 157 Wn.2d at 584-85. Mendoza did not withdraw his plea at the hearing but attempted to withdraw his plea later. Mendoza, 157 Wn.2d at 585. Our Supreme Court noted that "[w]hen a guilty plea is based on misinformation . . . the defendant may move to withdraw the plea based on involuntariness." Mendoza, 157 Wn.2d at 592. However, the court concluded that Mendoza could not withdraw his guilty plea because he failed to move for a withdrawal prior to sentencing. Mendoza, 157 Wn.2d at 592.

Here, unlike Mendoza, the State did not misinform Curtis of his standard sentencing range. And the failure to check the sentence enhancement box was a clerical error on the plea agreement form. Thus, Curtis' reliance on Mendoza is misplaced.

Community Supervision Fees

Curtis asserts that because the trial court found him indigent, the court erred when it ordered him to pay community supervision fees. The State concedes that the court erred. Because community supervision fees are

discretionary and because the court found Curtis indigent, we accept the State's concession.

We affirm the trial court's denial of Curtis' motion to withdraw his guilty plea. But we remand to the trial court to strike the community supervision fees.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80183-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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