No. 44142-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Plaintiff,

v.

MELVIN ALBERT KIMBREL,

Appellant/Defendant.

BRIEF OF APPELLANT

Wm. Michael Hanbey
Attorney for Appellant
WSBA # 7829

PO Box 2575
Olympia, WA 98507
360-570-1636

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A. Assignments of Error

Defendant assigns as error the following conclusions of law:

1. The trial court erred in entering Conclusion of Law I, ordering that the facts indicate the defendant was properly advised of his rights by the Court prior to entry of his Alford plea pursuant to CrR 4.2(d). [CP 133]

2. The trial court erred in entering Conclusion of Law II, ordering that the Alford Plea was properly reviewed by the Court prior to the entry of the plea. [CP 133]

3. The trial court erred in entering Conclusion of Law III, ordering that the facts establish the Change of Plea was entered knowingly, intelligently, and voluntarily and comported with the defendant's due process rights. [CP 133]

B. Issues Pertaining to Assignments of Error

The above conclusions of law are erroneous for the following reasons:

1. The Court did not establish for the record that the Defendant had reviewed and signed each Change of Plea form, was cognizant of its contents and had been advised by his attorney of the nature and extent of the waivers, conditions and consequences of entering an Alford plea to each charge. [Assignment of Error No. 1.]

2. The Court abused its discretion by finding in a change of plea circumstance that Defendant had been properly informed of the consequences of entry of an Alford plea, including waiver of his right of appeal arising from a conviction. [Assignment of Error No. 2.]

3. The Court did not establish for the record that the Defendant had voluntarily and knowingly waived his right of appeal in violation of his constitutional rights. [Assignment of Error No. 3.]

II. STATEMENT OF THE CASE

The Defendant, Melvin Alvin Kimbrel, was charged with two felonies in separate counts before the Thurston County Superior Court. In Cause No. 10-1-00610-2, the Defendant was charged with two counts of Assault 2°, DV. [CP 6] The second felony was in Cause No. 11-1-00050-1 where the Defendant was charged with Unlawful Possession of a Firearm 2°. [CP 141]

Defendant entered an Alford plea to each felony on 16 February 2011. [CP 8/142] This appeal arises from the procedure employed to receive the changes of plea which violated the constitutional rights of Mr. Kimbrel and constituted a manifest injustice. He is seeking the opportunity to withdraw his pleas.

Hearings on the change of plea came before The Honorable Gary S. Tabor, Judge. The first hearing was scheduled for a change of plea on 14 February 2011. The hearing began with the entry of an Amended Information altering the original charge in the assault matter to one count of Assault 2°. The attorney for Defendant, H. Gary Wallis, advised the

Court that he had reviewed the Statement of Defendant on Plea of Guilty and that Defendant wished for the Court to accept the plea. [RP 41-42]

A. First Hearing

A colloquy began between the Court and Mr. Wallis. The Court ascertained that Defendant intended to enter a plea of guilty on both charges. [RP 42] Defendant acknowledged the class of felony including the maximum penalty and fine. [RP 42] When the Court advised Defendant that the Assault 2° was a strike offense, the Defendant acknowledged he did initial the change of plea document. [RP 43] The Court then advised Defendant of the scope of the strike law. [RP 43] Judge Tabor noted that Defendant had no prior criminal history which meant this would be his first strike offense. He sought whether the Defendant understood the impact of the strike.

The Defendant then commented: "Yeah, but you're taking away, waiving all my rights, and I've never had a chance to prove I'm not guilty." [RP 43] The Court immediately responded: "Okay. It sounds like probably you don't want to plead guilty here today then." [RP 44] There followed discussion between the attorney and Defendant, then Mr. Wallis informed the Court: "We will go to trial, Your Honor."[sic] The hearing was concluded for the day. [RP 44]

B. Second Hearing

Two days later, on 16 February 2011, the matters were called again before Judge Tabor. On that day, the Court noted: "I recall we started a proceeding in this matter the other day. We did not complete that, but are we ready to proceed again?" [RP 45] The Court inquired of Defendant whether he had had a chance to speak about the strike issue with his attorney. Defendant acknowledged that he had. [RP 46]

The Court then identified the sentencing ranges and the recommendation by the State reflected at paragraph 6(g) on page 4 of the pleading for the Assault 2° charge. [RP 46-47] Defendant acknowledged that plea offer. The Court then inquired whether the Defendant was aware that the court did not have to follow the recommendation. Defendant answered in the affirmative. [RP 47] Then, the Court reviewed the recommendation from paragraph 6(g) on page four of the pleading for the Unlawful Possession of a Firearm 2°. Defendant acknowledged the plea offer. [RP 47-48]

An issue developed concerning whether separate costs or fees must be imposed with each separate cause of action and whether the DNA fee needed to be imposed for both causes. [RP 48] Defendant acknowledged the information provided by the Court when the Court summarized the combined total of fees from each cause. [RP 49] Again, the Court asked

the Defendant if he knew that the court did not have to follow the recommendation of the State. Defendant confirmed that was known to him. [RP 49]

C. Alford Pleas

Then the Court reviewed paragraph 11 of each Change of Plea form, where it was stated what Defendant did to "...make you guilty of these offenses...." [RP 49-50] Judge Tabor then cited for the record the statement of the Defendant: "I do not believe I am guilty. However, there is a substantial likelihood that a jury will find me guilty. The reason I would like to take advantage of the prosecutor's offer." The Court then corrected his citation: "I believe it says 'therefore' rather than 'the reason.'" "Therefore, I wish to take advantage of the prosecutor's offer." [RP 50]

Judge Tabor noted: "That appears to be an Alford Plea. Have you talked with your attorney about the meaning of an Alford Plea?" Defendant responded affirmatively and that he knew the meaning of it. [RP 50] The Court then entered into a description of an Alford plea and noted that an Alford plea required the Court to review the statement of probable cause "...to determine whether or not there are sufficient facts

had the matter gone to trial, for the trier of fact to find guilty beyond a reasonable doubt."[1] [RP 50-52]

The Court then reviewed the separate probable cause statements and determined that there was a sufficient factual basis in each cause for a trier of fact to find guilt. [RP 51] He then specifically inquired of the Defendant: "[A]re you making your Alford pleas to these two charges freely and voluntarily?" The Defendant responded: "Yes, Your Honor." [RP 51]

Thereafter, the Court held that Mr. Kimbrel had made a free and voluntary Alford plea to each cause and that he had had the assistance of counsel. Since the parties wished to proceed to disposition, the Court advised Defendant he would proceed to sentencing and inquired of Defendant: "Mr. Kimbrel, in every case when a person is to be sentenced they have the right to speak to the Court. Is there anything you would like to say before I impose sentence?" [RP 52] The Defendant responded: "Just when the accident happened...it was an accident." [RP 52-53]

The Court interrupted and stated: "You have nevertheless acknowledge that there are facts that the Court could find guilt beyond a reasonable doubt to assault in the second degree." [RP 53] The Defendant responded: "Yes, Your Honor." [RP 53]

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[1] Judge Tabor then gained approval from both legal counsel that the probable cause statement was appropriate in each case for him to consider.

The Court proceeded to sentencing on each of the causes of action following the recommendation set forth in the Change of Plea forms for each cause. [RP 4-55] However, the Court did not mention the requirement for community custody prior to disposition of the pleas.

On the 15th of February 2012, less than one year after the Judgment and Sentence was entered on each cause, a Motion to Set Aside and Withdraw Plea was filed in Thurston County Superior Court. [CP 31-38] The contentions of Defendant were that:

a) The Defendant was not properly advised of his right to appeal by his attorney prior to or at the time of the entry of his Alford Plea pursuant to CrR 4.2(d);

b) The Alford Plea of Defendant was not properly reviewed by the Court prior to the entry of the plea; and

c) The Change of Plea was not entered knowingly, intelligently, and voluntarily in violation of the due process rights of the Defendant.

A hearing was set before The Honorable Gary S. Tabor for consideration of the Motion on 17 April 2012. At the hearing, the Court acknowledged it had not been informed there would be oral argument, did not have a record of proceedings of the 14th and 16th of February 2011 and had not reviewed the submissions of the parties. The matter was continued until the 10th of May 2012 with the option for the parties to submit supplemental briefs or argument. [CP 71-75/76-128] The Court heard argument on the legal issues presented by the Motion on the 10th of

May 2012. At the conclusion of oral argument, the Court issued an Oral decision which denied the Motion to Set Aside and Withdrawal of Plea. [RP 12-16]

The parties attempted to reach agreement on proposed Findings of Fact and Conclusions of Law, but were unable to do so. The matter was reset for hearing on 27th of September 2012 for the Court to consider competing Findings of Fact and Conclusions of Law. Prior to the date of the hearing the parties agreed that, in lieu of oral argument on the proposed and competing Findings and Conclusions, a letter would be sent to Judge Tabor advising him that each party agreed he could review and enter the pleading which he thought most appropriately reflected his oral decision. The hearing was continued on the 27th of September 2012 due to a conflict. Thereafter, a joint letter from legal counsel was forwarded to Judge Tabor stating agreement that he could review the submissions in chambers and then enter Findings and Conclusions that he thought reflected his determination. Judge Tabor took the matter under advisement and entered Findings of Fact and Conclusions of Law and Order on 11 October 2012. [CP 130-34]

Defendant herein, through counsel, filed notices of appeal on 13 October 2012. Defendant now presents that appeal. [CP 135-40/167-72]

III. SUMMARY OF ARGUMENT

The Defendant contends that the change of plea procedure was constitutionally flawed and that manifest injustice occurred when he was subjected to a determination of guilt for each charge and sentenced.

Specifically, the Defendant was not fully advised by his legal counsel of the scope and consequences of the Alford plea submitted to the Court. Further, the Court failed to actually ascertain whether the Defendant was entering a voluntary, knowing and intelligent plea to each charge. The Court failed to advise the Defendant of the direct consequences of his entry of a plea when it failed to advise the Defendant of the community custody component of the sentence of each charge.

The Court failed to ascertain from the Defendant that he had reviewed the Statement of Change of Pleas with his legal counsel and whether that legal counsel had answered any questions he may have. The Court failed to recognize that the prosecutor representing the state did not execute either Statement of Change of Plea confirming the plea bargain offer. The Court failed to recognize that legal counsel for the Defendant had failed to execute the Statement of Change of Plea form for the Assault 2° charge.

When the Court discussed the statement of the Defendant wherein an *Alford* plea was indicated, and the Defendant indicated the "assault" was an accident, the Court reinforced the purpose of the *Alford* plea instead of inquiring of the Defendant if he was freely making the plea with the knowledge that he would be losing his right of appeal upon a plea.

These errors fail to support the conclusions of law reached by the Court and denied the Defendant the right to have his pleas set aside and withdrawn in each charge.

IV. ARGUMENT OF COUNSEL

A. Judge Tabor Erred In Holding That Defendant Had Fully Known And Understood The Consequence Of The Alford Pleas That He Entered

A defendant may waive his or her right of appeal whether it is from conviction or a plea of guilty[2] so long as the waiver is done intelligently, voluntarily and with the understanding of the consequences. *State v. Perkins*, 108 Wn.2d 212, 215, 727 P.2d 250 (1987). The State of Washington also recognizes a strong public interest in enforcing the terms of plea agreements voluntarily entered into by the parties. *State v. Tourtellotte,* 88 Wn.2d 479, 582-85, 564 P.2d 799 (1977). Where a defendant failed to file a notice of appeal "...after being read his appeal rights from the sentencing rule (CrR 7.1(b), now CrR 7.2(b)), and replied,

[2] Conviction includes a plea of guilty as well as a finding or verdict of guilty following a trial. *State v. Burnett*, 144 Wash. 598, 602-03, 258 P. 484 (1927).

'Yes, I understand...'" the high court denied a personal restraint petition in *In Re Hanson*, 94 Wn.2d 798, 620 P.2d 95 (1980).

Since 1889, the Washington State Constitution has guaranteed a defendant in a criminal prosecution "...the right to appeal in all cases." Const. art. I, § 22 (amend. X). Appeal is thus not a "privilege", but is a constitutional right. *State v. Schoel*, 54 Wn.2d 388, 341 P.2d 481 (1959).

The basic standard for determining validity of an *Alford* plea is whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *In re Personal Restraint of Montoya,* 109 Wn.2d 270, 280, 744 P.2d 340 (1987) (*quoting Alford,* 400 U.S. at 31, 91 S.Ct. 160). Under *Alford,* a defendant may plead guilty without admitting guilt,[3] as long as there is a factual basis to believe he committed the charged crime. *Montoya, supra.* A factual basis exists if there is sufficient evidence from which a jury could conclude the defendant is guilty. *State v. Newton*, 87 Wn.2d 363, 370, 522 P.2d 682 (1976).

CrR 4.2(d) provides:

> **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

[3]*State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (when defendant has read and signed a plea statement, it creates a strong presumption that the plea is voluntary).

not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Here, the Court did not inquire of the Defendant if he had read the Change of Plea forms. [CP 39-57] The Court did not inquire of the Defendant if he had discussed the Change of Plea forms with his attorney (other than the inquiry concerning the nature of a "strike offense").[4] [RP 46] The Court did not determine on the record that the Defendant had signed the Change of plea forms. The Court did inquire whether the Defendant was aware of the recommendation of the State concerning potential sentencing upon plea of guilty.[5] [RP 47]

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

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

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[4] The Defendant's attorney did not execute the Change of Plea form, on page 9, to attest that he had discussed the statement with the Defendant and that the Defendant was competent and understood the statement; nor, did the Court inquire of the Defendant's attorney whether he had discussed the statement with his client or whether he was competent and understood the statement. It is true that on the 14th Defendant's attorney asserted he had "gone over the statement" and that the Defendant "understood" the statement and consequences. But, subsequent colloquy with the court demonstrated that was not correct. [RP 41-42]

[5] However, the Court did not advise the Defendant that there was a requirement for community custody for one year when the standard sentencing range was addressed. That requirement was not included in the text of the written plea offer set forth in Paragraph 6(g) on each form. *See* Section B, below.

[RP 52-53] A defendant's signature on a plea statement is strong evidence of a plea's voluntariness, and a judge's on-record inquiry of a defendant who signs a plea bargain strengthens the inference of voluntariness. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). In *Branch*, the high court found that although the defendant had not signed the change of plea form, the questions from the State, the court and the affirmation from defendant's attorney constituted sufficient basis to determine that the plea was voluntary, knowing and intelligent. Here, the Court did not fully inquire, the Defendant's attorney did not execute the form, [CP 17] and between the time the Defendant's attorney spoke on the 14th of February and the time the Court entered the Alford pleas and found Defendant guilty, there were questions raised about the consequences of the pleas (the strike offense issue) and whether the conduct of the Defendant met the elements of the offense (the accidental nature of his conduct).

A court determines voluntariness on the basis of the totality of the circumstances. *Branch*, at 642. The totality of the circumstances reflected in the record of proceedings, when combined with the documents used to accomplish the procedure of entering a plea agreement in the Court demonstrate that there was error on the part of the Court to conclude that the Defendant had been properly advised of his rights under CrR 4.2, including his right of appeal. The record does not demonstrate that the

strong presumption of voluntariness arising from the signature of the Defendant on the forms requiring a voluntary, intelligent and knowing waiver of those rights existed. The Defendant did acknowledge that with the *Alford* plea there was a substantial likelihood that a jury would find guilt. [RP 50] But the Defendant's comments about the "accident" belie that affirmation. [RP 52-53]

Failure to comply fully with CrR 4.2 requires that the Defendant's guilty plea be set aside and his case remanded so that he may plea anew. *Wood v. Morris*, 87 Wash. 501, 511, 554 P.2d 1032 (1976). The Defendant's plea is invalid if "...the record does not affirmatively show that [the defendant] understood the law in relation to the facts or entered the plea intelligently and voluntarily." *State v. S. M.*, 100 Wn. App. 401, 414, 996 P.2d 1111 (2000).

B. Judge Tabor Erred In Concluding That The Alford Pleas Were Properly Reviewed By The Court Prior To The Entry Of The Pleas

The change of plea forms include the waiver of certain rights held by the defendant prior to entry of a plea or conviction. A waiver is an intentional relinquishment or abandonment of a known right or privilege and must be knowing, intelligent and voluntary. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). The appellate court reviews legal conclusion *de novo* to determine whether the findings of fact support the

legal conclusions. *Hardee v. Department of Social and Health Services,* 152 Wn.2d 48, 55, 215 P.3d 214 (2009).

The forms used for the Change of Pleas Statements were different forms. The form used for Cause No. 10-1-00610-2 was published in 8/2010. [CP 9] The form used for Cause No. 11-1-00050-1 was published in 7/2007. [CP 143] They differ in paragraph 6(f) in the description of "For crimes committed on or after July 1, 2000". The later form for Cause 10-2-00610-2 indicates that:

> [T]he Judge may order me to serve up to one year of community custody if the total period of confinement order is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart.

(Emphasis added.) [CP 145]

The chart indicates that a period of community custody of 12 months would apply to crimes against persons as defined in RCW 9.94A.411(2), which lists, *inter alia*, Assault 2°. [CP 146] However, the plea recommendation does not state that there would be an imposition of community custody.[6] [CP 146] Nor did the Court advise the Defendant that the Court would impose community custody[7] when the Court

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[6] Because mandatory community placement is a direct consequence of a guilty plea, failure to inform the defendant that he will be subject to mandatory community placement if he pleads guilty will render the plea invalid. *In Re Isador*, 151 Wn.2d 294, 88 P.3d 390 (2004).

[7] Until after the finding of guilt on each offense. [RP 55]

addressed the potential sentence reflected in the Change of Plea Statement. [RP 46-47] Before entering a plea of guilty, defendant must be advised of all direct consequences of his plea, including the possibility of restitution. *State v. Raleigh*, 50 Wn. App. 248, 253, 748 P.2d 267, *review denied*, 110 Wn.2d 1017 (1988).

Thus, the Defendant was not advised about the consequences of his plea. A direct consequence of the plea was the imposition of community custody for one year which the Court imposed after the sentencing recommendation had been described to the Defendant and a plea had been taken from the Defendant.

Another direct consequence of the plea was that the appellate rights of the defendant would be waived. Although there was the recitation in Paragraph 5(f) of the Change of Plea Statement, [CP 10/144] no discussion was held by the Court with the Defendant about that waiver. The Defendant's attorney did not execute the Change of Plea form attesting that he had discussed the form with the Defendant. [CP 17] And, the Defendant has averred that there was no discussion with him about the loss of his right of appeal by his attorney at any point as a consequence of the change of plea. [CP 68-69]

In order to determine whether a plea of guilty was initially invalid due to incomplete or inaccurate advice about the consequences, the court should determine three questions:

> (1) Was the defendant incompletely or inaccurately advised about one or more of the consequences of the plea?
>
> (2) Could the defective advice have materially affected the defendant's decision to plead guilty?
>
> (3) Did the defective advice materially affect the defendant's decision to plead guilty?

State v. McDermond, 112 Wn. App. 239, 248, 47 P.3d 600 (2002).

The first and third questions are factual questions. The second question is a question of law.

Here, the first question can be answered in the affirmative. The Defendant was not advised of the consequence of community custody, nor was he advised that he was waiving his right of appeal upon the plea.

The third question can likewise be answered in the affirmative, as the Defendant has averred that he was not advised by his attorney that he would lose his appeal right if he plead guilty.

Finally, the second question, the legal question, can also be answered in the affirmative because the advice given to the Defendant was defective and materially affected his right of appeal and his period of custody upon a plea of guilty.

The *McDermond* decision harmonized the issue of whether, in consideration of the validity of a plea, the consequence was direct or collateral. The court had determined that only direct consequences that had failed to be part of the notice to the defendant were those which were valid as a basis for appeal from a plea. Indirect consequences were not a valid basis until *State v. Acevedo*, 88 Wn. App. 232, 945 P.2d 225 (1997), *revised*, 137 Wn.2d 179, 970 P.2d 299 (1999) was decided. In that case, community placement had previously been identified as a direct consequence of a sentence. However, in *McDermond,* at 247, Division II of the Court of Appeals recognized that the focus of the inquiry had shifted from direct or indirect consequences of the plea to whatever the plea was affected "...due to incomplete or inaccurate advice about one of its consequences...."

Here, Defendant contends that his plea was affected by the lack of specific knowledge of the potential imposition of community placement; by the lack of knowledge of the waiver of a right of appeal; by the failure of his attorney to inform him of these consequences, which failure is reflected on the Change of Plea form and the absence of a record of such advice; and the lack of the signature of the deputy prosecuting attorney on the Change of Plea form for the Assault 2° charge. [CP 17] The record of oral proceedings is devoid of confirmation by the Deputy Prosecutor of

his/her recommendation on the plea agreement. Likewise, the oral record of proceedings on 16 February 2011 is devoid of confirmation from Defendant's attorney that he had reviewed the Change of Plea form with the Defendant (except for the single issue of the strike penalty provision). [RP 45-56]

Defendant contends that this lack of information and these procedural failures constitute a basis for the court to determine that the plea was not voluntary, intelligent or knowing and to order the plea be set aside.

C. Judge Tabor Erred When He Concluded That The Defendant Had Voluntarily, Knowingly And Intelligently Entered The Changes Of Plea To The Two Separate Felony Charges

The Court's consideration of the Change of Pleas by the Defendant occurred on two separate days. On the first day, 14 February 2011, the Court was advised by Defendant's attorney that:

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

[RP 41-42]

After the Court determined that there was also a Change of Plea for the second charge, the Court began a description of the maximum penalty

for the second degree assault charge. Then the colloquy about strike offense began with the net result of a termination of the hearing on the 14th of February. Thus, the normal colloquy between the Court and the Defendant was interrupted.

On the second hearing day, 16 February 2011, the Court noted: "I recall that we started a proceeding in this matter the other day. We did not complete that, but are we ready to proceed again?" [RP 45]

After receiving confirmation that the parties were ready to proceed, the Court received confirmation from the Defendant that he and his legal counsel had discussed the "strike offense issue". [RP 46] But he did not inquire whether he now understood the "strike offense issue".

The Court then discussed with Defendant the standard range and the plea recommendation from the prosecutor reflected in paragraph 6(g) of each form. Then commenced a discussion of the fines and costs and the inter-relationship between the two causes of action and whether duplicate fines or costs would be imposed. Ultimately, the Court confirmed with the Defendant what the dollar figure for fines and costs would be. [RP 46-47] However, the record is devoid of any discussion of other "conditions" that could be imposed.

The Court then determined that there would be Alford pleas to each charge. The Court reviewed the statement of probable cause and

found sufficient basis for conviction if the trier of fact believed the statement. [RP 51] Then the Court asked the Defendant: "... Mr. Kimbrel, are you making your Alford pleas to these two charges freely and voluntarily?" The Defendant responded: "Yes, Your Honor." [RP 51-52]

The Court then found the Defendant had made a free and voluntary Alford plea to each cause, that he had the assistance of counsel, and found Defendant guilty of the two offenses for which he had been charged. [RP 52]

The Court had not reviewed the Change of Plea Statements with the Defendant. He had not ascertained whether the signature on the final page of each Change of Plea form was that of the Defendant. The Court did not observe that the attorney for the Defendant had failed to execute the attestation on the final page of the Change of Plea form for the Assault 2° charge – No. 10-1-00610-2, [CP 17] as he had for the Unlawful Possession of a Firearm cause – No. 11-1-00050-1. [CP 151] The Court failed to note that the prosecutor had not executed the Change of Plea form for the Assault 2° or for the Unlawful Possession of a Firearm cause. [CP 17/151]

Where a defendant argues that his plea was entered without his consent or without an understanding of the plea's nature and consequences, cases since *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct.

1709 (1969), have placed a burden on the State to prove the contrary. *Wood v. Morris*, *supra*, at 507. To meet this burden, the State may introduce facts extrinsic to the statement of facts of the plea's acceptance. If there are inadequate facts from the hearing to support the burden, the State must make a "clear and convincing showing that the plea was in fact knowingly and understandingly entered." *Wood,* at 507.

An involuntary forfeiture of the right to a criminal appeal is never valid. *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998). A right of appeal, like other constitutional rights, can be waived. *State v. Perkins*, 108 Wn.2d 212, 217, 737 P.3d 250 (1987). Thus, the focus of the inquiry must become whether the waiver of the right was valid, and, as to this, the State bears the burden of proof. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). The waiver must affirmatively appear in the record. *State v. Gann*, 36 Wn. App. 516, 521, 675 P.2d 1261 (1984). The court cannot presume a waiver of a right from a silent record. *State v. Gann*, *supra.*

A signed guilty plea is *prima facie* evidence of voluntariness. *State v. Perez,* 33 Wn. App. 358, 654 P.2d 708 (1982). Only if the plea form is itself deficient must the State offer other evidence to counter the assertion. *State v. Chevernell*, 99 Wn.2d 309, 318-19, 662 P.2d 836 (1983). The burden the State faces in this cause is that the plea form is

deficient. Neither attorney executed the Statement on Change of Plea form for the Assault 2° charge. [CP 17] The form is not, *prima facie*, sufficient. *State v. Lujan*, 38 Wn. App. 735, 737, 688 P.2d 548 (1984). The State has the burden of proving validity of the guilty plea under a totality of the circumstances test. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

The defendant has the burden of showing that manifest injustice has occurred – one that is "obvious, directly observable, over [and] not obscure." *State v. Turley*, 149 Wn.2d 395, 398, 60 P.3d 228 (2003). Here, the Defendant contends that the deficiencies of the procedure robbed the Defendant of the certain knowledge that his rights of appeal would be lost upon entry of a plea, and that he would be subjected to community custody upon entry of the plea. The overt deficiencies were the lack of execution of the Change of Plea form by Defendant's attorney attesting his advice and information concerning the consequences of the plea (except as to the strike law) to the Defendant. The second overt deficiency was the failure of the prosecutor to execute the Change of Plea to conclude a plea bargain contract with the Defendant.

The Defendant furthers asserts that since the two causes of action were treated together and were inter-locked with the pleas and the sentence received by the Defendant, that each plea should be set aside due

to a manifest injustice because the Defendant did not enter a voluntary, knowing and intelligent plea to each charge. CrR 4.2(f) requires that the Court allow the Defendant to withdraw his pleas in this cause.

V. CONCLUSION

For the foregoing reasons, Defendant requests this honorable Court to reverse the decision of the Superior Court, order that the Motion to Set Aside and Withdrawal of Plea be granted, remand the cause to the Thurston County Superior Court, and to grant such other and further relief as the court deems just.

Dated this 7th Day of March 2013.

Respectfully submitted,

Wm. Michael Hanbey, #7829
Attorney for Appellant/Defendant
Melvin Albert Kimbrel

CERTIFICATE OF SERVICE

I, Lisa Shannon, certify that on the 7th day of March, 2013, I electronically filed the foregoing with the Court of Appeals and I caused true and correct copies of the same to be served on all parties of record in the manner indicated below:

Counsel for Plaintiff/Respondent Ms. Jennifer Lord, Thurston County DPA Office of the Prosecuting Attorney 2000 Lakeridge Drive SW Olympia, WA 98502	( ) U.S. Mail ( ) Hand Delivery (x) Legal Messenger
Defendant/Appellant Mr. Melvin Kimbrel 1333 Carrard Creek Road Oakville, WA 98568	(x) U.S. Mail ( ) Hand Delivery ( ) _____

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

DATED this 7th day of March, 2013.

Lisa Shannon

LISA SHANNON, Legal Assistant