

No. 62719-8-I

WASHINGTON COURT OF APPEALS, DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CORY ROBERTS,

Appellant

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**STATE'S RESPONSE BRIEF**

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## I. INTRODUCTION

In 1994, appellant Cory Roberts was faced with two counts of Rape 2 with Forcible Compulsion and one count of Rape 3. CP ROBERTS I 1-4.<sup>1</sup> He entered into an *Alford* plea with the State whereby he pled guilty to two counts of Rape 3 in return for the State's agreement to drop the higher charges. Roberts served all of his prison time under this plea and was released into the community. He appeared content with his plea deal until the State filed a sexually violent predator action following Roberts' commission of a "recent overt act" involving a four year old boy. In 2005, with the Rape 3 cases now stale, Roberts finally determined to fight his civil commitment petition by seeking withdrawal of his 1994 plea. Roberts based his motion on the recantation of one of the 1994 victims, W.B., an inmate incarcerated for his own felonies in the Walla Walla Penitentiary. Following remand from this court's unpublished decision in *State v. Roberts*, No. 57079-0-1 (June 4, 2007), the trial court determined that the W.B.'s recantation lacked credibility and denied Robert's motion to withdraw his plea. Judge Spector's decision denying the motion to withdraw should be affirmed.

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<sup>1</sup> As a remand proceeding, this appeal involves two sets of Clerk's Papers. The original set of Clerk's Papers in No. 57079-0-1 will be referenced as "CP ROBERTS I." The newly designated set in No. 62719-8-I will be referenced as "CP ROBERTS II." The State has also submitted a supplemental designation, which will be referenced as "Supp. CP ROBERTS II."

## **II. ISSUES PRESENTED FOR REVIEW**

A. When a trial court holds an evidentiary hearing and determines that a recanting victim is not credible, is a trial court nonetheless required to allow the defendant to withdraw his plea?

B. Has Roberts satisfied the "manifest injustice" standard necessary to support withdrawal of the plea when his request fails the standards set forth in *State v. Arnold*, 81 Wn. App. 379, 385, 914 P.2d 762 (1996), and his withdrawal request 15 years later would greatly hamper the State's ability to bring new charges?

## **III. FACTS**

### **A. BACKGROUND**

In February of 2003, the King County Prosecuting Attorney filed a petition alleging that Cory Roberts is a sexually violent predator pursuant to RCW 71.09. *CP ROBERTS I* 122-23.<sup>2</sup> The predicate offense supporting the State's RCW 71.09 petition was Roberts' 1990 conviction for Rape of a Child in the First Degree. *CP ROBERTS I* 187-88. In that case, while babysitting, the 13-year-old Roberts raped and beat a three-year-old girl named J.C., leaving her comatose and near death. *CP ROBERTS I* 189.

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<sup>2</sup> The VRP from initial withdrawal proceedings is in four volumes: 1 VRP, 4/25/05; 2 VRP, 5/5/05; 3 VRP, 6/2/05; 4 VRP, 6/18/05. The most current transcript will be referenced as VRP 11/4/2009.

In 1993, while serving a manifest injustice sentence for raping J.C., Roberts was placed in the Echo Glen facility in King County. At Echo Glen, Roberts (now 16) shared a room with a 14-year-old boy named J.E.. Roberts told the boy he would do the same thing to J.E. that he had done to J.C. *CP ROBERTS I 3-4*. Roberts covered the victim's mouth and anally raped him with his penis. *Id.* He forced the boy to give him oral sex, and fellated the boy. *Id.* Roberts repeatedly sexually assaulted the J.E. over the next several days. *Id.*

Roberts committed similar physical and sexual assaults against a 15-year-old boy, W.B.. *CP ROBERTS I 4*. He beat the boy, forced oral sex, and anally raped him with his penis. *Id.* Roberts threatened to use information both boys disclosed in group therapy against them. He raped W.B. again two weeks later. *Id.* W.B. later saw a doctor and reported anal bleeding. At the evidentiary hearing below, pursuant to a stipulation of the parties, the trial court admitted the statement that W.B. made to the police in 1993. *See CP ROBERTS II at 112-113.*

For these 1993 crimes, Roberts was charged as an adult with two counts of Rape in the Second Degree by Forcible Compulsion and one count of Rape in the Third Degree. *CP ROBERTS I 1-2*. In March of 1994, rather than proceed to trial, Roberts entered an *Alford* plea to two counts of Rape in the Third Degree. In exchange for this plea, the State

dropped the more serious Rape 2 charges. He was given consecutive sentences of 54 and 18 months.

After serving his prison sentence, Roberts was released into the community on January 16, 2001. *CP ROBERTS I* 191. Although Roberts was to have no contact with minors, by March of 2001, Roberts had ingratiated himself into the company of a single mother with a three-year-old boy named D.H. *CP ROBERTS I* 191. D.H. later told his mother that Roberts had touched his "pee-pee." *CP ROBERTS I* 191. D.H. also told his mother that he couldn't tell her what Roberts had done or Roberts would "bash mommy's head in." *Id.* Roberts was violated for his contact with the boy and received a modified sentence. *See State v. Roberts*, 113 Wn.App. 1051, No. 48938-1-I (September 30, 2002) (unpublished decision affirming violation).

On February 20, 2003, prior to Roberts anticipated release on the violation, the State initiated sexually violent predator proceedings against Roberts. The court found probable cause to hold Roberts as a sexually violent predator. Roberts is currently detained pending the civil commitment trial at the Special Commitment Center on McNeil Island.<sup>3</sup>

In January of 2005, the prosecutor preparing the SVP case contacted W.B. at the state penitentiary in Walla Walla prison, where

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<sup>3</sup> The SVP case has been stayed pending a conclusion of the motion to withdraw

W.B. was serving time for another crime. During the phone call, W.B. claimed that he had not been raped by Roberts in 1993 and recanted statements he made during that investigation. The prosecutor immediately informed defense counsel of this conversation and plans were made to depose W.B. CP ROBERTS I 140.

In February 2005, the attorneys for Roberts and the state traveled to the Walla Walla penitentiary to depose *W.B.* under the civil commitment cause number. Id At the deposition, W.B. testified that Cory Roberts did not rape him twelve years earlier. CP ROBERTS I 9. He confirmed statements, however, that Roberts had raped the boy that was the subject of the second count of Rape 3.

**B. 2005 TRIAL COURT CONSIDERATION OF MOTION TO WITHDRAW**

Following the SVP deposition, Roberts filed a motion in his 1994 criminal case to withdraw his guilty to *both* counts of Rape 3. His motion to withdraw was based exclusively on the recantation. The trial court noted that the motion to withdraw the pleas was "ancillary to" the sexually violent predator petition pending against Roberts in King County No. 03-2-18652-0. CP ROBERTS II at 115.

On June 2, 2005, W.B. appeared in court. 3 RP 4. W.B.'s attorney expressed concern that W.B. would be subject to criminal prosecution if

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litigation under the criminal cause number.

he answered any questions about his numerous 1993 statements Roberts raped him and his recent statement in the deposition that Roberts did not rape him. 3 RP 4 -5.

Roberts called W.B. to testify. After answering some preliminary questions, W.B. asserted the Fifth Amendment to all substantive questions. 3RP 8-16. He also pled the Fifth Amendment when asked whether he had had any contact with Cory Roberts since 1993. *Id.* at 13. Following additional briefing, the trial court concluded that W.B.'s assertion of the Fifth Amendment was not "fanciful, illusory, speculative, contrived or false", and that it could not compel *W.B.* to testify. 4 RP 40 - 42.

Roberts sought review on the trial court's Fifth Amendment ruling. The State cross-assigned error on the questions of the timeliness of the motion under CrR 7.8 and the need to demonstrate a manifest injustice prior to setting aside the plea.

The Court of Appeals ruled in Roberts' favor. In an unpublished decision, this court rejected the State's contention that Roberts' CrR 7.8 motion was time-barred. It also found that the State's manifest injustice arguments were premature. Finally, the Court of Appeals reversed the trial court's decision recognizing W.B.'s valid assertion of the Fifth Amendment. The matter was remanded to the trial court for an evidentiary

hearing where W.B. would be compelled to testify despite his assertion of the Fifth Amendment.<sup>4</sup>

### C. REMAND PROCEEDINGS

On remand, the State agreed to limited immunity for W.B. in order to facilitate his testimony. Prior to W.B.'s testimony, Roberts' defense attorney noted that: "I think it's fairly clear from the pleadings about what is in front of the Court at this time, *that it's about the credibility of [W.B.'s] recantation.*" VRP 11/4/2008 at 20 (emphasis added).

During testimony, W.B. admitted that he had signed his 1993 statements acknowledging that he had been raped by Roberts. *Id.* at 23, 31-32. He then recanted his prior statement, claiming that "Cory Robert's didn't touch me. " *Id.* at 25. W.B. claimed that he made up the 1993 rape story because: "I was approached by somebody, another person that was in the cottage with us, that he stated to me some stuff that happened to him from Cory, and I told him I'd help him out and I would stick up for him, protect him, whatever, and basically just, I don't know, made up some stories." *Id.* at 32.

On cross, W.B. claimed that he had claimed Roberts anally raped him in order to help out his "friend," J.E. *Id.* at 35-36. Through impeachment with his prior deposition testimony, W.B. admitted that J.E.

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<sup>4</sup> The State sought discretionary review by the Supreme Court, which was

was really "merely an acquaintance." *Id.* at 38. There were other discrepancies in W.B.'s testimony, including his claim that he had disclosed rape prior to Roberts' departure from the institution (*Id.* at 39), that he was not intimidated by Roberts despite their substantial difference in size (*Id.* at 42-43), and that he had delayed twelve years to supposedly correct his testimony even though Roberts was in prison for raping W.B. *Id.* at 48-51.

The prosecutor brought out other circumstances casting doubt on W.B.'s recantation. Rather than eagerly stepping forward to help a supposed friend, W.B. initially refused to make a statement to the police. *Id.* at 41. W.B. immediately told the officer that he had been sexually assaulted by Roberts, but did not want to discuss it and ultimately delayed giving a statement for several days. *Id.* at 41. Moreover, contrary to W.B.'s claimed penchant for helping mere acquaintances regardless of the personal cost. While spending much of his life in prison, W.B. had seen assaults and other illegal activities, but had *never* reported any wrongdoing -- except for his claim that Roberts had raped him. *Id.* at 52-54.

The evidentiary hearing brought out substantial evidence casting doubt on the credibility of W.B.'s recantation. Lori Nesmith, who was an Echo Glen program manager in 1993, testified that she took W.B.'s

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denied.

statement following the rape.<sup>5</sup> *Id.* at 77. W.B. was normally a "very active" and "kinetic" boy who was "very mobile, constantly moving." *Id.* at 85. After the rape, his demeanor in providing his statement was markedly different:

He was not giving eye contact. He was not as kinetic and mobile. He was picking at the end of the cushion on the couch, but that was about it, maybe bouncing his leg, did not give eye contact, was very muted in his responses to me, either single words or nods or grunts or yeahs as opposed to any kind of long answer to a question, unless I asked something very open-ended where he would have to give me some kind of answer.

*Id.* at 86.

Immediately following the hearing the State moved to clarify the record by expressly admitting Exhibit 7, which was progress notes and medical records from W.B. in the months following the rape. Supp. CP Roberts II at \_\_\_\_ (State's motion to clarify record). The exhibit had been discussed extensively at the hearing, but the court had reserved ruling on admission. Supp CP Roberts II at \_\_\_\_ (list of exhibits). According to the September 14, 1993 progress note by W.B.'s psychiatrist, W.B. reported that he had been sexually assaulted by a "resident peer." Supp. CP ROBERTS II at \_\_\_\_ (State's motion to clarify record). A follow up progress note on November 4, 1993 indicates that W.B. has experienced a "sore anus since alleged rape in July 1993" and that W.B. stated that he

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<sup>5</sup> Apart from W.B., she testified that Roberts had been implicated in two

had been "too embarrassed to complain." *Id.* A subsequent physical examination on November 5, 1993 indicates that W.B. had a tear in his rectal area that was "slightly healed." *Id.* The State presented this medical information as physical evidence casting doubt on the recantation and supporting W.B.'s original 1993 statements.<sup>6</sup>

After considering the evidence, Judge Spector denied Roberts' motion to vacate judgment and withdraw his guilty pleas. The court noted that "[t]he purpose of the evidentiary hearing was for the trial court to determine credibility of one of the victim's recantation of the rapes that occurred in the summer of 1993." CP ROBERTS II at 114.

The trial court found that W.B.'s testimony recanting his 1993 statements that Roberts had was not credible. CP ROBERTS II at 115-116. In findings of fact, the court noted that W.B. had made no attempt to recant his 1993 statements until contacted by the SVP prosecutor in 2005. *Id.* Indeed, W.B. "stated perfunctorily to Mr. Roberts counsel and the State's counsel that the rapes had not occurred," only after "learning that the State was going to subpoena *W.B.* to testify in Mr. Roberts' pending SVP matter." *Id.*

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other rapes involving his roommates. *Id.* at 80.

<sup>6</sup> The record contains no ruling on the State's motion to clarify and no indication on whether the trial court considered this information. Robert's opposed the State's motion, claiming that W.B.'s medical symptoms were due to constipation despite W.B.'s statement to his doctor regarding his sore anus and the rape.

The court found further support in its conclusion that W.B.'s recantation was not credible:

*The court finds that the testimony of [W.B] is not credible for several reasons.* First, the timing of the initial recantation occurred when the state first contacted him to be a witness in the pending SVP trial. The rapes occurred when [W.B] was fifteen years old; he is not thirty years old and he has an extensive felony history and is currently serving a sentence at Walla Walla State Penitentiary. Second, during the last fifteen years since the original allegations were made, *W.B.* has been represented by many attorneys related to his own various criminal charges. *W.B.* had many opportunities to recant or "set the record straight," as he testified. The recantation suspiciously occurred only after he was contacted by the State's attorney, then deputy prosecutor Jennifer Ritchie. Finally, it is clear from the most recent testimony *W.B.* does not want to be considered a "snitch" in any manner. Simply stated, *W.B.* has motive to recant. He does not want to be perceived as a snitch or as an aid to the state in securing a commitment under the SVP statute. *Therefore, the court finds the recantation testimony of W.B. to be untrue and unreliable.*

CP ROBERTS II at 116 (emphasis added). The court noted that W.B. had given five consistent statements recounting the rape in 1993, at or near the time of the event. *Id.* His highly selective recall of details from the period demonstrated "the orchestrated nature of his recantation." *Id.*

Roberts moved for reconsideration, which the trial court denied.

CP ROBERTS II at 123. This appeal followed. *Id.* at 125.

## **V. LEGAL ARGUMENT**

A trial court's decision whether to withdraw a plea under CrR 4.2 and 7.8 is reviewed for abuse of discretion. *State v. Robinson*, 104

Wn.App. 657, 662, 17 P.2d 653 (2001). Roberts has failed to demonstrate any trial court error in refusing to set aside his plea based on a victim recantation that was not credible.

**A. THE TRIAL COURT PROPERLY REFUSED TO WITHDRAW ROBERTS' PLEA BECAUSE W.B.'S RECANTATION WAS NOT CREDIBLE**

**1. Roberts Current Argument That A Trial Court Should Not Determine the Credibility of a Witness's Recantation Is Barred By Judicial Estoppel**

Judicial estoppel “serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court” *Garrett v. Morgan*, 127 Wash.App. 375, 112 P.3d 531, 533 (2005). As noted in *Mastro v. Kumakichi Corp.*, 90 Wash.App. 157, 163-164, 951 P.2d 817 (1998),

*A party is not permitted to maintain inconsistent positions in judicial proceedings. It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation.*

(Emphasis added; *citing Mueller v. Garske*, 1 Wash.App. 406, 409, 461 P.2d 886 (1969)).

The doctrine has been applied to preclude inconsistent positions before the appellate courts. *Mastro*, 90 Wn.App. at 163-64 (“Because this factual concession is central to Kumakichi's argument here that it did not breach the covenant of seisin merely by virtue of this encroachment, the

doctrine of judicial estoppel precludes this argument on appeal."). A key purpose in precluding inconsistent positions is "to avoid inconsistency, duplicity, and ... waste of time." *Cunningham*, 126 Wn.App. 222, 225, 108 P.3d 147 (2005).

Throughout proceedings below, trial counsel for Roberts argued that the issue before the trial court was "the credibility of [W.B.'s] recantation." VRP 11/4/2008 at 20. Counsel for Roberts argued that "what should happen here is to have an evidentiary hearing to determine the credibility of [W.B.'s] statement or his recantation." *Id.* at 98-99. The defense concisely stated that "[t]he only question is whether those statements or the recantation is somehow unreliable or not true." *Id.* at 101. If the recantation were deemed credible by the court, "then there are no facts convicting him of that count, and therefore it must be vacated." *Id.* at 101.

Having lost the credibility battle before the trial court, Roberts' appellate counsel now argues contrary to trial counsel. On appeal, Roberts posits that this court should disregard *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996) and hold that a trial judge is not permitted to determine the credibility of a victim recantation. Instead, the simple fact that "*W.B.* recanted under oath in open court" entitles Roberts to withdraw his plea. Opening Brief at 15. Roberts cannot forward an argument on appeal that

is the dead opposite of his argument before the trial court. Under the doctrine of judicial estoppel, he should not be allowed to seek advantage "by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position" on appeal. *Johnson v. Si-Cor, Inc.*, 107 Wash.App. 902, 906, 28 P.3d 832 (2001).

**2. A Trial Court Properly Considers The Credibility of a Recanting Witness In Determining Whether to Set Aside a Plea**

When a defendant seeks to challenge a conviction that was entered pursuant to an *Alford* plea, the motion should be denied where independent evidence supports the plea or suggests that the recantation was unreliable. *In re Clements*, 125 Wash.App. 634, 644-645, 106 P.3d 244, 249 (Wash.App. Div. 1,2005). Washington courts have repeatedly held that "[r]ecantation testimony is inherently questionable." *State v. Macon*, 128 Wash.2d 784, 801, 911 P.2d 1004 (1996). Roberts claim that a trial court is without the ability to determine the credibility of a recantation is contrary to the controlling *Macon* decision, the preference for finality of judgments and the inherent unreliability of recantations.

In *Macon*, the Supreme Court summarized the standards for setting aside a prior plea based on newly discovered evidence:

To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due

diligence; (4) is material; and 5) is not merely cumulative or impeaching. A new trial may be denied when any one of these factors is absent.

128 Wn.2d at 803-804.

When the newly discovered evidence involves a recanting witness, the court holds that "[a]dditional factors must be considered." *Id.* at 804. The court specifically holds that a recantation requires the trial court to "first determine whether the recantation is reliable before considering a defendant's motion for new trial based upon the recantation." *Id.* The Supreme Court notes that "[r]ecantations are inherently suspect and '[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not be lightly set aside by an appellate court.'" *Id.*

If there is any doubt regarding the trial court's duty to determine the reliability of the recantation, *Macon* further holds that:

*State v. Rolax* supports the conclusion that when a defendant's conviction is based solely upon the testimony of a recanting witness, the trial court does not abuse its discretion if it determines the *recantation is unreliable* and denies the defendant's motion for new trial. But it also follows from *Rolax* that when a defendant's conviction is based solely upon the testimony of a recanting witness, and the trial court determines the *recantation is reliable*, the trial court must grant the defendant's motion for new trial.

*Id.* (emphasis in original). To the extent that the prior decision of *State v. Powell*, 51 Wash. 372, 98 P. 741 (1909) is inconsistent, the *Macon* decision overrules it. *Id.*

In claiming that *D.T.M.* prevents a trial judge from making credibility determinations, Roberts misreads the *State v. D.T.M.*, 78 Wn.App. 216, 896 P.2d 108 (1995) case and runs afoul of the controlling *Macon* decision. The *D.T.M.* decision notes that the recanting victims statement "*if true*, meets all five criteria" for setting aside the prior plea. *D.T.M.*, 78 Wn.App. at 221 (emphasis added). Procedurally, the case came to the appellate court without an evidentiary hearing to determine the credibility of the recanting witness. The *D.T.M.* decision remands the case for "a hearing to evaluate M.J.'s credibility." *Id.* Roberts reads the next sentence in the opinion to mean that credibility is automatically established if the victim swears in open court, but this hardly comports with the common understanding of a hearing to determine credibility. Although the *D.T.M.* decision includes some poor phrasing on this point, it is unlikely that it remanded the case for a "hear to evaluate M.J.'s credibility," where the trial court was required to set aside the plea regardless of credibility.

Indeed, in accord with the *Macon* decision, subsequent cases analyzing *D.T.M.* have emphasized the "if true" language. It was not enough that the victim merely recanted under oath in open court. Rather, *D.T.M.* stands for the proposition "that the victim's recantation, *if true*, met the criteria for a new trial, and would have justified withdrawal of the

*Alford* plea." *Clements*, 125 Wn. App. at 641-42 (emphasis in original).

A trial court's exercise of discretion "ordinarily includes a determination of the reliability of the recantation." *Id.* at 221.

The very recent case of *State v. Scott*, \_\_\_ Wn.App. \_\_\_, 207 P.3d 495 (2009) follows the appropriate rule that a trial judge is to determine the credibility of new evidence when a defendant attempts to set aside a prior *Alford* plea. It is factually and procedurally identical to the current case. As with the current case, the *Scott* case involved both an *Alford* plea and recanting witnesses. After determining that the trial court had erroneously denied the motion due to a number of procedural bars, the appellate court remanded for an evidentiary hearing to determine the credibility of the victim recantation. 207 P.3d at 497.

In determining the necessity of an evidentiary hearing on remand, the appellate court noted that:

A witness or victim's recantation of earlier statements is generally considered new evidence. *Id.* at 799-800, 911 P.2d 1004. *The superior court must determine whether a witness's recantation is credible before considering the defendant's motion for a new trial based on the recantations, regardless of whether there is independent evidence supporting the defendant's conviction. Id.* at 804, 911 P.2d 1004. *This rule applies even where the defendant entered an Alford plea. D.T.M., 78 Wash.App. at 221, 896 P.2d 108 (superior court erred by denying defendant's motion to withdraw Alford plea without holding evidentiary hearing to determine whether alleged victim's recantation was credible).*

207 P.3d at 502 -503 (emphasis added). Contrary to Roberts' interpretation of *D.T.M.*, the *Scott* decision explains that an evidentiary hearing serves to evaluate the continued reliability of the independent factual basis that supported the original *Alford* plea. *Id.* at 503.

The *Scott* decision, in ordering a remand for an evidentiary hearing, does not adopt Roberts argument that the mere act of swearing to a recantation in open court is sufficient to set aside the plea. Instead, the court emphasizes that recantation undermines the factual basis for the *Alford* plea only "if true." 207 P.3d at 504.

The *Scott* case, which also involved a sexually violent predator challenging a prior conviction, is factually and procedurally indistinguishable from the current matter. The remand instructions provided in the *Scott* case necessitate affirming the trial court's actions in the current case:

We vacate the superior court's denial of Scott's motion to withdraw his guilty plea and remand to the superior court to hold an evidentiary hearing to determine whether his new evidence is credible. If the superior court determines that the new evidence is credible, then the court shall reconsider Scott's motion to withdraw his *Alford* plea. If the superior court determines that the new evidence is not credible, then Scott's *Alford*-plea based conviction stands.

207 P.3d at 505. This is precisely the action taken by Judge Spector in denying Roberts' motion to withdraw his plea.

Roberts provides no reason to depart from the approach where trial

courts are required to determine the credibility of a recantation prior to setting aside a plea. Here, the harsh result of Roberts' proposed rule preventing credibility determinations is readily apparent. After hearing W.B.'s testimony and considering the circumstances surrounding his original 1993 statements, the trial court determined that W.B.'s recantation was not credible. CP ROBERTS II at 115-116. Although Roberts assigns error to the trial court's finding of fact on W.B.'s lack of credibility, Roberts nowhere marshals an argument in support of his error assignment. Indeed, a trial court's credibility determinations "may not be reviewed on appeal." *State v. Pedro*, 148 Wash.App. 932, 951, 201 P.3d 398, 407 (2009). It has long been the rule that "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

Because the trial court's determination that W.B.'s recantation is not credible stands as true, Roberts' proposed rule *requires* a trial court to set aside a prior plea so long as a defendant can present any recantation in open court -- credible or not. Such a rule does not serve the integrity of judgments and judicial decision making. "Automatically allowing *Alford* pleas to be withdrawn would render such pleas "mere gesture[s]" or "meaningless formalit[ies] reversible at the defendant's whim." *Duran v. Superior Court In and For County of Maricopa*, 162 Ariz. 206, 208, 782

P.2d 324 (Ariz.App.,1989)(quoting *United States v. Barker*, 514 F.2d 208, 221 (D.C.Cir.), cert. denied 421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed.2d 682 (1975)).

For these reasons, the trial court acted appropriately in determining that W.B.'s recantation was not credible. Roberts has failed in his burden to demonstrate an abuse of discretion and the trial court should be affirmed.

**B. EVEN IF THE TRIAL COURT WAS NOT PERMITTED TO CONSIDER THE CREDIBILITY OF A RECONTING WITNESS, ROBERTS CANNOT ESTABLISH A "MANIFEST INJUSTICE" NECESSARY TO SET THE PLEA ASIDE**

A defendant may withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). In seeking to withdraw his plea after sentencing, the defendant must satisfy the manifest injustice requirements of CrR 4.2(f). *In re Clements*, 125 Wash.App. 634, 644-645, 106 P.3d 244 (2005). The defendant bears the burden of showing that a manifest injustice has occurred. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). A "manifest" injustice is one "that is obvious, directly observable, overt, not obscure." *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996) (quoting *State v. Taylor*, 83 Wn.2d 594, 596,

521 P.2d 699 (1974)).

Regardless of the trial court's ability to consider the credibility of a recanting witness, Roberts cannot demonstrate a "manifest injustice" because he acknowledges that the recantation effects only one count of his multi-count plea.<sup>7</sup> When Roberts pled guilty to two counts of Rape III, he avoided the possibility of conviction on two counts of Rape Second with Forcible Compulsion and an additional count of Rape 3. Both Roberts and the State struck a bargain that treated the crimes as a "package deal." It is fundamentally unfair to allow Roberts to challenge the entire plea based on a recantation that goes only to part of the plea. With fifteen years past the rape incidents, Roberts should not be allowed the option of forcing the State to retry a case that is now long stale.

The applicability of the "manifest injustice" standard to efforts to withdraw a multiple count plea is established by *Arnold*, 81 Wn. App. at 385-86. In *Arnold*, the defendant was charged with two counts of rape of a child involving two victims, but plead to two counts of fourth degree assault. *Id.* at 381. The defendant sought to withdraw his guilty plea after

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<sup>7</sup> Roberts argues that the State is bound by law of the case and may not raise this argument because it was partially considered in the June 4, 2007 opinion in this case. However, the June 4, 2007 opinion under Ct. App. No. 57079-0-I was limited to rejecting the State's claim that a manifest injustice must be shown prior to granting an evidentiary hearing. Slip op. at 5. Indeed, the court observed in footnote 8 on the same page that the question of "manifest injustice" remained open because the trial court had committed to no particular analysis by

one of the victims recanted her statement to police. *Id.* The *Arnold* decision notes that a plea may be withdrawn to correct a "manifest injustice." *Id.* However, "because of the many safeguards surrounding a plea of guilty, the manifest injustice standard is a demanding one." *Id.* at 385. See also *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) ("this is a demanding standard").

The standard for demonstrating a manifest injustice requires specific proof:

The Supreme Court has recognized four indicia of "manifest injustice": (1) denial of effective counsel, (2) plea not ratified by defendant, (3) involuntary plea, or (4) plea agreement not kept by prosecution. *Taylor*, 83 Wash.2d at 597, 521 P.2d 699.

*Arnold*, 81 Wn.App. at 385-386. The fact of the recantation alone does not automatically satisfy this standard, particularly in analyzing a multi-count plea where other counts remain fully supported regardless of the recantation. It is the defendant's burden to demonstrate a manifest injustice in light of the above standards. *Ross*, 129 Wn.2d at 283-84.

Like defendant *Arnold*, *Roberts* has failed in his burden to establish a manifest injustice when the recantation effects only part of the plea. First, the *Arnold* decision makes it clear that the focus is on the plea itself, not on the individual counts that form the plea. Although the recantation of a single victim to a single count may raise manifest injustice

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agreeing to hold an evidentiary hearing.

concerns, as Roberts admits in his opening brief, pleas are package deals. Opening Brief at 2 (noting that Roberts' 1994 pleas was "part of a package deal"). As with Roberts, Mr. Arnold failed to demonstrate a manifest injustice because he failed to explain how a knowing an voluntary plea "is somehow made unacceptable by virtue of the fact that one of the two victims later recanted." *Id.* at 386. After all, the trial court's initial acceptance of "his plea" was in a case where there "were two victims who accused him, only one of whom later recanted." *Id.*

Roberts will likely argue that *Arnold* is distinguishable because that case involved a straight plea and included statements from the defendant on his guilt. Although this may make *Arnold* an easier case,<sup>8</sup> the court is nonetheless clear that the focus is on the plea itself and not on the individual counts contained in the plea. The *Arnold* case distinguishes *DTM* because the recantation in *Arnold* did not represent the *sole* basis for the plea taken as a whole. *Id.* Defendant Arnold's own statements provided partial support for the plea, but an equally "important fact" was the existence of statements made by the other victim that were not recanted. With these statements, there remained evidence apart from the

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<sup>8</sup> The distinction between *Arnold* as involving a straight plea and *DTM* as involving an *Alford* plea is not as apparent as Roberts may make it sound. Notably, a main reason that Arnold sought to withdraw his plea was due to the insufficient intent statement in the plea itself. 81 Wn.App. at 382. Thus, neither the straight plea in *Arnold*, nor the *Alford* plea in *DTM* provided a statement by

recanting victim to support the plea itself, and as such, there was no "manifest injustice."

Because the protections surrounding entry of an *Alford* plea are no less rigorous than those surrounding a straight plea, the court should not treat these two pleas differently for purposes of a plea withdrawal analysis. Certainly, the overriding interests of finality are no different. In analyzing the withdrawal question, a plea is a plea regardless of its procedural form.

The Colorado Supreme Court has noted that "an *Alford* plea is no different from a guilty plea for purposes of" a plea withdrawal analysis.

*People v. Schneider*, 25 P.3d 755, 758 (2001). The *Schneider* court recognized that:

there must be some consequence attached to the decision to plead guilty. A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea. Defendants should be allowed to withdraw properly entered guilty pleas only in order to avoid manifest injustice. See *ABA Standards for Criminal Justice: Pleas of Guilty* 14-2.1(b) (3d ed.1999).

25 P.3d at 761.

In evaluating Roberts' claim of manifest injustice, the court should also consider the effects on the State's ability to reprove its case if Roberts is allowed to withdraw his plea after a 10 year hiatus. Again, the Colorado decision properly emphasizes the need to comport with

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the defendant supporting all of the necessary elements of the crime.

the well-settled principle that finality in the adjudication of controversies and the conclusiveness of judgments is crucial to the administration of justice. *See Davidson v. McClellan*, 16 P.3d 233, 236 (Colo.2001). "It is essential, for practical reasons as well as for fundamental fairness, that there be a point at which litigation reaches a conclusion and that parties be permitted to rely on the outcome." *Id.*

25 P.3d at 764. There is a reasonable expectation, particularly after the passage of 10 years, that a case is over: "We also recognize that when a defendant pleads guilty, the case is effectively closed. The District Attorney believes that he or she will no longer need to develop the case for presentation to a jury, and investigation and witness identification ceases. Similarly, victims believe that the case is over." *Id.* at 760.

Fifteen years is simply too late for this court to find a manifest injustice based on a recantation to a portion of Roberts' 1994 plea. This is not a case where DNA exonerates someone in the middle of a long prison term. Rather, Mr. Roberts has served his term and he merely seeks to gain advantage in his civil commitment action by seeking to withdraw an old plea. The State would be left with little chance of reopening the prosecution. The record below demonstrates that the assigned detective has only a vague recollection of the case and the nurse who W.B. told about the relationship between the rape and his "sore anus" has died. VRP 11/4/2008 at 11. Withdrawal of the plea in these circumstances would only serve to prejudice the State. *U.S. v. Graham*, 466 F.3d 1234,

1238 (10th Cir. 2006). There is no manifest injustice under these facts because any withdrawal of Roberts plea would essentially allow him to enjoy a free crime against victim J.E. due to the problems inherent in reopening a 15 year old Rape 2 investigation involving this victim.

In summary, Roberts is in the same situation as the *Arnold* defendant. Roberts' "guilty plea still has unrecanted factual support." *Arnold*, 81 Wn. app. at 387. The unrecanted factual support includes the statements of the other victim, J.E.. It also includes the medical evidence supporting a sexual assault against W.B., including anal tearing and bleeding. Supp. CP ROBERTS II at \_\_\_ (State's motion to clarify). Under these facts, as in *Arnold*, Roberts has not satisfied his burden of establishing a manifest injustice.

Moreover, Roberts comes to this court seeking withdrawal of a plea some fifteen years after it became final. The court should not find a manifest injustice allowing withdrawal of the plea when the staleness of the motion likely leaves the State without the ability to re prosecute the original crimes. Back in 1994, Roberts and the State reached an accommodation that satisfied both parties for more than 10 years. It would be a manifest injustice to allow Roberts to withdraw his plea at this late date on a sentence already served, especially when his actions are solely motivated by an effort to avoid civil commitment.

**V. CONCLUSION**

For the foregoing reasons, the court should affirm the trial court's denial of Roberts' motion to withdraw his 1994 plea.

DATED this 19th day of June, 2009.

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of )

CORY ROBERTS )

) No. 62719-8-I

) Declaration of Service

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JENNIFER NELSON-RITCHIE, being first duly sworn on oath, deposes and states that I arranged for service of a copy of the following documents by U.S. MAIL:

***State's Response Brief***

on:

Dana Lind  
Nielsen, Broman and Koch  
1908 E. Madison Street  
Seattle, WA 98122

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

Signed and dated by me this 19th day of June, 2009 at Seattle, Washington.

*Jennifer Nelson-Ritchie*  
JENNIFER NELSON-RITCHIE