

67609-1

67609-1

NO. 67609-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVIS,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JIM A. FERRELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ASSIGNMENT OF ERROR

Appellant asserts the trial court erred in denying appellant's motion to withdraw his plea.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Where the court correctly noted that appellant twice denied being threatened or pressured during his plea colloquy and where the court made explicit findings that the plea was voluntary, after a fully litigated hearing, did the court abuse its discretion in denying appellant's motion?

Furthermore, was there support in the record to support the court's findings of fact and credibility determinations, where those findings were based on the evidence presented and testimony?

C. STATEMENT OF THE CASE

On April 8, 2010, Jason Davis was charged by information with the crimes of assault in the first degree with a deadly weapon allegation and burglary in the first degree. CP 1-6. As set forth in the charging documents and the sworn Certification for Determination of Probable Cause submitted for this cause, Davis entered the home of his former roommate and girlfriend, Stacy Hill,

unannounced and uninvited while armed with a knife. CP 4, 80. Davis went upstairs to the master bedroom, undetected, and broke down Ms. Hill's door to enter the room. Id. He then attacked Chad Andrews and stabbed Mr. Andrews in the back approximately 11 times, causing serious bodily injury that required immediate hospitalization for his life-threatening injuries. CP 4-5, 80-81. A no contact was ordered at Davis' arraignment prohibiting any contact with Ms. Hill or Mr. Andrews. CP 81.

On March 18, 2011, the State amended the information to add the charge of attempted murder in the second degree with a deadly weapon allegation, listing that crime as count I. CP 11-12. In that same document, the State moved the assault in the first degree charge to count II and the burglary in the first degree charge to count III. Id. Additionally, the State added a deadly weapon allegation to the burglary in the first degree charge. Id.

On April 22, 2011, Davis entered an Alford plea of guilty to count II, assault in the first degree with the deadly weapon allegation. CP 13-34, 81. His standard range sentence was 117 months to 147 months. Id. During the plea colloquy, Davis twice denied that he had been threatened or pressured to enter his

plea. CP 68, 81. Davis also signed the plea form that affirmed he had not been threatened to enter the plea. CP 13-34.

During the plea colloquy, neither of his two attorneys brought to the court's attention any threats directed toward Davis. CP 81. The court accepted the plea as knowingly, intelligently, and voluntarily made. CP 81. The court signed the Statement of Defendant on Plea of Guilty, indicating those findings. CP 13-34.

After the plea was entered, by agreement of the parties, the order prohibiting Davis from having contact with Stacy Hill was lifted by court order. CP 81. Sentencing was scheduled for June 29, 2011. Id.

On June 10, 2011, Davis moved to withdraw his plea. CP 35-79, 81. He claimed that his plea was not voluntary based on threats Mr. Andrews made against him and his friends. Id.

On June 15, 2011, the State responded with its brief in Opposition to Defendant's Motion to Withdraw Guilty Plea. Supp. CP ___ (Sub. 82). The four attachments to this motion included: 1) Declaration of Counsel, Ms. Samantha Kanner, detailing the chronological history of this matter; 2) Transcript of Defendant's call to his mother on April 6, 2011 (later Exhibit 8 at the full hearing); 3) Transcript of Defendant's call to his mother on the day of the

plea, April 22, 2011 (later Exhibit 9 at the full hearing); and
4) Transcript of Defendant's call to Cheryl, Ms. Hill's mother, on
April 22, 2011 (later Exhibit 11 at the full hearing). Id. In
Ms. Kanner's Declaration, a detailed account of the history of this
case was provided along with a summary of the phone calls and
information available to the State in contravention of claims of
Davis in his motion to withdraw his plea. Id.

In the attachment later designated as Exhibit 8, Davis
explained his reaction to the threats by Chad Andrews to his
mother in a recorded telephone conversation on April 6, 2011,
sixteen days before entering his plea, that he was, "kind of okay
with that, you know?" Id.; CP 83-84; Exhibit 8 at 11-12. He went
on to explain, "let me get out, let me get a No-Contact Order and
then if he gets anywhere near me then. . . I'll just call the police and
let him sort that out uh. . . in King County jail." Id.

In attachment three to the State's response opposing
defendant's motion (later Exhibit 9), Davis explained in a recorded
conversation with his mother on the day of his plea on April 22,
2011, "The only reason I took it was because from what I
understood from them essentially um because of the way things

were the o, the other option was other than taking it was to go in to trial with literally no defense." CP 84.

In attachment four (later Exhibit 11), Davis explained to Hill's mother that he pled guilty because, "my lawyers basically told me that you know if we go to trial, then we go to trial with no defense." CP 84.

Appellant's motion to withdraw his plea occurred on July 15th and July 19th, 2011. CP 80-89. Stacy Hill, Kim Myhre (his mother), and Davis testified at the hearing on July 15th. RP 2-133. Argument on the motion occurred on July 19th. RP 134-65.

In a 10-page written order dated August 4, 2011, Judge Sharon Armstrong denied appellant's motion to withdraw his plea. CP 80-89. The court detailed the history of the case. CP 80-81. The court summarized the evidence presented and set forth the factual findings as to that evidence. CP 81-86. Those findings are cited to specific examples from the evidence presented and admitted during the hearing. Id.

The court set forth five reasons why the defendant failed to carry his burden to withdraw his plea as required by the cited law. CP 88-89. Those reasons are grounded in the factual findings

found earlier in the decision and are supported and cited from the record and from the exhibits admitted during hearing. CP 80-89.

Furthermore, the court made determinations of credibility as to Davis' claims for the reasons he pled guilty. Specifically, the court found Davis' claim that he pled guilty to a minimum of 93 months in prison to avoid a crime victim, of whom he was not afraid, not credible. CP 88. She further found his claim that he would exchange 93 months in prison for his freedom, not credible in light of Davis' assertion that he believed the case would be dismissed at trial when Mr. Andrews failed to testify.

Additionally, the court found that Andrews never threatened the defendant or anyone else that he would harm them if the defendant did not plead guilty. CP 88.

The court also found Davis' assertion that he pled guilty to protect Hill, her son Raine, and John Maynard not credible based on the evidence presented and prior statements made by Davis. Id. Hill was not concerned for her safety or that of her son and there was no evidence presented that Andrews had threatened them. CP 83, 88. The court concluded that Davis' plea was an "altruistic gesture" to assist Ms. Hill. CP 88. The court then

correctly noted that altruistic gestures are not grounds to set aside a plea. Id.

The court then opined that the true reason for Davis' change of heart and motion to withdraw his plea was so that he could win the case with a claim of self-defense with the assistance of Hill, based on the content of a recorded conversation between Davis and Hill over a month prior to the motion to withdraw was filed. CP 89. The court concluded, earlier in its decision, that Davis was attempting to tamper with Hill and pressure her to change her version of events at a future trial. CP 85. This factual conclusion was tied to exact quotes and dialogue from that conversation. Id.

The court noted that Davis conceded there were other reasons why he pled guilty that included his lawyers advising him that he had no viable defense, that he missed Hill and her son and wanted the no contact order lifted and that he wanted the case to come to an end. CP 86.

D. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA WHEN THE COURT FOUND, BASED ON SUBSTANTIAL EVIDENCE, THAT THE PLEA WAS VOLUNTARY.

Under CrR 4.2(f), the court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice. The Washington Supreme Court has held that under CrR 4.2(f):

"the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is (1) Necessary to correct a (2) Manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. Webster's Third International Dictionary (1966). Without question, this imposes upon the defendant a demanding standard. But this is not an ill-considered result."

State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)

(emphasis supplied). The court noted that this demanding standard requires the defendant to establish that his plea was not voluntary and was thus a manifest injustice. Id.

In Osborne, the trial court properly denied the defendant's motion to withdraw his guilty plea when the defendant claimed his plea was involuntarily made due to his wife's threat to commit

suicide if the case went to trial. State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984).

The appellate court affirmed, holding that there was nothing in the record to indicate that Osborne's plea was coerced except for the bare allegation in his affidavit. Id. at 97. The court held that the defendant's answer during a colloquy denying threats or coercion was not conclusive, but were "highly persuasive" that his plea was voluntary. Osborne, 102 Wn.2d at 97 (citing State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983) (emphasis supplied)).

In State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996), the Washington State Supreme Court ruled that a defendant's signature on a plea agreement is "strong evidence" that the plea is voluntary. Furthermore, when the voluntariness of a plea has been inquired into on the record, "the presumption of voluntariness is well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

The standard of review of a trial court's denial of a defendant's motion to withdraw a guilty plea is abuse of discretion. State v. Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (Div. I., 2003). "A decision based on clearly untenable or manifestly unreasonable grounds constitutes an abuse of discretion." Id.

In State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), the Court reiterated its prior definition of the abuse of discretion standard:

The reviewing court will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." A decision is based on "untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," and arrives at a decision "outside the range of acceptable choices."

Dixon, at 75-76; citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). "Credibility determinations are for the trier of fact and are not subject to review." State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000); citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Court in Fiser went on to observe, "This court must defer to the trier of fact of issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Fiser, at 719.

"Altruistic or subjective reasons for entering a plea are not grounds to set aside the plea." Williams, 117 Wn. App. at 400.

In this case, it is undisputed that during the plea colloquy Davis twice denied being pressured or threatened to enter his plea. CP 81. Additionally, Davis signed the plea form with the same assurances. CP 13-34.

2. THE FIVE REASONS GIVEN BY THE COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND A CORRECT APPLICATION OF THE LAW.

As set forth above, the court conducted a hearing in which witnesses were called and evidence was admitted by both the defense and the State regarding whether the plea was voluntary. The court's findings are contained in the 10-page order, signed August 4, 2011. CP 80-89. Each of the factual findings were attributed to actual testimony or from the exhibits admitted during the hearing. Id. In the order, the court outlined five reasons why Davis had failed to meet his burden to prove a manifest injustice as required. CP 88.

First, the court observed that the plea substantially reduced Davis' standard range sentence. This is correct. Davis' standard range pursuant to the plea was 117 months to 147 months. He

received a low-end recommendation for his plea at 117 months.

CP 13-34.

If Davis had been convicted of both attempted murder in the second degree and assault in the first degree, as charged, those two crimes would have merged for sentencing purposes. However, Davis was also charged with burglary in the first degree, a violent offense, that also had a deadly weapon allegation.

If convicted as charged, the standard range sentence would have been 156 months to 231 months. RCW 9.94A.510 (Table 1). The high-end of this range is nearly double the amount of time Davis was facing under the plea agreement.

Davis attempts to argue that he reasonably believed he would have received a low-end sentence, even if convicted at trial. First, he certainly would not have been given that recommendation by the State at sentencing absent this plea agreement. Second, this argument ignores the egregious, unprovoked nature of this crime, which culminated in the defendant stabbing Chad Andrews in the back 11 to 14 times, after breaking down a locked bedroom door to get to him. CP 1-6, 81. Furthermore, as Davis' attorneys and the court opined, he had no real defense to this crime, as he

was clearly the first aggressor. CP 89; see also Exhibit 9, at p. 3; Exhibit 11, at p. 2.

The State dismissed the burglary in the first degree and the accompanying deadly weapon allegation, as part of the plea deal, which substantially reduced Davis' legal jeopardy.

Second, the trial court indicated that Davis did not perceive danger to himself. This factual conclusion is arrived at by simply observing the prior statements Davis made to his mother just 16 days prior to his plea, where he talked about getting released, getting a no contact order and then getting the police involved and having Andrews "sort that out in King County jail." CP 83-84. These were his words just days before the plea. The trial court's finding is based on uncontested facts.

The court noted that Davis had been attempting to post bail, despite these threats. CP 83; RP 124-25. On cross-examination, Davis admitted, "I was attempting to arrange bail the entire time I was in here." RP 125. He then also admitted on cross-examination that he had discussed in dozens of phone calls to contemplating a plea to lesser charges of either assault in the second degree or assault in the third degree with credit for time served. Id. Under either scenario of bailing out of jail or receiving a reduced sentence,

Davis would have been released from custody. Davis made active efforts that entire time to be released, one way or another, and demonstrated no hesitation or fear in doing so.

On the day of his plea, Davis explained to his mother his concern that, "Chad hates me enough that apparently you know he wants to kill me so what I, why do I think he wouldn't lie on the stand?" CP 84; Exhibit 9 at 6. This statement supports the court's finding, that Davis' only concern was that Andrews would not testify truthfully if called to testify. Once again, this is a logical conclusion based on the words of Davis on the very day that he pled guilty.

Third, the trial court found that the stated reason Davis pled guilty was not credible. This finding is based on the previously mentioned factual finding that Davis was not afraid of Andrews. The trial court found it not credible that Davis would exchange at a minimum 93 months in prison for this alleged fear of Andrews, especially in light of Davis' belief that the case could have been dismissed if Andrews did not appear for trial. CP 88. Additionally, the court found that Chad Andrews never threatened the defendant or anyone else that he would harm them if the defendant did not plead guilty. CP 88; see also RP 129 (Davis admitted this on cross-examination).

The court made a credibility determination that, pursuant to Fiser and Camarillo, is not subject to review. However, even if the court does review this determination, it is firmly supported by the evidence in the record and by common sense.

Fourth, the court found that Davis' assertion that he pled guilty to protect Stacy Hill, her son Raine and John Maynard from Andrews not credible. CP 88. This finding was based on his calls to her after the plea where he repeatedly expressed his frustrations about not being there for her and Raine, in the court's words, "a direct result of his plea." Id.

Actually, Davis' own testimony on July 15, 2011, contradicts this claim, when he admitted on cross-examination that the reason he wanted to get out of custody on bail wasn't just for his freedom, "Well, and for-to-to better protect the people that I care about." RP 125. The trial court's credibility determination was based on substantial evidence and was well-founded.

The trial court then correctly noted that, to the extent this was an altruistic gesture to assist Hill, that is not a justifiable basis to withdraw his plea. Id. This is a correct reading of the court's ruling in Williams, 117 Wn. App. at 400, and therefore, not an abuse of discretion.

Finally, the trial court noted that Davis' true motivation for moving to withdraw his plea was revealed by his phone conversations with Hill, in which he attempted to tamper with her testimony, and came to believe he could win his case with a claim of self-defense. CP 89.

It is without dispute that the no contact order with Hill was lifted once the plea was entered. It is apparent that after having had the opportunity to discuss this matter in depth with Hill, Davis began to believe that he could then successfully argue self-defense and began to prepare for a possible trial. CP 89; Exhibit 5 pp. 15-18.

The trial court had the opportunity to review the entire transcript of the calls, and came to this conclusion. That conclusion is based on a clear reading and interpretation of the facts before it, and should not be disturbed on appeal.

After listening to all of the testimony and reviewing the admitted evidence, the trial court came to the conclusion that Davis had second thoughts about his chances at trial. CP 89. The court concluded that Davis had, in fact, no real defense and that his attorneys had provided him sound legal advice. Id.

As a result, Davis failed to meet his burden of proving a manifest injustice at the motion to withdraw this plea. He likewise fails to meet his burden to prove the trial court abused its discretion in denying his motion to withdraw his plea. The court did not abuse its discretion. Instead, the court properly applied the correct law to the facts that were firmly established by the record. All of the factual and legal conclusions, as well as credibility determinations were supported by the record and cited as such.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Davis' request and affirm the trial court's decision.

DATED this 30th day of March, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JIM A. FERRELL, WSBA #24314
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JASON DAVIS, Cause No. 67609-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name

4/2/12
Date

Done in Seattle, Washington