

FILED
Aug 17, 2015
Court of Appeals
Division I
State of Washington

No. 73230-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW FORD SMITH,

Appellant.

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

The Honorable Ira J. Uhrig

APPELLANT'S OPENING BRIEF

Oliver R. Davis
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 2

MR. SMITH’S CASE SHOULD BE REMANDED FOR A PLEA
WITHDRAWAL HEARING..... 2

E. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Chervenell, 99 Wn.2d 309, 662 P.2d 836 (1983) 5
In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983) 2
In re Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390
(2004) 3
State v. Frederick, 100 Wn.2d 550, 674 P.2d 136 (1983)..... 4
State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980) 5
State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 3
State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984) 4
State v. Walsh, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001) 4
State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974) 3
State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008) 5

Washington Court of Appeals Decisions

State v. McDermond, 112 Wn. App. 239, 47 P.3d 600 (2002)..... 3
State v. Skiggin, 58 Wn. App. 831, 795 P.2d 169 (1990)..... 4

United States Supreme Court Decisions

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274
(1969) 2
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 2

Constitutional Provisions

Const. art. I, § 3..... 3
U.S. Const amend. 6 5
U.S. Const amend. 14 3

Rules

CrR 4.2..... 3

A. ASSIGNMENT OF ERROR

Andrew Ford Smith's guilty plea was involuntary, contrary to the Due Process clause of the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Due Process clause of the Fourteenth Amendment requires a guilty plea be knowing, intelligent, and voluntary. In Washington, a guilty plea must be set aside when necessary to correct a manifest injustice. An involuntary plea is one of the indicia of a manifest injustice. Did the totality of the circumstances below render Mr. Walker's guilty plea involuntary?

2. May the defendant seek to withdraw his plea of guilty for the first time on appeal?

C. STATEMENT OF THE CASE

In accord with his statement at the conclusion of sentencing, held March 5, 2015,¹ Andrew Ford Smith seeks, for the first time on appeal, to withdraw his plea. CP 24-38; 3/5/15RP at 12.

Mr. Smith was originally charged with Rape in the Second Degree and Unlawful Imprisonment. CP 22-23. According to the affidavit of

¹ The verbatim report of proceedings for March 5, 2015, is erroneously labeled as reporting a proceeding date of May 8, 2015. The record of the superior court including the March 5, 2015 judgment and sentence make clear that the defendant was sentenced on his plea of March 5. CP 8-21.

probable cause, R.H. stated that she went to Mr. Smith's home in Sedro Woolley to smoke marijuana, and while there, Mr. Smith forcibly kept her in the bedroom for a period of time, and engaged in intercourse with her. CP 1-2.

During pre-trial proceedings, Mr. Smith was examined by Western State Hospital and was later deemed incompetent to stand trial. He was found competent on March 20, 2014, by an undisputed order. CP 42; 10/24/13RP at 2.

Mr. Smith later was found, on February 5, 2015, to have entered a voluntary guilty plea to one count of the crime of Indecent Liberties pursuant to RCW 9A.44.100(1)(b). 2/5/15RP at 10-15; CP 4 (amended information), CP 52-61 (statement of defendant on plea of guilty). He was sentenced on March 5, 2015 to an indeterminate sentence of a minimum of 89 months to the statutory maximum of 10 years. CP 8-21; 3/5/15RP at 5-12.

D. ARGUMENT

MR. SMITH'S CASE SHOULD BE REMANDED FOR A PLEA WITHDRAWAL HEARING.

Principles of due process require guilty pleas to be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Personal Restraint of Isadore, 151

Wn.2d 294, 298, 88 P.3d 390 (2004); U.S. Const. amend. 14; Wash. Const. art. 1, § 3; CrR 4.2(d).²

Consistent with this constitutional mandate, according to court rule, a court must allow a plea to be withdrawn if (a) the plea was not valid when it was made, or (b) whenever it is necessary to correct a manifest injustice. CrR 4.2(f);³ see State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002), overruled on other grounds, State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006). A manifest injustice is one “that is obvious, directly observable, overt, not obscure.” State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

Washington courts recognize four nonexclusive indicia of per se manifest injustice:

- (1) ineffective assistance of counsel,
- (2) a defendant’s failure to ratify the guilty plea,
- (3) an involuntary plea, or
- (4) the State’s breach of the plea agreement.⁴

² CrR 4.2(d) directs: “The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.”

³ CrR 4.2(f) states in relevant part:

The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

⁴ The Court in Taylor emphasized,

Id. at 597. The defendant bears the burden of showing there was a manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Importantly, a criminal defendant may raise the issue of the validity of his guilty plea for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001) (citing State v. Skiggn, 58 Wn. App. 831, 795 P.2d 169 (1990)).

First, it is apparent from the circumstances of the original charges that Mr. Smith was under pressure during the plea negotiation process, which had been preceded by examination at Western State Hospital and medically-induced competence restoration. CP 22-23; CP 42; 10/24/13RP at 2, 11/14/13RP at 3-6, 3/20/14RP at 3-8. Plea bargaining pressures may render a plea involuntary. State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), overruled on other grounds, Thompson v. Department of Licensing, 138 Wn.2d 783, 794, 982 P.2d 601 (1999).

The American Bar Association standards and the Criminal Rules Task Force proposed standards do not suggest that the list of indicia is exclusive and we do not so hold. If, however, facts presented to the court do not fall within one of the listed categories, ... we hold that there must at least be some showing that a manifest (i.e., obvious, directly observable, overt or not obscure) injustice will occur if the defendant is not permitted to withdraw his plea.

Taylor, 83 Wn.2d at 596.

Furthermore, Mr. Smith contends his plea was not voluntary, because of the less than ideal colloquy at the time of the taking of the plea. 2/5/15RP at 10-15. In order for a guilty plea to be knowing and voluntary, an accused must understand what he is waiving and the consequences of his plea. State v. Weyrich, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008).

Certainly, in order for the waiver of constitutional rights implicit in a guilty plea to meet the requirements of the Due Process clause, the plea must constitute “an intentional relinquishment or abandonment of a known right or privilege.” State v. Holsworth, 93 Wn. 2d 148, 156-57, 607 P.2d 845, 849 (1980) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). This is possible only after advisement of the right to trial by jury and confrontation of accusers and the privilege against self-incrimination. Holsworth, 93 Wn. 2d at 156-57.

In this case, the trial court only asked if Mr. Smith had gone over the constitutional rights that he was giving up, without specifying the particular rights in question. 2/5/12RP at 13. He argues this was inadequate. For example, a defendant must be advised that he is waiving the Sixth Amendment confrontation right before his guilty plea is constitutionally acceptable. State v. Chervenell, 99 Wn.2d 309, 314, 662 P.2d 836 (1983); U.S. Const. amend. 6. This would have been a right Mr. Smith might specifically have decided to invoke thus impelling him to not

enter a plea, where the complainant R.H. had indicated a significant unwillingness to testify.⁵ 5/21/14RP at 7-10.

The failure to so advise should invalidate the plea. See In re Hews, 99 Wn.2d 80, 89, 660 P.2d 263 (1983) (a guilty plea which is invalid due to the State's failure to adequately inform a defendant of his rights constitutes actual prejudice for purposes of collateral attack). Here, the trial court not only failed to advise Mr. Smith of his confrontation rights, but also his right to a trial specifically by a jury, or his privilege of not testifying at any trial. U.S. Const. amends 5, 16, 14. 2/5/15P at 12-14.

Mr. Smith might very well have not entered a guilty plea had the court identified and emphasized the particular constitutional rights he was waiving. This would have included the opportunity for Mr. Smith, during the oral colloquy, to inquire of the court about the nature of each of those rights. He contends the case should be remanded to the superior court for a plea withdrawal hearing.

//

//

//

//

//

⁵ The complainant's reluctance to testify resulted in the court granting the defense motion for a perpetuation deposition. 5/21/14RP at 7-8.

E. CONCLUSION

This Court should conclude that withdrawal of Andrew Ford Smith's guilty plea may be necessary to correct a manifest injustice. The case should be remanded to the trial court for a plea withdrawal hearing.

DATED this 17th day of August, 2015.

Respectfully submitted,

s/Oliver R. Davis
OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73230-7-I
v.)	
)	
ANDREW SMITH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
|---|--|
| <p>[X] ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |
| <p>[X] ANDREW SMITH
739104
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98584</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF AUGUST, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711