

73230-7

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NO. 73230-7-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ANDREW FORD SMITH,
Appellant.

FILED
Oct 19, 2015
Court of Appeals
Division I
State of Washington

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

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Andrew Smith pled guilty to Indecent Liberties. For the first time on appeal, Smith seeks to pursue a motion to withdraw his guilty plea and remand the case to the trial court to hold a hearing. Since Smith seeks no review of trial court actions, cannot establish his plea was involuntary, and he can pursue a motion to withdraw his guilty plea as a collateral attack, his remand for a hearing on withdrawal of his guilty plea must be denied and his appeal dismissed.

II. ISSUES

Where the defendant cannot establish invalidity of his guilty plea, can he pursue a motion to withdraw the guilty plea for the first time on appeal?

III. STATEMENT OF THE CASE

On September 9, 2013, Andrew Smith was charged with Rape in the Second Degree by Forcible Compulsion and Unlawful Imprisonment alleged to have occurred on September 4, 2013. CP 1-2.

It was alleged that a thirty-five year old female had gone to Andrew Smith's residence to smoke some marijuana with him. CP 4. After they smoked the marijuana Smith told the female he was going to rape her. CP 4. The female said Smith forcibly kept her in the bedroom for the next five

hours and had her perform oral sex on him and had penetrated her vagina with a finger or other object. CP 4. When contacted, Smith acknowledged the female was a friend who had been at the residence smoking marijuana. CP 5. He denied having intercourse with her, but admitted she had fled the house undressed. CP 5.

On September 12, 2013, a competency evaluation of Smith was ordered. CP 48-50.

On October 3, 2013, a review hearing was conducted on the competency evaluation order because Smith could not be evaluated at the jail. 10/3/13 RP 2¹. The parties agreed that Smith would be evaluated at Western State Hospital. 10/3/13 RP 2.

On October 24, 2013, Smith appeared in court again and it was clarified that Smith had refused to be evaluated at the Skagit County Jail. 10/24/13 RP 2.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

10/3/13 RP	Competency Evaluation Status
10/24/13 RP	Competency Evaluation Status (in volume with 11/14/13, 5/21/14 & 2/5/15)
11/14/13 RP	Competency Evaluation Status (in volume with 10/24/13, 5/21/14 & 2/5/15)
5/21/14 RP	Deposition Hearing (in volume with 10/24/13, 11/14/13 & 2/5/15)
2/5/15 RP	Guilty Plea (in volume with 10/24/13, 11/14/13, & 5/21/14)
3/5/15 RP	Sentencing.

On November 14, 2013, Smith appeared back before court following the competency evaluation. 11/14/13 RP 2. Western State had opined Smith was not competent. 11/14/13 RP 3. Competency restoration was ordered. CP 42-4.

On February 20, 2014, an order was entered finding Smith competent to stand trial. CP 40-1. There were no subsequent pleadings in the trial court suggesting competency issues.

On May 19, 2014, Smith sought a motion for deposition of the victim because she would only attend an interview under subpoena. Supp. CP ____, (Motion for Deposition, filed May 19, 2104, Sub. No. 37, supplemental designation of clerk's papers pending).

On May 21, 2014, the trial court entered an agreed order for the deposition. 5/21/14 RP 7, 9, Supp. CP __ (Order Directing Deposition, filed May 21, 2014, Sub. No. 39, supplemental designation of clerk's papers pending). The deposition was for discovery purposes. 5/21/14 RP 9.

On February 5, 2015, Smith entered a guilty plea to the lesser charge of Indecent Liberties. 2/5/15 RP 10-15, CP 52-61. Smith's two attorneys indicated they had gone over the guilty plea with Smith in its entirety and they believed he understood the plea statement and its consequences. 2/5/15 RP 10.

Smith acknowledged having gone over the guilty plea statement completely. 2/5/15 RP 12, CP 52-61. He said he did not have any questions about any part of it. 2/5/15 RP 12. He was then asked about the plea form:

It then goes over your constitutional rights, particularly the right to a trial. Do you understand that by pleading guilty you're giving up those rights?

2/5/15 RP 13. Smith answered yes. 2/5/15 RP 13.

The trial court found Smith's guilty plea to be knowing and voluntary and accepted the guilty plea. 2/5/15 RP 15.

On March 5, 2015, Smith was sentenced by the trial court to the low-end of the range of 89 months. CP 12, 19, 3/5/15 RP 3, 11.

On March 6, 2015, Smith filed a notice of appeal from his guilty plea and sentencing without specifying the basis of the challenge. CP 24-38.

IV. ARGUMENT

Where no factual basis supports a contention of invalidity of a guilty plea, a case should not be remanded to the trial court to require a hearing on a motion to withdraw the guilty plea.

Andrew Smith seeks to remand his case to the trial court with direction for the trial court to hear a motion to withdraw his guilty plea. Smith did not raise the motion in the trial court. He provides no factual basis to believe his guilty plea was rendered involuntary which would permit such a challenge for the first time on appeal.

i. To grant a challenge to a guilty plea for the first time on appeal, there must be a basis to believe the plea was involuntary.

Smith cites to *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001) to contend that he is entitled to raise the issue of the validity of his guilty plea for the first time on appeal. In *Walsh*, the defendant had been misadvised of the standard range because his counsel and the prosecutor had improperly scored a prior vehicular assault as one point instead of two points as required. *State v. Walsh*, 143 Wn.2d at 4-5. Although the mistake was discussed at sentencing, there was no expression from the defendant that he understood the different range and that the resulting prosecutor's recommendation would be different.

The *Walsh* court reasoned that the misunderstanding of the standard range affected the voluntariness of the guilty plea and is the type of constitutional error that RAP 2.5(a)(3) encompasses thereby permitting a challenge to the guilty plea be raised for the first time on appeal. *State v. Walsh*, 143 Wn.2d at 8, citing *State v. Skiggn*, 58 Wn. App. 831, 795 P.2d 169 (1990) (error was made in calculating the standard range entitled the defendant's option for withdrawal of the guilty plea).

ii. There is no basis to believe the plea here was involuntary.

Smith was adequately advised of his constitutional right regarding his guilty plea as provided by CrR 4.2. The written guilty plea statements read:

5. I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial.

CP 53 (emphasis in original).

Smith acknowledged having gone over the guilty plea statement completely. 2/5/15 RP 12, CP 52-61. He said he did not have any questions about any part of it. 2/5/15 RP 12. He was then asked about the plea form:

It then goes over your constitutional rights, particularly the right to a trial. Do you understand that by pleading guilty you're giving up those rights?

2/5/15 RP 13. Smith answered yes. 2/5/15 RP 13.

Smith's sole legal contention to support his claim that he should be entitled to a hearing is that the colloquy of the trial court regarding Smith's relinquishment of his constitutional rights was inadequate. Smith contends that the particular rights in question must be specified. Appellant's Opening Brief at page 5. Smith cites to *State v. Chervenell*, 99 Wn.2d 309, 314, 662 P.2d 836 (1983) to support his contention. However, when *Chervenell* described the method of proving the knowledge of the rights set out in *State v. Holsworth*, 93 Wn.2d 148, 607 P.2d 845 (1980), it provided:

The defendant in a habitual criminal proceeding may challenge the use of pre-*Boykin* pleas. The State has the burden of proving beyond a reasonable doubt that the plea was knowingly made after the defendant was apprised of the nature of the offense and of the consequences of pleading guilty to it, including possible maximum and mandatory minimum sentences upon conviction and the constitutional rights to jury trial, to confrontation, *and to remain silent*, waived by the plea.

(Italics ours.) *Holsworth*, at 161. **While this language might be construed as requiring a trial court to expressly advise a defendant of the three enumerated constitutional rights in addition to the nature of the offense and consequences of his plea, we do not so read it.**

State v. Chervenell, 99 Wn.2d at 314 (bold emphasis added). *Chervenell* does not require a defendant to be advised of each right waived specifically in an oral colloquy. See also *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 206-7, 622 P.2d 360 (1980) citing, *Boykin v. Alabama*, 395 U.S. 238, 244, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) (relying on written guilty plea

statement and acknowledging statements contained in it are adequate to establish an adequate guilty plea); *State v. Lewis*, 16 Wn. App. 132, 136, 553 P.2d 127 (1976) (due process does not require a trial court to inform a defendant “of each and every right which is waived by a guilty plea...”).

The record here shows that Smith knew his rights and that he was giving them up by pleading guilty. CP 53.

Smith makes two factual assertions to support his claim which are unsupported by the record.

First, he contends that he was under pressure during the plea negotiation process which was affected by the “medically-induced” competency restoration ordered. Appellant’s Opening Brief at page 4. There was no forced medication order as part of the competency restoration. CP 42-4, 11/14/ RP 5-6. And the order finding Smith competent had been entered more than ten months before his guilty plea. CP 40, 3/20/14 RP 3, 2/5/15 RP 10. His counsel had been evaluating his mental health defenses, having retained a psychologist to evaluate him as to insanity and had not raised any additional competency concerns. 3/5/15 RP 6. The record before the trial court does not support that his competency affected the voluntariness of his guilty plea.

Second, he contends that regarding his right to a trial he “might specifically have decided to invoke thus impelling him to not enter a plea,

where the complainant R.H. had indicated a significant unwillingness not to testify.” Appellant’s Opening Brief at pages 5-6. To support this claim, he points out that the victim had required the court to compel her cooperation before she be interviewed. Appellant’s Opening Brief at pages 5-6 at footnote 5. Although she did require legal process before she be interviewed, she did the interview once ordered. 3/5/15 RP 7-8.

In addition, approaching sentencing some of Smith’s relatives made claims the victim had made multiple stories about what happened. The prosecutor explained what occurred to the court.

On the other side of the pendulum, I don't know if The Court has it, but there is a number of written statements from family members and friends of Mr. Smith, which allude to the victim having recanted her story and giving inconsistent statements and this and that. And I just want The Court to know that she has been completely consistent from the beginning that she was forced to engage in oral sex with the Defendant against her will and was held for a period of hours. And I'm a little bit disturbed by some of the letter writers, the Defendant's sister and some friend went actually to talk to my victim. I think they actually went to talk to her boyfriend, she happened to be present, and they alleged that she recanted her story to them. We had to haul her into the police station again to talk to the defense attorney and myself where she had learned -- no, she had not recanted her story. So I'm a little bit concerned about what looks to me it be almost like witness tampering.

3/5/15 RP 3-4.

Smith’s own attorney provided the following explanation:

And Ms. Kaholokula indicated we -- we did speak with her, the victim, again, as a result of those conversations,

and -- and she was sticking with what she had originally reported to the police and what she had said to us in our -- in our interview.

3/5/15 RP 7-8.

Smith's factual claims do not support his contention of an involuntary guilty plea because he might have made a different choice.

iii. The defendant can pursue a motion to withdraw his guilty plea under CrR 7.8.

Remanding the case without requiring a hearing would provide Smith would have the ability to pursue his own motion to withdraw his guilty plea under CrR 7.8 and CrR 4.2(f). He would be able to supplement the record with a full factual support contending his plea was involuntary. Such collateral attack would be subject to CrR 7.8(c)(2) for screening by the trial court for factual sufficiency and for setting of a factual hearing if sufficient factual basis provided. As explained above, on the record as it presently exists Smith would not be entitled to withdrawal of the guilty plea.

V. CONCLUSION

For the foregoing reasons this Court must deny Andrew Smith's appeal seeking entry of an order to remand the case for a hearing on a motion to withdraw his guilty plea.

DATED this 19th day of October, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: _____

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Oliver R. Davis, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 19th day of October, 2015.



KAREN R. WALLACE, DECLARANT