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## STATEMENT OF THE CASE

By information filed August 10, 2005, the Clark County Prosecutor charged defendant Mary Elizabeth Trickett with one count of felony hit and run under RCW 46.52.020(4)(b). CP 1-2. The defendant has no prior criminal convictions. CP 7, 17; RP 12. On November 3, 2005, the defendant appeared before the court and entered both a written and an oral guilty plea to the charge. RP 1-20.<sup>1</sup> In order to help induce the plea the state agreed (1) to recommend 90 days on a range of 3 to 9 months, (2) to recommend that the defendant be allowed to serve this sentence in work release in her home state of California, and (3) to recommend that the defendant be allowed to remain out of custody in order to make arrangements for work release in California. CP 17-18, RP 14-16. At no point in the proceeding did the court or Statement of Defendant on Plea of Guilty inform the defendant of what did or did not qualify as work release in the State of Washington. CP 6-18; RP 1-20. The most important factor in the defendant's decision to plead guilty was the ability to maintain her employment on work release. CP 32-34, RP 72.

On December 8, 2005 the defendant again appeared before the court for sentencing. RP 66. At that time the defendant informed the court that she

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<sup>1</sup>The record in this case includes five consecutively number volumes of verbatim reports referred to herein as "RP x" with "x" being the specific page number. The volumes are not sequentially dated.

had arranged for “work release.” RP 66. The colloquy between the defendant and the court went as follows:

THE COURT: Okay. So you’ve got your work release all taken care of there?

THE DEFENDANT: My work release? Oh. Yes.

THE COURT: All right.

THE DEFENDANT: I have all that information and everything taken –

MS. BRYANT: Did they write a letter, Your Honor, or –<sup>2</sup>

THE COURT: Do you have –

MS. BRYANT: – other authorization?

THE COURT: Do you have something with you?

THE DEFENDANT: I have the documents. I haven’t signed anything with them because I wasn’t sure if this was going to be credible to this court. I needed to make sure first before I went ahead and got any more information.

This is the information for them, part of it (showing document to Ms. Bryant). There is a woman named Jamie to contact there.

MS. BRYANT: Okay, so you’re proposing to the Court that you enter the Shadow Truck Program?

THE DEFENDANT: Uh-huh.

MS. BRYANT: And is that a home –

THE DEFENDANT: Yeah, it’s a home –

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<sup>2</sup>MS. BRYANT was the deputy prosecuting attorney in the case.

MS. BRYANT: – (inaudible)?

THE DEFENDANT: Yeah, it's a home detention, because that's their equivalent for the work center here.

MS. BRYANT: Oh. We would oppose that, Your Honor. We -- on its face it appears to be (inaudible) home confinement and that we don't feel is appropriate in this circumstances.

What we agreed to was work release, actual incarceration at a facility that is run by the County authority in the town which she's from and –

THE COURT: What town is this?

THE DEFENDANT: Danville.

THE COURT: Okay.

THE DEFENDANT: They – instead of doing what – I explained to them what – what was going on, what had happened, and they told me that basically – because they are certified in several states. They also have all the other different requirements that any court would need. Basically all I have to do is give them the information and they contact the courts and keep in touch with the courts and let them know exactly where I am at every moment of the day.

THE COURT: Okay. But you are allowed to go home on off-work hours.

THE DEFENDANT: Yes.

THE COURT: Okay. We have that equivalent here, and it's called electronic home confinement, and we do not recommend and we do not order electronic home confinement unless there are some really extreme circumstances, such as contagious or illness or terminal illness, and that's our policy here in Clark County. That's why Ms. Bryant is telling you that the State will not accept that.

THE DEFENDANT: So basically you're telling me that I can't do this.

THE COURT: Correct.

THE DEFENDANT: Not even the LCD – LCD, which they have the same monitoring system. They actually have a band around you and everything.

THE COURT: That's – that's – that's the LCD, that's the band, that's the equivalent of our electronic home confinement. And the answer is no, I will not order that. You would have to be in a custody facility. And whether or not you have the band when you're out of the custody facility where they're, you know, so that they know you are – where you are, that's fine, but you would need to return to the custody facility on off hours. That's the issue.

THE DEFENDANT: I don't understand. It's almost the exact same thing.

RP 68-70.

Following a little further discussion the court put the matter over so the defendant and her attorney could determine whether or not the defendant's home county had a work release facility comparable to the Clark County Work Release facility. RP 71-74.

The next day the court again called the case and defense counsel informed the court that there were more than one county run facilities similar to the Clark County Work Release facility in the defendant's home county. The problem was that they would not accept out-of-state commitments. RP 23-24. Based upon the defendant's perceived as the state's failure to abide

by it's plea agreement, the defendant orally moved to withdraw her guilty plea. RP 24. In spite of the fact that the defendant had moved to withdraw her guilty plea the court proceeded with sentencing and imposed 90 days in jail. RP 25-30; CP 19-30. The court did put the matter over for a hearing on the defendant's motion. RP 27-30.

On December 20, 2005, the parties appeared before the court to argue the defendant's motion to withdraw her plea. RP 33. In the interim the defendant had filed a written motion and affirmation in support of the motion. CP 31, 32-34. The affirmation included the following statement:

7. The stipulated plea agreement filed in this case contained a promise from the prosecuting attorney's office that it would recommend that I be allowed to serve a 90-day jail penalty in a work release facility in the California county of my residence if I was able to find such a facility that would accept me.

8. I diligently sought out a work release facility. I was referred by one such facility to a private agency which is able to provide monitored home confinement which is substantially similar to the requirements of a work release facility.

9. I believe the prosecuting attorney's refusal to recommend that I be allowed to serve my penalty in a manner substantially similar to a work release facility and through the only means available to me constitutes an irregularity in obtaining the judgment and a manifest injustice that would support the withdrawal of my guilty plea. In addition, I believe the prosecuting attorney's failure to recommend the monitored home confinement that I sought out with the understanding that it would be acceptable to complete my obligations negates my original understanding of the consequences of the plea.

CP 33.

Following argument of counsel the court orally granted the defendant's motion to withdraw her guilty plea. RP 42-44. The state then moved for the imposition of bail and the court reimposed the prior bail at \$5,000.00 secured. RP 47-48. The court then remanded the defendant into custody and set a trial date of February 13, 2006, and a trial review for February 9, 2006. CP 48-52. On January 6, 2006, the stated filed a notice of appeal. CP 41. On January 20, 2006, the court entered the following findings of fact, conclusions of law, and order on the motion.

#### **FINDINGS OF FACT**

1. Mary Elizabeth Tricket, d.o.b. 05/17/1980, was charged by information with one count of Injury Hit and Run (RCW 46.52.020(4)(b) in Clark County, Washington on August 10, 2005.

2. On November 3, 2005 Ms. Tricket entered a guilty plea in the above-entitled and numbered matter. A Statement of Defendant on Plea of Guilty accompanied by a written copy of a plea recommendation agreed to by the State and the defendant was submitted to the court as part of the plea proceedings. A colloquy regarding the plea and the written documents was conducted by the court. It is agreed that the defendant was fully informed of her constitutional rights and did not express any confusion or misunderstanding regarding their scope or extent.

3. On November 3, 2006 the court found that the defendant's plea was made knowingly, intelligently and voluntarily. The defendant was also instructed by the court to stay in contact with her court-appointed attorney.

4. The plea agreement was memorialized on a standardized form prepared by the office of the prosecuting attorney and agreed to by the defendant. As part of the standardized form the plea agreement specified that if the defendant does not qualify for partial confinement

programs the recommendation will be for total confinement.

5. As part of the agreed plea recommendation submitted to the court the Defendant would be allowed to serve the minimum jail penalty of 90 days in alternative confinement at a work release facility in the county of her residence. The defendant was a resident of California. Sentencing was set for December 8, 2005 and the defendant was advised that she would need to present the court with the name of the work release facility which would accept her. There was not discussion regarding what constituted a "work release facility."

6. On December 8, 2005 the defendant appeared before the court for sentencing. The defendant stated that she had diligently sought out a work release facility in her area of residence and had contacted a variety of law enforcement agencies only to learn that they would not accept an individual serving a sentence imposed by an out-of-county court. The defendant presented documentation to the court relating to a private agency that would provide electronic home confinement services in the county of her residence. The defendant was informed by both the court and the prosecutor that these arrangements did not meet the standards of a "work release facility" and would not satisfy the conditions anticipated by the plea agreement. Sentencing was set over one day to allow the defendant's counsel to contact authorities in the defendant's county of residence to ascertain the availability of a work release facility in which she might serve her term.

7. On December 8, 2005, and subsequent to her previously scheduled sentencing hearing, the defendant informed her counsel that she wished to withdraw her guilty plea.

8. On December 9, 2005 the defendant and her counsel appeared in court for sentencing. Defendant's counsel informed the court that the defendant had provided him with the names of three California counties in her area of residence. Defendant's counsel had been able to speak with the administrator of the work release center in one county and had been informed that they would not accept an individual from a foreign jurisdiction. Subsequently, defendant's counsel was in contact with the Sheriff's office of a second county and was informed that this county followed the same procedure.

Defendant's counsel informed the court of defendant's desire to withdraw her guilty plea. The court found that the defendant had knowingly, intelligently, and voluntarily entered a guilty plea on November 3, 2006. Sentencing was completed and the defendant was taken into custody in order to start her term of confinement. A hearing date was set for December 20, 2005 regarding defendant's motion to withdraw her guilty plea.

9. Defendant's motion to withdraw her guilty plea and affidavit in support was filed with the court. Plaintiff's motion in response was filed with the court. After presentation of the motions on December 20, 2005 the defendant's motion with withdraw guilty plea was granted.

### **CONCLUSIONS OF LAW**

1. 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. CrR 4.2(f). Each plea must be made voluntarily, competently, and with an understanding of the nature and the consequences of the plea. CrR 4.2(d). If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8. CrR 4.2(f).

2. Relief from Judgment or Order is appropriate pursuant to CrR 7.8(b)(1) when the order is obtained by mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment order. Relief from a Judgment or Order is appropriate pursuant to CrR 7.8(b)(5) for any other reason justifying relief from the operation of the judgment.

3. Relief consistent with CrR 7.8(b)(5) and CrR 4.2(d) is appropriate in this case because it is not clear from the record what conditions of alternative confinement would meet the standards of a "work release facility" as identified in the plea agreement and referred to during defendant's colloquy within the court. The plea agreement was based on misinformation by the defendant who was apparently unaware that the state would oppose electronic home confinement in keeping with Clark County practice. The court said that electronic home confinement is considered total confinement in the case law and statutes of the State of Washington. All parties agreed to several

set overs so that the defendant could explore work release in California. Accordingly, the court found that the defendant did not fully understand the nature and consequences of her plea in this particular circumstance.

SCP 1-4.

On February 9, 2006, this case was called for trial review. Respondent's Clerk's Papers. The minute sheet for that date shows the following notation:

- State is appealing the court's Decision;
- Matter has not been stayed.

SCP 2.

The superior court file does not contain a minute sheet for February 13<sup>th</sup> and does not mention what occurred on that date if anything. The state filed its opening brief of appellant in this case on June 20, 2006, just one week after trial counsel obtained an order of indigency. *See* Opening Brief of Appellant and Order of Indigency.

## ARGUMENT

### **I. THE APPEAL SHOULD BE DISMISSED BECAUSE RAP 2.2(b) DOES NOT GRANT THE STATE AN APPEAL AS OF RIGHT FROM THE TRIAL COURT'S DECISION TO ALLOW A DEFENDANT TO WITHDRAW A GUILTY PLEA.**

In this case the defendant argues that the state's appeal should be dismissed because (1) the state has no appeal of right under RAP 2.2(b) and (2) this court should not grant discretionary review. The following presents these arguments.

#### ***(1) RAP 2.2(b) Does Not Grant the State an Appeal as of Right from the Trial Court's Decision to Allow a Defendant to Withdraw Her Guilty Plea.***

Rule 2.2(b) of the Rules of Appellate Procedure sets out those instances in which the state has an appeal as of right in a criminal case. This rule states:

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding which is below the standard range of disposition for the offense or which the state or local government believes involves a miscalculation of the standard range.

(6) Sentence in Criminal Case. A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.

RAP 2.2(b).

As the introductory section in part (b) indicates, in criminal cases the state may “only” appeal under one of the six listed circumstances. For example, in *State v. Williams*, 112 Wn.App. 171, 48 P.3d 354 (2002), the state appealed from the trial court’s decision to grant the defendant a DOSA sentence arguing that the defendant did not qualify under the applicable statute, thus making the case appealable under RAP 2.2(b)(6). The defense moved to dismiss, arguing that DOSA sentences are imposed within the standard range, thus precluding the state from seeking appellate review of the sentence. The court of appeal agreed, noting as follows:

RAP 2.2(b) limits the State’s criminal appeal rights to specified circumstances. Regarding sentencing, the State may appeal: “A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.” RAP 2.2(b)(6). Under RCW 9.94A.660, a DOSA sentence is split evenly between incarceration and community custody based upon the mid-point of the total standard range. Here, the trial court adopted the standard range proposed by the State. Under these circumstances, the State cannot

rely on RAP 2.2(b) to support a direct appeal. As discussed, a DOSA sentence is always within the standard range because it is always based upon the mid-point of the standard range.

*State v. Williams*, 112 Wn.App. at 176-177.

While the court refused to hear the case under RCW 2.2(b), the court did agree to hear the case as a discretionary appeal. The court stated:

Given the above, we hold for the first time that a dispute regarding a defendant's eligibility for DOSA is not properly reviewed under RAP 2.2(b)(6). "Although the State does not have the right to appeal the order dismissing its petition, its notice of appeal may be given the same effect as a notice for discretionary review." *In re Welfare of Watson*, 23 Wn.App. 21, 23, 594 P.2d 947 (1979) (citing RAP 5.1(c)). Accordingly, we may consider this matter solely under the discretionary standards found in RAP 2.3.

*State v. Williams*, 112 Wn.App. at 177.

The first basis listed under RAP 2.2(b) states as follows:

(1) Final Decision, Except Not Guilty. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

RAP 2.2(b)(1).

The term "abates" is not defined in this rule. As a result, the court can rely upon the common meaning for the term. In Black's Law Dictionary, the term abate includes the follow definition:

To bring entirely down or demolish, to put an end to, to do away with, to nullify, to make void.

Black's Law Dictionary, p. 4 (5<sup>th</sup> Edition 1979).

Webster's Dictionary provides a similar definition wherein it states the following as part of the definition for the word "abate":

To become defeated or to become null and void.

Webster's New Collegiate Dictionary, page 2 (1077).

As these definitions reveal, particularly which seen in light of the examples of abatement given in RAP 2.2(b)(1), an action is abated in a criminal case when the courts ruling prevents the prosecution from proceeding with the case, thereby precluding the state from obtaining a conviction.

Under this definition the prosecution in this case was not abated. The state was free to continue with the case and bring the defendant to trial. In fact, the court had reset the matter for trial. Thus, the court's ruling granting the defendant's motion to withdraw guilty plea did not abate the action and the state has no appeal as of right under RAP 2.2(1).

Under subsection (2) of RAP 2.2(b) the state does have an appeal of right from suppression motions, if the trial court expressly finds that the ruling has the practical effect of abating the action. This section states:

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

RAP 2.2(b)(2).

The case at bar does not involve either the grant or denial of a

suppression motion. Thus, the state has no appeal as of right under RAP 2.2(b)(2).

Under subsection (3) of RAP 2.2(b) the state may appeal as of right from an order arresting or vacating a judgment. This provision states:

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

RAP 2.2(b)(3).

In the case at bar the defendant brought her motion to withdraw guilty plea before the imposition of sentence. Thus, the grounds for granting or denying that motion are found in CrR 4.2. For example, in *State v. Davis*, 125 Wn.App. 59, 104 P.2d 111 (2004), the defendant appeals the trial court's refusal to appoint counsel on his motion to withdraw his guilty plea. In this case the defendant had filed the motion under CrR 4.2 after the court declared the sentence but before the court signed and filed it. The trial court found that since the defendant had made the motion after "judgment" was rendered, the motion was governed by CrR 7.8(b) instead of CrR 4.2, and as a result the defendant was not entitled to appointed counsel to pursue collateral relief. The court of appeals framed the issue as follows:

The controlling issue on Davis's appeal is the meaning of "judgment" under CrR 4.2. If, as the State argues, judgment occurs when the sentence is pronounced, then the trial court correctly refused to consider Davis's motion and did not act arbitrarily in refusing to consider the motion. If judgment occurs when the sentence is signed and filed with the clerk, then the trial court erred by not considering

the merits of Davis's motion to withdraw his guilty plea.

*State v. Davis*, 125 Wn.App. at 64.

Ultimately the court held that motion to withdraw a guilty plea after sentence is declared but before it is signed and filed are governed by CrR 4.2 and are not requests for collateral relief under CrR 7.8(b). While the ultimate decision in *Davis* is not apropos to the issue before this court, the quoted portion of the decision in *Davis* does clarify that in all cases in which a defendant moves to withdraw a guilty plea prior to imposition of sentence the motion is part of the original criminal proceeding and is governed under CrR 4.2.

Under the criminal rules, motions for arrest of judgment are governed under CrR 7.4(a), which states as follows:

(a) Arrest of Judgments. Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

CrR 7.4(a).

Under this rule the court has discretion to arrest judgment under three circumstances: (1) absence of personal jurisdiction or subject matter jurisdiction, (2) the failure of the information to charge a crime, and (3) lack of substantial evidence to support the conviction. Thus, under RAP 2.2(b)(3), if the trial court in a criminal case arrests judgment for any one of these three

reasons, the state may appeal as of right.

In the case at bar the trial court did not enter an order “arresting judgment” and did not base its ruling on the absence of jurisdiction, the failure of the information to charge a crime, or the lack of substantial evidence to support the judgment. Thus, in the case at bar, the trial court did not arrest the judgment and the state has no appeal of right under RAP 2.2(b)(3).

Under RAP 2.2(b)(4), the state has the right to seek an appeal if the trial court enters an order granting a motion for a new trial. A condition precedent to the use of this rule is the requirement that there have been a trial in the first place. It is critical to note that the rule does not include the language “or order granting a motion to withdraw a guilty plea,” even though CrR 4.4(b) specifically recognizes that such motions can be and are routinely brought in our criminal justice system. Under the rule of “*expressio unius est exclusio alterius*” the court cannot read “from an order granting a new trial” to mean “from an order granting a new trial or from an order granting a motion to withdraw a guilty plea.” *See State v. Swanson*, 116 Wn.App. 67, 65 P.3d 343 (2003); *see also City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003) (court applies rules of statutory construction to interpret court rules). Consequently, in the case at bar the state’s appeal in the case at bar cannot be sustained under RAP 2.2(b)(4).

Finally, under subsections (5) and (6) of RAP 2.2(b) the state has an appeal as of right from certain disposition in juvenile court, and from certain sentences in criminal cases. Since the case at bar was not taken under juvenile court jurisdiction and does not involve a sentencing issue, neither of this provisions provide the state with an appeal as of right in the case at bar.

***(2) Discretionary Review Is Inappropriate Because the Trial Court's Decision Does Not Render Further Proceedings Useless, It Does Not Substantially Alter the Status Quo of the Parties, It Does Not Substantially Limit the Freedom of the Parties to Act, and It Does Not Depart from the Accepted and Usual Course of Judicial Proceedings.***

As was previously mentioned in *State v. Williams*, if the state does not have an appeal as of right under RAP 2.2(b), the court of appeals may treat the state's notice of appeal as if it were a motion for discretionary review. *State v. Williams*, 112 Wn.App. at 177. the bases for motions for discretionary review are governed under RAP 2.3(b), which states as follows:

(b) Considerations Governing Acceptance of Review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless; or

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for

review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

Under the first criteria listed the court will consider granting discretionary review if the trial court has committed obvious error that “would render further proceedings useless.” In the case at bar the trial court’s decision to grant the defendant’s motion for a new trial based upon the defendant’s lack of understanding as to what the term “work release” entailed is far from “obvious error.” However, even if it were, it would not support a decision to grant discretionary review because the decision did not “render further proceedings useless.” Much to the contrary, the court’s ruling allowed the state to bring the defendant to trial and secure a guilty verdict if it chose to try. It did not. As a result, RAP 2.3(b)(1) does not support a request for discretionary review.

Similarly, under the second alternative, the court may grant discretionary review if the trial court commits probable error if the error “substantially alters the status quo or substantially limits the freedom of a party to act.” As with the first alternative, in the case at bar the trial court’s ruling left the state with the power to proceed with the prosecution of the

defendant. It did not “alter the status quo” or “substantially limit the freedom” of the state to act in the case. Thus, discretionary review is not appropriate under RCW 2.3(b)(2).

Under the third alternative in RAP 2.3(b) the court may grant discretionary review if the trial court’s decision has “so far departed from the accepted and usual course of judicial proceedings” so as to call for immediate appellate review. The decision whether or not to grant a motion to withdraw guilty plea under CrR 4.2 lies well within a trial court’s discretion, *see Argument II, infra*, and is itself well within the “usual course of judicial proceedings.” Thus, discretionary review is not available under RAP 2.3(b)(3).

Finally, under RAP 2.3(b)(4) the court of appeals may accept discretionary review in certain cases upon the certification of the trial court or upon the agreement of the parties. In the case at bar there is no certification from the trial court and the parties have not agreed to discretionary review. Thus, discretionary review is not available under RAP 2.3(b)(4). Absent a basis for discretionary review under RAP 2.3(b) this court should not consider the state’s appeal in this case. The state’s appeal should be dismissed.

## **II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE DEFENDANT'S MOTION TO WITHDRAW HER GUILTY PLEA.**

The decision whether or not to grant a motion to withdraw a guilty plea under CrR 4.2 lies within the sound discretion of the trial court. *State v. Jamison*, 105 Wn.App. 572, 20 P.3d 1010 (2001). As such the court of appeals should sustain that decision absent a manifest abuse of discretion. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999). An abuse of discretion occurs only when the court bases its decision on clearly untenable or manifestly unreasonable grounds, or when no reasonable person would take the view adopted by the trial court. *State v. Jamison*, 105 Wn.App. at 590. As the following explains in the case at bar the trial court did not abuse its discretion when it granted the defendant's motion to withdraw his guilty plea.

Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." This rule provides:

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendants plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f).

A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991). Since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with First Degree Kidnaping, First Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the

defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

*State v. Walsh*, 143 Wn.2d at 8-9.

Similarly, in *State v. Kisse*, 88 Wn.App. 817, 947 P.2d 262 (1997), the defendant plead guilty to three counts of luring and one count of

communication with a minor for immoral purposes. At the time of the plea the defendant believed he was eligible for a SOSSA sentence. In return for the plea the state had moved to dismiss child molestation charges in another cause number. As part of the plea bargain the state agreed to allow the defendant to seek a SOSSA sentence if he was eligible but the state did not agree to recommend this disposition even if the defendant was eligible. Before sentencing the defendant discovered through new counsel that he was not eligible for a SOSSA sentence. He then unsuccessfully moved to withdraw his guilty plea.

On review the court of appeals reversed, holding as follows:

In our view, one's eligibility for SSOSA is a direct sentencing consequence, because it "produces a definite, immediate and automatic effect on a defendant's range of punishment." If eligibility exists, the trial court may impose community custody, up to three years of treatment, up to 180 days jail, and various other conditions. If eligibility does not exist, the trial court generally must impose a sentence within the standard range, unless there are grounds for an exceptional sentence.

Here, it is obvious that Kisse was mistaken about his eligibility for SSOSA; indeed, the record demonstrates that his mistake was shared by the prosecutor, defense counsel, and the trial judge. Because of his mistake, he did not understand a direct sentencing consequence of his pleas, and his pleas were not knowing, voluntary, and intelligent. He was entitled to withdraw his pleas, and the trial court erred by ruling otherwise.

*State v. Kisse*, 88 Wn.App. at 822.

The fact in the case at bar squarely fall within facts of *Kisse*. In

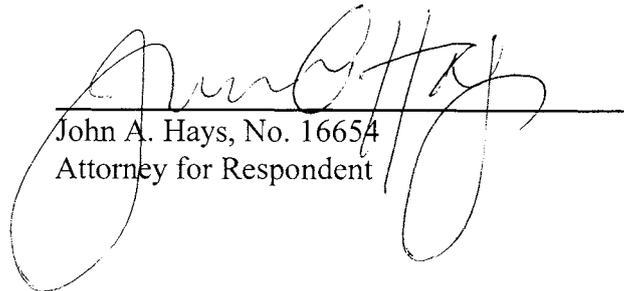
*Kissee* the defendant pled guilty believing that he would qualify for a particular sentencing option (SOSSA). In the case at bar the defendant pled guilty believing that she would qualify for a particular sentencing option (Work Release or In Home Monitoring). In *Kissee* the court found that the defendant's eligibility for SOSSA was a direct consequence of the guilty plea. In the case at bar the defendant's eligibility for Work Release or In Home Monitoring is equally a direct consequence of the defendant's guilty plea. In *Kissee* the defendant discovered that the sentencing option upon which he relied was not available (because he did not qualify). In the case at bar the defendant discovered that the sentencing option upon which she relied was not available (because no work release facility was available and the court refused to consider In Home Monitoring). Thus, in the same manner that the court in *Kissee* found that the defendant was entitled to withdraw his guilty plea based upon his mistaken belief as to his eligibility for SOSSA so the trial court in the case at bar was correct that the defendant was entitled to withdraw her guilty plea based upon her mistake belief as to her eligibility for Work Release or In Home Monitoring. As a result, the trial court did not abuse its discretion when it granted the defendant's motion.

## CONCLUSION

The state has no appeal as of right from a trial court's decision to grant a motion to withdraw a guilty plea. In addition, there is no basis for a discretionary review of this action. As a result this court should dismiss the state's appeal. In the alternative, the trial court acted well within its discretion when it granted the defendant's motion to withdraw his guilty plea and this court should affirm that decision.

DATED this 22<sup>nd</sup> day of August, 2006.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Respondent

## **APPENDIX**

### **RAP 2.2(b)**

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding which is below the standard range of disposition for the offense or which the state or local government believes involves a miscalculation of the standard range.

(6) Sentence in Criminal Case. A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.

**RAP 2.3(b)**

(b) Considerations Governing Acceptance of Review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless; or

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

**CrR 4.2(f)**

(f) Withdrawal of Plea. 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. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

**CrR 7.4(a)**

(a) Arrest of Judgments. Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

**CrR 7.8(b)**

**CrR 7.8(b)**

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.6;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment and suspend its operation.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

6 STATE OF WASHINGTON, )  
7 Appellant, )  
8 vs. )  
9 MARY E. TRICKETT, )  
10 Respondent, )

CLARK CO. NO.05-1-01718-0  
APPEAL NO: 34250-2-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF CLARK ) vs.  
13 )

13 CATHY RUSSELL, being duly sworn on oath, states that on the 22<sup>nd</sup> day of AUGUST,  
14 2006, affiant deposited into the mails of the United States of America, a properly stamped  
15 envelope directed to:

15 ARTHUR CURTIS  
16 CLARK COUNTY PROSECUTING ATTORNEY  
17 1200 FRANKLIN ST.  
18 VANCOUVER, WA 98668

MARY E. TRICKETT  
163 STANMORE CIRCLE  
VALLEJO, CA 94591

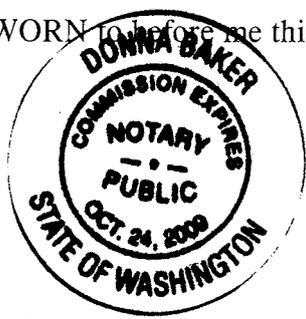
17 and that said envelope contained the following:

- 18 1. BRIEF OF RESPONDENT
- 19 2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
- 20 3. AFFIDAVIT OF MAILING

20 DATED this 22<sup>ND</sup> day of AUGUST, 2006.

21 Cathy Russell  
22 CATHY RUSSELL

23 SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of AUGUST, 2006.



24 Donna Baker  
25 NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09