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STATE OF WASHINGTON

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NO. 34325-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DANIEL RAY SMITH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-02056-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....	1
II. RESPONSE TO ASSIGNMENT OF ERROR #1	4
III. RESPONSE TO ASSIGNMENT OF ERROR #2	8
IV. RESPONSE TO ASSIGNMENT OF ERROR #3	12
V. CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>Boykin v. Alabama</u> , 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969)	5
<u>In re Keene</u> , 5 Wn.2d 203, 206-207, 622 P.2d (1980)	6
<u>State v. Delgado</u> , 148 Wn.2d 723, 727, 63 P.3d 792 (2003)	9
<u>State v. Henderson</u> , 114 Wn.2d 867, 870, 792 P.2d 514 (1990)	11
<u>State v. Iredale</u> , 16 Wn.App. 53, 553 P.2d 1112 (1976)	5, 6
<u>State v. Jamison</u> , 105 Wn.App. 572, 589-590, 20 P.3d 1010 (2001)	7
<u>State v. Keller</u> , 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)	9
<u>State v. Olivas</u> , 122 Wn.2d 73, 98-99, 856 P.2d 1076 (1993)	9
<u>State v. Phelps</u> , 113 Wn.App. 347, 353, 57 P.3d 624 (2002)	11
<u>State v. Powell</u> , 126 Wn.2d 246, 258, 893 P.2d 615 (1995)	7
<u>State v. Ridgley</u> , 28 Wn.App. 351, 623 P.2d 717 (1981)	6
<u>State v. S.M.</u> , 100 Wn.App. 401, 409, 996 P.2d 1111 (2000)	7
<u>State v. Saas</u> , 118 Wn.2d 37, 42, 820 P.2d 505 (1991)	5
<u>State v. Schaupp</u> , 111 Wn.2d 34, 38, 757 P.2d 970 (1988)	12
<u>State v. Sledge</u> , 113 Wn.2d 828, 838, 947 P.2d 1199 (1997)	11
<u>State v. Sloan</u> , 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004)	12
<u>State v. Surge</u> , 122 Wn.App. 448, 460, 94 P.2d 345 (2004)	9
<u>State v. Taylor</u> , 83 Wn.2d 594, 596, 521 P.2d 699 (1974)	5, 6
<u>Wood v. Morris</u> , 87 Wn.2d 501, 505, 554 P.2d 1032 (1976)	6

Statutes

RCW 43.43.753	8, 9
RCW 43.43.754(1)	8
RCW 9.94A.700(5)(e)	11
RCW 9.94A.715(2)(b)	11

Rules

CrR 4.2	5
CrR 4.2 (d)	5
CrR 4.2(f)	6
CrR 4.2(g)	6

I. STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case, except as noted below, in argument or as otherwise contrary to the record of proceedings.

The Clark County Cause Number is 04-1-02056-5, and was originally filed as two counts of Child Molestation in the First Degree and two counts of Child Molestation in the Second Degree. After several continuances, this matter began trial on August 15, 2005. RP 27. After voir dire, defense counsel, upon request of the defendant, asked the prosecutor if the original pre-trial plea offer was still available. RP 87. This was a plea offer that had been sent to the defense attorney from the prosecutor's office much earlier and which had been reviewed several times between the defense attorney and the defendant before being refused. RP 85.

After two breaks in the proceedings to draft the Statement of Defendant on Plea of Guilty to Sex Offense, to have counsel read the entire form to the defendant, and for counsel to answer his questions and explain the consequences, the defendant ultimately accepted the State's plea offer and pled guilty. RP 88-91; RP 52; CP 64. The State's plea offer included dismissing two counts, the State agreeing to recommend

that any prison time be served concurrently with the earlier Klickitat County conviction, and the defendant stipulating to the conditions of community custody which were all presented and contained in Appendix A that was attached and incorporated into the change of plea. CP 64; RP 41-52.

The court and the defendant's colloquy went, in part, as follows:

THE COURT: The prosecuting attorney is making a recommendation in this case. It's attached to the plea form as Exhibit or Appendix A. Did you have enough time to review your -- that offer with your attorney?

THE DEFENDANT: Yes.

THE COURT: All right. He read that to you?

THE DEFENDANT: Yes.

THE COURT: Do you understand the prosecuting attorney's offer in this case?

THE DEFENDANT: Yes.

RP 45-46

The court further inquired as to the defendant's reason for accepting the plea offer:

THE COURT: Has anybody promised you anything to get you to plead other than the promises laid out in the statement?

THE DEFENDANT: None.

THE COURT: I understand this is a Newton Plea, which means that you're agreeing that although you're contending that you're not guilty that there is sufficient evidence that a jury might find you guilty beyond a reasonable doubt of these offenses; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to plead guilty to take advantage of the State's recommendation to drop some charges and to make a particular sentence recommendation?

THE DEFENDANT: Yes, sir.

THE COURT: That includes their recommendation of concurrent time with your Klickitat County matter.

THE DEFENDANT: Yes, sir.

RP 50

Defense counsel, in his testimony during the defendant's motion to withdraw his plea, noted that he had discussed with the defendant several times that the benefit to the defendant for accepting this plea was a reduction in counts and concurrent time with the Klickitat County sentencing. RP 88, 89-90, 96, 105-106.

After taking testimony in the defendant's motion to withdraw his plea of guilty, the court denied the motion and sentenced the defendant

within the standard range, concurrent with the Klickitat County sentences and with the stipulated conditions of community custody/placement.

RP 112; CP 85.

II. RESPONSE TO ASSIGNMENT OF ERROR #1

THE DEFENDANT ENTERED HIS GUILTY PLEA KNOWINGLY, VOLUNTRILY, AND INTELLIGENTLY AND THE COURT ACTED PROPERLY IN REFUSING TO ALLOW A WITHDRAWAL OF THE GUILTY PLEA.

The appellant contends that trial court erred in denying the motion to withdraw the plea of guilty, claiming the plea was not knowingly, voluntarily and intelligently entered because the defendant was not informed of the direct consequences of entering his plea. Appellant contends that he believed he would receive less time in prison by taking the reduced charges and concurrent time recommendation of the state's plea offer, rather than going to trial. The appellant claims this offer was illusory as a plea to two counts would have given him 9 points standard range – even if the two counts were dropped as the prosecutor offered.

What the appellant forgets to mention is that the prosecutor's offer also contained a promise by the prosecutor to a concurrent sentence with the Klickitat County sentence. See Appendix A, CP 64. (As attached and incorporated into the Statement of Defendant on Plea of Guilty.)

CrR 4.2 (d) prohibits a trial court from accepting a guilty plea that is not voluntary. The rule provides that there must be a factual basis for the plea and requires the trial judge to make sure the plea is voluntary. The court must be sure that the defendant reads and signs a statement of plea of guilty that covers the many details and rights as prescribed in CrR 4.2. The court should also interrogate the defendant concerning these matters. State v. Iredale, 16 Wn.App. 53, 553 P.2d 1112 (1976). These strict requirements are designed to insure that guilty pleas will be voluntary, both under the rules of court and the constitution. Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969). Once the safeguards of these rules have been employed, a defendant will be permitted to withdraw a plea only upon the defendant's showing that withdrawal is necessary to avoid a manifest injustice. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

The standard of a manifest injustice is a demanding standard that is placed on a defendant who seeks to withdraw a guilty plea. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). The Taylor court set forth four non-exclusive examples of what is meant by the term "manifest injustice":

- “1. Denial of effective assistance of counsel,
2. The plea was not ratified by the defendant,

3. The plea was involuntary,
4. The plea agreement was not kept by the prosecution.”

Under this rule, a “manifest injustice” is “an injustice that is obvious, directly observable, overt, not obscure.” State v. Taylor, 83 Wn.2d at 596. (CrR 4.2(f)).

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness. In re Keene, 5 Wn.2d 203, 206-207, 622 P.2d (1980); State v. Ridgley, 28 Wn.App. 351, 623 P.2d 717 (1981). Further, when the judge goes on to inquire orally of a defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. State v. Ridgley, *supra*; State v. Iredale, *supra*. Finally whether a plea is knowingly, intelligently and voluntarily made is determined from the totality of the circumstances. Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976).

The same court that took the change of plea also heard the testimony offered in the defendant’s motion to withdraw his plea. The court entered its Findings of Fact and Conclusions of Law in its denial of the motion. CP 151-156.

As the court had done on the record previously, the court found that the defendant had entered a knowing, intelligent and voluntary plea of guilty. Further, the court discussed the colloquy with the defendant. There were recesses for further discussion between the defendant and his attorney. The court found the defendant was fully informed of his constitutional rights regarding the plea offer and did not express any confusion or misunderstanding as to the plea or its consequences. (PC 151-156.)

The standard of review on a trial court's denial of a motion to withdraw a guilty plea is an abuse of discretion standard. State v. S.M., 100 Wn.App 401, 409, 996 P.2d 1111 (2000); State v. Jamison, 105 Wn.App. 572, 589-590, 20 P.3d 1010 (2001). A court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. State v. Powell, 126 Wn.2d 246, 258, 893 P.2d 615 (1995).

The State submits that this was a knowing, intelligent and voluntary plea to these felonies. The defendant received the bargained reduction from four to two counts and a recommendation of concurrent time with the Klickitat County sentencing. Although this could have been a consecutive sentence under RCW 9.92.080, the defendant received the benefit of his plea bargain. As such, the defendant should not have been

entitled to withdraw the guilty plea and the State respectfully submits that no error occurred in its denial.

III. RESPONSE TO ASSIGNMENT OF ERROR #2

THERE WAS NO ERROR IN REQUIRING THE DEFENDANT TO SUBMIT TO A DNA SAMPLE PURSUANT TO STATUTE OR TO PAY THE DNA FEE.

The second assignment of error raised by the defendant is that the statutory authority does not authorize the trial court to order a defendant to submit to multiple DNA samples or to pay multiple DNA fees. The defendant, apparently, is saying that because he has been convicted of multiple felonies under different cause numbers at different times, that he does not have to provide a DNA sample for each conviction. The State submits that this is not in line with the statute or case law.

RCW 43.43.754(1) indicates, in the appropriate sections:

(1) Every adult or juvenile individual convicted of a felony, . . . must have a biological sample collected for purposes of DNA identification analysis. . . (RCW 43.43.754(1) (partial)).

This further is in line with the legislative findings under RCW 43.43.753. The Legislative Mandate, in part, is as follows:

The Legislature further finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of the State to assist Federal, State, and local criminal justice and law enforcement agencies in both the

identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interests of the State to establish a DNA database and DNA databank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.” (RCW 43.43.753) (partial).

Statutory interpretation is a question of law which the trial court reviews *de novo*. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. The court should assume that the Legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). In State v. Olivas, 122 Wn.2d 73, 98-99, 856 P.2d 1076 (1993), the Supreme Court upheld the validity of a prior version of RCW 43.43.754, the statute requiring DNA testing for convicted felons. One of the matters that is discussed was finding the statute valid under fourth amendment special needs analysis. In addition, Division I has also upheld the validity of the statute. State v. Surge, 122 Wn.App. 448, 460, 94 P.2d 345 (2004).

The State submits that there is nothing ambiguous about the taking of the DNA sample from a convicted felon. Each time he is convicted, a sample is taken, and a fee is charged for that procedure. Counsel on appeal makes argument that a sample has already been taken from him. Yet, there is no provision for that in the statute, nor is there anything that causes an ambiguity in the statute. Further, there is no showing that the first sample that was taken was properly taken, properly stored or can still be maintained. In short, there is no reason for the court not to continue to order DNA samples taken from each convicted felon pursuant to statute. The State submits that this claim by the defendant has no merit.

Appellant also contends that the court exceeded its authority in relation to its imposition of certain conditions of community custody. However, as part of accepting the State's plea-bargain offer, the defendant also stipulated to the very conditions he now complains about.

Appendix A, page 4 states:

(5) By accepting this offer, the defendant stipulates to the conditions as set forth herein of the conditions of sentence/community placement/custody and/or supervision.

CP 64

Under the invited error doctrine, a criminal defendant who pleads guilty to a charge pursuant to a plea agreement and who is sentenced consistently with the agreement may not seek appellate review of those

portions of the sentence that are statutorily authorized or that do not exceed the courts statutory authority. State v. Phelps, 113 Wn.App. 347, 353, 57 P.3d 624 (2002); State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

Here the record indicates that defense counsel and the state engaged in negotiations that produced a very favorable plea agreement for the defendant. The State agreed to a reduction from four to two counts, to recommend concurrent sentencing with the prior Klickitat County case, with the stipulation to certain conditions of community custody. CP 64 (“Appendix A”).

Further, the record indicates the terms of the plea agreement were fully disclosed and that the trial court imposed a sentence consistent with the agreement. RP 112; CP 161-182.

Pursuant to RCW 9.94A.700(5)(e) authorizing the court to impose “crime-related prohibitions” and RCW 9.94A.715(2)(b) which allows the imposition of rehabilitative programs or otherwise perform affirmative conduct, the trial court had authority to impose the conditions as stipulated in the plea bargain as agreed to by the defendant.

Plea agreements are construed as contracts. State v. Sledge, 113 Wn.2d 828, 838, 947 P.2d 1199 (1997)

The defendant cannot have the benefit of his bargain without the consequences to which he agreed and stipulated and on which the court relied in imposing the conditions of community custody. Here, the defendant agreed to accept a sentence which avoided a potentially more severe sentence as part of his negotiated plea agreement. He must be held to his bargain, just as the State is bound by the plea agreement. See, State v. Schaupp, 111 Wn.2d 34, 38, 757 P.2d 970 (1988)

The State contends that this issue has no merit.

IV. RESPONSE TO ASSIGNMENT OF ERROR #3

When a trial court imposes a sentence beyond the statutory maximum, this court must remand for amendment of the judgment and sentence to expressly provide for the correct term of community placement. State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). In some circumstances, the sentencing court may set forth the maximum sentence and explain that the total of the term of incarceration and the term of community custody cannot exceed the statutory maximum. *Id.* Consequently, this case must be remanded for resentencing.

The State agrees that it may be appropriate for resentencing.

V. CONCLUSION

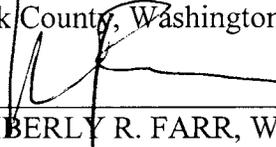
The State respectfully submits that the trial court acted properly in all accords that the denial of withdrawal of plea of guilty should be affirmed.

DATED this 27 day of Sept, 2006.

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