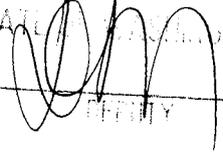


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STATE OF WASHINGTON

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NO. 34419-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

OSCAR A. SERRANO,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

Cause No. 03-1-01091-3

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not allowing Serrano to withdraw his guilty pleas to four counts of assault in the second degree with sexual motivation.
2. The trial court erred in entering Findings of Fact and Conclusions of Law findings nos. 4-6, 9-12, 14-19, 21; and conclusions nos. 1-4.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not allowing Serrano to withdraw his guilty pleas to four counts of assault in the second degree with sexual motivation? [Assignments of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

Oscar A. Serrano (Serrano) was charged by second amended information filed in Thurston County Superior Court with four counts of assault in the second degree with sexual motivation. [CP 12-13].

On January 9, 2004, the matter came before the Honorable Gary R Tabor for a change of plea hearing. [1-9-04 RP 3-16]. Serrano entered an Alford statement of defendant on plea of guilty. [CP 14-21]. After a colloquy with Serrano in which Serrano expressed some confusion regarding the sentence range, the court accepted his guilty plea to four counts of assault in the second degree with sexual motivation finding there was a factual basis for the plea and that the plea was knowingly, intelligently, and voluntarily entered. [1-9-04 RP 3-16]. The matter, by law required the preparation of a presentence investigation report (PSI),

and was set for sentencing upon completion of the required PSI. [1-9-04 RP 15-16].

Thereafter, both pro se and through appointed new counsel, Serrano filed a motion for withdrawal of his guilty plea. [CP 24-43, 44,45, 46-54, 142-160; 2-20-04 RP 3-6; 3-4-04 RP 3-6; 3-25-05 RP 2 14; 7-8-05 RP 3-17; 4-15-06 RP 4-14]. On February 6 and 7, 2006, the matter came before the Honorable Gary R. Tabor regarding Serrano's motion to withdraw his guilty plea. [Vol. I RP 5-199; Vol. II RP 204-282]. After hearing testimony from Serrano, Serrano's witnesses, the State's witnesses, and argument from Serrano's counsel and the State, the court denied Serrano's motion to withdraw his guilty plea. [Vol. II RP 256-282]. The court entered the following written Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The defendant, OSCAR A. SERRANO, was arrested for the charges in this case on June 5, 2003. An Information was filed on June 10, 2003. Attorney Richard Woodrow filed his notice of appearance on behalf of this defendant on June 23, 2003.
2. The trial date in this case was continued a number of times. The last such continuance was granted by the court at defense request on December 17, 2003. At that hearing, the Judge referred to January 20, 2004 as a possible trial date, but instructed the parties to consult with the court's Calendar Administrator for scheduling the new date. On December 19, 2003, a new trial date in this cause was

scheduled for January 12, 2004. The defendant assumed the trial had been re-scheduled for January 20, 2004.

3. Either defense counsel Richard Woodrow or his investigator, John Wilson, interviewed the potential State witnesses and the possible defense witnesses. None of the possible defense witnesses were found to have information that would be helpful to the defense at trial, and some of these witnesses would have been detrimental to the defense had they testified.
4. The defendant could read and understand the English language. He was able to express himself orally and in writing on legal matters, and did so on a number of occasions.
5. On one occasion after he entered his guilty pleas in this case, specifically on March 14, 2005, the defendant filed with the court a motion to proceed as his own attorney in this case. He stated in that motion that he was competent and able to read and understand the English language. At a hearing on March 25, 2005, the defendant orally addressed the court in support of this motion, and therefore was aware of the nature and contents of this motion.
6. Prior to April 15, 2005, the defendant never made a request for the assistance of an interpreter in this case. On April 15, 2005, the court directed that the defendant have the assistance of an interpreter at certain depositions ordered by the court in this case.
7. In November, 2003, a First Amended Information was filed in this case. It charged one count of first-degree child molestation, one count of attempted first-degree child molestation, and five counts of first-degree rape of a child. If convicted of four of these charges, the defendant would have faced a sentence range of 240 to 318 months in prison, or in other words 20 years to 26 years, 6 months in prison.

8. In early December, 2003, the defendant was given a plea offer from the State. That offer was to reduce the charges to four counts of second-degree assault with sexual motivation, with a sentence range of 63 to 84 months in prison. If there was a positive evaluation for the SSOSA sentencing option by a sex offender therapist and full disclosure by the defendant, the State would recommend that option. If the SSOSA option was granted by the court, the defendant would receive a suspended prison sentence of six months in jail, and a requirement that he complete sex offender treatment. If the conditions for a SSOSA sentence were not met, the State offered to recommend 84 months in prison.
9. The defendant considered pleading guilty in accordance with the State's offer and seeking a SSOSA sentence. He discussed this option with his mother, and spoke with her about how expensive the treatment program would be.
10. However, the defendant subsequently learned that he would likely be deported if he pled guilty. By the defendant's own admission in a statement he submitted to a Department of Corrections Pre-Sentence Report writer, the defendant discussed the fact of his deportation with his attorney. The defendant also told his mother that if he pled guilty, he would be deported when he was released from custody in this case.
11. The defendant's attorney discussed with the defendant the consequences of pleading guilty and the possible consequences if the defendant was convicted at trial. The attorney recommended to the defendant that he accept the State's offer of reduced charges and a prison term, and explained why he was making that recommendation.
12. The defendant came to court twice to plead guilty, one time in December, 2003, and then on January 9, 2004. Both times, the defendant's attorney reviewed with the defendant the form for a Statement of Defendant on Plea of Guilty. Each paragraph of that document was either read to the defendant by the attorney or read by the defendant.

13. The Statement of Defendant on Plea of Guilty signed by the defendant for the change of plea hearing on January 9, 2004, included a State's plea offer of 72 months in prison as a minimum term, with lifetime community custody.
14. Paragraph 8 of the Statement of Defendant on Plea of Guilty stated that the defendant entered his plea freely and voluntarily. Paragraph 9 of the Statement asserted that no one had threatened harm of any kind to the defendant or any other person to cause him to make his plea. Paragraph 10 of the Statement affirmed that no person had made any promises to the defendant to cause him to enter the plea except for what was set forth in the Statement.
15. Just above where the defendant signed his name to the Statement of Defendant on Plea of Guilty, it read: "My lawyer has explained to me, and we have fully addressed, all of the above paragraphs and attachment 'A' if applicable. I understand all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty'. I have no further questions to ask the judge".
16. In entering his guilty pleas on January 9, 2004, the defendant continued to maintain his innocence but pled guilty to take advantage of the State's plea offer.
17. At the change of plea hearing on January 9, 2004, the court observed the defendant throughout the hearing. The defendant asked a few questions for clarification, and answered appropriately the questions put to him by the court. The defendant appeared to be aware of what was taking place and appeared to be paying attention. Later, the defendant could recall the date for sentencing that the court had announced at the change of plea hearing.
18. At the change of plea hearing, the court asked the defendant if he was making his pleas freely and voluntarily, and the defendant answered with the word "yes".

19. At the change of plea hearing, after he was told the maximum penalty and the sentence range, the defendant stated that he had been told he would do three and a half years. The prosecutor then spoke up, emphasizing that the defendant would receive a minimum term within the standard range, and could earn good time, but that the Indeterminate Sentencing Review Board could also increase the minimum term. The defendant's attorney also spoke, confirming that he had discussed with the defendant the possibility of earning good time, and that the defendant would receive the maximum and minimum sentence. The defendant then affirmed that he understood he would be sentenced to a maximum term up to life and a minimum term within the range of 63 to 84 months in prison.
20. Good time is calculated by the Jail and the Department of Corrections. The court does not determine what amount of good time the defendant will receive.
21. At the time the defendant entered his guilty pleas, the defendant understood that he would not be released afterwards and knew that charges would not be dismissed. Rather, the defendant understood that he would receive a minimum prison term within the standard range, minus credit for the time he had served minus the good time credit he hoped to receive.
22. At the change of plea hearing, the court found that there was sufficient evidence to support the defendant's guilty pleas.
23. After accepting the defendant's pleas of guilty, the court set a further date for sentencing and ordered that the Department of Corrections prepare a Pre-Sentence Report, as required by law.
24. The defendant later provided to the Pre-Sentence Report writer a personal information form which he had filled out. The defendant included in this form a lengthy statement he had written, which was then included verbatim in the Pre-

Sentence Report. That report was dated February 3, 2004 and was filed with the court on February 6, 2004.

25. Attorney Richard Woodrow moved to withdraw from this case on February 20, 2004 because of the defendant's expressions of dissatisfaction with his representation. The court ordered that new counsel be appointed and that a subsequent hearing be held with regard to the defendant's apparent desire to withdraw his guilty pleas.
26. On February 26, 2004, attorney Samuel Meyer was appointed as the defendant's new attorney.

Based upon the above Findings of Fact, and the applicable legal principles, the Court makes the following:

II. CONCLUSIONS OF LAW

1. With regard to his motion to withdraw his guilty pleas, the defendant has the burden to prove that such withdrawal is necessary to correct a manifest injustice. The defendant has not that burden in this case.
2. On January 9, 2004, the defendant entered his guilty pleas freely, voluntarily, and intelligently, with full knowledge of the direct consequences of his guilty pleas, in order to take advantage of the State's plea offer.
3. Attorney Richard Woodrow provided the defendant effective assistance of counsel both in preparing this case for trial and in advising the defendant with regard to his pleas of guilt.
4. The defendant has failed to show that, but for some erroneous information or lack of information from his attorney, he would have chosen not to plead guilty.

Based upon this court's Findings of Fact and Conclusions of Law, as set forth above, the defendant's motion to withdraw his guilty pleas is hereby denied.

[CP 181-187].

On February 17, 2006, the matter came before the court for sentencing. [2-17-06 RP 3-16]. The court sentenced Serrano on all four counts to standard range sentences of 72-months on each of the four counts of assault in the second degree with sexual motivation with all the sentences running concurrently for a total sentence of 72-months based on an offender score of 9. [CP 22, 23, 167-180; 2-17-06 RP 3-16].

Timely notice of appeal was filed on February 17, 2006. [CP 164].

This appeal follows.

D. ARGUMENT

(1) THE TRIAL COURT ERRED IN FAILING TO ALLOW SERRANO TO WITHDRAW HIS GUILTY PLEA TO FOUR COUNTS OF ASSAULT IN THE SECOND DEGREE WITH SEXUAL MOTIVATION.

Under CrR 4.2(f), the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. State v. Taylor, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). In Taylor, the court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement

was not honored by the prosecution. *See also* State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). Any one of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. State v. Taylor, 83 Wn.2d at 597. However, the four indicia from Taylor are not exclusive and a trial court should examine the totality of the circumstances when deciding whether a “manifest injustice” exists. State v. Stough, 96 Wn. App. 480, 485, 980 P.2d 298 (1999).

- a. Serrano Was Denied Effective Representation Of Counsel In Entering His Plea Of Guilty And As Such The Trial Court Should Have Granted His Motion To Withdraw His Guilty Plea.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Washington Constitution Art. 1 section 22; United States Constitution Amend. 14. To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) counsel’s performance fell below an objective standard of reasonableness, and (2) but for counsel’s deficient performance the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2025, *rehearing denied*, 467 U.S. 1267 (1984). In 1985, the United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366

(1985), that the same two part test should be applied in challenges based on ineffective assistance of counsel in the context of guilty pleas. *See also State v. Garcia*, 57 Wn. App. 927, 791 P.2d 244 (1990).

Counsel has an affirmative obligation to assist a defendant “actually and substantially” in determining whether to plead guilty. *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993). When counsel fails to inform the defendant of the applicable law or affirmatively misrepresents a collateral consequence of a plea that results in prejudice to the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. *Stowe*, 71 Wn. App. at 188-89. In the context of a guilty plea, the defendant must show that his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty,” and that but for counsel’s failure to adequately advise him, he would not have pleaded guilty. *State v. McCollum*, 88 Wn. App. 977, 947 P.2d 1235 (1997).

Here, Serrano’s motion to withdraw his guilty plea was based in part on ineffective assistance of counsel in that his counsel had failed to “actually and substantially assist” him in deciding to plead guilty. Serrano alleged he was told by his counsel that all charges against him would be dismissed, which was consistent with Serrano’s continued assertion of his innocence, and that he was told by his counsel that he would be

immediately released from jail, that his counsel did not go over the statement of defendant on plea of guilty with him particularly failing to explain in detail the sentencing consequences of pleading guilty, and that his counsel never provided him with a necessary interpreter.

While it is true that the court found that Serrano entered his plea of guilty to take advantage of the State's offer at the same time maintaining his innocence (an Alford plea), Finding of Fact no. 16, it is apparent from the record that Serrano did not understand the nature of what was involved in pleading guilty—Serrano told the court at the guilty plea hearing that he believed he would only serve 3 ½ years all while maintaining his innocence and his desire to fight the charges against him—and that the neither the court nor Serrano's counsel clarified this issue. Moreover, Serrano's defense counsel, while knowing that he was from El Salvador, never sought a Spanish speaking interpreter, who may have been able to fully explain the circumstances of the case in terms that Serrano would understand both linguistically and culturally despite the fact that Serrano and his counsel could communicate conversationally (this court should not forget that after Serrano brought the interpreter issue to the court's attention that thereafter an interpreter was provided most particularly at he motion to withdraw the guilty plea). Given this state of affairs, it cannot be said that Serrano was afforded effective assistance of counsel where the

record demonstrates that Serrano's counsel did not "actually and substantially assist" Serrano in deciding whether to plead guilty given that Serrano pleaded guilty based on the mistaken belief that he would be released or only receive a sentence of 3 ½ years, his counsel did not go over the plea form with him, and his counsel never provided a Spanish speaking interpreter to explain the complexities involved in pleading guilty to Serrano in his native tongue. This court should reverse the trial court's denial of Serrano's motion to withdraw his guilty plea and allow Serrano to do so.

- b. Serrano Did Not Enter His Plea Of Guilty Knowingly, Voluntarily, And Intelligently Because He Was Not Afforded An Interpreter At The Time His Plea Was Entered And As Such The Trial Court Should Have Granted His Motion to Withdraw His Guilty Plea.

Due Process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *see* State v. Zumwalt, 79 Wn. App. 124, 901 P.2d 319 (1995) (plea of guilty involuntary when defendant was not adequately informed by his counsel that there was an insufficient factual and legal basis to support the deadly weapon charge). A plea of guilty is not voluntary if it is the product of or induced by coercive threat, fear, persuasion, promise or deception. State v. Swindell, 22 Wn. App.

626, 630, 590 P.2d 1292 (1979), *affirmed* 93 Wn.2d 192, 607 P.2d 852 (1980).

Here, in Findings of Fact Nos. 4-6, 17-19, the trial court in denying Serrano's motion to withdraw his guilty plea found that Serrano spoke and understood English. However, the court at the hearing on the motion to withdraw his guilty plea afforded Serrano a Spanish speaking interpreter something that was not afforded at the time Serrano's plea was taken. While it appears that Serrano can speak and understand conversational English—his ex-wife, the mother of the victim, claimed that he could do so at the hearing to withdraw his guilty plea as well as his attorney, Richard Woodrow, and his attorney's investigator, John Wilson, but Serrano indicated that he did not fully understand what was occurring prior to the entry of his plea and that much of the documents he filed in English to withdraw his guilty plea were prepared by others—given the totality of these circumstances, it cannot be said that at the time Serrano entered his guilty plea in the absence of a Spanish speaking interpreter that he knowingly, intelligently, and voluntarily enter the guilty plea particularly where the record evidences that he questioned the sentence he would receive upon pleading guilty—Serrano believed he would only receive 3 ½ years not the 72-months the State would recommend. This

court should reverse the trial court's denial of Serrano's motion to withdraw his guilty plea and allow him to withdraw his plea.

- c. Serrano Did Not Ratify The Plea Of Guilty And Did Not Enter His Plea Of Guilty Knowingly, Voluntarily, And Intelligently Because He Did Not Understand The Sentencing Consequences Of Entering The Guilty Plea And As Such The Trial Court Should Have Granted His Motion to Withdraw His Guilty Plea.

Where a defendant is misinformed regarding the standard sentencing range, the plea is involuntary and constitutes a manifest injustice. State v. Walsh, 143 Wn.2d 1, 6-9, 17 P.3d 591 (2001); State v. Miller, 110 Wn.2d 528, 531-535, 756 P.2d 122 (1988). This is so regardless of the fact that the correct sentencing range is less onerous. State v. Moon, 108 Wn. App. 59, 63-64, 29 P.3d 734 (2001); State v. Murphy, 119 Wn. App. 805, 806, 81 P.3d 122 (2002); In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). The remedy where a plea agreement is based on misinformation as to the standard sentencing range is the defendant's choice of specific performance of the agreement or withdrawal of the guilty plea unless there are compelling reason not to allow that remedy. Id.; State v. Walsh, 143 Wn.2d at 8-9

Here, at the change of plea hearing on January 9, 2004, Serrano told the court that he believed that he would only receive a sentence of 3 ½ years. [1-9-04 RP 6]. Instead of halting the proceedings and clarifying

whether Serrano in fact understood the applicable sentence range as well as all the sentencing consequences of pleading guilty and wished to proceed with the plea of guilty, the court said, “Well, that’s not the issue right now.” [1-9-04 RP 6]. While the State and Serrano’s counsel offered explanations to the court regarding the sentence range and recommended sentence, the court never asked Serrano if he understood and wished to proceed—the court merely asked if this sentence range had been explained to Serrano to which Serrano’s counsel said, “Right.” [1-9-04 RP 6-8]. Given these facts, contrary to the trial court’s Findings of Fact nos. 9-12, 14-15¹, 17-19, 21 and Conclusions of Law nos. 1-4, Serrano’s plea of guilty was not ratified by Serrano, nor can it be said that his plea of guilty to four counts of assault in the second degree with sexual motivation was knowingly, intelligently, and voluntarily entered. This court should reverse the trial court’s denial of Serrano’s motion to withdraw his guilty plea and allow him to withdraw his plea.

¹ This court should note that Findings of Fact nos. 14 and 15 included references to statements allegedly attributed to Serrano on his Statement of Defendant on Plea of Guilty. [CP 142-160]. However, these statements are pre-printed on the form that a defendant is required to sign in order to plead guilty and as argued in the first section of this brief, Serrano’s counsel provided ineffective assistance in failing to fully explain this form, including the pre-printed sections, to Serrano prior to the entry of his guilty plea. Thus, these pre-printed sections cannot be used against Serrano in determining whether the court erred in denying his motion to withdraw his guilty plea.

E. CONCLUSION

Based on the above, Serrano respectfully requests this court to reverse the trial court's decision and allow for the withdrawal of his guilty plea to four counts of assault in the second degree with sexual motivation.

DATED this 15th day of August 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 15th day of August 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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BY _____

Signed at Tacoma, Washington this 15th day of August 2006.

Patricia A. Pethick
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