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STATE OF WASHINGTON

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NO. 34545-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ARMBRUSTER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court failed to inquire as to whether the defendant understood all of the constitutional rights waived by pleading guilty thus making it impossible to determine that his plea was knowing, voluntary and intelligent.

Issue Presented on Appeal

Did the trial court's failure to inquire as to whether the defendant understood all of the constitutive defendant's his plea was knowing, voluntary and intelligent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Robert Armbruster was charged by amended information with assault in the second degree in violation of RCW 9A.36.021(1)(a) and malicious mischief in the second degree in violation of RCW 9A.48.080(1)(a). He pleaded guilty to assault in the second degree and malicious mischief in the second degree. CP 8-15. The Court imposed restitution in the amount of \$670 for damage to tires indicated in the statement of probable cause. CP 1-5. Mr. Armbruster stipulated to the statement of probable cause. He received a standard range sentence. CP 19-29. This timely appeal follows. CP 32-33.

2. SUBSTANTIVE FACTS

Counsel for Mr. Armbruster indicated that Mr. Armbruster was pleading guilty “with great reluctance”. RP 2. The trial court engaged in a limited colloquy with Mr. Armbruster. The trial court informed Mr. Armbruster of the maximum penalties and that he had “certain constitutional rights which are set forth on page 2 of your guilty plea. Did you go over those rights with Mr. Shaw?” Mr. Armbruster responded “yes”. RP 2, 4. The trial court asked if Mr. Armbruster was waiving those rights and then proceeded to discuss the fact that the offense at issue was a strike and that he would not be permitted to carry a gun. RP 5-6. The court accepted the guilty plea without determining if Mr. Armbruster knew or understood the nature of the constitutional rights he was waiving.

C. ARGUMENT

1. APPELLANT'S PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT WHERE THE TRIAL COURT FAILED TO EXPLAIN THE NATURE OF EACH CONSTITUTIONAL RIGHT BEING WAIVED.

A plea may be withdrawn “whenever it appears that withdrawal is necessary to correct a manifest injustice. A manifest injustice occurs when a plea is not knowing, voluntary and intelligent. State v. Ross, 129 Wn.2d 279,

283-84, 916 P.2d 405 (1996). Withdrawal of the plea under these circumstances is required under the due process clause of the state and federal constitutions. Boykin v. Alabama, 395 U.S. 238, 243, n.5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” State v. Ross, 129 Wn.2d at 284.

A plea is knowing, voluntary and intelligent where the defendant is made aware of all of the direct consequences of his plea. This includes knowledge that he waives fundamental constitutional rights by pleading guilty. Henderson v. Morgan, 426 U.S. 637, 645 n. 13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Boykin, 395 U.S. at 243, n.5; In re Woods v. Rhay, 68 Wn.2d 601, 606, 414 P.2d 601 (1966). A plea is not knowing, voluntary and intelligent if the defendant does not understand all of the direct consequences of his plea including the constitutional rights pleading guilty. Id.; In Re Personal Restraint Petition of Isadore, 151 Wn.2d 294, 302, 82 P.3d 390 (2004). The prosecution bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at 287. A reviewing court must indulge every reasonable presumption against waivers of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938), overruled in part on other grounds, Edwards v. Arizona, 451 U.S. 477, 101

S.Ct. 1880, 68 L.Ed.2d 378 (1981); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed 1177 (1937).

The sole purpose of a judge questioning a defendant at the time of the plea is to establish that the waiver of rights is constitutionally sufficient. In re Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966), cert.denied, 385 U.S. 905, 87 S.Ct. 215, 17 L.Ed.2d 135 (1966). In the instant case because the judge failed to do this, the plea was not valid. The Court in In re Woods v. Rhay, explained that

[t]o be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act.

In re Woods v. Rhay, 68 Wn.2d at 605. Mr. Armbruster pleaded guilty without ever being informed of the nature of his constitutional rights. Such a waiver does not meet the standard of knowing, voluntary and intelligent. *Id.*

In Ross, The Court held that the failure to advise the defendant that community placement would be imposed and the failure to explain the implications of community placement rendered the plea invalid. Ross, 129 Wn.2d at 287-88. The Court further held that the defendant must be advised of the direct consequences of his plea during the plea hearing or by clear and

convincing extrinsic evidence. Id. In Ross, the defendant was advised that the court did not have to accept the state's sentencing recommendation and he was advised of the maximum term applicable. Even though he received a standard range sentence below the maximum, he was not specifically advised of the consequences of community placement. On these grounds, the Court held that his plea was not knowing, voluntary and intelligent. and allowed Ross to withdraw his plea.. Id.

In Isadore, community placement was not indicated on the plea form and the judge did not discuss mandatory community placement during the plea colloquy. Isadore, 151 Wn.2d at 302. The Supreme Court vacated the plea and reiterated that mandatory community placement was a direct consequence of the plea that Isadore was not apprised of. The Court, citing Ross, held that Isadore's plea was not intelligent or voluntary and permitted Isadore to choose his remedy.

In Lutton v. Smith, 8 Wn. App. 822, 509 P.2d 58 (1979), defense counsel misinformed Lutton as to the likely term of incarceration. The court found the plea not voluntary and allowed Lutton to withdraw his plea. Lutton, 8 Wn. App. at 823-24. In Boykin, supra, the trial judge did not inform the defendant of the rights he would be waiving by pleading guilty. The United

States Supreme Court held that the plea must fail because it was not knowing, voluntary and intelligent. Boykin, 395 U.S. at 243. The Court in Boykin expressly indicated that knowledge of the constitutional rights waived was essential to a knowing, voluntary and intelligent plea. Boykin, 395 U.S. at 243; Accord, Woods v. Rhay, 68 Wn.2d at 606.

The instant case is as egregious as Boykin, Isadore, Ross, Lutton and Woods because like those cases, Mr. Armbruster was not informed of the direct consequences of his plea; he was not informed that by pleading guilty he would give up specific fundamental constitutional rights. Although it is not necessary for the trial judge to inform the defendant of his rights, the record must demonstrate such an advisement and the preferred method for explaining rights is to have the judge engage in a colloquy.

Though a failure on the part of the trial judge to fully determine the voluntariness of a plea does not necessarily constitute a deprivation of due process of law, such a failure readily lends itself to such a claim. *Woods v. Rhay*, 68 Wn.2d 601, 414 P.2d 601 (1966). We are satisfied from the facts in the case at bench that defendant's guilty plea was not freely, unequivocally, knowingly and intelligently entered.

Lutton, 8 Wn. App. at 824-25.

In the instant case, the defendant's plea was not knowing, voluntary and intelligent because the trial judge did not determine if Mr. Armbruster understood the nature of the constitutional rights he was waiving. The trial court asked, "Did you go over those rights with Mr. Shaw?" RP 4. Mr. Armbruster answered "yes", so it is reasonable to believe that Mr. Shaw did go over the rights in some manner with him. However, there is no indication of what "go over" meant or if Mr. Armbruster understood the review that occurred. It is possible that Mr., Shaw simply said you have some constitutional rights that you waive by pleading guilty. This would be insufficient and from the record it is impossible to ascertain if Mr. Armbruster was actually made aware of and understood his constitutional rights. As stated *supra* the record must affirmatively indicate the voluntariness of the plea. Woods v. Rhay, supra, Lutton v. Smith, supra, Boykin v. Alabama, supra.

The colloquy in the instant case failed to name or explain the constitutional rights. At best the court presumed that Mr. Armbruster understood the rights, and at worst simply did not think it necessary to make a finding that Mr. Armbruster actually understood the rights he was waiving. Mr. Armbruster answered "yes" when asked if he was aware of a generic set

of “constitutional” rights. RP 4. This is insufficient to determine a valid waiver.

The defendant is entitled to choose his remedy between specific performance and withdrawal of the plea. Isadore, 151 Wn.2d at 303. Where due process is implicated, “the terms of the plea agreement may be enforced, notwithstanding statutory language.” Isadore, 151 Wn.2d at 302-03.

It is important to note that if signing a plea agreement was conclusive evidence that a plea was voluntary, then a defendant would never be entitled to withdraw his plea. Fortunately that is not the law. Rather, the courts have recognized that although a defendant may indicate in his plea statement that the plea is being made “freely and voluntarily”, that statement is not conclusive evidence that the plea was in fact voluntary and it does not preclude a later claim of involuntariness. State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983); Barnes v. State, 523 A.2d 635, 643, (Md. App. 1987). This Court should remand for withdrawal of the plea.

D. CONCLUSION

Mr. Armbruster respectfully requests this Court find that his plea was not knowing, voluntary and intelligent and remand for withdrawal of the plea.

D/ TED this 18th day of August 2006.

Respectfully submitted,

LISE ELLNER
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Attorney for Appellant

I, Lise Ellner a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Robert Armbruster "Homeless" a true copy of the document to which this certificate is affixed, on August 18, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

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