

NO. 35131-5-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY LAMONT BRISCOE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick/Frederick W. Fleming

No. 05-1-04620-3

No. 05-1-01697-5

No. 06-1-01583-7

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant be allowed to withdraw his guilty plea when it was entered knowingly, voluntarily, and intelligently?
2. Did the judge at sentencing properly choose not to impose a DOSA when the defendant's pursuit of a DOSA was in breach of his plea agreement with the state, and the trial court gave its reasoning on the record?
3. Did Judge Fleming properly invoke the doctrine of comity when he advised defendant that his motion to withdraw his guilty plea should be made in front of the judge who accepted it? In the alternative, is there sufficient record for this court to affirm the trial court's denial of defendant's motion to withdraw his guilty plea on other grounds?

B. STATEMENT OF THE CASE.

1. Procedure

On April 11, 2005, the Pierce County Prosecutor's Office filed an information under Cause No. 05-1-01697-5, charging GREGORY LAMONT BRISCOE, hereinafter "defendant," with one count of unlawful possession of a controlled substance, and one count of first degree driving

while in suspended or revoked status. CP 87-89. The information under Cause No. 05-1-01697-5 was amended on October 25, 2005, to include three counts of bail jumping, with the other charges remaining the same. CP 102-05. On November 28, 2005, the information under Cause No. 05-1-01697-5 was amended a second time to include an additional count of bail jumping. CP 110-113.

On September 20, 2005, the Pierce County Prosecutor's Office filed additional information under Cause No. 05-1-04620-3, charging defendant with one count of domestic violence court order violation, one count of fourth degree assault, and one count of third degree theft. CP 1-3. The information under Cause No. 05-1-04620-3 was amended and filed on November 4, 2005, to include a charge of first degree burglary where the victim was present in the building or residence at the time the crime was committed, and three counts of second degree theft, with the fourth degree assault charge being dismissed, and with the other charges remaining the same. CP 5-9. The information under Cause No. 05-1-04620-3 was also amended a second time, under new Cause No. 06-1-

00905-5, to include an additional count of bail jumping with the other charges remaining the same. 10RP 3-4.<sup>1</sup>

One more count of bail jumping was added under Cause No. 06-1-01583-7 on April 11, 2006. CP 159-60.

Defendant reached a plea agreement with the prosecutor and signed a Statement of Defendant on Plea of Guilty on June 8, 2006. CP 40-44. As part of the plea agreement, the information under Cause No. 05-1-04620-3 was amended a third time to contain one count of first degree burglary where the victim was present in the building or residence at the time the crime was committed, one count of a domestic violence court order violation, and one count of second degree theft. CP 37-38. Also as part of the plea agreement, the information under Cause No. 05-1-01697-5 was amended a third time to contain one count of bail jumping and one count of unlawful possession of a controlled substance. CP 124-25. The charge of bail jumping under Cause No. 06-1-01583-7 was reduced to a class C felony. CP 162. Defendant pled guilty to the charges under Cause Nos. 05-1-04620-3, 05-1-01697-5, and 06-1-01583-7. CP

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<sup>1</sup> There are fourteen (14) volumes of verbatim report of proceedings: 1RP – 4/11/05, 2RP – 6/20/05; 3RP – 10/6/06, 10/25/05, 11/22/05, 11/28/05 (Arend); 4RP – 11/4/05; 5RP – 11/28/05 (Orlando); 6RP – 12/12/05; 7RP – 1/12/06; 8RP – 1/24/06; 9RP – 2/24/06; 10RP – 3/13/06; 11RP – 4/11/06; 12RP – 6/8/06 (bound with 1/24/06); 13RP – 7/28/06; 14RP – 7/13/06.

40-44, 127-30, 164-67. The charge under Cause No. 06-1-00905-5 was dismissed. 12RP 16.

Defendant entered a plea of guilty to the aforementioned charges before the Honorable Lisa Worswick on June 8, 2006. 12RP 13-15. On July 28, 2006, the parties appeared before the Honorable Frederick W. Fleming for sentencing. Under Cause No. 05-1-04620-3, the court sentenced defendant to concurrent sentences of 84 months in the Department of Corrections (DOC) and nine to eighteen months of community custody for first degree burglary where the victim was present in the building or residence at the time the crime was committed; 60 months in the DOC and nine to eighteen months community custody for the domestic violence court order violation; and 29 months for the second degree theft charge. CP 50-52. Under Cause No. 05-1-01697-5, the court sentenced defendant to 24 months for the unlawful possession of a controlled substance charge and 60 months for bail jumping. CP 138-52. Under Cause No. 06-1-01583-7 the court sentenced defendant to 60 months for bail jumping. CP 174-86. All sentences were to run concurrently. Defendant filed a timely notice of appeal. CP 210-13.

## 2. Facts

On April 9, 2005, two police vehicles stopped defendant after a records check on his vehicle showed his license to drive had been suspended. CP 87-89. The officers searched the car and defendant, finding two baggies of crack cocaine in the defendant's mouth. Id. On August 1, 2006, Judge Bathum issued a domestic violence no contact order prohibiting defendant from contacting his girlfriend, Jessica Kleiner. CP 1-3. Two days later, defendant entered Kleiner's residence, located at 11320 8<sup>th</sup> Ave Ct. E, #F3, Tacoma, WA. CP 1-3. Defendant forced his way into Kleiner's residence by shoving her aside after she opened the door, and then stole her Macy's, Capital One Visa, and Boeing Credit Union Debit cards. Id. When defendant contacted Kleiner, he violated the valid domestic violence no contact order that Judge Bathum issued two days before.

Defendant failed to appear several times for various court dates, and the state charged him with four counts of bail jumping. CP 21-24, 102-05, 110-13, 159-60. Defendant was facing a significant amount of jail time if convicted of the numerous charges filed against him. Under these circumstances defendant accepted a plea agreement with the prosecution, which would dismiss or amend multiple charges and have the sentences run concurrently in exchange for defendant's guilty plea. According to

defendant, the bail jumping charges were a significant factor in his later decision to plead guilty to the amended charges of residential burglary, domestic violence court order violation, second degree theft, unlawful possession of a controlled substance, and two counts of bail jumping. 12RP 9.

Prior to the plea hearing before Judge Worswick, defendant signed multiple statements of defendant on plea of guilty on three cause numbers, including the one containing the domestic violence court order violation. CP 40-44, 127-30, 164-67. Under “COMMUNITY CUSTODY RANGE” is written “9 to 18,” signifying the number of months of community custody defendant may serve. CP 40-44. Section 5(f) of the statement of defendant on plea of guilty states that if the “Offense Type” is one of the “Crimes Against Persons as defined by RCW 9.94A.411 (formerly .440(2)),” then “the court will sentence me to community custody for the community custody range established for that offense type unless type unless the judge finds substantial and compelling reasons not to do so.” Id. In this case, that standard community custody range, according to the Statement of Defendant on Plea of Guilty, was “9 to 18 months or up to the period of earned early release, whichever is longer.” Id. This document, signed by defendant, was passed to Judge Worswick at the commencement of the plea hearing. 12RP 3.

At the plea hearing, Judge Worswick asked defendant a series of questions designed to elicit whether he knew the consequences of his plea, and he answered affirmatively. 12RP 5-7. She also found his guilty pleas to be knowing, intelligent, and voluntary. 12RP 13-15. Judge Worswick then inquired as to the nature of the sentence for the domestic violence court order violation:

COURT: There's a community custody range here listed for the domestic violation. My understanding is I can't impose that if 60 months are being imposed because the maximum is 5 years. I don't think the community custody plus the DOC time can be more than 5 years.

PROSECUTOR: That is right, Your Honor.

12RP 7-8.

At sentencing, before Judge Fleming, the court followed the joint recommendation and sentenced defendant to a community custody range of nine to eighteen months. 13RP 20-21. Defense counsel advised the court that defendant wished to pursue a Drug Offender Sentencing Alternative (DOSA), although she noted that "I can't ask for DOSA on his behalf," and that "there was an agreed recommendation." 13RP 5. Defendant later asked the court for a DOSA, and the court denied his motion, instead opting to recommend drug treatment within the DOC.

13RP 14-15, 16. The court advised defendant that he took defendant's criminal history into consideration when denying a DOSA. 13RP 36-37.

During the hearing, defendant also attempted to make a motion to withdraw his plea, which Judge Fleming denied:

DEFENDANT: Your Honor, I want to withdraw my plea. I never got a chance to get to court to address this situation here because, for one, you know, I want to withdraw my plea –

COURT: Let me tell you something, Mr. Briscoe, this plea was entered before Judge Worswick, and if you're going to make a motion to withdraw your plea, it's my judgment that you do that before Judge Worswick. But it's not probably okay with you, and, therefore, in my judgment, you're not timely in moving to withdraw your plea, so I'm going to deny that motion, and I'm going to go ahead with sentencing in this cause number.

And I want you to tell me what you want to tell me, at this time, which is your sentencing date in this cause number.

DEFENDANT: Your honor, first of all, I was basically forced to plead guilty to a burglary which was my own residence. I had missed court for one day. I was in Auburn. I went to – I missed court, and went to Auburn jail the next day. As the email from the prosecutor, sent to my attorney here, saying that, basically, if I didn't take the deal that I would spend the rest of my life in prison, or

either I take the full-deal meal and spend the rest of my life in prison. Basically, they threatened me into taking the deal for the burglary. So he was saying he was going to give me 13 years for missing court.

13RP 11-12.

C. ARGUMENT.

1. DEFENDANT SHOULD NOT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA, SINCE IT WAS ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY, AND THE PORTION OF HIS SENTENCE AT ISSUE WAS NOT A DIRECT CONSEQUENCE OF HIS PLEA.

Due process requires that when a criminal defendant pleads guilty, his plea be knowing, voluntary, and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). “When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness.” State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982) (citing In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); In re Teems, 28 Wn. App. 631,

633, 626 P.2d 13 (1981); State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981)).

A defendant must be informed of all direct consequences of his plea. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). “A ‘direct’ consequence is one that ‘represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” State v. Matthews, 128 Wn. App. 267, 271-72, 115 P.3d 1043 (2005) (quoting State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). The burden is on the State to show that the defendant knew of all direct consequences of his plea. Ross 129 Wn.2d at 287 (citing Wood v. Morris, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976)). The State may meet this burden through the record of the plea hearing or other “clear and convincing extrinsic evidence.” Ross 129 Wn.2d at 287 (citing Morris 87 Wn.2d at 511). In regards to unexpected sentence provisions, a defendant must establish that the provision was a direct consequence of his plea. State v. Smith, 137 Wn. App. 431, 437, 153 P.3d 898 (2007).

In the present case, defendant was advised of all direct consequences of his plea. Defendant received the sentence he negotiated with the prosecutor and that was in the written plea agreement he signed prior to the hearing before Judge Worswick. CP 40-44, 127-30, 164-67. At the beginning of the plea hearing, the prosecutor handed Judge

Worswick several documents. 12RP 3. Included in these documents was a Statement of Defendant on Plea of Guilty for Cause No. 05-1-04620-3, signed by defendant. Id. Section 5(a) of the Statement indicated the “Total Actual Confinement” defendant would serve upon his plea of guilty. CP 40-44. According to the Statement, the sentence defendant would serve for Count 2 was sixty (60) months and a community custody range of 9 to 18 months. Id.

At the plea hearing, Judge Worswick asked defendant a series of questions to determine whether he understood the plea agreement:

COURT: Were you able to read over all three of these statements of defendant on plea of guilty and understand all of them before you signed them?

DEFENDANT: Yes, Your Honor.

COURT: Did Ms. Melby go over these two documents with you line by line and explain them to you?

DEFENDANT: Yes, Your Honor.

COURT: Did she answer all of your questions to your satisfaction?

DEFENDANT: Yes.

COURT: Did Mr. Ryan go over the last statement of defendant on plea of guilty with you line by line?

DEFENDANT: Yes, Your Honor.

COURT: Did he answer your questions to your satisfaction?

DEFENDANT: Yes, Your Honor.

COURT: Your pleading guilty to a number of charges here, residential burglary, domestic violence court order violation, theft in the second degree, Unlawful Possession of a Controlled Substance cocaine, and two counts of Bail Jumping. Do you understand all that?

DEFENDANT: Yes, Your Honor.

COURT: There are standard ranges for each of these crimes. They're listed here on the front page of each of your statements of defendant on plea of guilty. Did you go over all of those with your attorneys?

DEFENDANT: Yes, Your Honor.

12RP 5-7.

Defendant's answers confirmed that he understood the charges to which he was pleading guilty and the consequences of his guilty plea. Id. Defendant answered with the understanding that part of his sentence was a discretionary nine (9) to eighteen (18) months of community custody for Count 2, the domestic violence charge. This is clear from the Statement of Defendant on Plea of Guilty defendant signed prior to the hearing. CP 40-44. "When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the various criteria of voluntariness, the

presumption of voluntariness is well nigh irrefutable.” State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (quoting Perez, 33 Wn. App. at 26-162). After taking defendant’s plea, Judge Worswick then went on to correctly note that she could not impose a sentence in excess of the statutory maximum, not, as defendant asserts, that she could not impose community custody. 12RP 7-8.

Defendant is correct in his alternative argument that his sentence should be remanded to comply with State v. Sloan, which held, “When a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.” State v. Sloan, 121 Wn. App. 220, 223-24, 87 P3d. 1214 (2004). In this situation, remand is appropriate to the trial court for clarification of the sentence.

2. THE COURT'S DECISION NOT TO APPLY A DOSA SHOULD BE AFFIRMED BECAUSE THE DECISION IS DISCRETIONARY AND NOT REVIEWABLE. IN THE ALTERNATIVE, THE COURT AT SENTENCING PROPERLY CHOSE NOT TO IMPOSE A DOSA, AS THE DEFENDANT'S PURSUIT OF A DOSA WAS IN BREACH OF HIS PLEA AGREEMENT WITH THE STATE, AND THE TRIAL COURT GAVE VOICE TO ITS REASONING ON THE RECORD.

The decision whether or not to implement a Drug Offender Sentence Alternative (DOSA) is discretionary to the trial court. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519 (1998), review denied, 136 Wn.2d 1004, 966 P.2d 901 (1998). If a court imposes a standard sentence that does not apply a DOSA, the decision to not apply a DOSA is not reviewable. Id. The exception is when a defendant challenges the trial court's ruling on constitutional grounds. State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003) (citing Conners, 90 Wn. App. at 52). A complete failure to actually consider the motion for a DOSA constitutes a violation of due process. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

Courts apply contract principles in construing plea agreements. State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997); State v. Wheeler, 95 Wn.2d 799, 803, 631 P.2d 376 (1981). A prime object of

contract interpretation is to ascertain and give effect to the parties' intent. In re Marriage of Litowitz, 146 Wn.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002), cert. denied, 537 U.S. 1191 (2003). Courts review "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." Id. (Quoting Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)). Ambiguities in contracts are resolved against the drafter. State v. Skiggn, 58 Wn. App. 831, 838, 795 P.2d 169 (1990).

Defendant argues: 1) that the trial court's categorical refusal to consider a DOSA constitutes reversal and remand, and 2) that the trial court's failure to articulate its reasoning prior to deciding to refuse DOSA constitutes reversal and remand. Br. of Appellant at 18, 19. Defendant's first argument fails, because he is advancing a constitutional argument similar to State v. Grayson, that the trial court violated his due process rights by not considering a statutorily authorized motion (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993): "While trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law." However, defendant never claims that the trial court failed to articulate his reasons to

show consideration, only that he should have done so prior to refusing to grant a DOSA; this is not a constitutional argument.

The trial court did in fact articulate several reasons for denying defendant a DOSA. At sentencing, defendant specifically requested the reasoning behind the court's ruling. During an exchange with defendant, the court provided detailed reasoning for the record:

DEFENDANT: I want to ask you on record, Your Honor, just for my knowledge. Why wouldn't you recommend me to get treatment?

COURT: I am.

DEFENDANT: Put me on DOSA.

COURT: Let me tell you why, very simply, I looked at your criminal history, and you know, in one place there was 98 entries, and I just think with that criminal history, simply, that the best, fair, and just thing to do for the treatment that I'm convinced you need is to get it while you're within the Department of Corrections.

DEFENDANT: But, I mean, if these situations is occurring behind me doing drugs, it seems like you would put me in treatment. You know, it's not like my criminal history – there is no violence. It's not like I'm out there robbing people and hurting people out there in society.

COURT: I understand that.

DEFENDANT: The only person I've been hurting is myself, and at the same time –

COURT: But you'll still be young by the time you get this taken care of and pay the penalty. And while you're there you can accomplish something by getting yourself straightened out as far as treatment is concerned.

DEFENDANT: I mean, you telling me to go do almost five years. I've got kids, and you telling me to go do five years, and –

COURT: I didn't make all these choices that you made to get yourself into these five years, but I have responsibilities to this community. And I'm going to put on there that you get treatment within the Department, and whatever good that's going to do, I'll sign that, and I have.

13RP 36-37.

Defendant argues that the court must give its reasons prior to the ruling in order for the ruling to be valid. Br. of Appellant at 19. The court in Grayson, the decision cited principally by defendant, noted that the trial court in that case “did not articulate any other reasons for denying the DOSA, and he specifically rejected the prosecution’s suggestion that more reasons be placed on the record.” Grayson, 154 Wn.2d at 342. The opposite occurred here, as Judge Fleming entertained defendant’s request for more reasons to be placed on the record, and those reasons were grounded in the criminal record of defendant. 13RP 36-37. Whereas the

trial court's refusal to articulate any of its reasoning for denying the defendant a DOSA in Grayson constituted reversible error on "procedural grounds," Judge Fleming did expound on the record, thus satisfying his duties under Grayson. Grayson, 154 Wn.2d at 343.

In the alternative, defendant's pursuit of a Drug Offender Sentencing Alternative (DOSA) was not consistent with his plea agreement. The prosecutor's statement regarding amended information, handed to Judge Worswick at the beginning of the plea hearing, included the terms of the plea agreement between the prosecutor and defendant. CP 39. Included in the agreement was the term that "the State has agreed to amend the information in exchange for the defendant's plea and agreed recommendation to the *high-end of sentencing range* (emphasis added)." Id. Defense counsel confirmed at sentencing that a DOSA was "not part of the deal." 13RP 7. In fact, defense counsel agreed at sentencing that, if defendant pursued DOSA, it would be considered a breach of the agreement:

MR. LEECH:           The issue here is if Mr.  
(Prosecutor)       Briscoe pursues the DOSA, he's  
breaching the plea agreement.

MS. WHITENER: Exactly.  
(Defense Counsel)

13RP 8.

A DOSA reduces a defendant's sentence by half; Judge Fleming's decision not to impose a DOSA was proper because it was inconsistent with the terms of the plea agreement signed by defendant. Plea agreements are regarded and interpreted as contracts. State v. Oliva, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003), review denied, 151 Wn.2d 1007; 87 P.3d 1185 (2004). Defendant attempts to minimize the contract nature of the plea agreement, arguing, "*The agreed recommendation notwithstanding*, the plea of guilty statements expressly provide that, '[t]he judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94.660.'" (emphasis added) Br. of Appellant at 19. The issue is not what the judge was able to do, but what defendant was allowed to do pursuant to the agreement he signed and submitted to Judge Worswick. That overall agreement included a joint recommendation that defendant receive the high-end standard range sentence. CP 39. Because a DOSA would not have been consistent with the sentence agreed to by both parties, Judge Fleming was well within his discretion to not impose a DOSA.

3. JUDGE FLEMING PROPERLY INVOKED THE DOCTRINE OF COMITY WHEN HE ADVISED DEFENDANT THAT HIS MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD BE MADE IN FRONT OF THE JUDGE WHO ACCEPTED IT. IN THE ALTERNATIVE, THERE IS SUFFICIENT RECORD FOR THIS COURT TO AFFIRM THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA ON OTHER GROUNDS.

Comity allows courts of one jurisdiction to defer to the laws and judicial decisions of another jurisdiction. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 160-61, 744 P.2d 1032 (1987). “The doctrine of comity is not a rule of law, but one of practice, convenience and expediency.” Haberman, 109 Wn.2d at 160. The decision whether or not to invoke comity is at the discretion of the court. State v. Medlock, 86 Wn. App. 89, 96, 935 P.2d 693 (1997). In general, this principle has been applied to inter-jurisdictional issues, both interstate and international, but comity has also been applied within the same jurisdiction in Washington state. See, Am. Star Ins. Co. v. Grice, 123 Wn.2d 131, 134, 865 P.2d 507 (1994) (“Because both Washington and Wisconsin have adopted the Uniform Insurers Liquidation Act, the courts of Washington should recognize the right of the Wisconsin liquidator to seek a stay of all proceedings against the defunct insurer.”); Medlock, 86 Wn. App. at 96 (affirmed trial court’s deferral to Canadian court’s decision that arrest was

lawful); In re Freitas, 53 Wn.2d 722, 728-29, 336 P.2d 865 (1959) (ordering trial court to sustain a relator's demurrer where proceedings of a juvenile court interfered with proceedings of a probate court in a concurrent jurisdiction).

When Judge Worswick accepted defendant's pleas, she found that defendant's guilty pleas were "knowing, voluntary, and intelligent," and that there was "a factual basis to support the pleas." 12RP 14-15. When defendant made an oral motion to withdraw his guilty plea at sentencing, Judge Fleming, applying the rule of comity, notified defendant that the his motion should be made in front of Judge Worswick, because Judge Worswick had already ruled that his plea was knowing, voluntary, and intelligent, and has accepted his plea. Id. Defendant did not make a motion to continue sentencing so he could make his motion to withdraw his guilty plea before Judge Worswick, thus allowing proceedings to continue. The court then properly denied defendant's motion to withdraw his guilty plea.

In the alternative, if this court determines Judge Fleming erred in denying defendant's motion, the record is sufficient for this court to affirm the ruling on other grounds. Division One held in State v. Davis that the trial court should have held a hearing on Davis's oral motion to withdraw his guilty plea as it was prior to entry of judgment and sentence. State v.

Davis, 125 Wn. App 59, 104 P.3d 11 (2004). Firstly, the court implies in its opinion that the same judge presided throughout by not indicating that any hearings were before a different judge. Secondly, the court stated, “We may affirm the trial court’s denial of defendant’s motion to withdraw his guilty plea on other grounds, if they are supported by the record.”

Davis, 125 Wn. App at 68, n. 30.

The record is sufficient to allow this court to determine defendant’s motion to withdraw his guilty plea should be denied. As stated before, “When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” Branch, 129 Wn.2d at 642. Defendant advised Judge Fleming that his plea was involuntarily given because he “was basically forced to plead guilty to a burglary which was my own residence.” 13RP 12. This statement directly contradicts defendant’s statement during his plea hearing when he assured Judge Worswick that no one made any threats or promises in order to induce defendant to plead guilty. 12RP 12.

This final point also reinforces Judge Fleming’s decision to invoke comity when he held that defendant should have moved to withdraw his guilty plea before Judge Worswick. Judge Worswick, having heard defendant’s reasons for agreeing to plea guilty to the charges, would have

been in a far superior position to rule on defendant's motion than Judge Fleming. Judge Fleming never witnessed the defendant say that he was never threatened, nor that his main reason for pleading guilty was because of his concerns over the seriousness of the bail jumping charges. 12RP 9, 12. Understanding that his familiarity with the proceedings could not match Judge Worswick's, he therefore recognized that Judge Worswick was in a much better position to hear such a motion, and ruled accordingly.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

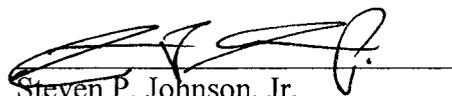
DATED: OCTOBER 16, 2007

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Pierce County  
Prosecuting Attorney



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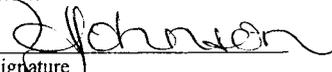
KAREN WATSON  
Deputy Prosecuting Attorney  
WSB # 24259



Steven P. Johnson, Jr.  
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/14/07   
Date Signature