

FILED
COURT OF APPEALS
DIVISION II

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NO. 37699-7-II

STATE OF WASHINGTON
BY _____

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN LYNN VASSEL,

Appellant.

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

The Honorable Thomas Larkin, Judge

BRIEF OF APPELLANT

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P.M. 10-1-2008

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to advise Mr. Vassel of the direct consequences of his plea, rendered his plea involuntary.

2. The trial court's failure to advise Mr. Vassel of the rights waived by pleading guilty, rendered his plea involuntary.

Issues Presented on Appeal

1. Did the trial court's failure to advise Mr. Vassel of the direct consequences of his plea, render his plea involuntary?

2. Did the trial court's failure to advise Mr. Vassel of the rights waived by pleading guilty, render his plea involuntary?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 14, 2008, Adrian Lynn Vassel was charged by amended information with assault in the second degree in violation of RCW 9A.36.021(1)(c) and reckless burning in the first degree in violation of RCW 9A.48.040(1). CP 3-4. Without a colloquy, Mr. Vassel waived his right to a jury trial and pleaded guilty to the amended charges. CP 6-14. This timely appeal follows. CP 32-35.

2. SUBSTANTIVE FACTS

The plea colloquy in its entirety is as follows:

THE COURT ...Mr. Vassel, I also have a Statement of Defendant on Plea of Guilty which has your signature on it; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You had a chance to go over this with Mr. Quigley and he explained it to you; is that right?

THE DEFENDANT: Yes.

THE COURT: Do you understand the charges in Count 3 to be one count of Assault in the Second Degree in Count 4, one count of Reckless Burning in the First Degree; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you're aware that by pleading guilty you waive certain rights that you have, such as, your right to trial, right to confront witnesses, and other rights; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you know the State is going to make a sentencing recommendation to me, but I'm not bound by their recommendation?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that is one of the reasons why you intend to plead guilty, is to take advantage of their recommendation; isn't that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And also because you believe there would be a substantial likelihood that you could be convicted if this went to trial; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you're also aware that if I were to accept your plea, even though you haven't admitted that you're guilty, it has the same affect as if you did admit guilt as far as the punishment is concerned? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The law does not distinguish between the two. You're aware of that? All of this has been explained to you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You're prepared to enter a plea at this time?

THE DEFENDANT: Yes.

THE COURT: This plea is given freely and voluntarily, with the advice of Mr. Quigley?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Nobody forced you or pressured you to enter this plea; is that correct?

THE DEFENDANT: Yes.

THE COURT: Are you ready to enter that plea?

THE DEFENDANT: Yes.

THE COURT: That plea is?

THE DEFENDANT: Guilty.

THE COURT: Mr. Quigley, any reason why I shouldn't accept his plea?

MR. QUIGLEY: No, Your Honor.

THE COURT: Before I do, though, I am going to take a look at the Declaration attached to the Original Information and make an independent finding whether there are facts that support this plea. (Pause in Proceedings.) I have had a chance to review the Declaration. I will find there are facts to support the plea, and I'm going to accept his plea of guilty.

RP 5-7.

The judge did not explain the elements of the crimes charged, the maximum or mandatory minimum sentencing for each crime or the important constitutional rights waived; such as the right to cross examine witnesses, the right against self-incrimination, the right to a speedy trial, the right to remain silent, or the right to testify at trial.

C. ARGUMENT

APPELLANT'S PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT WHERE THE TRIAL COURT FAILED TO EXPLAIN THE NATURE OF CRIME, THE MAXIMUM SENTENCE OR THE CONSTITUTIONAL RIGHTS BEING WAIVED

- a. The Trial Court Failed to Assure That Appellant Understood The Nature of The Constitutional Rights He Waived By Pleading Guilty.

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 and of the sentencing consequences. 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; Id.; In Re Personal Restraint Petition of Isadore, 151 Wn.2d 294, 302, 82 P.3d 390 (2004); In re Woods v. Rhay, 68 Wn.2d 601, 606, 414 P.2d 601 (1966),), cert.denied, 385 U.S. 905, 87 S.Ct. 215, 17 L.Ed.2d 135 (1966).

“A plea of guilty constitutes a waiver of significant rights by the defendant, among which are the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.”State v. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977), citing, Santobello v. New York, 404 U.S. 257, 260, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). 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).

Our State Supreme Court has long held that the judge is solely responsible for determining on the record that the defendant understands the

“nature of the charge against him and that the plea is voluntary.” Tourtellotte,

88 Wn.2d at 583. The trial court must also,

inform the defendant of the rights being waived by entering the guilty plea, the maximum sentence on the charge, the mandatory minimum sentence and any different or additional punishment the defendant may be subject to as a result of previous convictions. . . . The judge must insure the propriety of the final disposition of the case.

Tourtellotte, 88 Wn.2d at 583 (internal citations omitted). 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.

In sum, 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 at 605. In Vassel’s case, the judge’s limited colloquy merely elicited that Mr. Vassel: (1) was charged with assault in the second degree and reckless burning in the first degree; (2) that he signed the plea form; (3) that the attorney went over the form with Mr. Vassel; (4) that Mr. Vassel was informed that he was waiving the right to

trial and to confront witnesses and “other rights. RP 5-7. Based on this limited inquiry it is not possible to determine that Mr. Vassel knew and understood (1) the elements of the charges (i.e. the nature of the charges); (2) the maximum sentence; (3) the mandatory minimums; and (4) the constitutional rights waived.

The trial court failed to comply with the Supreme Court’s mandate in Tourtellotte, supra which required the trial judge to insure that Mr. Vassel: (1) understood the nature of the charges; (2) the terms of the plea which were binding on the court and the terms that were not binding; (3) which rights Mr. Vassel was waiving; (4) the maximum terms for each crime; and (5) the mandatory minimums for each crime. Tourtellotte, 88 Wn.2d at 583.

The Court in Tourtellotte, specifically required the trial judge to insure that the defendant understands that by pleading guilty he waives his right “to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.” Tourtellotte, 88 Wn.2d at 583. The trial judge in Mr. Vassel’s case did not make this inquiry.

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.

A defendant who pleads guilty waives his constitutional rights to a jury trial, to confront his accusers, and to assert his privilege against self-incrimination.

Boykin v. Alabama, 395 U.S. at 243.

The instant case, as in Boykin, the court did not inquire as to whether Mr. Vassel understood that by pleading guilty he would waive his right to: present witnesses in his defense; to remain silent; and to be convicted by proof beyond all reasonable doubt . RP 14. Advisement of these rights must appear on the record. 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. Lutton v. Smith, 8 Wn. App. 822, 824-25, 509 P.2d 58 (1973).

In the instant case, the trial judge asked very few questions which merely elicited that the trial attorney went over the plea form and Mr. Vassel understood the name of the charges against him. There was no inquiry into

Mr. Vassel's understanding of any specific rights, sentencing consequences or the actual nature of the charges or the state's burden of proof. As in Boykin, *supra*, this "colloquy" was insufficient to find Mr. Vassel's plea knowing, voluntary and intelligent.

Whatever the exact nature of the colloquy it is essential that it be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind as required by Rule 11. *McCarthy* at 467; *Frye* at 201. For this reason the trial court should question the defendant in a manner that requires the accused to provide narrative responses.

United States v. Fountain, 777 F.2d 351, 355 (1985).

The trial judge never asked Mr. Vassel any questions to elucidate Mr. Vassel's state of mind. Each of the few questions merely called for a yes or no response. Under Fountain, *supra* and Boykin, *supra*, this was error. Furthermore, the record does not provide any extrinsic evidence to support a finding that Mr. Vassel had any idea of the maximum sentence range, the elements of the crimes (the nature of the crimes) or the nature of his constitutional rights; such as, the right to remain silent, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the right to present a defense.

Mr. Vassel indicated “yes” when asked whether his attorney went over the plea form, so it is reasonable to believe that defense counsel did go over the plea form in some manner with him. RP 5-7. However, there is no indication of that Mr. Vassel understood the review that occurred. From the record it is impossible to ascertain if Mr. Vassel was actually made aware of and understood the majority of his constitutional rights, the nature of the crimes and the sentencing consequences. 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, Fountain, supra.

The colloquy in the instant case failed to name or explain the constitutional rights being waived and there was never any mention of the sentencing terms at stake. At best the court presumed that Mr. Vassel understood the plea and the waivers involved, and at worst simply did not think it necessary to make a finding that Mr. Vassel actually understood the rights he was waiving or the direct consequences of his plea. Mr. Vassel answered “yes” when asked if he was aware of a partial his “other rights”. RP 5-7. This is insufficient to determine a valid waiver.

- b. The trial Court Failed to Advise Mr. Vassel of the Nature of the Offenses and of the Maximum Sentences.

A plea is involuntary if the plea is entered without knowledge of the

direct sentencing consequences. This is a manifest injustice. CrR 4.2(f); 151 Wn.2d 294, 298 88 P.3d 390 (2004), citing, State v. Ross, 129 Wn2d 779, 284, 916 P.2d 405 (1996); State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (mutual mistake regarding sentencing renders plea invalid). “The sentence the court will impose is, of course, a direct consequence of the plea.” Isadore, 152 Wn.2d at 98, citing, State v. Miller, 110 Wn.2d 528, 531, 736 P.2d 122 (1988).

The court did not inform Mr. Vassel of the maximum sentence or of any mandatory minimums. This rendered Mr. Vassel’s plea involuntary because he entered his plea without an understanding of the direct consequences of his plea. To remedy the court’s failure to inform Mr. Vassel of the sentence range, Mr. Vassel must be permitted to withdraw his guilty plea to correct the manifest injustice. Isadore, 151 Wn.2d at 303

c. The Defendant Is Entitled To Choose His Remedy When a Plea is Unconstitutional.

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.

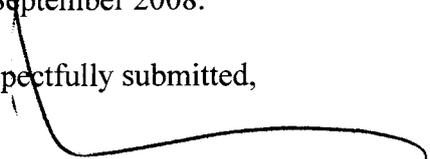
It is important to note that if signing a plea agreement was conclusive evidence that a plea was voluntary, then a defendant would never be entitled to withdraw his plea. Fortunately that is not the law. Rather, the courts have recognized that although a defendant may indicate in his plea statement that 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. Vassel respectfully requests this Court find that his plea was not knowing, voluntary and intelligent and remand for withdrawal of the plea.

DATED this 30th day of September 2008.

Respectfully submitted,

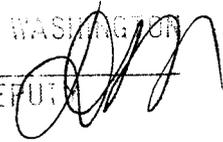


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STATE OF WASHINGTON
BY _____
DEPUTY _____



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 Adrian Vassel DOC# 991773 Washington Corrections Center P. O. Box 900 Shelton, WA 98584 true copy of the document to which this certificate is affixed, on October 1, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature