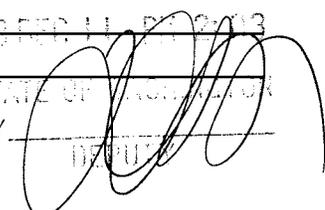


NO. 37699-7

SUPERIOR COURT
COUNTY OF PIERCE
CO. FILED 11/22/09
STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN LYNN VASSEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin, Judge

No. 07-1-03209-8

BRIEF OF RESPONDENT

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

1. Whether defendant should be allowed to withdraw his plea, which he entered knowingly, voluntarily and intelligently (Defendant's Assignments of Error 1 and 2).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant by an amended information with assault in the second degree, contrary to RCW 9A.36.021(1)(c), and reckless burning in the first degree, contrary to RCW 9A.48.040(1). CP 3-4. Defendant chose to plead guilty to both counts. RP (Plea) 4; CP 6-14.

During the plea hearing, the court questioned defendant about his decision to plead guilty. RP (Plea) 5-7. Defendant also submitted Statement of Defendant on Plea of Guilty. CP 6-14¹. Upon independently finding that there were facts to support the plea, the court accepted defendant's plea of guilty. RP (Plea) 8. Defendant had an offender score of eight. RP (Sentencing) 5; CP 20-31. The court sentenced defendant to 60 months in jail. RP (Sentencing) 12; CP 20-31.

¹ While on page 8 of the Statement, defendant states that he pleads guilty to counts I and II in the Amended Information, it is clear from the content of the Statement that it was scrivener's error, and that defendant pleaded to counts III and IV of the Amended Information.

Defendant filed a timely notice of appeal. CP 32-35.

C. ARGUMENT.

1. DEFENDANT SHOULD NOT BE ALLOWED
TO WITHDRAW HIS PLEA BECAUSE NO
MANIFEST INJUSTICE HAS OCCURRED.

When a defendant pleads guilty, he or she waives the right to appeal the determination of guilt. CrR 4.2(g)(5)(f). Defendant, however, may challenge that plea by attacking the circumstances surrounding the taking of the plea. *State v. Saylor*, 70 Wn.2d 7, 9, 422 P.2d 477 (1966).

Defendant can withdraw his guilty plea only when “it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). “This rule imposes a demanding standard on the defendant to demonstrate a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure.” *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996) (internal citations and quotation marks omitted). Defendant can prove manifest injustice by showing that the plea was not voluntary. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). In order to establish an involuntary plea, the defendant must show that he did not know a direct consequence of his plea. *Taylor*, 83 Wn.2d 594, 597.

A guilty plea is constitutionally valid when it is made knowingly, voluntarily and intelligently. *Branch*, 129 Wn.2d 635, 642. In addition,

Washington has a statutory procedural requirement that “[t]he court shall not accept a plea of guilty without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d).

In this case, defendant pleaded guilty knowingly, voluntarily and intelligently, and the court properly determined that defendant understood the nature of the charges and the consequences of the plea.

- a. Under the totality of the circumstances, defendant’s plea was substantively knowing, voluntary, intelligent and procedurally proper because the court determined that defendant understood the nature of the charges and the consequences of his plea

To determine whether the plea was knowing, voluntary and intelligent, the court must look at the totality of the circumstances.

Branch, 129 Wn.2d at 642; **Wood v. Morris**, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976). In determining the nature of the plea, courts look closely at the record of the plea hearing and give substantial weight to defendant’s plea statement. *See, e.g., Branch*, 129 Wn.2d at 642; **State v. Perez**, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982). For example, the **Perez** court held that:

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. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria

of voluntariness, the presumption of voluntariness is well nigh irrefutable.

33 Wn. App. 258, 261-262 (internal citations omitted).

Generally, when a defendant has received the information and pleads guilty pursuant to a plea agreement, there is a presumption that the plea is made knowingly, intelligently, and voluntarily. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993) (internal citation omitted). When a defendant signs a written plea form that includes a statement of guilt and acknowledges that he has read and understands the agreement, "the written statement provides prima facie verification of the plea's voluntariness." *State v. Stephan*, 35 Wn. App. 889, 893, 671 P.2d 780 (1983).

Specifically, a court may rely on the defendant's plea statement to ascertain defendant's understanding of the charges. *In re Keene*, 95 Wn.2d 203, 206, 622 P.2d 360 (1980). It is not necessary that defendant admit on the record to every element of the charged crime. *In re Hews*, 108 Wn.2d 579, 596, 741 P.2d 983 (1987). Further, "defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime." *In re Montoya*, 109 Wn.2d 270, 278, 744 P.2d 340 (1987); *In re Hews*, 108 Wn.2d 579, 595.

For example, in *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981), defendant argued that his plea was not voluntary because the trial judge did not question him on the record regarding the nature of the

charges. *Id.* at 354. The court disagreed with defendant and found that Ridgley voluntarily pleaded to two counts of second degree robbery. **Ridgley**, 28 Wn. App. 351, 359. The Court of Appeals found the following procedural facts persuasive:

Ridgley was then carefully questioned by the judge regarding his plea and the consequences thereof. He indicated that he had read his statement on plea of guilty provided pursuant to *CrR 4.2(g)*. He said he understood the statement and had discussed the matter with his attorney and was satisfied his attorney had represented his best interests. He indicated that he understood that he was giving up his right to a trial as well as his right to appeal the sentence, that the court was not required to follow the State's recommendation, and that the length of his prison term would be determined by the parole board.

His statement on plea of guilty indicated that he was not guilty but that after reviewing the evidence he believed a jury would find him guilty. He acknowledged to the judge that the statement was true. He said he had no questions and understood the proceeding.

Ridgley, 28 Wn. App. 351, 353.

The trial judge did not specifically enumerate the elements of second degree robbery to Ridgley. **Ridgley**, 28 Wn. App. at 354. On appeal, the court did not find it problematic because an intelligent and knowing standard “does not mandate oral inquiry by the judge of the defendant.” *Id.* at 355 (internal citation omitted). The court found it significant that defendant had signed a written statement in the form provided by *CrR 4.2(g)*. *Id.* See also *In re Keene*, 95 Wn.2d 203, 206-207, 622 P.2d 360 (1980) (“the judge was justified in relying upon the

plea statement”); *In re Ness*, 70 Wn. App. 817, 821 (“Ness’ statement on plea of guilty adequately informed him of the nature of the charges”).

In this case, like in *Ridgley*, the facts that defendant signed the Statement of Defendant on Plea of Guilty, received a copy of the Information, and answered the court’s inquiry during the plea hearing demonstrate both that the court properly accepted the plea and that defendant entered a knowing, voluntary and intelligent plea.

First, like the *Ridgley* court, the court below could rely on defendant’s plea statement because it adequately informed defendant of the nature of the charges and of the rights he was giving up by pleading his case. In relevant part, his statement said:

I am charged with the crime(s) of: Count III Assault Second Degree. The elements are: In Pierce County, in circumstances that did not amount to Assault First Degree, intentionally assault another person with a deadly weapon. Count IV: Reckless Burning – First Degree. The elements are: In Pierce County, recklessly damage a building or any hay, grain, crop or timber by knowingly causing a fire or explosion.

CP 6-14 (Statement of Defendant on Plea of Guilty, p. 1) (handwritten portions of the statement are italicized). Further, the standard range table was filled out by hand and contains standard range and community custody range for both counts. *Id.* at 2. The same page contains handwritten initials ALV next to the section entitled, “I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading

Guilty,” which contains five rights and the presumption of innocence. *Id.* at 2. The prosecuting attorney’s expected sentence recommendation to the judge is also handwritten in the statement. *Id.* at 4.

One of the sections states that defendant received a copy of the Information. *Id.* at 8. The following handwritten language appears in the plea form on the same page: “*I have reviewed the evidence and believe I would be convicted at trial in all likelihood. I therefore plead guilty to take advantage of the State’s offer to reduce the charges. ALV.*” *Id.*

Finally, defendant’s signature is immediately below the following typewritten section:

My lawyer had explained to me, and we have fully discussed, all of the above paragraphs and the “Offender Registration” Attachment, if applicable. I understand them 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.

Id. at 9.

In his statement, defendant indicated that he had received a copy of the amended information. *Id.* at 8. The information notified defendant of the nature of the crimes to which he pleaded guilty and created a presumption that the plea was knowing, voluntary and intelligent. *See, e.g., In re Ness*, 70 Wn. App. at 821

The judge went further than a mere reliance on the defendant’s statement and carefully questioned defendant regarding his plea and some

of its consequences. The judge asked defendant if it was his signature on the plea statement, if defendant went over the statement with his attorney, and if his attorney explained the statement to him. RP (Plea) 5. The judge asked whether defendant understood the charges, that the court was not bound by the State's sentencing recommendation, and that he was waiving certain important rights. RP (Plea) 6. The judge confirmed that defendant pleaded because he believed that there was a substantial likelihood he could be convicted if tried; that defendant understood the affect of the guilty plea; and that he was pleading freely and voluntarily, without pressure or force. RP (Plea) 6, 7. Defendant responded affirmatively to all the questions. RP (Plea) 5-7.

Finally, contrary to defendant's argument, the law does not require that all the rights defendant is waiving be verbally enumerated by the judge and verbally waived by defendant. See *Boykin v. Alabama*, 395 U.S. 238, 243, 244, 89 S. Ct. 1709, 23 L.Ed.2d 274, (1969); *Wood v. Morris*, 87 Wn.2d 501, 503, 506, 507-508, 554 P.2d 1032 (1976).

For example, in *State v. Branch*, 129 Wn.2d 635, 919 P.2d 1228 (1996), the Supreme Court found unconvincing defendant's argument that the trial judge erred when he failed to expressly articulate the three constitutional rights as being waived by a plea of guilty. *Id.* at 644. Those rights were the right to a jury trial; the right to confront one's accuser; and the privilege against self-incrimination. *Id.* at 644, n. 4. The court relied on *Wood, supra*, emphasizing that, "there is no constitutional requirement

that there be express articulation and waiver of the three rights ... by the defendant at the time of acceptance of his guilty plea if it appears from the record ... that the accused's plea was intelligently and voluntarily made, with knowledge of its consequences." *Id.* (quoting *Wood*, 87 Wn.2d at 508).

Like Branch, defendant in this case argues that the trial judge erred when he failed to expressly articulate on the record all of the rights defendant was waiving. *See* Appellant's Brief 9. However, in this case, the judge made an adequate inquiry into defendant's knowledge of all direct consequences of the plea in light of the completed and signed Statement of Defendant on Plea of Guilty, in which defendant initialed next to the rights he was waiving. CP 6-14 (Statement of Defendant on Plea of Guilty, p. 2). The court's inquiry during the plea hearing, combined with defendant's plea statement, demonstrate that defendant made the plea with knowledge of its consequences. *See* RP (Plea) 5-7; CP 6-14 (Statement of Defendant on Plea of Guilty). Under *Wood* and its progeny, the court did not have to go any further and verbally enumerate every single right defendant was waiving. *See Branch*, 129 Wn.2d at 644; *Wood*, 87 Wn.2d at 503, 506, 507-508.

Defendant relies on *State v. Tourtellotte*, 88 Wn.2d 579, 564 P.2d 799 (1977). However, *Tourtellotte* does not stand for a proposition that the court *must* verbally enumerate all of the rights defendant is waiving by pleading guilty. The court only stated that the judge "*should* inform the

defendant of the right 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.” *Tourtellotte*, 88 Wn.2d 579, 583 (internal citation omitted, emphasis added). In this case, it was not improper for the judge to rely on defendant’s statement, in which all of the aforementioned warnings appear either in defendant’s handwriting or are initialed by him. *See* CP 6-14 (Statement of Defendant on Plea of Guilty).

Defendant’s reliance on *United State v. Fountain*, 777 F.2d 351, 355 (1985), is also misplaced. *Fountain* is a federal case and, as such, relied on federal cases and rules, specifically on Rule 11 of the Federal Rules of Criminal Procedure. *Id.* at 355. The plain language of the federal rule significantly differs from CrR 4.2 and contains specific detailed mandatory instructions on how a federal judge court must accept a plea. *See* Fed. R. Crim. P. 11.

Defendant cannot show that a manifest injustice occurred. The evidence in this case supports the conclusion that defendant’s plea was knowing, intelligent and voluntary, and that the court made an adequate inquiry into defendant’s knowledge of the charges and the direct consequences of pleading guilty. Furthermore, as argued below, even if

this Court holds that, under CrR 4.2, the trial court failed to properly inform defendant regarding his plea, the court's error was not prejudicial.

- b. Defendant failed to show any obvious, overt injustice that would be corrected by the withdrawal of his plea

The defendant has the burden of proving that some obvious, overt injustice has occurred during the entry of the guilty plea that needs correction. *State v. Armstead*, 13 Wn. App. 59, 62, 533 P.2d 147 (1975). Because of all of the safeguards surrounding an acceptance of a guilty plea, a court should exercise great caution before setting aside a guilty plea. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

Just because defendant shows that the court below did not properly follow the technicalities of CrR 4.2 does not mean that defendant can withdraw his plea. Defendant must show overt injustice: some actual prejudice. See *In re Ness*, 70 Wn. App. 817, 822; *Ridgley*, 28 Wn. App. 351, 357-358.

For example, the *Ridgley* court emphasized that Ridgley never argued that “he did not understand the nature of the charge,” rather, he only asserted that the trial court erred “by not complying with the rule.” *Id.* at 357. The court found that, in the other cases, defendants always asserted some specific lack of understanding of the charges or unwittingly surrendered rights. *Id.* at 358. The court concluded that, “[i]n this case,

Ridgley comes before us armed with nothing but the bare assertion that there was a technical violation of CrR 4.2,” and therefore, Ridgley claimed no prejudice. *Id.* at 357, 358.

In contrast to Ridgley, Ness argued that his plea was not voluntary because he did not understand that he was giving up his right to bear arms, and that the charges he was pleading were burglary charges. *In re Ness*, 70 Wn. App. at 821-822. *See also Wood v. Morris*, 87 Wn.2d 501, 502, 554 P.2d 1032 (1976) (Wood argued that he was not adequately informed of the consequence of his plea because he did not realize that his sentence carried a five-year mandatory minimum).

Like Ridgley, and unlike Ness and Wood, defendant in this case only asserts that the court committed technical violations of CrR 4.2. Defendant merely lists all the *verbal* notices the court failed to give to him, and then asserts that lack of such verbal notices automatically means that defendant entered his plea without an understanding of its direct consequences and charges. *See* Appellant’s Brief at p. 11, 12.

However, nothing in the record suggests that defendant lacked a proper understanding of the charges, or did not realize he was giving up certain rights, or did not know his minimum sentence. On the contrary, as demonstrated in subsection (a) of this brief, the court’s inquiry during the plea hearing, combined with defendant’s plea statement, prove that defendant made the plea with knowledge of its conditions and

consequences. *See* RP (Plea) 5-7; CP 6-14 (Statement of Defendant on Plea of Guilty). The record has no indication of an overt, manifest injustice.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's finding below.

DATED: December 9, 2008.

GERALD A. HORNE
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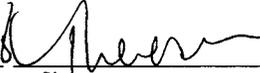

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Certificate of Service:

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.

12.10.08 
Date Signature