

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 38126-5-II

STATE OF WASHINGTON,

Respondent.

vs.

DAVID LEE ROY GOODWIN

Appellant.

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

Appellant's recitation of the facts of this case is adequate for purposes of responding to this appeal.

ARGUMENT

A. GOODWIN'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED HIS MOTION TO WITHDRAW HIS PLEA.

Goodwin claims the trial court abused its discretion when it denied Goodwin's motion to withdraw his guilty plea. This argument is without merit.

A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. State v. Padilla, 84 Wn.App. 523, 525, 928 P.2d 1141 (1997). Superior Court Criminal Rule 4.2(f) allows a defendant to withdraw his or her plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice," but this is a very high standard. CrR 4.2(f). A manifest injustice is one that is direct, obvious, and observable, not obscure. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974); State v. Saas, 118 Wn.2d 37,42, 820 P.2s 505 (1991). In addition, a "[m]anifest injustice includes instances where "(1)the plea was not ratified by the defendant; (2) the plea was not voluntary; (3)

effective counsel was denied; or (4) the plea agreement was not kept." State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006)(quoting State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001)). But a defendant who later tries to retract his admission of voluntariness made in open court bears a heavy burden in trying to convince a court that his plea was coerced. State v. Frederick, 100 Wn.2d 550, 558, 674 P.2d 136 (1983), overruled on other grounds by Thompson v. State Dep't of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999). A bare allegation of coercion is insufficient. State v. Osborne 102 Wn.2d. 87,97, 684 P.2d 683 (1984).

When a defendant fills out a written plea statement under CrR 4.2(g) and acknowledges that he has read and understands it and that its contents are true, it is presumed that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (citing State v. Perez, 33 Wn.App. 258, 261, 654 P.2d 708 (1982)); State v. Hennings, 34 Wn.App. 843, 846, 664 P.2d 10 (1983)(use of written form set out in CrR 4.2(g) is sufficient to show that a defendant is aware of the sentencing consequences of his plea). A defendant's signature on the plea agreement is "strong evidence" that the agreement is voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Additionally, "[w]hen 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." State v. Perez, 33 Wn.App. 258, 262, 654 P.2d 708 (1982). The State bears the burden of proving the validity of a guilty plea, including the defendant's "[k]nowledge of the direct consequences' of the plea, which the State may prove from the record or by clear and convincing extrinsic evidence." State v. Knotek, 136 Wn.App. 412, 423, 149 P.3d 676 (2006), quoting State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

Alleged Inaccuracies in Printed Plea Form

In the present case Goodwin argues that the plea form contains an incorrect statement of the law which resulted in Goodwin's being "misinformed" as to "the effects of his guilty plea." Brief of Appellant 11. This argument, frankly, makes no sense. First of all, the language in section iv in the pre-printed, model plea form is language taken directly from the suggested plea form for a sex offense as set out in CrR 4.2(h). "Use of the written form set out in CrR 4.2(g) is sufficient to show that a defendant is aware of the sentencing consequences of his plea." State v. Hennings, 34 Wn.App. 843, 846, 664 P.2d 10 (1983), citing In re Vensel, 88

WN.2d 552, 555, 564 P.2d 326 (1977). Here, Goodwin signed such a plea form. Goodwin agreed that he reviewed the plea form with his attorney and that he understood the elements of the crime and the maximum penalties for the crime. 3/28/08 RP 3,4.

Therefore it is presumed that Goodwin was aware of the consequences of his plea. Id. Goodwin further stated that no one had made any threats or promises in order to get him to plead guilty. Id. 6.

Still, Goodwin argues that subsection iv of the plea form-- which sets out the rules that must be followed before the State can seek an exceptional sentence--has "failed to keep pace with the new determinate sentencing scheme under RCW 9.94A.712 and those cases interpreting the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 403 (2004)." Brief of Appellant, 10. However, section iv of the statement on plea contains the very language that echoes the Blakely ruling itself. Consequently, the State fails to see how that section of the plea form "has failed to keep pace with . . . those cases interpreting" Blakely." On one hand Goodwin argues that the plea form is incorrect because it does not "keep pace" with Blakely and its progeny, while at the same time he argues that the plea

form's section iv is incorrect because it does contain the Blakely language. This argument confounds the State. Moreover, Goodwin cites no authority on point to support his claim that this language in the plea form is wrong. Nor has the State found any. See, State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)(refusing to consider issues raised without citation to authority).

Furthermore, even if this section in the plea form explaining that any aggravating factors must be proven to a jury did not apply to Goodwin's plea, how does such language in the form impact the validity of Goodwin's plea? What harm is there to Goodwin by the existence of a section in the plea form which accurately points out that any aggravating factors must be proven by the State to the jury? Indeed, if the plea agreement here involved an exceptional minimum sentence, the State would have either had to prove and plead the aggravators, or Goodwin would have had to stipulate to them—thus, Blakely would have applied to this case under those facts. State v. Monroe, 126 Wn.App. 435, 109 P.3d 449 (2004) (Blakely applies where the minimum term imposed under RCW 9.94A.712(3) exceeds the standard range).

Goodwin's logic in this section of his argument baffles the State. By claiming section iv of the plea form does not apply to indeterminate sentences is Goodwin arguing that if the State wanted an exceptional sentence in his case, it did not have to include the aggravating factors in the charging document because Goodwin would eventually be facing an indeterminate sentence? This is simply not true, since under Blakely and its progeny, the State would have to plead and prove any aggravators if it was seeking an exceptional sentence (see Monroe, supra) –regardless of the fact that Goodwin would ultimately be facing an indeterminate sentence. Perhaps the State misconstrues Goodwin's obscure argument. But, given the fact that Goodwin cites no authority for his proposition that the plea form used here, and modeled after the suggested form in CrR 4.2(g), contains inaccurate information—this Court should find this argument to be without merit.

Goodwin does cite to State v. Clarke, 156 Wn.2d 880, 892, 134 P.3d 188 (2006), but that case is not applicable here because Clark deals with an exceptional minimum sentence. Id at 880. Goodwin's sentence is not an exceptional minimum sentence—or any other “exceptional” sentence for that matter. Besides, it does

not follow that Clark's ruling that Blakely does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 which does not exceed the statutory maximum, this therefore invalidates section iv of the statement of defendant on plea.

In sum, Goodwin's argument that the plea form modeled after CrR 4.2(g) contained improper language is not supported by any authority that either Goodwin (apparently) or the State has been able to locate. Additionally, Goodwin signed the plea form with the assistance of experienced trial counsel. There is quite simply nothing to indicate that Goodwin did not fully understand the consequences of his plea. The trial court's decision denying his motion to withdraw his plea should be affirmed.

Appealability of Standard Range Sentence.

Goodwin also argues that the plea form contains an inaccurate statement of the law when it states that a standard range sentence cannot be appealed by anyone. Brief of Appellant 12. But this language is taken straight from the suggested language of the "model" plea form to a sex offense as set out in CrR 4.2(g). Once again, Goodwin does not cite any authority which holds that this section of the model plea form is not correct. Instead, Goodwin cites cases which hold that even when the

sentence is within the standard range, that the trial judge can still abuse its discretion if it bases its decision on untenable grounds or for untenable reasons. While Goodwin is generally correct as to this issue, it is also true that he has not cited a single case which holds that the language in the plea form stating that a standard range sentence cannot be appealed is wrong. A reviewing Court will not review an issue raised in passing or unsupported by authority or persuasive argument. See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

What the law does say about the ability to appeal a guilty plea is that, “[o]rdinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain.” State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); State ex rel. Fisher v. Bowman, 57 Wn.2d 535, 536, 358 P.2d 316 (1961); ; see also, State v. Moten, 95 Wn.App. 927, 930-31, 976 P.2d 1286 (1999)(discussing rare situations in which a guilty plea does not waive an appeal). RCW 9.94A.210(1) states that “[a] sentence within the standard range for the offense shall not be appealed.” In other words, ordinarily, “a sentence within the standard range shall not be appealed.” State v. Mail, 65 Wn. App. 295, 297, 828 P.2d 70 (1992). Thus—despite Goodwin’s

assertions to the contrary, the rule is that in general, a criminal defendant may not appeal the imposition of a standard range sentence. See e.g., RCW 9.94A.585(1); State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006).

However, a criminal defendant “may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act] or constitutional requirements.” Osman, 157 Wn.2d at 481-82(emphasis added); State v. Garcia-Martinez, 88 Wn.App. 322, 328, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998) (defendant may appeal a sentence imposed on an improper basis); see also RAP 2.3(b)(3) (appellate court will accept *discretionary* review of a trial court action that so far departs from the “accepted and usual course of judicial proceedings...as to call for review by the appellate court.”)

Here, the fact of the matter is that Goodwin’s argument that the plea form’s language advising a defendant that a standard range sentence “cannot be appealed by anyone” is improper is not supported by any authority. As such, his arguments to the contrary should be disregarded by this Court.

Alleged “New Evidence” as Basis to Withdraw Plea

Goodwin also claims that he should have been allowed to withdraw his plea because after entering his plea he learned that the father of the victim “might well have acted in a manner so as to have his daughter fabricate the charges against” him. Brief of Appellant 12. But the actual evidence was only that the father of the victim supposedly said that he had finally “got his revenge” against Goodwin. RP 98-99, 101. Such a statement-- as the trial court correctly found-- was, at best, “ambiguous.” 7/9/08 RP 7. Perhaps unfortunately, common sense tells us that victims or relatives of victims in criminal cases might want “revenge”—but the “revenge” is in terms of making a defendant pay for the crime he committed against the victim. Here—despite how Goodwin interpreted the alleged statements made by the father of the victim, there simply is not enough evidence to show that this person encouraged the victim to “fabricate the charges against the defendant.” Brief of Appellant 12. As such, this does not constitute a “manifest injustice” that would allow Goodwin to withdraw his plea. The trial court’s ruling on this issue was correct, and should not be disturbed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED GOODWIN TO A MANDATORY MINIMUM SENTENCE AT THE TOP OF THE STANDARD RANGE.

Goodwin also claims that the trial court abused its discretion when it imposed a mandatory minimum sentence at the top of the standard range, arguing that the court imposed that sentence to punish Goodwin for having entered an Alford plea and for having moved to withdraw his plea. Brief of Appellant 13. But Goodwin reads too much into the trial court's ruling.

Goodwin's sentence was within the standard range for his offense. 7/23/08 RP 4-5 (court sentencing Goodwin to a minimum term of 207.75 months and a maximum term of life). A "trial court has discretion to sentence anywhere within the standard range without providing any reasons in support of its decision." State v. Mail, 65 Wn.App. at 297 (emphasis added); State v. Herzog, 112 Wn.2d 419, 423-31, 771 P.2d 739 (1989) (a trial judge has broad discretion in setting a standard range sentence.) It is also true that a guilty plea does not automatically entitle a defendant to a lower sentence. United States v. Hammick, 36 F.3d 594, 600 (7th Cir. 1994). And some jurisdictions have held that it is permissible for a

trial court to consider the willingness of the defendant to admit guilt as a proper factor for more lenient sentencing.” See e.g., Hammick, 36 F.3d at 599-600; Commonwealth v. Johnson, 27 Mass.App.Ct. 746, 750-751, 543 N.E.2d 22 (1989).

In Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) the United States Supreme Court hinted that lack of remorse or acceptance of responsibility might be taken into consideration by a trial court in imposing a sentence. Id. at 330 (discussing right to remain silent at sentencing but noting that whether “silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility . . . is a separate question. . . not before us, and we express no view on it.”) Id. The Washington Supreme Court has also noted that a defendant’s lack of remorse justified a finding that leniency in sentencing was not merited. See e.g., State v. Sagastegui, 135 Wn.2d 67, 96, 954 P.2d 1311 (1998). Still, any sentence within the standard range is presumed not to be a penalty for the defendant’s exercise of his or her rights. United States v. Klotz, 943 F.2d 707, 710-11 (7th Cir. 1991). Significantly, the Klotz Court further noted that it “would fetter judges unduly to hold them to the lower or middle point of the range unless they

could come up with an expression that was unambiguously neutral with respect to all constitutional rights.” Id. at 711.

Here, Goodwin misconstrues the trial court’s comments about imposing a minimum sentence at the top of the standard range. With the above-set-out guidelines in mind, there has been no abuse of discretion in sentencing Goodwin in this case. First off, this was a standard range sentence—which the trial court could impose without making any comments as to why it imposed such a sentence. State v. Mail, supra; State v. Herzog, supra. Secondly, Goodwin is off-base when he claims that the trial court improperly based its sentencing decision “upon the fact that [Goodwin] was within the class of defendants who had entered an Alford plea and then later moved to withdraw that plea.” Brief of Appellant 15, 16. But the trial court did not say it would impose a high end sentence for all Alford pleas.

What the trial court said is “I’m not satisfied that there has been any acceptance of responsibility here, that coupled with the motion to withdraw the guilty plea tells me that he’s not entitled to a sentence at the low end of the range.” 7/23/08 RP 4,5. Lack of remorse can be a proper reason for not giving leniency in sentencing. Sagastequi, supra. And Respondent submits that it is

no great leap to say that “lack of remorse” can manifest itself in different ways –including one’s failure to accept responsibility for the crime. In this way, the trial court’s reason for imposing a high end sentence was not an abuse of discretion. Finally, Goodwin does not cite to any cases with a factual pattern like this one.

Therefore, none of the cases he cited stand for the proposition that the trial court abused its discretion when it stated it was sentencing Goodwin to a minimum sentence at the high-end of the sentencing range because Goodwin did not take responsibility for his crime. Rather, Goodwin cites to cases involving miscalculated offender scores or situations where the trial judge made a categorical statement that it would not give DOSA sentences in any case. Neither of these circumstances is present here. This case does not involve a miscalculated offender score or any other kind of “mutual mistake” in the plea paperwork. Nor did the trial judge here make a “categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders.” State v. Grayson, 154 Wn.2d 333, 341-342, 111 P.3d 11183 (2005)(emphasis added).

Here, the trial judge here imposed the minimum sentence at the high-end of the standard range because Goodwin himself (as

opposed to an entire "class" of offenders) refused to accept any responsibility for the crime. 7/23/08 RP 4-5. This was not an abuse of discretion. Accordingly, Goodwin's sentence should be affirmed.

CONCLUSION

The trial court did not abuse its discretion when it denied Goodwin's motion to withdraw his plea. Goodwin has not cited to any authority which holds that the statement of defendant on plea of guilty form used here and modeled after CrR 4.2(g) contained any inaccurate statements of the law. Nor has Goodwin shown that the trial court abused its discretion when it imposed the minimum sentence at the high end of the standard range. Because the trial court did not impose the sentence for untenable reasons, the sentence should be affirmed.

RESPECTFULLY SUBMITTED this 30 day of April, 2009.

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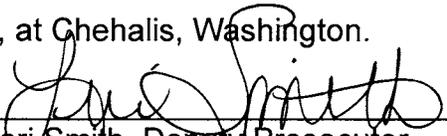
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DIVISION II

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declare under penalty of perjury of the laws of the State of Washington that
the following is true and correct: On 4/30/09, I served
appellant with a copy of the **Respondent's Brief** by depositing same in the
United States Mail, postage pre-paid, to the attorney for Appellant at the name
and address indicated below:

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DATED this 30 day of April, at Chehalis, Washington.



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