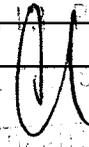


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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN DAVID MATTHEWS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 98-1-05430-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Should this court dismiss the appeal because defendant challenges orders entered by the trial court that were done at the directive of the appellate court?
2. Should this court treat all of the trial court's findings as verities when defendant does not provide argument or citation to the record to show that the challenged findings are unsupported by the record?
3. Should this court uphold the trial court's determination that the defendant opted to withdraw his plea when the record shows that defendant affirmatively averred that his plea was withdrawn on several occasions and when all of his actions were inconsistent with a choice to maintain his plea?
4. Should the court reject the above arguments, does this case present compelling circumstances that justify limiting the defendant's choice of remedy to withdrawal of the plea?

B. STATEMENT OF THE CASE.

Appellant, Brian Matthews ("defendant"), pleaded guilty to assault of a child in the first degree, and assault of a child in the third degree, back in June 1999, pursuant to a plea agreement that involved a reduction of

charges. CP 183-192. Under the plea agreement the State had agreed to recommend an exceptional sentence of 250 months. *Id.* Prior to sentencing, defendant filed a motion to withdraw his plea claiming that he was incompetent at the time he entered it. *See* CP 2-13, Opinion at p. 2. After two evaluations at Western State Hospital, and a hearing on the motion; the trial court denied his motion to withdraw his guilty plea and sentenced defendant to an exceptional sentence of 250 months on the first degree assault of a child conviction, and a concurrent standard range sentence on the assault of a child in the third degree. CP 2-13, Opinion at pp. 2-3. Petitioner appealed from both the entry of the judgment and the denial of his motion to withdraw his guilty plea. CP 2-13. In an unpublished opinion, the Court of Appeals affirmed the denial of the motion to withdraw the guilty plea and rejected defendant's arguments regarding the calculation of his offender score and a lack of a factual basis for his guilty plea. *Id.*

In 2003, defendant filed a personal restraint petition seeking to withdraw his guilty plea, claiming that five juvenile offenses had been improperly included in his offender score, making his offender score incorrect and that this had been a material factor in his decision to plead guilty. CP 194-196. Under then controlling law in Division II of the Court of Appeals there was a three part test for determining whether a defendant should be allowed to withdraw a guilty plea based upon an

incorrect offender score, See *State v. McDermond*, 112 Wn. App. 239, 47 P.2d 600 (2002). The Court of Appeals transferred the petition to the trial court for resolution of the disputed factual issues and a determination of the merits. CP 194-196.

The trial court found that the miscalculation of his offender score had not been a material factor in his decision to plead guilty and denied the motion to withdraw his guilty plea; the court did re-sentence the defendant without the juvenile offenses included in his offender score. *In re Matthews*, 128 Wn. App. 267, 269-70, 115 P.3d 1043 (2005). The court imposed an exceptional sentence of 250 months. CP 197-209, 210-213. The defendant appealed the court's ruling, which was consolidated with a separately filed personal restraint petition, arguing that he should have been allowed to withdraw his guilty plea. *Matthews, supra*. The Court of Appeals upheld the trial court's decision not to allow withdrawal of the guilty plea, but vacated the imposition of the exceptional sentence as a jury had not found the facts upon which the exceptional sentence was based. *Matthews*, 128 Wn. App. at 274-75. The court remanded for resentencing. *Id.* On remand, the trial court imposed standard range sentences on both counts for a total period of confinement of 171 months. CP 214-224.

Petitioner filed yet another personal restraint petition, in COA Case NO. 35437-3-II, alleging once again that his plea was invalid because he entered his plea without a correct understanding of the sentencing range.

CP 16-17. Because the Supreme Court's decision in *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006), had overruled the decision in *State v. McDermond*, *supra*, the State conceded that Matthews should be allowed to withdraw his guilty pleas. *Id.* The Court of Appeals agreed with the State's concession of error, and held Matthews "is entitled to withdraw his pleas" and remanded the matter to the trial court for further proceedings. *Id.*

The State had the defendant transported back to the superior court, and he first appeared before the superior court on April 4, 2008; the superior court wanted to set a trial date and to ensure that defendant had representation. Ex 1¹. The verbatim report of proceedings indicates that defendant's prior counsel wanted to withdraw due to a conflict, and that defendant wanted to represent himself. Ex 1, RP 3-6. The superior court allowed defendant's prior attorney to withdraw, and appointed new counsel until such time as defendant's motion to proceed pro se could be heard. Ex 1, RP 6-9. At this hearing, defendant made the following representation to the court:

¹ The verbatim report of this hearing was filed in the superior court and considered by the trial court in making its ruling. It was designated as a clerk's paper, but transmitted to the court as an "attachment". See Clerks Index dated October 6, 2008. The state is referring to this document as "Ex 1" followed by the relevant page cite to transcript as "RP *."

Defendant: Well, actually, I'm just asserting my constitutionally secured right [to self representation]. Since we set a trial date in this matter and the pleas are withdrawn, we need to address the issue of bail if we could?

Ex 1, RP 6. While defendant wanted the court to address a suppression motion and a motion to dismiss, the court limited the issues that day to bail, and setting dates for trial and other hearings. Ex 1, RP 6-10. The court did not enter a written order vacating defendant's judgment and plea at this time. The court set a hearing date for defendant's motion to represent himself, an omnibus hearing date, and a trial date. Ex 1, RP 10-13). The court set bail pending trial. Ex 1, RP 11.

The parties were back before the court on April 25, 2008. 1RP 3.² The trial court, in calling the matter, represented that defendant's plea had been withdrawn and that the matter had been set for trial; defense counsel concurred with that case status. 1RP 3. The court then proceeded to address the defendant's request to proceed pro se. 1RP 7-18. In the course of discussing the risks he faced, the court discussed the charges that he was facing at trial, the skills he would need to handle a trial, and that an exceptional sentence might follow a trial in this matter; the defendant

² There are five volumes of verbatim report of proceedings with the pagination starting anew in each volume. As the front page of each volume clearly identifies it as a particular volume out of five, the State will refer to the volume number prior to the "RP" designation. For example a reference found in Volume II of V would be is labeled "2RP."

acknowledged his understanding of these risks. 1RP 8, 11-16. The court set the remainder of defendant's motions over for two weeks and noted the State's motion for re-arraignment for the same day. 1RP 21-25.

The parties were back before the court on May 13, 2008, for the defendant's arraignment on an amended information. 2RP 3-5. The prosecutor represented that defendant had withdrawn his plea. 2RP 4. When asked whether defendant had any objection to the amended information, defendant indicated that he did, asserting that the prosecutor was being vindictive because he "withdrew his guilty pleas." 2RP 5-6. Defendant again reaffirmed that he had withdrawn his guilty plea stating:

Defendant: Given that Mr. Matthews has withdrawn his plea, Mr. Matthews does not dispute that the State can bring up the original charges that were amended during the plea agreement...

2RP 10-11. The court noted defendant's objections to the amended information, arraigned the defendant on the amended information and entered pleas of not guilty. 2RP 13-16. The court further directed that defendant file written motions with regard to his objections and ordered that all of defendant's motions should be heard by the trial judge. 2RP 16-29. The court set a trial date of May 29, 2008. 2RP 16.

On May 29, 2008, the trial was set over to June 4, 2008, because the prosecutor was in another trial. CP 391.

The parties were in court on May 30, 2008, and defendant was re-arraigned on a second amended information to which he entered a plea of “innocence.” 3RP 8. The State alleged aggravating factors in pursuit of an exceptional sentence, although the State had to file a substitute information as the aggravators had mistakenly been omitted from the amended information initially filed. 3RP 7-26. Defendant argued that the State should not be allowed to seek a jury determination of aggravating circumstances even though the legislature had enacted provisions to allow such a procedure; during this argument, the following exchange occurred between the court and defendant:

COURT: So that sounds like an argument against withdrawing the guilty plea and just arguing sentence. You moved to withdraw the guilty plea.

DEFENDANT: I did move to withdraw the guilty plea, Judge. I did not think that the State would come – because we already beat the aggravators on appeal, I was not of the understanding that the State would come and attempt to bring these aggravators back that had already been vacated at one time.

3RP 15. Later in this hearing, the defendant later again acknowledged that he had opted to withdraw his plea:

DEFENDANT: The issue is not what I thought was going to happen after I withdrew the guilty plea. The issue is that the State never, ever had the authority to charge aggravating factors in this case and the only reason that it’s now allowed to charge aggravating factors is because I opted to withdraw an unconstitutional plea of guilty.

3RP 19-20. Ultimately, the court denied defendant's motion to preclude application of the "Pillatos fix" legislation found in RCW 9.94A.537 to his case, finding that neither due process nor prohibitions against ex post facto laws would be violated by its application. 3RP 22-24.

The court then discussed the fact that the trial was expected to start the following Wednesday, June 4, 2008. 3RP 27-28. At that point, the defendant asked if the State would come discuss a possible resolution of the case short of trial. 3RP 27-28. The prosecutor indicated that he had received defendant's proposed resolution and was not inclined to accept it; the prosecutor noted that he had consistently related to defendant that he should be prepared for trial. 3RP 28.

The trial was set over until June 16, 2008. CP 392. On June 16, 2008, the parties were back in front of the court; the court continued the trial until July 30, noting that defendant had just filed a motion for "specific performance." CP 393; *see also* CP 90-96. The written motion was to "specifically enforce the plea agreement dated 6-7-1999." CP 90-96. Defendant asserted that as there had been no hearing or order regarding the withdrawal of his guilty plea, that he still had the right to request specific enforcement of his plea agreement. CP 90-96. Defendant also filed an affidavit in support of his motion in which he declared "That I do hereby formally and finally choose specific performance as my remedy for my involuntary plea." CP 99.

The parties were before the court on this motion on July 11, 2008. 4RP 3-27. At the hearing, defendant again asserted that as there had been no hearing on his right to withdraw and no order entered withdrawing his plea, that he could opt to maintain his plea and sentence as it existed under the 2006 judgment and sentence and that he had decided that was the course he wanted to pursue. 4RP 4-5. The State argued that it was clear that defendant had opted to withdraw his plea on remand as he had made that representation on the record several times and that further, all of his actions had been inconsistent with the position he was now asserting. 4RP 5-10. The requested relief defendant asked for on July 11 differed as to his requested relief in his written pleadings. *Compare* CP 90-96 with 4RP 4-5. Defendant later filed another affidavit, purportedly signed in March of 2008, claiming that he did not want his plea withdrawn or his earlier judgment vacated; this affidavit was consistent with the position he had taken at the hearing. CP 106-107.

The court held a hearing on these claims and entered an order finding that the defendant had committed to withdrawal of his plea as his choice of remedy in his personal restraint petition, that the Court of Appeals had directed the superior court to provide this remedy, and further that defendant had confirmed his choice of remedy at his first appearance back before the Pierce County Superior Court. 4RP 28-32. The court also entered a formal order vacating the prior judgment. CP 137-138; 4RP 42-

50. The court later denied defendant's motion for reconsideration. 5RP 35. The court noted that the judge handling defendant's initial appearance back before the superior court after his successful personal restraint petition could have handled the situation better by entering a formal order, but the lack of a formal order was not dispositive. 5RP 35. The court concluded the defendant had "a change of heart" when he realized that the State would be permitted to seek an exceptional sentence. 5RP 35.

On August 15, 2008, defendant filed a notice of appeal from the order withdrawing his guilty plea entered on July 17. CP 167-171. The State challenged the appealability of this order on the grounds that withdrawal of the plea was the relief that had been given by the Court of Appeals in its order granting defendant's personal restraint petition; the trial court was merely following that direction from the appellate court. The Commissioner of Division II found the order was appealable, and the court denied the State's motion to motion to modify this ruling.

C. ARGUMENT.

1. THIS COURT SHOULD DISMISS THIS CASE AS THE TRIAL COURT'S ORDERS WITHDRAWING THE PLEA AND VACATING JUDGMENT WERE ENTERED PURSUANT TO AN APPELLATE COURT DIRECTIVE AND ARE NOT APPEALABLE

It is beyond dispute that a superior court must comply with the directive of a higher appellate court. *Harp v. American Surety Co.*, 50

Wn.2d 365, 368, 311 P.2d 988 (1957). When an appellate court renders a decision in a particular case, its holding is “binding on the superior court, and must be strictly followed.” *Id.* If the superior court fails to enter the judgment or order as directed by the appellate court, it can be compelled to do so. *Id.*

It has long been the rule in Washington that “no appeal lies from a judgment entered by the superior court in conformity with the directions of the reviewing court.” *Frye v. King County*, 157 Wash. 291, 292, 289 P. 18 (1930), citing *Stewart v. Salamon*, 97 U.S. 361, 24 L.Ed.1044 (1878); *Rising v. Carr*, 70 Ill. 596 (1873); *Heinlen v. Beans*, 73 Cal. 240, 14 P. 855 (1887); *Patten Paper Co. v. Green Bay & Mississippi Canal Co.*, 93 Wis. 283, 66 N.W. 601 (1896); *Ward v. Carter*, 96 Okl. 183, 221 P. 48 (1923); *Holland v. Railroad*, 143 N.C. 435, 55 S.E. 835 (1906).

When a superior court enters a judgment or order as directed by an appellate court “there [can] be no appeal therefrom, because it is actually the judgment of the [appellate] court and the superior court is merely the ...instrumentality for entry of the order.” *Harp v. American Surety Co.*, 50 Wn.2d at 368.

In most jurisdictions, it is grounds for dismissal that the judgment appealed from has been entered on remittitur following a previous appeal and in accordance with the directions of the appellate court. It has been said that in such a case the judgment attempted to be appealed from is not appealable, and that the court has no jurisdiction to entertain the second appeal.

Frye v. King County, 157 Wash. at 292. This is true even if the trial court has misinterpreted the ruling from the appellate court. *Id.* at 294. If a party believes that the trial court has misinterpreted the directive of the appellate court, the appropriate method of relief is to seek recall of the mandate in the appellate court; there is no appeal. *Id.*

Defendant asserts that he has a right to appeal the order vacating the plea and judgment under RAP 2.2(a)(10), which allows for an appeal from an “order granting or denying a motion to vacate a judgment.” This Court’s Commissioner agreed with defendant, finding that the trial court was not mandated to withdraw the guilty plea or the corresponding judgment by the order of this court on the defendant’s successful personal restraint petition. The State’s motion to modify the Commissioner’s ruling was denied.

The State continues to assert that the orders withdrawing plea and vacating judgment in this case were to comply with the decision of this court in resolving defendant’s personal restraint petition. In his petition, the defendant asked for the right to withdraw his plea. The State conceded that he was entitled to withdraw his plea, and the Court of Appeals granted him that relief. CP 16-17. The defendant did not seek any other relief in his petition, and the State did not stipulate or concede that any other relief was appropriate or available. The Court accepted the State’s concession and held defendant “is entitled to withdraw his pleas” and remanded the

matter to the trial court for further proceedings. *Id.* The Commissioner focused too narrowly on the phrase “remand for further proceedings,” finding that this phrase did not direct the trial court to withdraw the plea. This analysis fails to consider entirety of the ruling as well as the procedural posture of the collateral attack.

The defendant asked for specific relief- withdrawal of the plea, and the Court of Appeals indicated that he was entitled to that relief and no other. No remedy – other than withdrawal of the plea- was discussed in the order granting the petition. The State stipulated only that petitioner should be allowed to withdraw his plea and not that he was entitled to any other remedy at law. Had the State known that the court might perceive that some other unasked-for remedy was available to petitioner, it would not have stipulated to the granting of relief. As the order does not discuss or envision any other remedy than withdrawal of the plea, it is error to construe the order as authorizing any relief except withdrawal of the plea. The orders entered below merely conform to the directive of this court in the order granting the defendant’s request to be allowed to withdraw his plea. Defendant does not have any right to appeal these orders under the authority cited above.

This court should dismiss the appeal because when the trial court acts upon the directive of the appellate court, those acts are not subject to appellate review.

2. AS DEFENDANT DOES NOT ARGUE OR DISCUSS WHY THE CHALLENGED FINDINGS ARE UNSUPPORTED BY RECORD, THIS COURT SHOULD TREAT THE CHALLENGED FINDINGS AS VERITIES.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Defendant has assigned error to five of the findings of fact pertaining to the order withdrawing defendant's guilty plea. Brief of Appellant at p.1. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who

assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Because the defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. The failure to argue is particularly egregious as to two of the challenged findings which contain specific references to the record, yet defendant makes no effort to articulate why the cited record does not support the court's finding. All of the court's findings should be considered as verities upon appeal.

3. THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT DEFENDANT OPTED TO WITHDRAW HIS PLEA AS DEFENDANT AFFIRMATIVELY AVERRED THAT HIS PLEA WAS WITHDRAWN AND ALL OF HIS ACTIONS WERE INCONSISTENT WITH A CHOICE TO MAINTAIN THE PLEA.

When the trial court has weighed the evidence, an appellate court reviews the findings of fact for substantial evidence and then determines whether the findings support the conclusions of law and judgment. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). An appellate court presumes the trial court's findings are adequately supported by the evidence and unchallenged findings of fact are treated as verities on appeal. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Additionally, this court defers to the trial court's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence as well as the credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Appellate courts will also defer to a trial court's findings when it resolves a factual question even though the "factual question" is outside of the merits of the underlying case. See *Hernandez v. New York*, 500 U.S. 352, 364, 372, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (reviewing court affords great deference to trial's court assessment of attorney's discriminatory intent when ruling on a

Batson challenge); *State v. Rhodes*, 82 Wn. App. 192, 197, 917 P.2d 149 (1996). Such rulings may be based on representations³ of counsel rather than sworn testimony, yet the court is still assessing demeanor and credibility; this assessment is “peculiarly within a trial judge's province” as a finder of fact and entitled to deference. *Snyder v. Louisiana*, ___ U.S. ___, 128 S.Ct. 1203, 1208170 L.Ed.2d 175 (2008).

In the instant case, the factual issue before the trial court was whether defendant had exercised his choice of remedy and opted to withdraw his plea. The trial court entered several findings indicating that the record showed the defendant had opted to withdraw his plea. As will be discussed further below, this determination should be upheld.

There are many examples where a criminal defendant may be estopped from asserting a particular argument based upon his prior conduct. The doctrine of invited error, for example, prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The policy behind this doctrine is to bar a criminal defendant, who makes a tactical choice in pursuit of some real or hoped for advantage, from later urging his own action as a ground for reversing his conviction. *State v. Young*, 129 Wn. App. 468, 472, 119 P.3d 870 (2005). The invited error doctrine is an

³ Even if not sworn as a witness, attorneys have an independent obligation to provide truthful information to the court under the rules of professional conduct. RPC 3.3(a)(1) (a lawyer shall not knowingly “make a false statement of fact or law to a tribunal[.]”).

important aspect of our appellate process that was crafted to prevent the injustice of a party benefiting from an error that he caused or should have prevented. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

Similarly, a criminal defendant may be found to have waived certain constitutional rights through his conduct without ever expressly waiving them on the record. See *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). In *Thomas*, the Washington Supreme Court determined that a defendant may waive his right to testify through his conduct; there is no requirement that the trial court obtain an on-the-record waiver of the right.” or that the court “inform a defendant of [his testimonial] right. 128 Wn.2d at 558-59. Similarly, in *State v. Wise*, 148 Wn. App. 425, 437, 200 P.3d 266, 272 (2009), the court found that defense counsel, by actively questioning four jurors in private, waived defendant’s right to have all voir dire questions conducted in open court. A defendant may waive a challenge to an allegedly invalid sentence where the alleged error involves defendant’s agreement to facts that he later tries to dispute. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 875, 123 P.3d 456 (2005); *In re Pers. Restraint Petition of Goodwin*, 146 Wn.2d 861, 873-876, 50 P.3d 618 (2002) (discussing certain cases in which waiver may be found). Other examples of a court finding waiver or employing estoppel against a criminal defendant are *State v. Knowles*, 79 Wn.2d 835, 840-41, 490 P.2d 113 (1971)(defendant who files a pretrial

motion, then fails to note the motion for hearing cannot assign error to the court's failure to rule on it), *State v. Vazquez*, 66 Wn. App. 573, 832 P.2d 883 (1992)(defendant, having voluntarily waived his right to trial by jury, could not complain on appeal about fact that his bench trial was conducted at same time as codefendant's jury trial), and *Hartigan v. Washington Territory*, 1 Wash. Terr. 447 (1874) (defendant and his counsel, having consented to the separation of the jury in a capital case, were estopped from raising an objection on appeal that the separation was unlawful).

In the instant case, the trial court found that defendant had indicated his choice of remedy; these findings are supported by the record and should be upheld. CP 137-138. The fact that defendant had specifically asked for the relief of withdrawal of his plea from the Court of Appeals, and that this is the relief that was given by the appellate court has been fully discussed in the first argument section of this brief. This collateral attack was a clear and unequivocal choice of remedy on defendant's part. Even before defendant's first appearance in the superior court after the Court of Appeals granted relief, defendant was filing motions that were consistent with an intention to take his case to trial, as opposed to maintaining his plea. CP 177-179, 225-31. Defendant's motion or demand for discovery, a copy of the accusation, the right to call witnesses, were consistent with the case heading for trial, but not with

defendant opting for no relief. CP 177-179. Defendant filed a motion for a *Franks* hearing which would only be relevant if the matter were pending trial, and not if he were maintaining his guilty plea. CP 225-231.

At his very first appearance in the superior court, defendant represented to the court that “the pleas are withdrawn” then asked the court to address the issue of bail pending trial. Ex 1, RP 6, 7, 9, 13.⁴ Defendant filed a demand for a speedy trial, which would indicate that not only did he want a trial, but that he wanted it to occur sooner rather than later. CP 232. This motion was followed by another demand for discovery, a motion to reduce bail, an omnibus order, and defense witness list. CP 233-234, 361-369, 370-382, 383-385, 386-390. Most telling, defendant filed a motion to dismiss alleging that when another superior court judge arbitrarily denied an earlier motion to withdraw, she had engaged in government misconduct such that he was entitled to a dismissal under CrR 8.3(b). CP 235-247. In this motion, defendant asserts that he has recently obtained the relief of withdrawal of his plea - the same relief he sought from his earlier motion. *Id.* He further asserts that his right to a fair trial was prejudiced by the earlier denial of his motion to withdraw because a defense witness had died in the intervening time. *Id.* Defendant obtained a ruling on this motion. CP 42-43. This motion to dismiss would have been irrelevant had not defendant already

⁴ This record supports the trial court’s finding of fact Nos. 7, 8, and 11.

opted to withdraw his plea as the case had to be pending trial for the motion to have any validity. The motion was premised on the denial of the motion to withdraw being error which had a harmful effect on an upcoming trial. Defendant sought extraordinary relief from the trial court – dismissal of the charges- that he could not have sought unless his plea was withdrawn and he was facing trial.

The record contains more than one occurrence of defendant representing that his plea is withdrawn, or interjecting no objection to the prosecutor's or court's characterization of that procedural posture. 1RP 3, 2 RP 4, 5-6, 10-11; 3RP 15, 19-20. He entered a plea of "innocence" to an amended information. 3RP 8. From April 4, 2008, until June 16, 2008, the defendant was repeatedly before the court, yet never objected to the court setting the matter for trial, or raised any claim that treating the case as one pending trial was premature.

The trial court properly found in unchallenged finding No.10 that the "defendant knowing availed himself of certain rights only afforded to persons who are under the jurisdiction of the trial court." CP 137-138. Defendant's actions cannot be reconciled with his later claim that he had not opted to withdraw his plea.

The record shows that the first time defendant indicated that he wanted to do something other than withdraw his plea was in his motion for specific performance, filed on June 16, 2008. CP 90-96. This was filed after he had received an unfavorable ruling on May 30, 2008,

regarding the State's ability to pursue an exceptional sentence. 3RP 22-24. The court looked at the history of this case and how defendant had been consistently seeking withdrawal of his plea since 1999- even prior to his initial sentencing. The court's finding that defendant had consistently maintained his desire to withdraw his plea was well supported by the record before the trial court.

The court did not find defendant's declaration⁵ asserting that he did not want to withdraw his plea, to be credible. CP 137-138, Finding No. 9. The court indicated its belief that the sudden change in position by the defendant was due to his realization that taking his case to trial could place him at risk of receiving an exceptional sentence. This conclusion regarding the defendant's intent and motivation is supported by the record below, and is a credibility determination that is not subject to appellate review. The trial court's determination that defendant did opt to withdraw his plea at his first appearance back in the Pierce County Superior Court should be upheld.

4. THIS CASE IS ONE WHERE THERE SHOULD BE A
LIMITATION ON DEFENDANT'S CHOICE OF
REMEDY

Generally, where a plea agreement is based on misinformation, the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. *State v. Miller*, 110 Wn.2d 528, 531, 756

P.2d 122 (1988). If there are compelling reasons not to allow that remedy, then the defendant's choice of remedy does not control. *Id.* at 535. The State bears the burden of showing defendant's choice of remedy is unjust. *Id.* at 536); ***State v. Moore***, 75 Wn. App. 166, 173, 876 P.2d 959 (1994) (defendant was allowed his choice of remedy where the State did not argue it would be prejudiced by withdrawal of the plea, but instead conceded it could still procure its key witness for trial). The passage of time and the inability of the State to prove its case is a reason not to honor the defendant's choice of remedy. ***State v. Walsh***, 143 Wn.2d 1, 9, n. 3, 17 P.3d 591 (2001) ("If the State would be prejudiced in presenting its case by the passage of time, it can ask that the defendant's remedy be limited to specific performance."). As noted by one court, a defendant could be seeking a tactical advantage by not raising the issue promptly because with the passage of time the State's witnesses may become unavailable or memories may fade. ***State v. Van Buren***, 101 Wn. App. 206, 212 n.2, 2 P.3d 991 (2000). Fraud or deceit on the part of the defendant, is another reason to disallow the defendant's choice of remedy. ***State v. Shineman***, 94 Wn. App. 57, 61, 971 P.2d 94 (1999).

The State submits that should the court reject the State's arguments above for either dismissing the appeal or upholding the trial's court determination that defendant elected to withdraw his plea., then this is a

⁵ The affidavit was dated March 25, but was not filed with the court until July 1, 2008.

case where the court should find that there are compelling reasons to limit the choice of remedy to withdrawal of the plea.

For over ten years, defendant has challenged the voluntariness of his plea. He sought to withdraw his plea prior to sentencing, on multiple appeals, and via multiple collateral attacks to his judgment. The State and the court system have expended numerous hours responding to and addressing his various claims challenging his plea. Finally, defendant is given the relief he has sought for nearly ten years, namely, the opportunity to withdraw his plea. He affirmatively asked for this relief and it was granted by the Court of Appeals.

Defendant now asserts, without citation to authority, that he is not required to accept this relief and that he can opt to keep his plea and judgment in place, despite his successful collateral attack. Usually a defendant who enters a plea based on misinformation is given his choice of remedy between withdrawal of the plea or specific performance. In the history of this case, defendant has had two sentencing hearings, his original and the one in 2003, where he was given specific performance of his plea agreement, yet he continued to seek relief that would allow him to withdraw his plea. Despite asking for specific performance in one pleading, defendant has retreated from this position and, now, no longer seeks this relief. Thus, he has shown that he does not want the remedy of specific performance.

Instead of specific performance or withdrawal of his plea, defendant seeks no relief whatsoever and, essentially, asks the State and courts to ignore that last personal restraint petition. If defendant wanted to keep his judgment and sentence in place, then he should not have filed a collateral attack seeking relief from that judgment. Having affirmatively sought relief from his judgment and triggered the expenditure of prosecutorial and judicial resources, defendant should not be allowed, at this point, to take a position that he doesn't want the relief that he obtained and, instead, be allowed to keep everything in place as it was prior to his personal restraint petition. Allowing defendant to keep his guilty plea in place would also mean that all of the county and judicial resources used in responding to and deciding his various pre-trial motions since April of 2008 would have been a waste.

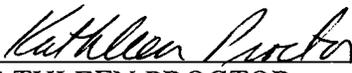
The justice system is designed to protect the rights of criminal defendants, but it is not their toy to be played with as it suits their mood. If defendant filed his personal restraint petition without truly wanting the relief that he asked for, then he deceived the court and the State. His lack of candor and his misuse of the justice system in this circumstance provides a compelling circumstance to limit his choice of remedy to withdrawal of his plea.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the trial court below and uphold the order withdrawing the plea and vacating the judgment.

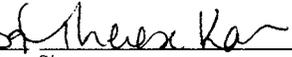
DATED: August 13, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

8.13.09 
Date Signature

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STATE OF WASHINGTON
BY _____
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