

NO. 44496-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JOSE LUIS CASTANEDA ORTIZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 10-1-01456-1

BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion in denying defendant's motion to withdraw his guilty plea when it found that the State had met its burden of proving the defendant knowingly, voluntarily and intelligently entered his guilty plea?

B. STATEMENT OF THE CASE.

1. Procedure and Facts Relevant to Appeal

On April 2, 2010, the Pierce County Prosecutor's Office charged JOSE LUIS CASTANEDA ORTIZ, hereinafter "defendant," with two counts of unlawful possession of a controlled substance with intent to deliver (to wit: methamphetamine and marijuana). CP 1-2. Defendant's son and co-defendant, Jose Luis Castaneda, Junior, hereinafter "Junior," had previously pleaded guilty to several counts arising out of the same incident. RP 998.

Defendant's case proceeded to trial in July of 2011. RP¹ 3. Midway through the trial on August 2, 2011, the State indicated it had spoken to Junior's defense attorney about performing a recomputation of Junior's offender score to lower his sentence to something that was more

¹ The verbatim record of proceedings that are paginated consecutively will be referred to as "RP." The other volumes will be referred to by the date of proceeding followed by

equitable given what the evidence in defendant's trial showed. RP 998-999. As part of this discussion, defendant also indicated that if the State were to make such a motion, defendant would consider pleading guilty. RP 1000- 1008. After further negotiations that same day, defendant pleaded guilty to a third amended information charging him with three counts of unlawful possession of a controlled substance with intent to deliver (to wit: methamphetamine, marijuana and oxycodone) and one count of unlawful possession of a controlled substance (to wit: heroin). CP 48-50; RP 1008-1018. Sentencing was set over and defendant was released on electronic home monitoring. RP 1020-1023.

On August 26, 2011, defendant was sentenced to the agreed sentencing recommendation of 120 months in custody to be followed by 12 months of community custody. 8/26/11 RP 7. On July 18, 2012, defendant filed a motion to withdraw his plea² arguing that his sentence exceeded the statutory maximum and that the State failed to comply with the plea agreement. CP 112-188. Because the State failed to receive notice of defendant's complaints, a hearing was not held until January 11, 2014. 1/11/14 RP 2-3.

"RP" and include 8/26/11, 1/11/13 and 1/25/13.

² Defendant filed multiple motions and orders which were all filed together by the clerk's office under the title "defendant's letter." The State refers to this as defendant's motion to withdraw his guilty plea.

At that hearing, pursuant to CrR 7.8(a) and *State v. Boyd*³, 174 Wn.2d 470, 275 P.3d 321 (2012), the State made a motion and the court signed an order *nunc pro tunc* correcting defendant's judgment and sentence so the term of community custody was removed so defendant's term of confinement plus community custody no longer exceeded the statutory maximum. CP 194-195; 1/11/13 RP 6. The court set over the issue regarding defendant's request to withdraw his plea to give defense counsel an opportunity to speak with defendant. 1/11/13 RP 6-7.

The court held a hearing on January 25, 2013, where defendant moved to withdraw his plea. 1/25/13 RP 2-4. Defendant argued that he pleaded guilty believing part of his plea agreement was that the State would agree to recalculate Junior's offender score⁴, but he realized later that was something that was going to happen anyways and he would not have pleaded guilty if he had known that. 1/25/13 RP 2-5. The court denied defendant's motion to withdraw his guilty plea finding defendant's plea was knowing, voluntary, and intelligent and the State performed as it

³ *Boyd* held that a written addition to the judgment and sentence stating that the total combined term of confinement and community custody actually served may not exceed the statutory maximum, (commonly referred to as the "Brooks notation") was no longer valid.

⁴ The State did move to recalculate Junior's offender score and his sentence was reduced from sixty months to a term of thirteen months. 1/25/14 RP 4; CP 189-193.

had promised. CP 196; 1/25/13 RP 8. Defendant filed a timely notice of appeal. CP 197.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE STATE MADE A VALID SHOWING THAT THE GUILTY PLEA WAS ENTERED KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY.

A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *State v. Olmstead*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966); *State v. Krois*, 74 Wn.2d 404, 407, 445 P.2d 24 (1968). The trial court abuses its discretion only when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A defendant does not have a constitutional right to withdraw a plea of guilty and to enter a plea of not guilty." *State v. Olmstead*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966).

In the present case, defendant has appealed the trial court's denial of his motion to withdraw his guilty plea. Appellant's opening brief seems to analyze the issue in terms of whether defendant's plea of guilty was voluntary. *See* Appellant's Opening Brief 5-10. However, defendant did

not file a direct appeal to review the taking of his plea. Rather, he made a motion to withdraw his guilty plea eleven months after the judgment and sentence were filed with the clerk and when that motion was denied, he timely filed an appeal of the trial court's decision. CP 197 ("defendant, seeks review by the designated appellate court of the Order by Judge Cuthbertson denying my motion to withdraw my guilty plea entered on 1/25/2013"). As a result, this court should not review whether defendant's plea was involuntary or coerced as appellant appears to argue. This court should review whether the trial courts abused its discretion in denying defendant's motion to withdraw his plea as that is the issue defendant has appealed and is properly before the court.

- a. Defendant's claim that he was misinformed about the term of community custody fails because he was not misinformed, any error was corrected and defendant never argued it to the trial court as a basis to withdraw his plea.

Defendant's first claim in requesting the court withdraw his guilty plea is based on his argument that he was misinformed about the term of community custody. However, a review of the record shows defendant was never misinformed about the length of community custody. In the statement of defendant on plea of guilty, the community custody range showed 12 months for counts I through IV. CP 51-59. During the

colloquy of the plea, the court went through each of the counts and confirmed defendant understood that they would each be followed by 12 months of community custody. RP 1002-1014. Defendant was also made aware multiple times that his maximum term of confinement was 120 months. CP 51-59; RP 1012-1014.

During sentencing, the court was also clear that defendant's term of confinement plus the community custody could not exceed the statutory maximum of ten years. When stating defendant's sentence, the court said:

I'm going to follow the agreed recommendation. It's 120 months understanding that that's the maximum sentence for these crimes. It's also \$200 court costs, \$500 crime victim penalty assessment, \$250 to the WestNET agency drug fund, \$100 for the DNA sample fee, \$3,000 cleanup fine, and the 12-months of community custody which follow. *Again, it can't exceed the 120-month maximum sentence when combined with the jail prison time.*

8/26/11 RP 7 (emphasis added).

Defendant was never misinformed about the length of community custody or the statutory maximum of his sentence. Rather, nine months after defendant pleaded guilty, the Washington Supreme Court issued *State v. Boyd* which held that the trial court is responsible for clarifying on the judgment and sentence the specific length of community custody to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 472-473, 275 P.3d 321 (2012). Prior to that case, courts had

been relying upon the "Brooks notation" essentially telling the department of corrections to reduce the term of community custody so that it, plus the term of confinement, did not exceed the statutory maximum. *Id.*

As a result of *Boyd*, eleven months after defendant entered his guilty plea and two months after the *Boyd* decision was issued, defendant filed his motion to withdraw his guilty plea. CP 112-188. In response, the State actually agreed with defendant that his judgment and sentence needed to be clarified and filed the motion to correct defendant's judgment and sentence as allowed under CrR 7.8(a). CP 189-193. At the hearing on January 11, 2013, the court entered an order *nunc pro tunc* removing the term of community custody so defendant's judgment and sentence complied with *Boyd*. CP 194-195; 1/11/13 RP 6-9.

In the nine months he was serving his sentence before *Boyd* was published, defendant never filed anything with the court alleging he was misinformed about the community custody time. When the issue was brought before court and corrected at the first hearing on January 22, 2013, defendant never objected or argued that he wanted to withdraw his plea based on the *Boyd* correction. In fact, when the court actually held the hearing on the motion to withdraw defendant's plea on January 25, 2013, defendant never mentioned the community custody time as a basis for moving to withdraw his plea. 1/25/13 RP 2-9.

The trial court's denial of defendant's motion to withdraw his plea had nothing to do with the community custody time because defendant never argued it. Rather, the community custody issue was something raised after the plea as a result of a change in the law and was corrected as allowed under CrR 7.8(a). Defendant's appeal is not only meritless because he was not misinformed about anything, it is also meritless because it is not within the scope of review for this appellate court.

Again, the taking of defendant's plea is not what defendant has appealed. Defendant has appealed the trial court's decision to deny his motion to withdraw his plea. Because the trial court's decision had nothing to do with community custody, defendant's argument that his plea was involuntary because he was misinformed about the community custody is not properly before the court for review. This court should limit its review to what is properly before the court and find defendant's argument fails not only because it is not properly before the court, but also because it is meritless as a review of the record shows defendant was never misinformed.

- b. CrR 7.8 is the correct legal standard to review a postjudgment motion to withdraw a guilty plea.

CrR 4.2(f) governs prejudgment motions to withdraw a plea. *State v. Pugh*, 153 Wn. App. 569, 576, 222 P.3d 821 (2009). It reads in relevant part:

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.... If the motion for withdraw is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f). "Judgment," under CrR 4.2(f), means the date the judgment and sentence are filed with the clerk. *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). CrR 7.8 is entitled "Relief from Judgment or Order" and governs a courts decision on a post judgment motion to withdraw a guilty plea. *State v. Olivera-Avila*, 89 Wn. App. 313, 317, 949 P.2d 824 (1997).

In *State v. Robinson*, 172 Wn.2d 783, 263 P.3d 1233 (2011), and *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), the Washington Supreme Court held that the manifest injustice standard of CrR 4.2(f) applies both before and after entry of judgment. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (citing *Robinson*, 172 Wn.2d at 791; *A.N.J.*, 168 Wn.2d at 106). As a result, "a postjudgment motion to withdraw a guilty plea must either meet the requirements of *both* CrR

4.2(f) and CrR 7.8, *cf. Robinson*, 172 Wn.2d at 791 n. 4, 263 P.3d 1233, or *only* CrR 7.8." *Lamb*, 175 Wn.2d at 129 (emphasis included in original). Either way, meeting only the manifest injustice standard of CrR 4.2(f) is insufficient when considering a postjudgment motion to withdraw a guilty plea. *Id.* Further, CrR 7.8 represents a potentially higher standard than CrR 4.2(f) for withdrawing a plea. *In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 602, 316 P.3d 1007 (2014).

In the present case, defendant's judgment and sentence was filed with the clerk on August 26, 2011. CP 60-74. Defendant filed his motion to withdraw his plea on July 18, 2012. CP 112-188. The trial court denied defendant's motion to withdraw his plea under the review of only CrR 4.2(f). 1/25/13 RP 2-9; CP 196. But, because defendant's judgment and sentence was filed with the clerk eleven months before he made his motion, the correct legal standard for reviewing defendant's postjudgment motion to withdraw his guilty plea is under CrR 7.8(b).

As a result, defendant's argument that the trial court abused its discretion by denying his motion to withdraw his plea based on manifest injustice under CrR 4.2(f) fails first and foremost because CrR 4.2(f) manifest injustice is not even grounds for granting a postjudgment motion to withdraw a guilty plea under CrR 7.8. However, if the court were to reach the issue and review the issue under the proper standard of review,

defendant's argument still fails. An appellate court may affirm a lower court's ruling on any grounds adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). Thus, while the trial court did not engage in an analysis which included CrR 7.8, because defendant fails to show the trial court abused its discretion when the correct standard is applied to the issues raised, this court may affirm the trial court's ruling based on grounds supported by the record.

- c. Defendant's claim that he was coerced to plead fails under CrR 7.8(b) as his plea was knowingly, voluntarily and intelligently made.

In a post judgment motion to withdraw a guilty plea, a defendant must show:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.8;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b).

If 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. *State v. Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). 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) (quoting *State v. Perez*, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) (citing *In re Personal Restraint of Keene*, 95 Wn.2d 203, 206-207, 622 P.2d 13 (1981))).

If a trial court orally inquires into a matter that is on a plea statement, there is a presumption that the defendant understands this matter, and it becomes "well nigh irrefutable." *Stephan*, 35 Wn. App. at 893-894. After a defendant has orally confirmed statements in this written plea form, that defendant should "not now be heard to deny th[is] fact." *In re Keene*, 95 Wn.2d at 207. Additionally, if the record reflects that if a defendant understood the nature and consequences of the plea and had determined that the plea was in his or her best interest, then the plea was

voluntary. *In Re Personal Restraint of Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) (citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970)).

In the present case, defendant alleges that he was coerced into pleading guilty to obtain an early release for his son and co-defendant, Junior, and he would not have pleaded guilty had he known this was something that was already going to happen. However, the record not only shows defendant's plea freely and voluntarily made, it also shows the recalculation of Junior's offender score was never part of defendant's plea agreement.

First, defendant's plea agreement was never predicated upon the early release of his son. Rather, as evidence was adduced in defendant's trial, the prosecutor became aware of the actual level of involvement of Junior and decided a recalculation of his offender score to serve a shorter sentence was a fair and just correction he needed to make. The prosecutor made several statements to the court indicating this. He stated he had spoken to Junior's attorney, Mr. Tolzin, about a recomputation of Junior's offender score and "he was on board with it, and I think that based off of the equity, as far as his criminal exposure, that would render a proper result that would have him, you know, spending perhaps 12-and-a-day in prison versus the full 60." RP 998.

In the same conversation, the prosecutor told the court:

that discussion with Mr. Tolzin is independent of this case.... I could tell the Court that he was definitely on board with it. I am going [to] do that, but I think it's a problem attaching to anything we got going on right here right now.... State's ready to proceed, and I'm going to address this regardless with Mr. Tolzin. I think it's the right thing to do within my limits of my discretion of addressing --

RP 1002. When defendant was ready to plead guilty and the State discussed the resolution and filing of the amended information with the court, the prosecutor never said anything about the recalculation of Junior's offender score as part of the plea agreement. RP 1008-1009.

When the court went through the colloquy with the defendant, there was no discussion about a recalculation of Junior's offender score as part of the plea agreement. RP 1008-1018. In defendant's statement on plea of guilty, there is nothing written anywhere, specifically not in the prosecutor's recommendation, discussing a recalculation of Junior's offender score as part of the plea agreement. CP 51-59.

Furthermore, during the hearing on defendant's motion to withdraw his plea, the prosecutor outlined his understanding of the plea agreement stating:

I think the benefit of the bargain was stated during the Court's colloquy with Mr. Castenada Ortiz, specifically that the State would drop the school bus stop enhancement, which acts as a doubler. And the benefit of the bargain that Mr. Castenada Ortiz received was 10 years of flat time

versus a potential of 20 years of flat time had we taken it to the end of the trial. I believe that somehow the resolution of his son's case was dovetailed, at least in Mr. Castaneda's mind to the resolution of his case. I think that was separate and apart. Regardless if Mr. Castaneda Ortiz was claiming that he was denied specific performance as to the release of his son from prison, I think that-- that issue that he's arguing is without merit because it happened. That was, I think, an unusual thing for the State to do. I think that it's decision to do so with regards to his son was supported by evidence that came out of the trial.

1/25/13 RP 7-8. Thus, while defendant may claim he believed the recalculation of Junior's offender score was part of his plea agreement, there is nothing in the record suggesting the prosecutor agreed to that. He cannot now claim that his own mistaken belief is grounds for withdrawal of his plea under CrR 7.8(b), specifically when there is nothing anywhere in the plea form which lends credibility to his belief that Junior's recalculation was part of the agreement.

Finally, defendant's plea was knowingly, intelligently, and voluntarily made. During the colloquy, defense counsel told the court he had gone over the plea statement with defendant and he believed defendant was "entering this plea freely and voluntarily, understanding and knowing what he's doing and knowing the ramifications." RP 1009. When the court asked defendant if anyone had threatened or forced him to plead guilty against his will, defendant responded "no." RP 1011-1012. Defendant orally pleaded guilty to all four counts on the record and he

signed the written plea form. RP 1017; CP 51-59. It is only after defendant had been incarcerated and his son had served his sentence and been released⁵, that defendant has brought this motion to withdraw his plea.

The trial court denied defendant's motion to withdraw his plea under the review of only CrR 4.2(f). The fact that the trial court found defendant failed to show a manifest injustice under CrR 4.2(f) shows the difficulty defendant is presented with here in attempting to show not only manifest injustice, but also relief under CrR 7.8(b) when the correct standard is applied. Defendant's plea was voluntarily, knowingly, and intelligently made. He fails to show grounds for relief under CrR 7.8(b) and this court should affirm the trial court's denial of defendant's motion to withdraw his plea based on the substantial evidence in the record showing it was knowingly, voluntarily, and intelligently made.

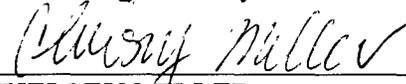
⁵ Defendant's son's offender score was recalculated by the State, his sentence was reduced and he was released from prison in January of 2012. 1/25/13 RP 4.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm the trial court's denial of defendant's motion to withdraw his plea.

DATED: June 5, 2014

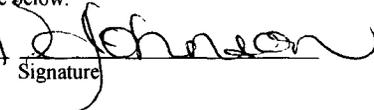
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Certificate of Service:

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.


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