

NO. 49113-3-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAYLIN J. IRISH,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The guilty plea was not knowing, intelligent and voluntary, in violation of constitutional due process, because Jaylin Irish was coerced into entering the plea.

2. In the absence of substantial evidence in the record, the trial court erred in finding:

The defendant ultimately decided of his own accord to accept the State's plea offer. Mr. Olbertz met his obligation to actually and substantially assist the defendant in deciding whether to plead guilty. Mr. Olbertz thoroughly and sufficiently reviewed with the defendant the statement of defendant on plea of guilty that was later accepted that day by the court.

Finding of Fact (FOF) 5; Clerk's Papers (CP) 104.

3. In the absence of substantial evidence in the record, the trial court erred in finding:

On the afternoon of September 10, 2013, the court engaged the defendant in a change of plea hearing. The court was satisfied that the defendant was making a knowing, voluntary, and intelligent decision to plead guilty to assault in the first degree and rendering criminal assistance in the first degree. Accordingly, the court accepted the defendant's guilty plea.

FOF 6; CP 104.

4. The trial court erred in entering the following Conclusion of

Law:

The defendant has not carried his burden to establish a manifest injustice that would warrant the withdrawal of his guilty plea. That defendant entered that plea knowingly, voluntarily, and intelligently. He made the decision to plead guilty and forgo his trial after full consideration with his attorney. That attorney more than adequately assisted the defendant in the decision of whether to plead guilty.

Conclusion of Law 1; CP 105.

5. The trial court erred in denying the motion to withdraw the guilty plea.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal court rule 4.2(f) directs a court to allow a request for plea withdrawal made before the entry of the final judgment if there is a manifest injustice in permitting the plea to stand. Where Mr. Irish moved to withdraw his plea before sentencing on the basis that the plea was involuntarily coerced due to fear that his attorney was not prepared for trial and that he faced approximately forty years in prisons if convicted, did the court deny Mr. Irish's right to due process of law and should he be allowed to withdraw his guilty plea? Assignments of Error No. 1, 2, 3, 4, and 5.

2. A guilty plea is involuntary if it is the product of coercive fear, promise and persuasion. Is Mr. Irish's plea involuntary where the offer was presented on the day of trial and where he believed that his attorney was

unprepared to proceed to trial that day, and where he faced approximately forty years in prison if convicted of the charges? Assignments of Error No. 1, 2, 3, 4, and 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

The Pierce County Prosecutor's Office charged Jaylin Irish with three counts of assault in the first degree with firearm enhancements, one count of drive by shooting, and one count of rendering criminal assistance in the first degree. Clerk's Papers (CP) 1-3. The State alleged that Mr. Irish acted as an accomplice in an incident in which an individual named Demarcus Pate fired a weapon in the direction of people involved in a fight, and that he rendered criminal assistance by driving Pate a short distance from the scene of the incident so that he would not be apprehended by police, and then let Pate get out of the car so that he could fire another round at the people involved in the fight. CP 1-3, 4-5.

The case came for jury trial on September 9, 2013 before the Honorable Kathryn Nelson. 1Report of Proceedings¹ at 3-64. The court

¹The record of proceedings consists of five volumes: 1RP—September 9, 2013 (pretrial motions); 2RP—September 10, 2013 (change of plea hearing); 3RP—October 18, 2013 (sentencing hearing); 4RP—April 28, 2016 (motion to withdraw plea hearing) and 5RP—May 26, 2016 (motion to withdraw plea and re-sentencing).

heard several pretrial motions on September 9, and the following morning Mr. Irish and his attorney Zenon Olbertz met for several hours to discuss a potential plea agreement offered by the State. 2RP at 67-68, 2RP at 69-71. Mr. Irish also met with his mother Rebecca Green in a jury room for approximately an hour during lunch that day 4RP at 105. Mr. Olbertz was present during some of the jury room during meeting 4RP at 103-05. After the lunch break, Mr. Irish entered a guilty plea to first degree assault (count I) and first degree rendering criminal assistance (count IV). 2RP at 72-75; CP 4-5 6-15. After inquiry, the court was satisfied that Mr. Irish was making a knowing, voluntary, and intelligent decision to plead guilty to the two counts and the court accepted his plea. 2RP at 72-75.

The court informed Mr. Irish that he would be giving up constitutional rights by pleading guilty, including the right to proceed to jury trial. 2RP at 72. At the conclusion of the colloquy, the judge stated he would accept Mr. Irish's plea of guilty. 2RP at 72.

Mr. Irish's written plea statement contains the following recitation:

On March 24, 2012, in the City of Tacoma, I drove my car . . . to the area of South 45th street. . . . I went there because I heard there was going to be a fight in that location. When I arrived, I saw several people fighting. I then saw one person pull out a gun and fire one shot towards some of the people he had been fighting with. The shooter got into my car, and I drove him north on South Alder Street to get him away from the scene so he could avoid apprehension by

law enforcement. As we reached the intersection of South Alder Street and South 43rd Street, the shooter told me to stop and let him out of the car so that he could fire another round at the people he had previously shot at. I agreed to let him out. When I drove off, I heard a gunshot.

4RP at 157; CP 14.

Mr. Irish later contacted his attorney, Zenon Olbertz, and stated that he wanted to withdraw his plea. 3RP at 84-92. Mr. Olbertz, stated at sentencing on October 18, 2013 that new counsel should be appointed because he had become a witness to a long period of negotiation that occurred prior to the change of plea on September 10. 3RP at 84-93. The trial court did not appoint new counsel, did not address the motion to withdraw his guilty plea, and instead proceeded with sentencing. 3RP at 85-92.

Mr. Olbertz argued that Mr. Irish was 18 at the time of the change of plea and that his role in the incident was limited to driving Demarcus Pate after he got into Mr. Irish's car after he fired a gunshot which hit the tailgate of an unoccupied pickup truck.² 3RP at 90. He argued that Mr. Irish was not the principal in the incident, that he did not have a gun, and that Pate was the person who fired the shot. 3RP at 91.

After hearing argument, the court imposed a standard range sentence

²Jaylin Irish was 16 years old at the time of the offense, which occurred March 24, 2012. 4RP at 109.

of 120 months for first degree assault and 15 months for first degree rendering criminal assistance, to be served concurrently. 3RP at 92, 4RP at 99.

Mr. Irish appealed and this Court vacated his sentence and remanded the case in order to permit him to move to withdraw his plea with new counsel. *State v. Irish*, 2015 WL 1472196, (No. 45509–9–II; March 31, 2015). On appeal, Mr. Irish argued that (1) the information failed to include all the essential elements of first degree rendering criminal assistance and (2) the trial court violated his right to counsel when it denied his trial counsel's motion to withdraw. *Irish*, 2015 WL 1472196 at *1.

This Court rejected Mr. Irish's challenge to the conviction for first degree rendering criminal assistance, finding that the State's charging document sufficiently alleged the essential elements of the charge. The Court found, however, that the trial court violated Mr. Irish's right to counsel by denying his trial counsel's motion to withdraw due to a conflict of interest because counsel had been a witness to Mr. Irish's allegation that counsel pressured him to plead guilty. *Irish*, 2015 WL 1472196 at *5. This Court vacated Irish's sentence, remanded the case to allow him to move to withdraw his guilty plea, and ordered the trial court to appoint new counsel. *Irish*,

2015 WL 1472196 at *5.

After the Mandate issued, Mr. Irish was appointed new counsel and a motion to withdraw his guilty plea was heard April 28, 2016. 4RP at 96-161, 5RP at 164-195; CP 77-78. The defense motion for withdrawal of plea pursuant to CrR 4.2(f) states in part:

The Defendant's guilty pleas were involuntary, and were not made knowingly and intelligently, due to prior counsel's ineffective assistance, as set for the above, and **due to the extreme duress that the Defendant was under at the time of his pleas, due to the coercive nature of his discussions and interactions with his counsel on the day of the trial and his guilty please [sic] herein.**

CP 77 (emphasis added).

Mr. Irish and his mother Rebecca Green explained the circumstances surrounding his guilty plea and his reasons for wanting to withdraw the plea. 4RP at 100-28, 129-59. Ms. Green testified on September 10, 2013—the morning of trial following a day of pretrial motions—she and her son met for approximately an hour in a jury room, and that when they reached a lunch break she thought her son's intention was to proceed to trial that day and to not accept the plea agreement that was offered. 4RP at 103-05. She stated that when she returned to the courthouse that day at 1:30 p.m., she learned that her son was going to plead guilty. 4RP at 106. She stated that her son

said that he wanted to withdraw his plea when she talked with him by phone later that day. 4RP at 109. She stated that she thought her son was adamant that he was going to proceed to trial and that he was pressured to plead guilty “to get the court case over.” 4RP at 123.

Mr. Irish said that while in custody prior to the trial date he met with Mr. Olbertz three to four times and talked with him over the phone five times. 4RP at 130, 131. He stated that there was a lack of communication with his attorney and the he felt that Mr. Olbertz was not focused on going to trial, did not develop a trial strategy, and that his focus was to get a plea deal. 4RP at 132.

He states that on September 9, 2013, his attorney presented him with a plea offer from the State. 4RP at 134. Mr. Irish stated that after he received the plea offer, he was allowed to talk with his mother in the jury room. 4RP at 137. He said that Mr. Olbertz came into the room at the end of the meeting and that he told him that he wanted to proceed to trial. 4RP at 138.

Mr. Irish stated that Mr. Olbertz told him on September 10 to sign the change of plea form and that he did not “believe we can beat this in trial.” 4RP at 139-40. He said that during lunch Mr. Olbertz came to the jail and said that he was looking at a forty to fifty years in prison, that he did not

believe they would win at trial and to accept the plea agreement, so he signed the change of plea document at the jail. 4RP at 140. Mr. Irish stated that he did not believe that there was an alternative, that he did not feel that Mr. Olbertz was prepared try the case, and this he “felt scared and pressured.” 4RP at 140. He stated that he signed the plea agreement because he felt like he had no other option, and because he was scared when he talked with his attorney in the jail because “I just felt like he was unprepared for trial” and “I didn’t feel like he was going to do his best to represent me in that trial because he wasn’t talking about anything about trial.” 4RP at 144. He stated he felt that Mr. Olbertz was completely prepared to go to trial, he would have not pleaded guilty. 4RP at 159.

Trial counsel Zenon Olbertz stated that he went over the plea agreement with Mr. Irish, and discussed aspects of the plea including the concept of accomplice liability, firearm enhancements, and the amount of time he was facing. 5RP at 166-85. He stated that he did not coerce or force Mr. Irish to accept the plea and that he was ready to proceed to trial. 5RP at 174.

After hearing argument, the trial court denied the motion to withdraw the plea. 5RP at 195; CP 106-07 . The court found Mr. Irish “entered that plea

knowingly, voluntarily, and intelligently” with full consultation with his attorney. 5RP at 194-95. The court entered an order denying the motion and findings of fact and conclusions of law on June 2, 2016. CP 103-05, 106-07.

After making its ruling, the court proceeded with re-sentencing after a brief recess. 5RP at 196. The court sentenced Mr. Irish to the same sentence as originally imposed with the exception of modifying the legal financial obligations for a DNA collection fee. 5RP at 198-99; CP 88-99.

Timely notice of appeal was filed June 22, 2016. CP 108-09. This appeal follows.

D. ARGUMENT

1. **THE COURT IMPROPERLY REFUSED MR. IRISH'S REQUEST TO WITHDRAW HIS GUILTY PLEA WHERE THE PLEA WAS INVOLUNTARY BECAUSE IT WAS THE RESULT OF COERCIVE FEAR**

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). To be valid, a plea must represent a voluntary and intelligent choice among the alternatives

available to the defendant. *In re Personal Restraint of Peters*, 50 Wn.App. 702, 704, 750 P.2d 643 (1988). The remedy for an invalid plea is the opportunity to withdraw the plea. *State v. Miller*, 110 Wn.2d 528, 535, 756 P.2d 122 (1988).

A timely request to withdraw a guilty plea should be granted if the request is based on a fair and just ground for withdrawal. When a defendant questions the waiver of his right to trial and moves to withdraw his guilty plea prior to sentencing, courts should liberally grant such motions if there is a fair and just reason for doing so.

A guilty plea involves the simultaneous waiver of several fundamental constitutional rights. The defendant bears the burden of showing a manifest injustice. *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). On the other hand, the State bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). The denial of a motion to withdraw guilty is reviewed for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

A guilty plea that is the product of, or is induced by coercive threat, fear, persuasion, promise, or deception is involuntary in violation of due process. *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). CrR

4.2(f) permits a defendant to withdraw a guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” Appendix A. A “manifest injustice” is obvious, directly observable, overt, not obscure. *Branch*, 129 Wn.2d at 641. “Manifest injustice is proved by showing that the plea is involuntary.” *State v. Hurt*, 107 Wn. App. 816, 829, 27 P.3d 1276 (2001) (citing *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). See also *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

CrR 4.2(d) provides:

(d) Voluntariness. The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

In order to be valid, a guilty plea must thus be voluntary. The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

In the case at bar, there are compelling reasons for allowing Mr. Irish to withdraw his guilty plea. The record shows Mr. Irish was pressured into pleading guilty by his fear that his attorney was unprepared for trial and that he predicted that Mr. Irish would be convicted if he went to trial. 4RP at

140, 141. In conjunction with an hazy understanding of the concept of accomplice liability and, the pressures he experienced at the 11th hour plea offer compelled Mr. Irish to enter a plea that was not a product of his free and voluntary choice. Under these circumstances, the trial court should have permitted Mr. Irish to withdraw his plea.

In *Frederick*, the Supreme Court explicitly rejected the argument that a defendant's denial of improper influence in open court precludes him or her from claiming coercion at some later time. *State v. Frederick*, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), overruled on other grounds by *Thompson v. Department of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). The Court held that “[t]he federal courts have clearly held that such a denial, while highly persuasive, is not conclusive evidence that a plea is voluntary.” *Frederick*, 100 Wn.2d at 557 (citations omitted).

Coercion may render a guilty plea involuntary, irrespective of the State's involvement. In this case Mr. Irish argues that his plea was coerced because he was only given a choice of taking the plea for 120 months or facing forty to fifty years in prison by going to trial with an attorney who predicted conviction and who did appear, from Mr. Irish's perspective, to be prepared for trial. 4RP at 140, 141; CP 77-78. The plea therefore, was the

product of coercive pressure.

In *Frederick*, the Court recognized that plea bargaining pressures may, in particular circumstances, render a plea involuntary, and that coercion by someone other than the State may render a guilty plea involuntary. *Frederick*, 100 Wn.2d at 556. The *Frederick* Court reversed the trial court's determination that the defendant was a habitual offender because the trial court did not permit the defendant to present evidence that one of his prior convictions based on a guilty plea was invalid because his plea was allegedly coerced by a codefendant. The Court held as follows:

We emphasize, however, that a defendant who seeks to later retract his admission of voluntariness will bear a heavy burden in trying to convince a court or jury that his admission in open court was coerced. The task will be especially difficult where there are other apparent reasons for pleading guilty, such as a generous plea bargain or virtually incontestable evidence of guilt. Nevertheless, a defendant should not be denied the opportunity to at least present evidence on the issue.

Frederick, 100 Wn.2d 558.

It is clear, that agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements. *State v. Lee*, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997). However, the court in *Frederick* recognized that even plea bargaining

pressures may render a plea involuntary. *Frederick*, 100 Wn.2d at 556. Entry of a guilty plea in return for dismissal of other charges does not per se render a plea involuntary. *Frederick*, 100 Wn.2d at 555-56.

In this case, Mr. Irish was coerced into taking the plea because he really had no choice and was forced to plead guilty. Mr. Irish felt that his trial attorney was unprepared to go to trial, had not discussed trial strategy with him and predicted conviction. Mr. Irish felt he therefore had no choice except to plead guilty. 4RP at 140, 141. This pressure made his plea involuntary. See, *Frederick*, 100 Wn.2d at 556.

The fear Mr. Irish described that his counsel was unprepared to go to trial, the amount of time he faced, the feeling that he had no alternative except to sign were the motivating factors to sign the plea agreement, not the agreement by the State to dismiss several charges. 4RP at 140, 141, 144. Mr. Irish stated that he entered the plea “[b]ecause I felt like I didn’t have no alternative. Basically, I felt that that was the only alternative I could do. Like, basically, I felt scared and pressured. Like, I felt like that was the only way out is just sign the deal because I was scared of the time.” 4RP at 140. Mr. Irish was facing a sentence that would result in incarceration until he was in his fifties. Moreover, he stated that his attorney repeatedly informed him

he was not likely to prevail if he went to trial. 4RP at 140, 141.

Thus, Mr. Irish was presented with little choice but to plead guilty, given his lack of confidence in his attorney in being able to convince a jury that he was not an accomplice to the counts of first degree assault and did not render criminal assistance. Accordingly, he has shown a manifest injustice justifying withdrawal of his guilty plea. *Frederick*, 100 Wn.2d at 556. The court abused its discretion by denying the motion when its decision was based on untenable grounds and for untenable reasons. *Marshall*, 144 Wn.2d at 280.

Mr. Irish asserted his innocence and presented fair and just reasons for questioning the prior waiver of his right to trial. The lower court should have permitted him to withdraw the plea.

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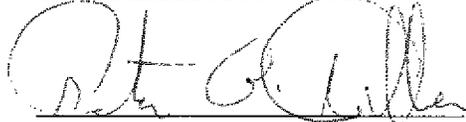
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F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Irish respectfully urges this Court to reverse the denial of his motion to withdraw guilty plea, reverse his convictions, and remand for further proceedings to allow him to withdraw his guilty plea.

DATED: November 30, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

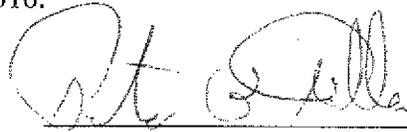
PETER B. TILLER-WSBA 20835
Of Attorneys for Jaylin Irish

CERTIFICATE OF SERVICE

The undersigned certifies that on November 30, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste.300, Tacoma, WA 98402-4454, and copies were mailed by U.S. mail, postage prepaid, to the following:

Michelle Hyer Pierce County Prosecutor 930 Tacoma Ave S Rm 946 Tacoma, WA 98402-2102 PCpatcecf@co.pierce.wa.us	Mr. David Ponzoha Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
Mr. Jaylin Irish DOC# 369759 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326 <u>LEGAL MAIL/SPECIAL MAIL</u>	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 30, 2016.



PETER B. TILLER

APPENDIX A

CrR RULE 4.2 PLEAS

- (a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.
- (b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts, the defendant shall plead separately to each.
- (c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.
- (d) Voluntariness. The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.
- (e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.
- (f) Withdrawal of Plea. 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 defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.
- (g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:
(NOTE - See the Statement of Defendant on Plea of Guilty and the Interpreter's Declaration at:

http://www.courts.wa.gov/rules/Word/supCrR4.02_GP.doc

(h) Verification by Interpreter. If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

TILLER LAW OFFICE

November 30, 2016 - 4:51 PM

Transmittal Letter

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