

NO. 49567-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

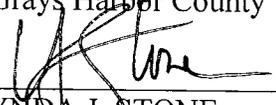
JACOB L. PERRY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

COURT COMMISSIONER CHRISTOPHER BATES – PLEA HEARING
THE HONORABLE DAVID L. EDWARDS – SENTENCING JUDGE

BRIEF OF RESPONDENT

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ASSIGNMENTS OF ERROR

Respondent accepts Appellant's Assignments of Error as stated.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent accepts Appellant's Issues Pertaining to Assignments of Error.

STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case with the following exception. The prosecutor simply requested her brief and the evaluation conducted by Dr. Krueger be incorporated into the record, which is what the clerk's minutes reflects. RP 11 and Supp. CP 44.

ARGUMENT

1. THE APPELLANT'S PLEA WAS VOLUNTARY.

Under CrR 4.2(d), the Court may 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.

A motion to withdraw a plea of guilty after sentencing is governed by CrR 7.8, which states the Court may relieve a party from a final judgment, order, or proceeding for mistakes, inadvertence, surprise,

excusable negligence, newly discovered evidence, or fraud. However, this is not what Appellant has argued.

It appears Appellant has argued under CrR 4.2(f). That rule states, in pertinent part, that “[t]he 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.” A manifest injustice is one which is obvious, directly observable, and not obscure. *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Four indicia of manifest injustice have been recognized by the Washington State Supreme Court: 1) the defendant was denied effective assistance of counsel; 2) the plea was not ratified by the defendant; 3) the plea was involuntary; 4) the plea agreement was not kept by the prosecution. *Id.* at 597. A defendant has the burden of establishing a manifest injustice “in light of all the surrounding facts of his case.” *State v. Dixon*, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984); *see also State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (describing the burden defendant must satisfy in order to establish a manifest injustice).

Proving a manifest injustice is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

An involuntary plea creates a manifest injustice supporting its withdrawal. *Taylor*, 83 Wn.2d at 597. “Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). When a defendant admits to reading, understanding, and signing a guilty plea statement, the plea is presumed voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Indeed, when the court engages the defendant in a colloquy on the record and satisfies itself that the plea is voluntary, the presumption of voluntariness is “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted). *See also In re Pers. Restraint of Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980) (court justified in relying on defendant’s acknowledgement that he had read plea statement prepared by his attorney and that it was true). The defendant’s high burden of proof requires more evidence than “a mere allegation by the defendant.” *Osborne*, 102 Wn.2d at 97.

Here, Appellant argues his plea was not voluntary because the record of the plea hearing does not affirmatively show that he understood the law, the facts, and the relationship between the two. Brief of Appellant at 7. This is inaccurate.

In paragraph 16 of the Statement on Plea of Guilty it asks the Appellant to state in his own words what he did that made him guilty of this crime. His statement was, “April 11, 2016, I assaulted Damien Anderson.” CP 8. Assault is defined as “The threat or use of force on another that causes that person to have a reasonable apprehension of imminent *harmful* or *offensive* contact.” *Black’s Law Dictionary* 109 (7th ed. 1999) emphasis added. The Statement on Plea of Guilty later states, “I have read or someone has read to me everything printed above, and in Attachment “A,” if applicable, and *I understand in full*. I have been given a copy of this statement. I have no more questions to ask the judge.” CP 8 emphasis added. Appellant then signed the Statement on Plea of Guilty indicating he completely understood. *Id.* Further, his defense attorney signed stating, “I have read and *discussed* this statement with the respondent and believe that the respondent is competent and *fully understands* the statement.” *Id.* emphasis added. There is nothing in the record to show that during the discussion the defense had with the Appellant that defense did not explain the definition/elements of assault to him. However, there is evidence on the record to show that the Appellant actually did fully understand. During the plea colloquy, the Commissioner asked, “You understand you are charged with assault fourth degree?” RP

4. The Appellant responded, “Yes, Your Honor.” *Id.* The Commissioner then asked, “And you understand the *elements* of that charge?” to which the Appellant stated, “Yes, Your Honor.” *Id.* emphasis added.

The trial court did not abuse its discretion when it accepted the Appellant’s guilty plea. Further, Appellant has failed to establish a manifest injustice warranting withdrawal of his plea.

2. THE COURT DID NOT EXCEED ITS AUTHORITY BY IMPOSING A MANIFEST INJUSTICE DISPOSITION.

A court may impose a disposition outside the standard range if it determines that a standard range disposition would “effectuate a manifest injustice.” RCW 13.40.160(2). A “manifest injustice” occurs if a disposition would either “impose an excessive penalty on the juvenile or would impose a serious danger to society in light of the purposes of the [Juvenile Justice Act].” RCW 13.40.020(17). The purposes of the Act include protecting the citizenry from criminal behavior; making the juvenile offender accountable for his or her criminal behavior; providing for punishment commensurate with the age, crime and criminal history of the juvenile offender; and providing necessary treatment, supervision and custody of juvenile offenders. *See* RCW 13.40.010(2).

Appellant argues that the court should not have relied on the State’s Memorandum in Support of Manifest Injustice as a basis for

imposing a Manifest Injustice Sentence. Brief of Appellant at 9.

However, when reviewing the record the court relied on the State's memo, as well as, the psychological evaluation conducted by Keith Krueger, Ph.D. and the Juvenile Probation Counselor's (JPC) first-hand knowledge of the Appellant. RP 9 – 11 and 18 – 19.

While the Court found five aggravating factors, which supported a Manifest Injustice disposition: (1) the [Appellant] has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion contract, (2) the [Appellant] exhibits dangerous and reckless behavior, which threatens the community, (3) the [Appellant's] parents lack control over him, (4) the [Appellant] is a high risk to re-offend, and (5) the [Appellant] does not take responsibility for his actions, the Court mainly focused on the Appellant being a high-risk to reoffend, the lack of parental control, and the Appellant's need for treatment. CP 11, RP 16 – 18.

A. The respondent is at a high risk to reoffend.

Protecting society from dangerous juvenile offenders is a recognized reason for a disposition outside the standard range. *State v. S.H.*, 75 Wash.App. 1, 11, 877 P.2d 205 (1994). *review denied*, 125 Wash.2d 1016, 890 P.2d 20 (1995). A finding that a juvenile poses a high

risk to reoffend is reversible only if there is not substantial evidence in the record to support the finding. *State v. J.N.*, 64 Wash.App. 112, 114, 823 P.2d 1128 (1992).

The respondent was placed on a deferred disposition on an Assault 3° in September of 2015, and by October of 2015 he had committed another offense. CP 39. Since that time, the respondent committed this Assault 4° and on May 5, 2016 he committed another Assault 4° for which he is also before the Court on for sentencing. CP 39. Even while on Community Supervision for a very serious assault, the respondent continues to engage in assaultive behavior. CP 39.

In his evaluation, Dr. Krueger noted that there have been several physical confrontations between the Appellant and others, and the Appellant's Facebook page would suggest a lot of conflicts with others. Supp. CP 32.

During the disposition hearing, the JPC stated while working directly with the Appellant, instead of his behavior getting better it was escalating. RP 9. The JPC went on to say the Appellant was becoming more dangerous to himself and the community. *Id.* Further, the sentencing judge stated he believed the Appellant was a high-risk to re-offend. RP 16. The Court said, "History has proven that. Every time

we've had [the Appellant] in here and set rules for him to follow, he has gone out and committed new criminal behavior." *Id.*

B. The respondent's parents lack control over him.

Courts may consider a respondent's parents' lack of parental control as an aggravating factor warranting a manifest injustice disposition. *See State v. T.E.C.*, 122 Wash.App. 9, 21, 92 P.3d 263, 268 (2004) ("[L]ack of parental control may be a valid aggravating factor in supporting a manifest injustice disposition." (Citation omitted.)); *State v. S.S.*, 67 Wash.App. 800, 817, 840 P.2d 891, 901 (1992) ("We hold that lack of parental ability to control a child's criminal behavior is a proper aggravating factor for the court to consider."). *In S.S.*, the Court of Appeals, when upholding the manifest injustice sentence of a habitual joy-rider, explained that poor parental control of a juvenile can create an increased threat to the community:

If a child cannot be controlled by his or her parent, the danger or risk to society is commensurately increased. Whether or not a child's parent can exert normal control over a child's behavior is clearly related to the degree of risk to society where the child's behavior itself constitutes such risk.

Id. Logically, a youth who cannot or is not controlled by his or her parents is a greater risk to the community than one who is controlled by his or her parents.

Dr. Krueger noted that the Appellant said his mother is his “Best friend.” Supp. CP 32. The Appellant was very inconsistent with what he said about his father. He vacillated between he did not like his father to he loved his father but did not want to be around him to his father is a “Prick” to he missed his father. Supp. CP 31. The Appellant told Dr. Krueger about a recent incident where the Appellant was on the run and was riding his bicycle. Supp. CP 32. He reported his father intentionally hit the bicycle bending the tire so the Appellant could no longer use the bicycle. Supp. CP 32. The Appellant called the police, and his father was arrested. Supp. CP 32.

The Appellant’s mother seems to have a severe substance abuse issue. Supp. CP 34. Early on in one of the Appellant’s other cases, he and his mother appeared in court at 8:30 a.m. The Court ordered Mrs. Perry to take a UA, which came back positive for alcohol and morphine. Supp. CP 34.

The Deputy Prosecuting Attorney had a conversation with the appellant’s father who demanded the appellant be held accountable when

he was picked up on two outstanding warrants. CP 41. It was reported by Mr. Perry and the police that the appellant had stolen Mr. Perry's credit card and had used it. CP 41. Furthermore, the appellant had stolen Mr. Perry's truck and had been driving around town while he was on warrant status. CP 41. Mr. Perry insisted the appellant be charged with these incidents. CP 41. However, the next day the deputy prosecuting attorney was informed by the police that Mr. Perry had signed waiver of prosecutions for both of those matters and refused to give any kind of statement. CP 41.

Further, the Deputy Prosecuting Attorney was notified by the JPC that both Mr. and Mrs. Perry knew the appellant had outstanding warrants for his arrest, but both refused to turn him in. CP 41. Additionally, Mrs. Perry stated she was not going to turn him in so he would lose his summer vacation. CP 41.

It does not appear that the respondent's parents hold him accountable for anything he does. Further, when they give him directives he refuses to cooperate with them with no consequences. Supp. CP 33. Dr. Kruger reported the respondent has little respect for his father and described him as someone who would readily bail the respondent out of trouble. Supp. CP 33 – 34.

During the dispositional hearing, the Court asked the JPC what kind of evidence based treatment probation had provided to the Appellant. RP 10. The JPC said that Functional Family therapy was referred. *Id.* at 11. However, he went on to say, “The family refused to participate. I spoke with our functional family therapist a number of times. She tried everything she could to get them to engage in services and there just wasn’t any having it.” *Id.* The Court said it was apparent that the Appellant’s parents lack any reasonable measure of control over him, and he does pretty much as he pleases. *Id.* at 16. The Court went on to say, “Not only do they lack control over him, they lack a willingness and/or ability to attempt to engage in services that are directed to help [the Appellant] and the family.” *Id.* at 17. The court was concerned that the parents flatly refused to participate in Functional Family Therapy. *Id.*

C. A manifest injustice sentence is necessary to meet the respondent’s treatment needs.

The court may consider the respondent’s treatment needs when addressing a request for a manifest injustice disposition. *See T.E.C.*, 122 Wash.App. at 17, 92 P.3d at 266-267 (“It is also proper for the trial court to consider a juvenile’s need for treatment in relation to a manifest injustice determination.” (Citation omitted.)). In cases where a respondent is deemed to be at a high risk to reoffend, “[a]n extended period of

structured residential care and specialized treatment may be appropriate.”

Id. (internal quotation marks and citation omitted).

According to Dr. Krueger, the Appellant needs to learn societal rules which will lead to more appropriate societal behaviors, and then he needs to learn to obey them. Supp. CP 33. Dr. Krueger opined that typical outpatient mental health counseling would not be nearly intensive enough by itself. Supp. CP 34. Dr. Krueger stated the Appellant needs to learn to start telling the truth by being confronted (in groups, in counseling sessions, in peer interactions). Supp. CP 34. Dr. Krueger went on to say the Appellant needs to be in a placement where he will not be able to get away with the lying, the disruption, the socially-inappropriate vulgarity, etc. that he has been demonstrating so persistently at such a young age. Supp. CP 34.

During disposition, the Court stated the Appellant’s treatment needs cannot be addressed in the community, partly because neither the Appellant, nor his parents will allow the issues to be treated. RP 17. The Court said that the Appellant has reached a point now where he needs such intense therapy that it can only be provided in a secure setting. RP 17-18.

3. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD APPELLATE COSTS.

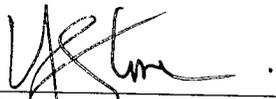
The Respondent is not asking for, nor will ask for, Appellate costs.

CONCLUSION

For the above reasons, the Respondent respectfully requests this Court to conclude that the Appellant has failed to meet his heavy burden of proving that his plea was involuntary and to affirm the disposition.

DATED this 21st day of November, 2016.

Respectfully Submitted,

By: 
LYNDA J. STONE
Deputy Prosecuting Attorney
WSBA #38749

LJS/lh

GRAYS HARBOR COUNTY PROSECUTOR

November 21, 2016 - 10:30 AM

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