

COA No. 28902-8-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

LARRY GLEN GATEWOOD, JR., Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

A. The court erred by denying Larry G. Gatewood's motion to withdraw guilty plea.

### Issue Pertaining to Assignment of Error

1. Did the court err by denying Mr. Gatewood's motion to withdraw guilty plea when he was coerced into making his plea? (Assignment of Error A).

## II. STATEMENT OF THE CASE

Mr. Gatewood was charged by information on June 10, 2009, with several offenses involving, among others, Toni Tusken, his wife. (CP 1-3). A most serious offense notice was filed on June 16, 2009. (CP 25).

Trial was scheduled for February 2010. (CP 55). On February 19, 2010, the State filed a motion to recognize Ms. Tusken as a material witness and for an order commanding her to testify as a prosecution witness and to enter into a recognizance bond of \$100,000, conditioned that she appear and testify for the State "and in default of his/her entering into such recognizance bond, that [she] be ordered to be detained in the custody of the Sheriff of Spokane County, Washington, until the trial . . . in which his/her testimony may be required, or until a video tape deposition

may be taken, which will be set as soon as possible.” (CP 99-100).

The motion was based on prosecution investigator Christopher K.

Hall’s certificate, which stated in part:

That Tusken is a crucial and vital witness for the successful prosecution of this case; that her lack of cooperation, possible absence at trial and intentional avoidance is of concern to the prosecution; that based on all the above facts, it is probable she will not willingly or voluntarily make herself available for any prosecution or defense interview(s) or for the defendant’s trial; that the trial is now set for February 22, 2010; that due to the seriousness of the charge against the defendant, it may be necessary for the court to issue a Material Witness Warrant for the arrest and detention of Toni Jean Tusken to allow for her presence at trial or a video taped deposition of her testimony, should she be contacted by any law enforcement agency regarding this or any other matter. (CP 102).

The court entered an order and warrant recognizing material witness on February 19, 2010. (2/23/10 RP 26; CP 103). It “[o]rdered that s/he be taken into custody and detained in the custody of the Sheriff of Spokane County, Washington, in lieu of \$100,000 bond until the trial of said action . . .” (CP 104).

On February 23, 2010, a hearing was held regarding the material witness. (2/23/10 RP 26-33). Ms. Tusken had been in jail for five days. (*Id.* at 29). The court noted the material witness warrant was in effect, but reduced the bond to \$10,000. (2/23/10 RP 33; CP 124). Ms. Tusken’s grandmother apparently posted

bond for her so she was released with conditions at the time the plea agreement was negotiated. (3/11/10 RP 8).

On February 24, 2010, the court permitted amendment of the information to charge Mr. Gatewood with count I, residential burglary; count II, third degree assault; count III, third degree assault; count IV, violation of a no-contact order; count V, stalking; count VI, stalking, count VII, harassment; and count VIII, harassment. (CP 129, 130-132). The information was amended in order to facilitate the plea agreement. (2/24/10 RP 2).

The guilty plea hearing and sentencing were held the same day. (2/24/10 RP 2). With a combination of exceptional sentences above and below the standard range, the parties agreed to a total of 18 years confinement. (*Id.* at 14). Mr. Gatewood pleaded guilty to the eight counts in the amended information. (*Id.* at 10-11). The court signed the judgment and sentence conforming to the plea agreement. (2/24/10 RP 22; CP 158-173). The court also signed agreed findings of fact and conclusions of law on the exceptional sentence. (2/24/10 RP 21; CP 143-145). The judgment and sentence was amended on February 25, 2010, to reflect community custody for the stalking counts as well as for counts II-IV. (2/25/10 RP 2-3; CP 174-187).

Mr. Gatewood subsequently moved to withdraw his guilty plea on the basis that it was involuntary because of coercion. (CP 188). His certificate in support of the motion stated:

I am the defendant on the above-titled case. I entered a guilty plea on February 25, 2010 to a number of charges, with a total sentence of 18 years. I wish to withdraw my plea because I feel it was made due to threats. Specifically, the threat that I would get a life without parole sentence if I did not accept the State's plea offer. I further believe that the threats and pressure on my wife to testify or else be held in jail on a material witness warrant, and possibly lose her job and her kids, also constitute threats to me because I would not want any of that happen to her. These things pressured me into taking a plea deal I really did not want to accept. (CP 190).

On March 11, 2010, the court held a hearing on Mr. Gatewood's motion to withdraw guilty plea. (3/11/10 RP 3). Defense counsel advised the court that "Mr. Gatewood agreed that what I had in the certificate was accurate – for his reasons, so I don't have much more to add than that." (*Id.* at RP 5). The court recited the facts attendant to entry of the guilty plea and the defense agreed with them. (*Id.* at 9-11). Finding good cause did not exist and a manifest injustice had not been shown, the court denied the motion and incorporated its oral ruling:

Okay. So it sounds to me – I mean, 216 months is an awful lot of time. And it sounds to me as if Mr. Gatewood had a little bit of buyer's remorse here, because we're not even quite a month out and

he's now indicating that he's not happy with the plea, in substance, and he wants to withdraw it based upon a claim that he was forced into taking the plea because he had no choice.

The case law that's been set out in the documents provided by both counsel indicates that a plea can be withdrawn upon a finding of manifest injustice – something that's obvious, not obscure – and the burden is on the defendant to prove the existence of the injustice. Based upon what I've got here, I do not – I cannot make that finding. So I will deny the motion to withdraw the plea. (3/11/10 RP 11-12; CP 197).

Mr. Gatewood appeals the denial of his motion to withdraw guilty plea. (CP 202).

### III. ARGUMENT

A. The court erred by denying Mr. Gatewood's motion to withdraw guilty plea when he was coerced into making his plea.

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." A "manifest injustice" is obvious, directly observable, overt, not obscure. *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). CrR 7.8 governs here because the motion was made after imposition of judgment and sentence. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005).

The defendant bears the burden of showing a manifest injustice. *Branch*, 129 Wn.2d at 641. 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).

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. An involuntary plea is a manifest injustice. *In re Pers. Restraint of Matthews*, 128 Wn. App. 267, 270, 115 P.3d 1043 (2005). Indeed, coercion of the accused to plead guilty is a basis for invalidating the plea regardless of whether there was any involvement or knowledge of the State in the coercion. *State v. Frederick*, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), *overruled on other grounds in part, Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999).

Mr. Gatewood first claims his plea was coerced because

he was only given a choice of taking the plea for 18 years or facing a life sentence without parole on his third strike. (CP 189, 190). Our Supreme Court has recognized that even plea bargaining pressures may render a plea involuntary. *Frederick*, 100 Wn.2d at 556. Mr. Gatewood was coerced into taking the plea because he really had no choice and was forced to plead guilty. This pressure made his plea involuntary. *Id.*

The coercion was also familial in that it involved Ms. Tusken, the wife of Mr. Gatewood. See *United States v. Cammisano*, 599 F.2d 851 (8<sup>th</sup> Cir. 1979). On February 23, 2010, a hearing for her first appearance as a material witness was held. Ms. Tusken had been in custody on a material witness warrant even though she said she would appear in court for trial. (2/23/10 RP 30, 32). Her counsel argued that being held in jail pending the trial might cause her to lose her job and her house, “a very high price to pay.” (*Id.* at 32). She had already spent four nights in jail. (*Id.* at 33).

Undue pressure was put on Ms. Tusken to testify against her husband. The State put her in the untenable position where the consequences she could face as a witness, not as a defendant, were dire. These threats were not only against Ms. Tusken, but also Mr. Gatewood, as he did not want her to lose her job and her

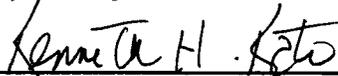
children as a consequence of being a material witness. (CP 190). With Ms. Tusken facing the pressure and threats to testify, which would have resulted in a life sentence without parole if he did not plead guilty, Mr. Gatewood was forced to accept the plea. (CP 189, 190). It was coerced, not voluntary. 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.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gatewood 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 this 10<sup>th</sup> day of November, 2010.

Respectfully submitted,

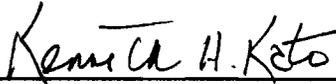


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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on November 10, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260-2043; and Larry G. Gatewood, #791845, Wash. Corrections Ctr., PO Box 900, Shelton, WA 98584. .

  
Kenneth H. Kato