

FILED

NO. 294030-III

OCT 05 2011

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

JOSE FRANCISCO GONZALEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00407-6

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ANITA I. PETRA, Deputy
Prosecuting Attorney
BAR NO. 32535
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ISSUES

1. **DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA?**
2. **WAS THE DEFENDANT DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?**

STATEMENT OF THE CASE

The defendant, Jose Francisco Gonzalez, brought this action to appeal the denial of his motion to withdraw his guilty plea, and to argue that he received ineffective assistance of counsel.

COURSE OF THE PROCEEDINGS

On May 7, 2009, the defendant entered pleas of not guilty to Count I, Identify Theft in the First Degree, and Count II, Theft in the Second Degree. (CP 1-2, 9). The Information also alleged an aggravating circumstance pursuant to 9.94A.535(2)(c), commonly referred to as "multiple current offenses." (CP 2). Bail was set at \$50,000. (CP 8). The State provided an offer letter to the defendant giving notice that

they intended to ask for a sentence of ten years.
(CP 33).

Due to this offer, the defendant decided to enter into a contract with the Metro Drug Task Force. (CP 34-38; RP 06/25/10, 27).

On June 18, 2009, the defendant entered pleas of guilty to both counts in the Information. (CP 10-18; RP 06/18/09, 2-5). The defendant was immediately released on his personal recognizance to fulfill his contact with the Metro Drug Task Force. (CP 19).

On July 9, 2009, the State moved to revoke the defendant's conditions of release, and the defendant was transported from the Franklin County Jail. (CP 20-22).

On July 16, 2009, the defendant's conditions of release were amended. Bail was set at \$50,000. (CP 23).

On August 20, 2009, the defendant sought an evaluation for a prison-based Drug Offender

Sentencing Alternative.¹ The Department of Corrections recommended that the defendant not be considered for the DOSA program. (CP 48).

On November 6, 2009, the defendant was set for sentencing, and the State filed a sentencing memorandum. (CP 29-48). During this hearing, the defense made arguments about the defendant's past DOSA history, and the Court wanted more information. (RP 11/06/09, 8-17).

On January 22, 2010, the court held a hearing to determine if the defendant was a proper candidate for a DOSA sentence. (RP 01/22/10, 3-37).

On May 13, 2010, the defendant's defense attorney, Shelly Ajax, had to withdraw as counsel due to a conflict, and Dan Arnold was appointed. (RP 05/13/10, 16). At this time, the defendant put the State on notice that he wanted to withdraw his guilty plea. (RP 05/13/10, 16).

¹ Drug Offender Sentencing Alternative hereinafter referred to as "DOSA."

On May 27, 2010, Mr. Arnold was disqualified from representing the defendant, and Mr. Richard Johnston was appointed. (RP 05/27/10, 24). Based on these new defense appointments and the need to get new counsel up to speed, the State was having difficulty getting the defendant sentenced. (RP 05/27/10, 24-25).

On June 7, 2010, the State tried to sentence the defendant, but his new attorney wanted to address DOSA again and requested transcripts from the hearing on January 22, 2010. (RP 07/07/10, 27-31).

On June 25, 2010, a hearing was held on the defendant's motion to withdraw his guilty plea taken on June 18, 2009. (RP 06/25/10, 19). The defendant's motion was denied². (RP 06/25/10, 36-37).

On September 23, 2010, the defendant was sentenced to 120 months confinement, and denied a

² A Supplemental Designation of Clerk's Papers was filed by Respondent on September 28, 2011, for the Findings of Facts and Conclusions of Law on Defendant's Motion to Withdraw Guilty Plea.

sentence under DOSA based on the previous hearing and arguments from both counsel. (CP 59; RP 09/23/10, 53-55). The State provided the court with certified copies of the defendant's criminal history in support of the aggravating circumstance, and the court entered findings on the exceptional sentence. (CP 57, 65-66; RP 09/23/10, 35, 53-55).

ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

The defendant first contends that the trial court abused its discretion in denying his motion to withdraw his guilty plea. This court will review a trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion. *State v. Zhao*, 157 Wn.2d 188, 197 FN5, 137 P.3d 835 (2006). Discretion is abused if it is exercised on untenable ground or for untenable reasons. *State v. Thang*, 145 Wn.2d 630,

642, 41 P.3d 1159 (2002). In addition, this Court may consider whether any reasonable judge would rule as the trial judge did. *Id.*

CrR 4.2(f), allows a defendant to withdraw his or her plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." This is a very demanding standard. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). "[A] 'manifest injustice' is one that is obvious, directly observable, overt, not obscure." *Id.* Examples of such manifest injustice include instances where the plea was not ratified by the defendant, the plea was not voluntary, effective counsel was denied, or the plea agreement was not kept. *State v. Zhao*, 157 Wn.2d at 197.

When a defendant fills out a written plea statement under CrR 4.2(g) and acknowledges that he has read and understands it and that its contents are true, the court can presume that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849,

852, 953 P.2d 810 (1998); *State v. Hennings*, 34 Wn. App. 843, 846, 664 P.2d 10 (1983) (use of written form set out in CrR 4.2(g) is sufficient to show that defendant is aware of the sentencing consequences of his plea); *State v. Branch*, 129 Wn.2d 635, 642, 919 p.2d 1228 (1996) (defendant's signature on plea agreement is "strong evidence" that the agreement is voluntary).

The defendant contends that his plea was not made voluntarily because he did not know the State was going to ask for a sentence outside the standard range if he did not fulfill his contract with the Metro Drug Task Force. The defendant cites to *State v. Moon*, 108 Wn. App. 59, 29 P.3d 734 (2001) in support of his argument. *Moon* is distinguishable to the present matter.

In *Moon*, the defendant's standard range was miscalculated. He was sentenced to 277 months, the top of his standard range of 207-277 months. After his plea, Mr. Moon learned that both counsel had his offender score wrong. His

correct standard range was 175-236. Mr. Moon moved to withdraw his guilty plea. His motion was denied and he was sentenced to 236 months, top of the correct standard range. Upon review, the court held, that when a defendant enters a plea based on "misinformation," they are entitled to enforce the plea agreement or withdraw the guilty plea. *State v. Moon*, 108 Wn. App. At 60.

The instant case does not involve a plea based on "misinformation." Frankly, this case is simply about the trial court choosing to believe the defendant's attorney, an officer of the court, rather than a 20-time convicted felon. The holding in *Moon* serves as no guidance in this matter.

First and foremost, the defendant's standard range was correct in his statement on defendant on plea of guilt. (CP 11). The defendant signed his statement on plea of guilty, and his plea contained no recommendation from the State. (CP 13, 17). The defendant went over this plea with

his attorney. (RP 06/25/10, 23). The signed plea of guilt specifically states:

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding the exceptional sentences:

(i)

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(CP 13).

The defendant was put on notice that the State intended to seek an exceptional sentence as stated in the Information and offer letter. (CP 1-2, 33).

Secondly, there was never a plea *agreement* to any sentence in the defendant's matter. This is evidenced by (1) State's offer letter, (2) the defendant's plea of guilt and, (3) the defendant's Metro Drug Task Force contract. (CP 10-18, 33, 34-38).

Lastly, the defendant went over the Metro Drug Task Force contract with his attorney before he pled guilty, and signed the contract. (CP 38; RP 06/25/10, 26-31). The contract specifically states:

Contractor has been charged with Identify theft in the first degree and theft in the [second] degree under Benton County Cause number 09-1-00407-6 the information in this case also includes an allegation of multiple current offenses with an offender score of nine. Contractor therefore has exposure to the standard range of 63 to 84 months with a maximum of 10 years with the aggravating factor. The state has made no offer contractor in that cause number and intends none except as set forth in this contract.

(CP 36-37). The evidence shows the defendant knew what he was up against if he did not complete the contract.

Clearly, there was no abuse of discretion. The defendant testified during his motion to withdraw his guilty plea that his attorney never went over the Metro Drug Task Force Contract with him so he was not aware that the State was going to ask for ten years. (RP 06/25/10, 21, 24). His

attorney, Shelly Ajax, took the stand and said the exact opposite.

Ms. Ajax testified that she received the offer letter from the State and went over it with the defendant. (RP 06/25/10, 26-27). Ms. Ajax testified that as a result of the offer, the defendant decided to enter into a contract with the Metro Drug Task Force. (RP 06/25/10, 27). Ms. Ajax testified that she went to the jail and went over the entire contract with the defendant by reading it out loud to him and gave him a copy so he could go over it. (RP 06/25/10, 27). Ms. Ajax testified that she did not leave a copy of the contract with the defendant in the jail for his own safety. (RP 06/25/10, 28). Ms. Ajax testified that she told the defendant to come by her office and pick it up once he is released from jail. Ms. Ajax testified that she wanted him to sleep on it after they went over it, and he would sign it the next day in court. (RP 06/25/10, 30). Ms. Ajax testified that she went

over the plea of guilty with the defendant. (RP 06/25/10, 28). The defendant testified that his attorney went over his plea of guilt with him. (RP 06/25/10, 23).

The defendant wants this Court to find that the trial court's decision to believe Shelly Ajax, an officer of the court, rather than a 20-time convicted felon was a decision based on "clearly untenable or manifestly unreasonable grounds." Such an argument is ludicrous. The trial court believed that Ms. Ajax went to the jail and went over the Metro Drug Task Force contract with the defendant, and that he understood it. Based on this testimony, the trial court held that the defendant's plea was voluntary. The State respectfully requests the trial court's decision be affirmed.

2. THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant next contends that his plea is invalid because his attorney failed to explain

the sentencing consequences that were stated in the Metro Drug Task Force contract that he signed, and thus rendered ineffective assistance.

The test for ineffective assistance of counsel is whether defense counsel's performance fell below an objective standard of reasonableness, and whether this deficiency prejudiced the defendant. *State v. McCollum*, 88 Wn. App. 977, 981, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999). In the context of a guilty plea, the defendant must show that his attorney failed to assist him in deciding whether to plead guilty, and that but for counsel's failure to offer adequate advice, he would have not pleaded guilty. *Id.* at 982. The reviewing court strongly presumes that counsel's performance was within the broad range of reasonable professional assistance. *Id.*

In the present matter, the record is clear. Defense counsel testified that she assisted the defendant in pleading guilty. (RP 06/25/10, 26-

31). The defendant testified that his attorney went over the guilty plea with him. (RP 06/25/10, 23). Defense counsel testified that she went to the jail and read the Metro Drug Task Force contract out loud to him. (RP 06/25/10, 27). She testified that she did not leave a copy of the contract with him for safety reasons, and that when he got out of jail, he could come pick it up. (RP 06/25/10, 27-28). Defense counsel testified that did not have him sign it the day she read it to him so he could have a chance to think about it because she never recommends a client enter into these types of contracts. (RP 06/25/10, 27-30).

The defendant testified to the contrary, and the trial court believed his attorney. The defendant has failed to show that his attorney failed to assist him in pleading guilty. The State respectfully requests that the trial court's decision be affirmed.

CONCLUSION

The trial court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea. Furthermore, the defendant is not able to show that his attorney failed in assisting him with pleading guilty, thereby, rendering her ineffective. Based on the foregoing, the State respectfully requests that the decision of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 4th day of
October 2011.

ANDY MILLER

Prosecutor



ANITA I. PETRA, Deputy

Prosecuting Attorney

Bar No. 32535

OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on October
4, 2011.



Pamela Bradshaw
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