

No. 30984-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSHUA A. RUTHERFORD,

Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
Honorable Donald W. Schacht, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to inquire as to whether Mr. Rutherford understood that he was waiving specific constitutional rights by pleading guilty, rendering the plea unconstitutional.

2. The record does not support the express finding that Mr. Rutherford has the current or future ability to pay Legal Financial Obligations.

Issues Pertaining to Assignments of Error

1. Mr. Rutherford's plea was not knowing, intelligent and voluntary where the trial court failed to explain the specific constitutional rights Mr. Rutherford was forfeiting.

2. Should the finding that Mr. Rutherford has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

B. STATEMENT OF THE CASE

Joshua A. Rutherford pled guilty to an Amended Information charging him with third degree rape of a child and third degree rape. CP 26-27; 4/9/12 RP 9. As the hearing commenced defense counsel informed the court that the parties had reached an agreement and wished to proceed to the taking of Mr. Rutherford's plea. 4/9/12 RP 1-2.

In response to the trial court's questions, Mr. Rutherford identified himself, stated he was 19 years old and had no prior criminal history. 4/9/12 RP 2, 4–5. The court confirmed with Mr. Rutherford that he had signed the statement on plea of guilty, having read through and gone over it with his attorney, that he understood it and had no questions. 4/9/12 RP 2–3. The court engaged Mr. Rutherford in a question and answer session regarding the two charges to which he was pleading guilty, including the maximum penalty, apparent offender score, standard range and term of community custody for each count, possible assessment of legal financial obligations and conditions, and otherwise outlining the consequences of his plea. 4/9/12 RP 3–8.

Regarding the constitutional rights that Mr. Rutherford was forfeiting by pleading guilty, the court merely stated: “Paragraph 5 on page 3 indicates that you have certain constitutional rights. When you plead guilty, you give up those rights.” When asked if he understood that, Mr. Rutherford responded “yes”. 4/9/12 RP 4.

When asked if he swore “the information contained in your statement on plea of guilty is true, so help you God?”, Mr. Rutherford responded “yes”. 4/9/12 RP 9. When asked whether anyone threatened him or his family to make him plead guilty, Mr. Rutherford replied “no”.

4/9/12 RP 8. Mr. Rutherford stated a factual basis for the plea that closely followed the language contained in the statement. 4/9/12 RP 8–9; CP 29–30. The court determined that the pleas were knowingly, intelligently and voluntarily made, and signed the statement on plea of guilty. 4/9/12 RP 9–10.

Based on the pleas, the court found Mr. Rutherford guilty as charged. 6/4/12 RP 13. The court imposed high end concurrent standard range sentences, for a total term of confinement of 34 months. CP 59, 63. The court ordered a total amount of Legal Financial Obligations (“LFOs”) of \$1,767.50. CP 60–61. The court made no oral finding that Mr. Rutherford had the present or future ability to pay the LFOs. 6/4/12 RP 11–17. However, the Judgment and Sentence contained the following pertinent language by the Court:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS (RCW 9.94A.760). The court has considered the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 60 at ¶ 2.5 (bolding in original). The court ordered that all payments on the LFOs be paid “at a rate of not less than \$50.00 per months commencing 90 days after release from custody.” CP 61 at ¶ 4.1.

The court made no inquiry into Mr. Rutherford's financial resources and the nature of the burden that payment of LFOs would impose. 6/4/12 RP 11–17.

This appeal followed. CP 83.

C. ARGUMENT

1. Mr. Rutherford's plea was not knowing, intelligent and voluntary where the trial court accepted his plea without adequately informing Mr. Rutherford of the specific constitutional rights he was forfeiting.

The record does not demonstrate that Mr. Rutherford's plea was knowing, intelligent and voluntary because the trial court failed to ensure that Mr. Rutherford understood the nature of constitutional rights he waived by pleading guilty. A plea may be withdrawn "whenever it appears that withdrawal is necessary to correct a manifest injustice. A manifest injustice occurs when a plea is not knowing, voluntary and intelligent." State v. Ross, 129 Wn.2d 279, 283–84, 916 P.2d 405 (1996); *see* CrR 4.2(f). Withdrawal of the plea under these circumstances is required under the due process clause of the state and federal constitutions. U.S. Const. amend. 14; Wash. Const. art 1 § 3; Boykin v. Alabama, 395 U.S. 238, 243–44, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Ross, 129 Wn.2d

at 284. In Miesbauer v. Rhay, 79 Wn.2d 505, 487 P.2d 1046 (1971), the court held, “[T]o be valid a guilty plea must be made voluntarily and with a knowledge of its consequences.” Id. at 507. As the Boykin court stated:

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

Boykin, 395 U.S. at 243-44. An involuntary plea constitutes a manifest injustice. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991).

A plea is knowing, voluntary and intelligent where the defendant is made aware of all of the direct consequences of his plea. This includes knowledge that he waives fundamental constitutional rights by pleading guilty. Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S.Ct. 2253 (1976); Boykin, 395 U.S. at 243, n. 5; In re Woods v. Rhay, 68 Wn.2d 601, 606, 414 P.2d 601 (1966), *cert. denied*, 385 U.S. 905, 87 S.Ct. 215 (1966). A plea is not knowing, voluntary and intelligent if the defendant does not understand all of the direct consequences of his plea including the constitutional rights he gives up by pleading guilty. Id.; In re Personal Restraint Petition of Isadore, 151 Wn.2d 294, 302, 82 P.3d 390 (2004). The prosecution bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at 287. A reviewing court must indulge every reasonable

presumption against waivers of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938), *overruled in part on other grounds*, Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809 (1937).

The sole purpose of a judge questioning a defendant at the time of the plea is to establish that the waiver of rights is constitutionally sufficient. In re Woods v. Rhay, 68 Wn.2d at 605. In Mr. Rutherford's case, because the judge failed to do this, the plea was not valid. The Court in Rhay explained that:

[t]o be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act.

Id.

Mr. Rutherford pleaded guilty without ever being informed of the nature of his constitutional rights. *Cf.* In re Woods v. Rhay (the court was satisfied that petitioner's plea of guilty was voluntarily and knowledgeably given, in part because the trial judge advised him of his right to a trial and of the court's willingness to facilitate and implement location of defense witnesses and to otherwise expedite the proceeding). Mr. Rutherford's waiver does not meet the standard of knowing, voluntary and intelligent. In re Woods v. Rhay, 68 Wn.2d at 605.

In Ross, the Court held that the failure to advise the defendant that community placement would be imposed and the failure to explain the implications of community placement rendered the plea invalid. Ross, 129 Wn.2d at 287–88. The Court further held that the defendant must be advised of the direct consequences of his plea during the plea hearing or by clear and convincing extrinsic evidence. Id. In Ross, the defendant had been advised that the court did not have to accept the state’s sentencing recommendation and he was advised of the maximum term applicable. Even though he received a standard range sentence below the maximum, he was not specifically advised of the consequences of community placement. On these grounds, the Court held that his plea was not knowing, voluntary and intelligent, and allowed Ross to withdraw his plea. Id.

In Isadore, community placement was not indicated on the plea form and the judge did not discuss mandatory community placement during the plea colloquy. Isadore, 151 Wn.2d at 302. The Supreme Court vacated the plea and reiterated that mandatory community placement was a direct consequence of the plea that Isadore was not apprised of. The Court, citing Ross, held that Isadore’s plea was not intelligent or voluntary and permitted Isadore to choose his remedy.

In Lutton v. Smith, 8 Wn. App. 822, 509 P.2d 58 (1979), defense counsel misinformed Lutton as to the likely term of incarceration. The court found the plea was not voluntary and allowed Lutton to withdraw his plea. Lutton, 8 Wn. App. at 823–24.

In Boykin, *supra*, the trial judge did not inform the defendant of the rights he would be waiving by pleading guilty. The United States Supreme Court held that the plea must fail because it was not knowing, voluntary and intelligent. Boykin, 395 U.S. at 243. The Court in Boykin expressly indicated that knowledge of the constitutional rights waived was essential to a knowing, voluntary and intelligent plea. Boykin, 395 U.S. at 243; *accord*, In re Woods v. Rhay, 68 Wn.2d at 606.

A defendant who pleads guilty waives his constitutional rights to a jury trial, to confront his accusers, and to assert his privilege against self-incrimination.

Boykin, 395 U.S. at 243.

In the instant case, the trial court did not name or explain the rights Mr. Rutherford would be giving up. The court did remark that, “[w]hen you plead guilty, the State no longer has to prove those elements because you admit them.” 4/9/12 RP 4. Because the court must find a factual basis for the plea, however, this remark is somewhat misleading. *See* CrR 4.2(d). The remark also conveys nothing about the rights to jury trial,

accuser confrontation and to not incriminate one's self. More importantly, the court appears to have assumed Mr. Rutherford was aware of his constitutional rights—to a jury trial, to confront his accusers, and to assert his privilege against self-incrimination—and understood them, although the court never even bothered to confirm if that were so. As in Lutton, *supra* and Boykin, *supra*, the “colloquy” between the court and Mr. Rutherford, such as it was, was insufficient to find Mr. Rutherford's plea knowing, voluntary and intelligent.

Whatever the exact nature of the colloquy it is essential that it be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment of the plea agreement cannot fully elucidate the defendant's state of mind as required by Rule 11. For this reason the trial court should question a defendant in a manner that requires the accused to provide narrative responses.

United States v. Fountain, 777 P.2d 351, 355 (1985) (citations omitted).

Furthermore, the record does not provide any extrinsic evidence to support a finding that Mr. Rutherford's plea in this respect was knowing, voluntary and intelligent.

Mr. Rutherford is entitled to choose his remedy between specific performance and withdrawal of the plea. Isadore, 151 Wn.2d at 303.

Where due process is implicated, “the terms of the plea agreement may be enforced, notwithstanding statutory language.” Id at 302–03.

It is important to note that if merely signing a plea agreement was conclusive evidence that a plea was voluntary, then a defendant would never be entitled to withdraw his plea. Fortunately this is not the law. Rather, the courts have recognized that although a defendant may indicate in his plea statement that the plea is being made “freely and voluntarily,” that statement is not conclusive evidence that the plea was in fact voluntary, and it does not preclude a later claim of involuntariness. State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983); Barnes v. State, 523 A.2d 635, 643 (Md. App. 1987). This Court should remand for withdrawal of the plea.

2. The express finding that Mr. Rutherford has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is no evidence to support the trial court's express finding that Mr. Rutherford has the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” Id. at 915-16.

Here, the court stated it had considered Mr. Rutherford’s “past, present, and future ability to pay legal financial obligations” and made an express finding that he had the present or likely future ability to pay those LFOs. However, whether a finding is expressed or implied, it must have support in the record. A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court’s determination “as to the defendant’s resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant’s present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A

finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Rutherford's financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's express finding in ¶2.5 that Mr. Rutherford has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Rutherford until after a future determination of his ability to pay. It is at a future time when the

government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's finding that Mr. Rutherford has or will have the ability to pay these LFOs when and if the State attempts to collect them, the finding is clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

D. CONCLUSION

For the reasons stated, this Court should find that Mr. Rutherford's plea was not knowing, voluntary and intelligent, and remand for his choice as to withdrawal of the plea or specific performance. Alternatively, the express finding of present and future ability to pay legal financial obligations should be stricken from the Judgment and Sentence.

Respectfully submitted on November 20, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 20, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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