FILED
Jan 22, 2013
Court of Appeals
Division III
State of Washington

30984-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA A. RUTHERFORD,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

Page No.

I. IDENTITY OF RESPONDENT 1

II. RELIEF REQUESTED 1

III. ISSUES 1

IV. STATEMENT OF THE CASE 1

V. ARGUMENT 4

A. The Defendant was Advised of the Constitutional Rights He Waived by Pleading Guilty 4

B. The Court's Finding that the Defendant Has the Ability to Pay His Legal Financial Obligations Is Supported in the Record 6

VI. CONCLUSION 9

TABLE OF AUTHORITIES

Page No.

State Cases

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991) 6, 7

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011) 6, 7

Woods v. Rhay, 68 Wn.2d 601, 414 P.2d 601 (1966) 4

United States Supreme Court Cases

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 5, 6

Statutes

RCW 10.01.160 7

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Was the Defendant's guilty plea voluntary?
2. Is the finding that the Defendant has the current or future ability to pay his legal financial obligations supported in the record?

IV. STATEMENT OF THE CASE

The Defendant Joshua Rutherford pled guilty by amended information to rape of a child in the third degree and rape in the third degree. CP 26-45; RP 8-9. The offenses regard two separate victims. CP 46-48.

The court advised the Defendant of his rights at his first appearance on August 17, 2011, and the Defendant signed the Acknowledgment of Advice of Rights. CP 113-14. This advisement sets forth the rights to a speedy and public jury trial, the right to confrontation, the right to summon

witnesses for the defense, etc. CP 113 at para. 4. The advisement also explains that if the defendant pleads guilty, he gives up specific enumerated rights listed therein. CP 113 at para. 5.

The Defendant signed the Statement of Defendant on Plea of Guilty directly underneath the paragraph, which states that his attorney has explained and fully discussed every paragraph in the Statement such that the Defendant had no further questions. CP 40. The Statement reads in part that the Defendant understands that he has certain rights (listed) and gives them up by pleading guilty. CP 31. The Defendant's attorney also signed the statement, averring that he believes his client fully understands the statement. CP 40.

At the plea hearing, the court asked the Defendant if he had indeed read the statement through with his attorney before signing it and understood it. RP 2-3. The Defendant agreed and said he had no questions. RP 3. The court explained that, because the Defendant was pleading guilty, the State was relieved of its obligation to prove the elements, which the Defendant was admitting. RP 4. The Defendant informed the court orally that he understood that he was giving up the rights listed on page 5 of the Statement. RP 4.

The court explained the various likely penalties (such as fines,

treatment, and probation) as well as the effect on the Defendant's future offender score. RP 5. The court also explained the restriction on firearms, the requirement for biological testing, and the suspension of public assistance, if any, during confinement. RP 7. The court asked the Defendant if he had questions about the sex offender registration requirement. RP 7.

The Defendant then recited the facts of his offenses. RP 8-9.

The court ordered a presentence investigation. RP 10. It was filed May 31, before the June sentencing hearing. CP 46; RP 1, 11. At sentencing, the court imposed legal financial obligations. CP 60-61; RP 13.

The judgment states:

> 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. Relevant to the Defendant's ability to pay, the record available to the court included the booking report, the indigency screening report, and the PSI. CP 46-56, 108, 115-16.

V. ARGUMENT

A. THE DEFENDANT WAS ADVISED OF THE CONSTITUTIONAL RIGHTS HE WAIVED BY PLEADING GUILTY.

The Defendant complains that his plea could not be voluntary, because he was not informed of his constitutional rights. Brief of Appellant at 6. The record shows that the Defendant was advised of these rights repeatedly over several months and, in two separate writings as well as orally, he averred his understanding of the rights and the fact that he would waive these rights by pleading guilty. CP 29-45, 113-14; RP 4.

The Defendant claims that his waiver does not meet the standard articulated in *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). Brief of Appellant at 6. That cite states that:

> To 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. It cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception.

Woods v. Rhay, 68 Wn.2d at 605. The record demonstrates that the guilty plea meets this standard.

The Defendant complains that it is misleading for the court to state that by pleading guilty, the Defendant relieves the State of the obligation to

prove the elements. Brief of Appellant at 8. But this is not a misstatement. Certainly a legal scholar can expound on these rights to an unlimited degree. That this is so and that the court did not engage in such an exposition, does not make the statement misleading.

The Defendant complains that the court did not repeat that he was waiving his "right to jury trial, accuser confrontation and to not incriminate oneself." Brief of Appellant at 8-9. There is no requirement that the court read the Statement aloud. It is sufficient that the information is in the Statement and the Defendant agreed that he read and understood every paragraph of the Statement without question. The court inquired of the Defendant whether he understood that he was giving up the rights on paragraph 5, page 3 of the Statement. RP 4.

The Defendant notes that in *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), a guilty plea was found involuntary where the court did not inform the Defendant of the rights he was waiving. Brief of Appellant at 8. That case has no resemblance to the one here. There "[s]o far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." *Boykin v. Alabama*, 395 U.S. at 239. The defendant was sentenced to death for each of five counts of robbery. *Boykin v. Alabama*, 395 U.S. at 240. Quoting an

earlier decision prohibiting the presumption of waiver from a silent record, the United States Supreme Court reversed, requiring an affirmative showing of voluntariness. *Boykin v. Alabama*, 395 U.S. at 242. The case requires an affirmative showing that the Defendant knowingly waived the rights (1) against self-incrimination, (2) of jury trial, and (3) of confrontation. *Boykin v. Alabama*, 395 U.S. at 243. As a result, specific constitutional rights are explicitly enumerated in the advisement and plea statement.

No authority requires the court to act as counsel for the Defendant by educating and advising him. The court is only required to make an adequate inquiry, which creates an affirmative record demonstrating the intelligence and voluntariness of the Defendant's act. That is accomplished in the record here.

The plea is voluntary. There is no cause to withdraw the plea.

B. THE COURT'S FINDING THAT THE DEFENDANT HAS THE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS SUPPORTED IN THE RECORD.

As the Defendant explains, a finding of fact must have some support in the record. Brief of Appellant at 12. *See State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011; *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991). The record is replete with support for the court's

finding.

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court affirmed the imposition of LFO's, struck the finding regarding ability to pay, and noted that the proper time to address the question is "when the government seeks to collect the obligation." *Id., citing State v. Baldwin*, 63 Wn. App. at 310. *See also* RCW 10.01.160 (requiring the trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.")

The Defendant asks to strike the finding, consistent with the holding in *Bertrand*. Brief of Appellant at 13. However, unlike *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to pay.

The Defendant is 19 years old and a high school graduate, with no difficulty reading or writing in English. CP 29; RP 3.

The booking report states that at the time of his arrest the Defendant

was employed in repairs at Mid Valley Restaurant Services. CP 108.

In the indigency screening form, the Defendant wrote, signed, and swore under penalty of perjury that he was employed in restaurant services, taking home $600. CP 115-16. He provided his employer's name and phone number. CP 115. He also claimed to have a second job as a cook, where he made $200. *Id.* He stated he was making payments on a 1995 Honda Civic toward a debt of $2600, supporting five other people in his household, and had child support obligations. CP 115-16.

In the presentencing investigation, the community corrections officer reported that the Defendant had done well in school and had intended to become a Marine and then a railroad lineman, goals that were only stymied by the new convictions. CP 51. He also hoped to become a professional MMA (mixed martial arts) fighter. CP 53-54. The Defendant had work history at Subway and Cutco, and also had found under-the-table employment for a relative. CP 51-52. He had been a volunteer firefighter. CP 54. His most recent employment had been as a cook for Betty's Diner in Waitsburg. CP 52.

The Defendant previously had been found in violation of court orders for failing to pay on other legal financial obligations. CP 51. However, at the time of sentencing he had no debt or financial obligations other than a

$50/mo child support obligation. CP 52.

Based on this record, the court's finding is well supported. The Defendant has the present and future ability to pay his legal financial obligations. There is no error in their imposition.

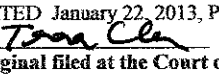
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: January 22, 2013.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Susan Marie Gasch <gaschlaw@msn.com> Joshua A. Rutherford, DOC # 357177 Airway Heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 22, 2013, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**