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NOV 04, 2016  
Court of Appeals  
Division III  
State of Washington

No. 34170-4-III

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**TERRENZ R. HAMPTON HENDERSON**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**GARTH DANO  
PROSECUTING ATTORNEY**

**Kevin J. McCrae – WSBA #43087  
Deputy Prosecuting Attorney  
Attorneys for Respondent**

**PO BOX 37  
EPHRATA WA 98823  
(509)754-2011**

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## **I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Did the court abuse its discretion by making a finding that the plea was knowingly, voluntarily and intelligently entered where such finding is supported on the record, even though the plea contains a technical error?

B. If the defendant should be allowed to withdraw his plea, what is the proper remedy?

C. Should the court remand for resentencing where the defendant neither objected to nor acknowledged his criminal history?

D. Was Mr. Hampton Henderson subject to an illegal hybrid sentence?

## **II. STATEMENT OF THE CASE**

Terrenz Hampton Henderson pled guilty to one count of unlawful possession of a firearm second degree and taking a motor vehicle without permission in the second degree. Mr. Hampton Henderson waived the reading of the amended information laying out the charges. RP 19. On the first page of the plea statement Mr. Hampton Henderson signed the statutory elements of both crimes as listed. CP 25. The trial judge found that Mr. Hampton Henderson understood the nature of the charges and the consequences of the plea. RP 22. Mr. Hampton Henderson then moved for and received a furlough, during which he was arrested after a fight

with a neighbor. RP 40. Mr. Hampton Henderson later moved to withdraw his plea, claiming he was disoriented and did not understand he would be on Department of Corrections' supervision. RP 35-42. The trial court found that there was sufficient information to conclude that Mr. Hampton Henderson's plea was knowing, intelligent and voluntary. RP 42.

### III. ARGUMENT

***A. The trial court did not abuse its discretion in refusing the motion to withdraw the plea.***

An appellate court reviews denial of a motion to withdraw a guilty plea for abuse of discretion. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Pugh*, 153 Wn. App. 569, 222 P.3d 821 (2009). The trial court did not abuse its discretion in this case.

The fact that the factual statement does not adequately describe the crime, without more showing that the plea was involuntary, does not render a plea agreement invalid. "When the record reveals that the defendant made a voluntary and intelligent decision to enter a plea agreement, factual or technical deficiencies underlying the agreement will not invalidate it." *State v. Hahn*, 100 Wn. App. 391, 996 P.2d 1125 (2000). In *Hahn* the defendant pled to assault in the second degree with a

deadly weapon enhancement. He moved to delete the deadly weapon enhancements from his sentence, arguing no factual basis. The State conceded that there was no factual basis, but argued that Mr. Hahn should still be held to his bargaining. The court agreed. Similarly, in *State v. Morreira*, 107 Wn. App. 450, 458, 27 P.3d 639 (2001), the defendant moved to withdraw his guilty plea as invalid because the deadly weapon he pled to using was not actually a deadly weapon under the statute. The Court rejected that argument, holding Morreira to his agreement.

Here Mr. Hampton Henderson signed the document listing all the elements of his crime on the front page of his plea agreement. CP 25. When asked he indicated that he made his plea freely and voluntarily. RP 22. When asked about the factual basis for the plea he indicated “that’s fine.” *Id.* “Plea agreements which are intelligently and voluntarily made, with an understanding of the consequences, are accepted, encouraged and enforced in Washington.” *Hahn*, 100 Wn. App. at 395. The plea in this case was intelligently and voluntarily made. Mr. Hampton Henderson received the benefit of his bargain with a reduced standard range and DOSA recommendation. There may have been a technical defect in the plea, but this does not change the fact that Mr. Hampton Henderson entered the plea knowingly and voluntarily and was apprised of the consequences of the plea. *See Id.*

It is also abundantly clear that Mr. Hampton Henderson was aware of the consequences of his plea agreement in regards to community custody. An appellate court reviews “a trial court's denial of a defendant's motion to withdraw a guilty plea for abuse of discretion. A decision based on clearly untenable or manifestly unreasonable grounds constitutes an abuse of discretion.” *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). The plea agreement specifically notes that the defendant is subject to 27.5 months community custody. The judge specifically read to him that there would be a recommendation of 27.75 months community custody. RP 21. Mr. Hampton Henderson had previously had a DOSA, RP 38, so it is hard to imagine he was unaware that he would be subject to community custody. The trial judge had ample opportunity to observe Mr. Hampton Henderson and decide whether he was disoriented or unable to comprehend the proceedings. He found Mr. Hampton Henderson’s allegations of coercion not credible. He was with it enough to ensure he could request his furlough. In short, Mr. Hampton Henderson already received his evidentiary hearing, the court considered the evidence presented, found Mr. Hampton Henderson’s arguments not credible, and refused the motion. The courts findings are supported by facts in the record. There is no grounds to find that the trial court abused its discretion.

The fact that the date in the plea differed from the date in the information is of no consequence. The State charged that “on or about the 2<sup>nd</sup> day of December, 2015 . . . .” CP 24. The factual statement in the guilty plea lists October 26, 2015. According to long standing applicable case law, October 26, 2015 is on or about December 2<sup>nd</sup> 2015. “[W]here time is not a material element of the charged crime, the language “on or about” is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.” *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). *See also State v. Thomas*, 8 Wn.2d 573, 586, 113 P.2d 73 (1941). There was no alibi defense here. The statute of limitations on these crimes is three years. RCW 9A.04.080(1)(h). There is no issue on the statute of limitations. Thus the date in the statement on plea of guilty for all legal purposes matches the date on the information.

***B. Assuming Mr. Hampton Henderson is permitted to withdraw his plea the proper remedy is remand, not dismissal.***

Assuming the plea is invalid, the proper remedy is to remand to allow the withdrawal of the plea and entry of a new plea, not dismissal. Mr. Hampton Henderson relies on one cryptic line in *In re Keene*, 95 Wn.2d 203, 213, 622 P.2d 360 (1980), to support his dismissal argument. In *Keene* the court allowed a withdrawal of a guilty plea to one count of an

information but not two others. In conclusion the court stated “Count 1 is hereby vacated and the charge is set aside.” *Id.* There was no analysis or explanation of what exactly the phrase the “charge is set aside” means. It clearly means the conviction is no longer valid. However, it does not necessarily equate to dismissed with prejudice or even dismissed without prejudice. Subsequent cases have held that the proper remedy is to remand for entry of a new plea. In *In re Taylor*, 31 Wn. App. 254, 260, 640 P.2d 737 (1982), which analyzed *Keene*, the court remanded for an entry of a new plea. Accord *In re Evans*, 31 Wn. App. 330, 332, 641 P.2d 722 (1982); *State v. Bouck*, noted at 191 Wn. App. 1031, 2015 Wash. App. LEXIS 2935, 2015 WL 7737708 (2015)(unpublished); *United States v. Kamer*, 781 F.2d 1380 (9th Cir. 1986); *United States v. Van Buren*, 804 F.2d 888 (6th Cir.1986)(vacating guilty plea but not charge); *Austin v. State*, 734 So. 2d 234 (Miss. Ct. App. 1999)(plea vacated, remanded for trial); *People v. Fred*, 17 Ill. App. 3d 730, 308 N.E.2d 219 (Ill. App. Ct. 4th Dist. 1974); *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (N.C. 1980); *State v. Barboza*, 115 N.J. 415, 558 A.2d 1303 (N.J. 1989); *United States v. Dewalt*, 92 F.3d 1209, 320 U.S. App. D.C. 68 (D.C. Cir. 1996); *Commonwealth v. Flanagan*, 578 Pa. 587, 854 A.2d 489 (Pa. 2004).

*Lee v. United States*, 113 F.3d 73, 77 (7th Cir. 1997), uses language similar to *Keene*, and provides a clarifying explanation. “[I]f a

conviction is vacated, the judgment set aside, and a plea of guilty withdrawn, the indictment comes back to life, and the appropriate thing to do is go to trial unless the government dismisses the count.” Similarly, in *Lutton v. Smith*, 8 Wn. App. 822, 825, 509 P.2d 58 (1973), the court vacated and set aside the judgment and sentence, allowed the defendant to change his plea, and remanded the case. Despite an extensive search the State could find no other case where dismissal of the charge was the appropriate remedy. Despite the somewhat confusing language in *Keene*, if the plea was invalid the proper remedy is to remand for entry of a new plea and to start the process over, not dismissal of the charge.

***C. Mr. Hampton Henderson must be returned to the trial court for resentencing.***

When the defendant does not object to, but also does not acknowledge, his criminal history, and challenges it for the first time on appeal the proper procedure is to remand for a new sentencing hearing where both sides may present fresh evidence regarding the defendant’s criminal history. *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014); *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012).

***D. The issue of the hybrid sentence is not ripe for review.***

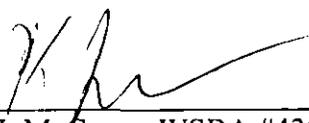
Because Mr. Hampton Henderson must be resentenced anyway, and his ranges may or may not change, the issue of the hybrid sentence under *State v. Smith*, 142 Wn. App. 122, 173 P.3d 973 (2007), is not ripe for review. This issue should be remanded to the trial court. If the same issue occurs after resentencing Mr. Hampton Henderson may raise the issue again.

**III. CONCLUSION**

The technical error in the guilty plea does not render it void. The trial court did not abuse its discretion in refusing to invalidate the guilty plea. However, Mr. Hampton Henderson is correct that his case must be remanded for resentencing.

Dated this 4<sup>th</sup> day of November, 2016.

GARTH DANO  
Prosecuting Attorney

By:   
Kevin J. McCrae – WSBA #43087  
Deputy Prosecuting Attorney

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON, )  
)  
Respondent, ) No. 34170-4-III  
)  
vs. )  
)  
TERRENZ R. HAMPTON HENDERSON, ) DECLARATION OF SERVICE  
)  
Appellant. )  
\_\_\_\_\_ )

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols  
Wa.Appeals@gmail.com

Dated: November 4<sup>th</sup>, 2016.

  
\_\_\_\_\_  
Kaye Burns