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No. 36392-9-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 17-1-00123-7

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JUAN MANUEL FLORES ARROYO,
Defendant/Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE ---------- 1

II. ARGUMENT---------- 9

A. The Trial Court Properly Denied the Defendant's Motion to Withdraw His Guilty Plea ---------- 9

B. The Trial Court Did Not Deprive the Defendant of a Fair Process in Presenting His Evidence for His Motion to Withdraw His Guilty Plea ---------- 14

III. CONCLUSION ---------- 16

TABLE OF AUTHORITIES

State Cases	Page
State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996) ----------	9,10
State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007 (1998)----------	9
State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003)----------	15
State v. Hendrickson, 129 Wn.2d 661, 917 P.2d 563 (1996)----------	10
State v. Oswalt, 62 Wn.2d 118, 381 P.2d 617 (1963) ----------	16
State v. Perez, 33 Wn. App. 258, 654 P.2d 708 (1982)----------	9,10
State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)----------	15
State v. Pugh, 153 Wn. App. 569, 222 P.3d 821 (2009) ---------	9
State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) ----------	10
State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) ----------	10,11

TABLE OF AUTHORITIES (con't)

State Cases **Page**

State v. Saltarelli,
98 Wn.2d 358, 655 P.2d 697 (1982) ---------- 14,15

State v. Taylor,
83 Wn.2d 594, 521 P.2d 699 (1974) ---------- 10

Federal Cases **Page**

Padilla v. Kentucky,
559 U.S. 356, 130 S. Ct. 1473,
176 L.Ed.2d 284 (2010)---------- 10,11

Statutes **Page**

RCW 9.94A.030(33)(t)---------- 14

RCW 9.94A.518---------- 13

RCW 9.94A.599---------- 14

RCW 9.94A.602---------- 13

RCW 9.94A.825---------- 13

Rules **Page**

ER 404(b) ---------- 14

I. STATEMENT OF THE CASE

On March 15, 2017, the defendant was charged by information with drive-by shooting, alien in possession of a firearm without an alien firearm license, and possession of a controlled substance, methamphetamine, with a firearm enhancement. (CP 1-3). The crimes were alleged to have occurred on March 12, 2017. (CP 1-2).

On July 17, 2017, the defendant pleaded guilty to drive-by shooting as charged in count one of the information. (CP 4-15; RP 6-12). The defendant pleaded guilty to the crime of drive-by shooting under a plea agreement with the State whereby there would be a joint, agreed recommendation that the defendant be sentenced to 15 months in prison at the low end of his resulting standard range of 15 to 20 months. (CP 4-15; RP 6-12). His counts of alien in possession of a firearm without an alien firearm license and possession of methamphetamine while armed with a firearm were to be dismissed pursuant to the plea agreement. (CP 19).

When the defendant pleaded guilty on July 17, 2017, the Statement of Defendant on Plea of Guilty used was in accordance

with CrR 4.2(g). (CP 4-15). Paragraph 6(l) of the Statement of Defendant on Plea of Guilty advised the defendant of the following immigration consequences:

> If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(CP 8). The defendant acknowledged understanding the above paragraph and other advisements in the plea form by signing paragraph 12 which states:

> My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "offender registration" attachment, if applicable, I understand them all. I have been given a copy of the "Statement of Defendant on Plea Guilty." I have no further questions to ask the judge.

(CP 13).

Mr. Trejo, the defendant's attorney, also acknowledged "I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the statement." (CP 13). Mr. Trejo speaks fluent Spanish and certified "the defendant's lawyer had previously read to him or her the entire

statement above and that the defendant understood it in full . . . an interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full." (CP 14, 190).

Prior to accepting the plea, Judge Small engaged in a colloquy with both Mr. Trejo and the defendant to ascertain the validity of the plea. The colloquy went in relevant part:

> Court: The Court's been handed a Statement of Defendant on Plea of Guilty, and it looks like you've signed this document, on page 10. Is this your signature? (Trans. P.7)
>
> Defendant: Yes. Id.
>
> Court: Did you read this, or was it read to you, in Spanish, before you signed it? Id.
>
> Defendant: It was read to me in Spanish. Id.
>
> Court: And that was by you, Mr. Trejo? Id.
>
> Mr. Trejo: Yes. Id.
>
> Court: And when that happened, did you have an opportunity to ask Mr. Trejo questions? Id.
>
> Defendant: Yes. Id.
>
> Court: Do you have any questions, whatsoever, for Mr. Trejo, at this time? Id.
>
> Defendant: No. Id.

Court: Now based on that lack of criminal history, do you understand your standard sentence range, for Count One, is 15 to 20 months, in prison? (Trans. P. 8).

Defendant: Yes. Id.

Court: And up to 18 more months, on Community Custody, under the supervision of the Department of Corrections, after you're released from prison? Id.

Defendant: Yes. Id.

Court: Do you still want to plead guilty? Id.

Defendant: Yes. Id.

***

Court: Have there been any other promises or statements made to you, to get you to plead guilty, to Count One? Id. 8-9.

Defendant: No. Id. 9.

***

Court: And, do you understand, if you are not a U.S. citizen, you may be deported, prevented from returning to the United States, or becoming a U.S. citizen? Id.

Defendant: Yes. Id.

Court: So let the record reflect the defendant spoke with Mr. Trejo, briefly, before answering. Mr. Trejo, have you had an opportunity to discuss with Mr. Flores

the possible collateral consequences to his status in the United States of America, as a result of this plea? Id.

Mr. Trejo: Yes, your honor. Id. At 10.

Court: Do you need additional time? Id.

Mr. Trejo: No, Thank you. Id.

***

Court: Mr. Flores, are you pleading guilty to this charge freely and voluntarily? Id. at 11.

Defendant: Yes. Id.

Court: Is anybody making you do this? Id.

Defendant: No. Id.

Court: Throughout this hearing, you've been looking at Mr. Trejo for, like, help, in answering the Court's questions, but I don't hear him responding anything. Although maybe he has; I just can't hear it. He's not making you do this, is he?

Defendant: No. Id.

Court: And have you had a chance to get advice that you need from him, before making this decision, to plead guilty to Count One? Id.

Defendant: What was that? Id.

Court: Have you had an opportunity—do you think you've gotten the advice, from Mr. Trejo that you

> needed, to make the decision to plead guilty to Count One? Id.
>
> Defendant: Yes. Id.
>
> Court: Are you pleased with his advice? Not necessarily what he is recommending, but that he's adequately representing you? Id.
>
> Defendant: More or less. Id.
>
> Court: Ok, and—after receiving that advice, it's your decision—nobody else's—to plead guilty. Do you understand that? Id. 11-12.
>
> Defendant: Yes. Id. at 12.
>
> Court: Okay. The Court will accept defendant's plea of guilty to Count One of the information, make a finding of guilt, based on the defendant's oral and written statements to the court, as well as, the real facts pertinent to Count One, set forth in the Declaration of Officer Aumell, on file herein. Id.

(CP 190-192; RP, Change of Plea and Sentencing, 6-12).

The court then signed the plea form certifying, "I find the defendant's plea to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of a plea. There is a factual basis for the plea. The defendant is guilty as charged." (CP 14).

The Judgment and Sentence was then entered. (CP 16-28). The court sentenced the defendant to 15 months in prison under the defendant's standard range of 15 to 20 months, as both the State and the defendant had recommended to the court. (CP 19). The defendant was also sentenced by the court to 18 months of community custody following his release from confinement. (CP 20).

On May 15, 2018, the defendant filed a motion to withdraw guilty plea and was represented by Mr. Gower during the proceedings related to that motion. (CP 29).

At the hearing on the motion to withdraw guilty plea, George Trejo, counsel for plea and sentencing, testified that he advised the defendant of the crimes, the possible consequences, and that the defendant was looking at a 5-year sentence if convicted as charged. (RP 117; CP 194). As to immigration consequences, Mr. Trejo testified that he advises all of his non-U.S. citizen clients about immigration consequences. (CP 194; RP 118-121). In the instant case, he discussed the consequences with the defendant "approximately three times prior the defendant's plea." (RP 122).

He also told the defendant that removal from the United States was likely with "very little relief" in sight. (RP 132-133; CP 194). In fact, during the pendency of the proceedings, he asked for continuance of the defendant's case "for the immigration issue." (CP 194). Mr. Trejo testified that he specifically told the defendant, "It was more likely than not you will be taken to ICE." (RP 133; CP 194).

In its memorandum decision on the defendant's motion to withdraw his guilty plea, the trial court stated: "This court finds his [Mr. Trejo] account of his advisements as credible given his testimony and the colloquy during the plea." (CP 198).

On September 18, 2018, the court entered an order denying defendant's motion to withdraw guilty plea, which incorporated the court's memorandum decision dated December 17, 2018. (CP 187-198).

II. ARGUMENT

A. The Trial Court Properly Denied the Defendant's Motion to Withdraw His Guilty Plea.

A trial court's denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. State v. Pugh, 153 Wn. App. 569, 576, 222 P.3d 821 (2009). A trial court's decision is an abuse of discretion when it is based on untenable grounds or reasons. Id. at 576, citing State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007 (1998).

Whether a plea is knowingly, intelligently, and voluntarily made is determined from the totality of the circumstances. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. Id. When the judge goes on to inquire orally of the defendant and satisfies herself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is

well warranted. State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982). This rule imposes a difficult and exacting standard on the defendant to demonstrate the existence of a manifest injustice. State v. Branch, 129 Wn.2d at 641. The injustice must be "obvious, directly observable, overt, [and] not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The defendant's burden is demanding because ample safeguards exist to protect the defendant's rights before the court accepts the plea.

The defendant claims that he received the ineffective assistance of counsel. To prevail on this claim, the defendant must demonstrate that (1) defense counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). If the defendant fails to demonstrate either prong, his claim fails. State v. Hendrickson, 129 Wn.2d 661, 678, 917 P.2d 563 (1996).

A constitutionally competent defense attorney must advise a defendant of the immigration consequences of entering into a guilty plea. Padilla v. Kentucky, 559 U.S. 356, 367, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). In State v. Sandoval, 171 Wn.2d 163, 249 P.3d

1015 (2011), our Supreme Court held that "[i]f the applicable immigration law 'is truly clear' that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation." Sandoval, 171 Wn.2d at 170 (quoting Padilla, 559 U.S. at 369). However, "[i]f 'the law is not succinct and straight forward,' counsel must provide only a general warning that 'pending criminal charges may carry a risk of adverse immigration consequences.'" Sandoval, 171 Wn.2d at 170 (quoting Padilla, 559 U.S. at 369).

In the instant case, the trial court correctly concluded that the relevant immigration law was not "truly clear" as to the crime of drive-by shooting. Sandoval, 171 Wn.2d at 171. Because the immigration law was not succinct and straight forward, the trial court concluded that Mr. Trejo need only provide a general warning that "pending criminal charges may carry a risk of adverse consequences." Sandoval, 171 Wn.2d at 170. Furthermore, with regard to Mr. Trejo's advice, "This court finds his account of his advisements as credible given his testimony and the colloquy during the plea." (CP 198).

> The defendant's guilty plea was constitutionally valid. Immigration law does not make it clear that a conviction for RCW 9A.36.045, drive-by shooting, is a "truly clear" deportable offense. The immigration law is not succinct and straight forward that a conviction for Drive-By Shooting is a deportable offense, because, only the immigration judge can make the determination whether the crime is a Crime of Moral Turpitude or a Particularly Serious Crime after the fact. Trejo was only required to advise the defendant that the conviction may carry a risk of immigration consequences. The record supports the defendant being advised of the possibility of adverse immigration consequences and denies defendant's motion.

(CP 198).

The defendant received the effective assistance of counsel in this case. Not only did the defendant receive the required immigration advisements, Mr. Trejo was instrumental in negotiating a plea agreement that substantially lessened the defendant's prison time from what he faced if he had been convicted of all three of his charges. Under the plea agreement, which the court followed, the defendant was only convicted of one felony, drive-by shooting, with a resulting standard range of 15 to 20 months based on an offender score of 0 and an agreed recommendation at the low end of the range. If he had been convicted of his other two offenses, he would

have been facing a range of 26 to 34 months for the drive-by shooting because of his then resulting offender score of 2.

More significantly, if the defendant had been convicted of his charge of possession of methamphetamine while armed with a firearm, he would have faced a minimum mandatory sentence of 60 months in prison, more than 3 times the amount of prison time he received by way of his plea agreement, because any felony offense under Chapter 69.50 RCW with a deadly weapon or firearm special verdict is a level 3 drug offense. RCW 9.94A.518; RCW 9.94A.602 (recodified as RCW 9.94A.825).[1]

Thus, with an offender score of 0 to 2, the range for his charge of possession of methamphetamine while armed with a firearm would have been 69 to 86 months (51 to 68 months, plus the 18-month firearm enhancement time); however, as a class C felony with a maximum penalty of 5 years, the presumptive range would be 60 months, inclusive of the 18-month firearm enhancement time.

[1] Consequently, Appellant's Brief contains an incorrect calculation of the defendant's possible sentencing range for this offense.

RCW 9.94A.599. Again, if convicted as originally charged, the defendant would have faced a minimum mandatory sentence of 60 months. Furthermore, a conviction of possession of methamphetamine while armed with a firearm would be a most serious offense and strike under the three strikes law. RCW 9.94A.030(33)(t). Instead, the defendant received a sentence of 15 months. The defendant also received both the effective assistance of counsel and the benefit of his bargain.

B. The Trial Court Did Not Deprive the Defendant of a Fair Process in Presenting His Evidence for His Motion to Withdraw His Guilty Plea.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). "Properly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697

(1982). The burden of demonstrating a proper purpose is on the proponent of the evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Simply put, the defense attempted to introduce evidence of Mr. Trejo's representation of a former client to suggest what may have happened in the instant case. Consequently, the evidence was properly excluded by the trial court as improper character evidence under ER 404(a). A trial court's evidentiary rulings are reviewed for abuse of discretion, the appellant bares the burden of proving an abuse of discretion occurred, and a reviewing court may sustain a trial court's evidentiary ruling on the grounds that the trial court used or on any other proper grounds. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995).

The defendant argues that, instead of improper character evidence, it sought to introduce impeachment evidence. However, it is a well-recognized and firmly established rule that a witness cannot be impeached on matters collateral to the principle issues being tried: the purpose of the rule is basically two-fold: (1) avoidance of undue confusion of issues, and (2) prevention of unfair advantage over a witness unprepared to answer concerning matters unrelated or

remote to the issues at hand. State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). In the present case, the trial court properly excluded the evidence the defendant attempted to introduce because the evidence was impeachment evidence on collateral matters (prior bar disciplinary decisions not related to the present case and testimony from a prior client regarding that prior representation). Furthermore, based on the collateral nature of this evidence, with minimal or no probative value, the trial court could have similarly excluded the evidence under ER 403. Therefore, the defendant has failed to meet his burden in demonstrating that the trial court abused its discretion in making the evidentiary rulings.

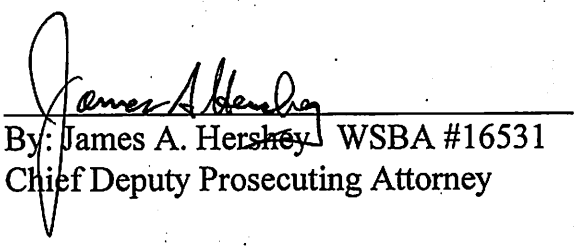
III. CONCLUSION

For the reasons set forth above, the trial court's decision denying the defendant's motion to withdraw his guilty plea must be affirmed.

DATED this 9th day of October, 2019.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. JUAN MANUEL FLORES ARROYO, Defendant/Appellant.	No. 36392-9-III Chelan Co. Superior Court No. 17-1-00123-7 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 9th day of October, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 9th day of October, 2019.

Cindy Dietz

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