No. 46108-1-II

(Consolidated with 46115-3-II and 46118-8-II)

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

HARVEY MADDUX,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUE 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT ....

A. FINDING OF FACT 1.19 WAS A PROPER FINDING BY THE COURT GIVEN THE EVIDENCE PRESENTED BY THE APPELLANT'S OWN WITNESS AT THE HEARING 1

B. THE DEFENDANT'S "CHANGE OF HEART" DOES NOT NEGATE THE FACT THAT HIS PLEAS WERE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED 3

C. THE APPELLANT CANNOT BE HERE TO COMPLAIN ABOUT A SITUATION HE CREATED. THE APPELLANT'S ACTIONS RELIEVED THE STATE OF ITS OBLIGATION REGARDING THE PLEA AGREEMENT 7

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Washington Cases

In re Personal Restraint of Ness, 70 Wn. App. 817, 855 P.2d 1191 (1993) 6

State ex. rel. Lige v. County of Pierce, 65 Wn. App. 614, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992) 2

State v. Armstrong, 109 Wn. App. 458, 35 P.3d 397 (2001) 7

State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996), *review denied*, 130 Wn.2d 1003, 925 P.2d 989 4

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996) 4

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) 1

State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287 (2011) 1

State v. Olmsted, 70 Wn.2d 116, 422 P.2d 312 (1966) 1, 4

State v. Osborne, 35 Wn. App. 751, 669 P.2d 905(1983), *review granted*, *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984) 5, 6

State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984) 5

State v. Perez, 33 Wn. App. 258, 654 P.2d 708 (1982) 5

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) 4

State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008) 2

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005) 2

State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1992) 4

Federal Cases

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) 3, 4, 7

Other Rules or Authorities

CrR 4.2 .... 4, 5

I. ISSUE

1. Was the court correct in denying the Motion to Withdraw Guilty Plea when the defendant failed to meet the burden imposed pursuant to CrR 4.2?

II. STATEMENT OF THE CASE

For the purposes of this brief, the state accepts the recitation of facts as outlined by the appellant. Additional facts, if necessary, will be noted in the Argument section of this brief.

III. ARGUMENT

A. FINDING OF FACT 1.19 WAS A PROPER FINDING BY THE COURT GIVEN THE EVIDENCE PRESENTED BY THE APPELLANT'S OWN WITNESS AT THE HEARING.

Findings of fact entered by a trial court after a hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing

inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

The appellant offers no case law for the position that the appellant was not informed of the proper definition of assault as state in Findings of Fact 1.19. Rather, the argument seems to be that while the court was right, it really was not if you read something into the argument that was not there. Such attempts must fail.

Prior counsel testified that "...once he [the appellant] has an opinion it doesn't change much – so there was an awful lot of discussion over what assault means, what it could mean, how it could possibly be that he could be convicted...." RP 33-34. In addition to this passage, the record is replete with testimony regarding conversations between the appellant's prior counsel and the appellant discuss all of the intricacies of the crime assault. *See* RP 34, 35, 36, 63, 82, etc. In fact, prior counsel directly addressed the issue of *mens rea*. "So what I was trying to get across to him

was you can't just come in and say I didn't intend to do that. That might not be enough in the jury's eyes. A lot has to do with the fact he was just sitting in the car and being accosted by Mr. Maddux under the circumstances." RP 35-36. *Mens rea* was the reason that the plea was entered as an *Alford* plea. *See* RP 39-40.

Ample evidence exists that there were significant discussions regarding *mens rea* as it impacts the case at hand. As a result, Findings of Fact 1.19, regardless of how the appellant wants to interpret it, was based upon the evidence presented to the court.

As the appellant correctly points out, "...the reviewing court will not revisit issue of credibility, which lie in the unique province of the trier of fact." *Brief of Appellant*, page 15; citations omitted. Simply because the court did not believe the appellant does not mean that there was an error.

B. THE APPELLANT'S "CHANGE OF HEART" DOES NOT NEGATE THE FACT THAT HIS PLEAS WERE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED.

"A defendant does not have a constitutional right to withdraw a plea of guilty and to enter a plea of not guilty. Such a motion is addressed to the sound discretion of the court. When the trial court has exercised its discretion in this regard, [an appellate court] on

review will set it aside only upon a clear showing of abuse of discretion ...." *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312, 313-14 (1966). The defendant bears the burden of proving manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-4, 916 P.2d 405, 408 (1996). "Because of the many safeguards surrounding a plea of guilty, the manifest injustice standard is a demanding one." *State v. Arnold*, 81 Wn. App. 379, 385, 914 P.2d 762, 766 (1996), *review denied*, 130 Wn.2d 1003, 925 P.2d 989. Manifest injustice is defined as "obvious, directly observable, overt, not obscure." *Id.*

The appellant voluntarily entered into the guilty plea. CrR 4.2(d) governs voluntariness of pleas:

> The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

"An *Alford* plea is valid when it 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1992). "[A] defendant's signature on a plea statement is strong evidence of a plea's voluntariness ...." *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A defendant must present some

evidence of involuntariness beyond his self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

> 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. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted).

"The law places a heavy burden on defendants if they are to satisfy the requirements of CrR 4.2(f) permitting withdrawal of a plea of guilty. The burden cannot be met by showing what, at most, was a technical error in taking of the plea" (citations omitted). *State v. Osborne*, 35 Wn. App. 751, 759, 669 P.2d 905 (1983), *review granted*, *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984).

> The constitution does not require that the defendant admit to every element of the charged crime. An information which notifies a defendant of the nature of the crime to which he pleads guilty creates a presumption that the plea was knowing, voluntary and intelligent. A defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime. In addition, a court may examine written statements to ascertain

> the defendant's understanding of the charges and may rely on the defendant's plea statement.

In re Personal Restraint of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993).

For example, in *Osborne*, the Washington Supreme Court upheld a denial of a motion to withdraw a guilty plea and ruled that the defendants were made sufficiently aware of the nature of the charge against them despite the fact that the defendants were not specifically apprised of an element of the crime to which they plead:

> Petitioners argue that they were unaware at the time their pleas were taken that the State had to prove the "knowledge" element common to these alternative methods of proving the underlying felony. It is true that petitioners were not specifically advised during the plea proceedings that knowledge is an essential element of the underlying felony of second degree assault. Nevertheless, we are not convinced that petitioners' pleas were made absent an understanding of the nature of the charge. It is clear from the record that petitioners were, at the time their pleas were taken, aware of facts gathered by the State from which a trier of fact could easily find the requisite "knowledge".

Osborne, 102 Wn.2d at 93-5.

Here, the Court conducted a thorough colloquy with the appellant in which he communicated an understanding of the charges to which he was pleading and the rights he was giving up. RP 3-16. To one cause number, the appellant admitted his conduct

and affirmed that he possessed drugs. *Id.* at 6. The Court also conducted a lengthy colloquy about the meaning of an *Alford* plea as to the other cause number. *Id.* at 8-17. Additionally, the appellant has extensive experience with the criminal system dating back approximately 30 years. CP3 19-21.[1] The appellant has, on multiple occasions, appeared before the courts and has answered to charges. For the same reasons outlined above, that do not need to be repeated here, *mens rea* was discussed, at length, between the appellant and his first counsel. The defendant entered his plea knowingly voluntarily and intelligently.

C. THE APPELLANT CANNOT BE HERE TO COMPLAIN ABOUT A SITUATION HE CREATED. THE APPELLANT'S ACTIONS RELIEVED THE STATE OF ITS OBLIGATION REGARDING THE PLEA AGREEMENT.

> 'A plea bargain is analogous to a contract right' and its terms are read as a contract. But plea agreements 'are more than simple common law contracts' because due process requires that the State adhere to the agreement's terms. In addition, fairness is required to 'ensure public confidence in the administration of our justice system.' After a party breaches the plea agreement, the non-breaching party may either rescind or specifically enforce it.

State v. Armstrong, 109 Wn. App. 458, 461, 35 P.3d 397 (2001); other citations omitted.

[1] CP3 refers to Clerk's Papers under Lewis County Superior Court Cause Number 14-1-00114-7.

Here, the appellant cannot be rewarded for his action in his attempt to withdraw his guilty plea. The appellant promised to plead guilty. Further, the appellant agreed that "[t]he filing of a motion in this case constitutes a rejection of this offer." *See* Exhibits 5, 6 and 7. The appellant filed a motion in both cases and, as a result, rejected the offer. *Id.* The fact that the appellant did so after he entered pleas of guilty does not change the fact that it is a violation.

Even if, *arguendo,* the appellant's actions of attempting to withdraw his plea is not a breach of contract in this matter, the state may still be relieved of its burden under the agreement. The appellant was convicted of an additional crime. CP3 37-49. Paragraph 6(d) of the Statement of Defendant on Plea of Guilty spells out that if the defendant is convicted of "...any new crimes before sentencing...the prosecuting attorney's recommendation may increase." CP3 10-18 (this is the same form used in each case). That is what occurred in this case. The appellant not only violated the agreement by attempting to further litigate the issue, but he was also convicted of a new felony offense.

As a result of the appellant's own actions, the state was free to seek a higher sentence. Because the state was successful is not a basis for a withdrawal of the guilty pleas in this matter.

IV. CONCLUSION

The appellant knowingly, voluntarily and intelligently entered pleas of guilty and violated the plea agreement entered in this matter. Both the denial of the motion and the sentence imposed by the trial court must, as a result, be affirmed.

RESPECTFULLY submitted this _____ day of December, 2014.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. HARVEY MADDUX, Appellant.	No. 46108-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Jonathan L. Meyer, Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 15 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email addresses: jahayslaw@comcast.net.

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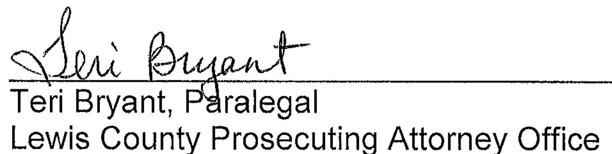

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LEWIS COUNTY PROSECUTOR

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