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NO. 63104-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IVAN BROOKS FLUKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD F. MCDERMOTT, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Fluker entered a plea of guilty and was properly advised of the consequences of his plea. Fluker later attempted to withdraw his plea because he changed his mind and wanted to litigate the charges. The trial court denied Fluker's motion. At sentencing, the prosecutor mistakenly thought that the original parties had incorrectly calculated the standard sentencing range and he sua sponte brought the issue to the court's attention. The issue had not been raised by Fluker. The prosecutor corrected his error before the judgment and sentence was filed and the court imposed a proper sentence. Even though the prosecutor mistakenly raised the issue at the sentencing hearing, Fluker subsequently claimed that he was somehow confused at the time of plea. Did the trial court abuse its discretion by denying Fluker's motion to withdraw his plea when there was no evidence of manifest injustice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Fluker was charged by Information with Burglary in the First Degree in violation of RCW 9A.52.020 with a firearm enhancement, Assault in the Second Degree in violation of RCW 9A.36.021(c) with a firearm enhancement, and Felony Harassment in violation of RCW 9A.46.020(1), (2). All three offenses were domestic violence offenses. CP

1-7. Fluker faced the potential of having additional counts and firearm enhancements added prior to trial. 7/23/08RP 40. Pursuant to a plea agreement, Fluker pleaded guilty to Burglary in the First Degree without the firearm enhancement and Assault in the Second Degree with a firearm enhancement. The Felony Harassment count and the firearm enhancement charged with the Burglary in the First Degree were dismissed pursuant to the plea negotiations. CP 11-33; 8/4/08RP 1-15. Fluker moved to withdraw his plea, but his motion was denied. CP 57-59; 12/16/08RP 16. Fluker was given a standard range sentence. CP 62-69. Fluker appealed. CP 61.

2. SUBSTANTIVE FACTS

Fluker pleaded guilty to Burglary in the First Degree and Assault in the Second Degree. The Assault in the Second Degree included a firearm enhancement. CP 11-33; 8/4/08RP 1-15. The State's recommendation included a recommendation of sixty-two (62) months in confinement. CP 33.¹ The sixty-two (62) months corresponded to the low-end recommendation of twenty-six (26) months on the Burglary in the First Degree charge and the additional mandatory thirty-six (36) months

¹ Fluker failed to mention in his opening brief that the State's recommendation specifically stated sixty-two (62) months of confinement. This recommendation was incorporated by reference and attached to the Statement of Defendant on Plea of Guilty at the time of plea.

firearm enhancement of the Assault in the Second Degree charge. The recommendation was given to Fluker and it was even attached to his Statement of Defendant on Plea of Guilty. CP 11-33. No other documents were provided to Fluker listing a recommendation of less than sixty-two (62) months.

During the plea colloquy, the court confirmed that Fluker had fully discussed the plea with his attorney and that his attorney had even read the Statement of Defendant on Plea of Guilty to him. 8/4/08RP 3-4. Not only was the prosecutor's recommendation attached to the Statement of Defendant on Plea of Guilty, it was specifically incorporated by reference. CP 15. In addition to the prosecutor's recommendation listing the sixty-two (62) months confinement, the Statement of Defendant on Plea of Guilty further explained that the thirty-six (36) months enhancement would run consecutively to all other sentences. CP 15. Specifically, the documents informed Fluker that the thirty-six (36) months enhancement "is mandatory and must be served consecutively to any other sentence and any other enhancement that I have already received or will receive in this or any other cause." CP 15.

The court conducted a detailed colloquy and Fluker responded appropriately and without confusion. At one point, in response Fluker's answer to one of the court's questions, the court, in an abundance of

caution, returned Fluker to the jail. 8/4/08RP 10-12. After Fluker had the opportunity to again discuss the case with his counsel, he returned to court and without confusion or hesitation, completed the colloquy. 8/4/08RP 12-15.

Prior to sentencing, Fluker informed the court that he wanted to withdraw his guilty plea. In preparation for filing his motion, Mr. Joe Chalverus was allowed to substitute in as counsel for Fluker. 10/10/08RP 2-5.

On December 16, 2008, Fluker argued his motion to withdraw his plea. The thrust of his argument was that he had changed his mind and that he wanted to have "a jury decide whether or not the facts support a guilty finding instead of his statement." 12/16/08RP 5-7. In support of his motion, he provided the court with a transcript of the plea hearing, the plea paperwork submitted by the parties, a letter from the King County veterans program, and an article on anxiety disorders. 12/16/08RP 5. Although Fluker attempted to rely on the letter from the veterans program and a claim of Post Traumatic Stress Disorder (PTSD), the evaluator had noted that there were no visible distresses and that some of the symptoms of PTSD are: "hyper vigilance, feeling distant from people, avoiding people, a poor sense of future..." 12/16/08RP 10. The prosecutor pointed out that the letter did not provide any information that would lead the

court to believe that Fluker was unable to comprehend the consequences of his actions. 12/16/08RP 11. Fluker's response to the State's opposition was that "He should be given that opportunity to show the jury that he did not commit these crimes." 12/16/08RP 13. At no time did Fluker ever argue that he did not understand the prosecutor's sixty-two (62) months recommendation.

The trial court found that there was no evidence that the PTSD prevented Fluker from understanding the consequences of changing his plea. 12/16/08RP 14. In particular, the court noted that Fluker "may have PTSD, but I don't believe that PTSD prevents him from intelligently taking a deal that's offered to him; and that's exactly what he did." 12/16/08RP 16. The court also stated that Fluker "was quite clear that he really wanted to take the deal." 12/16/08RP 14. After reviewing all of the documentation and hearing the arguments of the parties, the court concluded that "the defendant made a knowing, intelligent, and voluntary decision to enter his plea after having an opportunity to consult with counsel." The court also concluded that Fluker "understood the nature of the proceedings and the consequences of his plea" and that there was no showing of manifest injustice. CP 57-59. The court then scheduled a sentencing hearing for January 6, 2009. 12/16/08RP 19.

Prior to the sentencing hearing, the court granted Fluker's counsel's request to have Fluker evaluated at Western State Hospital. 3/02/09RP 2-5. Upon reviewing the report, the court found that Fluker "understands the proceedings, is now and has been able to effectively assist counsel." 3/02/09PR 5; CP 55-56. The court went on to say "As far as I'm concerned, [the Western State Hospital evaluation] takes away any issues that might surround his claim of incompetence when entering the plea of guilty." 3/02/09PR 5. Both the deputy prosecuting attorney and the defense counsel concurred with the conclusions of the evaluation. 3/02/09PR 2-3. The court then reaffirmed its earlier decision denying Fluker's motion to withdraw his plea. 3/02/09RP 5-6.

As the court moved to the actual sentencing hearing, the deputy prosecuting attorney sua sponte stated that he believed there was an error in the negotiated sentencing recommendation. Specifically, he incorrectly stated that the proper sentence should be forty-eight (48) months instead of the negotiated sixty-two (62) months. 3/02/09RP 11-12. The court initially correctly stated "Sixty-two is total incarceration on the first two counts of twenty-six months, if they run concurrently. Twenty-six added to thirty-six would be a maximum amount of incarceration of sixty-two months." 3/02/08RP 12. Unfortunately, the deputy prosecuting attorney was able to convince the court and defense counsel that the proper

sentence should be forty-eight (48) months. 3/02/08RP 12-13. The court then imposed a low-end sentence of twenty-six (26) months on count one and twelve (12) months and one (1) day on count two plus the 36 months firearm enhancement. Following the deputy prosecutor's incorrect guidance, the court stated that the total confinement was forty-eight (48) months. 3/02/08RP 24-25.

Prior to the filing of the Judgment and Sentence, the deputy prosecuting attorney realized his error. He immediately set a hearing for the next morning to correct his mistake. 3/02/09RP 2-5. At the hearing, Fluker attempted to bootstrap the prosecutor's error from the previous day onto his motion to withdraw his plea, despite the fact that his plea had occurred seven months earlier. 3/03/09RP 7. The court rejected Fluker's attempt, stating that the "State's recommendation was sixty-two months. That was done at the same time as the change of plea." 3/02/09RP 11, 15-16. The court then imposed a lawful low-end sentence with a total of sixty-two (62) months confinement. 3/03/09RP 15-16; CP 62-69.

C. **ARGUMENT**

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
WHEN IT DENIED FLUKER'S REQUEST TO WITHDRAW
HIS PLEA OF GUILTY**

Fluker claims that the trial court abused its discretion when it refused to grant his request to withdraw his guilty plea. Fluker is

mistaken. Fluker is not entitled to withdraw his plea. Fluker's plea was knowing, voluntary and intelligent, and made after being advised of the direct consequences of his plea. There is no manifest injustice in this case.

Due process requires that a guilty plea be knowing, voluntary and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). This standard is reflected in CrR 4.2(d), which mandates that the defendant be advised of all direct consequences of the plea. Once a guilty plea is accepted, the trial court may allow withdrawal of the plea only to correct a "manifest injustice." CrR 4.2(f). "Manifest injustice" means "an injustice that is obvious, directly observable, overt, [and] not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

Because of the many safeguards that precede a guilty plea, the manifest injustice standard for plea withdrawal is demanding. Taylor, 83 Wn.2d at 596. Our Supreme Court has suggested four indicia of manifest injustice that would allow a defendant to withdraw his guilty plea: (1) the defendant received ineffective assistance of counsel, (2) the defendant did not ratify his plea, (3) the plea was involuntary, and (4) the prosecution did not honor the plea agreement. Taylor, 83 Wn.2d at 597.

There is a strong public interest in enforcing plea agreements that are voluntarily and intelligently made. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). An appellate court reviews a trial court's decision on a

motion to withdraw guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

Fluker's initial basis for wanting to withdraw his guilty plea was simply a change of heart. Fluker changed his mind prior to sentencing and he wanted to take his case to a jury. While Fluker tacked a claim of PTSD on to his motion to withdraw his plea, neither the letter from the King County veterans program nor the Western State Hospital evaluation supported his request. Fluker understood the nature of the proceedings and he was fully capable of assisting in his defense.

The record also clearly demonstrated that Fluker entered a knowing, voluntary and intelligent plea. The case was negotiated by the parties and Fluker received the benefit of a sentence that was less than half of what he was facing if he was unsuccessful at trial. After having multiple opportunities to confer with counsel, Fluker participated in a plea colloquy with the prosecutor and the court. His responses to questions during the plea colloquy were reasonable under the circumstance and his answers were very clear. Fluker's motion to withdraw his plea was appropriately denied by the trial court because there was no manifest

injustice. In light of the court's thorough and in depth review of Fluker's plea, including its granting of the defense counsel's request to send Fluker to Western State Hospital, the court's decision to deny Fluker's motion was not based on untenable grounds or reasons.

As noted by the undersigned deputy prosecuting attorney at the time of sentencing, Fluker's subsequent argument that he was somehow confused about his standard range at the time of his plea is totally disingenuous. Fluker did not make this argument during his original motion to withdraw his plea. As discussed above, his argument boiled down to having a change of heart and wanting to present his case to a jury. It was not until the deputy prosecuting attorney handling the sentencing hearing incorrectly commented that he thought the parties had made a mistake in negotiating the case, that Fluker latched on to this final claim. That was approximately seven months after the entry of his plea. Fluker's attempt to bootstrap the deputy prosecuting attorney's mistake at sentencing to his motion to withdraw his plea is without merit. The State's recommendation was for sixty-two (62) months at the time of the plea. The trial court did not abuse its discretion when it denied Fluker's subsequent claim.

D. CONCLUSION

Fluker made a voluntary and intelligent plea agreement that should be enforced. The trial judge did not abuse his discretion when he found that there was no manifest injustice. For the reasons argued above, Fluker's plea and sentence should be affirmed.

DATED this 28th day of December, 2009.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, attorney for the appellant, of the Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 3rd Ave., Seattle, WA 98101 containing a copy of BRIEF OF RESPONDENT, in State v. Ivan Brooks Fluker, Cause No. 63104-7-I, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Pete DeSanto
Done in Kent, Washington

12/28/09

Date