

NO. 34557-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HARRY NATHAN CARRIER, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 04-1-03722-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to withdraw guilty plea where defendant failed to sustain his burden under CrR 4.2(f) that withdrawal was necessary to correct a manifest injustice?

(Appellant's Assignment of Error Nos. 1 and 2).

2. Was defendant provided constitutionally effective assistance of counsel throughout the proceedings below?

(Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

On July 30, 2004, the State filed an Information charging HARRY NATHAN CARRIER (hereinafter "defendant") with one count of first degree child rape¹ (count I), one count of first degree child molestation² (count II), one count of sexual exploitation of a minor³ (count III), one count of dealing in depictions of a minor engaged in sexually explicit conduct⁴ (count IV), and one count of possession of a depictions of a

¹ In violation of RCW 9A.44.073.

² In violation of RCW 9A.44.083.

³ In violation of RCW 9.68A.040(1)(b).

⁴ In violation of RCW 9.68A.050(1).

minor engaged in sexually explicit conduct⁵ (count V). CP 1-5. The State filed a Persistent Offender Notice advising the defendant that the State would be seeking a sentence of life in prison without parole if the defendant was convicted of first degree child rape *or* first degree child molestation *or* sexual exploitation of a minor. CP 6-7.

On June 13, 2005, the case was assigned to the Honorable John McCarthy, sitting in Department 11, for trial. The State filed an Amended Information amending the charge in count I from first degree child rape to first degree child molestation. CP 8-10. Before trial commenced, the defendant signed a statement on plea of guilty to counts IV and V. CP 11-20; RP⁶ 65-72. The plea statement that defendant signed advised him that the standard range for the crime in count IV was 60 months. CP 11-20. Counsel explained to the defendant the maximum penalty for the crime and the State's potential recommendation.⁷ RP 56. The court asked the defendant if he understood that he could be sentenced up to five years in jail and defendant indicated he understood. RP 69. The court accepted defendant's plea of guilty to counts IV and V. RP 70-71.

⁵ In violation of RCW 9.68A.070.

⁶ The transcript from the trial and plea hearings will be referred to as "RP" throughout this brief. The transcript from the motion to withdraw plea and sentencing hearing will be referred to as "2RP" throughout this brief.

⁷ The State did include a sentencing recommendation in the plea statement because defendant's plea to counts IV and V was not the result of any plea negotiations or agreement. RP 66.

The parties proceeded to trial on the remaining charges (counts I-III). RP 2-156. The State gave opening statements and presented the testimony of the victim's mother and the victim, A.G. RP 212-229. Midway through A.G.'s testimony, the defendant indicated a desire to plead guilty. RP 230. The State agreed to dismiss counts II and III if the defendant plead guilty to first degree child molestation as charged in count I. RP 230.

The defendant signed a Statement on Plea of Guilty, which indicated that the State's sentencing recommendation was life in prison without parole. CP 21-33. In section 6(k) of the plea form, the defendant was advised that the mandatory sentence would be life without parole if the current charge was a most serious offense and he had a prior conviction for a most serious offense. CP 21-33. Mr. Thoenig began the plea colloquy by advising the court:

The Court has before it the statement of defendant on plea of guilty to Count I. And Mr. Carrier and I entered pleas on Monday. We have gone over these forms. I have explained to him each and every one of the rights again that he has, that he waives upon entry of a plea of guilty

I have explained to him that a persistent offender notice has been filed in this case, and that this is a strike offense, and that there is a distinct possibility that he could be sentenced to life in prison without release or parole, and he understands that the Court would—that the prosecuting attorney will be asking for that. He understands that we will oppose that computation, but he also understands that that is a distinct possibility and that he could be sentenced to life

in prison without release or parole as a result of this guilty plea.

RP 27-28 (emphasis added). The court engaged in the following colloquy with the defendant:

COURT: Mr. Thoenig has told me most of what I would ask you. And he has handed to me your guilty plea statement to the crime of child molestation in the first degree. Do you understand the plea form?

DEF: I understand.

COURT: Do you indeed understand that you are presumed innocent; the burden is on the State to prove your guilt beyond a reasonable doubt; and by pleading guilty, you give up those constitutional protections, and you give up your right to continue with this jury trial, your right to further cross-examine or challenge witnesses who would testify against you, and you give up several other rights that are set forth clearly on Page 2 of the plea form?

DEF: I am aware of that.

COURT: Do you understand that the State's position is that you are to be sentenced to life in prison without the possibility of release or parole?

DEF: I understand that.

COURT: Apparently, Mr. Thoenig has indicated to me that he believes there is an argument that the standard range in your case should be 108 to 144 months to an indeterminate sentence of up to life. Do you understand that?

DEF: Yes.

STATE: Could I interject for one moment? And I apologize, Your Honor. At issue is probably going to be a prior conviction for indecent liberties without forcible compulsion where he had a deferred sentence. And I believe it

either counts or it doesn't count. But I suppose there is a possibility that for some reason the Court could find that it's not a strike, but it counts in the offender score, which would then make that 108 to 144 range higher. But I think what is important is that the defendant understands that his offender score is in dispute.

COURT: That's a correct statement of what you believe the dispute is, Mr. Thoenig?

COUNSEL: Yes, Your Honor.

COURT: Do you understand that, Mr. Carrier?

DEF: Yes.

COURT: **Do you understand that ultimately, the Court could sentence you to life, depending upon the legal arguments and discussions and ultimate decisions that I make?**

DEF: **I understand that.**

...

COURT: Is anyone forcing you to plea guilty today?

DEF: Absolutely not.

COURT: Are you pleading guilty of your own free will?

DEF: Yes.

COURT: Did you read over the plea form yourself? Did you go over it with Mr. Thoenig? Or both?

DEF: We went over it.

COURT: Are there any additional colloquy or questions that the State thinks the Court needs to ask Mr. Carrier about?

STATE: I don't think so, Your Honor. I know there is an attachment A that advises him that he will be required to register as a sex offender. He is already a sex offender. **And there is an Attachment S which advised him of some of the persistent offender law, and the indeterminate sentencing provisions. And it's my understanding Mr. Thoenig has gone over those with him.**

COUNSEL: That's correct. We have gone over them both. Is that correct, Mr. Carrier?

DEF: Yes.

RP 233-36 (emphasis added). The court accepted defendant's plea of guilty to count I and dismissed counts II and III pursuant to the plea agreement. CP 34-36; RP 236-38. The defendant signed the order of dismissal, which also advised him that the State was seeking to sentence him as a persistent offender. CP 34-36.

On December 30, 2005, defendant filed a motion to withdraw his guilty pleas on grounds that Mr. Thoenig failed to advise him that his standard range on count IV was 60 months and that he could be found a persistent offender and receive a sentence of life without parole on count I. CP 39-41. The court held a hearing on defendant's motion to withdraw his pleas. Both the defendant and Mr. Thoenig testified at the motion hearing. The court denied defendant's motion to withdraw guilty pleas. 2RP 67-70.

The court sentenced the defendant life in prison without the possibility of parole on count I, 60 months on count IV and 12 months on count V. CP 45-56; 2RP 96-97.

This timely appeal follows. CP 60-61.

2. Facts

The substantive facts of the case are not relevant to the issues raised in this appeal.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA PURSUANT TO CrR 4.2(f).

A guilty plea must be “knowing, intelligent, and voluntary in order to satisfy due process requirements.” State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993)(citing Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); In re Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). When a defendant fills out a written plea statement under CrR 4.2(g) and acknowledges that he has read and understands it and that its contents are true, a reviewing court will presume that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998)(citing State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). In addition, “[w]hen 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.” Perez, 33 Wn. App. at 262 (citing State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981)).

In this case, the presumption that defendant voluntarily pleaded guilty is “well nigh refutable.” Defendant signed statements on plea of guilty for each charge. CP 11-20, 21-33. Moreover, the trial court reviewed with defendant his rights and confirmed that he understood the consequences of his pleas on all three counts. RP 66-70, 230-37. The court also explicitly stated that it was satisfied that defendant was making his pleas knowingly, voluntarily, and intelligently. RP 70-71, 236-37.

Nevertheless, CrR 4.2(f) allows the defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a “manifest injustice.” The rule states:

Withdrawal of plea. The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

A manifest injustice is “an injustice that is obvious, directly observable, overt, not obscure.” State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996)(quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). Four nonexclusive criteria exist for determining whether a manifest injustice

has occurred: “(1) denial of effective counsel, (2) plea . . . not ratified by the defendant or one authorized [by him] to do so, (3) plea was involuntary, (4) plea agreement was not kept by the prosecution.” State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996)(quoting Saas, 118 Wn.2d at 42)(quoting Taylor, 83 Wn.2d 594 at 597, 521 P.2d 699).

A trial court’s denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966); State v. Jamison, 105 Wn. App. 572, 589-90, 20 P.3d 1010 (2001). A court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); Jamison, 105 Wn. App. at 589-90.

- a. The trial court properly exercised its discretion when it denied defendant’s motion to withdraw his plea to count IV because defendant failed to sustain his burden of showing a “manifest injustice” under CrR 4.2(f).

Defendant claims, like he did below, that his plea on count IV was not knowing, intelligent, and voluntary because he was not informed that the standard range sentence was 60 months. Defendant claims this is a manifest injustice which justifies withdrawal of his plea. But the record does not support defendant’s claim.

On July 13, 2005, defendant entered a guilty plea to counts IV and V of the amended information. CP 11-20. The defendant's signed statement on plea of guilty clearly advised him that the standard range on count IV was 60 months in prison. CP 11-20. During the colloquy with the court, the court again advised the defendant that the State would be recommending a sentence of 60 months on count IV. RP 68. Defendant acknowledged that he understood the State's recommendation. RP 68-69.

At the motion to withdraw the plea, defendant's attorney, Ray Thoenig, confirmed that he went through the plea statement with the defendant and informed the defendant of the correct maximum penalty. 2RP 46-47.

The defendant was the only person who testified that Thoenig incorrectly advised him that the statutory maximum on count IV was 12 months. 2RP 7. Defendant denied reading the guilty plea statement "word for word" and said he would not have gone to trial had he known he was looking at a sentence of 60 months. 2RP 10. The court determined that the defendant's testimony was not credible. 2RP 67-70. The trial court accepted Mr. Thoenig's version of events as more credible. 2RP 67-70. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Because the trial court determined that the defendant was properly informed of the maximum penalty, defendant did not sustain his burden of showing a “manifest injustice” under CrR 4.2(f). The trial court, therefore, properly denied defendant’s motion to withdraw his plea on count IV. Defendant has not shown that the trial court abused its discretion by denying defendant’s motion.

- b. The trial court properly exercised its discretion when it denied defendant’s motion to withdraw his plea to count I because defendant failed to sustain his burden of showing a “manifest injustice” under CrR 4.2(f).

Defendant claims that his plead to count I was not knowing, intelligent, and voluntary because he did not understand that he could be sentenced as a persistent offender to life in prison without parole. Defendant claims, like he did below, that this created a manifest injustice justifying withdrawal of his plea. Again, the record does not support defendant’s claim.

On June 15, 2005, defendant entered a plea of guilty to first degree child molestation, as charged in count I. CP 21-33. In exchange for the defendant’s plea, the State dismissed counts II and III. CP 34-36. The defendant’s signed statement on plea of guilty clearly advised the defendant that he could be sentenced to life without parole as a persistent

offender and that the State intended to prove he was a persistent offender. CP 21-33. The motion to dismiss counts II and III, which defendant signed, also advised the defendant that the State intended to prove that the defendant was a persistent offender. CP 34-36. Defendant also acknowledged receipt of the Persistent Offender Notice, which advised defendant that the State would be seeking a sentence of life without parole if the defendant were convicted of first degree child molestation, first degree child rape or sexual exploitation. CP 6-7, 2RP 11.

In addition, the plea colloquy made it abundantly clear that the defendant knew that the State was seeking a sentence of life in prison without parole. RP 230-37. Mr. Thoenig advised the court that the defendant was aware that the State was seeking a sentence of life without parole. RP 231. The court asked the defendant, "Do you understand that the State's position is that you are to be sentenced to life in prison without the possibility of release or parole?" RP 233. Defendant responded, "I understand." RP 233.

At the motion to withdraw guilty plea, Mr. Thoenig testified that he told the defendant "many times" that the State intended to prove that defendant was a persistent offender and would thus be seeking a sentence of life without parole. 2RP 48. Thoenig had no doubts that defendant

understood this very fact. 2RP 51. Thoenig never told the defendant that he would not be found a persistent offender. 2RP 55.

The defendant was the only person who testified that he did not know that the State was seeking a sentence of life without parole. 2RP 14. The defendant's testimony was not credible. For example, when confronted with the guilty plea statement that clearly set forth the State's recommendation of "life", the defendant testified that he thought the plea statement said "lite." 2RP 16. Defendant also testified that he was hard of hearing and that he didn't hear everything that his attorney said at the plea hearing. 2RP 33. But the evidence produced at the motion to withdraw plea established that the defendant wore a hearing device at his plea hearing. 2RP 23. Defendant also testified that he didn't read the guilty plea statement and relied instead on what his attorney told him, even though the court engaged in a lengthy colloquy with the defendant regarding everything in the plea statement. 2RP 33. The court properly determined that the defendant's testimony was not credible. RP 67-70.

Defendant did not sustain his burden of showing that withdrawal of his plea was necessary to correct a "manifest injustice" under CrR 4.2(f). The trial court, therefore, properly denied defendant's motion to withdraw his guilty plea on count I.

2. DEFENDANT WAS PROVIDED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL THROUGHOUT
THE PROCEEDINGS BELOW.

Defendant claims that his attorney was ineffective for failing to advise him of the sentencing consequences of his plea. Defendant's claim is not supported by the record.

To demonstrate that counsel was ineffective, defendant must show that: (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In the context of his guilty plea, defendant must show that his counsel failed to “actually and substantially [assist him] in deciding whether to plead guilty.” State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997)(quoting State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). And to establish prejudice, he must demonstrate that “but for counsel’s failure to adequately advise him, he would not have pleaded guilty.” McCollum, 88 Wn. App. at 982 (citing Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

In order to overcome the strong presumption that counsel’s representation was effective, a defendant must demonstrate both deficient performance and prejudice. State v. McFarland, 127 Wn.2d 322, 334-35,

899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 687).

Defendant claims that there was no legal basis for the court *not* to impose a life sentence and that counsel was ineffective for advising defendant otherwise. See Brief of Appellant at 20. But the record does not support defendant's claim. Counsel testified at the motion to withdraw guilty plea that he advised the defendant "many times" throughout the proceedings that the State was seeking to sentence him as a persistent offender. RP 48. Counsel told the defendant that there were issues to be litigated regarding his status as a persistent offender, but never told the defendant that they would be successful on those issues. RP 57. As evidenced by the State's sentencing memorandum (CP 67-129), there *were* issues involving comparability. In fact, counsel⁸ litigated the comparability issue at the sentencing hearing and the court strongly considered it. 2RP 71-90. Counsel never told the defendant that he would *not* be sentenced as a persistent offender and left the decision to plead guilty completely to defendant. RP 52-55. Defendant has not established

⁸ Defendant's attorney at sentencing was not the same person that represented defendant at his plea hearing.

that counsel's performance was deficient. Counsel provided accurate and appropriate advice, but left the ultimate decision of pleading guilty to the defendant. Defendant's claim fails under the first prong of the ineffective test.

In addition, defendant fails to establish that, but for counsel's actions, he would not have pleaded guilty. Defendant decided to change his plea midway through the victim's testimony. RP 230. Prior to that decision, A.G.'s mother identified numerous sexually explicit photographs of A.G. that were seized from the defendant's computer. RP 202-205. A.G. testified that the defendant took numerous photographs of her when she was naked. RP 219-20. A.G. testified that the defendant would give her massages wherein he touched "my bottom, my boobs, and my vagina." RP 224. A.G. testified that the defendant requested that she touch his penis and she did. RP 227. Mr. Thoenig correctly advised the defendant that the trial was not going well. The timing of defendant's plea midway through the victim's testimony strongly suggests that defendant plead guilty because he knew he was going to be convicted *as charged* at trial.⁹ In fact, Mr. Thoenig testified at the motion to withdraw plea hearing that

⁹ Mr. Thoenig succeeded in persuading the State to drop Counts II and III, child molestation in the first degree and sexual exploitation of a minor, in hopes that if the court disagreed that the defendant was a persistent offender, the defendant's sentencing range would be lower.

the defendant plead guilty because he didn't want to put the victim through the process. 2RP 53. This evidence strongly suggests that the defendant plead guilty on his own accord and for his own reasons – separate from his hope that he might not be sentenced as a persistent offender.

Defendant fails to sustain his heavy burden of showing deficient performance and prejudice. Defendant's claim of ineffective assistance of counsel thus fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's convictions.

DATED: December 28, 2006

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COURT OF APPEALS
DIVISION III

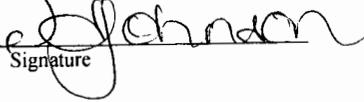
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STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/28/06 
Date Signature