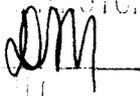


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STATE OF WASHINGTON
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NO. 34759-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROLLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENT OF ERROR

1. The trial court failed to inquire as to whether the defendant understood that he was waiving specific constitutional rights by pleading guilty rendering the plea unconstitutional.

2. The trial court's failure to determine from the record that a factual basis existed for the plea, rendered the plea unconstitutional.

Issues Presented on Appeal

1. Did the trial court's failure to inquire as to whether the defendant understood his constitutional rights render his plea unconstitutional?

2. Did the trial court's failure to provide a factual basis for the plea render the plea unconstitutional?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 13, 2006, Rand Roller pleaded guilty to an amended information charging one count of assault in the second degree in violation of RCW 9A.36.021(1)(c) and one count of robbery in the first degree in violation of RCW 9A.56.190 and RCW 9A.56.200. CP 4-9. Mr. Roller stipulated to his prior record and the court imposed a standard range sentence. CP 10-24. This timely appeal follows. CP 30.

2. SUBSTANTIVE FACTS

Trial counsel informed the court that she went over the plea form with Mr. Roller. Specifically she stated that he understands he is “giving up his trial rights”. Defense counsel further stated that Mr. Roller was aware of the sentencing range and the weapons enhancement. RP 3. 1 Counsel represented to the court that the co-defendant who is Mr. Roller’s brother agreed to testify against Mr. Roller and that is why he decided to plead guilty while maintaining his innocence. RP 4. The judge discussed the maximum sentence ranges, the weapons enhancement, the loss of voting privileges and the loss of the right to carry a gun; but the judge did not explain to Mr. Roller the nature of his constitutional rights. RP 6-7

THE COURT: You have certain constitutional rights. Those rights are set forth on page four of the Defendant's Statement on Plea of Guilty. Did you review those rights with your attorney?

THE DEFENDANT: I did.

THE COURT: Do you understand those rights, sir?

THE DEFENDANT: I do.

THE COURT: You are, at this time, giving those rights up, including the right to trial?

THE DEFENDANT: That is correct.

1 1RP refers to the verbatim report of the sentencing proceeding held on April 13, 2006.

RP 7-8. Defense Counsel did not inform the court that she went over any constitutional rights with Mr. Roller. She simply stated that “he understands he’s giving up all of his trial rights.” RP 3.

Neither the Court nor defense counsel informed Mr. Roller of the elements of the crimes to which he pleaded. The prosecutor told the court that he gave defense two copies of the amended information. The record however is silent as to whether the document was read by anyone in the court room and there was no waiver of formal reading on the record. RP 2. Mr. Roller entered a Newton plea. RP 8. The judge accepted the amended information and accepted the plea as knowing, voluntary and intelligent. RP 5, 9. The judge also stated without providing a record that “there is a factual basis for the plea”. RP 9.

C. ARGUMENT

1. APPELLANT'S PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT WHERE THE TRIAL COURT FAILED TO EXPLAIN THE SPECIFIC CONSTITUTIONAL RIGHTS BEING WAIVED.

a. The Trial Court Failed to Assure That Appellant Understood The Nature of The

Constitutional Rights He
Waived By Pleading Guilty.

A plea may be withdrawn “whenever it appears that withdrawal is necessary to correct a manifest injustice. A manifest injustice occurs when a plea is not knowing, voluntary and intelligent. State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). Withdrawal of the plea under these circumstances is required under the due process clause of the state and federal constitutions. Boykin v. Alabama, 395 U.S. 238, 243, n.5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” State v. Ross, 129 Wn.2d at 284.

A plea is knowing, voluntary and intelligent where the defendant is made aware of all of the direct consequences of his plea. This includes knowledge that he waives fundamental constitutional rights by pleading guilty. Henderson v. Morgan, 426 U.S. 637, 645 n. 13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Boykin, 395 U.S. at 243, n.5; In re Woods v. Rhay, 68 Wn.2d 601, 606, 414 P.2d 601 (1966),), cert.denied, 385 U.S. 905, 87 S.Ct. 215, 17 L.Ed.2d 135 (1966). A plea is not knowing, voluntary and intelligent if the defendant does not understand all of the direct consequences of his plea including the constitutional rights pleading guilty. Id.; In Re Personal

Restraint Petition of Isadore, 151 Wn.2d 294, 302, 82 P.3d 390 (2004). The prosecution bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at 287. A reviewing court must indulge every reasonable presumption against waivers of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938), overruled in part on other grounds, Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed 1177 (1937).

The sole purpose of a judge questioning a defendant at the time of the plea is to establish that the waiver of rights is constitutionally sufficient. In re Woods v. Rhay, 68 Wn.2d at 605. In the instant case because the judge failed to do this, the plea was not valid. The Court in In re Woods v. Rhay, explained that

[t]o be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act.

In re Woods v. Rhay, 68 Wn.2d at 605. Mr. Roller pleaded guilty without ever being informed of the nature of his constitutional rights. Such a waiver does not meet the standard of knowing, voluntary and intelligent. Id.

In Ross, The Court held that the failure to advise the defendant that community placement would be imposed and the failure to explain the implications of community placement rendered the plea invalid. Ross, 129 Wn.2d at 287-88. The Court further held that the defendant must be advised of the direct consequences of his plea during the plea hearing or by clear and convincing extrinsic evidence. Id.

In Ross, the defendant was advised that the court did not have to accept the state's sentencing recommendation and he was advised of the maximum term applicable. Even though he received a standard range sentence below the maximum, he was not specifically advised of the consequences of community placement. On these grounds, the Court held that his plea was not knowing, voluntary and intelligent. and allowed Ross to withdraw his plea.. Id.

In Isadore, community placement was not indicated on the plea form and the judge did not discuss mandatory community placement during the plea colloquy. Isadore, 151 Wn.2d at 302. The Supreme Court vacated the plea and reiterated that mandatory community placement was a direct consequence of the plea that Isadore was not apprised of. The Court, citing

Ross, held that Isadore's plea was not intelligent or voluntary and permitted Isadore to choose his remedy.

In Lutton v. Smith, 8 Wn. App. 822, 509 P.2d 58 (1979), defense counsel misinformed Lutton as to the likely term of incarceration. The court found the plea not voluntary and allowed Lutton to withdraw his plea. Lutton, 8 Wn. App. at 823-24. In Boykin, supra, the trial judge did not inform the defendant of the rights he would be waiving by pleading guilty. The United States Supreme Court held that the plea must fail because it was not knowing, voluntary and intelligent. Boykin, 395 U.S. at 243. The Court in Boykin expressly indicated that knowledge of the constitutional rights waived was essential to a knowing, voluntary and intelligent plea. Boykin, 395 U.S. at 243; Accord, Woods v. Rhay, 68 Wn.2d at 606.

A defendant who pleads guilty waives his constitutional rights to a jury trial, to confront his accusers, and to assert his privilege against self-incrimination.

Boykin v. Alabama, 395 U.S. at 243.

The instant case, counsel only informed the court that she advised Mr. Roller that he would waive his "trial rights". She did not mention any of Mr. Roller's other constitutional rights required under Boykin, supra, such as the right to confront his accusers, and to assert his privilege against self incrimination; and the court never informed Mr. Roller of these rights either.

This error is as egregious as Boykin, Isadore, Ross, Lutton and Woods, because like those cases, Mr. Roller was not informed of the direct consequences of his plea; he was not informed that by pleading guilty he would give up specific fundamental constitutional rights. Although it is not necessary for the trial judge to inform the defendant of his rights, the record must demonstrate such an advisement and the preferred method for explaining rights is to have the judge engage in a colloquy.

Though a failure on the part of the trial judge to fully determine the voluntariness of a plea does not necessarily constitute a deprivation of due process of law, such a failure readily lends itself to such a claim. *Woods v. Rhay*, 68 Wn.2d 601, 414 P.2d 601 (1966). We are satisfied from the facts in the case at bench that defendant's guilty plea was not freely, unequivocally, knowingly and intelligently entered.

Lutton, 8 Wn. App. at 824-25.

In the instant case, the trial judge asked generic questions regarding “certain constitutional rights”. She did not name or explain these rights. Rather she assumed that Mr. Roller was aware of each right and proceeded to ask if he understood “those rights”. RP 7-8. As in Lutton, *supra* and Boykin, *supra*, this “colloquy” was insufficient to find Mr. Roller’s plea knowing, voluntary and intelligent.

Whatever the exact nature of the colloquy it is essential that it be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind as required by Rule 11. *McCarthy* at 467; *Frye* at 201. For this reason the trial court should question the defendant in a manner that requires the accused to provide narrative responses.

United States v. Fountain, 777 F.2d 351, 355 (1985). Further more, the record does not provide any extrinsic evidence to support a finding that Mr. Roller's plea was knowing, voluntary and intelligent.

Mr. Roller indicated that his attorney went over the rights on page four, so it is reasonable to believe that Ms. Whitener did go over the rights in some manner with him. However, there is no indication of what "go over" meant or if Mr. Roller understood the review that occurred. It is possible that Ms. Whitener simply said you have some constitutional rights that you waive by pleading guilty. This would be insufficient, and from the record it is impossible to ascertain if Mr. Roller was actually made aware of and understood his constitutional rights. As stated supra the record must affirmatively indicate the voluntariness of the plea. Woods v. Rhay, supra, Lutton v. Smith, supra, Boykin v. Alabama, supra, Fountain, supra.

The colloquy in the instant case failed to name or explain the constitutional rights. At best the court presumed that Mr. Roller understood his constitutional rights, and at worst simply did not think it necessary to make a finding that Mr. Roller actually understood the rights he was waiving. Mr. Roller answered "yes" when asked if he was aware of a generic set of "constitutional" rights. RP 7-8. This is insufficient to determine a valid waiver.

- b. Appellant's Plea Was Not Voluntary Because The Trial Court Failed to Advise Appellant of the Elements of The Crimes To Which He Pleaded And Failed to Recite A Factual Basis For The Plea.

CrR 4.2(d) requires the trial judge, before accepting a guilty plea, to determine if "there is a factual basis for the plea." Thus, the judge must determine that the defendant's admitted conduct constitutes the charged offense. This protects a defendant "who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980).

Federal Criminal Rule 11(f) provides similar protections.

This subpart serves the dual purpose of the Rule, record creation and voluntariness, by making clear exactly what the defendant admits to, and whether the admissions are factually sufficient to constitute the alleged crime.

The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

(Citations omitted) United States v. Fountain, 777 F.2d at 355.

In Fountain, the prosecutor failed to allege in the information how Fountain was associated with the crimes charged and the record was also silent as to the factual basis for the plea.

[T]rial court should question the defendant in a manner that requires the accused to provide narrative responses. Questions concerning the setting of the crime, the precise nature of the defendant's actions, or the motives of the defendant, for instance, will force the defendant to provide the factual basis in his own words. The court should not be satisfied with coached responses, nor allow a defendant to be unresponsive.

United States v. Fountain, 777 F.2d at 355-56 (1985).

The Court in Fountain found the plea invalid because Fountain never admitted his role in the crime and the record was silent as to his understanding of the elements of the crimes charged. In State v. Powell, 29 Wn. App. 163, 165, 627 P.2d 1337 (1981), the Court held that a defendant was not apprised of the nature of the charge based solely on the conclusory plea statement, "I did participate in the 1 [degree] murder of Charles Allison"). The record in Powell, was otherwise silent as to the elements of the crime charged.

In the instant case, Mr. Roller entered the type of plea that is authorized by North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970) and State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). Under these cases, a defendant may voluntarily, knowingly, and intelligently plead guilty even if he is unable or unwilling to admit that he participated in the acts constituting the crime. North Carolina v. Alford, supra at 37. When a defendant makes an Alford plea, the trial court must exercise extreme care to ensure that the plea satisfies constitutional requirements. See State v. Newton, supra at 373.

In order for a guilty plea to be accepted as knowing, intelligent and voluntary, the accused must be apprised of the nature of the charge. Henderson v. Morgan, supra at 645;

Hews II, at 590; State v. Osborne, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984); In re Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980). At a minimum, "the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime." In re Keene, *supra* at 207 (quoting State v. Holsworth, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980)); State v. Osborne, *supra* at 93; Hews I, at 87.

State v. Montoya, 109 Wn.2d 270, 277-78, 744 P.2d 340 (1987).

In the instant case, as in Powell, *supra*, and Fountain, *supra*, the record fails to establish an adequate factual basis for the guilty pleas because there is no discussion of the elements that constitute the crimes and the defendant's statement in the plea is in the form of an Alford plea which does not admit wrongdoing. Mr. Roller's plea statement provides far less information than the pleas held unconstitutional in Powell and Fountain.

In State v. Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987), the defendant asserted unsuccessfully that he was not apprised of the essential elements of the crime to which he pleaded. Montoya, 109 Wn.2d at 278. The Supreme Court rejected this assertion because the amended information contained all of the elements of the crime charged and Montoya's trial attorney informed the court that he went over amended information with Mr. Montoya.

The instant case is distinguishable from Montoya. Here, trial counsel did not mention the amended information and the trial court never inquired whether Mr. Roller was ever made aware of the amended information. The record is completely silent on this point. Additionally, because Mr. Roller pleaded guilty using a Newton plea, he did not assert that he committed the crimes charged. Under Boykin v. Alabama, supra, Fountain, supra, and Powell, supra, Mr. Roller's plea was not knowing, voluntary and intelligent. He should be permitted his choice of remedies: withdrawal of the pleas. United States v. Fountain, 777 F.2d at 355.

c. The Defendant Is Entitled To Choose His Remedy When a Plea is Unconstitutional.

The defendant is entitled to choose his remedy between specific performance and withdrawal of the plea. Isadore, 151 Wn.2d at 303. Where due process is implicated, "the terms of the plea agreement may be enforced, notwithstanding statutory language." Isadore, 151 Wn.2d at 302-03.

It is important to note that if signing a plea agreement was conclusive evidence that a plea was voluntary, then a defendant would never be entitled to withdraw his plea. Fortunately that is not the law. Rather, the courts have recognized that although a defendant may indicate in his plea statement that the plea is being made "freely and voluntarily", that statement is not

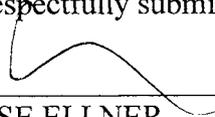
conclusive evidence that the plea was in fact voluntary and it does not preclude a later claim of involuntariness. State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983); Barnes v. State, 523 A.2d 635, 643, (Md. App. 1987). This Court should remand for withdrawal of the plea.

D. CONCLUSION

Mr. Roller respectfully requests this Court find that his plea was not knowing, voluntary and intelligent and remand for withdrawal of the plea.

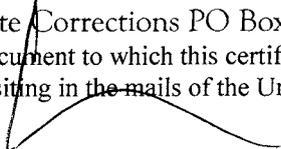
DATED this 1st day of September 2006.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Rand Roller Washington State Corrections PO Box 777 Monroe, WA , WA 98727 " a true copy of the document to which this certificate is affixed, on August 31, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature