

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 36118-3-II
)
 vs.) STATEMENT OF ADDITIONAL
) GROUNDS / RAP 10.10
)
 JOHN A. FISHER,)
)
 Appellant.)
 _____)

I, John A. Fisher, have received and reviewed the Opening Brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

FACTS RELEVANT TO ADDITIONAL GROUNDS

On June 15, 2006, I was informed by my Attorney, Matthew Hoff, that a plea agreement had been reached with State. Mr. Hoff explained to me and I understood the consequences of the plea to be that:

1. I would be required to agree to an exceptional sentence above the standard range (J&S APPENDIX 2.4);
2. I would be required to waive my right to have a jury determine any issues related to the imposition of an exceptional sentence upward (J&S APPENDIX 2.4);
3. My offender score was '0' (zero) on both counts

with a standard range sentence of 3 - 9 months actual confinement, plus 12 months on each count for a deadly weapon enhancement, for a standard range sentence of 15 - 21 months TOTAL ACTUAL CONFINEMENT for each count (STATEMENT OF DEFENDANT ON PLEA OF GUILTY, pg. 2, Section 6(a), before handwritten changes were made raising the offender score, standard range and total actual confinement)(Note: The handwritten changes were made after I signed the agreement & pled guilty, and were not ratified by me); and

4. The exceptional sentence upward would consist of raising the total term of actual confinement upward from 3 - 9 months to 12 months^{fn1} per count, to be served concurrent, plus a 12 month deadly weapon enhancement per count to be served consecutive, for a PRESUMPTIVE SENTENCE (prison term) of 48 months: Count I/12 Months + a 12 Month Deadly Weapon Enhancement (DWE). Count II/12 Months + a 12 Month Deadly Weapon Enhancement = PRESUMPTIVE SENTENCE OF 48 MONTHS. However, in lieu of the 12 month terms of confinement being served concurrent for the underlying Counts

fn1 The exceptional sentence upward added 3 months to the high end of the 3 - 9 month range, resulting in a 12 month exceptional sentence upward per count.

the waiver, APPENDIX 2.4 to the J&S, specifically indicates the stipulation & waiver was for an exceptional sentence upward only, i.e. above the standard range. See J&S, pg. 3, Section 2.4, paragraphs 1, 2, 4 & 5.

Mr. Hoff explained and I understood Section (aa) of the agreement to mean the offenses I pled to included a 12 month deadly weapon enhancement. This section simply meant that the two 12 month deadly weapon enhancements for Counts I & II would be served consecutive for a total of 24 months.

After signing the plea agreement a change of plea and sentencing hearing convened. The Prosecutor, Mr. Golik, advised the court that a last minute deal was pulled off. VERBATIM REPORT OF PROCEEDINGS (VRP) June 15, 2006, pgs. 1 - 2. Mr. Hoff & Mr. Golik advised the court that an agreement had been reached and that a change of plea on the Amended Information would be entered on two counts of assault with two deadly weapon enhancements per count; based on a stipulated exceptional sentence of 48 months in prison. VRP, pg. 2, lines 9 - 20. Mr. Golik plainly stated the 48 month sentence was comprised of "twenty-four (months) of which would be the weapons and then 24 (months) on the underlying assaults." VRP, pg. 2, lines 21 - 24. Nothing was said about how the time on the underlying counts would

be served, i.e. concurrent or consecutive.

The court explained that the standard range of actual confinement on the underlying charges, counts I & II, was 12 months with DWEs for 24 months, and that the DWEs must be served consecutive. VRP, pg. 4, lines 2 - 8. In my mind at the time, this explanation coincided with the terms of the plea agreement, that the underlying counts I & II would be served concurrent. Additionally, at this point in time, my offender score had not been read into the record and had not been raised from '0' (zero) to '2' (two) points, and therefore no exceptional sentence could be raised in adverse to a standard range sentence. Basically, my plea was entered and accepted by the court before I was notified the offender score was being raised from zero to two, which increased the standard range of confinement to 12 months per count, without the requirement of an upward exceptional sentence.

The court asked me if I understood that I was pleading guilty to two DWEs and that the enhancements were mandatory and must be served consecutive to any other sentence. I answered affirmatively (yes). VRP, pg. 5, lines 13 -17.

The court then led me through a colloquy, I plead guilty to the charges, VRP, pgs. 5 - 6, and then the court accepted my plea. VRP, pg. 7, lines 15 -21.

After the Amended Charges were read into the record, VRP, pg. 6 - 7, Mr. Golik advised the court that "these assault IIs count against each other. The score of two and the range with the enhancements is 24 to 26 months. We have reached a joint ... stipulated exceptional sentence of 48 months." VRP, pg. 8, lines 8 - 12. Again, nothing was said about how the time on the underlying counts would be served, i.e. concurrent or consecutive.

Without specifying whether the underlying offenses would be served consecutive or concurrent, the court simply pronounced that it would "go along with the recommendation." of the state. VRP, pg. 11, lines 22 - 23. The J&S reflects a standard range sentence at Section 2.3 SENTENCING DATA, but the court imposed an exceptional sentence above the standard range of 48 months on each count to be served concurrent for a total term of 48 months confinement. The WARRANT OF COMMITMENT also reflects a 48 month term of confinement on each count. Although the terms were ordered to be served concurrent, the court did not articulate how it arrived at two 48 months terms. Presumably, the court was confused about the 'upward' exceptional sentence and added 24 months to each count:

Count I / 12 + 12 DWE + 24 Exceptional Upward = 48

Count II / 12 + 12 DWE + 24 Exceptional Upward = 48

Concurrent 48 Month Exceptional Sentences = 48 Months

The presumption that the underlying counts would be served concurrent is verified by the fact that the court ordered them to be served concurrent. The State's later position that the plea agreement required the underlying counts to be served consecutive is negated by the fact that the state did not object to or take exception to the the offenses being served concurrent at the original sentence hearing. Additionally, on the day of sentencing, while in the courtroom, the only page of the J&S I saw was the signature page (page 9) and the fingerprint page (page 10), and thus any discrepancies or errors contained on the J&S were unavailable for me to identify and object to.

On July 19, 2006, the State Department of Corrections (DOC) requested a clarification of the J&S in this matter. The DOC indicated the J&S form was not clearly filled out because the box in Section 2.1 of the form was not checked to indicate a finding of a deadly weapon. VRP, pgs. 15 - 16, February 22, 2007.

On February 22, 2007, a sentence clarification hearing was conducted. Mr. Golik prepared an order correcting Section 2.1 of the J&S to indicate a finding of a deadly weapon on Counts I & II, and correcting Section 4.5 of the J&S to indicate 12 months on Count I and 12 Months on Count II (consecutive), for a total of 48 months. VRP, pgs. 14

- 15. I took exception to the correction and requested to withdraw my plea agreement rather than entertain specific performance. VRP, pg. 13, lines 10 - 11; VRP, pgs. 15 - 17.

The gist of my exception was that the terms of the agreement (direct consequences) were being modified by the State to my disadvantage. The correction 'required' the underlying offenses to be served consecutive; a condition not stipulated to in the plea agreement. Now that the offender score was two, the standard range jumped from 3-9 months to 12 - 14 months, so the State no longer needed a 3-month 'upward' exceptional sentence to get 12 months for each count. The State changed its position from an 'upward' exceptional sentence to 'consecutive' sentences for the underlying offenses, which increased the actual term of confinement by 12 months (i.e. from 36 to 48 months); and per DOC earned early release credits it increased the minimum term of actual confinement from '32 to 40' months. The change in the State's position altered the minimum and maximum amount of actual confinement I must serve. With the underlying offenses being served concurrent my maximum term of actual confinement was 36 months; 32 in lieu of earned early release (good time). With the underlying offenses being served consecutive my maximum term of actual

confinement is 48 months; 40 in lieu of earned early release.

The court stated the only thing that could be taken care of was correcting the sentence. The court indicated it would enter an order consistent with the sentencing guidelines. VRP, pg. 17, lines 2 - 5. The court signed the ORDER CORRECTING J&S, which reflects the aforementioned changes. ORDER CORRECTING J&S, filed 2/22/2007.

On May 21, 2007, by and through my Attorney Jeff Simpson, I filed a formal motion to withdraw my guilty plea entered on June 1, 2006. MOTION TO WITHDRAW GUILTY PLEA, pgs. 1 & 2. Mr. Simpson also submitted and filed a BRIEF IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA ACCOMPANIED WITH A DECLARATION OF JOHN FISHER (Myself).

On June 21, 2007, a hearing was held regarding my motion to withdraw the guilty plea. The subject of the hearing concerned a general confusion/mutual misunderstanding among all parties (including the DOCs) relating to the terms of the plea, direct consequences and the actual sentence passed down. VRP, pg. 20, lines 12 - 18. My attorney Mr. Simpson and the Prosecutor Mr. Golik were present. Mr. Golik also submitted and filed response to my motion. STATE'S RESPONSE TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA. The State admits there was a presumption the underlying offenses would be sentenced concurrently, but maintains an agreement was

reached by the parties for an exceptional sentence allowing the underlying counts to be consecutive to each other. Id. pgs. 1 & 2. No such agreement exists in the record.

The DOCs interpretation of the J&S and requested changes increased my sentence to 60 months. Although none of the other parties understood the significance of the change, the DOCs calculation worked to my disadvantage:

Ct I/48 Concurrent - (minus) 12 Month DWE = 36 Months
Ct II/48 Concurrent - (minus) 12 Month DWE = 36 Months
24 DWE + 36 = 60 Months

As illustrated after the mandatory 24 month DWE terms are served, 36 months remains on the underlying concurrent counts, totaling 60 months (24+36=60). In sum, according to the DOCs interpretation, I would be required to serve the two 12 month DWEs (24 months) prior to serving the remaining 36 months on the two underlying concurrent counts.

Mr. Simpson clearly explained the problem: "...If you look in the original J&S, he was sentenced to 48 months on Cts. I & II to run concurrent. DOC had a problem with that..." VRP, pg. 20, lines 22 - 25. The DOCs problem was that the DWEs appeared to be concurrent on the J&S, contrary to the mandatory consecutive confinement ordered on the enhancement portion of the J&S. DOC LETTER - FILED AUGUST 15, 2006; VRP, pg. 21, lines 9 - 18.

The court responded and reiterated for the record, that "If in fact it was 60 months, or turns out to be 60 months, ... I (the court) would agree that that would not form a basis for the contract or the agreement with Mr. Fisher and the State." VRP, pgs. 22 - 23. As illustrated the DOCs interpretation and requested changes worked to my disadvantage.

I also tried to explain the problem with the plea agreement and the State's sudden change of position. VRP, pgs. 25 - 29. The court asked me if the sentences were going to run concurrent or consecutive. VRP, pg. 25, lines 12 & 13. I answered that the specifics of the that question were not stipulated to in the agreement, except from what I understood from section 6(z) and (aa). "It said the weapons enhancement had to be running consecutive -- and the rest of it could be ran concurrent." VRP, pg. 25, lines 14 - 19. After trying to make my point, Mr. Simpson summed the issue up correctly: "Your Honor, I thing what Mr. Fisher is trying to say is with an offender score of two, his range on each (count) is 12 - 14 months, no enhancements. ... The general presumption is those are going to run concurrently. And than a weapons enhancement on each puts him at a range of 24 - 26 months on each count ... so, if it were to run concurrent, it would be 12 months on the

two underlying charges plus 24 months for the two enhancements to make a total of 36 months." VRP, pgs. 28&29.

As I explained earlier and in my declaration at the hearing, this was my understanding of the consequences of the plea. The presumptive sentence of 48 months in prison meant I would serve 36 actual months in lieu of the two underlying counts being served concurrent. No where in the plea agreement did I ever stipulate to consecutive sentences regarding the underlying charges.

The court denied my motion to withdraw the plea and I filed a timely notice of appeal. VRP, pg. 30, lines 19 - 22.

ADDITIONAL GROUND #1

1. THE TRIAL COURT ERRED IN DENYING MY MOTION TO WITHDRAW THE GUILTY PLEA

Under CrR 4.2(f) and CrR 7.8(c), the trial court shall allow a defendant to withdraw his guilty plea whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure, and occurs only when (1) the defendant has been denied effective assistance of counsel; (2) the plea was not ratified by the defendant; (3) the pleas was involuntary; or (4) the plea agreement was not kept by the state. State v. Taylor, 83 Wn.2d 594,

598, 521 P.2d 699 (1974); State v. Paul, 103 Wn.App. 487, 492, 12 P.3d 1036 (2000).

Any one of the four indicia listed above would independently establish a "manifest injustice" and would require a trial court to allow a defendant to withdraw his plea. Taylor, 83 Wn.2d at 597. However, the four indicia are not exclusive and a trial court should examine the totality of the circumstances when deciding whether a "manifest injustice" exists. State v. Stough 96 Wn.App. 480, 485, 980 P.2d (1999).

"An involuntary plea constitutes a manifest injustice." Paul, 103 Wn.App. at 494 (citing State v. Aaron, 95 Wn.App. 298, 302, 974 P.2d 1284 (1999)). "A plea is involuntary unless it is made with an understanding of the direct consequences of the plea." Id. at 494-95. The distinction between direct and collateral consequences of the plea 'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" Id. at 495. A defendant's sentencing range represents such a definite, immediate and largely automatic effect on a defendant's punishment. Id. at 495. "Thus, where a defendant enters a plea of guilty based on a prosecutor's erroneous advice that the standard sentence range was lower than it actually was, the defendant must

be permitted to withdraw his plea." Id. at 495.

Further, when a defendant enters a plea agreement based on misinformation that effects the sentencing consequences and he later becomes aware of this misinformation, he may chose to either withdraw his plea or demand specific performance of the plea agreement." State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); State v. Walsh 143 Wn.2d 1 (2001); State v. Mendoza, 157 Wn.2d 582 (2006).

- a. I Was Denied Effective Representation Of Counsel In Entering My Plea Of Guilty; As Such, The Trial Court Should Have Granted The Motion To Withdraw My Guilty Plea.

The Washington State and United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Washington Constitution Art. 1 section 22; United States Constitution Amendment 14. To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2025 (1984). In 1985, the United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), that the same two part test should be applied in challenges based on ineffective

assistance of counsel in the context of guilty pleas. See also State v. Garcia, 57 Wn.App. 927, 791 P.2d 244 (1990).

Counsel has an affirmative obligation to assist a defendant "actually and substantially" in determining whether to plead guilty. State v. Stowe, 71 Wn.App. 182, 186, 858 P.2d 267 (1993). When counsel fails to inform the defendant of the applicable law or affirmatively misrepresents a collateral consequence of a plea that results in prejudice to the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. Id. At 188-89; Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)(defendant must be appraised of the facts in relation to the elements of the particular offense so that an intelligent knowing decision can be made to either enter a plea or go to trial and test the states evidence). In the context of a guilty plea, the defendant must show that his counsel failed to "actually and substantially assist his client in deciding whether to plead guilty," and that but for counsel's failure to adequately advise him, he would not have pleaded guilty. State v. McCollum, 88 Wn.App. 977, 947 P.2d 1235 (1997).

Here, the motion to withdraw my guilty plea was based, in part, on ineffective assistance of counsel in that Mr. Hoff failed to "actually and substantially assist" me in

deciding to plead guilty.

Only moments before going to my readiness hearing Mr. Hoff presented me with the State's newest plea offer. Mr. Hoff told me I had to take the offer now. I felt extremely rushed in making the decision on whether to accept or reject the State's offer. Because Mr. Hoff was in such a hurry he did not adequately explain the law, the facts in relation to the elements, or the sentencing and penalty consequences of the plea agreement.

Mr. Hoff advised me that I was pleading to two counts of Assault in the Second Degree with a Deadly Weapon Enhancement (DWE) on each count; that my offender score was zero and that my standard sentencing range was 3 to 9 months on each count with a 12 month DWE on each count. I understood the DWE would be served consecutive and that the two underlying counts would be served concurrent. I also signed a waiver and stipulated to an 'upward' exceptional sentence of 48 months. This exceptional sentence was supposed to increase my standard range sentence on each count upward by 3 months:

Count I / 12 Months	plus	12 Month DWE
Count II / 12 Months	plus	12 Month DWE

12 (concurrent) plus 24 (consecutive) = 36 Months

As can be seen on the STATEMENT OF DEFENDANT ON PLEA OF GUILTY form, this information was typed into the plea agreement. Based on this information and sections 6(z)&(aa) of the plea form, I was led to believe, and Mr. Hoff specifically advised me, that although I was pleading to a presumptive 48 months I would only serve 36 months in lieu of the underlying counts being served concurrent.

However, as delineated in the above facts, the record demonstrates that the typed in information was scratched out and changed to reflect 2-points and a higher standard range sentence. This was done after the court already accepted my plea. Moreover, these changes altered the minimum and maximum amount of actual confinement I must serve and were not ratified by me, or explained to me, prior to pleading. As the record demonstrates Mr. Golik vaguely explained the changes, changes that were blended into the hearing obscurely enough that I could not recognize them during the hearing. First, the 3 month upward exceptional sentence was no longer needed in light of the offender score being raised from zero to two -- because the 0-point range carried a 3-9 month sentence plus the upward 3-months exceptional sentence equaling 12 months; whereas the 2-point range carried a 12-14 month standard range sentence, both ranges equaling 12 months, hence the obscurity; and Second,

although the sentence was for 48 months, neither the State nor the Court articulated how the 48 months was arrived at -- specifically, whether the underlying counts would be served concurrent or consecutive.

In confusion, the court sentenced me to 48 months on each count to run concurrent with each other. Afterwards, the department of corrections petitioned the court for a clarification hearing. As set forth in the facts, when I was brought back to court for the clarification hearing, the consequences of my plea and sentence were altered drastically to my detriment. The court's nunc pro tunc changes altered the consequences of my understanding of the plea at the time I entered it; as such, I did not fully understand the consequences of the plea rendering it involuntary and a manifest injustice.

Furthermore, I entered the plea based upon misinformation affecting the direct consequences of the sentence. I did not learn, and neither did the court or the State indicate, at any time, that the underlying counts 'must' be served consecutive until the DOC petitioned the court for a clarification hearing. As noted above, in State v. Stowe and State v. Miller, when counsel fails to inform the defendant of the applicable law or affirmatively misrepresents a collateral consequence of a plea that results

in prejudice to the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. Stowe, 71 Wn.App. at 188-89. When a plea is entered based on misinformation that affects the sentencing consequences, the defendant is given the option of requesting specific performance of the plea or choosing to withdraw his plea of guilt. Miller, 110 Wn.2d at 531.

I was not advised as a consequence of the plea that the underlying counts must be served consecutive. In fact, I was advised the opposite, that they would be served concurrent. Also I was not advised that my offender score was two; instead I was told it was zero. Additionally, several handwritten changes were made to the plea agreement after I signed it; changing the point and sentence range, changes that were not initialed and/or ratified by me. Mr. Hoff failed to "actually and substantially assist" me in deciding whether or not to plead guilty. Had Mr. Hoff adequately explained that my offender score was 2 and the underlying counts 'must' be served consecutive, I would not have plead to the offenses. Because these changes altered the direct consequences of my sentence, having a automatic effect on the range of my punishment, my plea was not knowingly, voluntarily or intelligently entered. In re Isadore, 157 Wn.2d 294, 297, 88 P.3d 390 (2004); In

re Hoisington, 99 Wn.App. 423, 433, 999 P.2d 296 (2000); State v. Walsit, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); State v. Mendoza, 157 Wn.2d 582 (2006).

After everything was said and done, I was left with the impression that Mr. Hoff, Mr. Golik and the court were in collusion with each other to obtain my plea fraudulently. Mr. Hoff came to me with what appeared to be a good deal, enticing me to accept the offer and sign off on it. However, after I signed off on it several changes were made without my permission.

Consequently, I was denied effective assistance of counsel rendering my plea involuntary and the trial court erred by not allowing me to withdraw the guilty plea. As such this Court should reverse the trial court's decision denying my motion to withdraw the guilty plea and allow me to withdraw the plea.

- b. I Did Not Enter The Plea Of Guilty Knowingly, Voluntarily, And Intelligently And The Trial Court Erred By Not Allowing Me To Withdraw The Plea.

Due Process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); see Zumwalt, 79 Wn.App. 124, 901 P.2d 319 (1995)(plea of guilty involuntary when defendant was not

adequately informed by his counsel that there was an insufficient factual basis to support the deadly weapon charge). A plea of guilty is not voluntary if it is the product of or induced by coercive threat, fear, persuasion, promise or deception. State v. Swindell, 22 Wn.App. 626, 630, 90 P.2d 1292 (1979), affirmed 93 Wn.2d 192, 607 P.2d 852 (1980).

For the reasons argued in the preceding section of this brief involving ineffective assistance of counsel, ratification and misinformation, my plea could not have been made knowingly, voluntarily and intelligently where I believed or was led to believe that my offender score was zero, that I was pleading to an upward exceptional sentence of 48 months, that the underlying counts would be served concurrent, and that I would serve 36 months of total confinement. Moreover, the record demonstrates there was a mutual confusion among all the parties, including the court and the department of corrections. When I stipulated to the upward exceptional sentence I was specifically advised it was for the purpose of increasing the high end of my 3-9 month range by 3-months to make a total of 12 months for each count. No where in the plea agreement, waiver for an exceptional sentence, or in the report of proceedings does it indicate the underlying counts

must be served consecutive. This fact is self-evident from the record, and the fact that the court originally ordered the underlying offenses served concurrent. Additionally, if the exceptional sentence was for consecutive sentences as the State maintains, how come no objection was made by the State when the court ordered the offenses to be served concurrent.

Given these facts, it cannot be said that my plea of guilt was knowingly, voluntarily and intelligently entered. This Court should reverse the trial court's denial of my motion to withdraw the guilty plea and, accordingly, allow me to withdraw the plea.

- c. My Plea Of Guilty Was Not Knowingly, Voluntarily And Intelligently Entered Because Handwritten Unratified Changes Were Made To The Form And Read Into The Record After The Fact (i.e., after the court accepted my plea).

For the reasons argued in the preceding sections of this brief involving ineffective assistance of counsel, ratification and misinformation, my plea could not have been made knowingly, voluntarily and intelligently where handwritten changes were made to the plea agreement after the court accepted my plea. The Court led me through a colloquy and I plead guilty to the charges. VRP, pgs. 5-6. Then the court accepted my plea. VRP, pg. 7, lines 15-21.

After the amended charges were read into the record, VRP, pg. 6-7, Mr. Golik advised the court that "these assault IIs count against each other. The score of two and the range with the enhancements is 24 to 26 months." VRP, pg. 8, lines 8-12.

This is the first time the point range is mentioned in the hearing. While Mr. Golik was speaking, Mr. Hoff was sitting there scratching out typed in information and handwriting in other information. See STATEMENT OF DEFENDANT ON PLEA OF GUILTY. Mr. Hoff did not explain the changes, did not ask me if I agreed to the changes, and did not ask me to ratify them with my initials.

Additionally, there is an error related to the type of weapon used in the handwritten changes which demonstrate Mr. Hoff did not explain them or ask me to ratify them with my initials. See STATEMENT OF DEFENDANT ON PLEA OF GUILTY, pg. 1, section 4(B), Count II. This section states that I assaulted "Steven Johnson w/a deadly weapon, to wit: a bow & arrows." This is not true and as established by the police reports, arresting officer's declaration of probable cause, the Original Information and Amended Information, the State alleged the deadly weapon related to count II was a "knife." Had I been given the opportunity to observe the handwritten changes, have them explained to me or ratify

them, I would have noted this error.

Given these facts, it cannot be said that my plea of guilt was knowingly, voluntarily and intelligently entered. State v. S.M., 100 Wn.App. 401 (2000)(plea may be withdrawn if not ratified); State v. Moon, 108 Wn.App. 59 (2001)(same); State v. Mcdermond, 112 Wa.App. 239 (2002)(if defendant is misinformed of standard range, whether too low or too high, plea may be withdrawn); State v. Adams, 119 Wn.App. 373 (2003)(defective advice regarding direct consequences of plea invalidates the plea).

Consequently, this Court should reverse the trial court's denial of my motion to withdraw the guilty plea and, accordingly, allow me to withdraw the plea.

- d. The State Breached The Plea Agreement And I Should Be Given The Choice To Either Withdraw My Plea Or Require Specific Performance.

A plea agreement, once accepted by the trial court, is binding on the State. State v. Shineman, 94 Wn.App. 57, 60-62, 971 P.2d 94 (1999)(when state breaches a plea agreement, the appropriate remedy is to grant the defendant a choice between withdrawing the guilty plea or having the agreement specifically enforced). "The integrity of the plea bargaining process requires that defendant's be entitled to rely on plea bargains as soon as the court has accepted

the plea." Miller, 110 Wn.2d at 536. A plea bargain is a binding agreement between the defendant and the state" Miller, at 536, quoting State v. Tourtellotte 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

A defendant must understand the sentencing consequences for a guilty plea to be valid. Miller at 531 (citing Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976)). When the plea rests in any significant degree on an agreement of the State, so that it can be said to be part of the inducement or consideration, the agreement must be fulfilled. Shineman, 94 Wn.App. at 60 (citing State v. Johnson, 23 Wn.App. 490, 596 P.2d 308 (1979)). Due Process requires that the State adhere to the terms of the plea agreement. Shineman, at 60 (citing In re Palodichuk, 23 Wn.App. 107, 89 P.2d 269 (1978)).

(i) THE STATE CHANGED ITS POSITION FROM CONCURRENT TO CONSECUTIVE SENTENCES

The facts here are straight forward. I plead guilty with an understanding the underlying counts would be served concurrent. I relied on concurrent sentences when considering whether I should plead or not; because the 48 month presumptive sentence in prison meant I would actually serve 36 months if the underlying counts were served concurrent; as a consequence concurrent sentences are what induced my plea. In fact, the judge originally ordered

the underlying counts served concurrent as I expected. Id. J&S. Additionally, when the court imposed concurrent sentences the State did not object, therefore, the State's position that the stipulation for an exceptional sentence required consecutive sentences, opposed to an exceptional sentence 'above the standard range,' is not well taken.

However, after the DOC's requested a clarification hearing on the J&S -- concerning whether or not there was a deadly weapon finding, the State changed its position related to the underlying counts and maintained "the plea agreement ... was for an exceptional sentence allowing the counts to run consecutively to each other." See STATE'S RESPONSE TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA, pg. 2. The record demonstrates the State's argument is incorrect. First, the 'stipulation' specifically indicates the agreement was for an "exceptional sentence above the standard range," i.e., upward. See FINDINGS OF FACT AND CONCLUSION OF LAW, sections I & II, filed June 15, 2006. Additionally, the court's MEMORANDUM OF DISPOSITION simply states 48 months. See MEMORANDUM OF DISPOSITION, filed June 15, 2006. Neither one of these documents or the plea agreement indicate an agreement was made requiring the underlying counts to be served consecutive. Furthermore, I ask this Court to examine the report of proceeding taken

during my plea; again there is no indication an agreement was made requiring the underlying counts to be served consecutive. I was advised the DEW's had to be served consecutive. Nothing is said about how the underlying counts must be served.

Despite the binding nature of the terms of the plea agreement and guiding constitutional principles set forth in Miller and Shineman, supra, the State drafted and presented an order asking the court to order the underlying counts consecutive as the stipulated exceptional sentence. See ORDER CORRECTION J&S, filed 2/22/2007. The court signed the order and imposed consecutive sentences. Id.

The State misrepresented the plea agreement and its change in position from concurrent to consecutive sentences constitutes a breach of the plea agreement. As a remedy, I am asking this Court to allow me to withdraw the plea.

If this Court finds the State did not breach the agreement, the record is completely devoid of any indication that the offenses 'must' be served consecutive; as such, I was not adequately advised of the direct consequences of the plea and, alternatively, I ask this Court to find the plea was not entered knowingly, voluntarily and intelligently and, accordingly, allow me to withdraw the plea.

(ii) THE STATE CHANGED ITS POSITION FROM ABOVE THE STANDARD RANGE TO CONSECUTIVE SENTENCES.

For the reasons argued in the preceding section of this brief involving the State's change in position from concurrent to consecutive sentences, the State breached the agreement a second time by changing its position from an exceptional sentence 'above the standard range' to an exceptional sentence "requiring consecutive sentences."

Again, the State's position is not well taken and is not supported by the record. First, the FINDINGS OF FACT AND CONCLUSION OF LAW FOR AN EXCEPTIONAL SENTENCE, the court's MEMORANDUM OF DISPOSITION and the STATEMENT OF DEFENDANT ON PLEA OF GUILTY have no language whatsoever indicating the stipulation/plea agreement was for an exceptional sentence 'requiring consecutive sentences.' In fact, the documents indicate only that "the defendant and the state agree ... to an exceptional sentence above the standard range." Nowhere does the documents refer to consecutive sentences. Furthermore, during the plea and sentencing proceedings neither the court nor the State refer to consecutive sentences regarding the underlying counts. Again, it is odd the State maintains the stipulation required an exceptional sentence allowing consecutive sentences, yet they failed to object when the court imposed concurrent sentences.

Here, either I was misinformed about the direct consequences of the plea or the State has breached the agreement. As a remedy, I am asking this Court to allow me to withdraw my plea.

If this Court finds the State did not breach the agreement, the record is completely devoid of any indication that the 'stipulation/plea agreement' required consecutive sentences; as such, I was not adequately advised of the direct consequences of the plea and, alternatively, I ask this Court to find the plea was not entered knowingly, voluntarily and intelligently and, accordingly, allow me to withdraw the plea.

- e. The Court Allowed Me To Plead To A Non-Existent Crime And The Record Demonstrates There Was No Factual Basis For A Finding Of Guilt On Count Two Based On The Use Of A Bow-And-Arrow.

CrR 4.2(d) requires that "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." This requirement protects defendants who are in the position of voluntarily pleading guilty with an understanding of the nature of the charge, but who do not realize that the conduct does not actually fall within the charge. State v. Zumwalt 79 Wn.App. 124, 901 P.2d 319 (199). Generally, the factual basis requirement requires the judge, before

accepting the guilty plea, to determine that the defendant's admitted conduct constitutes the charged offense. In re Crabtree 141 Wn.2d 577, 585, 9 P.3d 814 (2000).

A factual basis for a plea under CrR 4.2(d) exists when there is sufficient evidence in the record for a jury to conclude that the defendant is guilty. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991); State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

The record here establishes the alleged victim related to Count Two, Steven Johnson, was assaulted with a 'knife.' The arresting officer's DECLARATION OF PROBABLE CAUSE, dated the 11th day of October 2005, states: "Johnson advised that Fisher had assaulted him with a knife.... Johnson told me that Fisher swung an approximate 10" kitchen knife at him and told him he was going to kill him." The original Information filed on October 17, 2005, alleges that Steven Johnson was assaulted with a "knife." The Amended Information filed on May 26, 2006, alleges that Steven Johnson was assaulted with a "knife." The Second Amended Information, filed on June 15 2006, after my plea was entered, alleges that Steven Johnson was assaulted with a "bow and arrow."

My factual statement in the STATEMENT OF DEFENDANT ON PLEA OF GUILTY says that I assaulted Steven Johnson with

a "bow and arrows." Pg. 1. During the plea hearing Mr. Golik read the same statement into the record/from the 2nd Amend. Information. VRP, pg. 7, lines 9-14. However, on the next page of the transcript, Mr. Golik alleges I assaulted Johnson with a knife. VRP, pg. 8, line 16.

As previously discussed, "A factual bases for a plea under CrR 4.2(d) exists when there is sufficient evidence in the record for a jury to conclude the defendant is guilty." Saas, 118 Wn.2d at 43; Osborne, 102 Wn.2d at 95. Here, there is no evidence anywhere indicating Steven Johnson was assaulted with a "bow and arrow." His own statement to the arresting officer indicates he was assaulted with a knife. Despite this fact, the court allowed me to enter a plea based on facts that do not exist. The court essentially allowed me to plead to a non-existent crime, i.e., a crime that did not occur. Consequently, because there is no evidence that Johnson was assaulted with a bow and arrow, the evidence would be insufficient for a jury to conclude that I was guilty of assaulting Johnson with a bow and arrow; thus, there is no factual basis for the plea, the court should not have accepted it and, therefore, my plea was invalid.

Here, because the factual basis for the plea was based on a non-existent crime, the plea was not valid. Nothing

in the record indicates that Steven Johnson was assaulted with a bow and arrow. Pleading to ambiguous facts evinces a lack of understanding of the nature of the charge, and calls into question its voluntariness. Cf. Wood v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966); In re Montoya, 109 Wn.2d 270, 277-78, 744 P.2d 340 (1987); State v. Hubbard, 106 Wn.App. 149, 155-56, 22 P.3d 296 (2001). The court failed to determine that my admission was supported by the evidence and constituted the charged offense. Cabtree, supra, 141 Wn.2d at 585.

This Court should find that my plea was not factually supported, and therefore involuntary and, accordingly, reverse the trial court's denial of my motion to withdraw the plea and allow me to withdraw the plea.

ADDITIONAL GROUND #2

2. THE TRIAL COURT'S NUNC PRO TUNC ORDER CORRECTING THE JUDGMENT AND SENTENCE TO ADD A FINDING THAT I USED A DEADLY WEAPON ON COUNTS I & II VIOLATES BLAKELY AND THE SIXTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Blakely v.

Washington, 542 U.S. 296, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004), the high court clarified that the term "statutory maximum" referenced in Apprendi "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." The Blakely court explained that:

"nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See Apprendi 120 S.Ct. at 2348; Duncan v. Louisiana, 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty."

On June 15, 2006, I entered into a plea agreement and plead guilty to two Counts of Assault in the Second Degree as charged in the Second Amended Information. At the same time I also signed an Apprendi/Blakely waiver. See FINDINGS OF FACT AND CONCLUSION OF LAW FOR AN EXCEPTIONAL SENTENCE. I understood pursuant to the waiver that I waived my right to have a jury determine any issues related to the imposition of an exceptional sentence upward, i.e., above the standard range. I did not consent to judicial factfinding or waive my right to have a jury determine whether I was armed with a deadly weapon or not. Furthermore, during the plea

process, although I plead to the weapons enhancement, neither the court nor the plea form advised me I had a sixth amendment right to have a jury prove any facts that may enhance my sentence. The plea agreement simply advised me that "I was presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty." STATEMENT OF DEFENDANT ON PLEA OF GUILTY, pg. 2, section 5(e). I did not stipulate to judicial factfinding and I was not advised pursuant to the plea agreement that I had a sixth amendment right to have a jury determine, beyond a reasonable doubt, any fact that may enhance my sentence.

On February 22, 2007, the court entered an order correcting my J&S to find that I was armed with a deadly weapon. I was not notified I had any rights related to deadly weapon enhancements when pleading, I did not waive my right to have a jury make this determination, I did not consent to judicial factfinding, and the court did not formally incorporate this finding into the findings of fact and conclusions of law. State v. Michielli, 132 Wn.2d 229, 242 (a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact and conclusion of law and judgment). For the reasons argued in the preceding sections of this brief, Additional Ground #1 (a - e), I was not adequately advised of the direct

consequences of the plea, specifically that I had a right to have a jury determine any fact that enhances my sentence. The court's nunc pro tunc order/finding that I was armed certainly constitutes an enhancement.

Consequently, this Court should reverse the trial court's finding that I was armed, and hold that the failure to properly advise me of my rights renders the plea involuntary. I did not enter the plea with a complete understanding that I had or was waiving certain rights related to deadly weapon enhancements. For this reason my plea should be declared invalid and I should be allowed to withdraw it.

ADDITIONAL GROUND #3

3. CUMULATIVE ERROR MADE MY PLEA INVOLUNTARY.

Even if this Court does not grant reversal based upon any one of the individual errors argued above, reversal should nevertheless be granted, because the cumulative effect of those errors made my plea involuntary. See, E.g. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). There is no question that there was a fair amount of confusion from all parties concerning the plea agreement. All of these errors clearly compounded one another, and the result was that my plea was not knowingly, voluntarily and intelligently entered. Therefore, this Court should reverse

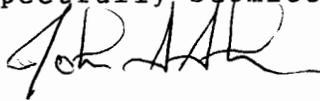
the trial court's denial of the motion to withdraw my plea and, accordingly, allow me to withdraw the plea.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the trial court's order denying my motion to withdraw the guilty plea and, accordingly, allow me to withdraw the plea.

DATED this 13 day of December, 2007.

Respectfully Submitted,



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