

NO. 36390-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY ERNEST FAIN, APPELLANT

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FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 06-1-03812-8

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**BRIEF OF RESPONDENT**

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

1. Did the defendant waive his right to appeal the sufficiency of the evidence on count three of the second amended information by entering into a knowing, voluntary, and intelligent plea of guilt to that charge?

(Appellant's Assignment of Error One)

B. STATEMENT OF THE CASE.

1. Procedure

On August 16, 2006, the defendant, Anthony Ernest Fain was charged in Pierce County Superior Court by original information with count one - assault in the first degree (victim C. Jiles); count two - assault in the first degree (victim V. Jiles); and count three - unlawful possession of firearm in the first degree. CP 1-2. On August 16, 2006, the defendant appeared in Pierce County Superior Court for arraignment and entered pleas of not guilty to all charges.

On December 27, 2006, the defendant was re-arraigned on an amended information which charged him with count one - attempted murder in the first degree (victim Christopher Jiles); count two - assault in the first degree (victim Christopher Jiles); count three - assault in the first

degree (victim Valeria Jiles); and count four - unlawful possession of firearm in the first degree. CP 3-5. The defendant pled not guilty to all charges.

On April 26, 2007, the parties appeared for trial in Department Eighteen, before the Honorable Beverly Grant. Prior to trial beginning, the defendant entered into a plea of guilty on count four - unlawful possession of firearm in the first degree. RP (5/10/07) 22; CP 6-13. The court accepted the defendant's plea of guilty and delayed sentencing until the conclusion of the trial on the remaining charges. RP (5/10/07) 22.

A jury trial on counts one, two, and three began on April 26, 2007. RP (4/26/07) 26. On May 8, 2007, the parties completed closing arguments. RP (5/7/07) 106.

Jury deliberations began on May 9, 2007. RP (5/9/07) 2. On May 10, 2007, the jury returned a verdict of guilty on count two – assault in the first degree (victim Christopher Jiles). RP (5/10/07) 5; CP 117. The jury also returned a verdict of Yes on the related special verdict form, finding that the defendant had been armed with a firearm during the commission of count two. RP (5/10/07) 5; CP 118.

The jury was unable to reach unanimous verdicts for count one – attempted murder in the first degree (victim Christopher Jiles) or count three – assault in the first degree (or the lesser included offense of assault

in the second degree for victim Valeria Jiles). RP (5/10/07) 9-11. The court declared a mistrial for counts one and three. RP (5/10/07) 9-11.

On May 25, 2007, the parties appeared back in Department Eighteen. The parties represented to the court that they had reached a settlement agreement through plea negotiations. RP (5/25/07) 4. The State filed a second amended information which charged the defendant with count two – assault in the first degree (victim Christopher Jiles); count three assault in the second degree (victim Valeria Jiles); and count four – unlawful possession of firearm in the first degree. RP (5/25/07) 4; CP 128-129. Though the defendant had already been found guilty by jury verdict of count two and had pled guilty to count four, the State sought to clarify the record by including both charges in the second amended information. RP (5/25/07) 4. The affect of the second amended information was to reduce count three from assault in the first degree (with a firearm sentencing enhancement) to assault in the second degree (with no enhancement).

The defendant entered into a plea of guilty to count three – assault in the second degree (victim Valeria Jiles). CP 131-138. The defense attorney explained to the court that he and the defendant had a long time to discuss the plea and the implications of pleading guilty. RP (5/25/07) 5. Furthermore, the defense attorney noted that they had

discussed the defendant's right and it was his belief that the defendant was entering into a knowing, voluntary, and intelligent plea. RP (5/25/07) 5.

The court conducted an exhausted colloquy with the defendant pursuant to his plea of guilty. During this colloquy, the defendant indicated that he understood the elements of the offense; standard sentencing range; maximum penalties; the offense constituted a most serious and violent offense; sentence recommendations of the parties; and the constitutional rights he was waiving by pleading guilty. RP (5/25/07) 5-10. In acknowledging that he understood his constitutional rights, the defendant indicated that it was not necessary for the court to read those rights to him. RP (5/25/07) 8. Paragraph five of the plea statement enumerated the constitutional rights the defendant was giving up by pleading guilty, including his right to appeal after trial. CP 131-138.

The defendant acknowledged that there were no threats or promises made to induce him to plead guilty. RP (5/25/07) 10. The court reviewed paragraph eleven of the plea form with the defendant which contained the factual basis for the plea. The defendant acknowledged that he agreed with the statement. RP (5/25/07) 11. The court accepted the defendant's plea and found that it was freely and voluntarily given. RP (5/25/07) 11.

After accepting the plea of guilty, the court sentenced the defendant to 378 months in prison. RP (5/25/07) 23; CP 142-154.

2. Facts

For purposes of the State's response, the substantive facts of the case are not relevant and will not be set forth in this brief.

C. ARGUMENT.

1. THE DEFENDANT WAIVED HIS RIGHT TO APPEAL THE SUFFICIENCY OF THE EVIDENCE ON COUNT THREE OF THE SECOND AMENDED INFORMATION BY ENTERING INTO A KNOWING, VOLUNTARY, AND, INTELLIGENT PLEA OF GUILT.

A voluntary plea of guilty waives all defenses other than that the complaint, information, or indictment charges no offenses. *State v. Bailey*, 53 Wn. App. 905, 771 P.2d 766 (1989), citing *Woods v. Rhay*, 68 Wn.2d 601, 606-07, 414 P.2d 601, *cert denied*, 385 U.S. 905, 87 S. Ct. 215, 17 L. Ed. 2d 135 (1966).

In *Bailey*, the defendant was charged by information with possession of stolen property first degree. The defendant later filed a motion to dismiss for preaccusatorial delay. The court denied the defendant's motion. The defendant later entered into a plea of guilty. *Bailey*, 53 Wn. App. At 905.

On appeal, Bailey argued that the charges he pled guilty to should have been dismissed for preaccusatorial delay. The Court held that Bailey's guilty plea waived his right to complain of the preaccusatorial

delay and affirmed his convictions. *Bailey*, 53 Wn. App. at 907.

In *Rhay*, the defendant was charged by information with forgery. The defendant later filed a motion to dismiss based on a speedy trial violation. The motion was denied. The defendant then entered into a plea of guilty. *Rhay*, 68 Wn.2d at 602-603.

On appeal, Rhay argued that his constitutional right to speedy trial had been violated. The court held that Rhay's guilty plea waived his right to complain of a delay between arrest and hearing. *Rhay*, 68 Wn.2d at 605.

In the case at bar the defendant entered into a knowing, voluntary, and, intelligent plea of guilty to count three of the second amended information, assault in the second degree. CP 131-138. The trial court went through an exhaustive colloquy with the defendant who acknowledged understanding the constitutional rights he was giving up by pleading guilty. The trial court made a finding that the defendant had made a voluntary plea. 5/25/07. RP 11. Similar to the defendants in *Bailey* and *Rhay*, the defendant in the present case waived the right to appeal all issues other than that the complaint, information, or indictment charges no offense.

D. CONCLUSION.

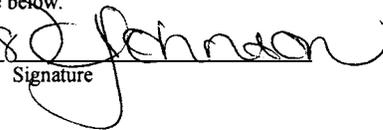
The State respectfully requests that this Court affirm the defendant's conviction for assault in the second degree. The defendant's voluntary plea of guilty to the offense waived his right to appeal the sufficiency of the evidence at trial on that offense.

DATED: March 17, 2008.

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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.

3/17/08   
Date Signature

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