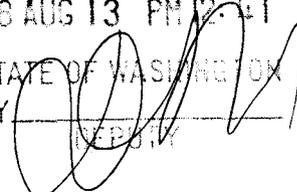


FILED
COURT OF APPEALS
DIVISION II

08 AUG 13 PM 12:41

STATE OF WASHINGTON

BY  DEPUTY

NO. 37192-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN N. LEWIS,

Appellant.

APPELLANT'S BRIEF

James L. Reese, III
WSBA #7806
Attorney for Appellant

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR

Assignments of Error	Page
No. 1- No.8	1
No. 9- No. 15	2
No. 16- No. 17	3
Issues Pertaining to Assignments of Error	
No. 1- No.2	3
No. 3	4

B. STATEMENT OF THE CASE

Statement of Procedure	4
Statement of Facts	8

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEA.	10
INVOLUNTARINESS OF GUILTY PLEA	13
II. THE SENTENCING COURT ERRED WHEN IT DETERMINED AN OFFENDER SCORE OF THREE INSTEAD OF TWO.	18
<i>State v. Dunaway</i>	24

D. CONCLUSION

F. APPENDIX

Findings of Fact and Conclusions of Law for Hearing on Defendant’s Motion to Withdraw	
--	--

Guilty Plea	A
CrR 4.2	B
RCW 9.94A.589(1)(a)	C
Sixth Amendment	D
Fourteenth Amendment	E

TABLE OF AUTHORITIES

TABLE OF CASES

<i>In re Keene</i> , 95 Wn.2d 203, 622 P.2d 360 (1980)	15
<i>In re Woods v. Rhay</i> , 68 Wn.2d 601, 414 P.2d 601 (1966)	14
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, <i>cert. denied</i> , 479 U.S. 930 (1986)	19
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984)	27
<i>State v. Bresolin</i> , 13 Wn.App. 386, 534 P.2d 1394 (1975)	22
<i>State v. Bush</i> , 102 Wn.App. 372, 9 P.3d 219 (2000)	20
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995)	25
<i>State v. Cimini</i> , 53 Wash. 268, 101 Pac. 891 (1909)	14
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987)	18,21,24,25,26
<i>State v. Ford</i> , 125 Wn.2d 919, 891 P.2d 712 (1995)	28

<i>State v. Frederick</i> , 100 Wn.2d 550, 674 P.2d 1136 (1983)	29
<i>State v. Freeman</i> , 118 Wn.App. 365, 76 P.3d 732 (2003), <i>review granted</i> , 151 Wn.2d 1020 (2004)	25
<i>State v. Garza-Villarreal</i> , 124 Wn.2d 42, 864 P.2d 1378 (1993)	22
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984)	26
<i>State v. Hashman</i> , 115 Wn.2d 217, 797 P.2d 477 (1986)	27
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	16,27
<i>State v. Hurt</i> , 107 Wn.App. 816, 27 P.3d 1276 (2001)	13
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996)	28
<i>State v. Jury</i> , 19 Wn.App. 256, 576 P.2d 1302 (1978)	17
<i>State v. Martinez-Lazo</i> , 100 Wn.App. 869, 999 P.2d 1275, <i>review denied</i> , 142 Wn.2d 1003 (2000)	13
<i>State v. Maxfield</i> , 125 Wn.2d 378, 886 P.2d 123 (1994)	20
<i>State v. McFarland</i> , 127 Wn.2d 332, 899 P.2d 1251 (1995)	16
<i>State v. Mitchell</i> , 81 Wn.App. 387, 914 P.2d 771 (1996)	20

<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976)	7
<i>State v. Prater</i> , 30 Wn.App. 512, 635 P.2d 1104 (1981)	22,26
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996)	13
<i>State v. S. M.</i> , 100 Wn.App. 401, 996 P.2d 1111 (2000)	15
<i>State v. Sommerville</i> , 111 Wn.2d 524, 760 P.2d 932 (1988)	14,16
<i>State v. Stacy</i> , 43 Wn.2d 358, 261 P.2d 400 (1953)	14
<i>State v. Taft</i> , 49 Wn.2d 989, 297 P.2d 1116 (1956)	14
<i>State v. Taylor</i> , 83 Wn.2d 594, 521 P.2d 699 (1974)	13
<i>State v. Thetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	27
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	16,17
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994)	21
<i>State v. Wright</i> , 76 Wn.App. 811, 888 P.2d 1214 (1995)	26
<i>Henderson v. Morgan</i> , 426 U.S. 637, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976)	15
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)	7

<i>Smith v. O'Grady</i> , 312 U.S. 329, 85 L.Ed. 859, 61 S.Ct. 572 (1941)	15
--	----

<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)	16
--	----

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment	2
Sixth Amendment	15

STATUTES

RCW 9.94A.090	12
RCW 9.94A.430-460	12
RCW 9.94A.589(1)(a)	3,20,26
RCW 9A.36.031 (1)(d) and/or (f)	7,19
RCW 9A.40.040	7
RCW 9A.40.010(1)	7
RCW 9A.56.190	7
RCW 9A.56.210 (1)	7
RCW 69.50.206(b)(4)	7
RCW 69.50.401(1),(2)(a) or(b)	5
RCW 69.50.4013	7

REGULATIONS AND RULES

CrR 4.2	3,12
CrR 7.8	12

A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion to withdraw his guilty plea.
2. The trial court erred when it entered finding of fact V which states:

“That the Defendant engaged in a lengthy oral colloquy with Judge Anna Laurie on the record.”
3. The trial court erred when it entered finding of fact VI which states:

“That the Defendant is now claiming that his plea was coerced without any proof other than his own statement.”
4. The trial court erred when it entered finding of fact VII which states:

“That there is a sufficient written and oral record of the Defendant's guilty plea.”
5. The trial court erred when it entered finding of fact VIII which states:

“That Judge Laurie went over with the Defendant at great length the guilty plea form, the rights he was giving up, and whether or not he was entering his guilty plea voluntarily.”
6. The trial court erred when it entered finding of fact X which states:

“That the cell phone the Defendant talks about in his brief was not new evidence.”
7. The trial court erred when it entered finding of fact XI which states:

“That defense counsel was prepared to introduce evidence about the cell phone.”
8. The trial court erred when it entered finding of fact XII which states:

“That there is no evidence to support the alleged promise of a specific sentence other than the Defendant’s own allegation.”

9. The trial court erred when it entered finding of fact XV which states:

“That the Defendant was facing at least 40 years if convicted of all of the charges.”

10. The trial court erred when it entered finding of fact XVII which states:

“That the Defendant has not overcome the strong presumption that his guilty plea entered on September 11, 2007 was entered voluntarily.”

11. The defendant’s due process rights guaranteed by the Fourteenth Amendment were violated when the trial court entered finding of fact XVIII which states:

“That the Defendant’s guilty plea entered on September 11, 2007 was voluntary.”

12. The trial court erred when it entered finding of fact XIX which states:

“That the court is not satisfied that defense counsel promised a specific sentence.”

13. The trial court erred when it entered finding of fact XX which states:

“That even if defense counsel did promise a specific sentence, there was no prejudice to the Defendant.”

14. The trial court erred when it entered finding of fact XXI which states:

“That the Defendant has not met his burden to prove that his defense counsel was ineffective.”

15. The trial court erred when it entered conclusion of law VI:

“That an oral colloquy between the judge and the defendant when a defendant pleads guilty makes the presumption of voluntariness well nigh irrefutable.”

16. The trial court erred when it entered an Order finding the defendant to be in breach of the plea agreement based on his motion to withdraw his guilty plea.

17. The Sentencing court erred when it calculated the defendant's offender score as three instead of two pursuant to RCW 9.94A.589(1)(a).

Issues Pertaining to Assignments of Error

1. Whether there was a manifest injustice requiring that the trial court “shall allow” the defendant to withdraw his guilty plea before being sentenced based on involuntariness of his plea and/or ineffective assistance of counsel as provided for in CrR 4.2(d) and (f)?

Mr. Lewis' attorney told him that if he could not get him 20 months then he would quit the business. The actual sentence was 40 months. Mr. Lewis had only 15-20 minutes to discuss the plea with his attorney because the jury was waiting to commence the trial. And Lewis was not only pressured by his attorney to plead guilty but was misinformed that the victims would not be present at sentencing.

(Assignments of Error 1-17.)

2. Whether assault in the third degree and robbery in the first degree constitute the same criminal conduct under RCW 9.94A.589(1)(a)? Both

crimes occurred at the same time and place (East 14th Street, Bremerton, Washington on February 7, 2007), involved the same victim, Larue Jerome Hubbard, and comprised the same criminal intent and objective i.e., to obtain money and other valuables by force? The trial court ruled that since the defendant took the victim to another location (6th Street) to get some more money from his mother that the crimes were not the same criminal conduct. (Assignment of Error 18.)

3. Whether there was substantial evidence to support the trial court's findings of fact regarding denial of the motion to withdraw Mr. Lewis' guilty plea and whether the findings of fact support conclusion of law VI? (Assignments of Error 3-16.)

B. Statement of the Case

Statement of Procedure

Initially, the defendant was charged as an accomplice to the robbery of Laure Jerome Hubbard and or Verice Carter on the night of February 6, 2007. CP 1. He was also charged as an accomplice with Burglary in the First degree on the same date when he allegedly entered a building and "...the Defendant or another participant in the crime was armed with a deadly weapon and/or did assault any person therein, to -wit: Larue Jerome Hubbard and/or Verice Careter. CP 2; counts I and II.

A First amended complaint was thereafter filed. This information

added an additional count of being an accomplice to Assault in the Second Degree when Verice Jeannine Carter was assaulted with a deadly weapon on February 6, 2007. CP 10, count III.

On April 12, 2007 a second amended information was filed that added a special allegation of being armed with a firearm in conjunction with Count III. In addition, a fourth count was added alleging that the defendant was an accomplice in the second degree assault of Larrue Jerome Hubbard on February 6, 2007. CP 16, count IV.

By September 11, 2007 a Fourth Amended Information was filed. CP 18. Count I alleged accomplice liability for Delivery of a Controlled Substance between February 1 and February 6, 2007 contrary to RCW 69.50.401(1),(2)(a) or (b). id. Count II alleged accomplice liability for the second degree robbery of Larue Jerome Hubbard. CP 19. Count III alleged accomplice liability for Possession of a Controlled Substance on February 6, 2007. CP 20. Count IV alleged accomplice liability for the unlawful imprisonment of Verice Carter on February 6, 2007. CP 21.

The defendant plead guilty on September 11, 2007 to the Fourth Amended information. CP 18. A statement of defendant on pleas of guilty was filed on September 11, 2007. CP 23. Mr. Lewis plead guilty to the drug charges and entered Alford pleas to the other two counts. He stated: "I did not commit unlawful imprisonment or robbery in the second degree

but take an Alford plea to those counts only to take advantage of the states offer otherwise facing 45 years in prison. I am guilty of possession and delivery of cocaine in Kitsap County on or about 2/6/07.” CP 28.

According to the plea agreement, the offender scores for all four counts was 3. CP 31. Count I had a standard range sentence of 20 to 60 months and the state intended to recommend a 60 month sentence. id. There was an agreement that Mr. Lewis did not need to join in this recommendation. Rather, he could argue for any sentence within the standard range.

Three days later at the time of sentencing on September 14, 2007, Mr. Lewis indicated that he wanted to withdraw his guilty pleas. CP 64. Another attorney was appointed for him and the state filed a notice of Breach of Plea Agreement. CP 63.

On October 10, 2007 the defendant’s substituted attorney filed a “Motion to Allow Defendant to Withdraw Guilty Plea”. CP 146. The state filed a “Response to Defense Motion For Withdrawal of Guilty Plea.” on the same date. CP 65. On November 7, 2007 the defendant filed a pro se 31 page document entitled :“Motion to Withdraw Guilty Plea”. CP 153.

On December 10, 2007 the State filed a fifth amended information. CP 186. This information added a fifth count of being an accomplice to

Assault in the Third Degree alleged to have occurred on February 6, 2007 involving Larue Jerome Hubbard. CP 189. The defendant then entered a plea agreement on the same date. He plead guilty to the two drug counts and entered Alford pleas to Counts II, IV and V.¹ CP 204. An amended plea agreement was also entered. CP 205. The defendant entered Alford² pleas as an accomplice to count II (robbery in the second degree); count IV (unlawful imprisonment); and to count V (assault in the third degree). CP 203.

Prior to sentencing the defense filed a motion to consolidate counts II and V and counts I and III for the purposes of calculating the offender score. CP 190. The prosecutor agreed that counts I and III merged because they were the same criminal conduct. CP 219; 12/14/07 RP 2.

¹Count I alleged Delivery of a Controlled substance in violation of RCW 69.50.401(1), (2)(a) or (b); Count II Robbery in the Second Degree of Larue J. Hubbard on February.6, 2007 in violation of RCW 9A..56.210(1) and RCW 9A.56.190; Count III Possession of a Controlled Substance [Cocaine] on Feb. 6, 2007 in violation of RCW 69.50.4013 and RCW 69.50.206(b)(4); Count IV Unlawful Imprisonment on Feb. 6, 2007 in violation of RCW 9A.40.040 and RCW 9A.40.010(1); Count V Assault in the Third Degree of Larue J. Hubbard on Feb. 6, 2007 in violation of RCW 9A.36.031(1)(d) and/or (f). All counts alleged accomplice liability.

² *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct.160, 27 L. Ed.2d 162 (1970) (an accused is entitled to enter a plea of guilty while still maintaining his innocence in order to take advantage of a plea bargain. See also *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

On December 14, 2007 the defendant was sentenced concurrently to 40 months on count I, 15 months for count II, 3 months on count III, 10 months for count IV and 10 months for count V. CP 224. Mr. Lewis filed his notice of appeal on January 3, 2008. CP 238.

Statement of Facts

The following outline of facts originates from the state's summary of the police reports that were used to establish probable cause and to establish a factual basis for the Alford pleas. 12/10/07 RP12-15.

"On February 6, 2007 around 8:30 pm, Cencom received a call from 1747 6th Street in Bremerton, WA that a female was being held at gunpoint at an address on East 14th Street, also in Bremerton. Officer Billy Renfro ... was the first officer to arrive at the 6th street address. While en route, Officer Renfro was told that there was one suspect inside the 6th street home and that he was armed with a gun.

Upon arrival, Officer Renfro was contacted by two females, ...Both told him that there was an armed man inside the residence with several children. As other units arrived, a male, later identified as Ryan Lewis, exited the residence. Lewis complied with Officer Renfro's instructions and was taken into custody without incident. In a search of Lewis incident to arrest, Officer Renfro found a 9mm handgun in his right jacket pocket.

Once Lewis was placed in custody, Officer Renfro spoke with the victim at the scene, Larue Hubbard. Hubbard said that when he arrived at his 14th street home, he was contacted by two black males wearing ski masks and pointing guns at him. Hubbard told the officer that his jacket was removed along with his watch, wallet and necklace. He was tied up and taken into the bathroom where he found his girlfriend, Verice Carter. Hubbard was forced to lie on the floor as the two men asked where the money was hidden in his house. One of the men struck Hubbard twice on the head with the back of the gun and threatened to break his fingers. After Hubbard told them that there was money at his mom's house, he was forced to drive Lewis to the house at gunpoint. Ms. Carter remained at the house with the second man, later identified as Jose Stridiron. Once at his mom's house, Hubbard was able to communicate the situation to his mom and sister and his sister was able to call the police.

While multiple officers dealt with the 6th street scene, several officers also responded to the 14th street address at approximately 8:30 pm. After officers had set up a perimeter, a female, identified as Verice Carter, ran out the front door. Ms. Carter told the officers that she was at home when two black males she did not recognize entered her residence. She was ordered at gunpoint to the floor, where she was forced to partially undress. She was tied up and taken to the bathroom. One of the men

stayed with her while the other one rummaged through the house, removing several items that belonged to Hubbard including a lockbox and a plastic jug of change. Ms. Carter estimated that she was in the bathroom for approximately an hour before she heard Hubbard come home. She heard Hubbard struggle with them and heard him being hit as the two men asked him where the money was. One of the men stayed at the 14th street residence there with her while the other man left with Hubbard.....” CP 215-16.

C. Argument

I THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEA.

The trial court considered Mr. Lewis’ arguments and denied his motion. 11/16/2007 RP 8. The defendant’s substituted attorney argued at the time of the hearing that Mr. Lewis was seeking withdrawal of his guilty pleas, prior to judgment, based on entry of an involuntary plea and based on ineffective assistance of counsel. CP 157-59. The defendant’s substituted attorney timely filed a “Motion to Allow Defendant to Withdraw guilty Plea.” CP 146. Part of the motion stated the following:

“The defendants were brought into the courtroom on the morning of September 11th. The jury was waiting in the courthouse to be brought in to begin the jury selection process. The new plea offer was communicated to Lewis by his attorney, Thomas Olmstead. Lewis told him that the plea offer was the same one he

had rejected previously because the prosecutor's office was still offering 60 months. Olmstead told him that it did not matter that the recommendation was 60 months because he guaranteed if he pled guilty that he would receive 20 months. Lewis was skeptical of the claim because his experience was that the judge generally followed the State's recommendation. Olmstead told him that because Lewis did not have any criminal history and because he was a military veteran he could persuade the judge not to do so. Olmstead also told him that the victim was a known drug dealer so the judge would not have sympathy for him. Olmstead told him that if he could not get him 20 months then he would quit the business. Lewis was also told that the prosecutor did not even want to give him 60 months but was being made to by her superiors. Lewis was told that at sentencing the prosecutor would not demand 60 months and that all they could present was written witness statements and police reports.

Lewis decided that he needed more time to think about the proposed offer. However, he received pressure from his attorney to accept the offer now because the jury was waiting outside and he had to decide right then whether to accept it. Based on all that was represented to him about the plea offer, Lewis signed the plea agreement. Only about 15 to 20 minutes passed between when he was first presented the offer until he was pressured into signing it....

After Lewis plead guilty he learned that the State wanted to set the sentencing hearing over so that the victims could be contacted. He also learned that they could be present at the sentencing hearing and testify about what had occurred. This was different information than he had received from his attorney. Based on this and after having additional time to reflect on his decision he decided that he wanted to withdraw his pleas of guilty.

On September 14th, the date of the sentencing hearing, Lewis informed the court that he did not

want to proceed with sentencing. Instead, he wished to withdraw his pleas of guilty. New counsel was appointed and a hearing was scheduled to determine if Lewis should be able to withdraw his guilty pleas.” CP 154-56

CrR 4.2 governs withdrawal of guilty pleas. That rule states in pertinent part:

“(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. 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.”

“(f) 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 pleas 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.”

The appellate courts have developed four criteria of manifest injustice: (1) denial of effective assistance of counsel; (2) failure of the defendant or one authorized by him to do so ratify the plea; (3) involuntary plea; and (4) violation of the plea agreement by the prosecution. See

generally, *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974);³ *State v. Ross*, 129 Wn.2d 279, 283, 916 P.2d 405 (1996).

A motion to withdraw a guilty pleas is reviewed for abuse of discretion. *State v. Hurt*, 107 Wn.App. at 828 (citing *State v. Martinez-Lazo*, 100 Wn.App. 869, 872, 999 P.2d 1275, *review denied*, 142 Wn.2d 1003 (2000)).

INVOLUNTARINESS OF GUILTY PLEA

Although Lewis was precluded from presenting his pro se, written materials at the hearing to withdraw his guilty plea, his substituted attorney argued to the court in a written motion that was submitted:

“Lewis had repeatedly rejected a plea offer for 60 months in this case. On the morning that the trial was to begin, his attorney pressured him into taking a plea offer that he really did not want to accept. He made improper guarantees of being able to convince the judge to give Lewis the bottom end of the standard range if he accepted the plea. Lewis felt additional pressure because he was forced to accept the plea after only approximately 15 minutes of consultation with his attorney. His will to reject the plea offer was overcome by the pressure put on him by his attorney to accept the plea. The defense concedes that Lewis’ signature is on the plea agreement and that he did not say anything on the record to the judge taking the plea about any concerns about improper coercion. However, that evidence, while highly

³This list is not exclusive to those four circumstances only. According to Taylor “...we hold that there must at least be some showing that a manifest (i.e., obvious, directly observable, overt or not obscure) injustice will occur if the defendant is not permitted to withdraw his plea.” *Id.* at 598.

persuasive, it (sic) not the end of the inquiry for the court. In light of all of the circumstances surrounding the plea, the court should make a finding that Lewis' guilty pleas were not voluntary." CP 157-58.

According to *In re Woods v. Rhay*, 68 Wn.2d, 601,605, 414 P.2d

601 (1966):

"To 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. It cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception."

(Citations omitted except the following: *State v. Taft*, 49 Wn.2d 989, 297 P.2d 1116 (1956); *State v. Stacy*, 43 Wn.2d 358, 261 P.2d 400 (1953); *State v. Cimini*, 53 Wash. 268, 101 Pac. 891 (1909)).

The trial court erred when it entered a finding of fact VI, which stated: "That the Defendant is now claiming that his plea was coerced without proof other than his own statement." CP 234. There was no substantial evidence to support this finding because there was no evidence to contradict this accusation of coercion outside of the record of entry of guilty plea. According to *State v. Sommerville*, 111 Wn.2d 524, 534, 760 P.2d 932 (1988): "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise."

In sum, the defendant's due process rights were violated because his guilty plea was coerced and not voluntary. *Henderson v. Morgan*, 426 U.S. 637, 645, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L.Ed.859, 61 S.Ct. 572 (1941) (accord: *In re Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980)).

INEFFECTIVE ASSISTANCE OF COUNSEL

According to the documents submitted at the hearing on withdrawal of Mr. Lewis' guilty pleas it was stated that according to *State v. S.M.*, 100 Wn.App. 401, 409, 996 P.2d 1111 (2000) there is a two-part test to establish a claim of ineffective assistance of counsel. The burden is on an accused to show that his attorney's performance was deficient. This requires a showing that counsel's errors were so serious that the accused's counsel was not functioning as "counsel" guaranteed under the Sixth Amendment.⁴ There is a presumption that an accused attorney rendered adequate legal assistance.

Secondly, the accused must show that his counsel's deficient performance prejudiced the defense. *id.* This requires proof that his or her counsel's errors were so serious that they deprived the defendant of a fair trial. Under this, the prejudice prong, it must be shown that but for

⁴See appendix along with other pertinent constitutional provisions.

counsel's errors there is a reasonable probability that the result of the proceedings would have been different. *Id.* See also *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.,2d. 222, 743 P.2d 816 (1987); *State v. McFarland*, 127 Wn.2d 332, 899 P.2d 1251 (1995).

The trial court also entered finding of fact XII which states:

“That there is no evidence to support the alleged promise of a specific sentence other than the Defendant's own allegation.”

There was no substantial evidence, such as a sworn affidavit filed by Lewis' plea attorney, refuting these accusations. *State v. Sommerville*, supra at 534; *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). (substantial evidence).

Lewis' substituted attorney argued in his written motion with regard to this argument:

“Lewis's counsel errors in this matter were numerous and serious. His attorney guaranteed that he would get a specific sentence. He staked his career on it. The actions of his attorney overcame his will to want to proceed to trial. His attorney also failed to investigate relevant defense evidence and misrepresented what the nature of the sentencing hearing would be in this case. As a result, Lewis was harmed by accepting a plea that he did not want to accept. If his attorney had not unduly pressured him into taking the plea he would have proceeded to trial. Additionally, if his attorney had followed up on relevant information and provided him with a full understanding of the nature of the sentencing hearing he

would not have pled guilty.” CP 151-52.

The trial court entered the following findings with regard to lack of investigation by his attorney: “That the cell phone the Defendant talks about in his brief was not new evidence.” CP 234; ff. X. And the following: “That defense counsel was prepared to introduce evidence about the cell phone.” CP 234, ff. XI.

Yet, Mr. Lewis’ substituted attorney also argued in his written motion the following with regard to the cell phone issue:

Also, during the course of the preparation for the trial an important issue for both sides was the veracity of the alleged victim, Larue Hubbard. He claimed that he did not know either of the defendants. On the other hand, the defendants planned to present evidence that they did know him and could prove it through the admission of Stridiron’s cell phone which was used to call Hubbard the day before they were arrested. The cell phone could not be found until just before the trial began. Prior to pleading guilty, Lewis told his attorney about the cell phone and why it was an important piece of evidence. He refused to listen to him and did not want to follow up on the information about the cell phone. CP 155-56.

According to *State v. Thomas*, supra, “...the presumption of counsel’s competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations.” *Id.* at 230 (citing *State v. Jury*, 19 Wn.App. 256, 263, 576 P.2d 1302 (1978)).

Based on the above stated reasons Mr. Lewis should have been

allowed to withdraw his guilty plea.

II. THE SENTENCING COURT ERRED WHEN IT DETERMINED AN OFFENDER SCORE OF THREE INSTEAD OF TWO.

Prior to sentencing on December 14, 2007, Mr. Olmstead - the attorney who represented Mr. Lewis at the time of entry of his initial guilty pleas and at sentencing- submitted a motion to consolidate counts II and V and counts I and III. CP 190.

The state agreed that counts I and III did merge for purposes of sentencing. CP 219. The sentencing court also agreed since it had previously ruled as such in the companion case involving the principal Stridiron. 12/14/2007 RP 5.

The defense argued orally and in its written motion that counts II (accomplice to robbery in the second degree) and count V (accomplice to assault in the third degree) pertained “..to the same criminal conduct, and was committed at the same time and place, toward the same victim, with the same level of intent as those elements are set forth in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987).” CP 190.

The sentencing court denied Mr. Lewis’ motion and instead stated:

“In terms of the robbery two, the facts that I reviewed in the probable cause statement to support that allegation was at the point that Lewis took Hubbard to his mother’s house at gunpoint to get more money. I think Mr.

Olmstead said more property. But in the probable cause statement it was clear that it was to get more money. The assault three actually happened earlier that evening and the probable cause statement identifies that two black males entered the house, one of the men hit Mr. Hubbard two times with a gun, and then put a blindfold over his eyes. That is the factual basis for assault three under prong A;⁵ i.e., caused bodily harm with a weapon or other instrument likely to produce bodily harm.

What we have here is different criminal conduct. They took place different times; they were the same victim. They were different locations. And the intent – perhaps “shift” isn’t the right word, but certainly “change” is. They had gotten all the money there was to get at the 14th Street house, according to the probable cause statement, and were going to get more.

I am denying the defense request to merge Counts II and V; that means that as Mr. Lewis stands here before me, we have him with an offender score of three on all four charges.” 12/14/07 RP 6-7.

An accused may challenge “[t]he procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The sentencing court erred when it denied the defendant’s motion and ruled that counts II and V did not constitute the same course of

⁵ The court is referring to the charge of Assault in the Third Degree where it was alleged that the defendant did “...with criminal negligence cause bodily harm to another person, to wit: Larue Jerome Hubbard, by means of a weapon or other instrument of thing likely to produce bodily harm and /or cause bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering to said person, contrary to [RCW] 9A.36.031(1)(d) and/or (f).” CP 189.

conduct and therefore did not merge for purposes of sentencing. *Id.* at 7. The court was erroneous in its reasoning because it overlooked the only robbery that was charged and it occurred at the 14th avenue address. There was nothing reported in the statement of probable cause that would establish a factual basis for a robbery at the 6th Street address. CP 5-7.

Judicial review of a trial court's determination regarding same criminal conduct is based on abuse of discretion or misapplication of law. *State v. Maxfield*, 125 Wn. 2d 378, 402, 886 P.2d 123 (1994). However, an appellate court conducts a de novo review of a sentencing court's calculation of an offender score. *State v. Bush*, 102 Wn.App. 372, 9 P.3d 219 (2000); *State v. Mitchell*, 81 Wn.App. 387, 914 P.2d 771 (1996).

RCW 9.94A.589(1)(a) describes "*same criminal conduct*" and the elements as "*two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.*"

Here, the crime of robbery in the second degree, is alleged to have occurred when the defendant took property from Larue Jerome Hubbard on February 7, 2007 "...in said person's presence against said person's will by the use of immediate force, violence, or fear of injury to said person...." CP 187. This took place at 2012 East 14th street. According to the statement of probable cause:

"Larue said he arrived at his residence (E.14th) about an

hour before the police showed up. When Larue called out to his girlfriend (Verice Carter) he was contacted by two black males inside the residence wearing ski masks and pointing a gun at him. Larue said that one of the men hit him two times with a gun and then put a blind fold over his eyes. ...Larue said the suspect(s) wanted money from him and he did not have it. Larue said that the suspect(s) took his watch, a necklace, and a water bottle full of change but they wanted more money. Larue said that he told the suspect(s) that his mom had money. Larue thought they would just leave but he was surprised when they said they would take him.” CP 5.

Based on this report, the assault and the robbery took place at the same time, at the same place, toward the same victim, and with the same level of intent to take items of value from the same victim, Larue Hubbard.

With regard to the element of intent the Washington Supreme Court established the guidelines in *Dunaway* and stated the rule as:

“...the trial courts should focus on the extent to which the criminal intent changed from one crime to the next ...[P]art of the analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.”

CP 193 (citing and quoting *State v. Dunaway*, 109 Wn.2d at 215.) See also, *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (when determining whether crimes share the same criminal intent, focus should be on whether a defendant’s intent, viewed objectively, changed from one crime to the next and whether commission of one crime furthered the other).

The defendant's intent- when the victim was knocked on the head with a pistol- did not vary from the intent to rob him of his valuables. Striking a person to get them to reveal the whereabouts of money furthers commission of the crime of robbery when valuables have been or are subsequently taken. There was "one overall criminal purpose." *State v. Garza-Villarreal*, 124 Wn.2d 42, 49, 864 P.2d 1378 (1993) ("one overall criminal purpose" in possessing cocaine and heroin with intent to deliver i.e., an intent to deliver *in the future*). (Itaics mine).

According to *State v. Prater*, 30 Wn.App. 512, 515-16, 635 P.2d 1104 (1981), a case involving the doctrine of merger, the appellate court found that a first degree assault conviction based on the gratuitous shooting of the husband during an armed, home-invasion robbery did not merge as part of the robbery. However, the first degree assault conviction based on striking the wife on the head with a gun to induce her to locate money on the premises did merge with the robbery conviction. It merged because it was part of the force used to induce the wife to find the money which was the object of the robbery. The force of the assault was not separate and distinct from the force of the robbery. *Id.* at 516.

In *State v. Bresolin*, 13 Wn.App. 386, 534 P.2d 1394 (1975) three men entered the home of the victim and his father. One victim, Mark Medearis, was assaulted with a gun and hit on the head several times. He

was threatened with a knife and thrown to the floor and kicked. His father was also handcuffed and told to lie on the floor. Money, a wallet and some weapons were taken. The court held:

“We find the acts of force necessary to commit the robbery of Mark Medearis to be the same as the acts of force inflicted upon him as alleged in the count charging assault in the second degree. The litany of injuries inflicted upon the victim was part of a continuing, uninterrupted attack to secure “dope” or money, and constituted proof of an element included within the crime of robbery. Under the evidence in this case, the assaults inflicted were not separate and distinct from the force required for the robbery.”

Id. at 394

Here, the trial court’s analysis was faulty because it focused on a planned robbery at Larue Hubbard’s mother’s house. This would have been a different location (6th street) and at a different time. The court stated in part: “They had gotten all the money there was to get at the 14th Street house, according to the probable cause statement, and were going to get more. I am denying the defense request to merge Counts II and V....”

12/14/07 RP 7.

According to the statement of probable cause Verice Carter told the police:

“Carter said both men continued to asked where the money was hidden. They asked when Hubbard was going to get home. She told them she did not know.

Both men said they would wait for Hubbard to get home. About 30 minutes later, Carter heard Hubbard walk in the house and say, "Hello!" She heard Hubbard say, "What the hell?" Carter said she heard the men confront Hubbard in the house. She said the men brought Hubbard into the bathroom with her. She said they heard the men hitting Hubbard and she believed he had been knocked out. She said they also threatened to break Hubbard's fingers. She said they continued to ask Hubbard where all the money was. Carter said Hubbard told them he did not have anything but he has some money at his mother's house....." CP 6.

State v. Dunaway

Dunaway entered a motor vehicle that was occupied by two women at the Alderwood Mall. He told them to drive at gunpoint. While en route to Seattle he took money from them. When in Seattle he told one woman to go inside a bank and get some more money for him. She did not return. Dunaway drove away with one of the women and then exited the vehicle in the city. He was charged with two counts of kidnapping in the first degree and two counts of robbery in the first degree. The sentencing court found that all four crimes encompassed the same criminal conduct. The State Supreme Court affirmed this ruling and held at 217:

"...Dunaway's kidnapping and robbery were intimately related. First, his objective remained the same with respect to each crime. Dunaway pleaded guilty to the charge of intentionally abducting his victim with the intent to commit robbery...Therefore, robbery was the objective intent behind both crimes. As to the other two factors, it is evident

that the kidnapping furthered the robbery and that the crimes were committed at the same time and place. Therefore, the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes.”

The beating of Mr. Hubbard furthered the objective of the contact with him in the first place; i.e. to rob him of his valuable property such as money, watches, jewelry, at the E. 14th street address. He was struck with the pistol so that he would tell his assailants where he kept his money. And he did tell the his assailants that his mother had money at another location. The parties then left E. 14th and went to the 6th street location with Mr. Hubbard. The reasoning and the factual pattern set forth in *Dunaway*, as argued to the trial court, cannot be distinguished from the case at bench.

The state attempts to distinguish *Dunaway* by arguing that in order to prove kidnapping in the first degree the state also had to prove the robbery. In other words, the prosecutor argues that two crimes cannot merge for sentencing purposes as the same course of conduct unless one crime legally merges into the other. CP 220; See *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (same elements test as applied to the merger doctrine).⁶

⁶The state also cited *State v. Freeman*, 118 Wn. App. 365, 76 P.3d 732 (2003), *review granted*, 151 Wn.2d 1020 (2004). The trial court’s decision that first degree assault and first degree robbery were not the same criminal conduct was affirmed. The Court of Appeals held: “Because

If that were the rule, the legislature would have stated as much. Instead the legislature has enacted a broader rule which should be applied with lenity at sentencing. See generally, *State v. Wright*, 76 Wn.App. 811, 828, 888 P.2d 1214 (1995) (Rule of lenity requires the court to adopt an interpretation of a statute most favorable to a criminal defendant). See also, *State v. Gore*, 101 Wn. 2d 481, 485-86, 681 P.2d 227 (1984) (The rule of lenity applies where two possible constructions of a statute are permissible).

Here, it is evident that robbery was the objective intent behind both crimes as in *Dunaway*. Also, the assault furthered the robbery at the E 14th street location and is the same criminal conduct. RCW 9.94A.589 (1)(a).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT ARE NOT SUPPORTED BY THE RECORD.

The trial court entered 21 findings of fact and 12 conclusions of law. The following assignments of error have not been addressed in the body of the brief and are done so here:

the evidence at trial was sufficient to persuade a fair-minded trier of fact that the shooting was a gratuitous, cold-blooded afterthought that went far beyond the force required to accomplish the robbery, we affirm the trial court's finding that the assault and robbery did not constitute the same criminal conduct." *Id.* at 378-79.

This is in accord with *State v. Prater*, *supra*, where the husband was shot in the face. His first degree assault hindered rather than aided commission of the robbery charge and did not merge. *Id.* at 30 Wn. App. 516.

According to *State v. Thetford*, 109 Wn.2d 392, 745 P.2d 496 (1987): "...a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence." See also, *State v. Black*, 100 Wn.2d 793, 676 P.2d 963 (1984). According to *State v. Hashman*, 115 Wn.2d 217, 797 P.2d 477 (1986): "Substantial evidence is evidence of sufficient quantum to persuade a fair minded person of the truth of the declared premise. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994): substantial evidence is enough evidence to persuade a fair-minded, rational person of the truth of the finding. See also, *State v. Sommerville*, supra at 534.

The trial court erred when it entered finding of fact V which states:

"That the Defendant engaged in a lengthy oral colloquy with Judge Anna Laurie on the record." CP 234.

This finding is not supported by the record. The word *Colloquy* is defined in Webster's New World Dictionary at 288 as "1. A conversation, especially a somewhat formal one; conference." Examination of the record shows that Mr. Lewis did not engage in a conversation with Honorable Judge Anna M. Laurie. Rather, he responded generally in "Yes" or "No" utterances to Judge Laurie's intricate questioning.

The trial court erred when it entered finding of fact VII:

"That there is a sufficient written and oral record of

the Defendant's guilty plea." CP 234.

This is a mixed finding of fact and conclusion of law. Granted, there is a written and oral record of Mr. Lewis' guilty plea. Whether they are sufficient is a legal question and not a finding of fact. Appellate courts review issues of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (citing *State v. Ford*, 125 Wn.2d 919, 923, 891 P.2d 712 (1995)).

The trial court erred when it entered finding of fact VIII which states:

"That Judge Laurie went over with the Defendant at great length the guilty plea form, the rights he was giving up, and whether or not he was entering his guilty plea voluntarily." CP 234.

This finding is not supported by the record. Judge Laurie's total colloquy consisted of about 13 and one half pages of transcribed proceedings. CP 125-139. The guilty plea form's colloquy consisted of six and one half pages. CP 133-39.

The trial court erred when it entered finding of fact XV which states:

"That the Defendant was facing at least 40 years if convicted of all of the charges." CP 235.

According to the judgment and sentence the maximum term for all five counts would have been 35 years. And not "at least 40 years." CP 223.

The trial court erred when it entered conclusion of law VI which states:

“That an oral colloquy between the judge and the defendant when a defendant pleads guilty makes the presumption of voluntariness well nigh irrefutable.” CP 236.

State v. Frederick, 100 Wn.2d 550, 556,674 P.2d 136 (1983) rejected the state’s argument that a denial of improper influence in open court precluded a defendant from claiming coercion at a later time.

D. Conclusion

This court should remand the case to allow Mr. Lewis to withdraw his guilty pleas based on involuntariness and ineffective assistance of counsel. In the alternative this Court should hold that the defendant’s offender score under the SRA is two and not three.

Dated this 8th day of August 2008.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Appellant

FILED
KITSAP COUNTY CLERK

2007 DEC 18 AM 9:49

DAVID W. PETERSON

DEC 06 2007

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 07-1-00235-7
Plaintiff,)	
)	FINDINGS OF FACT AND CONCLUSIONS
v.)	OF LAW FOR HEARING ON DEFENDANT'S
)	MOTION TO WITHDRAW GUILTY PLEA
RYAN NILAJA LEWIS,)	
Age: 28; DOB: 03/19/1979,)	
)	
Defendant.)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on Defendant's Motion to Withdraw Guilty Plea; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following--

FINDINGS OF FACT

I.

That the main issue in a motion to withdraw a guilty plea is whether or not the plea was knowing and voluntary.

II.

That the two issues at stake in the present motion are whether or not the plea was involuntary and whether or not defense counsel was ineffective.

FINDINGS OF FACT AND CONCLUSIONS OF LAW;
Page 1 of 5



Russell D. Hauge, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

A

31

1 III.

2 That the Defendant in the present case signed a Statement on Plea of Guilty on
3 September 11, 2007.

4 IV.

5 That prior to signing the statement, the Defendant had an opportunity to speak with
6 defense counsel.

7 V.

8 That the Defendant engaged in a lengthy oral colloquy with Judge Anna Laurie on the
9 record.

10 VI.

11 That the Defendant is now claiming that his plea was coerced without any proof other
12 than his own statement.

13 VII.

14 That there is a sufficient written and oral record of the Defendant's guilty plea.

15 VIII.

16 That Judge Laurie went over with the Defendant at great length the guilty plea form, the
17 rights he was giving up, and whether or not he was entering his guilty plea voluntarily.

18 IX.

19 That Judge Laurie went over with the Defendant the consequences of pleading guilty.

20 X.

21 That the cell phone the Defendant talks about in his brief was not new evidence.

22 XI.

23 That defense counsel was prepared to introduce evidence about the cell phone.

24 XII.

25 That there is no evidence to support the alleged promise of a specific sentence other than
26 the Defendant's own allegation.

27 XIII.

28 That Judge Laurie explained to the Defendant that the sentence was ultimately up to the
29 court.

30 XIV.

31 That the fact that the Defendant's sentence was ultimately up to the court was also on the



1 guilty plea form.

2 **XV.**

3 That the Defendant was facing at least 40 years if convicted of all of the charges.

4 **XVI.**

5 That Defendant pled guilty to substantially reduce the charges and the range he was
6 facing.

7 **XVII.**

8 That the Defendant has not overcome the strong presumption that his guilty plea entered
9 on September 11, 2007 was entered voluntarily.

10 **XVIII.**

11 That the Defendant's guilty plea entered on September 11, 2007 was voluntary.

12 **XIX.**

13 That the court is not satisfied that defense counsel promised a specific sentence.

14 **XX.**

15 That even if defense counsel did promise a specific sentence, there was no prejudice to
16 the Defendant.

17 **XXI.**

18 That the Defendant has not met his burden to prove that his defense counsel was
19 ineffective.

20 **CONCLUSIONS OF LAW**

21 **I.**

22 That the above-entitled Court has jurisdiction over the parties and the subject matter of
23 this action.

24 **II.**

25 That Criminal Rule 4.2 (f) requires the court only allow a guilty plea to be withdrawn if
26 the withdrawal is necessary to correct a manifest injustice.

27 **III.**

28 That manifest injustice is one that is obvious, directly observable, overt, and not obscure.
29 State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996).
30
31



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

IV.

That the voluntariness of guilty plea is determined by looking at the totality of circumstances in the case. State v. Williams, 117 Wash.App. 390 71 P.3d 686 (2003).

V.

That a written statement of defendant on plea of guilty and a defendant's acknowledgment that he understood and read it is prima facie evidence that a plea is voluntary.

VI.

That an oral colloquy between the judge and the defendant when a defendant pleads guilty makes the presumption of voluntariness well nigh irrefutable.

VII.

That to prove that a guilty plea was coerced, one needs more than just a bare allegation that a plea was coerced. State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984).

VIII.

That if the allegation in a motion to withdraw guilty plea is ineffective assistance of counsel, defense counsel must be so ineffective that a guilty plea is not valid.

IX.

That in order to prove that defense counsel was deficient, a defendant must show that counsel made errors so serious that counsel was not functioning as a guaranteed 6th Amendment counsel. State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991).

X.

That a Defendant must show that the defense counsel's actions were so serious that counsel effectively prevented a fair trial. State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991).

XI.

That for a defense counsel to be found defective, his or her conduct must fall below a standard of reasonableness.

XII.

That the burden is on the Defendant to overcome the presumption of effective performance.

SO ORDERED this 12 day of December, 2007.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

Ralf F. Olson
JUDGE

PRESENTED BY-

APPROVED FOR ENTRY-

STATE OF WASHINGTON

W. Schnepf
~~KELIEL PENDRAS, WSBA No. 34155~~
Deputy Prosecuting Attorney

R. Hauge
~~WSBA No. 31892~~
Attorney for Defendant

Schnepf, 37966

Prosecutor's File Number-07-150915-2



(b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) **Time.**

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) *Defendant Not Detained in Jail.* The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) **Objection to Arraignment Date—Loss of Right to Object.** A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. That date shall constitute the arraignment date for purposes of CrR 3.3. A party who fails to object as required shall lose the right to object, and the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) **Counsel.** If the defendant appears without counsel, the court shall inform the defendant of his or her

right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) **Waiver of Counsel.** If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) **Name.** Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) **Reading.** The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

[Amended effective September 1, 2003.]

Comment

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

RULE 4.2 PLEAS

(a) **Types.** A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) **Pleading Insanity.** Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) **Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. 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.

(e) **Agreements.** If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is

entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) **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.

(g) **Written Statement.** A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

Superior Court of Washington for State of Washington, _____ Plaintiff vs. _____ Defendant	No.	Statement of Defendant on Plea of Guilty to Sex Offense (STDFG)
--	-----	--

1. My true name is: _____
2. My age is: _____
3. The last level of education I completed was _____
4. **I Have Been Informed and Fully Understand That:**
 - (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
 - (b) I am charged with: _____
The elements are: _____
5. **I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:**
 - (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
 - (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
 - (c) The right at trial to hear and question the witnesses who testify against me;
 - (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
 - (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
 - (f) The right to appeal a finding of guilt after a trial.
6. **In Considering the Consequences of my Guilty Plea, I Understand That:**
 - (a) Each crime with which I am charged carries a maximum sentence, a fine, and a *Standard Sentence Range* as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f).)	MAXIMUM TERM AND FINE
1						
2						
3						

* (F) Firearm, (D) other deadly weapon, (SM) Sexual Motivation, RCW 9.94A.533(8).

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

RCW 9.94A.589

Consecutive or concurrent sentences.

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

[2002 c 175 § 7; 2000 c 28 § 14; 1999 c 352 § 11; 1998 c 235 § 2; 1996 c 199 § 3; 1995 c 167 § 2; 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.]

Notes:

Effective date -- 2002 c 175: See note following RCW 7.80.130.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

Severability -- 1996 c 199: See note following RCW 9.94A.505.

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT (XIV)

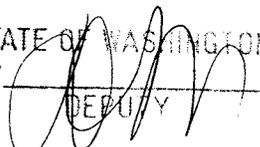
ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
COURT OF APPEALS
DIVISION II

08 AUG 13 PM 12:41

PROOF OF SERVICE

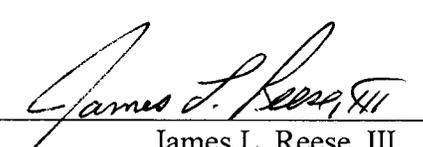
STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON)
COUNTY OF KITSAP)

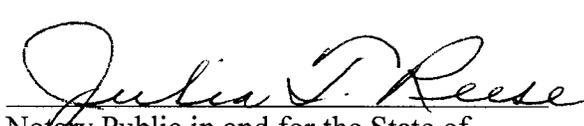
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 8th day of August, 2008, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Ryan N. Lewis, No. 37192-8-II to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, Washington 98402; hand delivered one (1) copy of the same to Kitsap County Prosecutor's Office, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Ryan N. Lewis, DOC #313469, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.


James L. Reese, III

Signed and Attested to before me this 8th day of August, 2008 by James L. Reese, III.


Notary Public in and for the State of
Washington, residing at Port Orchard.
My Appointment Expires: 4/4/09