

NO. 37586-9-II

COURT OF APPEALS
DIVISION II

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

FILED
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STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DAVID VANDAMENT,

Appellant.

COURT OF APPEALS
DIVISION II
CORRECTION
NOV 14 2008
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00867-5

BRIEF OF RESPONDENT

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DATED October 14, 2008, Port Orchard, WA _____
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying the Defendant's motion to withdraw his guilty plea when the Defendant failed to show that withdrawal of the pleas was necessary to correct a manifest injustice since: (1) the record below shows that both the Defendant and his attorney received a copy of the First Amended information; and, (2) the defense agreed on the record that a scrivener's error on the information could be corrected by hand?

2. Whether the trial court abused its discretion in denying the Defendant's motion to withdraw his guilty plea when the Defendant failed to show that withdrawal of the plea was necessary to correct a manifest injustice with respect to the community custody range for Count II since, pursuant to *State v. Smith*, the community custody associated with Count II was not a direct consequence of the plea and was inconsequential due to the fact that Count I required a life term of community custody?

3. Whether the trial court abused its discretion in denying the Defendant's motion to withdraw his guilty plea when the Defendant failed to show that withdrawal of the plea was necessary to correct a manifest injustice with respect to the fact that the current offenses were most serious offenses since this fact was not a direct consequence of the plea as it had no definite,

immediate and automatic effect on the range of the defendant's punishment in the present case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Vandament was charged by amended information filed in Kitsap County Superior Court with two counts: first-degree rape of a child and first-degree child molestation. CP 5. The Defendant entered pleas of guilty to the two charges and the trial court imposed a standard range sentence. CP 11, 21, 70. The Defendant subsequently filed a motion to withdraw his guilty plea. CP 79. The trial court denied this motion, and the Defendant now appeals the trial court's denial of his motion to withdraw his guilty plea. CP 459.

B. FACTS

On November 14, 2006 the Defendant entered guilty pleas to the two charges in the first amended information. CP 11, 21, RP (11/14/06) 2-12. Prior to the entry of the pleas, the trial court, the prosecutor (Ms. Bradley), and defense counsel (Mr. Yelish) had a brief discussion about a scrivener's error in the first amended information:

The Court: David Vandament.

Ms. Bradley: That matter is ready. He will need to come over.

You Honor, this will be a change of plea to

the first amended information. But right before the hearing Mr. Yelish did alert me to a scrivener's error basically in the first amended information. In Count II, which is child molest in the first degree, the range of dates is incorrect. The range of dates should reflect –

The Court: 1/1/99 to - -

Ms. Bradley: Yes. Should be 1/1/99 to September 1, 2000.

The Court: Okay. Well, is there a first amended information?

Ms. Bradley: There isn't, Your Honor. I would ask that we interlineate and add that. I can certainly do a first amended information at a later time.

The Court: So at present he's pleading guilty to the original information?

Ms. Bradley: The first amended information.

Mr. Yelish: The first amended information with the change in the scrivener's error.

The Court: Is there a first amended information in the file?

Mr. Yelish: It was filed September 1st, 2006.

The Court: All right. Thank you.

And that information needs to be adjusted with respect to the date range in Count II, is that correct?

Ms. Bradley: That's correct. Count II should read on or between January 1st, 1999 and September 1st, 2000.

The Court: Well, with the agreement of the parties, why don't we just interlineate the original information here and have counsel initial it and date it, the change.

Mr. Yelish: There was no objection to that, Your Honor. That's the correct dates.

The Court: Thank you.

RP (11/14/06) 2-3. The amended information was then corrected as the parties had discussed, and the attorneys dated and initialed the change. CP 6.

The court then went through the plea agreement with the Defendant and confirmed that the Defendant had gone over the document with Mr. Yelish, had signed the document, and did not have any questions about it. RP (11/14/06) 3-4. The court also went through a number of specific points with the Defendant, including a discussion regarding RCW 9.94A.712 and how it worked. RP (11/14/06) 4-5. Mr. Yelish also told the court that he had talked to the Defendant “extensively.” RP (11/14/06) 6.

The court then asked the Defendant if had any questions at all about the terms and conditions of the plea agreement, and the Defendant answered that he had no questions.¹ RP (11/14/06) 8.

The court next went through the statement of defendant on plea of guilty form with the Defendant and confirmed that the Defendant had signed the form after going over it with Mr. Yelish. RP (11/14/06) 9. The Defendant also indicated that he understood the form and had no questions

¹ The Plea agreement itself was signed by the Defendant and contained the following acknowledgment:

I enter into this agreement freely and voluntarily. No one has threatened me or any other person to cause me to enter into this agreement. My attorney has explained all the above paragraphs to me and we have fully discussed them. I understand them all, and understand that I waive substantial rights by entering into this agreement.

CP 25.

about it. RP (11/14/06) 9. The Defendant then entered guilty pleas to the two counts and stated he made the pleas freely and voluntarily. RP (11/14/06) 10-11. The trial court found that there was a factual basis for both pleas and that the Defendant understood the nature and consequences of the pleas, and that they were knowingly, intelligently, and voluntarily made. RP (11/14/06) 12.

The guilty plea form itself contains the Defendant's statement that he was pleading guilty to the two counts in the first amended information and that he had "received a copy of that Information." CP 17. The form also contained the Defendant's acknowledgment that he made his pleas "freely and voluntarily" and that his counsel had explained and discussed the form with him. CP 17. Defense counsel also signed the form and acknowledged that he had read and discussed the form with the Defendant, and the judge signed the form and found that the Defendant's pleas of guilty were knowingly, intelligently, and voluntarily made and that the Defendant understood the charges and the consequences of the plea. CP 18.

III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE DEFENDANT FAILED TO SHOW THAT WITHDRAWAL OF THE PLEAS WAS NECESSARY TO CORRECT A MANIFEST INJUSTICE SINCE: (1) THE RECORD BELOW SHOWS THAT BOTH THE DEFENDANT AND HIS ATTORNEY RECEIVED A COPY OF THE FIRST AMENDED INFORMATION; AND, (2) THE DEFENSE AGREED ON THE RECORD THAT A SCRIVENER'S ERROR ON THE INFORMATION COULD BE CORRECTED BY HAND.**

The Defendant argues that the trial court erred in denying the Defendant's motion to withdraw his guilty plea because he was never provided a copy of the First Amended Information and never advised of the nature of the charges against him. App.'s Br. at 8-14. This claim is without merit because the Defendant failed to show that withdrawal of the pleas was necessary to correct a manifest injustice and, thus, the Defendant cannot show that the trial court abused its discretion in denying the motion to withdraw the guilty pleas. In addition, the Defendant's claim on appeal that he did not receive a copy of the amended information is rebutted by his statement below that he received a copy of the amended information and the defense agreement, on the record, that a scrivener's error should be corrected by hand.

The Washington Supreme Court has held that an appellate court is not to reverse a trial court's order on a defense motion to withdraw a guilty plea absent an abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001), citing *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). A court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *Olmsted*, 70 Wn.2d at 119.

A defendant is entitled to withdraw his or her guilty pleas only if he or she establishes that “withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); See *State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). Manifest injustice is “an injustice that is obvious, directly observable, overt, not obscure.” *Taylor*, 83 Wn.2d at 596. The *Taylor* court recognized four general areas where “manifest injustice” may be found:

(1) the denial of effective counsel, (2) a plea ... not ratified by the defendant or one authorized [by him] to do so, (3) the plea was involuntary, (4) the plea agreement was not kept by the prosecution.

Taylor, 83 Wn.2d at 597. It appears that the Defendant in the present case is claiming that his plea was involuntary.

Once a plea is entered, however, the defendant bears the burden to show an involuntary plea. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984); see also *State v. McDermond*, 112 Wn. App. 239, 243, 47 P.3d 600

(2002). Many safeguards precede a plea of guilty, so the manifest injustice standard is demanding. *Taylor*, 83 Wn.2d at 596. A defendant's signature on a plea agreement is "strong evidence" that it is voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Additionally, when the trial court judge has inquired into the voluntariness of the plea on the record, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

In addition, a court is to presume a voluntary plea when the defendant engages in a colloquy with the court where the defendant acknowledges the truth of the plea and that he understands its contents and completes a written statement. *See State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (emphasizing that a defendant's plea under these circumstances is 'well nigh irrefutable' and 'prima facie verification of the plea's voluntariness'). (citations omitted); *see also State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (defendant's signature on the plea is 'strong evidence' of valid plea). Furthermore, a defendant's self-serving affidavit fails to satisfy the high evidentiary burden required to demonstrate a manifest injustice. *Osborne*, 102 Wn.2d at 97. Finally, a defendant need not be informed of all possible consequences of a plea, but rather, only the direct consequences. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

In the present case, the Defendant signed the Statement of Defendant on Plea of Guilty form the Defendant in which he expressly stated that he was pleading guilty to the two charged contained in the First Amended Information and that he had “received a copy of that Information.” CP 17. Now, however, Defendant appears to claim that he never personally received a copy of the First Amended Information, but acknowledges that “there is little doubt from the record that defense counsel had a copy.” App.’s Br at 9.

Even if this court were to ignore the Defendant’s acknowledgment in the Statement of Defendant form that he received a copy of the amended information (and were to assume that only defense counsel had an actual copy of the Information), the fact remains that the Defendant has cited no authority that holds that providing the Information to Defendant’s counsel is somehow insufficient or that the State is required to personally provide a copy of the Information to the Defendant in addition to defense counsel. Further, the Defendant has not argued that the First Amended Information was deficient or otherwise failed to provide the required notice of the nature of the accusations and charges. Rather, the Defendant concedes that the Information was sufficient. App.’s Br. at 12-13, n. 4.

The Defendant also argues that he did not receive a copy of the First Amended Information after it was corrected by hand at the plea hearing. App.’s Br. at 9. While it is true that the Information was corrected and the

date of the offense was modified by hand, this was done on the record and was done with the agreement of the Defendant. Specifically, at the guilty plea hearing defense counsel explained that the Defendant was pleading guilty to the First Amended Information with the change regarding the scrivener's error and that the defense had no objection to correcting the scrivener's error by hand on the First Amended Information. RP (11/14/06) 2-3.

The trial court then went through the Plea Agreement with the Defendant and confirmed that the Defendant had gone over the document with his counsel, had signed the document, and did not have any questions about it. RP (11/14/06) 3-4. The court then asked the Defendant if had any questions at all about the terms and conditions of the Plea Agreement, and the Defendant answered that he had no questions. RP (11/14/06) 8.

The court next went through the guilty plea form with the Defendant and confirmed that the Defendant had signed the form after going over it with his attorney. RP (11/14/06) 9. The Defendant also indicated that he understood the form and had no questions about it. RP (11/14/06) 9. The Defendant then entered guilty pleas to the two counts and stated he made the pleas freely and voluntarily. RP (11/14/06) 10-11. The guilty plea form itself contains the Defendant's statement that he was pleading guilty to the

two counts in the First Amended Information and that he had “received a copy of that Information.” CP 17.

Given all of these facts, the trial court did not abuse its discretion in denying the Defendant’s motion to withdraw his guilty plea because the Defendant failed to show that withdrawal was necessary to correct a manifest injustice. Rather, the record demonstrates that the plea was voluntary. First, as the Defendant signed the plea agreement and the Statement of Defendant on Plea of Guilty, there is “strong evidence” that the plea was voluntary. *Branch*, 129 Wn.2d at 642. Additionally, because the trial court inquired into the voluntariness of the plea on the record, the presumption of voluntariness is “well nigh irrefutable.” *Perez*, 33 Wn. App. at 262 (emphasizing that a defendant's plea under these circumstances is ‘well nigh irrefutable’ and ‘prima facie verification of the plea's voluntariness’); *see also Branch*, 129 Wn.2d at 642 (defendant's signature on the plea is ‘strong evidence’ of valid plea).

Furthermore, a defendant's self-serving affidavit fails to satisfy the high evidentiary burden required to demonstrate a manifest injustice. *Osborne*, 102 Wn.2d at 97. In the present case, the Defendant’s assertions that he did not personally receive a copy of the First Amended Information is refuted by his own statements below and, even if this court were to ignore the prior statements, the Defendant’s self-serving claims in his motion to

withdraw his plea failed to satisfy the high evidentiary burden required to demonstrate a manifest injustice.

The trial court, therefore, did not abuse its discretion in denying the Defendant's motion.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE DEFENDANT FAILED TO SHOW THAT WITHDRAWAL OF THE PLEAS WAS NECESSARY TO CORRECT A MANIFEST INJUSTICE WITH RESPECT TO THE COMMUNITY CUSTODY RANGE FOR COUNT II SINCE, PURSUANT TO *STATE V. SMITH*, THE COMMUNITY CUSTODY ASSOCIATED WITH COUNT II WAS NOT A DIRECT CONSEQUENCE OF THE PLEA AND WAS INCONSEQUENTIAL DUE TO THE FACT THAT COUNT I REQUIRED A LIFE TERM OF COMMUNITY CUSTODY.

The Defendant next claims that he should have been allowed to withdraw his plea on the ground that he was erroneously advised that the community custody range on Count II was 36 to 48 months. App.'s Br. at 14-18. This claim is without merit because Count I carried with it a mandatory life term of community custody and the Defendant was properly advised of this fact. The Defendant, therefore, was not misinformed about a direct consequence of his guilty plea because he was aware that Count I required a life term of community custody and was aware that this was true regardless of

what the community custody range was for count II. The fact that the Defendant was mistakenly advised about the community custody range on Count II was inconsequential and the trial court, therefore, did not abuse its discretion in denying the motion to withdraw because the Defendant failed to show that withdrawal was necessary to correct a manifest injustice.

In *State v. Smith*, 137 Wn. App. 431, 435, 153 P.3d 898 (2007), the defendant entered guilty pleas to charges of forgery (count I) and unlawful possession of a payment instrument (count II). The plea agreement erroneously stated that count II carried a 0 to 12 month standard range but correctly stated that count I carried a 14 to 18 month standard range sentence.

Smith, 137 Wn. App. at 435. Before sentencing, the defendant moved to withdraw his plea due to the fact that he was misadvised as to his standard range on count II. *Smith*, 137 Wn. App. at 435. The trial court, however, ruled that despite the mistake, the defendant failed to show a manifest injustice. *Smith*, 137 Wn. App. at 435. On appeal, the court noted that RCW 9.94A.589(1)(a) required the two counts to be run concurrently, and that,

Although the plea agreement stated an incorrect standard range sentence for count II, Smith was not misinformed about a direct consequence of his guilty plea because he received the same punishment under the correct sentencing range that he would have received under the erroneous range. In short, Smith's controlling sentencing range was 14 to 18 months, a direct consequence of his plea to count I that his plea to count II did not affect.

Smith, 137 Wn. App. at 438. The court thus concluded that the trial court did not abuse its discretion in concluding that Smith voluntarily entered into the plea agreement and that the error in the plea agreement did not result in a manifest injustice. *Smith*, 137 Wn. App. at 438.

The State concedes that the plea agreement and the Statement of Defendant on Plea of Guilty both erroneously listed the community custody term for Count II as 36 to 48 months when the actual term should have been three years or up to the period of earned release, whichever is longer.² Both documents, however, correctly stated that Count I carried a life term of community custody. CP 12, 21-22.

Furthermore, at the change of plea hearing the trial court initially informed the Defendant that both counts were subject to RCW 9.94A.712, but the court the court corrected itself and stated,

The Court: Well, I've kind of misstated here then, or I was wrong, Mr. Vandament, when I was talking to you. I said that both charges are 712 offenses. Just Count I is a 712 offense. Do you understand that?

The Defendant: Yes.

The Court: But as a practical matter, the duration of your

² The Statement of Defendant on Plea of Guilty form actually stated that the community custody range was 36-48 months in one place, but later, correctly, noted that the community custody would be for three years "or up to the period of earned release, whichever is longer." CP 12.

sentence is going to be controlled by Count I.

The Defendant: Yes.

The Court: Do you understand that?

The Defendant: Yes.

The Court: There's the two charges, the penalties will be concurrent.

RP (11/14/06) 7.

In the present case, as in *Smith*, the Defendant was not misinformed about a direct consequence of his plea because Count I carried a life term of community custody and the Defendant was properly advised of this fact. The fact that count II carried a community custody term of 36 months (instead of a term of 36 to 48 months) was irrelevant given the life term associated with Count I. Thus, as in *Smith*, the trial court did not abuse its discretion in denying the motion to withdraw the guilty plea because the error did not result in a manifest injustice.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE DEFENDANT FAILED TO SHOW THAT WITHDRAWAL OF THE PLEAS WAS NECESSARY TO CORRECT A MANIFEST INJUSTICE WITH RESPECT TO THE FACT THAT THE CURRENT OFFENSES WERE MOST SERIOUS OFFENSES SINCE THIS FACT WAS NOT A DIRECT CONSEQUENCE OF THE PLEA AS IT HAD NO DEFINITE, IMMEDIATE AND AUTOMATIC EFFECT ON THE RANGE OF THE DEFENDANT'S PUNISHMENT IN THE PRESENT CASE.

The Defendant next claims that the trial court should have allowed him to withdraw his plea because the section of the Statement of Defendant on Plea of Guilty form regarding most serious offenses was erroneously crossed out. App.'s Br. at 18-19. This claim is without merit because the fact that the current offenses were most serious offenses was not a direct consequence of the plea and thus any failure in this regard was insufficient to demonstrate a manifest injustice.

A defendant wishing to withdraw a guilty plea bears the burden of showing that a manifest injustice exists. *Ross*, 129 Wn.2d at 283-84. Manifest injustice occurs if trial counsel was ineffective, or if a plea is involuntary. *State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). Under CrR 4.2(d), a plea is involuntary if the defendant did not understand the consequences of pleading guilty. CrR 4.2(d); *State v. Barton*, 93 Wn.2d

301, 304, 609 P.2d 1353 (1980). However, “[a] defendant need not be informed of all possible consequences of a plea but rather only direct consequences.” *Ross*, 129 Wn.2d at 284. Direct consequences are distinguished from collateral consequences by “whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Id.*

RCW 9.94A.561 provides that

A sentencing judge, law enforcement agency, or state or local correctional facility may, but is not required to, give offenders who have been convicted of an offense that is a most serious offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions imposed upon persistent offenders. General notice of these sanctions and the conditions under which they may be imposed may, but need not, be given in correctional facilities maintained by state or local agencies. This section is enacted to provide authority, but not requirement, for the giving of such notice in every conceivable way without incurring liability to offenders or third parties.

The statute makes it clear that a trial court may, but is not required to, notify a defendant that his offenses are strike offenses. In addition, the Defendant has cited no authority that holds that failure to notify a Defendant in a guilty plea form that the charged offenses are strike offenses qualifies as a manifest injustice that permits a defendant to withdraw a guilty plea.

In the present case the original Information and the First Amended Information both explained that the charges offenses were strike offenses. CP 2, 5-6. Nevertheless, the provisions regarding strike offenses were incorrectly crossed out on the Statement of Defendant on Plea of Guilty form. CP 15. This error, however, had no bearing on the Defendant's sentence in the present case. The fact that the Defendant's current offenses were strike offenses was not a direct consequence of which the Defendant had to be informed because this fact does not represent "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Ross*, 129 Wn.2d at 284. Rather, the fact that the present offenses were strike offenses had no definite or immediate impact on the Defendant's punishment in the present case at all.

If the Defendant later commits another most serious offense for which he is convicted, the status of his present convictions as strikes will affect the sentence for that later conviction, but not for the sentence presently before the court. In short, the Defendant has failed to show that the error involved direct consequences that represented "a definite, immediate and largely automatic effect on the range of the defendant's punishment." Having failed to show that the alleged error involved a direct consequence of his plea, the Defendant has failed to show that his plea was involuntary and the trial court, therefore,

did not abuse its discretion in denying the Defendant's motion to withdraw his guilty pleas.

IV. CONCLUSION

For the foregoing reasons, the trial court did not abuse its discretion in denying the Defendant's motion to withdraw his guilty plea. The trial court's ruling and the Defendant's conviction and sentence, therefore, should be affirmed.

DATED October 14, 2008.

Respectfully submitted,

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