

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Court of Appeals NO. 38040-4-II
Clark County No. 07-1-02023-3

STATE OF WASHINGTON,

Respondent,

vs.

DEMETRIUS RAY WOOD

Appellant.

BRIEF OF APPELLANT

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PM 3-16-09

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A. ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WOOD'S MOTION TO WITHDRAW HIS GUILTY PLEA.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. MR. WOOD'S PLEA WAS INVOLUNTARY BECAUSE THE PLEA FORM WAS CONFUSING AS TO THE TERM OF COMMUNITY CUSTODY AND THE STATE CANNOT ESTABLISH THAT THE PLEA COLLOQUY ELIMINATED THE CONFUSION.

C. STATEMENT OF THE CASE

Demetrius Wood pled guilty to a third amended information charging him with assault in the first degree, assault in the fourth degree, and unlawful possession of a firearm in the first degree. CP 1-2, 3-13. The statement of defendant on plea of guilty, in paragraph (6) (a), originally listed the range of community custody as 18 to 36 months. CP 4. That portion was, at some point, written over with what appears to be "24-48 months." CP 4. In paragraph (6) (f), the period of community custody circled is "18 to 36 months or up to the period of earned early release, whichever is longer." CP 5. The correct period of community custody is 24 to 48 months, which is the period to which Mr. Wood was sentenced. CP 31. At the guilty plea hearing, there was substantial confusion among the lawyers and the court about what the period of

community custody would be. The discussion about community custody began as follows:

Court: "Now, the maximum penalty on the Assault in the first degree is life, a \$50,000 fine. The community custody range—

Prosecutor: "Oh."

Court: "—18 to 36—isn't that life?"

Prosecutor: "That sounds—yeah, 18 to 36 sounds right, Your Honor."

Defendant: "That's what I put down."

...

Prosecutor: "Twenty-four to 48 months on the first degree. I don't know what—I think it's 18 to 36. I think you're right, Your Honor."

Defense counsel: "Oh, yeah, he got the whole thing, but we didn't. It didn't copy."

Prosecutor: "Eighteen to 36. It's the—for Assault in the First Degree, it's 24 to 48."

Court: "Which?"

Prosecutor: "Twenty-four to 48."

Defense counsel: "Twenty-four to 48. Oh, this should be 24 to 48. I got it backwards. This is 18/36?"

Prosecutor: "I believe so."

Defense counsel: "On UPF?"

Court: "Okay...."

RP 68-69.

Later, the court said:

Court: "Do you agree that you have a history of seven in relation to the Assault in the First Degree and a four insofar as the Possession of a Firearm?"

Defendant: "Yes."

Court: "In addition to sentence your confinement, required to pay \$500 crime victims compensation, restitution, court costs, fines and attorney's fees. You understand that?"

Defendant: "Yes."

Court: "And this being a serious violent, 24 to 48 months or early release, whichever may occur first."

RP 70.

The day after the guilty plea, and prior to entry of the judgment, Mr. Wood filed a motion to withdraw his guilty plea. CP 14-16. Mr. Wood sought to withdraw his plea under CrR 4.2 alleging that a manifest injustice would occur if he was not allowed to withdraw his plea. CP 15. In his declaration, he said he was overcome by emotion when he entered his plea, and his emotion negated his judgment. CP 15. The court heard argument on the motion and denied Mr. Wood's plea, finding no basis for

withdrawal of the plea. RP 87. The court then proceeded to sentencing. Id. Mr. Wood was given a standard range sentence. CP 31. This timely appeal followed. CP 40.

D. ARGUMENT

I. MR. WOOD'S PLEA WAS INVOLUNTARY BECAUSE THE PLEA FORM WAS CONFUSING AS TO THE TERM OF COMMUNITY CUSTODY AND THE STATE CANNOT ESTABLISH THAT THE PLEA COLLOQUY ELIMINATED THE CONFUSION.

The conviction for assault in the first degree required a term of community custody of 24 to 48 months. The plea form in this case was confusing because in paragraph (6) (a), the term of community custody was originally listed as 18 to 36 months. That was sloppily written over with numbers that appear to read "24 to 48" months. This portion of the document, particularly the part that appears, from the totality of the record, to say "24" is practically illegible. Then, in paragraph (6) (f), the 24 to 48 month term of community custody is not circled, rather the 18 to 36 month term of community custody is circled. Thus, the plea form is internally contradictory.

To make matters worse, neither the lawyers nor the court appeared to know what the correct term of community custody was. The discussion between the lawyers and the court demonstrated that at one point they believed the term of community custody was 18 to 36 months. The parties

then went back and forth between saying 18 to 36 months and 24 to 48 months. At one point, it appeared the prosecutor concluded that there was an 18 to 36 month term of community custody to be applied, but that it applied to the unlawful possession of a firearm charge. This would make no sense, however, because no community custody was imposed on that count.

A defendant who pleads guilty must make a knowing and voluntary decision to waive his right to trial. A defendant must be advised of all of the direct consequences of the plea. The correct term of community custody is a direct consequence of a plea. *Pers. Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004); *State v. Hurt*, 107 Wn.App. 816, 828, 27 P.3d 1276 (2001); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996). A defendant is not required to prove that the improper advisement about the term of community custody was material to his decision to plead guilty. *Isadore* at 302, clarifying *State v. Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999). The *Isadore* Court stated: “We decline to adopt an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant’s subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake.” *Isadore* at 302. Here, Mr. Wood sought to withdraw his guilty plea on the grounds that he felt, in hindsight,

he had made a poor decision and acted out of emotion rather than reason. Under *Isadore*, this Court can still grant him relief from his plea if it finds that his plea was involuntary because he was not properly or adequately advised of the correct term of community custody.

A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *Hurt* at 828, *State v. Martinez-Lazo*, 100 Wn.App. 869, 872, 999 P.2d 1275, *review denied*, 142 Wn.2d 1003 (2000). The court abuses its discretion if it bases its decision on clearly untenable or manifestly unreasonable grounds. *Id.*; *State v. Olmstead*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). A motion to withdraw a guilty plea may be granted to correct a manifest injustice. CrR 4.2 (f); *Hurt* at 829; *Ross* at 283. Manifest injustice is proved by a showing that the plea is involuntary. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991); *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

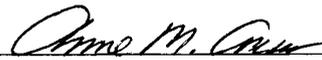
“Unless it is apparent from the record of the plea hearing that the plea was voluntary and intelligent, the State has the burden of proving the validity of the plea.” *Hurt* at 829, *Ross* at 287. In *Hurt*, the plea form misrepresented the minimum community placement term as “at least one year.” *Hurt* at 829. Further, the court did not clarify the issue at sentencing. *Hurt* at 829. Such is the case here. The transcript is unclear, the plea form is internally inconsistent (to the extent that the relevant

portion is even legible), and it simply isn't clear that Mr. Wood was conclusively advised of the precise term of community custody he would face after release. His plea was involuntary and the trial court should have allowed him to withdraw his plea to correct a manifest injustice.

E. CONCLUSION

This Court should remand Mr. Wood's case to the trial court and direct the trial court to allow him to withdraw his guilty plea.

RESPECTFULLY SUBMITTED this 16th day of March, 2009.



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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. WOOD)
- (3) AFFIDAVIT OF MAILING

Dated this 16th day of March, 2009

Anne M. Cruser

 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: March 16, 2009, Kalama, WA

Signature: Anne M. Cruser