

No. 38216-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DEMARKUS R. SMITH,

Appellant.

STATE OF WASHINGTON
BY
HENRY
COURT REPORTERS
SERVICES
11/11/15

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas Larkin (plea and sentencing) and the Honorables
Katherine Stolz, Ronald Culpepper, Susan Serko and Kitty-Ann Van
Doorninck (other proceedings), Judges

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENT OF ERROR

1. Mr. Smith's Alford¹ pleas were not knowing, voluntary and intelligent.

2. The trial court erred in refusing to allow Mr. Smith to withdraw his Alford pleas.

3. Mr. Smith was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A plea is only knowing, voluntary and intelligent if it is entered based upon an understanding of all of the direct consequences of the plea. Further, where a defendant enters an Alford plea, the court is required to take special care to ensure that it is knowing, because of the inherently equivocal nature of such pleas.

In this case, although the plea forms indicated the possible sentences for each offense, those forms were ambiguous about whether Mr. Smith had read all of the information and, when the pleas were entered, the trial court never discussed the specific potential sentences when engaging in the plea colloquy. Mr. Smith later asked to be allowed to withdraw his pleas stating, *inter alia*, that he had not understood the amount of time he would potentially serve at the time of the entry of the pleas.

Did the trial court err in refusing to allow Mr. Smith to withdraw his Alford pleas where it was not clear that he fully understood the direct

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

consequences of those pleas and the court failed to discuss the possible sentences with Mr. Smith prior to accepting the pleas?

2. Are State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008), and State v. Keene, 95 Wn.2d 203, 622 P.2d 360 (1980), distinguishable because those cases did not involve Alford pleas?

3. Was counsel ineffective in allowing his client to enter Alford pleas without ensuring that the client was fully aware of the potential sentence ranges applicable in the case?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Demarkus R. Smith was charged by amended information with unlawful possession of cocaine with intent to deliver, unlawful manufacturing of cocaine, unlawful possession of marijuana with intent to deliver and second-degree unlawful possession of a firearm. CP 20-22; RCW 9.41.010(12); RCW 9.41.040(2)(a)(i); RCW 69.50.401(1)(2)(a); RCW 69.50.401(2)(c). The possession and manufacturing charges carried firearm and school bus route stop enhancements. CP 20-22; RCW 9.94A.125; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.533; RCW 69.50.435.

Motions to continue were held on November 14, 2007, before the Honorable Katherine M. Stolz, January 14, February 15, May 5 and May 29, 2008, before the Honorable Ronald E. Culpepper and June 16, 2008, before the Honorable Susan Serko, and preliminary proceedings were begun before the Honorable Kitty-Ann Van Doorninck on June 30, 2008, after which the trial proceedings began before the Honorable Thomas P.

Larkin on July 1, 2008.² 1RP 1; 2RP 1; 3RP 1; 4RP 1; 5RP 1. On July 2, 2008, a second amended information was filed, removing the manufacturing charge, amending the marijuana charge to simple possession and removing the firearm and school bus route stop enhancements for the drug charges but adding a deadly weapon enhancement for the cocaine charge. CP 35-36. That same day, Judge Thomas Larkin accepted Smith's Alford pleas to that information. 6RP 1-12.

On August 1, 2008, Judge Larkin denied Mr. Smith's motion to withdraw his pleas and entered standard-range sentences for each offense. 7RP 1-18.

Mr. Smith appealed, and this pleading follows. See CP 77-91.

2. Facts alleged in Declaration of Probable Cause

As noted above, Mr. Smith entered Alford pleas, not conceding guilt but simply taking advantage of a plea offer. CP 4. As a result, this statement of facts is not an admission of the truth of these facts or that the prosecution could prove these facts if required to do so. It is presented instead to inform the Court of the basis for the charges and sentences, as set forth in the Declaration.

²The verbatim report of proceedings consists of seven volumes, which will be referred to as follows:

November 14, 2007, as "1RP;"
the volume containing the motions of January 14, February 15, May 5 and May 29, 2008, as "2RP;"

June 16, 2008, as "3RP;"

June 30, 2008, as "4RP;"

July 1, 2008, as "5RP;"

July 2, 2008, as "6RP;"

August 1, 2008, as "7RP."

Alleged in the Declaration is that officers went to serve a warrant at an apartment in Lakewood and found a plastic “baggie” containing 10.5 grams of suspected cocaine, some “packaging” bags, a pyrex measuring cup with dried white residue on it, two boxes of baking soda, six “baggies” containing a total of 240 grams of suspected marijuana and \$516, some of which was allegedly pre-recorded “buy” money from previous narcotics “buys.” CP 4. In the apartment, lying on his stomach on the floor of the living room near a loaded semi-automatic handgun was a man identified as Cavell Reed. CP 4. Also in the apartment, lying on his back on the living room floor was a man identified as Demarkus Smith. CP 4. A loaded .38 revolver was near Smith, who had a prior conviction for unlawful possession of a controlled substance as a juvenile. CP 4; see CP 51-64; 7RP 6-7.

3. Facts relating to entry of pleas

The Statement of Defendant on Plea of Guilty listed the charges set forth in the second amended information and stated:

In considering the consequence 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*.

CP 39-40.

Those ranges were then listed, with the offender scores, as follows:

Count:	Score:	Standard Range:
1	3	68-100 months plus enhancements of 12 months, total amount 80-112, with 9-12 months of community custody
2	3	6-10 months

CP 39-40 (emphasis in original). The plea form indicated, in boilerplate language, that “[m]y lawyer has explained to me, and we have fully discussed, all of the above paragraphs,” “I understand them all” and “I have no further questions to ask the judge.” CP 46-47. Omitted, however, was an acknowledgment that Mr. Smith “had previously read the entire statement above and . . . understood it in full” or that his lawyer had read it to him and he understood it. CP 46-47. The statement regarding guilt provided:

I have reviewed the evidence with my attorney. I believe there is a substantial likelihood that I will be found guilty at trial. I am pleading guilty to take advantage of the prosecutor’s offer.

CP 45-46.

At the plea hearing on July 2, 2008, the court asked Mr. Smith if he had a chance to review all of the relevant documents with his attorney and if the attorney had answered all of Smith’s questions and explained everything to him. 6RP 5-6. Mr. Smith said “[y]es, sir.” 6RP 6. The court then told Mr. Smith the charges he was pleading to and asked if Smith understood, to which Smith responded, “[y]es, sir.” 6RP 6-7. The court told Smith he was waiving rights such as the right to trial and confrontation and asked if counsel had explained that, and Smith said, “[y]es, sir.” 6RP 7.

Regarding sentencing, the court said:

And you also know that the State is going to make a sentencing recommendation to me, and that recommendation is set forth here in this agreement, but that I'm not bound by their recommendation? That means that I can sentence you to what I think is right and just under the law.

6RP 7. Mr. Smith again responded, “[y]es, sir.” 6RP 7. Smith said “[y]es” when asked if he knew the state’s recommendation and also acknowledged that he understood he was not admitting guilt but that, if the court accepted his plea, it had the “same consequences” as if guilt had been admitted. 6RP 8. After asking if anyone had pressured, forced or induced him to enter the pleas and hearing Smith respond “[n]o, sir,” the judge asked if the plea was “given freely, voluntarily, and intelligently and with the advice” of Smith’s attorney. 6RP 8-9. Smith said, “[y]es, sir,” and the court then accepted the pleas. 6RP 9.

At sentencing on August 1, 2008, counsel told the court that Mr. Smith wished to withdraw his pleas. 7RP 2. Smith told the court he had not been “fully aware of the circumstances of signing this plea bargain,” and that he “didn’t know how much time [he]. . . was signing to” at the time he entered the pleas. 7RP 5. Smith also said that it was the first time he had ever been in this situation and he had felt pressured into taking the pleas. 7RP 5. Since the plea hearing, Smith had taken some time to think it over and talk with family and had decided he would rather “fight for my life than to sign it away.” 7RP 5. He asked to be allowed to withdraw the pleas and take the case to trial, stating, “I know I’m not guilty.” 7RP 5.

In response, the prosecutor objected that it had not been given any notice of Smith’s desire to withdraw the pleas, arguing that the court

should not consider the motion as a result. 7RP 5-6. The prosecutor asked the court to proceed with sentencing and allow Smith to later file whatever he wanted to, whether it was briefing or an appeal. 7RP 6. While admitting that Mr. Smith was “a fairly young person,” the prosecutor stated that he did not believe that Mr. Smith had not known what he was doing in entering the pleas, noting that Mr. Smith had three prior felony convictions as a juvenile and the pleas were “the product of significant investigation and significant negotiation.” 7RP 6.

In denying Smith’s motion, the judge first noted that there had been no written motion filed and the case was scheduled for sentencing that day. 7RP 7. The judge then stated his belief that Mr. Smith had been properly advised, declaring:

I took the plea back on July 2nd. I know I went through the Statement of Defendant on Plea of Guilty. I went over it with him and asked him questions and took some time to make sure that he understood what he was doing. *I went over what the consequences were* and those other things.

7RP 7 (emphasis added). The judge concluded that Mr. Smith had not “indicated anything specifically” which would give the court a reason to set aside the pleas “at this time.” 7RP 7. The judge also stated that Mr. Smith could “raise the issue at a later time.” 7RP 7.

In arguments regarding the sentence, counsel stated his opinion that the plea agreement had been reached because of the “seriousness of the enhancements” as they were originally charged. 7RP 10. Indeed, counsel said, those had been a “powerful incentive to enter into an agreement even though you believe you’re innocent.” 7RP 10.

When asked to address the court, Mr. Smith said he had been

initially offered a deal of 20-60 months but had not accepted because he had not known if it was “the right time to take a plea bargain.” 7RP 11. He again stated that he had never been in the situation before. 7RP 11. He said that later, after the codefendants had accepted deals, the prosecutor then offered a deal of 68-100 months, and Mr. Smith did not understand at that time why he was not able to get the original offer back. 7RP 11. Smith said his attorney told him the deal he took was the last one the prosecutor would offer. 7RP 12. Although he had not known whether it was “the time to take the deal,” Smith’s attorney told him he was looking at “way more time” if he went to trial so Smith had accepted the deal. 7RP 12.

Smith told the court he had no family support at the time, had recently been shot and the whole process had been hard on him. 7RP 12. He asked the court to allow him to withdraw the pleas, stating he did not think he was guilty. 7RP 12.

The court told Smith it had accepted the pleas based upon the information in the Declaration of Probable Cause. 7RP 14. The court then told Smith that even a sentence at the low end of the standard range would be “long,” noted that even that sentence was not “very good” for Smith and advised Smith to use the time in custody to “make a commitment to yourself to do the right thing everyday.” 7RP 14. After that, the court imposed a sentence of 96 month in custody to be followed by 9-12 months of community custody. 7RP 14-15.

Shortly after the sentencing, Smith filed a pro se motion to withdraw his pleas, stating his grounds as “ineffective assistance of

counsel/misrepresentation of evidence.” CP 71-76. He indicated that he had not fully understood the consequences of the plea because it was his first time in this situation, his lawyer was pressuring him to take the plea and did not seem to want to defend Smith, and, Smith said, “I didn’t even realize how much time I was pleaing [sp] to[] until after I took the plea.” CP 75-76.

D. ARGUMENT

THE PLEAS WERE NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE AND THE TRIAL COURT ERRED IN REFUSING TO ALLOW MR. SMITH TO WITHDRAW THE PLEAS IN ORDER TO CORRECT A MANIFEST INJUSTICE

Under both the state and federal constitutional due process clauses, a plea is only valid if it is knowing, voluntary and intelligent. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), superseded in part by statute on other grounds as noted in United States v. Gomez-Cuevas, 917 F.2d 1521 (10th Cir. 1990); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976); see CrR 4.2 (requiring similar standard to be met before plea may be accepted). Where a plea does not meet those standards, it would be a manifest injustice to allow the plea to stand, and reversal with instructions to allow withdrawal of the plea is required. See State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

In this case, this Court should reverse, because the pleas were not knowing, voluntary and intelligent. An ordinary guilty plea meets that standard so long as the defendant understands all of the direct consequences of the plea. See In re Personal Restraint of Isadore, 151 Wn.2d 294, 297-98, 88 P.3d 290 (2004); State v. Ross, 129 Wn.2d 279,

284, 916 P.2d 409 (1996). A consequence is “direct” if it has a definite, immediate and automatic effect on a defendant’s punishment. Ross, 129 Wn.2d at 284-85. A sentence is just such a consequence, because it flows directly from the entry of the plea. 129 Wn.2d at 280, 284-85. As a result, when a defendant who has not been properly advised of the applicable standard sentencing range enters an ordinary guilty plea, that plea is not knowing, voluntary and intelligent and must be set aside as improper. See State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001).

Alford pleas are vastly different from ordinary pleas. Unlike when a defendant enters an ordinary guilty plea, a defendant entering an Alford plea does not admit guilt. See In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). As a result, an Alford plea is “inherently equivocal,” allowing a person who maintains their innocence to make the difficult decision, based upon a weighing of the alternatives, to accept a deal in light of the options available. Montoya, 109 Wn.2d at 280. Put another way, a defendant entering such a plea has engaged in a cost-benefit analysis of which option is best for him and, while refusing to admit guilt, has decided that it would be better to take a deal offered by the prosecution because of the risks he faced if the case went to trial. State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995).

For these reasons, an Alford plea is subject to a higher standard than a regular guilty plea. An Alford plea is only knowing, voluntary and intelligent if it is the product of a defendant’s free, reasoned choice among the legally available alternatives. See e.g., State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1970); Alford, 400 U.S. at 31. Further, a court

accepting such a plea is tasked to exercise “extreme care to ensure that the plea satisfies constitutional requirements” and is clearly knowing, voluntary and intelligent. Montoya, 109 Wn.2d at 277-78.

Here, the court did not exercise such care in failing to advise Mr. Smith on the record about the possible sentences he faced. Because the forms indicated both that Mr. Smith had read and understood the forms and that he had *not* read and understood them, it was incumbent upon the court to specifically inquire in order to make sure Mr. Smith knew what he was doing in entering the Alford pleas. In failing to conduct that inquiry or orally advise Mr. Smith of the significant length of the sentences he faced, the court allowed Mr. Smith to enter inherently equivocal pleas without full knowledge of their direct consequences and thus without the ability to properly evaluate all of the legally available alternatives as required for a valid Alford plea. The resulting pleas were not knowing, voluntary and intelligent, and this Court should so hold.

In response, the prosecution may argue that the statement of the standard ranges set forth on the plea forms was sufficient and that the trial court was not required to advise Mr. Smith of those ranges or question him to ensure he understood them before accepting the pleas. This Court should reject any such arguments, because the caselaw upon which they would likely rely is easily distinguished. It is true that, in Codiga, supra, and Keene, supra, the Supreme Court held that a trial court is not required to orally advise the defendant of all of the consequences of a plea or to question the defendant orally in order to “ascertain whether he or she understands” all of those consequences or the nature of the charges against

him or her. Codiga, 162 Wn.2d at 924; Keene, 95 Wn.2d at 206-208. But neither of those cases involved Alford pleas. Codiga, 162 Wn.2d at 923; Keene, 95 Wn.2d at 204. As a result, in neither case did the Supreme Court address the issues in light of the inherently equivocal nature of Alford pleas and the extra scrutiny and care which must be taken to ensure that such pleas are knowing, voluntary and intelligent.

Further, in Codiga and Keene there was no ambiguity in the plea forms about whether the defendant had read and understood everything contained therein, as there is here. See Codiga, 162 Wn.2d at 912-931; Keene, 95 Wn.2d at 203-212.

This Court should reject any efforts by the prosecution to rely on Codiga and Keene and should hold that the trial court erred in refusing to allow Mr. Smith to withdraw his pleas in order to correct a manifest injustice.

Finally, this Court should reverse based upon counsel's ineffectiveness. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show that counsel's representation was deficient and the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" of effectiveness, it is overcome where counsel's conduct fell below an objective standard of reasonableness. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049

(1999).

Counsel fell below that standard here. For the purposes of entering a plea, counsel has a duty to “actually and substantially” assist his client in determining whether to enter a plea. See State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Counsel also has an obligation to inform his client of all “direct” consequences of a plea. See State v. Barton, 93 Wn.2d 301, 305, 609 P.3d 1353 (1980). The plea forms indicate that Mr. Smith was not properly advised or aware of the potential sentences in this case and thus counsel was prejudicially ineffective in allowing his client to enter Alford pleas which were not knowing, voluntary and intelligent. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand with instructions to allow Mr. Smith to be permitted to withdraw the Alford pleas. Further, because counsel was ineffective in assisting Mr. Smith in deciding whether to enter the pleas, different counsel should be appointed to assist him on remand.

DATED this JR day of March, 2009.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Demarkus Smith, DOC 321526, Clallam Bay Corr. Center,
1830 Eagle Crest Way, Clallam Bay, WA., 98326.

DATED this 17th day of March, 2009.



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

STATE OF WASHINGTON
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