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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

DEMARKUS SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 07-1-05059-2

Brief of Respondent

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

1. Whether the trial court correctly denied the defendant's motion to withdraw his plea where the defendant was fully informed of the consequences of his plea and entered into it voluntarily?

B. STATEMENT OF THE CASE.

1. Procedure

Out of an incident that occurred on September 26, 2007, the defendant was charged the following day with four counts: Count V, Unlawful Possession of a Controlled Substance With Intent To Deliver; Count VI, Unlawful Manufacture of a Controlled Substance, Cocaine; Count VII, Unlawful Possession of a Controlled Substance with Intent to Deliver, Cocaine; and Count VIII, Unlawful Possession of a Firearm in the Second Degree.¹ CP 1-3. Each of counts five through seven also included two firearm sentence enhancements. CP 1-3. On January 10, 2008, an amended information was filed adding a school bus route stop enhancement to Counts V, VI, and VII. CP 20-22.

The case was assigned out for trial on July 1, 2008. *See*, RP 07-01-08, p. 4, ln. 14-17. After addressing some preliminary matters, the parties returned the following day, whereupon they advised the court they

had reached an agreement. *See generally*, RP 07-01-08; *see also* RP 07-02-08, p. 4, ln. 14 to p. 5, ln. 20. The defendant then entered a plea to a Second Amended Information that included only Counts V, VII and VIII, with the firearm sentence enhancements and school bus rout stop enhancements removed on all counts, and a deadly weapon enhancement added to Count I. CP 36-36; RP 07-02-08, p. 5, ln. 12 to p. 7, ln. 4.

The court initially asked the defendant if he had a chance to review all the plea paperwork with his attorney, if the defendant went over every document with his attorney, and if the defendant's attorney answered all of the defendant's questions. RP 07-02-09, p. 6, ln. 3-15. The defendant answered, "yes" to each question. RP 07-02-09, p. 6, ln. 7-15. The defendant indicated that he understood the charges. RP 07-02-08, p. 7, ln. 5-8. The court informed the defendant that the State would be making a sentencing recommendation, that it was the recommendation set forth in the plea agreement, and that the court was not bound by that recommendation. RP 07-02-09, p. 7, ln. 16-24. The court then specifically asked the defendant if he knew what the State's recommendation was going to be and the defendant answered, "yes." RP 07-02-09, p. 7, ln. 25 to p. 8, ln. 2.

The court also advised the defendant that because he was pleading guilty by way of an *Alford* plea, that it was legally the same as a guilty

¹ Presumably Counts I-IV were charged against the co-defendants.

plea, and that the defendant was doing so to take advantage of the prosecutor's recommendation. RP 07-02-09, p. 8, ln. 2-21. The defendant also acknowledged that he was entering the plea freely, voluntarily and intelligently with the advice of his attorney. RP 07-02-08, p. 8, ln. 25 to p. 9, ln. 3.

Based upon an offender score of 3, the plea form listed the defendant's standard range as 68-100 months, plus 12 months of enhancement on Count V; 6-18 months on Count VII, and 9-12 months on Count VIII.² See CP 39, 40. The prosecutor's recommendation on the plea form was for a term of 100 +12 months, as well as other standard conditions, with the agreement that the defendant could argue for the low end. CP 42. The sentencing was scheduled for August 1, 2008.

At the sentencing, the defendant brought a pro se motion to withdraw his plea. In doing so he addressed the court directly and stated the following:

Your Honor, I wasn't fully aware of the circumstances of signing this plea bargain. To be honest, I really didn't know how much time I was signing to. This is my first time in this situation, and I felt I was being pressured into taking this plea. I had time to think this over and talk with my family, and this is not what I wanted to do. I know some of the odds were against me, but I would rather fight for my life than to sign it away. Your Honor, I want to withdraw my plea bargain and take this case to trial because I know I am not guilty.

² In listing the ranges for Counts V and VII, the pre-printed plea form numbered them as Counts 1 and 2 respectively. See CP 40.

[RP 08-01-08, p. 5, ln. 11-20.]

The court noted that the matter was on for sentencing, that no motion was timely made and that the court carefully went over the plea with the defendant. RP 08-01-08, p. 7, ln. 1-7. The court went on to note that the defendant had failed to identify anything specifically to the court that would give the court a basis to set aside the plea, and decided not to grant the motion and instead to proceed with sentencing. RP 08-01-08, p. 7, ln. 8-11.

After the counsel for both sides addressed the court regarding the sentencing recommendations, the defendant addressed the court himself and again asked to withdraw his plea because he wanted to get back an earlier lower plea recommendation that he had rejected and that had been withdrawn. RP 08-01-08, p. 11, ln. 15 to p. 12, ln. 18. The court then imposed a mid-range sentence of 96 months (84 + 12 enhancement) on Count V, and the low end of 6 and 9 months respectively on Counts VII and VII. CP 57, as well as other standard conditions.

On August 14, 2008, the defendant filed a Motion of Withdrawal of Guilty Plea (CrR 7.8). CP 71-72. On August 21, 2008, the defendant filed a notice of appeal seeking review of the Judgment and Sentence. CP 77-91.

On October 2, 2008, the trial court sent the defendant a letter advising him that his motion to withdraw the guilty plea had been filed in the court file, but that the court would not consider the motion unless all the necessary supporting documents and affidavits were filed with the motion. CP 97. The court's letter also advised the defendant that in the alternative to doing that, the defendant could file a personal restraint petition with the Court of Appeals. CP 97.

2. Facts

Because there was no trial, the facts are not particularly at issue. However, for the sake of context the following is taken from the Declaration For Determination Of Probable Cause. *See*, CP 4.

[On September 26th, 2007] at approximately 0650, Pierce County Sheriff's Deputies served a search warrant at 6217 Lakewood Dr. W Apartment #156. Lying on his back in the living room of the apartment was DEMARKUS SMITH. A loaded .38 revolver was sitting next to SMITH, who is a convicted felon, having previously been convicted of UPCS. Lying on his stomach a few feet away from SMITH was CAVELL REED. A loaded semi-automatic handgun was sitting on the floor next to REED'S right side. REED is presently out of custody on \$25,000 bond on an Attempted Robbery 1/Assault 2 case (Pierce County Cause #07-1-02588-1).

Inside the apartment Deputies located a plastic baggy containing 10.5 grams of cocaine that field tested positive, several plastic packaging baggies, a pyrex measuring cup with dried white paste inside that field tested positive for cocaine, and two boxes of baking soda. It appeared to the Deputies that crack cocaine was being

manufactured from powder cocaine. 6 individually packaged bags of marijuana weighing 240 grams were also found. \$516 was found in various places. Part of the cash was pre-recorded buy money from previous narcotics buys from prior cocaine deliveries.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA WHERE THE DEFENDANT'S PLEA WAS KNOWING, INTELLIGENT AND VOLUNTARY WHEN IT WAS MADE.

“Due process requires that a guilty plea be knowing, intelligent and voluntary.” *In re Personal Restraint of Montoya*, 109 Wn.2d 270, 744 P.2d 340 (1987) (citing *In re Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257-58, 49 L.Ed.2d 108 (1976)).

Under CrR 4.2(f), a court must allow a guilty plea to be withdrawn only where it appears that withdrawal is necessary to correct a manifest injustice. This rule imposes a demanding standard on the defendant to demonstrate a manifest injustice, i.e., "an injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974), *State v. Branch*, 129 Wn.2d 635, 641-642, 919 P.2d 1228 (1996); *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). A showing that the plea was involuntary is sufficient to establish a manifest injustice. *Taylor*, 83 Wn.2d at 598; *State v. Turley*, 149 Wn.2d 395, 398-

399, 69 P.3d 338 (2003). A guilty plea is considered involuntary if the State fails to inform a defendant of a direct consequence of his plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)(interpreting CrR 4.2(d)). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. *Wood v. Morris*, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976).

When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). When the judge verifies the various criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is “well nigh irrefutable”. *State v. Perez*, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982); *Branch*, 129 Wn.2d at 642. In *Branch* and *Keene*, this Court stated that when a defendant makes affirmative statements to the Court at the time of the plea regarding his knowledge and understanding of the contents of the plea form, that he will not later be heard to deny those statements. *Branch*, 129 Wn.2d at 643-44 (citing *Keene*, 95 Wn.2d at 206-07). Finally, the lower court’s credibility determinations are not

subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the presumption of voluntariness is well nigh irrefutable. In paragraph 12 of the plea agreement, the defendant signed the agreement, acknowledging the pre-printed language that:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the “Offender Registration” Attachment, if applicable. I understand them all. I have been given a copy of this “Statement of Defendant on Plea of Guilty.” I have no further questions to ask the judge.
[CP 47.]

The defendant’s attorney also signed a statement that:

I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the Statement.

[CP 47.]

The court also went over the voluntariness of the plea with the defendant before accepting the plea. The court initially asked the defendant if he had a chance to review all the plea paperwork with his attorney, if the defendant went over every document with his attorney, and if the defendant’s attorney answered all of the defendant’s questions. RP 07-02-09, p. 6, ln. 3-15. The defendant answered, “yes” to each question. RP 07-02-09, p. 6, ln. 7-15. The defendant indicated that he understood the charges. RP 07-02-08, p. 7, ln. 5-8. The court informed the defendant that the State would be making a sentencing recommendation, that it was the

recommendation set forth in the plea agreement, and that the court was not bound by that recommendation. RP 07-02-09, p. 7, ln. 16-24. The court then asked the defendant if he understood that and the defendant answered “yes.” RP 07-02-09, p. 7, ln. 23-24. The court then specifically asked the defendant if he knew what the State’s recommendation was going to be and the defendant answered, “yes.” RP 07-02-09, p. 7, ln. 25 to p. 8, ln. 2.

The court also advised the defendant that because he was pleading guilty by way of an *Alford* plea, that it was legally the same as a guilty plea and that the defendant was doing so to take advantage of the prosecutor’s recommendation. RP 07-02-09, p. 8, ln. 2-21. The defendant also acknowledged that he was entering the plea freely, voluntarily and intelligently with the advice of his attorney. RP 07-02-08, p. 8, ln. 25 to p. 9, ln. 3.

The court asked the defendant if he was ready to enter a plea and the defendant answered, “yes.” RP 07-02-08, p. 9, ln. 4-6. The court asked the defendant what his plea was, and the defendant answered, “guilty.” RP 07-02-08, p. 9, ln. 7-8. The court then asked the defense attorney if there was any reason why the court should not accept the plea, and the defense attorney said that he couldn’t think of any. RP 07-02-08, p. 9, ln. 9-11.

Here, not only did the defendant sign the plea form, he also verbally ratified the plea on the record. There is nothing in the record to support any inference the plea was involuntary. The defendant cannot rebut the

presumption that the plea was voluntary, especially where that presumption is well nigh irrefutable.

The defendant makes two erroneous arguments in support of his claim. First, the defendant erroneously claims that the plea was involuntary because the court failed to check a box on the plea form indicating that either the defendant himself or the defendant's lawyer had read the entire statement to him and that he understood it in full. Br. App. 11, 12. While the court failed to mark the check box after it accepted the defendant's plea, that error is harmless where the defendant acknowledged on the record that he had reviewed the plea form with his attorney, the attorney answered all of the defendant's questions, and explained everything to the defendant and that the defendant understood the charges to which he was pleading. *See*, RP 07-02-08, p. 6, ln. 3-20.

The court's opinion in ***Branch*** is on point on this issue. Here, the judge failed to check off a box on the standard plea form, which box is included in the sample plea form CrR 4.2(g). In ***Branch***, the court noted that CrR 4.2 contains numerous procedural safeguards, but that they are not constitutionally mandated and that failure to adhere to the requirements of CrR 4.2 does not in and of itself result in a violation. ***Branch***, 129 Wn.2d at 642. The court went on to note that while CrR 4.2 requires that the record show that the plea was entered voluntarily and intelligently, even the absence of a defendant's signature on the plea form does not necessarily vitiate the plea's voluntariness. ***Branch***, 129 Wn.2d

at 642. The court in *Branch* went on to hold that the plea statement should be examined in conjunction with the verbatim report of proceedings, and if together they show that the plea was knowingly, intelligently and voluntarily entered, the plea was valid. *Branch*, 129 Wn.2d at 643-44. The court went on to note that *Branch's* conduct at the plea hearing amounted to an oral ratification of the plea statement, and the same is the case here. *See Branch*, 129 Wn.2d at 643-44. For the reasons explained above, there is ample evidence in the record that the plea was knowing, intelligent and voluntary, and the technical defect of the court's failure to check the box after the fact of the plea did not render it otherwise.

The defendant also erroneously claims that "an *Alford* plea is subject to a higher standard than a regular guilty plea." *See*, Br. App. 10. That claim is unsupported by citation to authority, and is apparently an inference. The claim is also incorrect, although the differences between an *Alford* plea and a standard plea do implicate some different requirements for an *Alford* plea to be valid.

Alford pleas were authorized by the United States Supreme Court. *See, North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). In an *Alford* plea a defendant may voluntarily, knowingly and intelligently plead guilty even if the defendant is unwilling or unable to admit participating in the acts constituting the alleged crime. *Montoya*, 109

Wn.2d 270 at 277-78 (citing *Alford*, 400 U.S. at 37.) Thus, an *Alford* plea differs from a standard plea insofar as in an *Alford* plea, rather than admitting the facts that make the defendant guilty of the charged crime, the defendant instead must establish an entirely independent factual basis for the plea which substitutes for an admission of guilt. *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995). Because of this, the court must be particularly careful to establish a factual basis for the plea, and to ensure that the due process constitutional requirements that the plea be knowing, intelligent and voluntary. *D.T.M.*, 78 Wn. App. at 220; *Montoya*, 109 Wn.2d at 278. See also, *Newton*, 87 Wn.2d at 373.

In *In re Clements*, the court discussed the standard for the validity of an *Alford* plea.

An *Alford* plea is valid if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *In re Montoya*, 109 Wash.2d 270, 280, 744 P.2d 340 (1987) (quoting *Alford*, 400 U.S. at 31, 91 S. Ct. 160). Such a choice occurs where the defendant “intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.” *Montoya*, 109 Wash.2d at 280, 744 P.2d 340 (quoting *Alford*, 400 U.S. at 37, 91 S. Ct. 160). Establishment of a sufficient factual basis of guilt is not an independent constitutional requirement, but an inadequate factual basis may affect the constitutional voluntariness of the plea because some information about the facts is necessary to the defendants [sic] assessment of the law in relation to the facts. See *In re Hews*, 108 Wash.2d 579, 592, 741 P.2d 983 (1987) (quoting *United States v. Johnson*, 612 F.2d 305, 309 (7th Cir.1980)).

[*In re Clements*, 125 Wn. App. 634, 645, 106 P.3d 244 (2005).]

Here, there is strong evidence that the plea was voluntary under the standard for *Alford* pleas. The defendant's statement on the plea form, in paragraph 11 states: "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 46, para. 11. After this statement, the plea form contains a box that was checked to indicate that instead of making a factual statement, the court could review the probable cause declaration to determine a factual basis for the plea. CP 46., para. 11.

At the sentencing, when he asked to withdraw his plea, the defendant made the bare assertion that he wasn't fully aware of the circumstances of signing the plea bargain, that he felt pressured to take the plea. RP 08-01-08, p. 5, ln. 11-14. But then he went on to say that he had time to think it over, and talk to his family and decided that the plea was not what he wanted to do, and that he would rather fight for his life than sign it away. RP 08-01-08, p. 5, ln. 11-21. This all indicates that he actually changed his mind after he entered the plea. His bare assertion that he didn't understand the plea is insufficient without more, especially where he has a motive to say that in an attempt to invalidate the plea in order to be able to withdraw it.

The court denied the motion to withdraw the plea and proceeded to sentencing. Before imposing sentence, the court heard from counsel for both sides and then gave the defendant an opportunity to address the court. The defendant then told the court that he had the opportunity for a better plea bargain earlier, but declined it, even though his co-defendants did not, and went on to indicate that he wanted to get back to that earlier offer even though it was no longer available. RP 08-01-08, p. 11, ln. 15-25. He then went on to tell the court that his attorney had advised him that the plea offer he accepted was the prosecutor's last offer, and that at trial he was facing substantially greater time in custody. RP 08-01-08, p. 12, ln. 2-9

For the reasons indicated above, the quality of the record at the time of the plea shows that the defendant has failed to rebut the "well nigh irrefutable presumption" that his plea is valid. Moreover, the defendant's statements at the time of his plea show that it was in fact knowing, intelligent and voluntary. He understood that he was facing significantly greater time at trial, and that he entered into the plea in order to take advantage of the State's offer. His statements show that his desire to withdraw his plea came after he had entered it as a result of subsequent reflection, and talking with his family about it. RP 08-01-08, p. 5, ln. 15-20. His statements also show that his regret was largely a consequence of the fact that in retrospect he regretted his decision to decline the earlier offer, i.e. "buyer's remorse." *See*, RP 08-1-08, p. 11, ln. 16-25.

Moreover, the defendant received a substantial benefit as a result of his plea agreement. If convicted at trial under the [first] Amended Information, he faced a sentence of 212 to 240 months. This is because the school bus route stop enhancement doubled his statutory maximum to 20 years, as well as adding 24 months of additional time to his sentence. RCW 69.50.435; 9.94A.533(6). With a 20 year statutory maximum, his firearm enhancements would have been for 60 months each, consecutive to each other and all other portions of his sentence. RCW 9.94A.533(3)(a). Adding 60 months, plus 60 months, plus 24 months to his standard range of 68-100 months, his base range was 212-244 months, however, the statutory maximum of 20 years capped the sentence at 240 months. So his actual range was 212-240 months. Instead, as a result of his plea he received a sentence of 96 months, 116 months lower, or less than half of the minimum sentence he faced if convicted at trial. Notwithstanding the defendant's "buyer's remorse" after his plea, the plea was well considered and provided a substantial benefit to him.

Just as the trial court did, this Court should deny the defendant's claim as without merit.

2. TRIAL COUNSEL WAS NOT INEFFECTIVE WHERE THE DEFENDANT WAS PROPERLY INFORMED OF THE CONSEQUENCES OF HIS PLEA.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient,

i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Here counsel was not ineffective. As indicated in the preceding section, the record shows that the defendant was adequately informed of the consequences of his plea, so that the plea was knowing, intelligent, and voluntary. The defendant has failed to show that counsel's performance fell below an objective standard of reasonableness. Accordingly, this claim should be also denied as without merit.

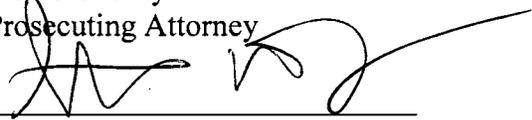
D. CONCLUSION.

The court should deny the appeal where both the documentary record and the verbatim report of proceedings amply demonstrate that the

defendant's plea was knowing, intelligent and voluntary. Given that record, the defendant has failed to put forth evidence to overcome the well night irrefutable presumption that the plea was valid.

DATED: July 15, 2009.

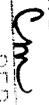
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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