

NO. 41228-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

ERNEST H. GUGGER, Appellant.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Gugger's motion to withdraw guilty plea.
2. The trial court erred by finding that Mr. Gugger's guilty plea was voluntary.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred by denying the motion to withdraw guilty plea where the plea was rendered involuntary when the defendant was forced to choose between proceeding with a trial where counsel was unprepared and the jury had been tainted, or taking the plea.

## **III. STATEMENT OF THE CASE**

On September 21, 2009, Ernest Gugger and Christopher Hindermann were charged with unlawful manufacturing of methamphetamine, unlawful possession of pseudoephedrine, and unlawful possession of ammonia with intent to manufacture methamphetamine. CP 1-2. Mr. Hindermann was also charged with several additional crimes,

including child endangerment, animal fighting, and delivery of a controlled substance. 2RP 222-23.

On July 12, 2010, the parties met to discuss a short continuance because the State had provided discovery just before the hearing. The court granted a one week continuance and advised both parties that no more continuances would be granted. 1RP 96. Specifically, the court warned the State:

And I want you all to come prepared to start because there will be no further continuances. I hope you all understand that. And so I guess I'm looking at [the prosecutor] and saying please don't submit anything else additional. I mean, you so what you have to do as a litigator, I understand that, but this is the kind of thing that interrupts and causes the Court to believe that there is due process due to the defendants, they need to be prepared, I don't want to inject error into this case. So I'm assuming that the State is now fully prepared and won't be submitting anything additional.

1RP 96.

The case proceeded to jury trial on July 26, 2010. 2RP. One of the primary issues was that Mr. Gugger had not made any statements to the police, but Mr. Hindermann had made out-of-court statements. 2RP 109. The State advised the court that the State would not be seeking to introduce Mr. Hindermann's statement implicating Mr. Gugger in methamphetamine manufacturing. 2RP 110-11, 114. The court granted Mr. Gugger's motion in limine to that effect, allowing only Mr.

Hindermann's statement that he knew Mr. Gugger to be submitted. 2RP 115-16.

The first witness, Mr. Hindermann's 17 year old daughter, testified on July 27, 2010. 2RP 194. Miss Hindermann testified about her father's drug use, 2RP 200, the presence of other children in the home, 2RP 202, the location of the school bus stop, 2RP 203, her father's marijuana grow on the property, 2RP 203, guns on the property, 2RP 204-5, that her father engaged in animal fighting, 2RP 207, and that Mr. Gugger had lived on her father's property, 2RP 209. When the court was recessed for the day, neither the State nor Mr. Hindermann gave any indication of an impending deal. 2RP 220-21.

On July 28, the day began with the prosecutor announcing that the State had made a deal with Mr. Hindermann—that he would plead guilty to reduced charges in return for testifying against Mr. Gugger in his trial. 2RP 222, 239. Following the plea, the prosecutor informed Mr. Gugger's attorney for the first time that now that Mr. Hindermann has pled guilty, he may be called as a witness and the witness list will change. 2RP 239-40. The defense moved for a mistrial, arguing that having Miss Hindermann testify to so much prejudicial information that went beyond the charges against Mr. Gugger, exacerbated by the prosecutor's opening statement, combined with the impact of a new changed witness list, had

materially impacted Mr. Gugger's due process rights. 2RP 240-43.

Defense counsel told the court that she could not be ready to proceed again to trial with this changed evidence without an additional two weeks to prepare. 2RP 246. The Court denied the motion for mistrial, but gave the defense two days recess to prepare for the changes to the case. 2RP 249-50.

Following the two day recess, on July 30, the parties appeared again before the court and Mr. Gugger pled guilty to one count of unlawful manufacture of methamphetamine and one count of conspiracy to unlawfully possess pseudoephedrine. Supp. CP, 7/30/10 RP 2, CP 8-16. The plea included sentence enhancements for school zone and presence of minors, which Mr. Gugger was told would be subject to good time credit. Supp. CP, 7/30/10 RP 6.

At the sentencing hearing held on August 23, 2010, Mr. Gugger made a motion to withdraw his guilty plea. 8/23/10 RP 2. Mr. Gugger's reasons for withdrawing his plea were (1) he had been misinformed about what parts of his sentence were subject to good time credit and how much he was eligible for; and (2) that he had been "forced" into taking the plea because when his co-defendant pled guilty in the middle of the trial, which had compromised his right to a fair trial with the jury already empanelled. 8/23/10 RP 4. He told the court that he was given only two hours to

consider the plea and did not have time to make an informed choice.

8/23/10 RP 6. The court denied his motion and proceeded to sentencing.

8/23/10 RP 10, CP 17-30.

This appeal of the denial of motion to withdraw guilty plea timely follows. CP 31.

#### IV. ARGUMENT

**ISSUE 1: THE TRIAL COURT ERRED BY DENYING THE MOTION TO WITHDRAW GUILTY PLEA BECAUSE THE PLEA WAS RENDERED INVOLUNTARY WHEN THE DEFENDANT WAS FORCED TO CHOOSE BETWEEN PROCEEDING WITH A TRIAL WHERE COUNSEL WAS UNPREPARED AND THE JURY HAD BEEN TAINTED, OR TAKING THE PLEA.**

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). CrR 4.2(f) requires that the trial court allow a defendant to withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." "Manifest injustice" means "an injustice that is obvious, directly observable, overt, [and] not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (citing Webster's Third International Dictionary (1966)). There are four indicia of manifest injustice that would allow a defendant to withdraw his guilty plea: (1) the defendant received ineffective assistance of counsel, (2) the defendant did not ratify his plea,

(3) the plea was involuntary, and (4) the prosecution did not honor the plea agreement. *Taylor*, 83 Wn.2d at 597.

A trial court's denial of a motion to withdraw a guilty plea is reviewed under the abuse of discretion standard. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

Mr. Gugger made a motion to the court to withdraw his guilty plea, telling the court that he had felt he had no choice but to plead because the timing of Mr. Hindermann's plea deal had compromised his ability to have a fair trial before the jury that had been empanelled, and also because he had not understood the nature of the sentencing enhancements. 8/23/10 RP 4. The court denied that motion, finding that the plea was voluntary. 8/23/10 RP 10. The court abused its discretion in denying the motion to withdraw the plea because the State's actions in making a deal with the co-defendant after trial began, and then announcing that he would be testifying against Mr. Gugger, materially changed the case against Mr. Gugger and forced him into a position where his only alternative to the plea was a trial where his due process rights were compromised, rendered Mr. Gugger's subsequent decision to plead guilty involuntary.

In the speedy trial arena, the courts have held that due process is compromised when the State materially changes the case against the defendant on the eve of trial.

We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before the crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights.

*State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

Likewise, in this case, the State's case against Mr. Gugger materially changed, not on the eve of trial, but after the first witness had already testified. When Mr. Hindermann pled guilty after the trial began, the State's case materially changed from the prosecutor's stated position pre-trial that Mr. Hindermann's statements against Mr. Gugger would not be brought into evidence, to having Mr. Hindermann be the State's star witness. See 2RP 110-11, 114, 239-40. Yet, no mention is made of a pending deal when the State was warned by the court that no more surprises to the defense would be tolerated, nor the day before when trial was recessed. See 1RP 96; 2RP 220-21. By surprising Mr. Gugger during

trial with this material change, the State compromised due process, just as the State did in *Price*.

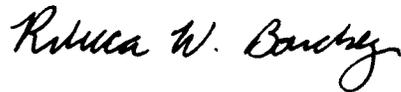
Instead of giving Mr. Gugger's counsel the time she needed to prepare for trial with this new evidence and witnesses, Mr. Gugger was forced into a position where his attorney had told the court she would not be prepared to proceed to trial under the changed witnesses and facts, but the court had refused to give her adequate time to prepare, or to grant her motion for a new trial. See 2RP 240-43, 246, 249-50. In addition, Mr. Gugger's attorney had already told the court that the jury had been tainted by the prosecutor's opening argument and Miss Hindermann's testimony regarding charges not pending against Mr. Gugger, but painting him with the same brush. See 2RP 240-43.

The situation created by the State's late deal with Mr. Hindermann forced Mr. Gugger into a "Hobson's choice," choosing between proceeding to trial before a tainted jury with unprepared counsel, or taking the guilty plea the State offered him only two hours to consider. By forcing Mr. Gugger into this position, the State's actions rendered Mr. Gugger's plea involuntary. Therefore, his motion to withdraw plea should have been granted. The trial court abused its discretion in denying the motion to withdraw plea.

## V. CONCLUSION

By entering into a deal with Mr. Hindermann after trial began, the State forced Mr. Gugger into a position where his only choices were to proceed to trial before a tainted jury with unprepared counsel or taking the State's offer. This Hobson's choice rendered Mr. Gugger's plea involuntary and therefore, he should have been permitted to withdraw the plea. The trial court abused its discretion in denying Mr. Gugger's motion to withdraw plea.

DATED: May 27, 2011



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CERTIFICATE OF SERVICE

I certify that on May 27, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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