

NO. 41228-4

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BY

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

STATE OF WASHINGTON, RESPONDENT

v.

ERNEST GUGGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 09-1-04259-6

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the trial court properly exercise its discretion when it denied defendant's motion to withdraw guilty plea when defendant failed to show that his plea was involuntary? 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT. 6

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA AFTER REVIEWING THE PLEA FORM AND PLEA PROCEEDING AND DETERMINING DEFENDANT HAD ENTERED HIS PLEA VOLUNTARILY. 6

D. CONCLUSION. 16

Table of Authorities

State Cases

<i>State v. Branch</i> , 129 Wn.2d 635, 641, 919 P.2d 1228 (1996)	6, 8, 13
<i>State v. Malone</i> , 138 Wn. App. 587, 592 n.3, 157 P.3d 909 (2007)	7
<i>State v. Marshall</i> , 144 Wn.2d 266, 280, 27 P.3d 192 (2001).....	6, 14
<i>State v. Newton</i> , 87 Wn.2d 363, 370, 552 P.2d 682 (1976)	7, 13
<i>State v. Olmsted</i> , 70 Wn.2d 116, 118, 422 P.2d 312 (1966)	6, 7, 12
<i>State v. Perez</i> , 33 Wn. App. 258, 261, 654 P.2d 708 (1982).....	7, 8
<i>State v. Price</i> , 94 Wn.2d 810, 814, 620 P.2d 994 (1980)	14, 15
<i>State v. Smith</i> , 134 Wn.2d 849, 852, 953 P.2d 810 (1998)	8
<i>State v. Taylor</i> , 83 Wn.2d 594, 596, 521 P.2d 699 (1974).....	7, 8
<i>State v. Zhao</i> , 157 Wn.2d 188, 197, 137 P.3d 835 (2006)	6

Federal and Other Jurisdictions

<i>North Carolina v. Alford</i> , 400 U.S. 25, 37, 91 S. Ct. 160 (1970).....	7
--	---

Rules and Regulations

CrR 3.3.....	15
CrR 3.5.....	1
CrR 4.2(d)	7
CrR 4.2(f).....	6
ER 404(b).....	2

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

1. Did the trial court properly exercise its discretion when it denied defendant's motion to withdraw guilty plea when defendant failed to show that his plea was involuntary?

B. STATEMENT OF THE CASE.

On September 21, 2009, under cause number 09-1-04259-6 in the Superior Court of Washington for Pierce County, the State charged Ernest Gugger, defendant, with unlawful manufacturing of methamphetamine, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and unlawful possession of ammonia with intent to manufacture methamphetamine. CP 1–2. The State also charged Christopher Hindermann, codefendant, with similar charges. 2RP 222–23.

Defendant and co-defendant's jury trial began on June 28, 2010, before the Honorable Susan K. Serko. 1RP 3–4. The court denied defense's motion regarding the issuance of a warrant. *Id.* at 38. Trial continued with a 3.5 hearing on June, 29, 2010, where the State called three officers to testify about the incident implicating both defendants. *Id.* at 40–85. Due to scheduling issues, the court recessed until July, 26, 2010. *Id.* at 85.

On July 12, 2010, the court convened to proceed with the trial.¹ *Id.* at 86. The State made a motion to admit evidence under ER 404(b) including surveillance videos, which had just come into the possession of the prosecutor, of defendants purchasing pseudoephedrine. *Id.* at 86–89. The court granted a two-week recess for the defense to review the additional discovery. *Id.* at 94. The trial judge stated that because the additional discovery was minimally burdensome on defendant’s case, additional recesses would not be granted. *Id.* 89–90, 96.

Motions in limine were argued on July 26, 2010. 2RP 106. The court held that the State could use codefendant’s redacted statement against defendant, so long as it did not facially implicate defendant. *Id.* at 115–16. The next day, the jury heard the State’s opening statement and testimony from Alexis Nicole Hindermann, the codefendant’s daughter. *Id.* at 194–95. She testified that she had seen her father use, grow, and possess marijuana. *Id.* 203–05. She further testified defendant had frequented her father’s property. *Id.* at 209. She also testified that she believed a trailer on her father’s property—where the alleged manufacture of methamphetamine occurred— belonged to defendant. *Id.* at 209–10.

¹ The record does not state why the trial continued on this date. It indicates that both parties received relatively short notice of the change, and that the court intended to proceed. IRP 86.

The next day, codefendant changed his plea from not guilty to guilty. *Id.* at 222–39.

After subsequent plea negotiations, defendant entered a plea of guilty on July 30, 2010. CP 8–16. Defendant entered an Alford plea, pleading guilty to unlawful manufacturing of methamphetamine and two sentencing enhancements: commission of the crime (1) within 1000 feet of a school bus route stop, and (2) when a person under the age of eighteen was present. *Id.*

The Honorable Linda CJ Lee conducted defendant’s plea proceeding.² 7/30/2010 RP 1.³ The court used the declaration of probable cause and the supplemental declaration of probable cause for a factual basis for the plea. *Id.* at 14. These facts include finding a trailer containing methamphetamine, various products used in the production of methamphetamine, and mail addressed to defendant. CP 40–41. It states that these items were within 1000 feet of a school bus route and in the presence of minors. CP 6. Finally, the declaration states that the trailer,

² The record does not explain why Judge Lee conducted the plea proceeding in place of Judge Serko.

³ The plea proceeding’s transcript was filed in the Superior Court file and transmitted to the Court of Appeals as an exhibit. As it was not indexed as clerks papers or given page numbers, the State will reference the transcript as “7/30/2010 RP” throughout its brief.

residence where the minors lived, and an RV contained levels of methamphetamine from 33 to 222 times greater than normal levels. *Id.*

During the plea proceeding, defendant presented a completed plea form to the court, stating that his lawyer read him the plea form and he understood its terms. 7/30/2010 RP 5. He further stated he understood the terms of the additional sentencing enhancements. *Id.* at 6. Finally, the defendant assured the court he entered his plea freely, voluntarily, and without threat or promise by the State. *Id.* at 15. After determining defendant was entering his plea voluntarily, the court accepted his plea of guilty.⁴ *Id.* at 15–16.

On August 13, 2010, the parties appeared before Judge Serko for sentencing. 2RP 259. Defendant moved to withdraw guilty plea. *Id.* at 259. The court determined that Judge Lee should hear the motion and preside over any sentencing. *Id.* 259–64.

The parties were before Judge Lee on August 23, 2010. Defense counsel made a motion to withdraw guilty plea on the basis that (1) the plea form did not state the amount of good time defendant would receive, and (2) he did not understand the enhancements terms. 8/23/2010 RP 2.

⁴ Defendant also pleaded guilty to a separate crime during the proceeding under cause number 10-1-00052-8: conspiracy to commit unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. 7/30/2010 RP 15. That plea is not part of the current appeal.

Defendant stated his reason for the motion was because he involuntarily entered his plea. *Id.* at 4–6. The court reviewed the transcript of the plea proceeding with the defendant and determined he voluntarily entered his plea. *Id.* at 6–10. The court denied defendant’s motion and proceeded to sentencing. *Id.* at 10–14.

Defendant faced a standard range sentence of 100 to 120 months for the manufacturing charge, plus a 24-month school zone enhancement and a 24-month child endangerment enhancement, totaling 148 to 168 months in custody. *Id.* at 11. The parties agreed to recommend a mid-range sentence of 158 months in custody with a 12-month community custody sentence. *Id.* at 10–12. The recommendation included \$5,800 in fees. *Id.* at 12. The court followed the recommendation and sentenced defendant to 110 months in custody for the manufacturing charge, plus 24 months for each enhancement, for a total of 158 months. *Id.* at 13–14. The sentence also required \$5,800 in legal financial obligations.⁵ *Id.* at 14.

On September 23, 2010, defendant filed a notice of appeal seeking review of the denial of his motion to withdraw his guilty plea. CP 31–33. The court deemed his notice premature as the trial court had not yet

⁵ The court also sentenced defendant for the conspiracy charge under cause number 10-1-00052-8. 8/23/2010 RP 14. The sentence consisted of 12 months in custody, to be served concurrently with the manufacturing charge.

entered a written order. The court entered its order on December 28, 2010. CP 42. This appeal timely follows. CP 31–33.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEA AFTER REVIEWING THE PLEA FORM AND PLEA PROCEEDING AND DETERMINING DEFENDANT HAD ENTERED HIS PLEA VOLUNTARILY.

The reviewing court must not overturn a trial court’s order on a defense motion to withdraw guilty plea absent an abuse of discretion. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006); *see also State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). The court must be deferential to the sound discretion of the trial court regarding such a motion. *See State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). To abuse its discretion, the record must show that the trial court’s discretion was predicated upon grounds clearly untenable or manifestly unreasonable. *Id.* at 119.

“The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). The defense must demonstrate that withdrawal of the plea is necessary to correct a manifest injustice. *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). Withdrawal

of guilty plea is a demanding standard that requires an injustice that is “obvious, directly observable, overt, [and] not obscure.” *Id.*, quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Manifest injustice does not exist unless the defendant can prove (1) the plea was not ratified by the defendant, (2) the plea was not voluntary, (3) effective counsel was denied, or (4) the plea agreement was not kept. *State v. Malone*, 138 Wn. App. 587, 592 n.3, 157 P.3d 909 (2007).

“The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). The rule requires a factual basis for the plea in order to ensure the plea is entered voluntarily. *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). The factual basis may be established “from any source the trial court finds reliable,” and is not limited to the admissions of the defendant. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). Even if the defendant does not admit guilt, the court may accept a guilty plea so long as it was a “voluntary choice among the alternative courses of action open to the defendant.” *Newton*, 87 Wn.2d at 372, citing *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160 (1970).

In *Olmsted*, the court outlined some of the factors it used to determine whether the trial court appropriately denied a defendant’s

motion to withdraw guilty plea. *Id.* The court reviewed the record and found that “at the time appellant pleaded guilty to the charge he did so *voluntarily and expressed full knowledge of the nature of the offense charged and the consequences of his plea.*” *Id.* (emphasis added). The court affirmed the trial court’s decision specifically because the defendant entered his plea voluntarily and understood the charges against him. *Id.*

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), *citing Perez*, 33 Wn. App. at 261. When the trial judge personally interrogates the defendant regarding these matters, the “presumption of voluntariness is well nigh irrefutable.” *Perez*, 33 Wn. App. at 261–62, *citing Branch*, 129 Wn.2d at 642. The court should exercise caution in setting aside a guilty plea after the necessary safeguards have been satisfied. *Taylor*, 83 Wn.2d at 597.

In this case, the trial court thoroughly reviewed the record with Mr. Gugger to determine whether he entered his plea voluntarily before denying his motion. 8/23/2010 RP 6–10. It began by reviewing the transcript of the plea proceeding, including a detailed colloquy about the plea form and its contents. *Id.* The record strongly indicates why the trial

court appropriately exercised its discretion when it denied defendant's motion.

First, the plea form is compelling proof of defendant's voluntary plea. He signed a plea form to one charge of unlawful manufacture of a controlled substance, methamphetamine. CP 8-16. The plea form states that he had been informed and fully understood the manufacturing charge against him. *Id.* 8. The charge included both a school zone enhancement and a child endangerment enhancement. *Id.* The plea form indicates that defendant fully understood the consequences of his guilty plea, including a standard range sentence of 100 to 120 months, plus 24 months for each enhancement. *Id.* at 9. By signing the plea agreement, Mr. Gugger acknowledged that he signed the plea "freely and voluntarily," nobody threatened or caused him to sign it, and no person had made a promise to him that would cause him to sign it. *Id.* at 15.

Furthermore, in his own handwriting, defendant wrote, "I am entering an Alford/Newton plea to take advantage of the plea offer and not risk being convicted of more crimes." *Id.* Underneath his statement, the plea form states that the court could use the statement of probable cause for the factual basis for the plea. *Id.* Paragraph 12 of the plea form reads:

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.

Id. at 16. Mr. Gugger signed the plea form on the line immediately after Paragraph 12. *Id.* His attorney acknowledged that she had read and discussed the plea form with defendant, and that she believed defendant fully understood the terms. *Id.* Finally, Judge Lee’s signature on the plea form indicates the court found defendant’s plea of guilty to be “knowingly, intelligently and voluntarily made.” *Id.* The plea form, as examined and reviewed by the trial court, provided no reason to believe defendant had not entered his plea voluntarily.

Second, the court orally interrogated defendant about the plea’s terms during the plea proceeding. 7/30/10 RP 5–7. When asked if he had the opportunity to review the plea form and whether he understood all of the information in the document, defendant answered in the affirmative. *Id.* at 5. The court asked if defendant understood the charge of unlawful manufacturing of methamphetamine with a school bus stop and child endangerment enhancement, and he answered “yes.” *Id.* at 5–6. The court inquired whether defendant understood his sentence would range from 148 to 168 months and defendant answered “yes.” *Id.* at 6. He also stated that he had no questions regarding the consequences of his charges. *Id.*

Defendant confirmed that it was his signature and initials on the plea form.

Id. at 12.

Defendant further assured the court that he understood that the conviction would be on his record, that he would be sentenced as if he had admitted all the facts that had been charged against him, and that there was a substantial likelihood the jury would have found him guilty if he proceeded to trial. *Id.* at 13–14. Before accepting defendant’s plea of guilty, the court offered a final chance to Mr. Gugger to withdraw from the plea offer and inquired, “Do you wish to proceed with your plea this afternoon, Mr. Gugger?” *Id.* at 14. The defendant replied, “Yes.” *Id.* Finally, when asked whether his plea was entered “freely and voluntarily,” defendant answered “yes.” *Id.* at 15. The court then accepted his plea of guilty. *Id.* at 15–16.

The trial court referred to this evidence of a voluntary plea to explain why it was denying defendant’s motion to withdraw guilty plea during sentencing. 8/23/2010 RP 6–10. The court stated:

You either had to proceed with trial or you had to take the plea that was before you. And I went through a very detailed colloquy with you, sir, and I’ll address each of your concerns. You said that you felt forced to take the plea because you only had two hours and your co-defendant had pled. And I asked you specifically at page 15, lines 6 through 12 – I asked you specifically whether you were pleading guilty before me freely and voluntarily. Your answer on line 8 was “yes” on line 15. . . . And I asked you

– and this is the key question for this Court – “and after your review with your lawyer, do you believe you fully understand all the information contained within both of [plea forms]?” And your answer to me, sir, was “yes.” If the Court cannot rely on your statements, then no pleas would ever be taken, everybody would always go to trial. . . . I do not see a reason why this Court should accept your motion to withdraw the plea at this point. You made your plea to me knowingly, voluntarily and intelligently and that is the basis upon which I accepted your plea, and that is the basis upon which I’m denying the request.

Id. at 7, 9–10.

This court should deny defendant’s claim because the trial court properly denied the motion to withdraw guilty plea. Similar to the trial court in *Olmsted*, the court in Mr. Gugger’s case determined he entered a guilty plea voluntarily, competently, and with an understanding of its terms. This is manifest by the plea form, the colloquy with the defendant during the plea proceeding, and the record from the sentencing. The trial court did not abuse its discretion on untenable or unreasonable grounds in denying the motion to withdraw.

Defendant further argues the trial court erred because the State, by presenting defendant with the option to go to trial or plea-bargain, somehow cornered defendant into a “Hobson’s choice” which “rendered Mr. Gugger’s plea involuntary.” Brief of Appellant at 8. However, this argument overlooks the simple fact that defendant was always faced with the same options from the moment the State filed charges against him.

Barring either a voluntary or involuntary dismissal of the pending charges, the case could only be resolved by trial or by entry of a guilty plea.

Defendant opted for a trial. Then, mid-trial, he opted for a guilty plea.

Apparently, his codefendant's decision to plead guilty triggered defendant's change of strategy. Once informed that his codefendant would be available to testify against him, defendant had three viable options: plead guilty, proceed to trial with the current jury, or move for a mistrial and seek a new jury. Defendant opted to sign a plea form. In doing so, he forfeited his "right to a speedy trial and public trial by an impartial jury ..."

CP 9. Defendant attested to fully understanding the terms of the plea agreement. 7/30/10 RP 5. Defense counsel's statements during the plea proceeding further evidence this fact:

I spent quite some time going over these forms with my client. . . . He understands that he's giving up his right to the jury trial that we're in right now. . . . After he answered all my questions, he stated he wished to proceed with the guilty plea.

Id. at 3–4. Defendant fails to demonstrate how the State's actions impeded on his "voluntary choice" among "alternative courses of action." *See Newton*, 87 Wn.2d at 372. There is no obvious, directly observable, or overt injustice that nullifies defendant's voluntary plea. *Branch*, 129 Wn.2d at 641. Defendant had multiple courses of action. His decision to plead guilty does not make the State responsible for his buyer's remorse.

Accordingly, the trial court did not err or abuse its discretion in denying the motion to withdraw. *Marshall*, 144 Wn.2d at 280.

Defendant lastly argues the State violated his due process rights such that he entered his plea involuntarily. Brief for Appellant at 7–8. He cites *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980), to support his claim. Brief for Appellant at 7. But that authority has little, if any, relevance to the issue before this court.

In *Price*, the defense argued that the State interjected new facts into the case without allowing time for defense counsel to review them prior to trial. 94 Wn.2d at 814. In order to review the facts, the defense had to request a continuance, thus implicating defendant's right to a speedy trial. *Id.* The court agreed that *if* the State had failed to act with due diligence in disclosing material facts immediately prior to trial, then perhaps defendant's right to a speedy trial, or his right to be represented by counsel who was sufficiently prepared, might be prejudiced. *Id.* However, the court also imposed a preponderance of the evidence burden on the defense to prove defendant's due process rights had been prejudiced. *Id.*

The analogy between Mr. Gugger and *Price* fails for several reasons. First, defendant mistakenly asserts the *Price* court determined that the State compromised the defendant's due process. Brief for

Appellant at 7–8. Actually, the *Price* court found that the defendant had not satisfied his burden and denied his claim. *See Price*, 94 Wn.2d at 815.\

Next, the specific rights assessed in *Price* are not at issue here. Defendant’s trial had begun in compliance with CrR 3.3, and there is no allegation that his constitutional right to a speedy trial had been violated.

Even if the court were willing to draw on *Price* as an analogy, defendant must identify two distinct rights (e.g., the right to a speedy trial and the right to be represented by prepared counsel) and prove by a preponderance of the evidence that those rights were prejudiced by the State’s actions. Even then, the State fails to see how defendant’s voluntary acceptance of a plea bargain constitutes a violation of any right.

The record reflects that prior to entering the guilty plea, defendant’s trial counsel was contemplating moving for a mistrial after the codefendant’s change of plea. 2RP at 240. However, no formal motion was made. Instead, defendant decided to plead guilty, apparently because he thought doing so was in his best interest. CP 15. His plea colloquy reflects that it was his voluntary choice to enter a guilty plea. 7/30/10 RP 5–7. Accordingly, this court should find that the trial court properly exercised its discretion by denying defendant’s motion to withdraw guilty plea.

D. CONCLUSION.

The trial court did not abuse its discretion by accepting the defendant's plea of guilty. The presumption that defendant's plea was voluntary is well nigh irrefutable because the defendant signed a plea form and the trial court personally interrogated defendant about the circumstances regarding his plea. There was no reason for the trial court to question the validity of defendant's voluntariness. A manifest injustice did not occur because defendant cannot demonstrate how his plea was rendered involuntary. This court should defer to the trial court's discretion on this matter and affirm its denial of defendant's motion.

DATED: JULY 6, 2011

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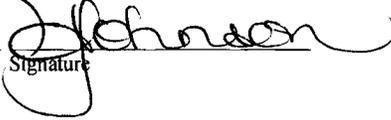
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Certificate of Service:

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.

7/7/11 
Date Signature

11 JUL -7 7:57
STATE OF WASHINGTON
BY _____
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