

NO. 42995-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ASHE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

THE HONORABLE BRIAN ALTMAN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Should the trial court have granted the appellant's motion to withdraw his plea of guilty to Assault in the Second Degree, when the court sentenced him in accordance with the agreed plea recommendation to 90 days work crew but converted the sentence to 90 days jail due to the appellant's medical inability to complete work crew?

B. STATEMENT OF THE CASE

On December 13, 2010, the appellant was charged by information with three counts of Assault in the Second Degree. CP 1-2.

Pursuant to a plea resolution, the information was amended on July 14, 2011 to contain only one count of Assault in the Second Degree. RP 3-4, CP 3-4. The appellant entered a plea of guilty to Assault in the Second Degree, as charged in the amended information. RP 4-6, CP 5-14. The Court accepted the appellant's guilty plea and found the appellant guilty of Assault in the Second Degree. RP 9, CP 14.

The State recommended that the Court impose 90 days converted to 89 days work crew, with credit for one day already

served, CP 8, RP 10. The appellant's trial attorney agreed with the recommendation, RP 12, and stated on the record that

[h]e [i.e., Mr. Ashe] indicated to me [i.e., the trial attorney] that he felt he'd be able to do the work crew. There was no problem with that. He's been a hard working man whose had a business here and he continues to work hard and will take the time to make sure he gives back to this community through the work crew time that he's – if Your Honor's allowed him to do that here today.

RP 15-16.

The Court concurred with the agreed recommendation and imposed three months with 89 days to be served on work crew and one day credit for time served, CP 15, RP 20. In imposing the three-month sentence, the Court indicated that the appellant was allowed to serve it in "partial confinement" (i.e., work crew), "*if eligible and approved*," CP 15 (emphasis added).

The appellant's attorney indicated that it was the appellant's "desire . . . to get it [i.e., the work crew] all done . . . this winter," RP 23, and the appellant himself stated he would "get it done in September [2011]," RP 24.

On October 26, 2011, the appellant's trial attorney filed a motion to withdraw the appellant's guilty plea, RP 28-33. He stated that "[o]ne of the most important issues to the [appellant] . . . was

the desire to avoid any further jail sentence,” CP 29. He noted that the appellant “reported for a day of work crew, but due to medical issues was removed from performing further work crew duties,” id. He argued that the parties were mutually mistaken as to the appellant’s ability to serve his sentence on work crew and that the appellant detrimentally relied upon this mistake, CP 30-33.

On December 15, 2011, oral argument was heard on the appellant’s motion, RP 25-32. The State noted that the appellant “tried to do the work crew and was found ineligible for medical reasons,” RP 25, but did not argue for or against the motion, RP 26. The appellant’s (new) trial attorney reiterated the points and arguments made in the written motion, RP 26-27, and responded to the Court’s questions, RP 27-29. Upon further questioning by the Court, the State responded that there was no dispositive case law on point and that the mutual mistake doctrine may or may not apply, RP 29-31.

The Court denied the appellant’s motion, RP 32, CP 35-36, noting that it “assume[d] he [i.e., the appellant] knows about his own health issues,” RP 33. The Court further denied the appellant’s motion to reconsider, RP 34, and ordered him to report to the Skamania County Jail by January 15, 2012 at 12:00 PM to

serve out his sentence there, CP 34, RP 34. This appeal follows, CP 37-39.¹

C. ARGUMENT

THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY TO ONE COUNT OF ASSAULT IN THE SECOND DEGREE, BECAUSE THE COURT'S CONVERSION OF ITS SENTENCE TO JAIL DUE TO THE APPELLANT'S MEDICAL INABILITY TO PERFORM WORK CREW AS PER THE JOINT PLEA RECOMMENDATION WAS MERELY A COLLATERAL CONSEQUENCE OF HIS GUILTY PLEA AND WAS A MATTER ABOUT WHICH THE APPELLANT WOULD HAVE HAD THE BEST KNOWLEDGE, WITH NO REASONABLE EXPECTATION THE PROSECUTOR SHOULD HAVE BEEN AWARE.

As the appellant correctly states, Appellant's Opening Brief at 4, withdrawals of pleas are governed by CrR 4.2(f), under which

[t]he 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.²

A "manifest injustice" is one that is "obvious, directly observable, overt, not obscure." State v. Saas, 118 Wn.2d 37, 42, 820 P.2d

¹ It should be noted that the appellant never actually reported to the jail to serve his sentence since on January 12, 2012, the Court granted his motion for an appeal bond, RP 47-48, and declined to remand him into jail, RP 47. His attorney noted that the bondsman was present "and prepared to file a bond," RP 46.

² As the appellant also correctly indicates, Appellant's Opening Brief at 4, since his motion was made post-judgment, it is actually governed under CrR 7.8. See CrR 4.2(f). Under CrR 7.8, the court may relieve a party from final judgment for "[m]istakes," CrR 7.8(b)(1), or for "[a]ny other reason justifying relief from the operation of the judgment," CrR 7.8(b)(5). However, this should not affect the substantive law at issue.

505 (1991), citing State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974); Also see State v. Hystad, 36 Wn.App. 42, 45, 671 P.2d 793 (1983).

The appellant bears the burden of demonstrating manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Because the criminal rules are so carefully designed to insure that the defendant's rights have been protected before a guilty plea is accepted, CrR 4.2(f) creates a "demanding standard" which the defendant must meet if he wishes to withdraw his or her guilty plea. Saas, 118 Wn.2d at 42 (citing Taylor, 83 Wn.2d at 596). As stated in Taylor:

The comprehensive protective requirements of CrR 4.2(d), (e) and (g) present a striking contrast to the less strict procedures formerly associated with RCW 10.40.175 and its connected cases. Greater safeguards have been thrown around a defendant at the critical time of accepting his plea of guilty. Every effort has been made to ascertain that the plea of guilty is made voluntarily, with understanding and with reasonable knowledge of the important consequences. That being the case, trial courts should exercise greater caution in setting aside a guilty plea once the required safeguards have been employed.

83 Wn.2d at 597. As is clear from Taylor, a motion to withdraw a guilty plea implies that the judge taking the plea has not done his job in taking a plea that is constitutionally valid. A defendant must

meet a stringent standard to demonstrate that a guilty plea is invalid.

Before a trial court can allow a defendant to withdraw his or her guilty plea, the defendant must prove one of the following: (1) that he was denied effective assistance of counsel; (2) that the defendant did not ratify the plea; (3) that the plea was involuntary; or (4) that the plea agreement was not honored by the prosecution. State v. Watson, 63 Wn. App. 854, 857, 822 P.2d 327 (1992); State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984). The defendant has the burden of establishing a manifest injustice "in light of all the surrounding facts" of his or her case. Dixon, 38 Wn. App. at 76.

Here, in alleging a mutual mistake, the appellant is essentially claiming that his guilty plea was made involuntarily. Under CrR 4.2(d),

[t]he 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.

A voluntary plea requires that the defendant be informed of all direct consequences of his plea prior to acceptance of that agreement. CrR 4.2; State v. Barton, 93 Wn.2d 301, 305, 609 P.2d

1353 (1980). However, a trial court is not required to inform a defendant of all possible collateral consequences of his or her guilty plea. Id. The distinction between direct and collateral consequences of a plea "turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment." Id., quoting Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

In State v. Miller, 110 Wn.2d 528, 529, 756 P.2d 122 (1988), overruled on other grounds, State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011), the defendant pled guilty under the mistaken assumption that it was possible he could get a sentence under 20 years for Murder in the First Degree. In fact, that crime carries a mandatory minimum of 20 years. Id. This was a mistake made mutually by the prosecutor and the defense attorney. Id. The trial court denied the defendant's motion to withdraw his guilty plea. Id. at 529-530.

On appeal, the Court of Appeals reversed, allowing the defendant to withdraw his guilty plea, Id. at 530. The State Supreme Court granted the State's petition for review.

On review, the State Supreme Court upheld the Court of Appeals, allowing the defendant to withdraw his guilty plea. Id. at 535. In doing so, however, the Supreme Court held that

where the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea.

Id. at 536. “[T]he defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy.” Id. at 535. If the defendant chooses specific performance in this situation, it must be enforced, even if contrary to statute. Id. at 532-533.

Twenty-three years later, the State Supreme Court overruled the latter “aspect of Miller,” holding “that specific performance is not an available remedy in cases of mutual mistake,” Barber, 170 Wn.2d at 873. “Where the parties have agreed to a sentence that is contrary to law, the defendant may elect to withdraw his plea.” Id.

Here, the appellant analogizes his medical inability to perform work crew, as jointly recommended by the State and his trial attorney (and initially imposed by the trial court), with the Miller and Barber line of case treating plea agreements predicated upon

legal mistakes or impossibilities. Appellant's Opening Brief at 5-8. As explained by the prosecutor to the trial court, this analogy fails since "work crew is sort of always premised on – on an eligibility." RP 30.³

The agreed plea recommendation was not unlawful, just impossible for reasons personal to the appellant himself. Therefore, the consequence of his (ultimately) not getting that sentence is collateral, not direct under Barton, since it was not "a definite, immediate, and largely automatic effect on the range of the defendant's punishment," 93 Wn.2d at 305, quoting Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). As a collateral consequence, it is not a basis for the appellant to withdraw his guilty plea.

Furthermore, the fault for the mistake in the appellant's case was lopsided, not mutual, since the appellant and his attorney would have had better access to his own medical condition and physical abilities than would the State. In fact, the trial court

³ It should be stated at this point that the appellant incorrectly avers that "[t]he prosecutor reiterated that he felt the mutual mistake doctrine did apply," Appellant's Opening Brief at 3. In fact, the prosecutor only stated that he thought "there was an argument to be made . . . that it could fall into the mutual mistake doctrine," RP 30. "[O]ne could make an analogy but I don't think it's necessarily dispositive," Id., he went on. After explaining the similarities and distinctions, he concluded, "So I think one could see it both ways." RP 31.

indicated as such in denying the appellant's motion: "I assume he knows about his own health issues." RP 33. At the time of his sentence, his attorney specifically stated that "[h]e [i.e., Mr. Ashe] indicated to me [i.e., the trial attorney] that he felt he'd be able to do the work crew. There was no problem with that." RP 15.

With that representation from the appellant, the State cannot be faulted for its mistaken assumption that he could perform work crew. In contrast, the cases cited by the appellant, Appellant's Opening Brief at 5-8, all involve mutual errors about which both sides should reasonably have been aware.

In State v. Moore, 75 Wn. App. 166, 167-168, 876 P.2d 959 (1994), both parties initially understood that a prior deferred sentence would not count as criminal history. At sentencing, however, the State (correctly) argued that the prior deferred sentence *did* count, and the trial court agreed. Id. at 168-169. The trial court denied the defendant's motion to withdraw his guilty plea. Id. at 169. The Court of Appeals agreed that the prior counted, Id. at 171, but reversed the trial court's denial of the defendant's motion to withdraw his guilty plea, Id. at 173-174. Both lawyers made *legal* mistakes of which they both should have been aware.

Similarly, in State v. Walsh, 143 Wn.2d 1, 4, 17 P.3d 591 (2001), both parties mistakenly believed a prior conviction “scored” one point instead of the actual two points, affecting the defendant’s standard sentencing range. The Court of Appeals allowed the defendant to withdraw his guilty plea, Id. at 10. Again, both lawyers made *legal* mistakes of which they both should have been aware.

In State v. Bisson, 156 Wn.2d 507, 521, 130 P.3d 820 (2006), it was largely errors made by the *State* that the defendant was led to believe certain sentencing enhancements would run concurrently rather than consecutively as required. The State Supreme Court allowed the defendant to withdraw his plea, Id. at 525.

In State v. Wilson, 102 Wn. App. 161, 162-163, 6 P.3d 637 (2000), both parties were mistaken as to the nature of one of the defendant’s prior convictions. The correction made him ineligible for work ethic camp. Id. at 163. The Court of Appeals faulted the defendant for having “failed in his statutory and contractual duty to assist” in “compiling his criminal history,” Id. at 170. However, the Court also found that the “defense counsel and the prosecutor . . . erred,” Id. The Court “reverse[d] and remand[ed] to provide Wilson an opportunity to withdraw his plea,” Id. at 163.

Finally, in State v. Skiggn, 58 Wn. App. 831, 838, 795 P.2d 169 (1990), the Court found “that the defense attorney was primarily responsible for the errors set forth in the plea form,” which greatly understated the standard sentencing range.

From this record, it appears to us that the defense attorney, with the correct information available, inadvertently made significant errors with respect to the standard ranges and the prosecutor's recommendation in completing the plea form signed by Skiggn.

Id. However, the Court also found that “[t]he State is partially responsible for not reviewing the plea form carefully enough to detect the errors,” Id. The defendant was allowed to withdraw his plea. Id. at 839.

While these cases implicate varying degrees of State versus defense culpability in the errors made, in all of them, the prosecutor reasonably should have been aware of those errors, either in the exercise of due diligence, or based on the State's access to criminal records, or simply because the prosecutor as a legal professional is expected to have some expertise in the criminal law.

In the appellant's case, however, the mistake was predicated upon a misunderstanding of his personal medical condition about which the appellant himself would have the best knowledge and

about which there is no reasonable expectation the prosecutor should have been aware.

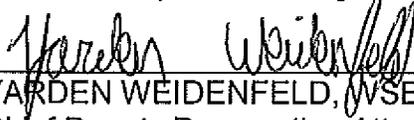
D. CONCLUSION

For the above reasons, the trial court properly denied the appellant's motion to withdraw his plea. This Court should affirm the judgment of the trial court and remand for the appellant to serve out his sentence.

DATED this 29th day of June, 2012.

RESPECTFULLY submitted,

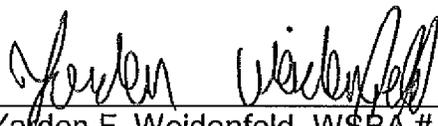
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