

**NO. 46873-5-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

MARQUEZE SAVON BROUSSARD APPLETON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson, Judge

No. 13-1-04996-3

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**OPENING BRIEF OF RESPONDENT**

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

1. Did the trial court properly exercise its discretion by denying the defendant's motion to withdraw his guilty plea when he submitted a signed plea statement stating he was pleading guilty voluntarily and affirmed this statement in a colloquy at his plea hearing?
2. Has the defendant waived any challenge to the factual basis for his guilty plea to second degree assault when he raises this nonconstitutional issue for the first time on appeal?

B. STATEMENT OF THE CASE

The State originally charged Markeze Appleton by information with one count of first degree assault (RCW 9A.36.011(1)(a)) on December 30, 2013, under cause number 13-1-04996-3. (CP 1-2). Pursuant to a plea agreement, Mr. Appleton ultimately pleaded guilty on July 16, 2014, to an amended complaint charging him with one count of assault in the first degree (RCW 9A.36.011(1)(a)), and one count of assault in the second degree (RCW 9A.36.021(1)(a)), stemming from a previous incident with the same victim. (CP 39-40; CP 47-56).

Defense counsel initiated the negotiations that eventually led to the plea agreement between Mr. Appleton and the State. (10/24/14 RP 7). In exchange for Mr. Appleton's guilty plea, the State agreed not to pursue an additional second degree assault charge resulting from the shooting of

December 17, 2013, and the firearm enhancement on the first degree assault charge in the amended information. (7/16/14 RP 7).

Mr. Appleton and his attorney provided a completed and signed statement on plea of guilty to both charges in the form required under CrR 4.2(g). (CP 47-56). Prior to accepting the plea, the court held a colloquy with Mr. Appleton where it informed him of the consequences of pleading guilty to the charges against him. (7/16/14 RP 7-11). Mr. Appleton was informed that pleading guilty waived his right to a jury trial, his right to confront witnesses against him, and the presumption of innocence. (7/16/14 RP 7). The court also confirmed that defense counsel had explained the elements of the charged offenses to Mr. Appleton and that he understood them. (7/16/14 RP 8). The court then outlined the possible sentences that could be imposed for the charged offenses, including supervision by the Department of Corrections upon release from incarceration. (7/16/14 RP 8-9).

The court accepted the plea as being made knowingly, intelligently, and voluntarily. (7/16/14 RP 13). At the sentencing hearing on October 24, 2014, Mr. Appleton moved to withdraw his guilty plea and requested an evidentiary hearing in support of that motion. (10/24/14 RP 2). The court denied the motion to withdraw the guilty plea and Mr. Appleton was sentenced to 184 months imprisonment after a joint

recommendation from the prosecutor and defense counsel. (10/24/14 RP 9; 10/24/14 RP 13).

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHEN IT ASSERTED CLAIMS CONTRARY TO REPRESENTATIONS MADE BY THE DEFENDANT IN HIS SIGNED PLEA STATEMENT AND ORALLY AT HIS PLEA HEARING.

A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). "A defendant does not have a constitutional right to withdraw a plea of guilty and to enter a plea of not guilty." *State v. Olmstead*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). CrR 4.2(f) only authorizes a court to allow the withdrawal of a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." *State v. Saas*, 118 Wn.2d 37, 39, 820 P.2d 505 (1991); CrR 4.2(f). A "manifest injustice" is one that is "obvious, directly observable, overt, not obscure." *Id.* at 42 (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). This rule imposes a demanding standard on a defendant who seeks to withdraw a guilty plea. *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 *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Perez*, 33 Wn. App. at 262.

Mr. Appleton’s motion to withdraw his guilty plea is grounded on a claim that his plea was not voluntary as is required under CrR 4.2(d). (CP 73-75). Mr. Appleton claims that his original attorney rushed him through the process of coming to a plea agreement with the prosecutor and that he did not have adequate time to consider the proposed agreement between his attorney and the State. (CP 75). Mr. Appleton’s actions prior to his motion to withdraw, however, indicate his plea was voluntary.

The court considered Mr. Appleton’s motion but ultimately denied it. (10/24/14 RP 9). The court stated that it had followed the case for months and believed the plea to be voluntary. (10/24/14 RP 9). Additionally, the court pointed out that Mr. Appleton’s attorney and the State submitted a joint recommendation for his sentence following a plea agreement as an indication that the plea was voluntary. (10/24/14 RP 9). The record indicates that defense counsel initiated the negotiations leading to this plea agreement. (10/24/14 RP 7).

Mr. Appleton’s written plea statement does not indicate that his guilty plea was involuntary. Instead, it reveals multiple instances where Mr. Appleton could have disputed that he was pleading guilty voluntarily

yet failed to do so. Paragraph 8 of Mr. Appleton's written plea statement states that "I make this plea freely and voluntarily." (CP 55). Mr. Appleton marked this paragraph with his initials to indicate his acquiescence to this statement. (CP 55). Paragraph 9 reads "No one has threatened harm of any kind to me or to any other person to cause me to make this plea." (CP 55). Mr. Appleton also marked this paragraph with his initials. (CP 55).

Mr. Appleton's acquiescence to paragraphs 8 and 9 of his written plea statement was confirmed at his plea hearing in a colloquy with the trial judge. (7/16/14 RP 8). After being informed of the nature of the charges against him and the consequences of pleading guilty, Mr. Appleton decided to plead guilty on his own accord:

THE COURT: Whose decision is it to plead guilty today, Mr. Appleton?

THE DEFENDANT: This is my decision to plead guilty, Your Honor.

(7/16/14 RP 8). During the colloquy, the trial judge also confirmed that Mr. Appleton's guilty plea was not the result of a threat against him or any other person:

THE COURT: Anybody threaten you or force you to plead guilty against your will?

THE DEFENDANT: No, Your Honor.

(7/16/14 RP 8). These oral statements made during the course of the colloquy with the trial judge confirm that the decision to plead guilty was made by Mr. Appleton himself and that he did not decide to plead guilty under any sort of duress or threat.

In *Perez*, this court held that “[w]hen the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” *Perez*, 33 Wn. App. at 262. In this case, Mr. Appleton first asserted that his plea was voluntary on his written plea statement. He subsequently affirmed this assertion in a colloquy with the trial judge. Therefore, the presumption that Mr. Appleton made his plea voluntarily is “nigh irrefutable.”

A trial court abuses its discretion if its decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). The trial court properly exercised its discretion in denying Mr. Appleton’s motion to withdraw his guilty plea. The decision to deny Mr. Appleton’s motion was neither manifestly unreasonable nor based on untenable grounds. The trial court based its decision on multiple statements from Mr. Appleton where he insisted that he was pleading guilty voluntarily. The trial court monitored this case for

months and held a firm belief that Mr. Appleton's plea was knowing, voluntary, and intelligent. (10/24/14 RP 9). Denying the motion to withdraw Mr. Appleton's guilty plea was a proper exercise of the trial judge's discretion.

2. THE ISSUE OF WHETHER A FACTUAL BASIS FOR MR. APPLETON'S GUILTY PLEA TO SECOND DEGREE ASSAULT EXISTS IS NOT PROPERLY BEFORE THIS COURT AS IT WAS NOT PRESERVED FOR APPEAL IN THE TRIAL COURT.

On appeal, Mr. Appleton claims that the trial court erred in accepting his plea of guilty to second degree assault due to a lack of a factual basis for that charge. App. Br. at 2. "[T]he establishment of a factual basis is not an independent constitutional requirement and is constitutionally significant only in so far as it relates to the defendant's understanding of his or her plea." *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987). The requirement is intended simply to enable the trial court to verify the accused's understanding of the charges. *In re Hilyard*, 39 Wn. App. 723, 726-7, 695 P.2d 596 (1985). The court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

In his motion to withdraw his guilty plea, Mr. Appleton did not claim lack of a factual basis to either charge he pleaded guilty to. (CP 73-75). The motion contains a declaration from Mr. Appleton where he alleges being rushed into the plea agreement, but does not assert noncompliance with CrR 4.2(d)<sup>1</sup> as a basis for relief. (CP 73-75). Similarly, the transcript of Mr. Appleton's plea hearing does not reveal any objection to the lack of a factual basis to either charge during that proceeding. (7/16/14 RP 2-13). The first time Mr. Appleton alleged an improper acceptance of his guilty plea due to the lack of a factual basis is on appeal. A claim of error may only be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The factual basis requirement is found in CrR 4.2(d) and is not an independent constitutional requirement. Therefore, it may not be the basis for an appeal if it was not preserved at the trial level.

As the issue of whether a factual basis existed for a guilty plea to the second degree assault charge was not preserved at the trial level and is not an independent constitutional requirement, it is not properly before the court on appeal. RAP 2.5(a); *Hews*, 108 Wn.2d at 591-2; *State v.*

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<sup>1</sup> "Voluntariness. 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." CrR 4.2(d).

*Zumwalt*, 79 Wn. App. 124, 129, 901 P.2d 319 (Wa. Ct. App. 1995)

*disapproved of on other grounds in State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006).

D. CONCLUSION

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: June 5, 2015.

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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.

6.5.15   
Date Signature

# PIERCE COUNTY PROSECUTOR

**June 05, 2015 - 4:35 PM**

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