

FILED
NOVEMBER 18, 2014
Court of Appeals
Division III
State of Washington

NO. 32533-4-III (Consolidated with 32538-5-III)

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JUSTIN EDWARD MUELLER,

Defendant/Appellant.

APPELLANT'S BRIEF

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RULES AND REGULATIONS

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ASSIGNMENTS OF ERROR

1. The trial court's conclusions of law entered in connection with Justin Edward Mueller's motion to withdraw his guilty pleas are not supported by the record. (CP 48; Appendix "A")

2. The trial court abused its discretion when it denied Mr. Mueller's request for a prison DOSA.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is a defendant's guilty plea knowing, voluntary and intelligent where the trial court fails to engage in an appropriate colloquy at the time of entry of plea?

2. Did the trial court give appropriate consideration to Mr. Mueller's request for a prison DOSA, and, if not, was it an abuse of discretion?

STATEMENT OF CASE

On January 13, 2014 an Information was filed against Mr. Mueller under Cause Number 14-1-00043-3. He was charged with residential burglary. (CP 1)

Another Information was filed against Mr. Mueller under Cause Number 14-1-00150-2 on February 4, 2014. It charged him with second degree identity theft. (CP 51)

Mr. Mueller signed a waiver of time for trial on February 26, 2014. (CP 7)

An Amended Information was filed under Cause Number 14-1-00150-2 on March 12, 2014. Second degree identity theft was dismissed in exchange for a guilty plea to possession of stolen property second degree. (CP 58)

Mr. Mueller entered his guilty pleas on March 12, 2014. (CP 8; CP 60)

A motion to withdraw the guilty pleas was entered in both cases on April 9, 2014. (CP 19; CP 71)

Mr. Mueller filed a declaration in each of the cases on May 14, 2014. He asserted ineffective assistance of counsel based upon a lack of

sufficient information (*i.e.*, not being informed of the victim impact statement). (CP 20; CP 32)

Mr. Mueller's motions to withdraw his guilty pleas were denied. Findings of Fact and Conclusions of Law were entered on June 11, 2014. (CP 48; CP 114)

A Judgment and Sentence on each case was entered on June 4, 2014. Mr. Mueller was sentenced to sixty-three (63) months under Cause Number 14-1-00043-3. He was given a concurrent sentence of twenty-two months under Cause Number 14-1-00150-2. (CP 35; CP 84)

Mr. Mueller filed his Notices of Appeal the same date. (CP 46; CP 95)

Following his sentencing Mr. Mueller filed a *pro se* motion to arrest judgment along with a motion to correct the Judgment and Sentence. (CP 97; CP 99)

SUMMARY OF ARGUMENT

The colloquy conducted by the trial court was insufficient to establish that Mr. Mueller's guilty pleas were knowing, intelligent and voluntary.

The trial court abused its discretion by not giving due consideration to a prison-based DOSA.

ARGUMENT

I. INVOLUNTARY PLEA

CrR 4.2(f) provides, in part:

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. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered.

....

The trial court obviously determined that the plea agreement was within the interests of justice. There was no discussion with the prosecuting attorney concerning the prosecuting standards.

Mr. Mueller based his motion to withdraw his guilty pleas on ineffective assistance of counsel. The trial court ruled that Mr. Mueller's plea was "knowingly, intelligently, and voluntarily" made. It also ruled that Mr. Mueller did not establish a manifest injustice.

The trial court's Conclusions of Law do not even address the question of ineffective assistance of counsel. Even so, Mr. Mueller contends that the trial court's Conclusions of Law are erroneous.

"Alleged involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal." *State v. Knotek*, 136 Wn. App. 412, 422-23, 149 P.3d 676 (2006).

Mr. Mueller is basing his position on the trial court's failure to conduct an appropriate colloquy at the time the guilty pleas were entered. His *pro se* motions deal with this issue.

"The State bears the burden of proving the validity of the guilty plea," ... which the State may prove from the record or by clear and convincing extrinsic evidence. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). A defendant ... bears the burden of proving "manifest injustice," defined as "an injustice that is obvious, directly observable, overt, not obscure." *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

State v. Knotek, supra, 423.

The trial court's lack of a sufficient colloquy is directly observable. It is not obscure. The failure to make the appropriate inquiry amounts to an injustice that is both obvious and overt.

As announced in *State v. Elmore*, 139 Wn.2d 250, 268-69, 985

P.2d 289 (1999):

Boykin [*Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969)] identified reversible error in a trial court's *acceptance* of a guilty plea without having created a record that affirmatively showed the plea to be knowing and voluntary. [Citations omitted.] Such record must show that in pleading guilty, the defendant understood he was giving up three important constitutional rights. The right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243; *Parke v. Raley*, 506 U.S. 20, 29, 113 S. Ct. 517, 523, 121 L. Ed.2d 391 (1992).

The trial court never discussed Mr. Mueller's constitutional rights with him. The trial court's colloquy consisted of the following:

THE COURT: ... on 043-3, do you understand by signing this statement you are voluntarily pleading guilty to the charge of residential burglary.

MR. MUELLER: Yes.

THE COURT: You understand that carries a standard range of 63 to 84 months with a maximum term and fine of 10 years and \$20,000?

MR. MUELLER: Yes.

THE COURT: And your statement is "On the date charged, in Benton County, Washington, I entered a residence at 90 Casey in Richland. I did not have permission to be in the residence and I intended to commit a theft from the residence." Is that correct?

MR. MUELLER: Yes, Your Honor.

THE COURT: I will accept the plea and I will sign the order for a PSI?

(McLaughlin RP 6, l. 20 to RP 7, l. 11)

THE COURT: ... with regard to 150-2, do you understand you are voluntarily pleading guilty to the charge of possession of stolen property 2nd degree?

MR. MUELLER: Yes.

THE COURT: And you understand that carries a standard range of 22 to 29 months and a maximum term and fine [*sic*] of 5 years and \$10,000?

MR. MUELLER: Yes, Your Honor.

THE COURT: And your statement is, "On the date charged, in Benton County, Washington, I possessed an access device, credit card, knowing it to be stolen." Is that correct?

MR. MUELLER: Yes, Your Honor.

(McLaughlin RP 7, l. 13 to RP 8, l. 1)

An appropriate colloquy for a trial court to engage in is set forth in *State v. Weaver*, 46 Wn. App. 35, 38-40, *fn.* 4, 729 P.2d 64 (1986). The colloquy in Mr. Mueller's cases does not even come close to an appropriate colloquy. (Appendix "B")

When comparing the two (2) colloquies it is apparent that Mr. Mueller's pleas were not fully comprehensive, understanding, or voluntary.

Moreover, the trial court never advised Mr. Mueller that it did not have to follow the recommendations of either the prosecuting attorney or defense counsel. It is significant that the trial court tried to remedy this oversight at the end of the hearing on the motion to withdraw guilty pleas. The trial court made the following inquiry of Mr. Mueller:

THE COURT: I've got a question. Mr. Mueller, did you read these defendant --

Statement of Defendant on Plea of Guilty
before you entered them?

MR. MUELLER: I'm sorry.

THE COURT: Did you read these statements
before you entered them?

MR. MUELLER: My statements?

Q: Yes, the Statement of Defendant on
Plea of Guilty? It indicates in there if you
read them. I'm asking if you read them?

MR. MUELLER: Yes, when she came
upstairs.

THE COURT: On page four of nine it indi-
cates under paragraph (h), "The judge does
not have to follow anyone's recommenda-
tion as to sentence." You understand that?

MR. MUELLER: Yes, I do.

THE COURT: And do you remember me
asking you if you've read over this state-
ment and understand it?

MR. MUELLER: Yes.

THE COURT: And you said, yes?

MR. MUELLER: Yes.

THE COURT: And I asked you if you understood by signing these statements you are voluntarily pleading guilty to the charge, correct?

MR. MUELLER: Correct.

THE COURT: And I asked you that and you said, yes?

MR. MUELLER: Correct.

THE COURT: Okay. And then I read your statement in each of these pleas and ask [*sic*] if that was indeed your statement and you said, yes: is that correct?

MR. MUELLER: Yes.

THE COURT: Nothing further.

(McLaughlin RP 27, l. 1 to RP 28, l. 8)

II. DOSA

Mr. Mueller requested a DOSA sentence. The State opposed a DOSA sentence. The PSI ordered by the Court indicated that Mr. Mueller was a marginal candidate for DOSA. (CP 31)

The only indication that the trial court gave with regard to DOSA occurred at the March 12, 2014 hearing on the motion to withdraw guilty pleas. The Court stated:

If I let him withdraw this plea I'm basically saying any time after plea that some victim statement comes in that is anti-defendant you would have to let them withdraw the plea. I will not let him withdraw his plea and I can honestly say that **the fact the victim doesn't want me to do prison based DOSA, will have very little impact. Almost never.** I certainly listen TO the victim and I understand their concerns but that will not have much impact on my decision.

(McLaughlin RP 31, ll. 11-19) (Emphasis supplied.)

The trial court never mentioned DOSA at the sentencing hearing.

Mr. Mueller contends that that fact, in and of itself, shows an abuse of discretion by the trial court.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion

manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court provided no reasoning for not granting a prison based DOSA. The record is devoid of any means of determining why the trial court did not grant the prison based DOSA, other than the fact that the State opposed it.

“[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence ... is effectively a failure to exercise discretion and is subject to reversal.”

State v. Jones, 171 Wn. App. 52, 55, 286 P.3d 83 (2012) quoting *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

CONCLUSION

Mr. Mueller’s guilty pleas were not knowing, intelligent or voluntary. The trial court’s limited inquiry at the guilty plea hearing fails to meet the constitutional standards discussed in *Elmore* and *Boykin*.

The trial court abused its discretion at the sentencing hearing when it failed to consider Mr. Mueller’s request for a prison-based DOSA.

Mr. Mueller should be allowed to withdraw his guilty pleas. Alternatively, the case should be remanded for argument on a prison-based

DOSA before another judge. *See: State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

DATED this 20th day of October, 2014.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX "A"

9. At the hearing, Ms. Cornish testified that she met with the defendant a number of times in the jail and in court, and discussed his cases fully with him. Ms. Cornish also conducted witness interviews on each case.
10. When the defendant testified, he did not dispute Ms. Cornish's testimony, but instead focused his complaint on the fact that he did not receive the victim impact statement until after he entered his guilty plea. He told the court that had he known that the victim would object to a DOSA sentence and write a negative letter, he would not have pleaded guilty. The defendant told the court that if he had received the victim impact statement prior to entering his guilty plea, he would not have pleaded guilty. He acknowledged, however, that he knew that the State was going to object to his receiving a DOSA sentence.

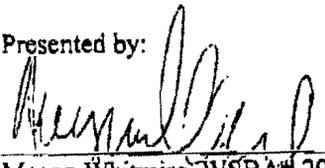
CONCLUSIONS OF LAW

1. The defendant's plea of guilty to the information was made knowingly, intelligently, and voluntarily.
2. The defendant did not establish that a manifest injustice occurred.
3. The Defendant's motion to withdraw his guilty plea is denied.

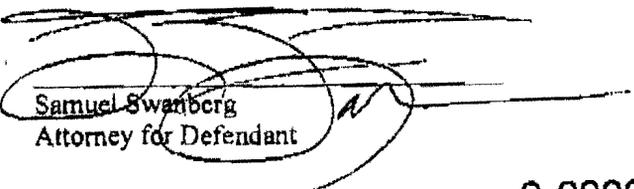
DONE IN OPEN COURT this 11 day of June, 2014.


Hon. Vic VanderSchoor, Superior Court Judge

Presented by:


Megan Whitmire, WSBA# 29933
Deputy Prosecuting Attorney

Approved as to form:


Samuel Swanberg
Attorney for Defendant

0-000000050

APPENDIX "B"

«4» "THE COURT: Your name is Dennis Weaver?

"THE DEFENDANT: Yes, sir.

"THE COURT: You've discussed this charge of vehicular assault with your attorney, Mr. Raber?

"THE DEFENDANT: Yes sir.

"THE COURT: You understand that vehicular assault is a Class C felony punishable by not more than five years?

"THE DEFENDANT: Yes, sir.

"THE COURT: What's the standard range, Mr. Hackett?

"MR. RABER: Three to nine months, Your Honor.

"MR. HACKETT: Three to nine months. The defendant has been advised that the State, if a plea of guilty is accepted, will be seeking an aggravated sentence of 18 months in the Department of Corrections.

"THE COURT: You understand the standard range to be three to nine months?

"THE DEFENDANT: Yes, sir.

"THE COURT: And that the State is going to ask for an exceptional sentence?

"THE DEFENDANT: Yes. I have one question on that though. B[y] signing a guilty plea, does that mean I'm automatically going to be sentenced to 18 months?

"THE COURT: No. It means that the State is going to ask the Court to go outside the standard range. The sentence will be determined by the judge.

"THE DEFENDANT: I see.

"THE COURT: Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand that you have the right to submit the issues in this case to a jury?

"THE DEFENDANT: Yes, sir.

"THE COURT: That you're presumed to be innocent; you're innocent until the State has proven every element of this crime beyond a reasonable doubt?

"THE DEFENDANT: Yes, sir.

"THE COURT: If the jury should find you guilty, you would have the right to an appeal.

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: To the charge of vehicular assault, how do you plead; guilty or not guilty?

"THE DEFENDANT: Guilty.

"THE COURT: Has anyone told you that you had to plead guilty?

"THE DEFENDANT: No, sir.

"THE COURT: Anyone threatened or promised you?

"THE DEFENDANT: No, sir.

"THE COURT: The only reason you're pleading guilty is because you are guilty?

"THE DEFENDANT: Yes, sir.

". . .

"THE COURT: Do you have in front of you a Statement of Defendant on Plea of Guilty?

"THE DEFENDANT: Yes, sir.

"THE COURT: Have you read that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Have you read everything on that page?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand everything you read?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you have any questions about anything?

"THE DEFENDANT: The only thing here is the recommendation would not exceed 18 months. I wondered if I was locked in, which I asked earlier.

"THE COURT: You discussed that with Mr. Raber?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand that's up to the Court?

"THE DEFENDANT: Right.

"THE COURT: The Court is not bound by it.

"THE DEFENDANT: Yes.

"THE COURT: But that the State is going to ask for something outside the standard range.

"THE DEFENDANT: Yes.

"THE COURT: Do you have any other questions?

"THE DEFENDANT: No, sir."

NO. 32533-4-III (Consolidated with 32538-5-III)

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) BENTON COUNTY
 Plaintiff,) NO. 14 1 00043 3
 Respondent,) (Consolidated with 14 1 00150 2)
)
 v.) **CERTIFICATE OF SERVICE**
)
 JUSTIN EDWARD MUELLER,)
)
 Defendant,)
 Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 20th day of October, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

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CERTIFICATE OF SERVICE