

NO. 32666-7-III

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Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON, RESPONDENT

v.

PAUL CHARLES HOLLAND, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John M. Antosz

No. 13-1-00809-5

Brief of Respondent

GARTH DANO
Prosecuting Attorney

By
KATHARINE W. MATHEWS
Deputy Prosecuting Attorney
WSBA # 20805

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.

1. Did the trial court properly exercise its discretion by denying Mr. Holland's motion to withdraw his guilty plea when the record shows the plea was made intelligently and voluntarily, precluding a finding of manifest injustice?

B. STATEMENT OF THE CASE.

The state accepts and adopts the procedural and substantive facts recited in the Brief of Appellant and supplements these facts as follows.

During the discussion between court and counsel over how best to respond to the jury's notice that it was deadlocked, Mr. Holland's attorney interrupted to request that Mr. Holland be allowed to go to the men's room, stating: "He's not feeling well. He's feeling ill." RP 260. Before the court could respond, Mr. Holland said: "I'm okay." *Id.* He then said: "I just don't want to get sick." RP 260-61. His attorney asked that Mr. Holland be allowed to excuse himself should he need to. RP 261. The court responded: "Certainly" and Mr. Holland said "Thank you, sir." *Id.*

Before a decision was reached concerning the appropriate deadlocked jury response, the jury sent a second question asking for additional evidence. *Id.* The court and counsel agreed on an appropriate answer to the second question, which was delivered to the jury. RP 261-

62. Discussion then resumed on the deadlocked jury response and continued for some period of time. RP 262. The jury was eventually instructed: “Please continue your deliberations.” RP 269. The court then recessed. *Id.* Mr. Holland did not ask to use the men’s room at any time during either discussion. RP 262-69.

A short while later, the court went back on the record to announce the jury had reached a verdict. RP 269. Mr. Holland’s attorney responded that during the recess the parties had resolved the case and asked the court to permit Mr. Holland to enter a plea to an unranked felony with a recommended sentence of four months incarceration in the Grant County jail. RP 269-70. The State had also agreed that Mr. Holland could begin serving his sentence 30 days later. RP 272. If convicted of felony harassment—threat to kill, Mr. Holland faced a prison term between 22 and 29 months. *Id.*

Immediately following counsel’s recitation of the agreement, Mr. Holland said: “Thank you, sir.” *Id.* The court replied: “All right. I haven’t --” and Mr. Holland interrupted: “No, no. I’m just saying thank you. Thank you, sir.” RP 272-73.

The court, concerned about taking any more of the juror’s time, stated it needed time to consider what to do and instructed the parties to prepare the plea change paperwork as quickly as possible. RP 276. The

court went into brief recess three more times before the jury was brought back. RP 275. Immediately before bringing in the jury, the court announced that, subject to agreement of the parties, it would take the verdict but hold onto it until sentencing. RP 277. Mr. Holland said: "I understand." *Id.* The court emphasized: "You're not going to know what the verdict is." *Id.* Mr. Holland responded: "I understand. It's fair." *Id.* When the court repeated that the verdict would not be announced before the guilty plea, Mr. Holland said: "Thank you, sir." RP 277-78.

After taking the verdict and polling the jury, the jurors were excused and another brief recess was taken while the parties completed their paperwork. RP 281. Mr. Holland's counsel assured the court that he had reviewed the paperwork with his client and that they were ready to proceed. RP 282. After confirming that Mr. Holland had either read or had read to him the entire Statement of Defendant on Plea of Guilty, the court and Mr. Holland engaged in the following colloquy:

COURT: Do you need any more time to read this, Mr. Holland?

MR. HOLLAND: No sir.

COURT: Do you need any more time to talk to your attorney?

MR. HOLLAND: No, sir.

COURT: Has anyone made any threats or promises to get you to enter a guilty plea?

MR. HOLLAND: Not at all, sir.

COURT: Are you confused about anything in this case?

MR. HOLLAND: No.

COURT: No?

MR. HOLLAND: No, sir.

COURT: Okay. And do you have any questions about your case at all?

MR. HOLLAND: No, sir.

COURT: And you understood everything you read on this Plea of Guilty?

MR. HOLLAND: Yes, sir. Yes, sir. Yes, sir.

RP 285-86. During the colloquy, the court and defense counsel made multiple modifications to the “*In re Barr*”¹ plea statement. RP 287. The court asked Mr. Holland whether he was pleading to the “fiction” of the amended charge “because you recognize the sufficient risk of being convicted of the [original] crime charged; is that correct?” Mr. Holland answered: “Yes, sir.” RP 288. Further modifications were made to avoid any future confusion concerning the *In re Barr* plea. RP 289-90, CP 88-96. The court closely questioned Mr. Holland to ensure he knew the difference between the elements of the

¹ *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984)

crime charged and the crime to which he was pleading. RP 291. The court then addressed Mr. Holland's physical condition:

COURT: Also, I know that while you were waiting for the verdict from the jury, you expressed some discomfort, maybe some stomach pain. Is that what you had?

MR. HOLLAND: Yes, sir.

COURT: Okay. And was that over some anxiety over this case?

MR. HOLLAND: Yes, sir.

COURT: Has that affected your ability to understand these –

MR. HOLLAND: No, sir. It hasn't affected my ability –

COURT: Okay. It hasn't –

MR. HOLLAND: – ahead of time. Sorry.

COURT: Has it affected your ability to understand this guilty plea?

MR. HOLLAND: No, sir, it hasn't.

COURT: Has it affected your ability to talk to your attorney and understand what your attorney is advising you?

MR. HOLLAND: No, sir, it hasn't.

COURT: Or to understand what I'm saying?

MR. HOLLAND: No, sir, it hasn't.

RP 291-92. The court asked: "Do you understand once you plead guilty it's final? You can't ask for a trial or ask for relief consistent with any

verdict the jury may have reached. Do you understand that?" RP 293.

When Mr. Holland nodded, the court repeated: "Do you understand that?"

Mr. Holland answered: "Yes, sir, I do." RP 293. A bit later, the court asked: "Do you have any final questions about this case?" Mr. Holland responded: "No, sir." RP 294-95. The court asked: "Any confusion about what we're doing here?" Mr. Holland said: "No." RP 295.

After taking Mr. Holland's plea, the court read aloud the "not guilty" verdict. Mr. Holland responded: "The system works." RP 296. He went on: "I'm an idiot, but the system does work. I'm a coward. I should have never took the – I'm a coward." He then said: "Thank you, your Honor, sir. Thank you. Thank you. Thank you, Bob. You are the best lawyer in the world." *Id.*

Mr. Holland filed a motion and supporting declaration to withdraw his guilty plea on July 21, 2014, the day before his sentencing hearing and over two months after entering his plea. CP 103, CP 88. He asserted:

Waiting for the decision and verdict of the jury caused my stomach to hurt and I felt sick the entire time the jury deliberated. All I wanted to do during this time was to leave the courthouse and surrounding area. When approached with the State's offer to resolve my case, I felt that the only way I was going to get away from the courthouse and surrounding area was to accept the plea. I know I told the judge that I had enough time to think about the matter, but all I kept thinking was that I needed to take the deal and tell the judge what he wanted to hear so that I could get out of the courthouse.

CP 105. The court denied the motion, explaining “my observation was he understood all my questions, * * * that when I was talking to him, I was making eye contact like I am now . . . he understood them all[.]” 7/22/14 RP 38. The court went on to find that there was no rush or other precipitous process “that caused Mr. Holland to not think clearly about all his options.” *Id.* Later, during sentencing, Mr. Holland admitted: “Well, Your Honor, you, you, you gave me all the questions that you’re supposed to, like, I mean, are, *are you feeling all right and all that* and I understood that at that time. I would just wish I would have never heard the verdict to tell the truth.” 7/22/14 RP 40 (emphasis added). He went on to explain: “I mean, I was found not guilty and to me it still, just, like, means something. Shouldn’t we go with the jury now?” 7/22/14 RP 41.

Mr. Holland’s timely appeal followed his sentencing.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING MR. HOLLAND’S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE RECORD SHOWS THE PLEA WAS MADE INTELLIGENTLY AND VOLUNTARILY, PRECLUDING A FINDING OF MANIFEST INJUSTICE.

This is a case of buyer’s remorse, not manifest injustice. At the time Mr. Holland entered his plea, he was fearful of a 22 to 29 month

prison sentence if the verdict went against him. At that point, four months in the Grant County jail on an unranked felony must have seemed a wildly attractive way out. Before pleading, Mr. Holland affirmed he knew the verdict could go either way. He volunteered that the court's solution—taking the verdict but withholding it until after his plea—was “fair.” That he now wishes he had decided differently does not make his original decision involuntary.

Great safeguards are thrown around a defendant during the critical time of accepting a guilty plea. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). “Every effort [is] made to ascertain that the plea of guilty is made voluntarily, with understanding and with reasonable knowledge of the important consequences.” *Id.* Trial courts should exercise great caution in setting aside a guilty plea once the required safeguards have been employed.” *Id.* Here, the record depicts a trial court solicitous of Mr. Holland's rights and of his welfare, cautiously navigating the collision between an eleventh-hour plea agreement and the jury's unexpected verdict. While Mr. Holland's post-verdict frustration is understandable, the court was careful to ensure that before pleading guilty he fully understood he would be bound by his plea regardless of the verdict. All required safeguards were employed.

Denial of a motion to withdraw a guilty plea should not be

overturned absent an abuse of discretion. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). Overturning the trial court requires a showing in the record that the court's discretion was predicated upon grounds clearly untenable or manifestly unreasonable. *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). The record here does not. Here, the court referred to its observations during the plea change colloquy and to Mr. Holland's demeanor and responses. Mr. Holland candidly affirmed that the court asked all the questions it was "supposed to," including questions about whether his physical distress interfered with his ability to understand and to decide.

A defendant may withdraw a guilty plea only upon demonstrating that withdrawal is necessary to correct a manifest injustice, "i.e., an injustice that is obvious, directly observable, overt, not obscure." *Taylor, supra*, 83 Wn.2d at 596. "Without question, this imposes upon the defendant a demanding standard." *Id.* The standard is demanding because a defendant's written plea statement is prima facie evidence that the plea is voluntary when the defendant acknowledges reading and understanding the statement and that the contents of the statement are true. *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). The court's inquiry on the record into the voluntariness of the plea renders this presumption of voluntariness "well nigh irrefutable." *Id.* at 262. Here, the eleventh hour

nature of the plea agreement led the court to a lengthy colloquy with Mr. Holland concerning his understanding of the agreement, his motive for changing his plea, and the difference between the crime for which he was being tried and the crime to which he was pleading. The court asked whether he had been given enough time with his attorney to understand everything, and whether he had any questions of the court. Mr. Holland affirmed that he had enough time and fully understood the plea statement. The court took care to inquire into Mr. Holland's understanding that his plea was final, regardless of the verdict. Mr. Holland understood and volunteered that he thought the procedure was fair. Finally, the court inquired into whether any physical discomfort interfered with his ability to understand the plea agreement, his attorney, or the court. To each inquiry, Mr. Holland responded: "No, sir. It hasn't."

In *Olmsted, supra*, the court found that the trial court's denial of a withdrawal motion was not an abuse of discretion because the appellant, like Mr. Holland, was represented by able and experienced counsel and, as here, the record showed he changed his plea "voluntarily and expressed full knowledge of the nature of the offense charged and the consequences of his plea." *Olmsted*, 70 Wn.2d at 119.

Mr. Holland's motion was not supported by evidence sufficient to overcome this well-nigh irrefutable presumption of voluntariness.

Withdrawal of a plea taken with all the appropriate safeguards requires more evidence than “a mere allegation by the defendant.” *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). In *Osborne*, the defendant argued his plea was involuntary because his wife threatened to commit suicide if he went to trial. *Id.* at 92, 96-97. Because the defendant had “specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion,” the Supreme Court held his bare, self-serving allegations insufficient to overcome the “‘highly persuasive’ evidence of voluntariness.” *Id.* at 97. Mr. Holland’s only evidence was his own declaration that, but for his extreme pain and his desire to flee the courthouse, he would never have agreed to change his plea nor have told the court he understood and agreed to everything about the last-minute deal, the process, and the consequences of his decision.

There is no evidence that withdrawal of Mr. Holland’s guilty plea is necessary to prevent an injustice that is obvious, directly observable, overt, and not obscure. There is, conversely, ample evidence of an intelligent and voluntary decision to take a calculated risk. Mr. Holland’s current desire to “just go with the jury,” while understandable, is insufficient. The trial court did not abuse its discretion.

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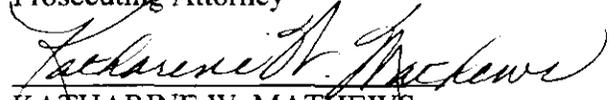
D. CONCLUSION.

The trial court properly denied Mr. Holland's motion to withdraw his guilty plea because the strong presumption of voluntariness created by his written plea statement and his candid responses to a careful, thorough plea colloquy could not be overcome by a single, self-serving declaration.

The decision of the trial court should be affirmed.

Respectfully submitted this 13th day of July, 2015.

GARTH DANO
Grant County
Prosecuting Attorney



KATHARINE W. MATHEWS
Deputy Prosecuting Attorney
WSBA # 20805