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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

CHUCCO ROBINSON, RESPONDENT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ELLEN KALAMA CLARK

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BRIEF OF APPELLANT

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**INDEX**

ASSIGNMENTS OF ERROR..... 1

ISSUE PRESENTED..... 3

STATEMENT OF THE CASE ..... 3

ARGUMENT ..... 7

    A.    THE TRIAL COURT ERRED IN GRANTING  
          DEFENDANT’S MOTION TO WITHDRAW  
          HIS GUILTY PLEA BASED UPON AN  
          ALLEGED CONFUSION ..... 7

CONCLUSION ..... 19

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

IN RE KEENE, 95 Wn.2d 203,  
622 P.2d 360 (1980)..... 10

IN RE TEEMS, 28 Wn. App. 631,  
626 P.2d 13 (1981)..... 10

STATE V. CODIGA, 162 Wn.2d 912,  
175 P.3d 1082 (2008)..... 15, 16, 17, 18

STATE V. HYSTAD, 36 Wn. App. 42,  
671 P.2d 793 (1983)..... 10

STATE V. PEREZ, 33 Wn. App. 258,  
654 P.2d 708 (1982)..... 10

STATE V. RIDGLEY, 28 Wn. App. 351,  
623 P.2d 717 (1981)..... 10

STATE V. TAYLOR, 83 Wn.2d 594,  
521 P.2d 699 (1974)..... 9

STATE V. WALSH, 143 Wn.2d 1,  
17 P.3d 591 (2001)..... 17

WOODS V. RHAY, 68 Wn.2d 601,  
414 P.2d 601 (1966) *cert. denied*  
385 U.S. 905, 17 L. Ed. 2d 135, 87 S. Ct. 215 (1966) ..... 12

**COURT RULES**

CrR 4.2(f) ..... 9

CrR 4.2(g)..... 9

I.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact No. 4 which provided: the defendant acknowledged at the plea that the criminal history submitted by the State was true and correct to the best of his knowledge. (CP 39)
2. The trial court erred in entering Finding of Fact No. 11 which provided, in part: “defendant filed a motion to withdraw his guilty pleas based upon his belief, pursuant to alleged advice and direction given to him at the time of his 1994 guilty plea in King County, that the prior juvenile convictions has ‘washed’, meaning that those convictions were no longer on his criminal record, and that they could never be used against him again for any sentencing purposes.” (CP 40)
3. The trial court erred in entering Finding of Fact No. 12 which provided: “the negotiations and guilty plea in this case are the first time since the 1994 sentencing that the issue of whether or not the juvenile offenses has ‘washed’ would have arisen for this defendant.” (CP 40)

4. The trial court erred in entering Finding of Fact No. 13, which provided: “the defendant relied on the information given him in 1994 when he made the decision to plead in the case at bar. The defendant believed the prior offenses had ‘washed’ in the sense that they were no longer a part of his criminal history and would not be used in calculating his offender score.” (CP 40)
5. The trial court erred in entering Finding of Fact No. 14, which provided: “defendant did not disclose the prior juvenile convictions in question to the Court at the time of the guilty plea based upon his mistaken belief they no longer part of his criminal history and were not countable.” (CP 40)
6. The trial court erred in entering Conclusion of Law No. 1, which provided: “defendant’s failure to disclose the prior juvenile convictions was based on a mistaken belief as to the law that those convictions had ‘washed’ prior to his 1994 sentencing. (CP 40)
7. The trial court erred in entering Conclusion of Law No. 3, which provided: “the defendant’s guilty plea in this case was not knowing, voluntary or intelligently made due to the

defendant's mistaken belief that the prior juvenile offenses had 'washed', and the substantial increase in the sentencing range with the juvenile offenses included in the offender score calculation." (CP 41)

8. The trial court erred in entering Conclusion of Law No. 4, which provided: "the defendant's motion to withdraw his guilty plea is granted." (CP 41)

## II.

### ISSUE PRESENTED

- A. DID THE TRIAL COURT CORRECTLY DENY DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA?

## III.

### STATEMENT OF THE CASE

On June 22, 2007 around 2:00 am, Amanda Aronson had known defendant for about one week when defendant phoned her asking for a ride. (CP 3) Ms. Aronson refused. (CP 3) Around 4:20 am, defendant came to her home and knocked on the door. (CP 3) When she opened the door, defendant walked immediately inside without invitation and straight to her bedroom. (CP 3) She followed defendant into the bedroom to find

that he had removed all of his clothing and had an erect penis. (CP 3) When she refused to lay down with him, the defendant grabbed her and pulled her down onto the bed. (CP 3) Defendant put his hands all over her body and was able to pull off her pajama bottoms. (CP 3) She told defendant several times to get off of her, but he refused. (CP 3-4) She was finally able to escape into the bathroom where she put on some sweatpants. (CP 4) She went into the living room with defendant following. (CP 4) She told defendant that he needed to leave several times, but he refused. (CP 4) When she sat on the couch, defendant came over and lay on top of her, holding her arms and shoulders down with his hands. (CP 4) She struggled until she escaped again. (CP 4) Defendant appeared very angry because all the veins in his arms were popping out, so she was afraid for herself and her children. (CP 4) She was able to talk the defendant into letting her check on the children asleep upstairs. (CP 4) Once upstairs, she continued to call downstairs for defendant to leave which he did finally after about twenty minutes. (CP 4) Ms. Aronson called for help immediately and officers responded. (CP 3-5)

Based upon these facts, the State charged the defendant with first degree burglary, attempted first degree rape, and first degree kidnapping. (CP 1-2) The parties negotiated a plea agreement based upon the State's understanding of defendant's criminal history. (CP 11-19) Defendant had

several prior juvenile felony convictions which the State's deputy was unaware of and the defendant chose not to disclose at the time the parties were negotiating a plea agreement. (CP 23-25) Defendant acknowledged his 1994 second degree murder conviction, but nothing more. (CP 11-19, 24, 32)

Defendant knew he had the prior convictions and knew the State's deputy did not know based upon the first appearance evaluation which reflected only his 1994 murder conviction. (CP 57) Nevertheless, defendant entered settlement negotiations with the State and finalized an agreement without disclosing the prior convictions. (CP 11-19, 24, 32) Defendant secured a substantial reduction in the charges he faced as part of the plea bargain. (CP 11-19) The State agreed to amend the information to charge first degree burglary and third degree rape which resulted in a standard sentencing range well below what the defendant faced if convicted as originally charged. (CP 11-19)

The defendant pled guilty on February 20, 2008, to first degree burglary and third degree rape. (CP 11-19) The sentencing was scheduled for April 14, 2008, to accommodate the preparation of a pre-sentence report by the Department of Corrections ("DOC"). (RP 12) The DOC investigator uncovered the defendant's additional criminal history. (CP 23-25, 32-35) Defendant only then admitted that he knew about the

prior convictions, but maintained that he believed the convictions had “washed.” (CP 34) The DOC’s discovery of the additional criminal history caused the sentencing hearing to be continued to April 23, 2008, to address the issue of additional undisclosed criminal history. (CP 23-24) On April 25, 2008, defendant moved to withdraw the guilty plea. (CP 31)

The trial court, in its oral ruling, noted that:

Counsel, the criminal history which was presented at plea prepared by the State did not include the two juvenile charges of second degree assault from 1991. Without those included in the criminal history, they were not used to calculate the offender score as listed in the plea statement. Now we have discovered that those crimes did in fact occur, and pursuant to current statute they should be counted in the calculation of the offender score.

[The State] argues that the defendant assumed the risk, that he had a duty to disclose these prior convictions and if he didn’t, then that’s his problem. . . . I think it was eminently reasonable for Mr. Robinson to believe that these convictions no longer existed against him. They were not used against him when he was sentenced in 1994 on a murder charge; why would he think that they could be used against him in 2008 on lesser felony charges?

. . . I’m going to find that the plea was not made knowingly, intelligently and voluntarily.

RP 28-29. The motion to withdraw was granted. RP 29, CP 31.

The State filed this appeal. CP 42.

#### IV.

#### ARGUMENT

#### A. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BASED UPON AN ALLEGED CONFUSION.

Defendant argued to the trial court that his plea was involuntary based upon his confusion regarding his criminal history. The defendant claimed that:

he was confused about whether his prior juvenile convictions counted as criminal history or washed out; the authorities advised him in 1994 that none of his juvenile offenses counted because of his age at the time of the convictions; it was his understanding that those convictions could never be used against him again; in my research and discussions in prison, this belief was confirmed by case law and discussions with other inmates; he was still under the complete impression that those convictions washed when he spoke to his trial counsel. I remember telling him [attorney] about the prior juvenile convictions, but, at the same time, conveying my belief that those convictions had washed. I remember telling Mr. Collins that we did not need to be concerned with those convictions because of my belief that they were no longer part of my record.

(CP 50-68)

Defendant's own declaration is contradictory. Defendant admits that he researched the issue and discussed the issue with authorities and other inmates. (CP 63-64) Common sense and reasonable inferences would result in defendant becoming aware of the titanic struggle waged

over this very issue between the Supreme Court and the Legislature. Defendant's own research would have discovered that his prior juvenile convictions became countable in his offender score as of 2002, six (6) years prior to his discussions with his trial attorney herein. It is disingenuous to argue that something is legally binding based upon your own legal research, then claim ignorance of a significant change in that very area of law when it is disadvantageous to your position.

Defendant's plea was clearly entered knowingly because defendant chose not to disclose his prior convictions to obtain a better plea agreement. (CP 64) If defendant's prior convictions *truly* did not count in his offender score, then defendant faced no additional sanctions or penalties by disclosing the existence of the convictions to the State's deputy during negotiations and the trial court at the time of the plea. The defendant knew that the State's deputy handling his current case did not know of his prior convictions from the time of defendant's first appearance hearing, yet said nothing.

Defendant's plea was clearly entered voluntarily because he knew that the State's deputy had not discovered the prior history and defendant negotiated an acceptable settlement based upon that deception. (CP 64) The voluntariness of defendant's plea only arose once the deception was revealed by the DOC's pre-sentence investigation.

Defendant's plea was entered intelligently because he knew of the State's deputy's ignorance of his prior convictions and failed to disclose same. Defendant knew of his prior convictions, yet consciously chose not to disclose same to the trial court.

CrR 4.2(f) governs the withdrawal of a guilty plea and provides, in pertinent 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.

CrR 4.2(f)

The State Supreme Court defined a "manifest injustice" as an "injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The court identified four indicia which could independently establish manifest injustice, including: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea was not honored by the prosecution. Finally, the court noted that CrR 4.2(f) places a demanding standard on the defendant. *Taylor* at 597.

Defendant claimed that his guilty plea was entered involuntarily. When a defendant completes the written statement on plea of guilty pursuant to CrR 4.2(g) and acknowledges that he has read it

and understands it and that its contents are true, that written statement provides *prima facie* evidence that the plea was voluntary. *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, 28 Wn. App. 631, 626 P.2d 13 (1981); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981). When a trial court judge inquires orally of the defendant and satisfies the court on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. *State v. Perez*, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982); *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). Mr. Robinson's declaration did not refute this presumption.

The trial court had defendant's "Statement of Defendant on Plea of Guilty." CP 11-19 The pleading detailed the elements of the crimes and explained the facts in support of the charge. The added indicia that defendant's guilty plea was entered knowingly, intelligently and voluntarily is that the defendant agreed to enter an *In re Barr* plea to count two of the amended information for the sole purpose of gaining the benefit of his "bargain." The plea statement provides the standard range sentence and the maximum penalty the court could impose. In the plea statement, defendant averred that he was entering the plea freely and voluntarily, that no one caused him to enter the plea and no one made any promises other than in the plea agreement to cause him to plead guilty. (RP 10-13,

CP 11-19) Defendant further averred that he understood the entire agreement. (RP 4) Defendant's trial counsel, Mr. Collins, averred that his client fully understood the agreement. (RP 3-13) Finally, the trial court went through a colloquy with defendant on the record to satisfy itself that Mr. Robinson understood the agreement, and that it was entered into voluntarily, and was knowingly made. (RP 3-13) The defendant assured the trial court that the agreement was understood and at no time indicated that he was confused about any aspect of his guilty plea. (RP 3-13)

The trial court inquired of the defendant whether his criminal history as reflected in the Understanding of Criminal History was true and correct. (RP 5-6) The defendant assured the trial court that it was and exhibited no confusion regarding the prior convictions that, as the parties stood before the trial court, only the defendant and his counsel knew existed. (RP 5-6) Defendant averred that he understood that if the State discovered additional criminal history, not only would the State's recommendation change, but the guilty plea would remain binding on defendant. (CP 12) Defendant claims that he was confused, yet refused to clear up his confusion when he had the opportunity on several occasions. Defendant's declarations fail to overcome the presumption of the voluntariness of his plea, and should fail.

A guilty plea must be voluntary. "To be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act." *Woods v. Rhay*, 68 Wn.2d 601, 604, 414 P.2d 601 (1966) *cert. denied* 385 U.S. 905, 17 L. Ed. 2d 135, 87 S. Ct. 215 (1966).

He arguably attempted to show that he did not understand his criminal history, yet it was the defendant who declared that he was "still under the complete impression that those convictions 'washed' when he spoke to his trial attorney. (CP 50-68) Moreover, defendant admitted in his declaration that he told his attorney "about prior juvenile convictions, but, at the same time, conveying my belief that those convictions had 'washed'". (CP 64) Finally, defendant admitted "telling Mr. Collins that we did not need to be concerned with those convictions because of my belief that they were no longer part of my criminal history." (CP 64)

If the defendant's declaration filed in support of the motion to withdraw his guilty plea is accepted, then there were no facts upon which to base a withdrawal of his guilty plea. The defendant's declaration, coupled with his trial counsel's, established that defendant was not confused about his criminal history. Defendant knew he had prior convictions that the State obviously had not discovered from the date that

pre-trial services prepared its first appearance assessment. Further, that defendant consciously chose not to advise the State of his prior convictions. Defendant went so far as to advise his attorney not to be concerned with the prior convictions. (CP 64) Defendant's and trial counsel's declarations presented the trial court with contradictions which belied common sense.

Defendant's counsel argued to the trial court that defendant was "confused" by the legal conflict that raged on between the Washington State Supreme Court and the Legislature regarding the counting of juvenile convictions as part of the offender score for sentencing purposes. (CP 50-68) It is illustrative to note that the issue was resolved in 2002, yet defendant claimed that he was still confused. (CP 50-68) It stretches common sense that defendant could rely upon his own legal research in this area as well as the opinions of other inmates, yet not be apprised of the fact that 6 years prior to his signing of an understanding of his criminal history that his prior juvenile convictions had been legislatively reinstated as counting towards his offender score. It is disingenuous for the defendant and trial counsel to argue to the trial court that the defendant was mistaken as to the law when he failed to advise the trial court when he acknowledged his criminal history that he had prior convictions that he believed had washed."

The record of the guilty plea shows no evidence of irrationality, no evidence that the defendant did not understand what he was doing. (RP 3-13) He answered the court's inquiries at the guilty plea hearing including stating that he understood what he was doing. (RP 3-13) The defendant was asked by the trial court whether he had any questions about pleading guilty. (RP 11) After a complete colloquy with the defendant regarding his understanding of the plea statement, the trial court acknowledged his change of plea as being knowing, voluntary and intelligently made. (RP 12, CP 11-19).

The defendant's Statement of Defendant on a Plea of Guilty outlines in great detail all of the defendant's rights. The defendant signed the document. (CP 11-19). In short there was little at the motion hearing but the defendant's bald assertions that he did not fully understand his guilty plea. Nevertheless, the trial court specifically found that the defendant had entered his guilty plea knowingly, voluntarily, and intelligently. (RP 12, CP 11-19). That was the trial court's prerogative.

Essentially, defendant argued to the trial court that he should be rewarded for his disingenuous calculated gamble when he earlier affirmed to that same Judge that the prosecutor's understanding of his criminal history was true and complete. Defendant's position contradicts basic common sense in light of his declaration.

It is also logically dissonant for the defendant to present testimony at the hearing and argue regarding claims of what his counsel said. Defendant claimed that he was so convinced by the sentencing court's comments in 1994 that he still believed in 2008 that his prior juvenile convictions had "washed." (CP 50-68) Yet, the defendant also claimed that during his incarceration that "in my research and discussions in prison, this 'belief' was confirmed by case law and discussions with other inmates." (CP 63-65, Declaration of Chucco Robinson, dated 4/25/08)

If the defendant was so "mistaken", then why did he tell his counsel that "we [do] not need to be concerned with those [juvenile] convictions because of my belief that they were no longer part of my record." (CP 63-65, Declaration of Chucco Robinson, dated 4/25/08, at p. 2).

In *State v. Codiga*, the court addressed whether a defendant can assume the risk that an offender score or a standard range has been miscalculated. *State v. Codiga*, 162 Wn.2d 912, 175 P.3d 1082 (2008). The court examined the plea form clause which provided, "if any additional criminal history is discovered, both the standard range and the prosecuting attorney's recommendation may increase." The court also noted that a guilty plea will be binding and the defendant cannot withdraw the plea "if additional criminal history is discovered even though the

standard sentencing range and the prosecuting attorney's recommendation increase." In the present case, defendant's statement on plea of guilty included the exact same language. (CP 12)

The *Codiga* court observed that:

The Court of Appeals has analyzed this clause on a number of occasions. . . . [T]he Court of Appeals has drawn a distinction between instances where the mistake was a factual one involving the defendant's criminal history and instances where the completely and correctly revealed his or her criminal history, but the attorneys made a legal mistake as to the resulting sentencing range for the current crime. (citations omitted) . . . This distinction is supported by the plain language of the standard clause included in the CrR 4.2(g) forms and by the tentative nature of the offender score and standard range calculations at the time of the plea agreement. 'At the time of the plea colloquy, the trial court is merely operating on the basis of the information given to it by the parties – it is not at that time making a determination that this information is correct.' *State v. Kennar*, 135 Wn. App. 68, 75, 143 P.3d 326 (2006). It is not until the sentencing hearing that the trial court determines the defendant's offender score and the applicable standard sentence range.

*Codiga*, at 926.

The court continued:

We treat plea agreements as contracts and a basic principle of contract law is that a successful avoidance of an agreement based upon mutual mistake depends upon a finding that the party seeking to avoid the agreement did not bear the risk of mistake. (citations omitted) The clause at issue in this case clearly states that the defendant assumes the risk that new or additional criminal history will be discovered that increases his or her offender score. Allowing the defendant to assume this risk is both fair and

reasonable because the facts of his or her criminal history should be within the defendant's knowledge. Furthermore, the defendant has a statutory and contractual duty to provide an accurate statement of criminal history.

*Id.*, at 928.

The Court reiterated its "strong preference for the enforcement of plea agreements, and the burden of showing manifest injustice sufficient to warrant withdrawal of a plea agreement rests with the defendant." *Id.*, at 929, referencing *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). The plea form in *Codiga* and herein asked the defendant to report "prior convictions and *juvenile adjudications or convictions* whether in this state, in federal court or elsewhere. CP 12 The pleading specifically provides that "unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. (CP 12) Herein, the defendant did not attach an additional statement, so he failed to disclose his entire criminal history. Defendant thereby assumed the risk that his additional, undisclosed, criminal history would be discovered and rightfully impact his offender score. *Codiga*, 162 Wn.2d at 930.

Defendant argued to the trial court that this case involved a legal mistake and hence qualified for withdrawal of his guilty plea. The glitch in defendant's argument occurs when examining the circumstances of this

case in light of the decision in *Codiga*. The court summed up its holding as follows:

[W]e recognize that the assumption of risk clause . . . provides that the defendant assumes the risk that new or newly discovered criminal history will result in a higher offender score and a longer standard range. Yet under this clause, the defendant does not assume the risk for miscalculation of the offender score based on a mistake as to the legal effect of a *fully disclosed criminal history*. (emphasis added)

*Id.*, at 930.

Here, as in *Codiga*, the plea form failed to report defendant's entire criminal history, including adult and juvenile felonies regardless of whether defendant "believed" such counted in his offender score. The information to make the criminal history form complete was solely within defendant's knowledge at the time he executed the plea statement, executed the understanding of criminal history, and stood before the trial court and avowed that he had revealed his entire criminal history. Defendant took a chance that his additional criminal convictions would not be discovered and hence he would benefit by the reduced sentence. Defendant gambled and thereby assumed the risk that his prior convictions would be discovered. Accordingly, the State respectfully submits that the trial court erred in allowing the defendant to withdraw his guilty plea. The State hereby requests that this court vacate the trial court's order thereby

reinstating defendant's guilty plea and the trial court proceed to sentencing thereon based upon defendant's now fully disclosed criminal history.

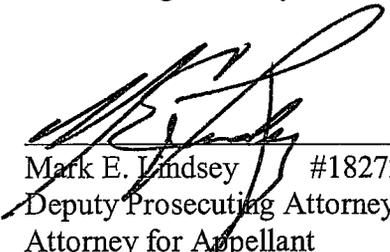
V.

### CONCLUSION

For the reasons stated, the order allowing defendant to withdraw his guilty plea should be vacated, the guilty plea reinstated, and the matter remanded for sentencing.

Dated this 17th day of October, 2008.

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