No. 93545-9

No. 46967-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN W. BUCKMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUE PRESENTED FOR REVIEW

1. The trial court did not abuse its discretion in denying Mr. Buckman's Motion to Withdraw a Guilty Plea.

II. STATEMENT OF THE CASE

A police officer investigating a theft complaint discovered Mr. Buckman (date of birth November 19, 1992) and KBS[1] (date of birth November 8, 1996) cohabitating. CP 1-3. KBS's mother supported the relationship. CP 1-3. The officer reported the possible abuse allegation to Child Protective Services who opened up a case on October 24, 2011. CP 1-3.

On October 25, 2011, Chief Williams of the Winlock Police Department, and Social Worker Roni Jensen, met with KBS at Winlock High School to discuss KBS's relationship with Mr. Buckman. CP 1-3. KBS was 14 years old and disclosed that she was the current girlfriend of Mr. Buckman, who is three years and 11 months older than her. CP 1-3. KBS disclosed that she and Mr. Buckman had a sexual relationship. CP 1-3. The first time KBS and Mr. Buckman had intercourse was in June 2010 when she was 13 years old. CP 1-3.

[1] The State will refer to the victim by her initials, KBS, to protect her identity.

Mr. Buckman was charged by information on November 1, 2011 with Rape of a Child in the Second Degree. CP 1-3. The information alleged the rape took place on or about and between May 1, 2010 and September 30, 2010. CP 1.

On January 26, 2012, Mr. Buckman pleaded guilty as charged to one count of Rape of a Child in the Second Degree. CP 4-14. Mr. Buckman's attorney submitted a motion for Special Sex Offender Sentencing Alternative (SSOSA) examination. CP 15-16. The judge signed the order for the SSOSA examination on January 31, 2012. CP 19-20.

Mr. Buckman was sentenced on March 7, 2012. RP (3/7/12) 1-20[2]; CP 24-37. The State opposed the imposition of a SSOSA sentence and asked the sentencing court to impose a sentence in the middle of the standard range. RP (3/7/12) 5, 8. A standard range for Mr. Buckman was a minimum of 86 to 114 months in prison with a maximum of life in prison. RP (3/7/12) 5, 8.

Mr. Buckman's attorney asked the sentencing court to allow Mr. Buckman to do a SSOSA. RP (3/7/12) 9. The judge granted Mr. Buckman's request for a SSOSA. RP (3/7/12) 15; CP 24-37. As part

[2] Due to multiple Reports of Proceedings, they will be demarcated as follows: RP (3/7/12); RP (10/10/12); RP (6/19/14); RP (10/31/14); and RP (11/18/14).

of the SSOSA sentence the sentencing judge imposed a number of restrictions and conditions on Mr. Buckman. RP (3/7/12) 15-18; CP 27-37. Mr. Buckman was required to serve six months in the Lewis County Jail. CP 27. If Mr. Buckman did not successfully complete the SSOSA and it was revoked he was to serve 114 months minimum term in prison. CP 27.

Mr. Buckman was required to be on community custody and abide by his community custody conditions including, outpatient sexual deviancy treatment, no criminal law violations, no contact with the victim for life, register as a sex offender and all the additional requirements of community custody listed in Appendix H of his Judgment and Sentence. CP 27-37.

On March 26, 2012 Mr. Buckman signed the Department of Corrections (DOC) Conditions, Requirements, and Instructions form acknowledging his community custody requirements. CP 38. One of Mr. Buckman's requirements was to report as directed to DOC. CP 38. Mr. Buckman was released from the Lewis County Jail on July 11, 2012. CP 38. Mr. Buckman phoned his Community Corrections Officer (CCO) on July 12, 2012 and was instructed to report that day to his CCO. CP 38.

Mr. Buckman failed to report as directed but did report on July 16, 2012. CP 38. Mr. Buckman failed to report on his next scheduled report date of August 2, 2012. CP 39. CCO Colleran attempted to contact Mr. Buckman on August 3, 2012 but was unable to reach him. CP 39. Mr. Buckman eventually reported on August 6, 2012 but failed to report again on August 11, 2012. CP 39.

Mr. Buckman's CCO completed a violation report on August 15, 2012 after having no contact with Mr. Buckman since August 6, 2012. CP 39. At that time the CCO was requesting 30 days confinement as a sanction for failing to report as directed. CP 39.

On October 3, 2012 the State filed a supplemental petition to revoke Mr. Buckman's SSOSA. CP 46-67. The State alleged that Mr. Buckman had contacted KBS in person on September 4, 2012 and attempted to make contact with her by a third party on September 7th and 9th, 2012. CP 47, 50-58. These contacts violated the provisions of the Judgment and Sentence, Mr. Buckman's conditions of community custody, and the Sexual Assault Protection Order, which would also make each contact a crime. CP 47.

The State also alleged Mr. Buckman sold heroin to a confidential informant during the week of September 3, 2012. CP 47, 60-62. Next, the State alleged Mr. Buckman failed to properly register

as a sex offender. CP 47, 55- 57. Finally, the State alleged that Mr. Buckman had made admissions during phone calls in the jail and to law enforcement that he continued to use heroin. CP 47. The State again requested Mr. Buckman's SSOSA be revoked and he be sentenced within the standard range. RP (3/7/12) 48.

A SSOSA revocation hearing was held on October 10, 2012. RP (10/10/12) 1-12. Mr. Buckman admitted to the violations. RP (10/10/12) 3-5. Mr. Buckman and his attorney asked the sentencing judge to give Mr. Buckman a second chance and allow Mr. Buckman to continue with his SSOSA. RP (10/10/12) 7-10. The State argued Mr. Buckman's SSOSA should be revoked. RP (10/10/12) 5-7. The sentencing judge agreed with the State and revoked Mr. Buckman's SSOSA and sentenced Mr. Buckman to 114 months minimum term to life in prison. RP (10/10/12) 11; CP 65-79.

On November 8, 2012, Mr. Buckman timely appealed his revocation and sentence to this Court. Mr. Buckman's first appeal alleged he had not received effective assistance of counsel at both his trial and revocation hearing. Brief of Appellant No. 44147-1-II, 4-9.

On June 17, 2013, Mr. Buckman filed a Statement of Additional Grounds for Review to this Court. Mr. Buckman stated his

case should have been handled through the juvenile courts because he was under the age of eighteen at the time the offense occurred, and as a result of not being offered "a juvenile disposition," his plea was neither knowing, intelligent, nor voluntary. SAG, 1-12.

On June 21, 2013, Mr. Buckman filed a supplemental Statement of Additional Grounds for Review to this Court. Mr. Buckman argued further that he should have been tried and sentenced as a juvenile with "a juvenile disposition." While response from this Court was pending regarding the first appeal by Mr. Buckman, Mr. Buckman also filed a Personal Restraint Petition on October 8, 2013. Supp. SAG 1-6.

Mr. Buckman's Personal Restraint Petition stated the Superior Court of Lewis County lacked jurisdiction over his case because he was a minor on the dates the incidents occurred, and he had received ineffective assistant of counsel because he had plead guilty to the offense of Rape of a Child in the Second Degree and was sentenced accordingly as an adult instead of as a juvenile. PRP, 9. Similar information was filed by Mr. Buckman in his Motion to Properly Admit New Information on October 13, 2013. Supp. PRP, 1-3.

While awaiting this Court's decision on both the first appeal and the Personal Restraint Petition, Mr. Buckman filed a Motion to Modify or Correct Judgment and Sentence in the Superior Court of Lewis County on February 7, 2014. CP 83. On June 19, 2014, the Superior Court of Lewis County set the case over to a later date to ensure proper jurisdiction over the case as the issue presented was similar to the issues presented to this Court in the appeal and Personal Restraint Petition. RP 2-5.

On June 25, 2014, this Court granted a motion on the merits to affirm and dismissing the personal restraint petition. This Court, in its ruling, determined, "[t]he State correctly charged Buckman and the superior court properly sentenced Buckman as an adult." Supp. CP-COA Consol. Nos. 44147-1-II; 45472-6-II Opinion, 12.[3] Mr. Buckman filed a motion to modify the Commissioner's ruling on July 23, 2014, but this Court denied the motion on August 18, 2014.

On September 4, 2014 Mr. Buckman filed a motion to withdraw his guilty plea in the Superior Court of Lewis County, as well as filed a petition for review on the denied motion to modify on

[3] The State will be filing a Supplemental Designation of Clerk's Papers designating a copy of the COA Opinion in Consol. Nos. 44147-1-II; 45472-6-II. For whatever reason the opinion was never received by the Clerk's Office; therefore, the State filed a copy pf the opinion. Hereafter, the State will cite to the opinion, Supp. CP, COA Op, page number.

September 17, 2014. CR 100. On October 31, 2014, the Superior Court of Lewis County held a hearing of Mr. Buckman's motion to withdraw plea. RP 6-13.

The Superior Court of Lewis County determined the correct interpretation of RCW 9.94A.507 using the phrase "seventeen years of age or younger" should be interpreted as anyone under the age of seventeen up to their seventeenth birthday, but not beyond their seventeenth birthday. RP 6-13. The court reasoned if the Legislature had intended to have the statute read under the age of eighteen, they would have phrased it as such:

> **MR. GROBERG**: Well, I think it means up until the day you turn 18.
>
> **THE COURT**: Well, if that's the case, why didn't the Legislature say under the age of 18, as they have done over and over and over again in the statute? As a matter of fact, even in this exact statute, they use that phrase.

RP 7. The trial court denied Mr. Buckman's motion to withdraw his guilty plea, and Mr. Buckman timely filed this appeal. CP, 136-37. The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MR. BUCKMAN'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Mr. Buckman argues his guilty plea was uninformed due to the trial court's use of informing and sentencing him under RCW 9.94A.507(2)'s indeterminate sentence when he was under the age of 18 at the time of the offense.

1. Standard Of Review.

A trial court's decision on a motion to withdraw a guilty plea for abuse of discretion, and the findings of fact that support this decision are reviewable for substantial evidence. *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455, 457 (2007); *citing State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997), *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

"However leave should be granted to withdraw a plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." *State v. Marshall*, 144 Wn.2d 266, 280-281, 27 P.3d 192, 199 (2001); *citing* CrR 4.2(f). "A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was

not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept." *Id.* at 281, 27 P.3d 192, 199; *citing State v. Wakefield*, 130 Wn.2d 464, 925 P.2d 183 (1996). The State will break its argument into four sections, (1) ineffective assistance of counsel, (2) the voluntariness of the plea, (3) sufficiency of evidence to support the trial court's findings and (4) that Mr. Buckman did not meet his burden to show his guilty plea should be withdrawn to correct a manifest injustice.

2. Ineffective Assistance Of Council.

To prevail on an ineffective assistance of counsel claim Buckman must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable.

Id. at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005).

> In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.

Id. at 156 Wn.2d 33, 41-42, 123 P.3d 844, 848-849 (internal citations omitted).

> In 1976, RAP 2.5(c)(2) codified certain restrictions on the law of the case doctrine:
>
> Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Id. This Court has already determined that Mr. Buckman had received effective assistance of counsel in the ruling for the direct appeal and the Personal Restraint Petition dated June 25, 2014. Supp. CP-COA Consol. Nos. 44147-1-II; 45472-6-II Opinion, 4-13. Therefore, there was no manifest injustice under this prong because Mr. Buckman received effective assistance of counsel.

3. Voluntariness Of The Plea.

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted).

The court rule requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Prior to acceptance of a guilty plea, "[a] defendant must be informed of all the direct consequences of his plea." *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted). A

defendant need not show a direct consequence in which he or she was uninformed about was material to his or her decision to plead guilty. *In re Isadore*, 151 Wn.2d 294, 301, 88 P.3d 390 (2004).

> When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When 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.

State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted). To meet his or her burden that a guilty plea was not voluntarily made, a defendant must present some evidence of involuntariness beyond his self-serving allegations. *State v. Osbourne*, 102 Wn.2d 87, 97, 684 P.2d 683, 690 (1984).

The voluntariness of Mr. Buckman's plea is evidenced in Mr. Buckman's Statement of Defendant on Plea of Guilty to Sex Offense, and his Felony Judgment and Sentence after the revocation of his SSOSA. CP 4-14; 24-37; and 65-79.

The trial court conducted a thorough colloquy with Mr. Buckman, in which he communicated an understanding of the charges to which he was pleading and the rights he was giving up.

RP (3/7/12) 19-20. Page 8 of the Statement of Defendant on Plea of Guilty to Sex Offense (STTDFG) contains the following:

> 7. I plead guilty to:
> count 1 Rape of a Child in the Second Degree in the original Information. I have received a copy of that Information.
>
> 8. I make this plea freely and voluntarily.
>
> 9. No one has threated harm of any kind to me or to any other person to cause me to make this plea.
>
> 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
>
> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On or about June 2010, I had sexual intercourse with my girlfriend, K.B.S. (DOB 11/8/96) we were not married, and I am more than 36 mos older than her.
>
> 12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 11. Mr. Buckman signed the STTDFG as did his attorney, the deputy prosecuting attorney and the judge. CP 11-12.

On March 7, 2012, in open court, the trial court judge had the following colloquy with Mr. Buckman:

> **THE COURT**: Now, Mr. Buckman, I have to tell you that right now what that means is if your counsel hasn't told you, you're looking at 114 months in prison if you screw up. Okay? If that isn't enough motivation over and above what you've already told me, nothing will be. Okay? So 114 months, that's almost 10 years. That's nine and a half years in prison, and you don't get much good time for that either. So that is not something that you want and just prove me right and then wrong and that will be great for you. All right?
>
> I need to advise you that as a result of this felony conviction your right to own, possess, or have under your control any firearm is revoked. That revocation lasts forever unless and until you get a superior court judge in this state to reinstate your right to bear arms. If you own, possess or have under your control any firearm without such a written restatement order, it's a new felony so don't do it. Do you understand? That means hunting too. Okay?
>
> **THE DEFENDANT**: (Nods head up and down.)

RP 3/7/12 16-17. Further into the proceeding, the trial court again questioned Mr. Buckman regarding his understanding and acceptance of his plea:

> **THE COURT**: Mr. Buckman, have you had an adequate time to review this judgment and sentence with Mr. Brown?
>
> **THE DEFENDANT**: Yes, Your Honor.
>
> **THE COURT**: Does it say what it should say?
>
> **THE DEFENDANT**: What's that, Your Honor?
>
> **THE COURT**: Does it say what I said it should say?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And you know what you have to do and what you can't do, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

RP 3/7/12 19-20. Further, on October 11, 2012, in open court, the trial judge had the following colloquy with Mr. Buckman:

THE COURT: Mr. Buckman, have you had adequate time to review these orders with Mr. Brown?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do they say what I said they would say?

THE DEFENDANT: Yes, Your Honor.

RP 10/11/12 2-3. Mr. Buckman also, upon the revocation of his SSOSA agreement, read and signed his felony Judgment and Sentence acknowledging his indeterminate sentence of 114 months to life initially determined in the March 7, 2014 STTDFG. CP 75-76. Based on the trial court's colloquy and Mr. Buckman's admission of his comprehension and the thoroughness of the explanation of the consequences of his plea, Mr. Buckman's plea was made knowingly.

4. Sufficiency Of Evidence To Support The Trial Court's Findings.

A trial court's conclusions of law are reviewed de novo. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

"The purpose of statutory interpretation is 'to determine and give effect to the intent of the legislature.'" *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724, 727 (2012); *see also State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 663, 853 P.2d 444 (1993).

> We derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. Plain language that is not ambiguous does not require construction," but "if more than one interpretation of the plain language is reasonable, the statute is ambiguous and we must then engage in statutory construction. We may then look to legislative history for assistance in discerning legislative intent.

Id. at 192-3, 298 P.3d 724, 727 (*citations omitted*). A penal statute subject to statutory construction due to ambiguity "will be 'strictly construed' in favor of the defendant." Id. at 193-4, 298 P.3d 724, 728 (*citations omitted*). We interpret ambiguous penal statutes "adversely to the defendant only if statutory construction "clearly establishes" that the legislature intended such an interpretation." *Id.* "If the indications of legislative intent are 'insufficient to clarify the ambiguity,' we will then interpret the statute in favor of the defendant." *Id.*

> Interpretation of a penal statute will be either the only reasonable interpretation of the plain language or, if there is no single reasonable interpretation of the plain language, then whichever interpretation is clearly established by statutory construction or, if there is no such clearly established interpretation, then whichever reasonable and justifiable interpretation is most favorable to the defendant.

Id. at 194, 298 P.3d 724, 728 (*citations omitted*).

The text of RCW 9.94A.507(2) indicates that an offender convicted of Rape of a Child in the Second Degree "who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section." The plain language of the statute specifically indicates an age demarcation of anyone under the age of seventeen up to and including the seventeenth birthday, but does not lend initial clarity to the remainder of the seventeenth year up to the eighteenth birthday. Therefore, it must be determined whether the statutory construction of the Sentencing Reform Act of 1981 adds clarity to the issue.

The broad structure of the 1981 Sentencing Reform Act (SRA) codified under RCW 9.94A, the statute indicates that the use of the age seventeen is separate from the other sections found within the SRA. The SRA gives 21 specific notations of the age of 18. RCW 9.94A.030(31); 9.94A.030(34); 9.94A.030(36)(a)(x);

9.94A.030(37)(b)(ii); 9.94A.510(XVI); 9.94A.518(III); 9.94A.533(10)(a); 9.94A.535(3)(g); 9.94A.535(3)(h)(ii); 9.94A.540(1)(e); 9.94A.655(1)(e); 9.94A.6551(1)(e)(3); 9.94A.670(14); 9.94A.703(1)(c); 9.94A.728(10); 9.94A.730(1); 9.94A.827(2). Thirteen of the 21 are used in the context of either "under the age of eighteen" or "over the age of eighteen." Four of the 21 are used as "eighteen or older," and the remaining four of the 21 are used in direct reference of one's 18th birthday. It is only in RCW 9.94A.507 is the age range determined by the age of seventeen, and the closest context is in the "eighteen or older" language.

In the circumstance of the "eighteen or older" statutory language found in the SRA, the statue's plain language determines that the category defined by age is signified by the cut off of the beginning of the age of eighteen. In those circumstances, defining the category by eighteen or older means that one is or is not defined in the category until one reaches the age of eighteen, not 17 and 364 days.

Under the above logic, RCW 9.94A.507(2)'s "seventeen years of age or younger" language should mean anyone under the age of seventeen up to the person's seventeenth birthday, but no further. If the Legislature had intended to include the entire seventeenth year

in this category, it would have fit more in line with the category demarcation used everywhere else within the SRA, "under the age of eighteen."

Mr. Buckman was seventeen years of age, but beyond his seventeenth birthday when he had sexual intercourse with his thirteen year old girlfriend per his admissions. Based on the analysis in this section, Mr. Buckman was correctly sentenced with an indeterminate sentence of 144 months to life for pleading guilty to Rape of a Child in the Second Degree under the requirements given under RCW 9.9A.507(2).

5. Burden Of Proof.

The State is not conceding the sentence is incorrect. *Arguendo*, if this court finds the sentence was incorrect, Mr. Buckman does not have an absolute right to withdraw his guilty plea. Mr. Buckman, as any defendant attempting to withdraw his or her plea, must meet the strict requirements of CrR 4.2(f). Mr. Buckman was unable to meet his burden and the trial court correctly ruled that Mr. Buckman's guilty plea could not be withdrawn because there was not a manifest injustice.

There is no constitutional right to withdraw a guilty plea. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). Under the

criminal court rules "[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." CrR 4.2(f).

The defendant bears the burden of proving manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-4, 916 P.2d 405, 408 (1996). Due to the numerous safeguards in place surrounding a defendant's plea of guilty, the manifest injustice standard is a demanding one. *State v. Arnold*, 81 Wn. App. 379, 385, 914 P.2d 762 (1996), *review denied*, 130 Wn.2d 1003, 925 P.2d 989 (1996). Manifest injustice is defined as "obvious, directly observable, overt, not obscure." *Id.*

A motion to withdraw a guilty plea "is addressed to the sound discretion of the court." *State v. Olmsted*, 70 Wn.2d at 118. A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *Id.* "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Mr. Buckman, in his memorandum of Law in Support of Motion to Withdraw his Guilty Plea, argued that the cases *Stockwell* and *Yates* were inapplicable to the case at hand. CP 94-96. Likewise, Mr.

Buckman failed to address another case on point, *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 320 P.3d 1107 (2014). All three cases dictate that Mr. Buckman was not entitled to the relief requested in the matter.

First, in *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 321 P.3d 1195 (2014), the defendant attempted to withdraw his guilty plea based upon the argument that his plea was "...not knowing voluntary, and intelligent because he was not informed that the proper sentence ...was an indeterminate sentence...rather than a determinate sentence." *Id.* at 39-40. The court held that the defendant must show actual and substantial prejudice to obtain relief. *Id.* at 41. No such showing was made here. Mr. Buckman could have obtained a benefit with a modification of his plea, and thus not be prejudiced. Rather than being sentenced to a minimum with a maximum of life, Mr. Buckman's sentence could have been modified to a determinate sentence instead of filing a motion to withdraw his plea.

The same is true in *In re. Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). In that matter, the Supreme Court agreed that the defendant was misinformed of the statutory maximum, but held that the defendant had failed to show any

resulting prejudice. *Id.* at 591. The same is true here, there is no prejudice that Mr. Buckman can show; only a benefit.

In *Snively*, the court found that the sentence entered was outside the sentencing court's authority. *Id.* at 32. However, the court found that "...his claim that his plea was involuntary due to misinformation as to sentencing is not by itself an exempt ground for relief under 10.73.100." *Id.* The court held the only relief he was entitled to was a correction of the sentence not a complete withdrawal. *Id.* While the underlying issue was an attack on a twenty year old sentence to avoid a civil commitment, the same result is dictated here. Mr. Buckman is entitled only to a correction of the error not a withdrawal.

While it could be argued that these cases are not analogous because a heightened standard of showing prejudice does not apply on a direct appeal of a pleadings error, this is not Mr. Buckman's first attempt at withdrawing his guilty plea. Mr. Buckman has been quite prolific in his use of the appeals process specifically targeting his plea in both a previous direct appeal to this Court as well as a personal restraint petition that was combined and decided on by this Court. It is for those reasons, the State asks this Court determine the perceived prejudice of Mr. Buckman must be actual, and that the trial

court did not abuse its discretion by denying Mr. Buckman's motion to withdraw his guilty plea.

If, arguendo, the defendant is entitled to the presumption of prejudice, certainly such a presumption can be overcome in this case. Simply put, facing less time in prison is a benefit, not a burden. Mr. Buckman actually received the sentence he wanted: a SOSSA. Had Mr. Buckman complied with the terms of the SOSSA, Mr. Buckman's current issue with his sentencing would have never came to be. If this Court should not agree with the trial court's ruling in this case, the State asks this Court to remand for the purpose of resentencing only as opposed to Mr. Buckman's request to withdraw his guilty plea Mr. Buckman appeared to have no issue with when initially given with the favorable SOSSA.

Certainly, if the case were reversed and Mr. Buckman had been sentenced to a determinate sentence and, in fact, was to be subjected to an indeterminate sentence, the prejudice may be present, but that was not the case before the trial court.

Both *Stockwell* and *Yates* were in the same position as the defendant in this matter. All were given a sentence that contained errors, and the State requested the same result be reached in the trial court. The trial court's ruling was not based on unreasonable or

untenable grounds or reasons. Therefore this Court should affirm the trial court's ruling denying the motion to withdraw the guilty plea.

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IV. CONCLUSION

The trial court did not abuse its discretion in sentencing Mr. Buckman with an indeterminate sentence, and for the foregoing reasons, This Court should affirm the trial court's denial Mr. Buckman's motion to withdraw his guilty plea.

RESPECTFULLY submitted this 6 day of July, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: Amber Caulfield
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Rule 9 Intern

And by:
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. BRIAN W. BUCKMAN, Appellant.	No. 46967-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Amber Caulfield, Rule 9 Intern and J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 6, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John Hays, attorney for appellant, at the following email address: Slong@tillerlaw.com.

DATED this 6th day of July, 2015, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

July 06, 2015 - 11:42 AM

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