

65447-1

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NO. 65447-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE MITCHELL,

Appellant.

201105-2 M10-21

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Should four prior separate felony assault convictions, committed on the same day, have been scored separately for sentencing purposes, rather than as one offense comprising the “same criminal conduct,” when the defendant admitted to assaulting four separate victims?

2. Was the defendant’s plea of guilty voluntarily, knowingly, and intelligently made, when the defendant signed the plea statement, the court engaged in a full colloquy, and the defendant was previously found both competent to stand trial and capable of goal-directed, purposeful conduct?

## **II. STATEMENT OF THE CASE**

Respondent accepts the factual statement presented by appellant’s counsel in his motion to withdraw, with the following additions:

The victim, a classification counselor at the Washington State Reformatory in Monroe, suffered a fracture of the orbital bone of her left eye. 1 CP 79 (affidavit of probable cause); 1 CP 30, ¶ 12 (before trial court as part of guilty plea statement).

At the time of plea, trial counsel – in whom the defendant had expressed complete trust and confidence, 1 CP 66 – stated he

believed his client was making a knowing, voluntary, and intelligent waiver of his rights. 2 RP 50-51. The defendant had had a chance to go over the plea paperwork with counsel over the lunch hour. 2 RP 47, 50. He signed the plea paperwork. 2 RP 52; 1 CP 31, 35. The defendant told the court that his statement, in para. 11 of the plea statement, was true. 2 RP 55-56, referencing 1 CP 30. The trial court engaged in a full colloquy with the defendant regarding the rights he was waiving and the consequences of a change of plea. 2 RP 51-57.

An evaluation by Dr. Gregory Kramer of Western State Hospital noted that while the defendant self-reported psychotic episodes, he exhibited no overt symptoms of such on the ward. 1 CP 60, 62. Consequently, it was considered possible he was exaggerating his symptoms. 1 CP 63. The intake psychiatrist opined that the defendant's self-reports of psychotic hallucinations seemed to gratify him, and perhaps filled a "narcissistic need to be more important or more liked[.]" 1 CP 59. While the evaluation discussed possible psychotic disorder, possible mood disorder, and possible personality disorder, 1 CP 63-64, Dr. Kramer's actual diagnosis was firm only on personality disorder. 1 CP 64 (Diagnosis Axis II). The report noted the defendant understood the

pending charges, the risks he was facing, and the role of court and counsel, and was competent to stand trial. 1 CP 65-66. In assessing diminished capacity, Dr. Kramer concluded the defendant was capable of purposeful, goal-oriented conduct, and thus could form the requisite mental state of "intent" for assault. 1 CP 66-69.

With respect to the 1998 assault convictions, the record at sentencing confirms that the defendant was charged in Cowlitz County Superior Court, 98-1-00034-9, with an assault on officer J. Davis (Count I), officer J. Jolly (Count III), Sgt. Dixie Wells (Count IV), and officer C. Davis (Count V). 1 CP 101-102 (information). All the assaults occurred on or about Jan. 12, 1998. *Id.* The defendant pled guilty to these charges. 1 CP 105-111 (see also 1 CP 112-120, judgment and sentence). In his plea paperwork, the defendant admitted to assaulting four police officers. 1 CP 110.

### **III. ARGUMENT**

#### **A. THE RECORD DOES NOT SUPPORT ANY CLAIM THAT THE DEFENDANT'S CHANGE OF PLEA WAS OTHER THAN VOLUNTARILY MADE.**

Under CrR 4.2(f), a guilty plea may be withdrawn if withdrawal is necessary to correct a "manifest injustice." CrR 4.2(f); State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). The

defendant bears the burden of demonstrating a “manifest injustice.” State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). A “manifest injustice” is one that is obvious, directly observable, overt, and not obscure. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991); State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). A trial court's decision to deny a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

Proof a plea was involuntary will satisfy the “manifest injustice” standard. State v. Taylor, 83 Wash.2d at 597. A plea is coerced, and therefore involuntary, if the defendant's will was overborne. State v. Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). However, a defendant seeking to withdraw his or her guilty plea bears a heavy burden in trying to convince a court that it was coerced. State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), overruled on other grounds, Thompson v. Dept. of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999).

Whether a plea is knowingly, intelligently and voluntarily made is determined from a totality of the circumstances. Branch, 129 Wn.2d at 642. The reviewing court regards a defendant's signature on a guilty plea as “strong evidence” that the plea was

voluntary. Id. If the trial court orally inquired into the voluntariness of the plea, the defendant's signature gives rise to a presumption of voluntariness that is "well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

That describes the situation here. The defendant signed the document. 2 RP 52; 1 CP 31, 35. The court engaged in a full colloquy before accepting the plea. 2 RP 52; 1 CP 31, 35. The defendant's own counsel thought his client was acting voluntarily, knowingly, and intelligently. 2 RP 50-51. And there was a real benefit to the defendant, for he was facing trial on second-degree assault. The plea offer, which he accepted, was to custodial assault.<sup>1</sup> The difference in standard range between the two crimes was 63-84 months (assault 2<sup>o</sup>) versus 51-60 (custodial assault). Compare Washington State Sentencing Guidelines Comm'n, Adult Sentencing Manual III-43 with III-83 (2008) (scoring sheets).

Juxtaposed against this "well nigh irrefutable" factual setting are the defendant's mental health issues. But trial counsel, who was well aware of them, see 2 RP 70-72, expressed his opinion

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<sup>1</sup> Counsel for appellant, in seeking to withdraw, has only raised *possible* issues. But should the voluntariness of the plea be raised as an actual claim of error, either by defendant pro se or by new counsel, this would be a breach of the plea agreement, freeing the State to retry the defendant for second-degree assault. See 1 CP 34, ¶¶ 6, 7.

that his client was proceeding voluntarily in pleading guilty. 2 RP 50-51. The defendant, after thorough examination, had been found competent to stand trial and capable of forming the requisite intent for the charged crime. 1 CP 65-69. There were also the concerns that he might have been exaggerating his symptoms. 1 CP 59-60, 62-63. Issues raised in the forensic psychological report do not refute the presumption of voluntariness that attaches to the facts surrounding this plea.

**B. CRIMES COMMITTED UPON DIFFERENT VICTIMS CANNOT COMPRISE THE “SAME CRIMINAL CONDUCT.”**

The defendant had four prior felony assault convictions under one cause number and with one date of violation. The trial court counted each of these as one point. 2 RP 66; see 1 CP 38-40 (criminal history and scoring sheet). In his motion to withdraw, counsel for the defendant suggests that the trial court’s declining to find that these four convictions comprised the “same criminal conduct” is a possible issue for this Court’s independent review.

Since the defendant’s four assault 3<sup>o</sup> convictions were committed after July 1, 1986, they are to be counted separately unless found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i) and –(ii). Crimes

encompass the same criminal conduct if they involve 1) the same criminal intent and were committed 2) against the same victim at 3) the same time and place. RCW 9.94A.589(1)(a); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998); State v. Garza-Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993). All three "prongs" – same intent, same victim, same time and place – must be met for crimes to involve the same criminal conduct. Deharo, 136 Wn.2d at 258; State v. Miller, 92 Wn. App. 693, 707, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023 (1999). Crimes against different victims will never be the same criminal conduct even if driven by the same subjective purpose. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987) (kidnap and robbery of two women); State v. Garnier, 52 Wn. App. 657, 659, 661, 763 P.2d 209 (1988) (burglary of 18 separate suites in a building).

That is the case here. The information in Cowlitz County cause 98-1-00034-9 listed four separate counts of third-degree assault, with a separate named police officer as the victim on each. 1 CP 101-102; see above, p. 3 (naming them). And in his statement on plea of guilty, the defendant admitted to assaulting four police officers. 1 CP 110. Inquiry need go no further.

An appellate court will reverse a sentencing court's decision on "same criminal conduct" only if it finds a clear abuse of discretion or misapplication of the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (construing statute narrowly to disallow most claims of same criminal conduct). Neither is found on this record. This issue is frivolous.

#### **IV. CONCLUSION**

After independent review by this Court, the judgment and sentence should be *affirmed*.

Respectfully submitted on December 1, 2010.

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