

NO. 44142-0-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

MELVIN ALBERT KIMBREL,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

The Honorable Gary Tabor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MR. KIMBREL IS ENTITLED TO WITHDRAW HIS ALFORD PLEA BECAUSE HE DID NOT UNDERSTAND HE WAS WAIVING HIS RIGHT TO APPEAL HIS CONVICTION, OR OTHER DIRECT CONSEQUENCES THUS, IT WAS NOT VOLUNTARILY MADE.

A criminal defendant waives important constitutional rights when he enters a plea of guilty, and due process requires the plea be knowingly, intelligently and voluntarily entered. U.S. Const. amends. 5, 14; Wash. Const. art. 1 §§ 3, 22; *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1079, 23 L.Ed.2d 274 (1969); *Personal Restraint of Isadore*, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004). The State bears the burden of demonstrating a plea is knowing, intelligent and voluntary. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

CrR 4.2 also governs guilty pleas, and sets forth procedural safeguards designed to make certain that a defendant's constitutional rights are protected. *State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). The rule requires the trial court to permit a defendant to withdraw his guilty plea to correct a "manifest injustice." CrR 4.2(f).<sup>1</sup> The court

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<sup>1</sup>CrR 4.2(f) reads in full:

The court shall allow a defendant to withdraw the defendants [sic] 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.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the

shall allow a defendant to withdraw a plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. *Id.*

A “manifest injustice” is one that is “obvious, directly observable, overt, not obscure.” *Ross*, 129 Wn.2d at 284, quoting *State v. Sass*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). The Washington Supreme Court has identified four non-exclusive situations that meet the “manifest injustice” standard: (1) ineffectiveness of trial counsel; (2) a plea not ratified by the Defendant; (3) an involuntary plea; and (4) the prosecutor’s breach of a plea bargain. *Taylor*, 83 Wn.2d at 597.

A plea is "not knowingly, voluntarily, or intelligently entered unless a defendant correctly understands its direct sentencing consequences." *State v. Kisse*, 88 Wn.App. 817, 821, 947 P.2d 262 (1997). By entering an *Alford* plea, Mr. Kimbrel was of course waiving his right to appeal the conviction. Such a consequence is direct, because it is definite and immediate. *Kisse*, at 822.

Although Mr. Kimbrel sought to withdraw his plea after judgment and sentence had been entered, the Court of Appeals may still review the circumstances under which the plea was entered. *State v. Saylor*, 91 Wn.2d 532, 536, 588 P.2d 1350 (1979). Indeed, the Court of Appeals reviews the trial court's ruling on a post-judgment motion to withdraw for abuse of

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defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after the judgment, it shall be governed by CrR 7.8.

discretion. *State v. Olmstead*, 70 Wn.2d 116, 422 P.2d 312 (1966).

Due process clearly requires that a defendant's plea be voluntary, knowing, and intelligent. *State v. McDermond*, 112, Wn.App. 239, 243, 47 P.3d 600 (2002). In addition to the constitutional requirement, CrR 4.2(d) provides in pertinent part:

(d) **Voluntariness:** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and *with an understanding of the nature of the charge and the consequences of the plea.* (emphasis added).

A trial court should grant leave to withdraw a plea 'whenever it appears that the withdrawal is necessary to correct a manifest injustice.' CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). As noted *supra*, "manifest injustice" means "an injustice that is obvious, directly observable, overt, [and] not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). An involuntary plea is a manifest injustice for purposes of CrR 4.2(f). *State v. Walsh*, 143 Wn.2d 1,8, 17 P.3d 591 (2001).

Kimbrel evidenced his fundamental misunderstanding of the meaning of an *Alford* plea or the ramifications of entering a plea in general. During the first hearing, on February 14, 2011, when asked if he understood the ramifications of a "strike offense," Kimbrel stated, "Yeah, but you're taking away, waiving all my rights, and I've never had a chance to prove I'm not guilty." RP at 43. After discussion, counsel informed the court

that the matter would be proceeding to trial. RP at 44. Another hearing took place February 16, 2011. At the conclusion of that hearing, Kimbrel again showed his misapprehension of the proceedings by stating, during allocution that “it was an accident.” RP at 53. It is unclear whether Kimbrel understood much of the procedure or consequences at all: could he appeal the conviction? Was it a strike offense? Would community custody imposed? He clearly did not understand the direct consequences of his plea and the court did not engage in inquiry after it became clear that Kimbrel did not understand the ramifications. Mr. Kimbrel had no prior criminal history or involvement in criminal proceedings. He had no idea what it meant to be barred from making an appeal or a collateral attack on the judgment. His statements to the court indicates he did not enter the plea with an understanding of its consequences, that is, he did not enter the plea voluntarily. CrR 4.2(d). Because an involuntary plea is a manifest injustice, Mr. Kimbrel should be allowed to withdraw his *Alford* pleas.

**B. CONCLUSION**

Based on the foregoing facts and authorities, Mr. Kimbrel respectfully requests he be allowed to withdraw his *Alford* pleas.

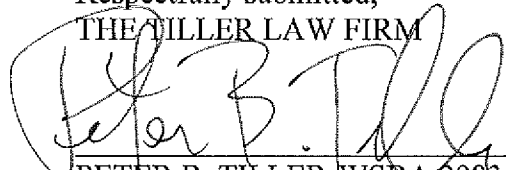
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DATED: July 30, 2013.

Respectfully submitted,

THE TILLER LAW FIRM




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Of Attorneys for Melvin Kimbrel

CERTIFICATE OF SERVICE

The undersigned certifies that on July 30, 2013, that this Reply Brief was e-filed, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to Ms. Carol LaVerne, Thurston County Deputy Prosecutor, 2000 Lakeridge Drive SW. Bldg. 2, Olympia, WA 98502 and Mr. Melvin Kimbrel, 1333 Gerrard Creek Road, Oakville, WA 98568, true and correct copies of this Reply Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 30, 2013.



PETER B. TILLER



# TILLER LAW OFFICE

**July 30, 2013 - 3:32 PM**

## Transmittal Letter

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