IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID LEE ROY GOODWIN, Appellant.	No. 38126-5-II UNPUBLISHED OPINION

Bridgewater, J. — David Lee Roy Goodwin appeals his conviction for attempted child rape on plea of guilty, and the trial court's denial of his motion to withdraw his guilty plea. We hold that the trial court did not abuse its discretion in imposing a minimum sentence under former RCW 9.94A.712 (2006) at the top of the standard range, nor did the court abuse its discretion in denying Goodwin's motion to withdraw his guilty plea. We affirm.

Facts

By information filed October 25, 2007, the State charged Goodwin with 10 counts of first degree rape of a child against the same complaining witness. The State also filed a notice of aggravating factors and intent to seek an exceptional sentence. Following plea negotiations, the State and the defense agreed that Goodwin would enter an *Alford*[1] plea to one count of attempted first degree child rape under a third amended information charging no other crimes. The parties also agreed to sentencing under former RCW 9.94A.712,[2] with a maximum sentence of life and a minimum mandatory incarceration period within a standard range of 156.75 to 207.75 months, based on an agreed offender scored of 8. The State agreed to recommend a minimum sentence at the low end of the standard range, and did so at sentencing.

On March 28, 2008, Goodwin entered an *Alford* plea in open court and a written statement of defendant on plea of guilty to sex offense. The State filed a third amended information as above described. The trial court conducted a colloquy with the defendant regarding the consequences of his guilty plea. Goodwin acknowledged that he had carefully reviewed the statement on plea of guilty with his attorney and that he understood it. The court reiterated, "You understand that that I'm not bound by [the State's] recommendation and could impose any sentence up to the maximum?" RP (Mar. 28, 2008) at 6-7. Goodwin acknowledged that he understood so, and the court ultimately accepted Goodwin's guilty plea. The court then

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] Former RCW 9.94A.712 is an indeterminate sentencing statute that governs sentencing for nonpersistent sex offenders. Under the statute's provisions, the trial court must impose both a minimum and maximum sentence. The maximum sentence is the statutory maximum sentence for the offense. When imposing the minimum sentence, the court may either impose a standard range or an exceptional sentence. *State v. Hughes*, 166 Wn.2d 675, 687, 212 P.3d 558 (2009).

ordered a presentence investigation report and set a sentencing hearing.

Prior to the scheduled sentencing hearing, the defendant filed a motion to withdraw his guilty plea on the basis of new evidence. The new evidence consisted of statements by two witnesses who reported that following the guilty plea hearing, the father of the complaining witness said to them, "I feel like I finally got my revenge." CP at 38. The State responded at the hearing on the withdrawal motion that (1) the evidence was not newly discovered, and (2) it was too ambiguous in any event to qualify as a basis to justify withdrawal of the guilty plea. The court denied Goodwin's motion to withdraw his guilty plea, finding that although the father's statement was not available until after the entry of Goodwin's guilty plea, the statement was ambiguous, and thus did not justify withdrawal of the plea.

At the subsequent sentencing hearing, the court sentenced Goodwin at the top of the standard range to a minimum term under former RCW 9.94A.712 of 207.75 months. The court stated that it was not following the joint recommendation of 156.75 months because the court was "not satisfied that there has been any acceptance of responsibility here, that coupled with the motion to withdraw the guilty plea tells me that he's not entitled to a sentence at the low end of the range." RP (July 23, 2008) at 5. Goodwin's appeal followed.

Discussion

Denial of Defendant's Motion to Withdraw Guilty Plea

Goodwin first contends that the trial court abused its discretion in denying his motion to withdraw his guilty plea. We disagree.

We review a trial court's decision on a motion to withdraw a guilty plea for an abuse of

discretion. *State v. Zhao,* 157 Wn.2d 188, 197 n.5, 137 P.3d 835 (2006); *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Alternatively, we consider whether any reasonable judge would rule as the trial judge did. *Thang*, 145 Wn.2d at 642.

CrR 4.2(f) allows a defendant to withdraw his or her plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." This is a very demanding standard. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). A manifest injustice is one that is obvious, directly observable, overt, and not obscure. *Saas*, 118 Wn.2d at 42; *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Examples of such manifest injustice include instances where the plea was not ratified by the defendant, the plea was not voluntary, effective counsel was denied, or the plea agreement was not kept. *Zhao,* 157 Wn.2d at 197.

When a defendant fills out a written plea statement under CrR 4.2(g) and acknowledges that he has read and understands it and that its contents are true, we presume that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *State v. Hennings*, 34 Wn. App. 843, 846, 664 P.2d 10 (1983) (use of written form set out in CrR 4.2(g) is sufficient to show that defendant is aware of the sentencing consequences of his plea); *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (defendant's signature on plea agreement is "strong evidence" that the agreement is voluntary). Additionally, when the judge goes on to inquire orally of the defendant and satisfies himself or herself 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, 262, 654 P.2d 708 (1982).

Goodwin contends that a defendant must be permitted to withdraw a guilty plea that was not made knowingly, voluntarily, and intelligently. He cites *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), and *State v. Kissee*, 88 Wn. App. 817, 947 P.2d 262 (1997), but both cases are distinguishable. *Walsh* held that the defendant's plea was not made voluntarily where it was based on a mutual mistake about the appropriate standard range. *Walsh*, 143 Wn.2d at 8-9. *Kissee* held that a mistaken belief that defendant was eligible for a SSOSA sentence was sufficient basis to withdraw a guilty plea. *Kissee*, 88 Wn. App. at 822. Neither circumstance warranting withdrawal of a guilty plea is present here.

Goodwin next contends that his plea was not made knowingly, voluntarily, and intelligently because the statement on plea of guilty form that he signed contained "legal errors." Br. of Appellant at 12. Goodwin argues that the form does not accurately reflect the change in the law wrought by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He contends that under *Blakely*, "any aggravating factor which is used to *enhance punishment above the top of the standard range* for a determinate sentence, other than criminal history, must be alleged in the charging document or by separate notice, and must be proven to a judge or jury beyond a reasonable doubt," Br. of Appellant at 10-11 (emphasis added), and the form does not accurately reflect this altered legal landscape. This contention is dubious,[3] and

[3] "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely,* 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). *Blakely* clarified that the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303 (emphasis omitted). The statement on

irrelevant in any event because Goodwin's sentence is within the standard range. Because Goodwin complains about an alleged legal error in the form that has no bearing on his case, we decline to address it further.

Goodwin also contends that, by stating that a standard range sentence cannot be appealed, the guilty plea form misstates the law. We disagree. The statement on the form, although lacking nuance, is generally correct. "As a general rule, the *length* of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the *correct* standard sentencing range." *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003) (emphasis added). For present purposes we need only note that while a defendant may appeal the sentencing court's determination of the appropriate standard range, he may not challenge the court's discretionary imposition of a sentence that lies within that range. *Cf. Williams*, 149 Wn.2d at 146-47 (discussing the nuances of appealing a standard range sentence). Again, the alleged legal error in the form that Goodwin points to does not assist him. As further discussed below, Goodwin only contends that as to the sentence imposed the trial court abused its discretion by sentencing Goodwin at the high end of the standard range, he does not contend that

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plea of guilty form at issue here contained a provision that reflected the requirements of *Blakely*, stating:

> The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP at 62; *see also* CrR 4.2(g) subsection 6.(h)(iv).

the standard range the court applied was incorrect. "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." *Williams*, 149 Wn.2d at 146-47.

As noted, Goodwin's underlying and primary complaint is that the trial court imposed a sentence at the top of the standard range rather than the bottom of the range as recommended by the State pursuant to the plea agreement. But the written plea form clearly stated that he trial court was not bound by any sentence recommendation. Moreover, the trial court verified in an extensive colloquy that Goodwin understood that to be so, and that the court was free to sentence him at the top of the range.

Goodwin additionally argues that when he entered his guilty plea, he was unaware that the father of the complaining witness "might well have acted in a manner so as to have his daughter fabricate the charges against [Goodwin]." Br. of Appellant at 12. Goodwin notes that he promptly moved to withdraw his plea when he became aware of the father's statement indicating that he finally "got [his] revenge." CP at 37. He contends that the trial court *could* have granted his motion to withdraw his plea and that this court should vacate his sentence and remand with instructions to grant the plea withdrawal. But as we have noted, the trial court's decision on a motion to withdraw plea is discretionary. Here, the trial court found that the alleged statement by the victim's father was ambiguous and thus provided no basis for withdrawing the plea. Goodwin does not attempt to challenge that finding. Under these circumstances, we hold that the trial court did not abuse its discretion in denying Goodwin's motion to withdraw his guilty plea.

Standard Range Sentence

Goodwin contends that the trial court abused its discretion by imposing a sentence at the top of the standard range in order to punish him for entering an *Alford* plea and moving to withdraw his guilty plea. We disagree.

Judges are afforded "nearly unlimited discretion" in determining an appropriate sentence within the standard range. *State v. Mail*, 121 Wn.2d 707, 711 n.2, 854 P.2d 1042 (1993). "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." *Williams*, 149 Wn.2d at 146-47.

Goodwin relies on *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), but that case is distinguishable. There, our Supreme Court held that the categorical refusal to consider a DOSA sentence for *any* defendant was a failure to exercise discretion and reversible error. *Grayson*, 154 Wn.2d at 341-42. Here, there is no similar failure to exercise discretion. Goodwin mischaracterizes the trial court's comments as a categorical refusal to impose less than top-of-the-range sentences upon defendants who make *Alford* pleas. But the judge made no such statement. Instead, he found that *in this case* Goodwin had not shown any acceptance of responsibility and thus the State's recommended low-end standard range sentence was not justified. Notably, the trial judge was not required to give any reasons when sentencing Goodwin within the standard range. *State v. Mail*, 65 Wn. App. 295, 297, 828 P.2d 70 (1992), *aff'd*, 121 Wn.2d 707, 854 P.2d 1042 (1993). In any event, Goodwin's apparent lack of remorse

was not an improper consideration for imposing a standard range sentence different from what the State recommended. *Cf. State v. Sagastegui*, 135 Wn.2d 67, 96, 954 P.2d 1311 (1998) (death penalty case indicating that where defendant showed lack of remorse, leniency in sentencing was not warranted).

Goodwin asserts that under *Alford* he may enter a guilty plea without admitting guilt, and that under CrR 4.2(f) he may seek to withdraw that plea. Both contentions are true, but irrelevant as to the standard range sentence that he received. Goodwin was not impermissibly punished for entering an *Alford* plea and later seeking to withdraw that plea. *Cf. United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991) (defendant suffered no penalty for exercising his right to remain silent where trial court sentenced him at high end of federal presumptive range because he did not assist in drug investigation). The salient point is that nothing entitles Goodwin to a low end standard range sentence simply because the State was obliged to recommend such a sentence by the plea agreement. Here, there was no failure to exercise discretion and no improper punishment as Goodwin contends. Rather the trial court properly exercised its discretion in sentencing Goodwin to a standard range sentence. Under the facts of this case, that exercise of discretion is unassailable. Accordingly, we hold that the trial court did not abuse its discretion in imposing a minimum sentence at the top end of the standard range.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Houghton, J.

Van Deren, C.J.