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

STATE OF WASHINGTON,	)	No. 62714-7-I
Respondent,	)	
v.	)	UNPUBLISHED OPINION
MICHAEL A. BASSETT,	)	
Appellant.	)	
	)	FILED: November 9, 2009

Schindler, C.J. — Michael Bassett appeals the trial court's denial of his motion to withdraw his guilty plea based on newly discovered evidence and the circumstances surrounding the entry of his plea. Because the trial court properly determined that withdrawal was not necessary to correct a manifest injustice, we affirm.

FACTS

According to witnesses present at a night club on November 19, 2007, Michael Bassett fired a gun four times, injuring Keith Russell, Ashley Reda, and Michael Hop. Ashley Hallen told police that she was standing near Russell when Bassett approached, stepped on her feet, and grabbed Russell and

pushed him onto the dance floor. Hallen saw the two struggle, heard gunshots and saw flashes coming from between them, and then saw Russell fall. Derrick Knox also told police that he saw Bassett push Russell onto the dance floor where the two struggled until shots were fired. Robert Curcio told a police detective that he saw two men fighting on the dance floor. One guy was pushed into Curcio, bent over, and pulled a gun out of his waistband. As he was still bent over, he was pushed again and the gun went off while it "was still pointed downward." Curcio then heard two more shots and a bullet "whizzed by [his] right ear."

Based on witness accounts, security video footage and additional investigation, police located and interviewed Bassett on November 28, 2007. Bassett admitted to being at the club but denied being the shooter. Bassett told police that he was dancing in the area where the shooting occurred but was hit in the face or head when the fighting started and didn't see anything.

On December 3, 2007, the State charged Bassett with one count of first degree assault for shooting Russell and two counts of second degree assault for shooting Reda and Hop. Including a 60 month weapon enhancement, the standard range for the charges was 222 to 276 months. On January 10, 2008, the State offered to recommend a mid-range sentence if Bassett agreed to plead guilty as charged. Based on negotiations with defense counsel, the State agreed to extend the offer until March 20. But when Bassett refused the offer at a case setting hearing on March 20, the State amended the information to

charge three counts of first degree assault, one count of attempted first degree robbery, and one count of unlawful possession of a firearm in the second degree, resulting in a standard range of 540 to 646 months, including weapon enhancements. The next day, defense counsel contacted the prosecutor and asked her to accept Bassett's plea on the terms of the original offer. On March 26, 2008, Bassett pleaded guilty to one count of first degree assault and two counts of second degree assault as originally charged. At the plea hearing, Bassett signed a Statement of Defendant on Plea of Guilty and the trial court conducted a colloquy before accepting the plea. Bassett was obviously upset during the plea hearing and broke down repeatedly.

On April 16, 2008, a defense investigator located and interviewed Curcio, who had not responded to defense efforts to contact him. Curcio, who was in the Navy and was familiar with guns, told the investigator that the shooting appeared to be accidental because the gun fired as Bassett was pushed and stumbled backwards and down a step. On May 8, 2008, Bassett filed a motion to withdraw his guilty plea based on the newly discovered evidence provided by Curcio in the interview. He also claimed that the plea was involuntary based on the totality of the circumstances, including the lack of a recording of the plea hearing due to an equipment malfunction and Bassett's extremely emotional state. In the alternative, Bassett requested new counsel to determine whether he received ineffective assistance of counsel, justifying withdrawal of the plea.

The State filed a brief in opposition to Bassett's motion to withdraw his

plea, challenging Curcio's credibility and disputing Bassett's complaints regarding the voluntariness of the plea. In support, the State provided a declaration of Detective James Cooper describing the attributes of the gun likely used in the shooting. Based on the bullets recovered at the scene and the statements of witnesses who claimed to have heard four separate shots, Cooper concluded that the gun "was most likely a double-action .380 caliber semi-automatic handgun" that takes at least "7-10 pounds of force to pull the trigger," and "cannot be fired "accidentally" four times."

On July 30 and August 5, the trial court heard argument on the motion to withdraw the plea. The trial court reviewed the transcript of the defense interview of Curcio. While acknowledging that Curcio described the first shot as accidental, the trial court was not persuaded that Curcio's description of the next two shots sufficiently altered the factual basis of the plea to create a manifest injustice warranting withdrawal of the plea. In particular, the trial court observed that Curcio "seems to be opining that although he said he didn't see where the two shots came from, he's saying now, you know, I think they were accidental because he could have done better." Moreover, the trial court noted, "[o]riginally [Bassett] was asserting he was not the shooter. Then at the time of the plea, he admitted his culpability." Although there was "no doubt that he was conflicted when he entered the plea," Bassett "went forward, indicated that he was doing it freely and voluntarily" and did not raise any factual dispute "with regard to the way the plea was conducted and the representations that were made to Judge

McBroom that prompted him to accept the plea." The trial court denied the motion to withdraw the guilty plea.

The trial court also denied the alternative motion for new counsel to investigate the potential for an ineffective assistance claim. However, after a hearing in October 2008, the trial court allowed defense counsel to withdraw based on a conflict of interest and appointed new counsel. Bassett's new attorney appeared at the December 1, 2008 sentencing hearing and presented a written motion to withdraw Bassett's guilty plea, on the grounds that the plea colloquy was not recorded such that it could not be determined whether prior counsel rendered ineffective assistance. The trial court denied the motion and imposed a standard range sentence.

Bassett appeals.

DISCUSSION

We will not reverse a trial court's denial of a motion to withdraw a guilty plea absent an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). "To hold that a trial court has abused its discretion, the record must show that the discretion exercised by the court was predicated upon grounds clearly untenable or manifestly unreasonable." State v. Olmsted, 70 Wn.2d 116, 119, 422 P.2d 312 (1966).

Under CrR 4.2(f), a court must allow withdrawal of a guilty plea if "necessary to correct a manifest injustice."[1] A manifest injustice is "obvious,

[1] Citing authority from other jurisdictions and American Bar Association standards, Bassett urges us to adopt a different standard for evaluating a motion to withdraw a guilty plea

directly observable, overt, not obscure." State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996).

Relying on State v. D.T.M., 78 Wn. App. 216, 220-21, 896 P.2d 108 (1995), Bassett argues that newly discovered evidence that substantially changes the factual basis for a plea, creates a manifest injustice warranting withdrawal of a guilty plea. But in D.T.M., after the defendant entered an Alford [2] plea, the victim recanted her earlier statement that had been the sole factual basis for a finding of guilt. D.T.M., 78 Wn. App. at 220. Because the recantation, if true, met the criteria for a new trial under CrR 7.8(b)(2), the trial court was required to evaluate the witness's credibility at a hearing, and if it found the recantation credible, to allow the defendant to withdraw his plea and proceed to trial. D.T.M., 78 Wn. App at 221.

Here, in the Statement of Defendant of Plea of Guilty, Bassett states:

> The judge has asked me to state briefly in my own words what I did that makes me guilty of this (these) crime(s). This is my statement:
>
> On 11/19/07 in King County Washing[ton], I with intent to inflict great bodily harm did assault Keith Russell with a firearm, a means likely to produce great bodily harm or death and did inflict great bodily harm on Keith Russell. On 11/19/07 in King County Washington I did intentionally assault Ashley Reda with a deadly weapon, a firearm. On 11/19/07 in King County Washington I did intentionally assault Michael Hop with a deadly weapon, a firearm. I did all this by taking a firearm into a dance club, shooting at Keith Russell four times on the dance floor, hitting Russell, Reda, & Hop.

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when it is filed before sentencing. Because he raises this argument for the first time on appeal and because he does not dispute that CrR 4.2(f) expresses the current rule in Washington, we need not address it here. RAP 2.5(a).

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

The Curcio interview arguably provided support for a potential defense of accident. But Bassett does not argue, and cannot demonstrate, that his guilty plea and conviction lack factual support because Curcio later provided the defense with additional details not contained in his original statement to the police. See, State v. Arnold, 81 Wn. App. 379, 386-87, 914 P.2d 762 (1996) (defendant's statement on plea of guilty and statements made by other victim provided independent evidence of guilt, such that newly discovered testimony of recanting victim did not demonstrate manifest injustice warranting withdrawal of guilty plea); In re Pers. Restraint of Clements, 125 Wn. App. 634, 642-43, 106 P.3d 244 (2005) (where additional unrecanted evidence supported finding of guilt, victim's recantation did not provide grounds for finding of manifest injustice). The trial court properly determined that the Curio interview did not establish a manifest injustice warranting withdrawal of Bassett's guilty plea.

Basset also contends that the circumstances surrounding the plea demonstrate a manifest injustice justifying withdrawal of his plea. In particular, Bassett claims that the State's coercive tactics, his own emotional turmoil and obvious distress at the plea hearing, and the absence of a recording of the plea hearing, demonstrate that his plea was involuntary. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974) (involuntary plea would establish manifest injustice).

But Bassett signed the statement on plea of guilty indicating that he made

the plea "freely and voluntarily" and not as a result of threats or promises, thereby providing "prima facie verification of the plea's voluntariness." State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Despite the lack of a transcript of the hearing, Bassett does not dispute that when questioned by the prosecutor, he affirmed his understanding of the charges, his rights, and the consequences of his plea, as well as his intention to enter a plea of guilty. Bassett does not dispute that the judge also inquired orally of him at the hearing and was satisfied that the plea was made voluntarily, such that the "presumption of voluntariness is well nigh irrefutable." Perez, 33 Wn. App. at 262.

The trial court did not abuse its discretion by denying Bassett's motion to withdraw his guilty plea.

Affirmed.

Schindler, C.J.

WE CONCUR:

Cox, J.

Ellington, J.