IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. IVAN BROOKS FLUKER, Appellant.	)	No. 63104-7-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: June 1, 2010

Spearman, J.-Ivan Fluker argues the trial court should have permitted him to withdraw his plea of guilty to first degree burglary and second degree assault. Holding that Fluker has failed to demonstrate his plea was involuntary, we affirm.

FACTS

The State charged Ivan Fluker with burglary in the first degree, assault in the second degree, and felony harassment, all stemming from an incident at the home of his estranged girlfriend. Both the burglary count and the assault count included a firearm enhancement. The State offered to dismiss the felony harassment charge and the firearm enhancement on the burglary charge if Fluker would plead guilty.

At the hearing on Fluker's plea of guilty, the trial court carefully reviewed with Fluker his constitutional rights and the consequences of his plea

agreement:

> THE COURT: Okay. You understand you are charged with two crimes. (Inaudible) burglary in the first degree, and count two is assault in the second degree with a firearm (inaudible) domestic violence. Have you discussed with [your attorney] Mr. Nacht what the State would have to prove to find you guilty of these charges?
>
> THE DEFENDANT: Yes, ma'am.
>
> . . .
>
> THE COURT: Okay. If you look at page two of the statement paragraph (inaudible) lists important (inaudible) constitutional rights you have (inaudible) before trial. Have you had a chance to review those with Mr. Nacht?
>
> THE DEFENDANT: Yes, ma'am.
>
> . . .
>
> THE COURT: You understand that once you (inaudible) you give up each and every one of these rights?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: . . . On court two, standard range is twelve months plus one day to 14 months in prison. There will be a three year enhancement added, and the maximum term is ten years and $5,000 fine. Are you aware of that range? Those ranges (inaudible).
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Sir, you seem a little distressed today. (Inaudible.)
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Okay. Nobody wants to plead guilty, but are you ready to do this today?
>
> THE DEFENDANT: Yes, ma'am.
>
> . . .
>
> THE COURT: Okay. Now, this range, of course, is based on your known criminal history (inaudible) sentencing. Additional criminal (inaudible) your range would increase the prosecutor's recommendation and (inaudible) increase (inaudible). You will not be permitted to withdraw the plea. Are you aware of that?
>
> THE DEFENDANT: Yes, ma'am.
>
> . . .
>
> THE COURT: And I can't tell if it's agreed, but if it's not agreed you and your attorney (inaudible) make your own recommendation. But the judge is not bound by either recommendation (inaudible) sentence you anywhere within the standard range, including up to the maximum, which would be 34 months (inaudible) 14 months plus (inaudible).

THE DEFENDANT: Yes, ma'am.

The trial court then recited the factual basis of the charges against Fluker and asked Fluker, "Is this a true statement?" Fluker replied, "No, ma'am." At this point, the court declined to continue taking the plea, and recessed the proceedings to permit Fluker time to discuss the plea with his attorney. When Fluker returned, he indicated he did, in fact, wish to enter a plea of guilty:

> THE COURT: All right. Sir, we were talking about paragraph eleven on page nine, and I had asked you whether you adopt this statement as your own. Do you adopt this statement as your own even though it's written out by your attorney and prosecutor?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: And at least for purposes of this plea and sentencing do you accept this statement as a true statement?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: Do you feel anyone has threatened you or pressured you to plead guilty here? (Inaudible) really (inaudible).
> MR. NACHT: Your Honor, may I note for the Court that Mr. Fluker is facing charges that carry approximately twelve and a half years' firearm enhancements. Plus the class A felony in count one that would then carry approximately four years of time. So the question by the Court may be a loaded question as far as does he feel pressured. . . . [I]n any event he's indicated that he wishes to take the offer made by the State as noted on these documents.
> THE COURT: So Mr. Fluker is that really what you want to do? You are kind of between a rock and a hard place. State has made some very serious charges against you. This is an offer that eliminates one of the counts and (Inaudible.) firearm enhancements. But it is completely up to you whether you want to take this plea and plead guilty to these charges or not.
> THE DEFENDANT: Yes, ma'am.
> THE COURT: That's your intent? Okay. Counsel, I need both you and your client to sign the statement.
> MR. NACHT: Get your signature there. And (inaudible).
> THE COURT: So now Mr. Fluker, other than the pressure of the charges against you do you feel that anyone else has threatened you or pressured you to plead guilty?
> THE DEFENDANT: No, ma'am.

The court accepted Fluker's plea.

Before sentencing, Fluker obtained new counsel and moved to withdraw his guilty plea. The motion was based entirely on Fluker's allegation that post-traumatic stress disorder rendered his plea involuntary. In support of his motion, Fluker submitted a transcript of the plea hearing, the plea agreement paperwork, a letter from a mental health specialist, and an article regarding post-traumatic stress disorder. Fluker offered no testimony. The trial court concluded there was no evidence that post-traumatic stress disorder had prevented Fluker from understanding the consequences of his plea agreement, and denied the motion. Nevertheless, the court ordered Fluker to undergo an evaluation at Western State Hospital.

Upon Fluker's return, the court reviewed the written evaluation prepared by Western State Hospital and heard from both parties. The court found nothing to support Fluker's claim that he was incompetent when he entered his guilty plea and concluded that the sentencing should proceed. Fluker did not designate the written evalution for review.

During the prosecutor's sentencing presentation he advised the court of what he believed to be an error in the previous prosecutor's written sentencing recommendation. Specifically, he told the trial court that the remaining firearm enhancement was to be added only to the end of the sentence for the assault charge, rather than to the end of the total sentence. As such, he stated, the written recommendation should have been for only 48 months instead of 62

months.[1] Defense counsel and the court agreed, and the court imposed a sentence of 48 months.

The next day, however, before entry of the judgment and sentence, the prosecutor advised the court that he had been wrong and that the original recommendation was correct. On the State's motion the court reconvened the sentencing hearing. At the hearing the court agreed with the State's calculation of the sentencing range and imposed the 62 month sentence over the defendant's objection. Fluker appeals.

DISCUSSION

In his RAP 10.10 statement of additional grounds for review Fluker contends that the trial court erred by refusing to allow him to withdraw his plea. Specifically, he claims he was suffering from post-traumatic stress disorder and, thus, was not competent to enter his plea of guilty. We disagree.

A trial court must allow a defendant to withdraw a guilty plea if it appears that withdrawal is necessary to correct a manifest injustice. State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996); CrR 4.2(f). Under CrR 4.2(d), the trial court cannot accept a guilty plea "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." The court also must be "satisfied that there

[1] With Fluker's offender score, the low end of the standard range for burglary in the first degree was 26 months; for assault in the second degree, the low end of the standard range was 12 months. These two counts were to run concurrently. The firearm enhancement added 36 months.

is a factual basis for the plea." In carrying his burden of demonstrating the existence of a manifest injustice, a defendant must show more than technical noncompliance with CrR 4.2; the constitutional standard is whether the plea was made knowingly, intelligently, and voluntarily. Branch, 129 Wn.2d at 641-42.

The test for assessing a defendant's competency to enter a guilty plea is whether he was capable of making "a voluntary and intelligent choice among the alternative courses of action." State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970)). The trial court has broad discretion to judge the mental competency of a defendant and may base its determination on a variety of factors, including the defendant's appearance, demeanor, and conduct; his personal and family history; any medical and psychiatric evidence; and the statements of counsel. State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993); State v. Loux, 24 Wn. App. 545, 548, 604 P.2d 177 (1979). Expert opinion is not binding on the judge, who may weigh the credibility of witnesses and give credence to his or her own recollection of the defendant when the plea was entered. Osborne, 102 Wn. App. at 98; Loux. 24 Wn. App. at 548.

Here, the trial judge who took Fluker's plea conducted a thorough inquiry into whether the plea was made knowingly, voluntarily, and intelligently. The court took great care to ensure that Fluker fully understood what rights he was giving up and what potential consequences he might face. Indeed, when Fluker expressed some reservation about the factual basis of the charges against him,

the court recessed the proceedings to permit Fluker to speak with his attorney. During this process, the court had the opportunity to observe Fluker's appearance, demeanor, and conduct. The court concluded Fluker was able to make a voluntary and intelligent choice among the alternative courses of action available to him. This conclusion is supported by Fluker's answers to the court's questions. We decline to substitute our judgment for that of the trial court on matters involving credibility and demeanor. Loux. 24 Wn. App. at 548. We conclude that Fluker has made an insufficient showing that entry of his guilty plea was a manifest injustice. Therefore, he is not entitled to relief.

In his statement of additional grounds Fluker also claims that defense counsel was ineffective for failing to raise the issue of post-traumatic stress disorder at the plea hearing. This argument fails for the same reasons as his previous argument. If Fluker cannot show a sufficient basis to support his claim that his plea was involuntary, he likewise cannot show counsel was ineffective for failing to raise the issue.

Finally, Fluker contends that ambiguity regarding sentencing consequences rendered his guilty plea involuntary. Fluker's motion to withdraw his plea, however, was filed before sentencing, and focused only on whether post-traumatic stress disorder rendered the plea involuntary. Fluker's motion thus made no mention of alleged ambiguity in sentencing consequences, and the trial court had no opportunity to hear testimony, review evidence, or consider briefing on the issue. Indeed, although defense counsel objected when the

prosecutor sought to return to the original sentencing recommendation of 62 months, he did not seek leave to move to withdraw the plea on this basis, but instead went ahead with the sentencing. Accordingly, this issue was never properly raised or developed before the trial court, and the record before us is insufficient to decide the issue.[2] RAP 2.5(a); see State v. Donohoe, 39 Wn. App. 778, 782, 695 P.2d 150 (1985).

Affirmed.

Spearman, J.

WE CONCUR:

Schindler, J.

Cox, J.

[2] We note that the record does show that the document setting forth the prosecutor's sentencing recommendation of 62 months was incorporated by reference into Fluker's statement on plea of guilty. There was no testimony before the trial court regarding any other understanding about the prosecutor's sentencing recommendation.