IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERNEST HENRY GUGGER, Appellant.	No. 41228-4-II UNPUBLISHED OPINION

Penoyar, C.J. — Ernest Henry Gugger appeals the trial court's denial of his motion to withdraw his guilty plea. He asserts that he misunderstood the sentence enhancements, thereby rendering his guilty plea involuntary. We affirm.

Facts

On September 21, 2009, the State charged Gugger with unlawful manufacturing of methamphetamine, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and unlawful possession of ammonia with intent to manufacture methamphetamine. The State also charged codefendant Christopher Hindermann with similar crimes.

Gugger and Hindermann's jury trial began on June 28, 2010, before the Honorable Susan K. Serko. The court ruled on pretrial motions including a June, 29, 2010 CrR 3.5 hearing, where the State called three officers to testify implicating Gugger and Hindermann in the charged crimes. Due to scheduling issues, the court recessed until July, 26, 2010.

On July 12, 2010, the court convened to proceed with the trial.[1] The State moved to

[1] It appears that the court's intervening case "went away" thereby resolving the court's scheduling conflict. Report of Proceedings at 86.

admit evidence under ER 404(b), including surveillance videos that had just come into the prosecutor's possession, showing Gugger and Hindermann purchasing pseudoephedrine. The court granted a two week recess for the defense to review the additional discovery, but stated that additional recesses would not be granted.

Motions in limine were argued on July 26, 2010. The court held that the State could use Hindermann's redacted statement against Gugger, so long as it did not facially implicate Gugger. The next day, the jury heard the State's opening statement and testimony from Hindermann's daughter. She testified that she had seen her father use, grow, and possess marijuana. She further testified that Gugger had frequented her father's property. She also testified that she believed a trailer on her father's property, where the alleged manufacture of methamphetamine occurred, belonged to Gugger. The next day, Hindermann changed his plea from not guilty to guilty.

After subsequent plea negotiations, on July 30, 2010, Gugger entered an *Alford*[2] plea of guilty to unlawful manufacturing of methamphetamine and two sentencing enhancements: commission of the crime (1) within 1000 feet of a school bus route stop, and (2) when a person under the age of eighteen was present. The Honorable Linda CJ Lee conducted Gugger's plea proceeding.[3] The court used the declaration of probable cause and the supplemental declaration of probable cause for a factual basis for the plea. These facts included finding a trailer containing methamphetamine, various products used in the production of methamphetamine, and mail

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[2] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[3] The record does not explain why Judge Lee conducted the plea proceeding in place of Judge Serko.

addressed to Gugger. It stated that these items were within 1000 feet of a school bus route stop and in the presence of minors. The declaration also stated that the trailer, the residence where the minors lived, and a recreational vehicle contained levels of methamphetamine from 33 to 222 times greater than the legal threshold for mandatory cleanup and designation as "uninhabitable." Clerk's Papers at 6.

During the plea proceeding, Gugger presented a completed plea form to the court, stating that his lawyer had read him the plea form and he understood its terms. He further stated he understood the terms of the additional sentence enhancements. Finally, Gugger assured the court he was entering his plea freely, voluntarily, and without threat or promise by the State. After determining that Gugger was entering his plea voluntarily, the court accepted his plea of guilty.[4]

On August 13, 2010, the parties appeared before Judge Serko for sentencing. Gugger moved to withdraw his guilty plea. Judge Serko determined that Judge Lee should hear the motion and preside over any sentencing.

The parties were before Judge Lee on August 23, 2010. Gugger moved to withdraw his guilty plea on the basis that (1) the plea form did not state the amount of good time he would receive, and (2) he did not understand the sentencing enhancements' terms. Gugger stated his reason for the motion was because he had involuntarily entered his plea. The court reviewed the transcript of the plea proceeding with Gugger and determined that he had voluntarily entered his plea. The court denied Gugger's motion and proceeded to sentencing.

Gugger faced a standard range sentence of 100 to 120 months for the manufacturing

[4] Gugger also pleaded guilty to a separate crime during the proceeding under cause number 10-1-00052-8: conspiracy to commit unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. That plea is not part of the current appeal.

charge, plus a 24-month school zone enhancement and a 24-month child endangerment enhancement, totaling 148 to 168 months in custody. The parties agreed to recommend a mid-range sentence of 158 months in custody with a 12-month community custody sentence. The court followed the recommendation and sentenced Gugger to 110 months in custody for the manufacturing charge, plus 24 months for each enhancement, for a total of 158 months.[5] Gugger appeals.

analysis

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 (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 (quoting *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.

[5] The court also sentenced Gugger for the conspiracy charge under cause number 10-1-00052-8. The sentence consisted of 12 months in custody, to be served concurrently with the manufacturing charge. Neither this charge nor this sentence are part of the current appeal.

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 on the record confirms 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).

Grugger contends that by entering into a plea deal with his codefendant after trial had started, the State imposed a "Hobson's choice" on Gugger by forcing him to proceed with trial under the changed circumstances with his trial counsel unprepared for such changed circumstances, or to plead guilty. Appellant's Br. at 8. He relies on *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980), for the notion that due process is compromised when the State materially changes the case against the defendant on the eve of trial. *Price* holds:

> [I]f the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such *unexcused conduct by the State* cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case *when the State has not acted with due diligence* will compel him to choose between prejudicing either of these rights.

Price, 94 Wn.2d at 814 (emphasis added).

Here, however, the State is not the sole actor. Codefendant Hindermann's acceptance of the plea deal was the event that placed Gugger in the alleged predicament that he laments. There is no indication that the State inexcusably failed to act with due diligence. Hindermann chose when to change his plea, not the State.

But more to the point, Gugger made no mention of any "Hobson's choice," nor did he indicate any other misgivings, when he changed *his* plea to guilty. The trial court made an extensive record conducting a very detailed colloquy making sure that Gugger understood the plea he was making, the rights he was giving up, and the consequences of the plea. Relevant here, the court specifically asked Gugger about the sentencing enhancements, going over the effect and time involved in each of the two enhancements and the range of possible total sentence. Given Gugger's signed statement on plea of guilty, and the trial court's extensive colloquy, there is clear evidence that Gugger's plea was knowing and voluntary. Accordingly, the trial court did not abuse its discretion in denying Gugger's motion to withdraw his plea.

In a statement of additional grounds (SAG), Gugger raises two issues. He first argues that the underlying statutes on which his 24-month sentence enhancements were based are ambiguous in that it is not clear whether multiple consecutive enhancements may be applied. Thus, he contends, he was misinformed about a direct consequence of his plea, i.e. his sentence length, and thus he should have been permitted to withdraw his plea. As to Gugger's possible sentence length, the record is clear that the trial court spelled out the sentence enhancements at his plea hearing and how the enhancements affected the total length and range of incarceration available to the court in setting his sentence.

He also contends that because the enhancement statutes are ambiguous as to whether enhancements can be imposed consecutively, the rule of lenity requires that the statutes be interpreted in his favor with the enhancements applied concurrently.

For both of these contentions, Gugger relies on *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). In *Jacobs* our Supreme Court reversed a drug offender sentencing alternative sentence based on a range that had been expanded by stacking two 24–month drug zone enhancements. The *Jacobs* court concluded that it was unclear if the legislation required multiple drug zone enhancements to be served concurrently or consecutively to each other. Applying the rule of lenity, the court directed the trial court to add only 24 months to the base range on resentencing. *Jacobs*, 154 Wn.2d at 602–604.

In 2006 the legislature amended RCW 9.94A.533(6) to require drug zone enhancements be served consecutively "to all other sentencing provisions." *See* Laws of 2006, ch. 339, § 301. The acknowledged purpose of the amendment was to overturn the *Jacobs* decision. *See Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008). "The amendment permitted multiple enhancements and directed that they run consecutively." *Gutierrez*, 146 Wn. App. at 156. Gugger's contentions in his SAG fail.

We affirm.

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.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.