IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEMARKUS RONELLE SMITH, Appellant.	No. 38216-4-II UNPUBLISHED OPINION

Bridgewater, J. — Demarkus Ronelle Smith challenges his *Alford*[1] plea. We affirm.

Facts

On September 26, 2007, Pierce County Sheriff's Deputies served a search warrant at 6217 Lakewood Dr. W., Apartment #156, Lakewood, Washington. Lying on his back in the living room of the apartment was "Demackus [sic] Smith." CP at 4 (capitalization omitted). A loaded .38 revolver was laying next to Smith.

Inside the apartment, deputies located a plastic baggy containing 10.5 grams of cocaine, additional plastic baggies, a Pyrex measuring cup with cocaine residue, two boxes of baking soda,

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

and six individually packaged bags of marijuana weighing 240 grams. The deputies also found $516.

The State charged Smith with unlawful possession of a controlled substance—cocaine, with intent to deliver; unlawful manufacturing of a controlled substance—cocaine; unlawful possession of a controlled substance—marijuana, with intent to deliver; and second degree unlawful possession of a firearm. The possession and manufacturing charges carried firearm and school-bus-route-stop enhancements. On the day of trial, Smith agreed to enter an *Alford* plea as to the charges of unlawful possession of cocaine with intent to deliver, unlawful possession of marijuana with intent to deliver, and unlawful possession of a firearm in the second degree. In exchange for his plea, the State dismissed the remaining charges and added a deadly weapon enhancement to the unlawful possession of cocaine with intent to deliver charge.

Smith indicated, on the record, that he had reviewed the guilty plea statement and that he understood it. Likewise, he stated that he understood the constitutional rights he was foregoing, and he understood that the State would make a sentencing recommendation, based on the plea statement, to the trial court.[2] The trial court accepted Smith's plea, acknowledging that Smith

[2] The relevant dialogue from the plea hearing is as follows:

> THE COURT: Okay. And I have a Statement of Defendant on Plea of Guilty here then. Mr. Smith, you have had a chance to review all of these documents with your attorney?
> THE DEFENDANT: Yes, sir.
> THE COURT: Did he go over every one of them with you?
> THE DEFENDANT: Yes, sir.
> THE COURT: Did he answer all of your questions?
> THE DEFENDANT: Yes, sir.
> THE COURT: Explain everything to you?
> THE DEFENDANT: Yes, sir.
> THE COURT: Do you understand the charges that you're pleading guilty

entered it freely, voluntarily, and intelligently. But, the trial court failed to check the box on Smith's guilty plea indicating that he had read and fully understood the plea agreement.

On August 1, 2008, during sentencing, Smith brought a pro se motion to withdraw his *Alford* plea pursuant to CrR 7.8.[3] He asserted that he was not fully aware of the circumstances of signing the plea agreement or the length of the sentence to which he agreed. In addition, he claimed that his trial counsel pressured him to accept the *Alford* plea. The trial court denied Smith's pro se motion, noting that Smith had not properly moved the trial court, nor had he provided any specific argument under which the trial court would have authority to set aside the

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> to in the Second Amended Information?
>
> THE DEFENDANT: Yes, sir.
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> . . . .
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> THE COURT: Now, you know then as well that by pleading guilty, you waive certain rights that you have?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: A right to trial, a right to confront witnesses, and other rights? And Mr. Shepard has explained that to you; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you also know that the State is going to make a sentencing recommendation to me, and that recommendation is set forth here in this agreement, but that I'm not bound by their recommendation? That means that I can sentence you to what I think is right and just under the law.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you know what the State's recommendation is going to be?
>
> THE DEFENDANT: Yes.

VTP (Jul. 2, 2008) at 6-8.

[3] CrR 7.8(c)(1) states:

> *Motion*. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

plea.

Discussion

Smith complains that the trial court erred when it denied his motion to withdraw his *Alford* plea because he did not make it knowingly, voluntarily, or intelligently. Additionally, he complains that he received ineffective assistance of counsel because his trial counsel failed to properly advise him of the potential sentences he faced following entry of his *Alford* plea. We disagree.

I. Voluntariness of *Alford* Plea

We review a trial court's decision on a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it adopts a position that is manifestly unreasonable or based on untenable grounds or reasons. *State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971)).

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Under CrR 4.2(d), a trial 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." *See also State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). We look to the totality of the circumstances to determine whether a defendant knowingly, intelligently, and voluntarily entered a plea. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

Once a trial court accepts a guilty plea, it must allow withdrawal of the plea only to correct a manifest injustice. CrR 4.2(f); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). A manifest injustice is "'obvious, directly observable, overt, not obscure.'" *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (quoting *Taylor*, 83 Wn.2d at 596). The defendant bears the heavy burden of demonstrating a manifest injustice. *Osborne*, 102 Wn.2d at 97.

An involuntary plea constitutes a manifest injustice for purposes of CrR 4.2(f). *Taylor*, 83 Wn.2d at 597. A plea is involuntary when it is based on misinformation regarding a direct consequence of the plea. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). The length of a sentence is a direct consequence of a guilty plea because it represents a direct, immediate and automatic effect on the defendant's range of punishment. *Ross*, 129 Wn.2d at 284. When a defendant completes a plea statement and admits to reading, understanding, and signing it, it creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). When a trial court verifies the criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Here, Smith signed the statement of defendant on plea of guilty. The statement contained, among other things, the standard range for each count charged. Additionally, the statement contained the prosecutor's recommendations to the judge on sentencing and costs. Furthermore, Smith orally acknowledged to the trial court that he reviewed all of the documents with his attorney and that he understood the charges he was pleading to, in addition to the recommended

standard ranges for each charge. Smith has not met his burden requiring him to refute the presumption of voluntariness. *Perez*, 33 Wn. App. at 262.

Nevertheless, Smith insists that the trial court had an obligation to advise him, on the record, about the possible sentences he faced. According to Smith, the trial court had this obligation because even though the plea forms indicated that he read and understood them, he did not, in fact read and understand them. The State contends that the trial court's failure to check the appropriate box is harmless because the court accepted Smith's plea after he acknowledged it on the record.

The State relies on *Branch*, 129 Wn.2d at 643-44, for the proposition that Smith cannot deny the statements he made before the court, or his knowledge and understanding of the plea form, simply because the court failed to check the appropriate box. Smith contends that *Branch* is not dispositive because he entered an *Alford* plea, and *Alford* pleas warrant a higher standard of scrutiny than a regular guilty plea. We disagree.

The State properly notes that CrR 4.2 contains procedural safeguards that are not constitutionally mandated. *See Branch*, 129 Wn.2d at 642. "Failure to adhere to the technical requirements of CrR 4.2(g) does not in itself result in a constitutional violation or amount to a manifest injustice." *Branch*, 129 Wn.2d at 642. Instead, CrR 4.2 requires that the record of the plea hearing show that the plea was entered voluntarily and intelligently. *Branch*, 129 Wn.2d at 642. Here, the court failed to check the appropriate box on the plea form, but Smith

demonstrated his willingness to enter into the plea after acknowledging, on the record, that he read it and understood it. The presumption of voluntariness is "well nigh irrefutable." *Perez*, 33 Wn. App. at 262.

Moreover, Smith's assertion that an *Alford* plea is subject to a higher standard than a regular plea is misguided. *See State v. Knotek*, 136 Wn. App. 412, 428, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013 (2007). The standard for determining the validity of an *Alford* plea is whether the plea represents an intelligent choice among the alternative courses of action open to the defendant. *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). Thus, if a defendant "'intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt,' such a plea is valid." *Montoya*, 109 Wn.2d at 280-81 (quoting *Alford*, 400 U.S. at 37).

Because Smith is not challenging the factual basis of his plea, the only question for us to consider is whether Smith intelligently entered his *Alford* plea in lieu of proceeding to trial. As discussed above, Smith has failed to show that he involuntarily entered his *Alford* plea. *Perez*, 33 Wn. App. at 262.

II. Effective Assistance of Counsel

Next, Smith claims that his defense counsel was ineffective. Ineffective assistance of counsel is a mixed question of law that we review de novo. *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013, 154 P.3d 919 (2007). To prove ineffective assistance of counsel, Smith must establish that his counsel's performance was (1) deficient and (2) the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S.

668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In a plea bargaining context, effective assistance of counsel requires that counsel actually and substantially assisted his client in deciding whether to plead guilty. *Osborne*, 102 Wn.2d at 99.

Smith contends that he received ineffective assistance of counsel because his counsel allowed him to enter an *Alford* plea without first informing him of the potential sentences he faced. The record does not support this claim.

Regardless of what counsel told Smith, the trial court guaranteed that Smith understood the sentence he faced. The court specifically asked Smith whether he knew what the State's sentencing recommendation was and Smith answered, "Yes." VTP (Jul. 2, 2008) at 7. Further, Smith acknowledged, on record, that he had a chance to go over all of the documents with his counsel and that his counsel had explained everything to him. Smith fails to demonstrate that his trial counsel's performance was deficient. *Strickland*, 466 U.S. at 688-89.

And assuming Smith can demonstrate deficient performance, he fails to demonstrate prejudice. *Strickland*, 466 U.S. at 692. A bare allegation that a defendant would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice. *Osborne*, 102 Wn.2d at 97. Here, Smith has offered no more than bare allegations that his trial counsel was deficient in failing to inform him of possible sentencing ramifications. Bare allegations, without more, do not establish prejudice under *Strickland*. *Strickland*, 466 U.S. at 692. Smith has failed to establish that his defense counsel was ineffective.

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, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.