89342-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

Robert C. Kinnaman
Petitioner

ANSWER TO STATE'S RESPONSE TO PETITION

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AUTHORITIES CITED

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ARGUMENT

1. THE COURT SHOULD NOT OVERRULE THE BRIGHT LINE RULE OF MENDOZA.[1]

The State concedes that Mr. Kinnaman's plea to the enhancement was involuntary as a matter of well-settled law. But for the first time, the State now asks the Court to overrule *Mendoza* and change the bright-line rule that the SRA is to be strictly construed and that misinformation about sentencing consequences renders a plea involuntary, regardless of the nature or degree of the error. Response (R) at 3. The Court should decline this invitation. Either a plea is voluntary, or it is not. Either the penalty proposed in the plea agreement conforms to the SRA or it does not.

The State does not suggest an alternative standard, but presumably, it would be along the lines of a case-by-case analysis whereby the trial court can impose a sentence that more or less conforms to that imposed by the legislature. Besides trivializing the panoply of constitutional trial rights the accused surrenders, including the right to be presumed innocent absent proof of every element beyond a reasonable doubt, this procedure has serious separation of powers problems.

[1] *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

2. AN INVOLUNTARY PLEA IS INVALID REGARDLESS OF FACTUAL BASIS.

Despite having conceded that the enhancement plea is invalid, the State seems to argue that the plea should nevertheless be upheld if it rests upon an adequate factual basis. R1. This is not the law. The issue is not whether enhancement plea lacks a factual basis. The enhancement plea is invalid as a matter of law because of the sentencing error. *State v. Barber*, 170 Wn.2d 854, 857, 248 P.3d 494 (2011). Rather, the question presented is whether the pleas are severable such that withdrawing one plea but not the other is an available remedy.

The State contends that Kinnaman admitted facts sufficient to establish the enhancement by describing his passenger's jumping out of moving vehicle. Besides being irrelevant, this is incorrect. The incident with the passenger preceded the eluding. Kinnaman was pulling over. It was after he became aware of contact with the passenger that he "took off." R2. Kinnaman stated that he failed to stop <u>because of</u> the incident with the passenger, not vice versa. The decision to elude was made after the pursuit began.

The State also contends that Kinnaman admitted at the plea hearing that the pursuit passed through a construction site where DOT workers were present. R2. Again, this is immaterial. He elected to withdraw his plea because the prosecutor had told him falsely that one or more workers

did not merely witness the pursuit but had stated that they were in actual danger.

3. THESE PLEAS ARE SEVERABLE IN THE CONTEXT OF AN EQUITABLE REMEDY FOR AN INVOLUNTARY PLEA.

If the Court of Appeals had upheld both pleas, Mr. Kinnaman would not be petitioning this Court for review. He assigns error to the Court's vacating both pleas. He seeks to preclude an enforced "remedy" that places him in a position in which he must again bargain with the State on the eluding charge. Such a "remedy" is "unquestionably to his disadvantage." *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977).

The State cites *Chambers*[2] as authority for honoring the intent of the parties to a plea agreement. R3. But Mr. Kinnaman's manifest intent was to enter guilty pleas based solely on facts the State was prepared to prove. The Court should maintain the distinction between a remedy sought by a defendant and one imposed by the State to his unquestionable disadvantage. *See, State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988), citing *Tourtellotte*, 88 Wn.2d at 584.

The State relies on *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990), in arguing that charges of eluding and endangerment are not severable. The facts of *Bowerman* are entirely distinguishable. The

[2] *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2012).

information charged Bowerman with the single crime of first degree murder. "The count alleged two alternative ways of committing that single crime: (1) aggravated, premeditated murder, and (2) felony murder. Premeditated murder and felony murder are not separate crimes. They are alternate ways of committing the single crime of first degree murder." Accordingly, Bowerman was not permitted, midway through the trial, to plead guilty only to the charge of felony-murder. *Bowerman*, 115 Wn.2d at 800.

That is not what we have here. Eluding and endangerment are not alternative means of committing the same crime. They constitute two offenses for which the State bargained and Kinnaman agreed to enter two guilty pleas. When one of the pleas turned out to be invalid, nothing in *Bowerman* suggests that due process is affronted if the defendant is allowed to withdraw that plea.

CONCLUSION

The Court should accept review, reverse the Court of Appeals and allow Mr. Kinnaman to withdraw the involuntary plea to endangerment while leaving his voluntary plea to attempted eluding intact.

Respectfully submitted this 23rd day of February, 2014.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served by agreement with this Answer to the State's Response to the Petition for Review electronically by e-mail at: gfuller@co.grays-harbor.wa.us.

A hard copy was also mailed, first class postage prepaid, to:

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February 24, 2014

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Attached is Petitioner Kinnaman's Answer to the State's Response to his Petition for Review.

Regards, *Jordan McCabe*
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