68438-8

68438-8

No. 68438-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN CURTIS COLLINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mariane Spearman
The Honorable Laura Gene Middaugh

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

MR. COLLINS'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS HE WAS MISADVISED OF THE MAXIMUM SENTENCE AND MISADVISED REGARDING THE DOSA 3

1. Due process mandates that a guilty plea be entered voluntarily. 3

2. Mr. Collins was misadvised of the relevant maximum sentence. 4

a. The trial court misadvised Mr. Collins of the maximum sentence. 4

b. The trial court misadvised Mr. Collins that the DOSA is the entire midrange standard range sentence and not merely one-half the mid-point. 7

3. It is irrelevant whether the misadvisement was material to Mr. Collins's decision to plead guilty. 12

4. Mr. Collins is entitled to reversal of his conviction. 13

F. CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 5

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 3

WASHINGTON CASES

In re the Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 3, 7, 12, 13

In re the Personal Restraint of Stoudamire, 145 Wn.2d 258, 36 P.3d 1005 (2001) 3

State v. Ford, 125 Wn.2d 919, 891 P.2d 712 (1995) 3

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 8

State v. Kennar, 135 Wn.App. 68, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007) 5

State v. Knotek, 136 Wn.App. 412, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007) (emphasis in original) 5

State v. Lusby, 105 Wn.App. 257, 18 P.3d 625, *review denied,* 144 Wn.2d 1005 (2001) 13

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998) 4

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 4, 7, 12

State v. White, 123 Wn.App. 106, 97 P.3d 34 (2004) 8

STATUTES

RCW 69.50.401 5

RCW 69.50.408 2

RCW 9.94A.505 5

RCW 9.94A.510 5

RCW 9.94A.518 5

RCW 9.94A.525 5

RCW 9.94A.530 5

RCW 9.94A.535 5

RCW 9.94A.662 8

RCW 9A.20.021 4

RULES

CrR 4.2 ..... 3, 7, 11

A. ASSIGNMENTS OF ERROR

1. Mr. Collins's guilty plea was invalid because it was not knowingly, intelligently, and voluntarily entered.

2. The trial court erred in advising Mr. Collins of the maximum sentence for the offense.

3. The trial court erred in failing to advise Mr. Collins that his sentence consisted of 40 months, not merely the 20 months imposed as part of the Drug Offender Sentencing Alternative (DOSA).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that a guilty plea be entered knowingly, intelligently, and voluntarily. If the defendant is misadvised about the applicable maximum sentence for the offense charged, the resulting plea is not entered knowingly, voluntarily, and intelligently. Mr. Collins was advised that he could be sentenced up to 20 years for the offense with which he was charged, when in fact the maximum sentence he faced was 60 months. Was Mr. Collins's resulting guilty plea invalid because it was not entered knowingly, voluntarily, and intelligently?

2. Did the trial court also fail to advise Mr. Collins that if he was revoked from the DOSA, the court would impose *all* of the

remaining time in the standard range, which here was 40 months, and which rendered Mr. Collins's guilty plea invalid?

C. STATEMENT OF THE CASE

Steven Collins pleaded guilty to one count of possession with intent to deliver methadone. CP 8-17. In the Statement of Defendant on Plea of Guilty, Mr. Collins was advised the standard range for this offense was 20+ - 60 months, with a maximum sentence of 20 years. CP 9.[1] Mr. Collins was also advised that the judge could impose a sentence outside the standard range. CP 12. Mr. Collins was not advised that since he pleaded guilty, the judge could impose a sentence above the standard range only if Mr. Collins stipulated to aggravating factors in his guilty plea.

Mr. Collins was also advised in the Statement of Defendant on Plea of Guilty that the judge could impose a DOSA but was not advised that should he be revoked from the DOSA, the court would impose the entire standard range sentence. CP 14.

[1] Under RCW 69.50.408, a person who had previously been convicted of a drug offense under chapter RCW 69.50, the maximum sentence is doubled for this offense. Mr. Collins had previously been convicted of conspiracy to distribute cocaine. CP 25, 35. Since delivery of a controlled substance is a Class B offense with a statutory maximum of 10 years, here the statutory maximum doubled to 20 years.

The Judgment and Sentence filed following the sentencing hearing stated the standard range as 20+ to 60 months, with a maximum sentence of 20 years. CP 70.

D. ARGUMENT

MR. COLLINS'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS HE WAS MISADVISED OF THE MAXIMUM SENTENCE AND MISADVISED REGARDING THE DOSA

1. Due process mandates that a guilty plea be entered voluntarily. A defendant may plead guilty if there is a factual basis for the plea and the defendant understands the nature of the charges and enters the plea voluntarily. CrR 4.2(a); *State v. Ford*, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). Due process requires that the guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re the Personal Restraint of Stoudamire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Misadvisement of the relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17

P.3d 591 (2001); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998).

2. Mr. Collins was misadvised of the relevant maximum sentence.

a. The trial court misadvised Mr. Collins of the maximum sentence. The court and the Statement of Defendant on Plea of Guilty advised Mr. Collins that the maximum sentence for his offense was 20 years. CP 9; RP 6. That information was incorrect. The plea form also stated:

> (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so or both parties stipulate to a sentence outside the standard range. If the judge goes outside the standard range, either I or the State can appeal that sentence to the extent to which it was not stipulated. If the sentence is within the standard range, no one can appeal the sentence.

CP 12. This paragraph erroneously implied that the judge could impose a sentence above the standard range.

It is true that a person being sentenced for a Class B felony cannot be punished by confinement exceeding a term of ten years. RCW 9A.20.021(1)(b). But in *Blakely v. Washington*, the United States Supreme Court rejected the notion that this term under RCW

9A.20.021(1)(b) was the statutory maximum for a Class B offense under the SRA. 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Instead, the Court noted that the maximum sentence was "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis in the original.) *Id.* Consistent with *Blakely*, this Court has recognized that "it is the direct consequences of her guilty plea, not the maximum potential sentence if she went to trial, that [the defendant] had to understand." *State v. Knotek*, 136 Wn.App. 412, 424 n.8, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007) (emphasis in original).[2] Thus, here, the maximum sentence was the high end of the standard range, which was 60 months. CP 29.

Mr. Collins's guilty plea did not support a sentence above 60 months – the maximum the judge could have imposed for possession with intent to deliver methadone based on his offender score. RCW 69.50.401; RCW 9.94A.505, .510, .518, .525, .530, .535. Well before Mr. Collins entered his guilty plea, the standard form was amended to read as follows:

---

[2] *But see State v. Kennar*, 135 Wn.App. 68, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007) (reaching opposite conclusion).

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by the imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proved beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

I understand that if a standard range sentence is imposed, the sentence cannot be appealed by anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.

CrR 4.2(g). The information Mr. Collins was given did not substantially comply with this form, and therefore violated the rule. *Id.* It also violated Mr. Collins's constitutional right to a knowing, intelligent, and voluntary plea, because it misinformed him about the sentencing consequences of his plea. *Isadore*, 151 Wn.2d at 298; *Walsh*, 143 Wn.2d at 8.

Mr. Collins was advised that the judge could impose a sentence outside the standard range, up to a maximum sentence of 20 years. This statement was incorrect under *Blakely* and CrR 4.2(g). Because Mr. Collins was misadvised of the sentencing consequences of his plea, his plea was involuntary and consequently invalid.

b. The trial court misadvised Mr. Collins that the DOSA is the entire midrange standard range sentence and not merely one-half the mid-point. The Statement of Defendant on Plea of Guilty advised Mr. Collins that if the court sentenced him to a DOSA, the sentence was one-half the midpoint of the standard and that in addition, the court would impose community custody for the remaining one-half of the midpoint. CP 14. Mr. Collins was not advised that the sanction for violation of the DOSA was imposition of

all of the remaining time under the standard range, which here was 40 months.

"A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision." *State v. White,* 123 Wn.App. 106, 113, 97 P.3d 34 (2004). Under a prison-based DOSA sentence, the defendant serves one-half of the standard-range sentence in prison while receiving substance abuse treatment. RCW 9.94A.662(1)(a)(2); *State v. Grayson,* 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). If the defendant fails to complete the DOSA program, or DOC administratively terminates the offender from the DOSA program, the defendant is reincarcerated to serve the balance of the unexpired sentence subject to the rules relating to earned early release. RCW 9.94A.660(7)(c).

In the Statement of Defendant on Plea of Guilty, Mr. Collins was advised:

> (o) The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under former RCW 9.94A.120(6) (for crimes committed before July 1, 2001), or RCW 9.94A660 (for offenses committed on or after July 1, 2001). This sentence could include a period of total confinement for one-half the mid-point of the standard range or 12 months, whichever is greater, and community custody of at least

> one-half of the standard range, plus all of the other conditions prescribed in paragraph (6)(e). The judge could impose a residential treatment-based DOSA alternative that would include three to six months of residential chemical dependency treatment and 24 months community custody, plus all the other conditions described in paragraph (6)(e). During confinement and community custody under either alternative, I will be required to participate in substance abuse evaluations and treatment, not to use illegal controlled substances and to submit to testing to monitor that, and other restrictions and requirements will be placed on me.

CP 14.

Again well before Mr. Collins entered his guilty plea, the plea form had been amended to read as follows:

> (t) The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660. If I qualify and the judge is considering a residential chemical dependency treatment-based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment-based alternative.
>
> If the judge imposes the prison-based alternative, the sentence will consist of a period of total confinement in a state facility for one-half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one-half of the midpoint of the standard range.

If the judge imposes the residential chemical dependency treatment-based alternative, the sentence will consist of a term of community custody equal to one-half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment program for a period of three to six months, as set by the court.

As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the conditions of my community custody or order me to serve a term of total confinement equal to one-half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay $30.00 per month to offset the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the

> court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.

CrR 4.2(g).

Again as in the previous argument, the information Mr. Collins was given did not substantially comply with this form, and therefore violated CrR 4.2. *Id.*

But more importantly, the amended form not used here, would have properly advised the defendant that non-compliance with the DOSA program could result in the defendant serving the term of total confinement under the standard range. In the form actually used in Mr. Collins's plea, he was never advised that non-compliance could expose him to serving the entire term of confinement under the standard range, here, 40 months. This failure was not cured at the hearing on his guilty plea where the court merely advised Mr. Collins that it could sentence him to a DOSA but that the State was not recommending a DOSA. RP 9. Further, at sentencing, Mr. Collins acknowledged the DOSA required 20 months of supervision, and actively advocated for it, but the judge never advised him that during those 20 months, if he failed to complete the program or was

dismissed from it, the court would impose *all* of the remaining time on the standard range, which here was 40 months. RP 14-28.[3]

Thus, the failure to advise Mr. Collins of the total term of confinement to which he was exposed violated his constitutional right to a knowing, intelligent, and voluntary plea, because it misinformed him about the sentencing consequences of his plea. *Isadore*, 151 Wn.2d at 298; *Walsh*, 143 Wn.2d at 8.

3. It is irrelevant whether the misadvisement was material to Mr. Collins's decision to plead guilty. It may be argued that since Mr. Collins was sentenced to 40 months in custody, which fell within the standard range, the error in advising him was not material to his decision to plead guilty. This argument was plainly rejected in the Supreme Court's decision in *Isadore*:

> We decline to adopt an analysis that requires the appellate court to inquire into the materiality of [the misadvisement] in the defendant's subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.

---

[3] At the subsequent hearing on Mr. Collins's *pro se* motion for an appeal bond, Mr. Collins stated that he believed the court had sentenced him to 20 months plus 12 months supervision and not the 40 months the court imposed with 20 of those months essentially suspended on the condition he successfully completed the program. RP 39. Mr. Collins noted his attorney never advised him of this detail as well. RP 40.

Isadore, 151 Wn.2d at 302. Since this Court cannot delve into the reasons Mr. Collins entered his plea to determine whether or not the misadvisement entered into his decision to plead guilty, his guilty plea was invalid.

4. Mr. Collins is entitled to reversal of his conviction. The remedy available for an involuntary plea is for the appellate court to reverse and remand to the superior court to allow the defendant an opportunity to withdraw his guilty plea. *State v. Lusby,* 105 Wn.App. 257, 263, 18 P.3d 625, *review denied,* 144 Wn.2d 1005 (2001).

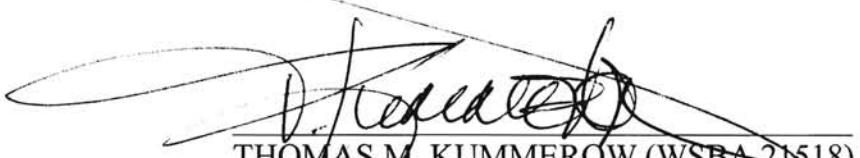
Since Mr. Collins was misadvised of the maximum sentence, the proper sentence under a DOSA, and the consequences of the failure to complete the requirements of a DOSA requires reversal of Mr. Collins's guilty plea and remand to the trial court for Mr. Collins to determine whether he wishes to withdraw his guilty plea.

F. CONCLUSION

For the reasons stated, Mr. Collins respectfully requests that this Court reverse his conviction and sentence and remand to the trial court to allow Mr. Collins to withdraw his guilty plea.

DATED this 26th day of November, 2012,

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. STEVEN COLLINS, Appellant.	)))))))))	NO. 68438-8

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ANN JOYCE, STATE THAT ON THE 26TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] STEVEN COLLINS 211 32ND AVE. E SEATTLE, WA 98112	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF NOVEMBER, 2012.

X Ann Joyce

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710