68438-8

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NO. 68438-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN CURTIS COLLINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN
AND LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Misinformation regarding a direct consequence of a guilty plea may render the plea invalid. Prior to entering a plea of guilty, the defendant was accurately informed of the standard range for the crime, and the applicable statutory maximum term set forth in RCW 9A.20.021 and RCW 69.50.408. Consistent with this Court's decision in State v. Kennar,[1] should this Court reject the defendant's claim that he was misadvised as to a direct consequence of his plea?

2. Under State v. Ross,[2] and State v. Shultz,[3] the potential for imposition of punishment for a violation of a condition of sentencing that would require an additional proceeding is not a direct consequence of a plea, and is not something that a defendant must be informed about at the time of entry of a plea of guilty. Should this Court reject the defendant's argument that he must be allowed to withdraw his guilty plea because he was not informed that if he was found to have willfully violated a condition of his sentence (in this case a drug offender sentencing alternative) that punishment could follow?

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[1] 135 Wn. App. 68, 143 P.3d 326 (2006), rev. denied, 161 Wn.2d 1013 (2007).

[2] 129 Wn.2d 279, 916 P.2d 405 (1996).

[3] 138 Wn.2d 638, 980 P.2d 1265 (1999).

B. STATEMENT OF THE CASE

On June 17, 2011, the defendant was charged with Violation of the Uniform Controlled Substances Act, Delivery of Methadone. CP 1. The charge stemmed from an incident wherein the defendant sold 50 pills of methadone to an undercover police officer. CP 4-5. At the time of his arrest, it was discovered that the defendant had additional methadone on his person. CP 5.

On June 28, 2011, the defendant was denied entry into a pretrial drug treatment program due to a felon in possession of a firearm charge. CP 7.

As charged, with an offender score of five, the defendant's standard range was 20+ to 60 months. CP 24. The State provided notice that it would consider adding a school bus zone enhancement for trial, an event that would add 24 months to the defendant's standard range. CP 24, 40-41. An additional charge of possession of methadone also could have been added based on the drugs found on the defendant's person at the time of his arrest. With the additional charge and the sentencing enhancement, the defendant's standard range would be 84 to 144 months.[4] CP 24.

[4] This is potentially what the defendant faces should he withdraw his plea.

On November 16, 2011, the defendant entered a plea of guilty as charged, with the State recommending a low-end sentence of 20 months plus one day. CP 8-27.

The defendant was sentenced on February 2, 2012. CP 28-37. Per his request, he received a prison based special drug offender sentencing alternative (DOSA), wherein he received a sentence of 20 months confinement, followed by 20 months of community custody. CP 31. The defendant now seeks to withdraw his plea.

Additional facts are included in the sections below.

C. ARGUMENT

1. THE DEFENDANT WAS PROPERLY INFORMED AS TO THE STANDARD RANGE AND THE MAXIMUM SENTENCE FOR THE CRIME.

The defendant seeks to withdraw his plea of guilty based on his claim that he was misinformed regarding the maximum sentence for the crime. Specifically, citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 1531, 159 L. Ed. 2d 403 (2004), he argues that the trial court mistakenly informed him that the maximum term was the statutory maximum of 20 years, instead of 60 months, the top end of the standard range. This Court rejected this same argument in State v. Kennar, supra, and should do so again here.

Due process requires that a defendant's guilty plea be entered into knowingly, voluntarily, and intelligently. In re Isadore 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). While there is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made, a defendant may withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); CrR 4.2(f). The defendant bears the burden of showing that a manifest injustice exists. State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996).

A defendant need not be informed of all possible consequences of a plea, after all, the possible consequences of a plea are virtually limitless. For example, certain foreign countries may deny entry of persons with a specific felony conviction, or certain employers or professions may not allow persons to work in the particular field or obtain appropriate licensing. Still, a defendant must be informed of all direct consequences of his plea. Isadore, 151 Wn.2d at 298. Misinformation regarding a direct consequence of a guilty plea may render a guilty plea invalid. Isadore, at 298; Walsh, 143 Wn.2d at 8-9.

Here, RCW 9A.20.021 and RCW 69.50.408 dictate that the statutory maximum sentence for delivery of methadone is 20 years.[5] In the Statement of Defendant on Plea of Guilty, and the Felony Plea Agreement, the defendant was informed that the maximum term was 20 years. CP 9, 23. At the plea hearing, the defendant was again informed, and did acknowledge, that he understood that the maximum term for delivery of methadone was 20 years. RP 6.

In State v. Weyrich,[6] the defendant pled guilty but was misadvised that the statutory maximum for first-degree theft was 5 years, instead of 10 years. The State argued that Weyrich should not be allowed to withdraw his plea because he had been correctly advised of his standard range, and the statutory maximum was not a direct consequence of the plea. The Supreme Court rejected this argument, holding that "[a] defendant must be informed of the statutory maximum for a charged crime, as this is a direct

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[5] Delivery of methadone is a Class B felony. RCW 69.50.401(1), (2)(a). Generally, the maximum term of confinement for a Class B felony is 10 years. RCW 9A.20.021(1)(a). However, if a defendant's current conviction is for a title 69 offense, a second or subsequent offense under the chapter allows for imprisonment for a term up to twice the term otherwise authorized. RCW 69.50.408(1). The defendant's 1995 conspiracy to distribute cocaine conviction is such an offense. CP 35; In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999); In re Bowman, 109 Wn. App. 869, 38 P.3d 1017 (2001), rev. denied, 146 Wn.2d 1001 (2002). Thus, the statutory maximum term of confinement here is 20 years.

[6] State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008).

consequence of this guilty plea." Weyrich, 163 Wn.2d at 557. Thus, under Weyrich, the defendant's plea here would have been deemed involuntary if he had not been advised that the statutory maximum for his crime was 20 years.[7]

In Kennar, this Court, post Blakely, rejected the claim that advising a defendant of the statutory maximum, as required by CrR 4.2 and Weyrich, renders a guilty plea invalid. This Court correctly concluded that the standard range and the statutory maximum sentence are both direct consequences of a guilty plea of which a defendant must be informed. Kennar, at 74-75. Even with the changes to the Sentencing Reform Act brought about by Blakely, the statutory maximum sentence impacts a range of possible punishment provisions. For example, the statutory maximum sentence limits the period of community custody that can be imposed. See State v. Franklin,172 Wn.2d 831, 836, 263 P.3d 585 (2011); In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), superseded by statute, State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012); RCW 9.94A.701(9).

[7] CrR 4.2 also requires that the trial court inform a defendant of both the applicable standard sentence range and the maximum sentence for the offense as determined by the legislature. See Kennar, 135 Wn. App. at 75.

Additionally, as part of any sentence, the sentencing judge may impose certain crime-related prohibitions and affirmative conditions, including no-contact orders. RCW 9.94A.505(8). Crime-related prohibitions, however, may extend for a period of time not to exceed the statutory maximum for a defendant's crime. State v. Cayenne, 165 Wn.2d 10, 14, 195 P.3d 521 (2008).

The trial court may also impose an exceptional sentence not exceeding the statutory maximum based on a defendant's criminal history (that may not be accurately known at the time of a plea) under certain circumstances. RCW 9.94A.535(2). Thus, there are multiple important reasons why a defendant must be accurately informed of the statutory maximum sentence, as was done here, and as is required by the Supreme Court.

Contrary to the defendant's position, Blakely did not change the maximum sentence for delivery of methadone. While Blakely required a change in sentencing procedures before a court can impose a sentence above the standard range (in some circumstances), Blakely did not change the maximum sentence set by statute. All that the Blakely Court held was that a defendant has a Sixth Amendment right to have a jury determine, beyond a reasonable doubt, aggravating facts (other than recidivist facts)

used to impose an exceptional sentence above the standard range. Blakely, 542 U.S. at 301-04.

Finally, the defendant's premise--that 60 months, the top end of the standard range as known at the time is the relevant maximum sentence--is flawed. Here, he was accurately advised of the top end of the range based on what was known of the defendant's criminal history at the time his plea was taken.[8] Given that fact, he fails to explain why also informing him of the statutory maximum was error. Nothing he was told was inaccurate. He was informed of his standard range. He was told that if a court sentenced him outside his standard range without legal justification, he could appeal that sentence. And he was informed of the statutory maximum for the offense as required. This case is no different than Kennar, a case the defendant cannot distinguish.

The defendant has the burden of showing that a manifest injustice has occurred. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003). Here, he cannot demonstrate that withdrawal of his guilty plea is necessary to correct a manifest injustice as

[8] To state that a specific standard range is the maximum a judge may sentence a defendant is inaccurate. If additional criminal history is discovered, or if the defendant is convicted of another felony prior to sentencing, his standard range would increase.

required by CrR 4.2(f). He was properly informed of the law and consequences of his plea.

2. THE DEFENDANT HAS FAILED TO ESTABLISH A BASIS TO WITHDRAW HIS PLEA OF GUILTY BASED UPON THE INFORMATION HE RECEIVED REGARDING DRUG OFFENDER SENTENCING ALTERNATIVES.

Next, the defendant contends that he must be allowed to withdraw his plea because he was not informed of the potential consequences a defendant faces for violating a sentence condition imposed under a drug offender sentencing alternative. This claim has no merit. Under existing case law, the potential consequences for violations of a condition of sentence are not direct consequences that a defendant must be informed of at the time of a plea. See Ross, 129 Wn.2d at 285.

One of the many sentencing options available to a sentencing court is the imposition of a drug offender sentencing alternative or DOSA. See RCW 9.94A.660 (Drug offender sentencing alternative--Prison-based or residential alternative); RCW 9.94A.662 (Prison-based drug offender sentencing alternative); RCW 9.94A.664 (Residential chemical dependency

treatment-based alternative).[9] Under a prison-based DOSA, the sentencing alternative the court ultimately chose, the court imposes total confinement of one-half the midpoint of the standard range or 12 months—whichever is longer, followed by one-half the midpoint of the standard range as a term of community custody. RCW 9.94A.662(1)(a) and (b). Under a DOSA, a defendant receives substance abuse treatment. Id. A DOSA is considered a form of a standard range sentence. State v. White, 123 Wn. App. 106, 113, 97 P.3d 34 (2004).

Here, the defendant was specifically informed that a prison-based DOSA was a sentencing alternative available to the sentencing court.

> The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under former RCW 9.94A.120 (for crimes committed before July 1, 2001), or RCW 9.94A.660 (for offenses committed on or after July 1, 2001). This sentence could include a period of total confinement for one-half of the midpoint of the standard range or 12 months, whichever is greater, and community custody of at least one-half of the midpoint of the standard range.

CP 14; see also RP 9.

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[9] See also RCW 9.94A.650 (First-time offender waiver); RCW 9.94A.6551 (Partial confinement as a part of a parenting program); RCW 9.94A.670 (Special sex offender sentencing alternative); RCW 9.94A.680 (Alternatives to total confinement); RCW 9.94A.690 (Work ethic camp program--Eligibility—Sentencing).

Once a DOSA sentence is imposed, if the Department of Corrections finds at a hearing that a defendant has willfully violated a condition of his DOSA sentence or that he has failed to complete his treatment program, the offender "may" be reclassified to serve the remaining balance of the original sentence. RCW 9.94A.662(3). It is this later provision that the defendant claims the trial court was required to inform him about. The defendant is mistaken.

"A defendant need not be informed of all possible consequences of a plea but rather only direct consequences." Ross, 129 Wn.2d at 284. A direct consequence is one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. A condition of sentence that calls for an additional proceeding upon violation, is not a consequence of a plea that is automatic, and it is not a direct consequence of a plea. Id. at 285. For example, "[a]n extension of a trial court's jurisdiction over restitution orders is neither immediate nor automatic," and is thus not a direct consequence of a plea. Shultz, 138 Wn.2d at 647-48.

Here, the imposition of additional confinement for violation of his DOSA sentence is not automatic—in fact, there is no indication

herein that the defendant has violated a condition of his DOSA sentence, or that his term of confinement is anything other than what was imposed by the trial court. But even if the defendant had violated a condition of his DOSA sentence, a hearing would have to be held to determine whether his violation was willful, and then, imposition of additional confinement (within the standard range) is still discretionary. Thus, "any effect on punishment flows not from the guilty plea itself but from additional proceedings." Ross, 129 Wn.2d at 285. Consequently, the defendant's plea was not, as he claims, involuntary because he was not informed of its direct consequences.

The defendant cites to no case that has held that the fact that punishment may follow from a violation of a DOSA sentence, or any other type of sentence, has been held to be a direct consequence of a plea. Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (citing DeHeer v. Seattle Post-Intelligencer, 60

Wn.2d 122, 126, 372 P.2d 193 (1962)). Under Ross and Shultz, the defendant's argument has no merit.

D. CONCLUSION

For the reasons cited above, this Court should reject the defendant's claim that he should be allowed to withdraw his plea.

DATED this 8 day of ~~January~~ February, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. COLLINS, Cause No. 68438-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-08-13

Date

Done in Seattle, Washington