69638-6

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No. 69638-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY C. LEE,

Appellant.

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

The Honorable Michael J. Heavey

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON CASES

STATUTES

RULES

A. ASSIGNMENTS OF ERROR

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

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

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

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. Lee was advised that he could be sentenced up to five years for the offenses with which he was charged, when in fact the maximum sentence he faced was 24 months. Was Mr. Lee's resulting guilty plea invalid because it was not entered knowingly, voluntarily, and intelligently?

C. STATEMENT OF THE CASE

Anthony Lee pleaded guilty to one count of possession of cocaine and one count of theft in the second degree. CP 8-18. In the Statement of Defendant on Plea of Guilty, Mr. Lee was advised the standard range for this offense was 12+ - 24 months on the possession

count, and 22 – 29 months on the theft count. Mr. Lee was also advised each offense had a maximum sentence of 5 years. CP 9. Mr. Lee was also advised that the judge could impose a sentence outside the standard range. CP 12.

The Judgment and Sentence filed following the 2010 sentencing hearing stated the standard range as 12+ to 24 months on the possession count, 17 – 22 months on the theft count, both with a maximum sentence of five years. CP 35. The 2012 Judgment and Sentence from the 2012 sentencing hearing contained the same calculation. CP 51.[1]

[1] Mr. Lee filed a motion to modify or correct the Judgment and Sentence petition challenging the term of incarceration and term of community custody, which the superior court transferred to this Court to be considered as a personal restraint petition. CP 47. This Court reversed Mr. Lee's Judgment and Sentence and remanded for resentencing. CP 48-49.

D. ARGUMENT

MR. LEE'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. Lee was misadvised of the relevant maximum sentence. The court and the Statement of Defendant on Plea of Guilty advised Mr. Lee that the maximum sentence for his offense was five years. CP 9; 2/16/2010RP 5. That information was incorrect.

It is true that a person being sentenced for a Class C felony cannot be punished by confinement exceeding a term of five years. RCW 9A.20.021(1)(c). But in *Blakely v. Washington*, the United States Supreme Court rejected the notion that this term under RCW 9A.20.021(1)(c) was the statutory maximum for a Class C 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 24 months for the possession count and 22 months for the theft count. CP 35.

Mr. Lee's guilty plea did not support a sentence above 24 months – the maximum the judge could have imposed for possession of cocaine based on his offender score. RCW 69.50.4013; RCW 9.94A.505, .510, .518, .525, .530.

Mr. Lee was advised that the judge could impose a sentence outside the standard range, up to a maximum sentence of five years. This statement was incorrect under *Blakely* and CrR 4.2(g). Thus, the failure to advise Mr. Lee of the maximum sentence to which he was exposed, the high end of the standard range, 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.

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[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).

3. It is irrelevant whether the misadvisement was material to Mr. Lee's decision to plead guilty. It may be argued that since Mr. Lee was sentenced to a Drug Offender Sentencing Alternative sentence of 12 months in custody, which fell below 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.

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

4. Mr. Lee 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).

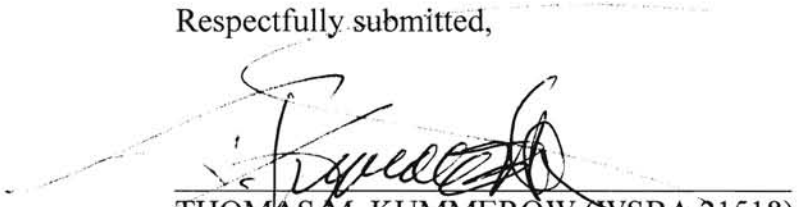
Mr. Lee was misadvised of the maximum sentence which requires reversal of Mr. Lee's guilty plea and remand to the trial court for Mr. Lee to determine whether he wishes to withdraw his guilty plea.

F. CONCLUSION

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

DATED this 25th day of April 2013.

Respectfully submitted,



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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF APRIL, 2013, 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:

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