No. 44141-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

ROBERT T. WHEELER,
Defendant/Appellant.

pm 5/20/13

APPELLANT'S OPENING BRIEF

On Appeal from Pierce County Superior Court No. 05-1-02167-7
The Hon. Elizabeth T. Martin, Judge

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I. INTRODUCTION

Robert Wheeler's guilty plea was involuntary because he was misinformed about the maximum punishment—a direct consequence of his plea. This Court should exercise its discretion to reach the merits of this manifest miscarriage of justice. In the alternative, trial counsel was ineffective for failing to request the sentencing court exercise its discretion to consider the involuntariness of Mr. Wheeler's guilty plea. Finally, this Court can remand with instructions that the trial court has the discretion to consider whether Wheeler's guilty plea is invalid.

II. ASSIGNMENTS OF ERROR

A. Mr. Wheeler's guilty plea was invalid because he was repeatedly misinformed about the maximum sentence.

B. Mr. Wheeler filed a Personal Restraint Petition seeking to vacate his judgment because his guilty plea was invalid. This Court remanded for correction of the sentence. Was trial counsel ineffective in failing to move the trial court to exercise its discretion to consider the voluntariness of Wheeler's guilty plea?

C. Should this Court remand with instructions that the trial court has the discretion to consider a challenge to the voluntariness of Wheeler's guilty plea?

III. FACTS

Robert Wheeler pleaded guilty to one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree. Supp

CP 48-59. Wheeler's guilty plea form indicates that the maximum sentence for the Rape of a Child count is "life" and $20,000 (in paragraph 4) and later states that maximum as 20 years and $50,000 (in paragraph 6). For the Child Molestation count the plea form lists the maximums as "life" and $20,000 (¶ 4), as well as 20 years and a $50,000 fine (¶ 6). When Wheeler was sentenced the same day, the *Judgment* listed the maximum punishment as "20 yrs/$50,000" and "10 yrs/$20,000" respectively. CP 60-81.

On March 24, 2010, Mr. Wheeler filed a Personal Restraint Petition challenging the voluntariness of his guilty plea. On July 3, 2012, this Court remanded for correction of the judgment.

At the remand hearing, Mr. Wheeler appeared (with different counsel) in Pierce County Superior Court on October 12, 2012. The Court corrected the judgment to reflect the correct maximum sentences for each crime of conviction: RP 3. Neither counsel for Wheeler nor Wheeler himself requested that the sentencing court exercise its discretion and consider the voluntariness of Wheeler's guilty plea. *Id.*

IV. ARGUMENT

A. Introduction

When he pleaded guilty, Robert Wheeler was repeatedly misinformed about the maximum sentence for his two crimes of conviction. Each maximum varied slightly from the one before. First, he was told that

each crime carried a "life/$20,000" maximum. Later, the plea form listed the maximum as 20 years and a $50,000 fine. CP 48-59. Finally, when he was sentenced that same day, the maximum was described as 20 years for one crime and 10 years for the other. CP 60-81. The correct maximum for each crime was life and a $50,000 fine.

B. Mr. Wheeler's Guilty Plea is Unquestionably Invalid.

This was not merely a ministerial error. The maximum penalty is a direct consequence of a guilty plea. *State v. Vensel,* 88 Wn.2d 552, 555, 564 P.2d 326 (1977). The maximum punishment is even more critical where an indeterminate sentence is imposed, as it was here.

Wheeler's plea was based on misinformation about a direct consequence when he was repeatedly misadvised about the maximum penalty. As a result, Wheeler's plea was neither knowing, nor voluntary.

When a defendant pleads guilty, he must do so knowingly, voluntarily, and intelligently. *Henderson v. Morgan,* 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); *McCarthy v. United States,* 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); *State v. Ross,* 129 Wn.2d 279, 284, 916 P.2d 405 (1996); Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988). *See also* CrR 4.2(d); *In re Fonseca,* 132 Wn. App. 464, 132 P.3d 154 (2006) (plea

withdrawn where defendant did not know he was ineligible for DOSA at time he pled guilty).

A defendant must be properly informed of all direct consequences of his guilty plea. *See State v. Ross,* 129 Wn.2d 279, 285, 916 P.2d 405 (1996); *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353(1980) ("Defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea."). In *In re Pers. Restraint of Hoisington,* 99 Wn. App. 423, 993 P.2d 296 (1999), the Court stated that "a guilty plea entered on a plea bargain that is based upon misinformation about sentencing consequences is not knowingly made." 99 Wn. App. at 428.

When he pled guilty, Wheeler was misinformed about the maximum penalties. The maximum possible sentence is a "direct" consequence of a guilty plea. *State v. Vensel,* 88 Wn.2d at 555 ("We believe it is important at the time a plea of guilty is entered, whether in justice or superior court, that the record show on its face the plea was entered voluntarily and intelligently, and affirmatively show the defendant understands the maximum term which may be imposed.").

It is elemental that the maximum possible punishment that follows conviction also includes the maximum fine for the offense charged. *See* RCW 9A.20.010. *See also Ables v. Scott,* 73 F.3d 591, 592 n. 2 (5th

Cir.1996) (citing *United States v. Rivera,* 898 F.2d 442, 447 (5th Cir.1990)). Because a potential fine enhances a defendant's sentence, it is a direct, not a collateral, consequence of a guilty plea. *See Ross,* 129 Wn.2d at 285 (to qualify as a direct consequence of a guilty plea, the effect must either enhance the defendant's sentence or alter the standard of punishment).

Where a defendant is misinformed about a "direct consequence of a guilty plea" he does not need to demonstrate that the misinformation materially affected his decision to plead guilty. *In re Pers. Restraint of Isadore,* 151 Wn.2d 294, 88 P.3d 390 (2004). According to *Isadore,* a defendant "need not make a special showing of materiality" in order for misinformation to render a guilty plea invalid, but instead must show that the misinformation concerned "a *direct* consequence of [the] guilty plea." 151 Wn.2d at 296 (emphasis added).

Withdrawal of a guilty plea is appropriate even where correction of the mistake works to a defendant's benefit. For example, in *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 149 (2006), the Washington Supreme Court held that a guilty plea is involuntary when it is based on a miscalculated sentence range, even where the correct sentence range results in a lower sentence. 157 Wn.2d at 584. "Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on a direct consequence of the plea, regardless of whether the actual

sentence range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." *Id.* at 591.

Because the *Mendoza* decision is central to this case, a brief exposition is warranted. The *Mendoza* opinion begins its reasoning with the settled law that when a defendant pleads guilty, due process requires that he must do so knowingly, voluntarily, and intelligently. *Id.* at 587; *In re Isadore, supra* (citing *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) ("Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). This standard is reflected in CrR 4.2(d), which mandates that the 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."

The *Mendoza* court then relies on the "clarification" in *Isadore* that a defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty in order to seek withdrawal of the plea. ("In determining whether the

plea is constitutionally valid, we decline to engage in a subjective inquiry into the defendant's subjective risk calculation and the reasons underlying his or her decision to accept the plea bargain."). *Mendoza,* 157 Wn.2d at 590-91. A guilty plea based on incorrect information regarding a direct consequence of the plea is deemed involuntary without a case specific showing of materiality because 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. Instead, a knowing, voluntary, and intelligent guilty plea requires a meeting of the minds. *See State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

Mendoza created one exception to the rule above. When a defendant is "clearly informed before sentencing" of the correct direct consequences of the plea, "and the defendant does not object or move to withdraw the plea on that basis before he is sentenced, the defendant waives the right to challenge the voluntariness of the plea." 157 Wn.2d at 592.

That exception does not apply in this case. Here, there was an obvious and uncorrected mutual mistake about the maximum fine which renders Wheeler's plea involuntary. Although different maximum sentences were announced at sentencing, those maximums were as incorrect as the two listed on the guilty plea form. In three tries, the maximum was misstated three times.

Where a plea agreement is based on misinformation, the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea." *Walsh,* 143 Wn.2d at 8-9. *See also In re Pers. Restraint of Hoisington,* 99 Wn. App. 423, 993 P.2d 296 (2000). The defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy. *Miller,* 110 Wn.2d at 535. Wheeler wishes to withdraw his guilty plea.

C. This Obvious Error Should Not Go Uncorrected. Either This Court Should Review the Merits of Wheeler's Claim of Should Remand With an Instruction That the Trial Court Possesses the Discretion to Consider the Claim.

Mr. Wheeler has been seeking to withdraw his guilty plea since he filed his first PRP. The trial court had the discretion to consider that claim, if trial counsel had raised it. There was no reason for trial counsel not to raise the issue, unless trial counsel misunderstood the law.

This Court has the discretion to either consider the claim in this appeal or to remand to the trial court. Obviously, Wheeler would prefer that this Court reach the issue given the amount of time that has lapsed.

Both court rules and caselaw explain that an "old" issue can be considered in a "new" sentencing hearing or appeal.

The United States Supreme Court recognized the ability of state courts to restore the pendency of a case in *Jimenez v. Quarterman,* __ U.S. __, 129 S.Ct. 681(2009). In that case, after Jimenez lost his first appeal and

after the time to challenge his conviction had run, the Texas Court of Criminal Appeals granted Jimenez an out-of-time appeal. *Id.* at 683-84. In his petition for a writ of habeas corpus, Jimenez argued that the discretionary decision to grant an otherwise out-of-time appeal restored the pendency of the case. *Id.* at 684. The Supreme Court agreed, reasoning once the Texas Court of Criminal Appeals granted the out-of-time appeal, Jimenez's case was no longer final for purposes of collateral review. *Id.* at 686. In other words, when the state court exercised its discretionary power to entertain an otherwise out-of-time appeal the conviction, which had earlier been final, was no longer.

Court rules gave the trial court and give this Court the discretion to reach the obvious merits of Wheeler's claim. The pendency of a case otherwise final under RAP 12.7 can be revived pursuant to RAP 2.5(c). Washington courts have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Barberio,* 121 Wash.2d 48, 51, 846 P.2d 519 (1993). This is consistent with RAP 12.2, which allows trial courts to entertain post-judgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal. If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the

case. *Id.* at 50, 846 P.2d 519 ; *accord* RAP 2.2(9), (10), (13) (providing right to appeal from postjudgment orders).

This Court can also reach this issue because trial counsel was ineffective for failing to argue that the sentencing court should exercise its discretion and entertain Wheeler's motion to withdraw his guilty plea. The law gave the sentencing court that discretion and Wheeler obviously has sought to withdraw his plea for years. The fact that Wheeler did not verbalize this desire at the hearing is of no moment. Wheeler was not required to act as his own attorney, pointing out the deficient performance as it happens.

Finally, this Court could also remand this case to Pierce County Superior Court with an instruction that the court has the discretion to consider a motion by Wheeler to withdraw his guilty plea. At such a hearing, both parties would be able to present all of the equities—the most important of which is the simple fact that Wheeler was convicted and is serving life-maximum sentences based on guilty pleas that are unquestionably invalid. In the end, the question posed here is whether the law should permit correction of a manifest error identified after its harm was realized.

Mr. Wheeler urges this Court to answer that question in the affirmative or to allow the trial court that same opportunity.

IV. CONCLUSION

Based on the above, this Court should vacate Wheeler's convictions and/or remand this case to Pierce County Superior Court to permit him to move to withdraw his guilty pleas.

DATED this 20th day of May, 2012.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on May 20, 2013, I served a copy of the attached *Opening Brief* on opposing counsel by emailing a copy to:

Pierce County Prosecutor's Office—Appellate Division
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May 20, 2013//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis

Fri 5/24/2013 11:11 AM

CERTIFICATE OF SERVICE ON APPELLANT

I, Jeffrey Ellis, certify that I served a copy of the attached *Opening Brief* on Appellant, Robert T. Wheeler by sending a copy to:

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May 23, 2013//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis