69423-5

COA NO. 69423-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROY JACKSON JR.,

Appellant.

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

The Honorable Hollis R. Hill, Judge
The Honorable LeRoy McCullough, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE GUILTY PLEA IS INVALID BECAUSE JACKSON WAS MISINFORMED ABOUT A SENTENCING CONSEQUENCE OF HIS PLEA.

The State concedes, as it must, that the mandatory minimum term of a sentence is a direct consequence of a guilty plea. Brief of Respondent (BOR) at 12. The State further agrees that the record shows Jackson was misinformed that the assault conviction under count I carried a mandatory minimum sentence. BOR at 1, 13, 15-16. Withdrawal of the plea, then, is in order. See State v. Miller, 110 Wn.2d 528, 528-29, 537, 756 P.2d 122 (1988) (mistake over mandatory minimum sentence entitled defendant to withdraw plea), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

The State, however, seeks to escape this snare by claiming the mistake carried no practical consequence for Jackson's sentence. BOR at 1, 14. That argument is not well taken.

It is true that Jackson ultimately received a standard range sentence that was above the five year mandatory minimum term he was informed he would receive. CP 79. His plea is still involuntary. Where a defendant is misinformed of a direct consequence, the plea is still invalid even where the misinformation has no practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even

though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea and was entitled to withdraw it).

Comparison with cases involving misinformation about the statutory maximum term is instructive. The statutory maximum sentence for a charged crime, like the statutory minimum, is a direct consequence of a plea. In re Pers. Restraint of Stockwell, 161 Wn. App. 329, 335, 254 P.3d 899 (2011), review granted, 175 Wn.2d 1005, 284 P.3d 742 (2012); State v. Kennar, 135 Wn.App. 68, 74-75, 143 P.3d 326 (2006), review denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007). Misinformation regarding the statutory maximum provides a basis to withdraw the plea when challenged on direct appeal. Stockwell, 161 Wn. App. 329, 335, 254 P.3d 899 (2011); State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). The plea is rendered involuntary even where a defendant is sentenced to a standard range that does not reach or exceed the statutory maximum. Weyrich, 163 Wn.2d at 556-57 (defendant allowed to withdraw pleas despite State's argument that the mistaken maximum sentence had no actual bearing on the plea because the trial court sentenced Weyrich within the correct standard range).

The same holds true when a defendant is misinformed about the statutory minimum. The State nonetheless suggests the trial court told Jackson that he would be eligible for good time credit and therefore Jackson was not really misadvised of any direct consequence. BOR at 15. That suggestion rests on the dubious premise that the mandatory minimum term is a direct consequence of the plea by sole virtue of its effect on earned early release time. The Supreme Court has described the mandatory minimum term as a direct consequence without regard to its effect on available good time credit. Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032, 1039 (1976).

In any event, the trial court only told Jackson "Presumably the remainder would be eligible for good time." 2RP 15. The equivocation embodied in that word "presumably" must be measured in light of the fact that Jackson was unequivocally told during the same plea hearing that count I carried a mandatory minimum term. 2RP 9. That misinformation was likewise contained in the written plea form signed by Jackson. CP 18. At best, the consequence of whether he could earn early release time is ambiguous because earned early release time is unavailable during the statutory minimum term that Jackson was wrongly advised he faced. RCW 9.94A.540(2). Any ambiguity regarding a direct consequence is held against the State. State v. Bisson, 156 Wn.2d 507, 522-23, 130 P.3d

820 (2006). Ambiguity regarding a direct consequence of a plea entitles the defendant to the remedy of withdrawal. Bisson, 156 Wn.2d at 525.

Furthermore, "earned release time" is not the only kind of "early release" impacted by a mandatory minimum term. An offender subject to a mandatory minimum term is not eligible for other forms of early release during that term. RCW 9.94A.540(2) states "During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for *community custody*, earned release time, *furlough, home detention, partial confinement, work crew, work release, or any other form of early release*[.]" Even if the trial court could be said to have unambiguously informed Jackson that he was eligible for earned release time on count I, the trial court did not in any way inform Jackson that he was eligible for other forms of early release despite being told he faced a mandatory minimum term. Jackson's plea remains involuntary.

Finally, the State asks this Court to find that there are compelling reasons to deny Jackson's desired remedy of withdrawal of the plea. BOR at 18. That request should be denied because the State has wholly failed in its burden to show withdrawal would be an unjust remedy. The State bears the burden of demonstrating that the defendant's choice of remedy is unjust. State v. Turley, 149 Wn.2d 395, 401, 69 P.3d 338 (2003). "The State's burden requires a showing that compelling reasons exist not to

allow the defendant's choice." Turley, 149 Wn.2d at 401. The State does not even try to show a compelling reason to deny Jackson's choice to withdraw his plea. Where the State fails *on appeal* to meet its burden of showing a compelling reason to refuse a defendant's choice of remedy, the reviewing court will permit a defendant to obtain his choice, including withdrawal of the plea. Id. This Court should therefore allow Jackson to withdraw his plea.

2. THE COURT VIOLATED DUE PROCESS AND STATUTORY MANDATE IN USING THE WRONG STANDARD OF PROOF TO DENY A COMPETENCY EVALUATION.

a. Reason To Doubt, Not Preponderance Of The Evidence, Is The Standard For Triggering A Mandatory Competency Evaluation.

The State contends the trial court used the correct standard of proof in refusing to order a competency evaluation because a "reason to doubt" competency is equivalent to a preponderance of the evidence. BOR at 24. The State cites no case that equates the two standards. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." Donlin v. Murphy, 174 Wn. App. 288, 300, 300 P.3d 424 (2013) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

On the contrary, courts routinely apply the "reason to doubt" standard without reference to the preponderance of evidence standard. See, e.g., City of Seattle v. Gordon, 39 Wn. App. 437, 441-42, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985); State v. O'Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979); State v. Lord, 117 Wn.2d 829, 900-04, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

Under the "reason to doubt" standard, "the ultimate question for the trial court is whether there is a 'factual basis' to doubt the defendant's competence." State v. Woods, 143 Wn.2d 561, 605, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001). Plainly there can be a factual basis to doubt competency without reaching the level of showing it is more probable than not that a defendant is incompetent.

Aside from case law, basic principles of statutory construction support Jackson's position. Courts presume the legislature is aware of long-standing legal principles. In re Detention of Hawkins, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010). The preponderance of the evidence standard has been around for a long time. See Noyes v. Pugin, 2 Wn. 653, 656, 27 P. 548 (1891) ("there being a direct conflict between the testimony of plaintiff and defendant, it was for the jury to determine, under all the

facts and circumstances before them, upon which side lay the preponderance of the evidence").

Yet the legislature deliberately chose "reason to doubt" rather than "preponderance of the evidence" as the proper standard by which to measure whether a competency evaluation should be ordered under RCW 10.77.060(1)(a). The legislature certainly knows how to specify a preponderance of the evidence standard when it wants to. See, e.g., RCW 10.77.086(4) ("If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional period of ninety days"); RCW 10.77.030(2) ("Insanity is a defense which the defendant must establish by a preponderance of the evidence."). It did not do so in RCW 10.77.060(1)(a).

"[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" In re Detention of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting United Parcel Serv., Inc. v. Dep't of Rev., 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). "Reason to doubt" is not the same as a preponderance of the evidence. The State's contrary interpretation of the statute is untenable.

Seeking to avoid the consequences of the trial court's error in applying an improperly heightened standard of proof, the State asks this Court to uphold the trial court's decision by boldly proclaiming "nothing in the record" suggests incompetence. BOR at 26. The State wants this Court to review the trial court's findings and conclusion and affirm the trial court's decision.

The problem is that "*[a]ppellate review cannot cure an inadequate standard of proof.*" Mansour v. King County, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006) (quoting Nguyen v. Dep't of Health Medical Quality Assurance Comm., 144 Wn.2d 516, 530, 29 P.3d 689 (2001). Significantly, the trial court nowhere stated that it would have denied a competency evaluation if the standard of proof was less than a preponderance of the evidence.

Further, the State is simply incorrect that there is no evidence to support a reason to doubt competency. Defense counsel's observations and insights are evidence. Indeed, "considerable weight" should be given to the attorney's opinion regarding the client's competency. Lord, 117 Wn.2d at 903. Defense counsel personally interacted and observed Jackson and was of the opinion that there was reason to doubt Jackson's competency. 1RP 3-8, 25-27.

In this regard, it is also important to clarify that the trial prosecutor inaccurately described the content of the November 7 jail call in urging the trial court to find no reason to doubt competency. 1RP 13-14. According to the prosecutor, Jackson said "'I am going to act like -- and he uses kind of lingo for crazy." 1RP 13. The prosecutor interpreted what Jackson said as "I am going to act like I am crazy and wait for a better offer." 1RP 13-14. State's appellate counsel repeats the error in urging this Court to affirm. BOR at 5, 26.

Jackson did not use lingo for being crazy. The verbatim report of proceedings, which captured the jail call recording played in open court, is incomplete and not wholly accurate. Pre-trial Exhibit 1, designated for appeal, contains the relevant jail call recording under .wav file 1320697824-149.[1]

In actuality, the unidentified male says, "What deal are they talking about?" Pre-trial Ex. 1 at 3:21. In response, Jackson says "I tell you, I'm going to tell you more when you come here to visit me, you feel me, because I don't know. I might try to pump f[iz]ake and try to act like I'm

[1] Unhelpfully, the exhibit contains many jail calls, not just the two calls presented by the trial prosecutor and considered by the trial judge, and none of the .wav files are designated by date.

t[iz]aking it all the w[iz]ay, you feel me, and just wait for a b[iz]etter one, you know what I'm saying?" Pre-trial Ex. 1 at 3:23.[2]

The "iz" speech in brackets is a form of slang similar to Pig Latin, with "iz" functioning as an added syllable to established words.[3] In context, Jackson is using a basketball analogy to say he might to try give the impression that he would take the case to trial ("I might try to pump f[iz]ake and try to act like I'm t[iz]aking it all the w[iz]ay") in order to get a better plea deal ("a b[iz]etter one"). This exchange does not show Jackson attempting to manipulate competency proceedings by pretending to act like he is crazy. The State's argument to the contrary is based on a misapprehension of the record. No doubt the State would argue the jail call, correctly understood, still reflects Jackson's ability to hold a lucid

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[2] Undersigned counsel, in listening to the recording and setting forth relevant contents of the phone call in this brief, has made a good faith attempt at accuracy. Jackson invites this Court to listen to the recording itself should there be any question about what was said in the jail call.

[3] Wikipedia describes "-izzle" speak as follows: "Popularized by rap artist Snoop Dogg, from a style of cant (esoteric slang) used by African American pimps and jive hustlers of the 1970s. The '-iz, -izzle, -izzo, -ilz' speak, similar in some ways to Pig Latin, was developed by African Americans around the period of the Harlem Renaissance, with hotspots of the speak in Oakland, New York City, and Philadelphia. It was partially developed as young African American girls improvised chants and nursery rhymes while jumping rope, with the -iz dialect serving to add syllables when necessary to maintain the rhythm. A similar -iz dialect has also been used by carnies (carnival workers)." Wikipedia has been cited as a source of information by Washington appellate courts. See, e.g., Rivas v. Overlake Hosp. Medical Center, 164 Wn.2d 261, 266 n.2, 189 P.3d 753 (2008).

conversation, but that is just one among other factors to consider in determining a reason to doubt competency, none of which are dispositive.

b. Challenge To The Standard Of Proof May Be Raised For The First Time On Appeal.

The State also claims Jackson cannot raise the issue of whether the trial court used the wrong standard of proof for the first time on appeal. BOR at 22. The State is mistaken.

The validity of laws governing criminal procedures, including the burden of producing evidence and the burden of persuasion, implicates due process. State v. Hurst, 173 Wn.2d 597, 603, 269 P.3d 1023 (2012); see Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'").

The mandatory procedures under chapter 10.77 RCW are required by due process. State v. Heddrick, 166 Wn.2d 898, 904, 909, 215 P.3d 201 (2009). Part of that mandatory procedure is use of the correct standard of proof to determine whether there is reason to doubt

competency under RCW 10.77.060(1)(a), as is the need to obtain a competency evaluation once the "reason to doubt" standard is satisfied.

As stated, "*[a]ppellate review cannot cure an inadequate standard of proof.*" Mansour, 131 Wn. App. at 267 (quoting Nguyen, 144 Wn.2d at 530). It makes little sense then to argue, as the State does, that the error here is not manifest.

Consistent with RAP 2.5(a)(3), a party is able "to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time." Conner v. Universal Utils., 105 Wn.2d 168, 171, 712 P.2d 849 (1986). There is no sound reason why the same should not be true in criminal cases. See State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (RAP 2.5(a)(3) "makes no distinction between civil and criminal cases").

In State v. Coley, for example, the defense raised no objection to the trial court putting the burden of proof on Coley to show incompetency after he was previously found incompetent. State v. Coley, 171 Wn. App. 177, 190-92, 286 P.3d 712 (2012), review granted, 176 Wn.2d 1024, 301 P.3d 1047 (2013). When Coley argued on appeal that the trial court erroneously placed the burden on him, the State responded that the court heard from both sides and any error was thus "theoretical and not manifest." Coley, 171 Wn. App. at 186. The Court of Appeals reached

the merits of the issue and reversed. Id. at 189-92. Jackson requests that this Court do the same.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Jackson respectfully requests that this Court vacate the guilty plea.

DATED this 24 day of December 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON	)	
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Respondent,	)	
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v.	)	COA NO. 69423-5-I
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ROY JACKOSN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROY JACKOSN
DOC NO. 334536
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JULY 2013.

X Patrick Mayovsky