NO. 44589-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOEL KISSLER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The prosecutor fundamentally misapprehends the error that occurs when the court gives the accused person affirmatively incorrect information about the nature of the punishment he faces when deciding whether to waive the right to counsel**

The prosecution inexplicably emphasizes the number of questions the court asked Mr. Kissler when he waived his right to counsel, as if the sheer bulk of questions cures a flawed *pro se* colloquy predicated on inaccurate information. It concedes that "at a minimum," the accused person must be informed of "the classification of the charge [and] the maximum penalty upon conviction" in order to knowingly, intelligently, and voluntarily waive the right to counsel. Response Brief at 20-21. This minimum information was incorrectly explained to Mr. Kissler before he waived his right to counsel.

The State acknowledges that there was a "technical inaccuracy" in the court's description of the punishment Mr. Kissler could receive if convicted of Count 3. Response Brief at 22. The court told Mr. Kissler that Count 3 was a class C felony, with a maximum penalty of five years in prison. 9/11/12RP 5. In fact, Count 3 was a class B felony with a statutory maximum of 10 years, and once the State amended the information to add a firearm enhancement, this ten year maximum

constituted the mandatory sentence under the sentencing guidelines. CP 1-3; CP 24; *see* Opening Brief at 23-24.

The prosecution illogically asserts that Mr. Kissler is "indirectly" conceding that he validly understood the maximum penalty when he pled guilty. Response Brief at 23. To be clear, Mr. Kissler was not told and there is no evidence he understood the classification and degree of penalty he faced if convicted of possessing a controlled substance with intent to deliver as charged in Count 3, which is a minimum requirement for a knowing, intelligent, and voluntary waiver of counsel.

The prosecution appears to believe no error occurred because Mr. Kissler was told that he faced a maximum of ten years of punishment for the different offense alleged Count 1. Response Brief at 22. It does not explain how Mr. Kissler would understand that the penalty for Count 1 had any bearing on Count 3, particularly after the court described the two offenses as being different classes of felonies. 9/11/12RP 4-5. Moreover, the charges in Count 1 and Count 3 were very different in terms of the strength of the State's evidence. Count 1 involved a claim of assault against a witness who never appeared at trial and Mr. Kissler likely had a sense that this count would be hard for the

State to prove. *See* 2/5/13RP 8 (discussing complainant's expected failure to appear for trial). He would have been far less concerned about the maximum penalty in Count 1 when weighing his decision to proceed *pro se*.

The prosecution misunderstands the factual background in *State v. Silva*, 108 Wn.App. 536, 31 P.3d 729 (2001), which is directly on point. Mr. Silva had two "separate but concurrent" criminal cases proceeding against him. *Id.* at 538. The court engaged the defendant in a colloquy before he opted to represent himself. *Id.* at 538, 540. But this colloquy occurred in the course of the other case and was tailored to that case's procedural posture. *Id.* at 540. When Mr. Silva waived counsel in the second case, the court relied on the earlier colloquy. *Id.*

That earlier colloquy had not included "critical information concerning the nature of the charges in this case and the maximum possible penalties Silva faced in this case." *Id.* Mr. Silva demonstrated his understanding of the charges at the time he decided to represent himself by describing them in detail, was fully apprised of the risks associated with self-representation, represented himself in several cases, and he demonstrated substantial skill as a litigator. *Id.* at 540-41. But,

> Silva was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel. . . . .
>
> This information was essential to assess the risk of proceeding without the assistance of counsel and Silva did not have the benefit of it.

Id. at 541-42.

Unlike Mr. Silva, Mr. Kissler had little courtroom experience. His first and only prior felony conviction occurred in 2010, when he was 61 years old. CP 237. In that case, he had pled guilty to a charge of unlawful possession of a controlled substance and received a sentence as a first time offender of 21 days in jail. CP 237-40. This experience did not prepare Mr. Kissler to discern the nuances of the state's complicated sentencing guidelines and appreciate the magnitude of the penalty he faced if convicted of possession of the controlled substance with the intent to deliver. By failing to advise Mr. Kissler of the seriousness of the penalty he faced for this offense, he waived his right to counsel without the benefit of necessary information and this error undermines the validity of his waiver. *Silva*, 108 Wn.App. at 542.

The degree of punishment Mr. Kissler faced substantially changed in the course of the proceedings, after he had waived his right

to counsel. Opening Brief at 23-24. The court never advised Mr. Kissler that by adding firearm enhancement allegations, mandatory consecutive punishment and a significant increase in the standard range would follow.

The State incorrectly couches the standard of review as whether the court abused its discretion in granting the request to proceed *pro se*. Response Brief at 19, 24. It cites cases involving the court's discretion after a valid, unequivocal waiver, to grant or deny a pro se request based its timeliness and effect on the administration of justice. *See State v. Breedlove*, 79 Wn.App. 101, 106-07, 900 P.2d 586, 589 (1995); *see also State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). But it is a separate question whether a person knowingly, intelligently, and voluntarily waived his right to counsel.

"Whether a waiver of counsel is knowing and intelligent is a mixed question of law and fact which we review *de novo*." *United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995). "On direct appeal, the government bears the burden of proving the validity of the waiver." *Id.* This court does not simply defer to the trial court who incorrectly advised Mr. Kissler of the penalty he faced if convicted, as the State posits.

The prosecution asserts that the court would have erred had it told Mr. Kissler that the amended information added substantial mandatory punishment to his charges. Response Brief at 24. The cases its cites are factually inapposite because each is based on the court's refusal to grant a request to proceed *pro se* and not the court's impartation of information changing the punishment the accused person faces, particularly after a deficient initial colloquy. *Id.*

After citing a number of cases where courts have considered whether a judge must explain a substantial change in circumstances to a *pro se* defendant, the State concludes that Mr. Kissler "understood the maximum possible penalty he faced upon conviction." Response Brief at 27. But it ignores its own concession of a "technical inaccuracy" in what the court told Mr. Kissler about the most serious offense for which he was convicted and Mr. Kissler premised his decision to plead guilty on this inaccuracy. *See* Response Brief at 22. Having never received accurate information about the potential punishment he faced, Mr. Kissler's waiver of counsel was not knowingly, intelligently, and voluntarily entered. *Silva*, 108 Wn.App. at 541.

2. **The violation of Mr. Kissler's right to a speedy trial requires dismissal of the charges.**

Despite Mr. Kissler's repeated objection to the prosecution's numerous requests to continue the trial, the State responds by claiming the issue is unpreserved and therefore waived. *See* 9/11/12RP 11; 10/4/12RP 2; 11/27/12RP 2-3; 12/27/12RP 7; 1/17/13RP 4-5, 10; 1/31/13RP 3; 2/4/13RP 5-6. The court granted each request without inquiry into the availability of alternative dates. It also continued the trial when stand-by counsel was on vacation, even though Mr. Kissler objected to the continuance. 11/27/12RP 2. The court denied Mr. Kissler's motion to dismiss the case due to a violation of the time for trial required by CrR 3.3. 1/17/13RP 11. The State's preservation argument should be disregarded given Mr. Kissler's repeated insistence that the case proceed to trial as soon as possible and his consistent objections to the State's requests to delay the trial.

For the reasons set forth in Mr. Kissler's opening brief, the court did not grant authorized continuances and these delays violated Mr. Kissler's right to a speedy trial under CrR 3.3.

3. *Williams-Walker* and *Recuenco* dictate that the court lacks authority to impose a firearm enhancement when the court only instructs the jury that the definition of a deadly weapon controls the special verdict

Confusing the legal issue at stake, the prosecution offers a lengthy discussion of how courts consider instructional error. Response Brief at 28-34. But as Mr. Kissler explained in his opening brief, the deadly weapon instruction given to the jury was not erroneous. It explained what the jury was required to find to impose a deadly weapon enhancement. By instructing the jury on the findings essential to a deadly weapon enhancement, the court did not gain authority to impose a firearm enhancement.

In order for the jury to "make a firearm finding" as required for a "firearm" enhancement, the court must give the correct pattern jury instructions specific to the firearm enhancement. *State v. Recuenco*, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008).

The court instructed Mr. Kissler's jury that "*for purposes of a special verdict*," it must decide whether Mr. Kissler was "armed with *a deadly weapon*." CP 193 (Instruction 33; emphasis added). This instruction is not the approved pattern instruction required by *Recuenco*, 163 Wn.2d at 437 (citing 11 Wash. Prac., Pattern Jury Instr.

Crim. WPIC 2.10.01 (3d Ed 2008)). Instead, the court asked the jury to decide whether he possessed a deadly weapon under the protocol for a deadly weapon enhancement. CP 193.

In the consolidated cases in *State v. Williams-Walker*, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010) the Supreme Court held that the jury's verdicts did not authorize firearm enhancements because, even when the instructions told the jury that the special verdict form finding was premised on possession of a firearm, the verdict forms asked whether the defendants had deadly weapons. 167 Wn.2d at 894, 900-01.[1] The Court refused to hold a firearm enhancement was implicitly authorized by other verdicts even if possession of a firearm was an element. *Id.* at 901.

The decision in *Williams-Walker* rested on Washington's "inviolate" and broadly protected right to a jury trial under Article I, section 21. *Id.* at 896. This Court recognized that the jury's verdict controls the punishment a court may impose, and when the jury's verdict reflects a finding of lesser punishment, the sentencing judge is bound by the jury's finding. *Id.* at 898.

A pre-printed "special verdict form" asked the jury to vote yes or no in answering whether Mr. Kissler was armed with a "firearm" at the time of the offense. CP 146. But Instruction 33 explained what the jury would decide in the special verdict. Instruction 33 told to the jury it was deciding whether Mr. Kissler was armed with a deadly weapon. CP 193.

In *Williams-Walker*, the court explained:

> Quite simply, only three options exist: First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.

167 Wn.2d at 901. By virtue of instruction 33, the jury found the use of a deadly weapon and the court lacked authority to impose a greater punishment.

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[1] *Williams-Walker* cited the unpublished Court of Appeals decision in *Ruth*, which says the jury received both deadly weapon and firearm enhancement definitional instructions. 167 Wn.2d at 894 (citing 2006 WL 2126311).

4. **The prosecution concedes the incorrect term of community custody must be stricken.**

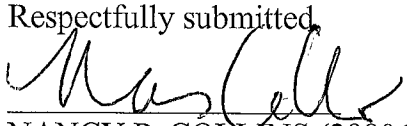
The State appropriately concedes that the judgment and sentence must be corrected to strike the alternate term of community custody imposed by the court's notation. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

B. CONCLUSION.

For the forgoing reasons as well as those discussed in the Opening Brief, Mr. Kissler respectfully requests this Court vacate his convictions due to the violation of his right to a speedy trial. Alternatively, the Court should order a new trial based on the deprivation of his right to counsel absent a valid, knowing and intelligent waiver of counsel. The sentencing errors must be corrected by striking the unauthorized firearm enhancement and term of community custody.

DATED this 14th day of April 2014.

Respectfully submitted,



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