Supreme Court No. 100819-8
(COA No. 825348)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Timothy Farwell,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Timothy Farwell, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review on October 4, 2021 pursuant to RAP 13.3 and RAP 13.4. The opinion is attached.

B. ISSUE PRESENTED FOR REVIEW

A guilty plea is voluntary only if made with an accurate understanding of the direct consequences, including the sentence length. When Mr. Farwell entered his guilty plea, the court told him he faced the statutory maximum, which the court could not actually impose. Despite this misinformation about the possible sentence, the Court of Appeals found that Mr. Farwell's guilty plea was voluntary.

The Court of Appeals based its holding on cases finding that the statutory maximum is a direct consequence of a plea that the defendant must be informed about, even though after

Blakely v Washington,[1] the statutory maximum is no longer the range of punishment a defendant faces. Should this Court grant review of whether a person is misinformed when they are told the court can impose an impossible statutory maximum? RAP 13.4(b)(1)-(3).

C. STATEMENT OF THE CASE

Mr. Farwell pleaded to the reduced charge of assault in the third degree (domestic violence) and misdemeanor bail jumping. CP 13-26. The standard range sentence for third degree assault was 1-3 months. CP 14. But Mr. Farwell was informed that if he pleaded guilty he faced up to five years for a class C felony—a sentence that the court could not legally impose. CP 14; RP 12/6/19 RP 4, 5-6.

Pursuant to the parties' agreement, the court sentenced Mr. Farwell to the recommended term of 60 days in jail for the

[1]542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

assault and suspended a 364-day sentence for the misdemeanor. CP 31; 41.

On appeal, Mr. Farwell asserted that he was misinformed about the maximum penalty the court could impose because he was informed the trial court could impose up five years' incarceration and $10,000 fine. RP 5. However, under *Blakely*, the maximum sentence that may be imposed in a particular case is not the statutory maximum. Citing to previous decisions holding that the statutory maximum is a "direct consequence" of a guilty plea which a person must be informed of, the Court of Appeals held that Mr. Farwell's guilty plea was not rendered involuntary by the court misinforming him it could impose the statutory maximum. Op. at 3-4 (citing *State v. Kennar,* 135 Wn. App. 68, 143 P.3d 326 (2006)).

D. ARGUMENT

This Court should grant review to resolve conflicting authority about whether a guilty plea is involuntarily entered if the defendant is misinformed that the court can impose an impossible statutory maximum sentence. RAP 13.4(b)(1)-(3).

a. Advising a person of an impossible statutory maximum renders their guilty plea involuntary.

The Due Process Clause of the Fourteenth Amendment requires that a defendant's 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 Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); U.S. Const. amend. XIV, § 1. When a person pleads guilty, he waives the fundamental right to a trial by jury. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). The accused must be informed of the direct consequences of pleading guilty. *Id.* at 284. "A direct consequence is one that

has a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bradley*, 165 Wn.2d at 939 (quoting *Ross*, 129 Wn.2d at 284). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

When a person is misinformed of the possible sentencing consequences, a guilty plea is involuntary. *State v. Buckman*, 190 Wn.2d 51, 58, 409 P.3d 193 (2018); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences."). Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Mendoza*, 157 Wn.2d at 590-91.

Moreover, a defendant is not required to show that the misinformation was material to his decision to plead guilty. "[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea . . .

[a]bsent 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 [regardless of any showing of materiality]." *Id.* at 590-91; *accord, Bradley*, 165 Wn.2d at 939.

In *Blakely*, the Supreme Court defined a maximum sentence as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303. Importantly, the maximum sentence that may be imposed in a particular case is not the statutory maximum. *See id.* The maximum sentence is the maximum permissible sentence the court could actually impose as a consequence of the guilty plea based on the defendant's offender score. *Id*. A hypothetical maximum sentence faced by another offender is irrelevant. *Buckman*, 190 Wn.2d at 59.

b. The court informed Mr. Farwell he could be sentenced to the statutory maximum of five years when the court could only impose up to three months for the felony offense he pleaded guilty to.

The maximum possible sentence the court could impose for Mr. Farwell's offenses was the standard range sentence of 1-3 months for assault in the third degree plus 364 days for the misdemeanor offense.[2] CP 14; RCW 9.94A.515 (seriousness level III for assault in the third degree); RCW 9.94A.510 (1-3 month standard range based on offender score of "0").

Mr. Farwell faced only a standard range sentence of 1-3 months for the charged felony offense, and 0-364 days for the charged misdemeanor offense. CP 14, 40. Though Mr.

[2] A court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law. Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2).No such facts are present or alleged here.

Farwell's guilty plea included a table that set forth the "standard range" sentence and the "maximum term and fine," the plea form did not inform him that the standard range sentence, in addition to the maximum on his misdemeanor conviction, was the only effective maximum sentence the court could impose. CP 14. To the contrary, the court erroneously informed him he faced a five year sentence: "On this charge, an offender score of zero, standard range of 1 to 3 months, 12 months' community custody, max term of 5 years, max fine of $10,000." 12/6/19 RP 4.

The Court continued to restate a five year maximum as if it were a possible sentence:

> THE COURT: Again, an offender score of zero, 1 to 3 months, 12 months' probation with DOC, meaning follow-up treatment. Understood?
>
> MR. FARWELL: Yes.
>
> THE COURT: Five years, $10,000 fine. Any questions about your score ranges and treatment -- or score ranges and DOC probation?
>
> MR. FARWELL: No.

12/6/19 RP 5-6. Mr. Farwell was misinformed about the sentence he faced because there were no circumstances in which the court could impose a sentence above the standard range, or up to five years; the State gave no notice of an aggravator, and there was no basis for the court to find one. *See, e.g.*, RCW 9.94A.535, .537. This misstatement was reiterated in the court's advisement about Mr. Farwell's rights on appeal, where the court informed him that he could appeal only if the court imposed a sentence above the three-month maximum, standard range sentence. 12/6/19 RP 5.

The trial court could not have imposed any sentence above the standard range plus the maximum misdemeanor time of 364 days. Consequently, the "maximum term" was not "five years" as Mr. Farwell was advised. CP 14; 12/6/19 RP 4. Rather, the maximum was the top-end of the standard range, which was only three months on the felony offense, and 364 days for the misdemeanor offense. Mr. Farwell was thus

misadvised of the maximum punishment he faced as a consequence of his guilty plea. *State v. Knotek*, 136 Wn. App. 412, 425, 149 P.3d 676 (2006).

c. This court should resolve the conflict about whether a court's advice about the statutory maximum misinforms a person about their potential sentence and thus renders a guilty plea involuntary.

In *Knotek*, the Court of Appeals reiterated that before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she [or another defendant] went to trial." *Id*. at 424 n.8 (citing *Ross*, 129 Wn.2d at 284). *Knotek* found *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek . . . [to] the top end of the standard range[] . . ." *Id*. at 425. The top of the standard range was the "effective maximum" for the defendant's plea. *Id*. Thus, where a defendant is told the maximum sentence is five years when in fact the effective maximum sentence is the top of the standard

range, the defendant is misadvised of the consequences of the plea.[3]

The Court of Appeals in Mr. Farwell's case identified the split between *Knotek* and subsequent cases that have relied on this Court's holding in *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008) to conclude it is not misinformation to advise a defendant about an impossible range of punishment. Op. at 4 (citing *Kennar*, 135 Wn. App. at 75). In *Kennar*, another division of the Court of Appeals held that "[b]oth the statutory maximum sentence determined by the legislature and the applicable standard sentence range have been declared to be direct consequences of a guilty plea about which a defendant

[3] *Knotek* concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she "clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose." 136 Wn. App. at 426. In this case, no discussion of *Blakely* ever occurred—the court simply told Mr. Farwell he could appeal if he imposed a sentence above the standard range. 12/6/19 RP 5.

must be informed in order to satisfy due process requirements." 135 Wn. App. at 75.

However, this results in a person being misinformed about the actual range of punishment. In Mr. Farwell's case, he was told the court could sentence him up to five years on a felony offense, when the maximum sentence available for this offense was three months. A guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences, which renders a guilty plea involuntary. *Buckman*, 190 Wn.2d at 59.[4] This Court should accept review and resolve the split in authority on this constitutional question. RAP 13.4(b)(1)-(3).

[4]Buckman challenged his guilty plea through collateral attack, rather than on appeal, so unlike in Mr. Farwell's case, he was required to establish "actual and substantial prejudice." *Buckman,* 190 Wn.2d at 60.

E. CONCLUSION

Based on the foregoing, petitioner Timothy Farwell respectfully requests this that review be granted pursuant to RAP 13.4(b)(1)-(3).

This document contains 2,052 words, excluding the parts of the document exempted from the word count by RAP 18.17

DATED this 3rd day of November, 2021.

Respectfully submitted,

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APPENDIX

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FILED
10/4/2021
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. TIMOTHY ALLEN FARWELL, Appellant.	)	No. 82534-8-I UNPUBLISHED OPINION

VERELLEN, J. — Timothy Farwell contends his guilty plea was involuntary because the trial court incorrectly advised him about the maximum sentence the court could impose. The court correctly advised Farwell of both the standard range sentence and the statutory maximum sentence for the charged crimes. Farwell's guilty plea was voluntary, knowing, and intelligent.

Farwell also contends and the State concedes that the domestic violence fee and the costs of community custody should be stricken. Because the court intended to strike all discretionary fees, we accept the State's concession and remand for the trial court to strike these fee provisions.

Therefore, we affirm Farwell's guilty plea and remand for further proceedings consistent with this opinion.

FACTS

On December 5, 2019, Timothy Farwell was charged with third degree assault and attempted bail jumping. Farwell pleaded guilty.

As part of the plea process, Farwell submitted a statement of defendant on plea of guilty which listed the standard range sentence and the statutory maximum sentence for third degree assault and misdemeanor bail jumping.

The next day, the trial court conducted a plea colloquy. As part of the colloquy, the court orally advised Farwell of the standard range sentence and the statutory maximum sentence for the charged crimes.

The court accepted Farwell's guilty plea and sentenced him to a standard range sentence of 60 days' confinement. Farwell's judgment and sentence listed the same sentencing information and ordered payment of a domestic violence fee and costs of community custody.

Farwell appeals.

ANALYSIS

I. Guilty Plea

Farwell argues that his guilty plea was not "knowing, intelligent, and voluntary" because he was "misinformed about the maximum sentence the court could impose."[1]

Due process requires that a defendant's guilty plea be voluntary, knowing, and intelligent.[2] "A plea is knowing and voluntary only when the person pleading guilty understands the plea's consequences, including possible sentencing

[1] Appellant's Br. at 4.

[2] State v. Weyrich, 163 Wn.2d 554, 556, 182 P.3d 965 (2008) (citing State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); CrR 4.2(d) (2005)).

consequences."[3] To comply with due process, a defendant must be advised of both the standard range sentence and the statutory maximum sentence for each charged crime.[4]

It is undisputed the trial court advised Farwell of the standard range and statutory maximum sentence for each crime. Before sentencing, Farwell submitted a statement of defendant on plea of guilty which noted the standard range and the statutory maximum sentence for third degree assault and misdemeanor bail jumping. At sentencing, the court orally advised Farwell that based on an offender score of 0, the standard range sentence for third degree assault was "1 to 3 months" with a maximum "term [of] 5 years" and a maximum fine of "$10,000."[5] The court also stated that based on his offender score the standard range sentence for misdemeanor bail jumping was 0 to 364 days' confinement with a maximum term of 0 to 364 days and a maximum fine of "$5,000."[6] And Farwell's judgment and sentence contained the same sentencing information. Because the court advised Farwell orally and in writing about both the standard range sentence and the statutory maximum sentence for third degree assault and misdemeanor bail jumping, Farwell's guilty plea was voluntary, knowing, and intelligent.

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[3] State v. Buckman, 190 Wn.2d 51, 59, 409 P.3d 193 (2018) (citing In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 594-95, 316 P.3d 1007 (2014)).

[4] See State v. Kennar, 135 Wn. App. 68, 74, 143 P.3d 326 (2006); Weyrich, 163 Wn.2d at 557.

[5] Report of Proceedings (RP) (Dec. 6, 2019) at 4-5.

[6] RP (Dec. 6, 2019) at 7.

Farwell relies on Blakely v. United States[7] and State v. Knotek[8] to support his proposition that his guilty plea was involuntary because the court advised him of the statutory maximum sentence rather than the maximum he actually could be sentenced to, which, given that his case presented no aggravating factors, was only the standard range.

But since Blakely and Knotek, ample case law has rejected this proposition. For example, in State v. Weyrich,[9] our Supreme Court held that "[a] defendant must be informed of the statutory maximum for a charged crime, as that is a direct consequence of his guilty plea."[10] And in State v. Kennar, this court held that "[b]oth the statutory maximum sentence determined by the legislature and the applicable standard sentence range have been declared to be direct consequences of a guilty plea about which a defendant must be informed in order to satisfy due process requirements." [11] In his reply brief, Farwell contends that because he submitted his appeal to Division Two of this court, Kennar, a Division One case, "is not binding" authority.[12] But Division Two of this court has also held that "[a] defendant must be informed of the statutory maximum sentence for a

[7] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[8] 136 Wn. App. 412, 149 P.3d 676 (2006).

[9] 163 Wn.2d 554, 182 P.3d 965 (2008).

[10] Id. at 557.

[11] 135 Wn. App. 68, 75, 143 P.3d 326 (2006) (citing In re Vensel, 88 Wn.2d 552, 555, 564 P.2d 326 (1977); State v. Mendoza, 157 Wn.2d 582, 587-88, 141 P.3d 49 (2006)).

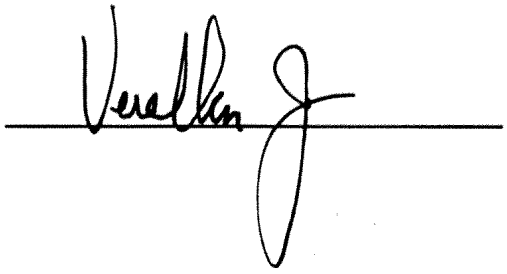
[12] Appellant's Reply Br. at 1.

charged crime because it is a direct consequence of his guilty plea."[13] Current case law does not support Farwell's argument.

II. Discretionary Fees

Farwell argues that remand is necessary to strike the requirement that he pay the domestic violence fee and the costs of community custody. Because the trial court intended to strike all discretionary fees,[14] we accept the State's concession that the domestic violence fee and the costs of community custody should be stricken.

Therefore, we affirm Farwell's guilty plea and remand for further proceedings consistent with this opinion.



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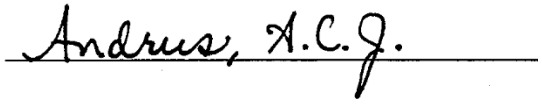

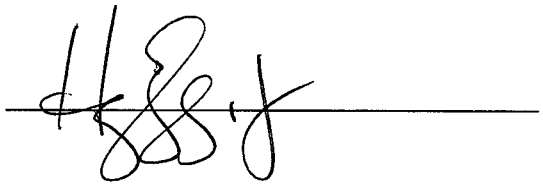

[13] In re Pers. Restraint of Stockwell, 161 Wn. App. 329, 335, 254 P.3d 899 (2011) (citing Weyrich, 163 Wn.2d at 557), aff'd, 179 Wn.2d 588, 316 P.3d 1007 (2014).

[14] Clerk's Papers at 29-33, 39-47; RP (Dec. 6, 2019) at 15.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 82534-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: November 3, 2021
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