

69309-3

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No. 69309-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARRIDAN NELSON,

Appellant.

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

The Honorable Eric Z. Lucas

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Nelson's guilty pleas were involuntary.
2. The trial court erred in failing to advise Mr. Nelson of his right to withdraw his guilty pleas.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

At the time of entering a guilty plea, a defendant must be properly advised of the sentencing consequences resulting from the guilty pleas. Where the defendant is misadvised, the plea is involuntary and the defendant has the right to move to withdraw the plea. Here, the State conceded that Mr. Nelson was misadvised of the sentencing consequences of his guilty pleas but the trial court failed to advise Mr. Nelson he had the right to withdraw the guilty pleas or allow him to move to withdraw the pleas. Is Mr. Nelson entitled to remand to the trial court to allow him to withdraw the involuntary guilty pleas?

C. STATEMENT OF THE CASE

On June 27, 1995, Garridan Nelson pleaded guilty to three counts of first degree murder. CP 58-65. Paragraph 6(h) of the Statement of Defendant on Plea of Guilty advised Mr. Nelson that one of the consequences of his plea to first degree murder was that he was not eligible for "time off for good behavior." CP 60.

The trial court sentenced Mr. Nelson to the upper end of the standard range to the mandatory minimum of 240 months, and 320 months on each count to be served consecutively, for a total sentence of 960 months in prison. CP 55. In paragraph (7) of the Judgment and Sentence, Mr. Nelson was advised that:

RCW 9.94A.120(4) provides that 240 months on each count is a mandatory minimum during which the defendant is not eligible for community custody, earned early release time, furlough, etc.

CP 55.

Subsequently, in *State v. Cloud*, this Court invalidated a similar portion of RCW 9.94A.120 as it violated the single subject rule under Article II, section 19 of the Washington Constitution. 95 Wn.App. 606, 617-18, 976 P.2d 649 (1999). Based upon the result in *Cloud*, on July 21, 2012, Mr. Nelson filed a Motion to Modify or Correct Judgment and Sentence Pursuant to CrR 7.8, to strike the unconstitutional provision of the statute from his Judgment and Sentence. CP 8-29. In response, the State conceded that Mr. Nelson was entitled to the relief he requested. CP 3-5.

On August 23, 2012, the trial court held a hearing on Mr. Nelson's motion at which Mr. Nelson appeared telephonically. Based upon the State's concession, the court agreed to amend the Judgment

and Sentence. RP 2. Mr. Nelson immediately asked the court if he was being remanded for resentencing, to which the court replied:

THE COURT: No. That's not required. The order – hang on a second. The order caption is Order Amending Judgment and Sentence. That's all we have to do. We don't have to resentence you. Any other questions?

THE DEFENDANT: Well, there were other issues that I would like to have been able to bring up at a sentencing hearing.

THE COURT: Well, I am sure that's true from your point of view. But the only issue that I see is that this relief that you have requested in terms of early release needs to be granted. The process that you outlined is not necessary. All we have to do is amend the Judgment and Sentence. And that's what I intend to do this morning. I will send you a copy of the order. If you have any other issues or any further need for a motion, you can always make those motions.

RP 3.

Mr. Nelson appeals from the trial court's refusal to order a resentencing to allow him to move to withdraw his guilty pleas. CP 1.

D. ARGUMENT

MR NELSON'S GUILTY PLEAS WERE
INVOLUNTARY AND, AS A CONSEQUENCE, HE IS
ENTITLED TO WITHDRAW THOSE PLEAS

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).

An appellant may challenge the voluntariness of his plea for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001); *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). In *Walsh*, the defendant raised for the first time on appeal the voluntariness of his plea based upon a mutual mistake regarding the applicable standard range. The Supreme Court ruled that since "[a]

defendant must understand the sentencing consequences for a guilty plea to be valid[],” the defendant may raise the voluntariness of his plea and move to withdraw the guilty plea for the first time on appeal where it is based upon a misadvisement of the sentencing consequences. *Walsh*, 143 Wn.2d at 8, quoting *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), overruled on other grounds, *State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011).

2. Mr. Nelson’s guilty pleas were involuntary as they were based upon a mutual mistake regarding the consequences of his sentence. A trial court must permit withdrawal from a plea agreement where the defendant entered the plea involuntarily. CrR 4.2(f); *Wakefield*, 130 Wn.2d at 474-75. Further, the trial court must advise the defendant of his right to withdraw the guilty plea prior to resentencing. *Id.* (“A trial court must permit withdrawal of a plea agreement where the defendant entered the plea involuntarily”).

In *Walsh*, the defendant established that his guilty plea was involuntary based upon a mutual mistake about the standard range sentence. Both the defense and the prosecution understood at the time of entering into a plea agreement that the standard sentencing range was 86 to 114 months, when the actual range was 95 to 125 months.

Walsh, 143 Wn.2d at 4. The Court held Mr. Walsh was entitled to withdraw his guilty plea because his plea was not voluntary. *Id.* at 91-10.

Under *Walsh*, a defendant is entitled to withdraw his guilty plea when his or her sentence is based on mutual mistake. 143 Wn.2d at 6-7. Here, all parties assumed Mr. Nelson was not eligible for earned release time. Based on the parties' mutual mistake, the court amended the Judgment and Sentence, but it failed to advise Mr. Nelson of his right to withdraw his plea. The proper recourse is to remand to allow Mr. Nelson to withdraw his guilty pleas. *See Wakefield*, 130 Wn.2d at 475 (“Given these circumstances, we hold that Wakefield may withdraw her plea and remand to the trial court for a hearing to give Wakefield this opportunity.”).

3. It is irrelevant whether the misadvisement was material to Mr. Nelson’s decision to plead guilty. It may be argued that since Mr. Nelson was sentenced to such a long standard range sentence, the error in advising him was not material to his decision to plead guilty. This argument regarding materiality 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. Nelson entered his plea to determine whether or not the misadvisement entered into his decision to plead guilty, his guilty plea was invalid.

4. Mr. Nelson is entitled to remand to allow him to move to withdraw his guilty pleas. The remedy 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).

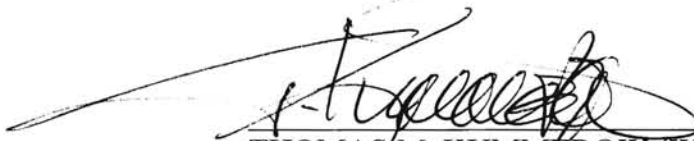
Since Mr. Nelson was misadvised of the sentencing consequences, he is entitled to reversal of his guilty pleas and remand to the trial court to allow Mr. Nelson to withdraw his guilty pleas.

E. CONCLUSION

For the reasons stated, Mr. Nelson requests this Court reverse his convictions and sentence and remand for him to withdraw his guilty pleas.

DATED this 14th day of March 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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Respondent,)	NO. 69309-3-I
)	
)	
GARRIDAN NELSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MARCH, 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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