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COURT OF APPEALS
DIVISION ONE

NOV 12 2013

No.
COA No. 69638-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CRAIG LEE,

Petitioner.

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

The Honorable Michael J. Heavey

PETITION FOR REVIEW

FILED
MAY - 1 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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RULES

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A. IDENTITY OF PETITIONER

Anthony Lee asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the Court of Appeals unpublished decision in *State v. Anthony Craig Lee*, No. 69638-6-I (October 14, 2013). A copy of the decision is in the Appendix at page A-1.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires that a guilty plea be entered knowingly, intelligently, and voluntarily. If the defendant is misadvised about the applicable maximum sentence for the offense charged, the resulting plea is not entered knowingly, voluntarily, and intelligently. Mr. Lee was advised that he could be sentenced up to five years for the offense with which he was charged, when in fact the maximum peril he faced was 24 months. Was Mr. Lee's guilty plea invalid because it was not entered knowingly, voluntarily, and intelligently?

2. Is the decision in Mr. Lee's case in direct conflict with the decision of Division Two in *State v. Knotek,* 136 Wn.App. 412, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007)?

D. <u>STATEMENT OF THE CASE</u>

Anthony Lee pleaded guilty to one count of possession of cocaine and one count of theft in the second degree. CP 8-18. In the Statement of Defendant on Plea of Guilty, Mr. Lee was advised the standard range for this offense was 12+ - 24 months on the possession count, and 22 – 29 months on the theft count. Mr. Lee was also advised each offense had a maximum sentence of 5 years. CP 9. Mr. Lee was also advised that the judge could impose a sentence outside the standard range. CP 12.

The Judgment and Sentence filed following the 2010 sentencing hearing stated the standard range as 12+ to 24 months on the possession count, 17 – 22 months on the theft count, both with a maximum sentence of five years. CP 35. The 2012 Judgment and Sentence from the 2012 sentencing hearing contained the same calculation. CP 51.[1]

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[1] Mr. Lee filed a motion to modify or correct the Judgment and Sentence petition challenging the term of incarceration and term of community custody, which the superior court transferred to this Court to be considered as a personal restraint petition. CP 47. This Court reversed Mr. Lee's Judgment and Sentence and remanded for resentencing. CP 48-49.

On appeal, Mr. Lee contended his plea was not a knowing, voluntary or intelligent plea because he had been misadvised of the maximum sentence which he faced. The Court of Appeals adhered to its decision in *State v. Kennar,* 135 Wn.App. 68, 143 P.3d (2006), *review denied,* 161 Wn.2d 1013 (2007).

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

MR. LEE'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED AS HE WAS MISADVISED OF THE MAXIMUM SENTENCE

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). Misadvisement of the relevant maximum sentence is a direct

consequence of a guilty plea. *State v. Walsh,* 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State v. Morley,* 134 Wn.2d 588, 621, 952 P.2d 167 (1998).

Pursuant to CrR 4.2(f), a defendant may withdraw a plea of guilty "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice may occur if the plea was not knowing, voluntary and intelligent. *State v. S.M.,* 100 Wn.App. 401, 409, 996 P.2d 1111 (2000). A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. Marshall,* 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

2. <u>Mr. Lee was misadvised of the relevant maximum sentence</u>. The court and the Statement of Defendant on Plea of Guilty advised Mr. Lee that the maximum sentence for his offense was five years. CP 9; 2/16/2010RP 5. That information was incorrect.

It is true that a person being sentenced for a Class C felony cannot be punished by confinement exceeding a term of five years. RCW 9A.20.021(1)(c). But in *Blakely v. Washington*, the United States Supreme Court rejected the notion that this term under RCW 9A.20.021(1)(c) was the statutory maximum for a Class C offense under the SRA. 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403

(2004). Instead, the Court noted that the maximum sentence was "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis in the original.) *Id.* Consistent with *Blakely*, this Court has recognized that "it is the direct consequences of her guilty plea, not the maximum potential sentence if she went to trial, that [the defendant] had to understand." *State v. Knotek*, 136 Wn.App. 412, 424 n.8, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007) (emphasis in original).[2] Thus, here, the maximum sentence was the high end of the standard range, which was 24 months for the possession count and 22 months for the theft count. CP 35.

Mr. Lee's guilty plea did not support a sentence above 24 months – the maximum the judge could have imposed for possession of cocaine based on his offender score. RCW 69.50.4013; RCW 9.94A.505, .510, .518, .525, .530.

Mr. Lee was advised that the judge could impose a sentence outside the standard range, up to a maximum sentence of five years. This statement was incorrect under *Blakely* and CrR 4.2(g). Thus, the failure to advise Mr. Lee of the maximum sentence to which he was

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[2] *But see State v. Kennar*, 135 Wn.App. 68, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007) (reaching opposite conclusion).

exposed, the high end of the standard range, violated his constitutional right to a knowing, intelligent, and voluntary plea, because it misinformed him about the sentencing consequences of his plea. *Isadore*, 151 Wn.2d at 298; *Walsh*, 143 Wn.2d at 8.

3. The decision of Division One in Ms. Lee's case is in direct conflict with Division Two of the Court of Appeals' decision in *Knotek*. The Court of Appeals rejected Mr. Lee's argument that trial court erred when it advised him that the maximum sentence he faced was the statutory maximum as opposed to the high end of the standard range, relying on its decision in *Kennar*, 135 Wn.App. at 74-76. *Kennar* ruled that the decision in *Blakely* did not change the requirements regarding the advisement of the maximum sentence. *Id.*

Division Two of the Court of Appeals in *Knotek* disagreed. The Court in *Knotek* ruled that consistent with *Blakely*, the Court has recognized that "it is the direct consequences of her *guilty plea*, not the maximum potential sentence if she went to trial, that [the defendant] had to understand." *Knotek*, 136 Wn.App. at 424 n.8 (emphasis in original).

The decisions in this case and the decision of Division One in *Kennar* are in direct conflict with the Division Two decision in *Knotek*.

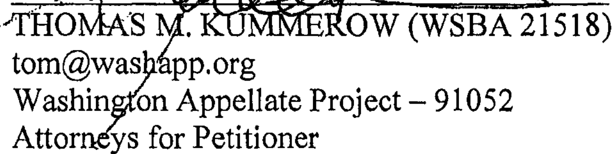
As a consequence, this Court should grant review to resolve this conflict.

F. CONCLUSION

For the reasons stated, Mr. Lee submits this Court should grant review of the decision in his matter.

DATED this 12th day of November 2013.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 69638-6-I
v.	)	DIVISION ONE
ANTHONY C. LEE, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: OCT 14 2013

COURT OF APPEALS DIV I STATE OF WASHINGTON 2013 OCT 14 AM 9:50

PER CURIAM. — Anthony Lee appeals his convictions for second degree theft and possession of cocaine. Citing Division Two's decision in State v. Knotek, 136 Wn. App. 412, 149 P.3d 676 (2006), he contends he was misadvised of the applicable maximum sentence and that his guilty plea was therefore not knowingly, voluntarily, and intelligently entered. He concedes, however, that this court reached a contrary conclusion in State v. Kennar, 135 Wn. App. 68, 143 P.3d 326 (2006). Lee offers no persuasive basis to depart from our decision in Kennar. We adhere to it and reject his challenge to his plea. Lee's statement of additional grounds for review, which discusses a civil claim for unlawful imprisonment, fails to articulate any basis for relief from his conviction and sentence.

Affirmed.

Cox, J.

WE CONCUR:

Spearman, J.

Leach, C. J.

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DIVISION ONE

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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** under **Case No. 69638-6-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:

☒ respondent Andrea Vitalich, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Date: November 12, 2013