No. 31311-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

THOMAS T. ARANDA,
Defendant/Appellant.

APPEAL FROM THE CHELAN COUNTY SUPERIOR COURT
Honorable Lesley A. Allan, Superior Court Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Mr. Aranda's guilty plea was not knowing, intelligent or voluntary.

2. The trial court erred in imposing costs of defense as an additional legal financial obligation three weeks after Mr. Aranda was sentenced.

Issues Pertaining to Assignments of Error

1. Was Mr. Aranda's guilty plea knowing, voluntary and intelligent, where he was not informed until after sentencing that his offense of first degree rape required an indeterminate sentence consisting of a maximum term of life and a minimum term of confinement?

2. Does a court lack statutory authority to impose an additional non-restitution legal financial obligation upon an offender after he has been sentenced?

B. STATEMENT OF THE CASE

In November 2009 eighteen-year-old Thomas T. Aranda pled guilty to one count each of first degree rape (while armed with a firearm), first degree robbery (while armed with a firearm), first degree burglary, second degree unlawful possession of a firearm(possession by person under age eighteen) and possession of a controlled substance-psilocybin.

The five counts arose from an incident that occurred in April 2008, when Mr. Aranda was sixteen years old. 11/17/09 RP 6, 20–21.

At the plea hearing, the trial court confirmed Mr. Aranda had been told of the standard range sentences that were being offered:

> [THE COURT]: So, including the firearm enhancement, the range on [first degree rape] is 222 to 276 months. On [first degree robbery including the firearm enhancement], it's 137 to 162 months. On [first degree burglary], it's 67 to 75 months. [Second degree unlawful possession of a firearm] is 12 months plus one day to 16 months. And on [possession of a controlled substance], six months plus one day to 18 months.

11/17/09 RP 3–4, 9. Mr. Aranda indicated he understood the 5-year firearm enhancements must run consecutive to each other and to the other sentences:

> [THE COURT]: And so what that ends up meaning is that on the ... longest range which is on count one, the rape first degree, your range effectively becomes 282 to 336 months. That's the range that the Court is going to be sentencing you in, on the most serious count.

11/17/09 RP 10, 18. The court informed Mr. Aranda that the prosecutor's office was recommending 27 years [324 months], "which is not quite at the high end" of the standard range for the rape charge, and noted that the court was not bound by that recommendation. 11/17/09 RP 10; CP 18. The agreement allowed Mr. Aranda to ask to be sentenced to the low end of the range, 23 and one- half years. 11/17/98 RP 11; CP 4. The court noted the

rape charge included lifetime community custody and offender registration upon release, and carried a maximum penalty of life in prison and/or a $50,000 fine. 11/17/09 RP 5, 12–15, 20.

The trial court did not advise Mr. Aranda of the indeterminate sentencing required for sex offenses committed after July 12, 2001 or discuss paragraph 6(f) of his statement on plea of guilty or advise him that a life sentence was a possible outcome of pleading guilty to the first degree rape charge. 11/17/09 RP *passim;* CP 15, 17.

The statement on plea of guilty contains the following notification about legal financial obligations that may be imposed:

> In addition to sentencing me to confinement, the judge will order me to pay $500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

CP 14 at ¶ 6(e). At the plea hearing, the court and Mr. Aranda engaged in a short colloquy about the costs:

> [THE COURT]: Do you understand that as part of your sentence, first of all, you will be required to pay certain legal costs and fines to the county?
> [MR. ARANDA]: Yes.
> [THE COURT]: And in what I would call the sort of standard case, they're about $1250. But then in addition in this case, there will be other costs, restitution potentially to the victims of the case and

there will probably be some assessments towards subpoena fees for witnesses, expert witness fees, things of that nature?
[MR. ARANDA]: Yes.
[THE COURT]: And that has not yet been determined how much that is; do you understand that?
[MR. ARANDA]: Yes.

11/17/09 RP 11–12.

The court confirmed that Mr. Aranda and his attorney read the plea form to each other; Mr. Aranda said he understood it and signed it. 11/17/09 RP 19.

The court accepted the pleas and found Mr. Aranda guilty as charged, finding he knowingly, voluntarily and intelligently waived his legal rights, was fully advises of the charges and consequences of the charges against him, and there was a factual basis for the pleas. 11/17/09 RP 22.

At sentencing, the court followed the plea agreement, stating:

"So when I look at all of the factors before the Court, Consider the wishes of the victim, the requests by the State, the requests by your attorney and your statement, the Court is going to accept the State's recommendation and *impose what amount to a 27-year sentence on the most serious of the charges*, and with the other recommendations as made by [the prosecutor]. You will be placed on a number of conditions as part of your sentence that were outlined there by [the prosecutor] *including being on lifetime supervision with the Department of Corrections upon your release*.

1/14/10 RP 32 (emphasis added). No mention was made of a minimum or maximum term of confinement as required for sex offenses. 1/14/10 RP 4–6, 8, 32; CP 32–33.

The court imposed $1350[1] in legal financial obligations.

> [THE COURT]: All right, the legal financials I believe are $1350 plus the restitution amount but the Court believes that we need to consider Mr. Aranda's responsibility for a portion or all of the expert witness expenses that were incurred, the various reports, and I don't know that anybody is prepared to do that today. And we may need to set a short hearing to do that. I know that there were tremendous bills incurred as part of the investigation and work on this case by the defense. And the Court is inclined to assess against Mr. Aranda at least some of those costs.

1/14/10 RP 33. In closing remarks, the court emphasized that the sentence, although lengthy, was not a life sentence:

> [THE COURT]: Sir, you will serve a lot of time in prison for these crimes. But unlike as was suggested I think maybe by your sister, *this, because of your young age, does not represent the rest of your life. You will eventually get out of prison* and have the opportunity to show that you mean what you say when you stand here and say that you've changed, that you've learned things and that you want to make better use of your life. *You will have this opportunity* although it will not be coming for [] quite a long time. I hope that *when that day arrives* that you do in fact remember what you said as you stood here in this court and show our community that you can be a better person than you were in April of 2008.

1/14/10 RP 33–34 (emphasis added).

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[1] These are set forth in the Judgment and Sentence, CP 34–35 as: $500 victim assessment, $200 court costs, $450 for court-appointed attorney, $100 crime lab fee, $100 DNA fee.

At the time of sentencing, the parties entered an agreed order setting restitution of approximately $2,308. CP 293–94. The Judgment and Sentence was signed by the judge and filed on January 17, 2010. CP 29–44.

Two weeks after sentencing, the parties appeared at hearing on the court's motion to impose, as described by the prosecutor, "a cost bill associated with independent DNA testing, a DNA expert, and perhaps an independent lab test." 2/3/10 RP 2. The prosecutor said the State was "not requesting the court to impose costs associated with these matters because that was not part of the State's plea agreement." 2/3/10 RP 2. The court was not prepared to address the issue, and the matter was continued. 2/3/10 RP 2–3.

Five days later, a hearing was held on the court's motion. Over defense objection, the court entered an order imposing $6900 as additional legal financial obligations, incurred as expert witness services associated with Mr. Aranda's defense. 2/8/10 RP 2–4; CP 47.

Thereafter, on March 2, 2010, an order was entered apparently without hearing. The Agreed Order Clarifying and Amending Judgment and Sentence ordered that "the Judgment and Sentence entered herein on January 14, 2010, is clarified and amended on page 5, section 4.1(b) to

reflect that as to count I (first degree rape), the minimum term is 264 months and the maximum term is the statutory maximum of life in prison." CP 48–49.

On December 6, 2012, Mr. Aranda filed his notice of appeal of the Judgment and Sentence entered on January 14, 2010. CP 80. By Commissioner's Ruling filed January 17, 2013, the Court denied its motion to dismiss for untimely filing of the Notice of Appeal, and this appeal has been allowed to go forward.

C. ARGUMENT

1. Mr. Aranda's guilty plea was not knowing, voluntary and intelligent, where he was not informed until after sentencing that his offense of first degree rape required an indeterminate sentence consisting of a maximum term of life and a minimum term of confinement.

An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. *State v. Walsh*, 143 Wn.2d 1, 7–8, 17 P.3d 591 (2001).

Due process under the United States and Washington State constitutions requires that a plea of guilty be made knowingly, intelligently and voluntarily. U.S. Const. amend. 14; Wash. Const. art 1 § 3; *PRP of*

Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004), citing *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *PRP of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A defendant enters a valid plea only if he makes a knowing, voluntary, and intelligent decision based on an understanding of the charge and the consequences. *State v. McDermond,* 112 Wn. App. 239, 243–44, 47 P.3d 600 (2002). A guilty plea is not knowingly made when it is based upon misinformation of sentencing consequences. *Isadore*, 151 Wn.2d at 298, citing *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). A defendant need not be informed of all possible consequences of his plea, but he must at least be informed of all direct consequences of the plea. *Isadore*, 151 Wn.2d at 298, citing *Ross*, 129 Wn.2d at 284.

A guilty plea is constitutionally involuntary when a defendant is misinformed about a direct consequence of pleading guilty. *State v. Mendoza*, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A plea will be overturned based on defective advice when the advice relates to a direct, as opposed to a collateral, consequence of the plea that materially affects the defendant's decision to plead. *McDermond,* 112 Wn. App. at 247. The

possibility of a life sentence is a direct, not a collateral, consequence of pleading guilty. *McDermond,* 112 Wn. App. at 248.

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin,* 395 U.S. at 242. "The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." *Wood v. Morris,* 87 Wn.2d 501, 502–03, 554 P.2d 1032 (1976).

In *PRP of Murillo*, 134 Wn. App. 521, 142 P.3d 615 (2006), this Division held that a defendant who was not advised properly of the requirement of a maximum sentence of life for his offense and of the community custody range of his sentence did not enter a plea knowingly, intelligently or voluntarily. In *Murillo*, this Court pointed out that: (1) although the required sentence was life imprisonment, the court that accepted Murillo's plea "told Mr. Murillo otherwise: 'I guess I can go low [below the standard range minimum sentence], but I cannot go above under the present law'"; (2) "the sentencing court wrote the determinate sentence of 59-1/2 months in the portion of the judgment form used for sentences not subject to [former] RCW 9.94A.712, while leaving blank the

portion of the judgment form that related to sentences subject to [former]RCW 9.94A.712"; and (3) misunderstandings regarding the term of community custody and the term of confinement and maximum term of sentence were apparent from colloquy and the written plea agreement. *Murillo*, 134 Wn. App. at 531.

The facts of this case are very similar to those in *Murillo*. Mr. Aranda signed a plea agreement which stated in boilerplate language the sentence required by statute for his crime of first degree rape was life imprisonment and the court would impose a minimum term of confinement. CP 15, 21. But the court that accepted his plea told him otherwise. "[*O]n the ... longest range* which is on count one, the rape first degree, *your range* [including the two 60 month firearm enhancements] effectively *becomes 282 to 336 months. That's the range that the Court is going to be sentencing you in*, on the most serious count. 11/17/09 RP 10 (emphasis added).

The filled-in portions of his statement on plea of guilty also reflect that Mr. Aranda was facing only a determinate sentence. The statement lists his "Total Actual Confinement" as 222–276 months including one 60–month enhancement as well as the additional enhancement attributable to the first degree robbery charge. CP 14. The addendum to the statement

notes "[t]he effective sentence on this plea is 282-336 months which is the standard range on the rape 1st charge plus its own 60 month firearm enhancement plus the 60 month firearm enhancement on the robbery 1st charge. The two firearm enhancements are consecutive to each other and to the other standard ranges thereby the effective range noted here. (23.5 years to 28 years)." CP 16. And the agreement similarly reflects a determinate sentence: the "[p]rosecutor will recommend 27 years (324) months" (CP 18) and Mr. Aranda is free to ask to be sentenced to the low end of the range, 23 and one- half years. 11/17/98 RP 11; CP 4.

The error that a determinate sentence was the subject of the plea agreement was not corrected, and was presented to Mr. Aranda as part of the consequences of his plea. When the trial court reviewed the plea with Mr. Aranda during colloquy, the judge did not correct the determinate sentence misconception—instead, the judge failed to advise Mr. Aranda in any way of the statutorily required sentence of life imprisonment with a specified minimum term of confinement, and only informed him of the maximum penalty and fine.

At the sentencing hearing, the error continued. The State recommended a determinate sentence, Mr. Aranda's attorney asked for a low-end determinate sentence as contemplated by the plea agreement, and

the court imposed the determinate sentence of 27 years recommended by the State, to be followed upon Mr. Aranda's release by lifetime supervision with the Department of Corrections. 1/14/10 RP 4–6, 13–14, 32. In closing remarks, the court emphasized that the sentence, although lengthy, was not a life sentence and that Mr. Aranda would "eventually get out of prison". 1/14/10 RP 33–34. The sentencing court wrote the sentence of 264 months on the rape charge in the portion of the judgment form used for sentences not subject to RCW 9.94A.507. It left blank the portion of the judgment form that related to sentences subject to RCW 9.94A.507. CP 32–33.

From all information in the record, Mr. Aranda was misinformed as to his potential life sentence from all directions—the court, the prosecutor and Mr. Aranda's attorney[2]. At the time of the plea hearing Mr. Aranda was barely eighteen years old and had made an unsuccessful suicide attempt earlier that morning. CP 29, 114. Mr. Aranda was not correctly informed of the consequence of his plea of guilty to first degree rape until nearly two months after sentencing, when an order was entered that amended the Judgment and Sentence to "reflect that as to count I (first degree rape), the minimum term is 264 months and the maximum term is

the statutory maximum of life in prison." CP 48–49.

Criminal rules of procedure impose a duty on the trial courts of this State to ensure that defendant's guilty pleas are knowingly, voluntarily, and intelligently made; Criminal Rule 4.2(d) affirmatively imposes this duty. *Murillo*, 134 Wn. App. at 531. That duty was not met here. The court apparently misunderstood the sentencing consequences. The sentence a court will impose is a direct consequence of the plea. *Isadore,* 151 Wn.2d at 298, citing *Miller*, 110 Wn.2d at 531. And as in *Murillo,* both the judge's advice to Mr. Aranda and the written plea agreement reflect this misunderstanding. Mr. Aranda's guilty plea was not knowingly, intelligently, and voluntarily made. Manifest injustice of a constitutional magnitude exists, and Mr. Aranda must be allowed to withdraw his guilty plea to correct that manifest injustice. *Murillo*, 134 Wn. App. at 531.

2. A court lacks statutory authority to impose an additional non-restitution legal financial obligation upon an offender after he has been sentenced.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the

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[2] According to the WSBA web-site, Mr. Aranda's attorney, Michael Joseph Platts, is deceased. www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=6903 (last accessed April 15, 2014).

power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981(SRA) is an issue of law, which is reviewed de novo. *State v. Hale,* 94 Wn. App. 46, 54, 971 P.2d 88 (1999).

Statutory construction is a question of law which is reviewed de novo. *Matter of the Post-sentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007), citing *Cockle v. Dep't of Labor & Indus.,* 142 Wn.2d 801, 807, 16 P.3d 583 (2001). "A trial court may only impose a sentence that is authorized by statute." *Leach*, 161 Wn.2d at 184, citing *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). "This court applies unambiguous statutes according to their plain language and construes only ambiguous statutes." *Leach*, 161 Wn.2d at 185, citing *State*

v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). When interpreting a statute, a court must first assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Thus, if the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). In *State v. Hall*, the court stated this rule as follows:

> Where the meaning of a statute is clear on its face, this court assumes that the Legislature "means exactly what it says" and we give effect to the plain language without regard to rules of statutory construction. *State v. Warfield*, 103 Wn. App. 152, 156, 5 P.3d 1280 (2000.

State v. Hall, 112 Wn. App. 164, 48 P.3d 350 (2002).

The statute authorizing the superior court to impose legal financial obligations as part of an offender's sentence is RCW 9.94A.760, which provides in pertinent part:

> Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation *as part of the sentence.* The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760(1) (emphasis added); *see State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000).

Here, the trial court did not order the payment of $6,900 as "costs and fees associated with defense" at the time of the January 14, 2010 sentencing. *See* Order, entered February 8, 2010 (CP 47). Although the court mentioned at the plea hearing[3] and again at sentencing[4] it was considering assessing some of these costs, it did not do so. *See* Judgment and Sentence at CP34–35. At sentencing, the court also remarked "I don't know that anybody is prepared to do that today. And we may need to set a short hearing to do that." RCW 9.94A.760, however, says payment of a specific assessment may only be made as part of the sentence. The statute does not authorize setting a future hearing to assess a particular legal financial obligation. *C.f.,* the restitution statute, RCW 9.94A.750, which requires restitution to be ordered at time of sentencing but allows for a future hearing to determine the amount.[5]

Nor did the trial court have authority to modify the judgment and sentence to include post-sentence imposition of a legal financial obligation. "After final judgment and sentencing, the court loses jurisdiction to the DOC." *State v. Harkness,* 145 Wn. App. 678, 685, 186

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[3] 11/17/09 RP 11–12.
[4] 1/14/10 RP 33.
[5] "If restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. The court may continue the hearing beyond the one hundred eighty days for good cause. ..." RCW 9.94A.750(1).

P.3d 1182 (2008). This leaves no room for inherent authority to be exercised by the sentencing court. *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003). A sentence imposed under the SRA may be modified only if it meets statutory requirements relating directly to the modification of sentences. *Harkness,* 145 Wn. App. at 685 (citing *State v. Shove,* 113 Wn.2d 83, 89, 776 P.2d 132 (1989)). Examples include earned early release time as determined by the DOC, authorized furlough or leave of absence, serious medical issues, clemency or pardon, partial confinement for reestablishment in the community, or reduction in sentence due to prison overpopulation. *Id.* A court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Hale,* 94 Wn. App. at 53. Here, there was no statutory basis for the post-sentence order, and the court's post-sentence imposition of a legal financial obligation exceeded its authority to modify the judgment and sentence.

The Judgment and Sentence specifies $1,350 as the legal financial obligation ordered by the court. CP 34–35. A restitution order was also entered on the day of sentencing. CP 93–94. The superior court did not have statutory authority to order an additional and separate assessment to

the total legal financial obligation nearly three weeks after sentencing. The order is invalid and must be stricken.

D. CONCLUSION

For the reasons stated, the Court should vacate the lower court's finding of guilt and remand to allow Mr. Aranda to withdraw his guilty plea, should he choose to do so. *Miller*, 110 Wn.2d at 536.

Respectfully submitted on April 15, 2014.

s/Susan Marie Gasch, WSBA 16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 15, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Thomas T. Aranda (#336060)
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen WA 98520

E-mail:
prosecuting.attorney@co.chelan.wa.us
Douglas Shae/James Andrew Hershey
Prosecuting Attorney
P.O. Box 2596
Wenatchee, WA 98807-2596

s/Susan Marie Gasch, WSBA #16485