71313-2

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NO. 71313-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARLON ALDRIDGE,

Appellant.

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's plea was not knowing or voluntary in violation of due process.

2. The court erred in denying appellant's motion to withdraw his guilty plea when appellant was misinformed that the mandatory minimum sentence would necessarily apply.

3. The sentencing court failed to exercise its discretion in sentencing appellant to the high end of the standard range because the court incorrectly believed it was constrained by the terms of the plea agreement.

Issues Pertaining to Assignments of Error

1. A guilty plea may be withdrawn for manifest injustice whenever the party is misinformed about the direct consequences of the plea, even if the sentence actually imposed is less than expected. A mandatory minimum 60-month sentence for first-degree assault applies only if the court makes specific factual findings to support it. Appellant was told the mandatory minimum applied to his case. The court ultimately made no findings and did not impose the mandatory minimum. Did the court err in denying appellant's motion to withdraw his guilty plea based on this misinformation?

2. The court is not bound by the terms of a plea agreement and the court is not required to follow the parties' sentencing

recommendations. Did the sentencing court fail to exercise its discretion when it sentenced appellant to the high end of the standard range pursuant to the agreed sentencing recommendations and stated it felt constrained to follow the parties' agreement?

B. STATEMENT OF THE CASE

The King County prosecutor charged appellant Marlon Aldridge with one count of first-degree assault while armed with a firearm and one count of unlawful possession of a firearm in the first degree. CP 1-2. After the court had ruled on motions in limine and a jury had been selected, Aldridge agreed to plead guilty in exchange for the State's agreement to dismiss the firearm sentencing enhancement and a guarantee that federal charges would not be pursued. CP 80. The plea agreement also provided that the prosecutor would recommend 171 months, the high end of the standard range, and stated this was an agreed recommendation. CP 71, 84. The statement of defendant on plea of guilty also acknowledged the statutory mandatory minimum sentence of 60 months for first-degree assault. CP 71.

At the plea colloquy, Aldridge stated he went through the plea with his attorney, who had explained it to him thoroughly and answered his questions. 2RP[1] 7-9. He expressed understanding that the prosecutor would

[1] There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 19, 2013; 2RP – Aug. 20, 2013; 3RP – Oct. 21, Nov. 22, Dec. 5, and Dec. 17, 2013.

recommend 171 months and that this was an agreed recommendation. 2RP 14. He expressed understanding that the court did not have to follow the recommendation. 2RP 15. He also stated he understood the mandatory minimum sentence and had discussed it with his attorney. 2RP 15. Aldridge also expressed understanding of the elements of the charges, the mandatory community custody to be imposed, and the numerous rights he would be waiving by pleading guilty. 2RP 9-13. The court found Aldridge understood the nature of the charges and the consequences of the plea, and found the plea to be knowing, intelligent, and voluntary. 2RP 22.

Shortly after the plea hearing, Aldridge informed his attorney he wished to withdraw the plea on the grounds of ineffective assistance of counsel. 3RP 3-4. New counsel was appointed, and Alridge formally moved to withdraw his plea. CP 113-62. Aldridge argued he did not understand that the plea agreement would preclude him from requesting a sentence lower than the top of the standard range. CP 126. He argued he was misinformed about application of the 60-month mandatory minimum sentence. CP 122. He argued he was misinformed about his offender score. CP 126. And finally, he argued he did not have the opportunity to appropriately consult with counsel because the plea offer came on the eve of trial with the jury waiting, and his only chance to discuss it with his attorney

occurred in the chaotic and noisy environment of the King county jail. CP 126-27.

At the hearing on the motion to withdraw his guilty plea, Aldridge testified his attorney told him his offender score was four, which was correct. 3RP 18. However, he explained he believed at the time that it had been five and that this was a reduction, a benefit to him. 3RP 23. He testified his attorney told him the statutory minimum of 60 months for first-degree assault was mandatory. 3RP 22. And he explained he understood that the prosecutor would recommend the high end of the standard range, but did not believe he was "definitely pleading to the high end." 3RP 21-22. He testified his attorney did not clarify that the plea agreement required him to agree to the high end. 3RP 35. He explained his attorney did not thoroughly explain the plea agreement, and he (Aldridge) felt rushed to accept or reject it immediately. 3RP 23. Aldridge's only chance to consult his attorney about the agreement was for 10 to 15 minutes in "the cage" with officers walking by, walkie-talkie noises, and other inmates talking, yelling and banging on doors. 3RP 17.

Aldridge's former attorney disputed much of Aldridge's testimony. He claimed Aldridge asked if he could present evidence in favor of a lower sentence, and he explained that would not be possible under the plea agreement. 3RP 52-53. He testified he told Aldridge that he would have to

agree to the high-end sentence. 3RP 52-53. He testified he discussed the mandatory minimum sentence and calculated for Aldridge what that would mean in terms of lost earned early release time. 3RP 54-55. He acknowledged he did not tell Aldridge that the mandatory minimum sentence only applies under some circumstances because he believed those circumstances to exist in Aldridge's case. 3RP 58.

The court denied Aldridge's motion to withdraw his guilty plea, finding the attorney thoroughly explained the agreement and it was voluntary. 3RP 65-66. The Court found the plea was not rendered involuntary by the lack of explanation regarding the conditional nature of the mandatory minimum sentence because it clearly applied to the facts of the case. 3RP 66-67.

At sentencing, the prosecutor recommended a sentence of 171 months, as agreed, as well as concurrent 48 months on the unlawful possession of a firearm charge, and 36 months of community custody. 3RP 87. Defense counsel stated she was barred by the plea agreement from recommending anything else and that her client very much regretted the plea. 3RP 88. After hearing pleas for leniency from Aldridge's family and Aldridge's explanation that he committed the crime while in a state of alcohol-induced blackout, the court imposed sentence. 3RP 89-99. The court stated, "I really feel constrained, though, to follow the parties'

agreement, and so I will sentence in accordance with the parties' agreement of 171 months on count I and 48 months on count II followed by a period of 36 months of community service [sic]." 3RP 99. Notice of appeal was timely filed. CP 99.

C. ARGUMENT

1. THE GUILTY PLEA WAS INVALID BECAUSE ALDRIDGE WAS MISINFORMED ABOUT APPLICATION OF A MANDATORY MINIMUM SENTENCE, A DIRECT CONSEQUENCE OF HIS PLEA.

Aldridge's guilty plea was involuntary and invalid because he was misinformed he would automatically be subject to a mandatory minimum sentence of 60 months. This misinformation entitles him to withdraw his guilty plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006); State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004).

"'Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.'" In re Stockwell, 179 Wn.2d 588, 594-95, 316 P.3d 1007 (2014) (quoting State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)); U.S. Const. Amend. XIV; Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama. 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4. 2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without

first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" Mendoza, 157 Wn.2d at 587 (quoting CrR 4.2).

"Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Id. A guilty plea is not voluntary or knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-9. A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

A mandatory minimum term is a direct consequence of a plea. Conley, 121 Wn. App. at 285 (citing State v. McDermond, 112 Wn. App. 239, 244-45, 47 P.3d 600 (2002)); State v. Johnston, 17 Wn. App. 486, 490, 564 P.2d 1159 (1977) (citing Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032, 1039 (1976)); see also State v. Miller, 110 Wn.2d 528, 528-29, 537, 756 P.2d 122 (1988) (mistake over mandatory minimum sentence entitled

defendant to withdraw plea), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

RCW 9.94A.540(1)(b) prescribes a mandatory minimum term in some cases of first degree assault: "[T]he following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535: . . . An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years." RCW 9.94A.540(1)(b). This provision also affects the actual release date: "During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release[.] "RCW 9.94A.540(2).

Aldridge's statement on plea of guilty recites the mandatory minimum sentence as if it were automatic: "The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence." CP 71. Aldridge's attorney reinforced Aldridge's understanding that the mandatory minimum sentence would automatically apply. 3RP 54-55, 58. Although Aldridge's 171-month sentence is significantly longer than the 60 month mandatory

minimum, the mandatory minimum term is not without effect. Counsel testified he explained to Aldridge, because of the inability to earn early release time, the mandatory minimum would increase his actual jail time by six months. 3RP 54-55; RCW 9.94A.540(2). But this information was incorrect.

The mandatory minimum sentence prescribed by RCW 9.94A.540 does not automatically apply to all convictions for first-degree assault. State v. McChristian, 158 Wn. App. 392, 402- 03, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011). Nor does it apply whenever a firearm was used. In re Pers. Restraint of Tran, 154 Wn.2d 323, 329, 111 P.3d 1168 (2005). The court may not impose the mandatory minimum sentence without a specific factual finding that the offender used force or means likely to result in death or intended to kill the victim. State v. McChristian, 158 Wn. App. 392, 402- 03, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011).

Under recent United States Supreme Court precedent, that finding must be made by a jury to comply with the Sixth Amendment. Alleyne v. United States, __U.S.__, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013). The Alleyne court applied the logic of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to hold that any fact that increases the mandatory minimum must be submitted to the jury. Alleyne,

133 S. Ct. at 2155. In this case, there was no jury finding regarding whether or not Aldridge used force or means likely to result in death or intended to kill the victim.[2] Without that finding, the mandatory minimum sentence cannot be applied to Aldridge. Alleyne, 133 S. Ct. at 2164. Aldridge was misinformed about a direct consequence of his plea because he was incorrectly informed he would receive a mandatory minimum sentence.

A guilty plea is involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91. Under Mendoza, a defendant may withdraw a guilty plea when the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent 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." Id. at 591. In short, misinformation indicating greater punishment invalidates a plea in the same manner as misinformation indicating lesser punishment. Id. at 590-91.

Mendoza dictates the outcome in this case. The plea form and Aldridge's attorney's testimony show he was affirmatively misinformed

[2] Nor did he stipulate to facts necessary to support the mandatory minimum sentence.

about the mandatory minimum 60-month sentence. CP 71; 3RP 54-55, 58. That misinformation renders his guilty plea involuntary, a manifest injustice that entitles him to withdraw his guilty plea. Mendoza, 157 Wn. 2d at 584.

It is immaterial whether Aldridge relied on the mandatory minimum sentence set forth in the plea form. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." Mendoza, 157 Wn.2d at 589; see also State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty."). On the contrary, the Supreme Court has specifically rejected "an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty" because "'[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.'" Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302). Therefore, misinformation regarding the direct consequences of a plea is presumed prejudicial on direct appeal. Stockwell, 179 Wn.2d at 596.

Aldridge should be allowed to withdraw his plea because the plea agreement misinformed him he would face a mandatory minimum sentence

of 60 months as a consequence of pleading guilty. Mendoza, 157 Wn. 2d at 584; Conley, 121 Wn. App. at 285.

Aldridge is entitled to withdraw his plea as to both counts because the plea is indivisible. A plea agreement is indivisible when the defendant pleads guilty to multiple charges in a single proceeding and the pleas are described in the same agreement. State v. Turley, 149 Wn.2d 395, 400, 402, 69 P.3d 338 (2003). When manifest injustice is shown as to one count, the entire plea agreement, including all charges, may be withdrawn and may not be limited to one count only. Id. at 400. Under Turley, this Court should permit Aldridge to withdraw his plea of guilt to both counts.

2. THE COURT FAILED TO EXERCISE ITS DISCRETION BECAUSE IT INCORRECTLY BELIEVED IT WAS BOUND TO FOLLOW THE AGREED RECOMMENDATION.

The Sentencing Reform Act vests a sentencing judge with broad discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). Nevertheless, "the trial judge must still exercise this discretion in conformity with the law." Id. The failure to exercise any meaningful discretion in determining the sentence is an abuse of the sentencing court's discretion. Id. at 335-36.

A trial court fails to exercise sentencing discretion when it erroneously believes it has none. State v. McGill, 112 Wn. App. 95, 98-

99, 47 P.3d 173 (2002); see also State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) aff'd, 169 Wn.2d 571 (2010) ("A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand.") (citing State v. Garcia–Martinez, 88 Wn. App. 322, 329–30, 944 P.2d 1104 (1997)). Remand is required here because the trial court erroneously believed it had no discretion to deviate from the agreed recommendations of the parties at sentencing. 3RP 99. Because this is a misapprehension of the law and an abdication of the court's sentencing discretion, Aldridge asks this Court to vacate his sentence and remand for resentencing.

In McGill, the trial court imposed a standard range sentence because it mistakenly believed it had no authority to depart from the range, apparently by overlooking the SRA's multiple offense policy. McGill, 112 Wn. App. at 98-99. The court imposed a standard range term despite remarking it may have imposed an exceptional sentence if it thought it had such discretion:

> I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters. And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that

> for me. So I have no option but to sentence you within the range on these of 87 months to 116 months.

Id. at 98-99. Because these comments indicated it would have considered granting an exceptional sentence had it known it could, this Court remanded so the trial court could exercise its principled discretion. Id. at 100-101. This Court should do likewise here.

Like the sentencing court in McGill, the court here was apparently unaware of its broad sentencing discretion, stating it felt "constrained" to follow the parties' agreed sentencing recommendation. 3RP 93-94. When no additional mitigating or aggravating facts are found, the court may impose sentence anywhere within the standard range. RCW 9.94A.505. It is well settled that the court is not bound by the plea agreement or the parties' sentencing recommendations. RCW 9.94A.431(2); State v. Barber, 152 Wn. App. 223, 227, 217 P.3d 346, 348 (2009) aff'd, 170 Wn.2d 854 (2011). Even when both parties agree, the final decision on sentencing rests with the court. State v. Harrison, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003) (citing In re Pers. Restraint of Powell, 117 Wn.2d 175, 199, 814 P.2d 635 (1991)). The sentencing court's "incorrect understanding of applicable sentencing laws" is a fundamental defect resulting in a complete miscarriage of justice. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

A defendant may appeal a standard range sentence if the court fails to comply with procedural requirements of the SRA or constitutional mandates. State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). "[I]t is well established that appellate review is still available for the corrections of legal errors or abuses of discretion in the determination of what sentence applies." State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (State may appeal imposition of drug offender sentencing alternative). A party may "challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (quoting Williams, 149 Wn.2d at 146-47). Here, Aldridge may appeal his sentence because the court abused its discretion by basing its decision on a misunderstanding of the law and failing to recognize it had that discretion. 3RP 99; Williams, 149 Wn.2d at 147.

Remand is required because it cannot be ascertained from the record whether the sentencing judge would have imposed the same sentence if he had understood he was not bound by the parties' recommendation. See Mulholland, 161 Wn.2d at 334 ("Where the appellate court 'cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,' remand is proper.") (quoting McGill, 112 Wn. App. at 100–01).

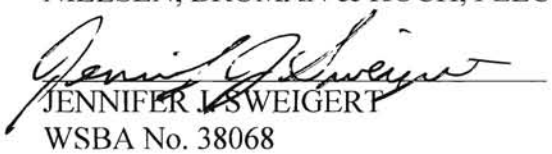
D. CONCLUSION

For the foregoing reasons, Aldridge requests this Court permit him to withdraw his guilty plea or, alternatively vacate his sentence and remand for resentencing.

DATED this 24th day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71313-2-I
	)	
MARLON ALDRIDGE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARLON ALDRIDGE
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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE 2014.

X Patrick Mayovsky