NO. 47238-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LIA TRICOMO,

Appellant.

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

REPLY BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT.

1. Double Jeopardy protections do not permit Ms. Tricomo's multiple convictions.

"Where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea. *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). In her guilty plea Ms. Tricomo agreed to permit the trial court to review the affidavit of probable cause to determine the factual basis for her plea. That affidavit describes the incident and permits this Court to conclude the multiple convictions violate Double Jeopardy.

Examining the facts which underlie the guilty pleas, the affidavit of probable cause and police report, it is clear that Ms. Tricomo's acts constituted a single criminal episode driven by the singular intent to kill Mr. Alkins. The affidavit of probable cause states that earlier in the evening she had hidden a knife in the bedroom with the intent to use it to kill Mr. Alkins. CP 5. Consistent with that plan when they entered the bedroom she used the knife to cut Mr. Alkins throat several times. *Id.* She subsequently used the same knife to prevent him from leaving the house, cutting his wrist in the process. *Id.* Ultimately when those

efforts did not lead to Mr. Alkins's death she strangled him with an extension cord. *Id.* The intent to kill never changed.

Nonetheless, the State in its response contends "the available evidence does not support [the] assertion" that Ms. Tricomo's actions were driven by such a singular intent. Brief of Respondent at 9. The affidavit of probable cause, signed under penalty of perjury by the prosecutor, belies that claim. Having sworn to the accuracy of those facts, the State cannot simply disavow its own statement simply out of convenience.[1]

Where they are based on same conduct murder and assault are the same offense for double jeopardy purposes. *See State v. Womac*, 160 Wn.2d 650, 654-55, 160 P.3d 40 (2007) (entry of convictions for homicide by abuse, second degree felony murder, and first degree assault for death of his son violated double jeopardy principles). Again the facts establish a single intent to kill Mr. Alkins. The assault and

---

[1] Moreover, the State's contention on appeal that its sworn statement was factually inaccurate should raise concerns for the State. *See e.g., Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (King County deputy surrendered immunity when swearing to accuracy of incorrect facts in affidavit of probable cause).

murder counts therefore arose from a single course of conduct and cosntitute the same offense.

Moreover, as argued in her initial brief, the multiple assault charges constitute a single count of assault. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 329 P.3d 78, 82 (2014).

2. Ms. Tricomo was misinformed of the consequences of her guilty plea.

The Fourteenth Amendment's Due Process Clause 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). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). 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).

As the Supreme Court ruled in *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), while a certain term imprisonment may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. Instead, the

Court noted the maximum sentence under Washington law is "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 original.) *Id.*

Here, the standard range is the maximum possible sentence the court could impose for the offenses of which Ms. Tricomo was convicted. There were no circumstances in Ms. Tricomo's case which would have permitted the imposition of any sentence above the standard range. Thus, the "maximum term" was not "life," "10 yrs" or "5 yrs" as the plea form stated. Rather, the maximum was the top-end of the respective standard ranges. Ms. Tricomo was misadvised of the maximum punishment she faced as a consequence of her guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 W.2d 1013(2007).

Knotek is directly on point. There this Court acknowledged that before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she went to trial. . . ." *Id.* at 424 n.8. The *Knotek* Court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek post-*Blakely* as a result of her pre-*Blakely*

plea—[to] the top end of the standard ranges . . . ." *Id.* at 425. Thus, where a defendant is told the maximum sentence is life when in fact it is the top of the standard range the defendant is misadvised of the consequences of the plea.[2]

In response, the State relies upon Division One's opinion in *State v. Kennar* which concluded CrR 4.2 requires a guilty plea inform a defendant of the statutory maximum to ensure the voluntariness of the plea. 135 Wn. App. 68, 76, 143 P.3d 326 (2006). That conclusion is not compelled by CrR 42, is contrary to *Knotek*, ignores the constitutional analysis, and is simply incorrect.

CrR 4.2(d) provides:

> Voluntariness. The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Nothing in the rule requires the trial court inform the defendant of the statutory "maximum." Instead, the rule requires the court to inform the

---

[2] *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

defendant of the "direct consequences" of his plea. "A direct consequence is one that has a definite, immediate and largely automatic effect on the range of the defendant's punishment." *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) (Internal quotations omitted). As *Knotek* recognized, without an aggravator the statutory maximum is not a direct consequence of the plea. 137 Wn. App. at 424 n.8. *Kennar* is simply wrong in assuming the statutory maximum is a direct consequence.

The reasoning of *Blakely* and its progeny require a jury finding as to an aggravating factor beause that finding alters the maximum punishment – that is without that finding the "maximum" possible penalty is the top of the standard range. At best, the "statutory maximum" is merely theoretical and wholly inapplicable to a case such as Ms. Tricomo's in which no aggravating factor was charged and agreed to in the plea. A sentence of life in prison for a crime without a charged aggravator is no more the maximum penalty for the offense than death. Each is legally unavailable. Thus, to tell a person the maximum punishment is life, when in fact that punishment cannot

---

substantially lowered the maximum sentences that the trial court could impose."

legally apply. The same is true of the ten and five year statutory maximums, neither has any application where an aggravating is not involved.

Kennar's analysis misses this point entirely, insisting instead that informing a person of this fictional "maximum" is necessary to ensure the voluntariness of the plea. But, informing a person of a wholly irrelevant statutory cap which cannot apply to them in no way ensures the guilty plea is voluntary or knowing. Indeed, the opposite is true. Informing the defendant of an inapplicable sentence and telling her that it is the maximum sentence she faces when in fact it is not actually serves to undercut the validity of the plea. It is nonsensical to insist CrR 4.2 requires a court to engage in a practice that renders the plea unconstitutional. *Kennar* is simply wrong. The statutory "maximum" is not a direct consequence of the plea and nothing in CrR 4.2 or the constitutional analysis says otherwise.

Ms. Tricomo was not properly informed of the consequences of her plea he must be permitted to withdraw it.

B. CONCLUSION.

Id. at 426. In the case at bar, no discussion of *Blakely* ever occurred.

For the foregoing reasons, and those set forth in her initial brief, Ms. Tricomo's assault conviction should be vacated and dismissed. In addition, she is entitled to withdraw her plea. Finally, Ms. Tricomo should receive a new sentencing hearing at which the court considers evidence bearing on her relative culpability.

Respectfully submitted this 5th day of November, 2015.

s/*Gregory C. Link*
GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 47238-4-II
v.	)	
	)	
LIA TRICOMO,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	CAROL LA VERNE, DPA [Lavernc@co.thurston.wa.us] THURSTON COUNTY PROSECUTOR'S OFFICE 2000 LAKERIDGE DR SW BLDG 2 OLYMPIA WA 98502-6045	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X]	LIA TRICOMO 348594 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF NOVEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

November 05, 2015 - 3:57 PM

Transmittal Letter

Document Uploaded: 3-472384-Reply Brief.pdf

Case Name: STATE V. LIA TRICOMO

Court of Appeals Case Number: 47238-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

Lavernc@co.thurston.wa.us