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Division III
State of Washington
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Supreme Court No. 96353-3
Court of Appeals No. 35347-8-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN LAND,

Petitioner.

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

PETITION FOR REVIEW

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A. <u>IDENTITY OF PETITIONER</u>

Dustin Land, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 35347-8-III pursuant to RAP 13.3 and RAP 13.4(b)(3), issued on August 21, 2018. The opinion is attached.

B. <u>ISSUE PRESENTED FOR REVIEW</u>

A guilty plea is voluntary only if made with an accurate understanding of the direct consequences. Mr. Land was misinformed about the actual maximum sentence the court could impose, yet the Court of Appeals found his guilty plea was voluntarily entered. Should this Court grant review under RAP 13.4(b)(3) to determine whether a guilty plea is involuntary if the defendant is misinformed that the court can impose an impossible statutory maximum?

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

Dustin Land was charged with Possession of a Controlled Substance for possessing the drug used to treat opiate dependence, buprenorphine. CP 5, 6; RP 4. He was also charged with the

misdemeanor offense of theft in the third degree, for taking about $20 of food from the grocery store. CP 2, 7; RP 4-5.

Mr. Land had an offender score of zero. CP 11. His standard sentencing range was calculated to be 0-6 months for the felony controlled substance offense, and 0-364 days for the misdemeanor theft. CP 11, 18. Mr. Land was informed that the offense of possession of a controlled substance was a class C felony, which carried a maximum penalty of five years and a $5000 dollar fine. CP 6; 11; 18; RP 5. This advisement of the maximum term was also included in his plea form and the judgment and sentence. CP 11; 18.

Mr. Land entered a plea of guilty to both charges, and received a sentence of 57 days to serve on Count I, with 364 days suspended for the misdemeanor offense of theft. CP 20. The court imposed $3690 in court costs. RP 18.

On appeal, Mr. Land asserted that he was misinformed about the maximum penalty the court could impose because he was informed the trial court could impose up five years' incarceration and $10,000 fine. RP 5. However, under *Blakely v. Washington*, the maximum sentence that may be imposed in a particular case is not the statutory maximum. 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The

maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea; thus Mr. Land in fact only faced a standard range sentence of 0-6 months for the charged felony offense, and 0-364 days for the charged misdemeanor offense. *Id*; CP 11, 18. Consequently, the "maximum term" was not "5 years" as he was advised. CP 11, 18; RP 5.

Mr. Land was thus misadvised of the maximum punishment he faced as a consequence of his guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013 (2007).[1] The Court of Appeals nevertheless ruled that his plea was not rendered involuntary by the court misinforming him it *could* impose a sentence, even though this was not in fact permitted by law. Opinion at 2-3.

[1] This issue can be decided for the first time on appeal because it is a manifest error affecting a constitutional right. *Knotek*, 136 Wn. App. at 422-23; *State v. Kennar*, 135 Wn. App. 68, 71, 143 P.3d 326 (2006).

E. <u>ARGUMENT WHY REVIEW SHOULD BE GRANTED</u>

This Court should grant review to decide whether a guilty plea is involuntarily entered if the defendant is misinformed that the court can impose the statutory maximum sentence.

1. <u>Due process protections require a guilty plea be made knowingly, intelligently and voluntarily.</u>

The Due Process Clause of the Fourteenth Amendment 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); U.S. Const. amend. 14. When a person pleads guilty, he waives his protection from self-incrimination and the right to a trial by jury. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Such "[w]aivers of constitutional rights not only must be voluntary 1 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). "A direct consequence is one that has a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bradley*, 165 Wn.2d at 939 (quoting *Ross*, 129 Wn.2d at 284).

"A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re Pers. Restraint of*

Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Mendoza*, 157 Wn.2d at 591.

Moreover, a defendant is not required to show the misinformation was material to his decision to plead guilty. "[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea...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 [regardless of any showing of materiality]." *Mendoza*, 157 Wn.2d at 590-91; *accord Bradley*, 165 Wn.2d at 939.

2. <u>Because Mr. Land was misinformed of the possible maximum sentence the court could impose, his plea was involuntary.</u>

In *Blakely v. Washington*, the Supreme Court recognized 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." 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed.

2d 403 (2004). Importantly, the maximum sentence that may be imposed in a particular case is not the statutory maximum. *See id.* The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id.*

Here, the standard range plus 364 days for the misdemeanor offense is the maximum possible sentence the court could impose for Mr. Land's charged offenses. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law. Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). No such facts are present or alleged here.

Mr. Land thus faced only a standard range sentence of 0-6 months for the charged felony offense, and 0-364 days for the charged misdemeanor offense. CP 11, 18. The "maximum term" he faced was not "5 years" as he was advised. CP 11, 18; RP 5. Rather, the

maximum was the top-end of the standard range, which was only six months on the felony offense, and 364 days for the misdemeanor offense. Mr. Land was thus misadvised of the maximum punishment he faced as a consequence of his guilty plea. *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018) (misinformation about the possible sentencing consequences renders a plea involuntary); *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013(2007). [2]

As in *Knotek*, before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she [or another defendant] went to trial..." *Id.* at 424 n.8 (citing *Ross,* 129 Wn.2d at 284). The *Knotek* court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek . . . [to] the top end of the standard range..." *Id.* at 425. The top of the standard range was the "effective maximum" for the defendant's plea. *Id.* Thus, where a defendant is told the maximum sentence is five years when in fact the

[2] This issue can be decided for the first time on appeal because it is a manifest error affecting a constitutional right. *Knotek*, 136 Wn. App. at 422-23; *State v. Kennar*, 135 Wn. App. 68, 71, 143 P.3d 326 (2006).

effective maximum sentence is the top of the standard range, the defendant is misadvised of the consequences of the plea.[3]

Though Mr. Land's guilty plea included a table that supplied the "standard range" sentence and the "maximum term and fine," this did not inform him that the standard range sentence, in addition to the maximum on his misdemeanor conviction, was the only effective maximum sentence the court could impose. CP 11. "Where a plea agreement is based on misinformation generally the defendant may choose...withdrawal of the guilty plea." *State v. Walsh,* 143 Wn.2d 1, 9, 17 P.3d 591 (2001) (citing *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). A guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. *Id.* As *Mendoza* made clear, it does not matter whether the misadvice was material to Mr. Land's decision to plead guilty. 157 Wn.2d at 590-91. This Court should grant review to determine whether this misinformation renders a plea involuntary.

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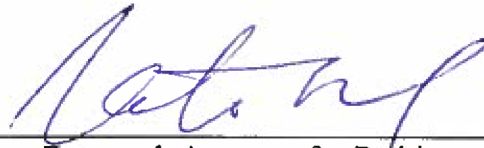
[3] *Knotek* concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she "clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose." 136 Wn. App. at 426. In this case, no discussion of *Blakely* ever occurred.

F. CONCLUSION

This Court should grant review under RAP 13.4(b)(3) to determine whether a plea is rendered involuntary when the defendant is informed that the court can impose an impossible statutory maximum.

Respectfully submitted this the 19th day of September 2018.



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

STATE OF WASHINGTON,	)	No. 35347-8-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DUSTIN J. LAND,	)	
	)	
Appellant.	)	

PENNELL, A.C.J. — Dustin Land pleaded guilty to possession of a controlled substance and third degree theft. He appeals, arguing the pleas were invalid because he was not accurately advised of the maximum penalty for his controlled substance offense. We find no error and affirm.

FACTS

Dustin Land was charged with possession of a controlled substance, buprenorphine (count 1), and third degree theft (count 2). At arraignment, Mr. Land was informed that count 1 was a class C felony that "*could be punished* by up to five years incarceration, and a fine up to $10,000." Report of Proceedings (Mar. 13, 2017) at 5 (emphasis added). As to count 2, Mr. Land was informed it was a gross misdemeanor that "*could be punished* by up to 364 days in jail and a fine of up to $5,000." *Id*. (emphasis added). Mr. Land pleaded not guilty to both charges.

Mr. Land subsequently changed his pleas to guilty, pursuant to a plea agreement. His statement on plea of guilty includes the following disclosure with regard to the standard sentencing range, and maximum sentence and fine, for each count based on an offender score of 0.

Figure 1[1]

Count No.	Offender Score	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	0	0 - 6 Months	N/A	12 Months	5 Years/$10,000
2	N/A	0 - 364 Days	N/A	24 Mos. Prob.	364 Days

The trial court accepted Mr. Land's guilty pleas and sentenced him to 57 days on count 1 and 364 days suspended on count 2. This sentence was consistent with the terms of the plea agreement. Mr. Land now appeals.

ANALYSIS

Mr. Land challenges the validity of his guilty pleas, arguing he was misadvised of the maximum possible punishment he faced for his controlled substance offense. This is a constitutional claim that can be raised for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001).

Contrary to his assertions, Mr. Land was not misadvised about the consequences of his pleas. Mr. Land's guilty plea statement accurately recited the statutory maximum

[1] *See* Clerk's Papers at 11.

terms of incarceration for each of his two offenses. While the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) protected Mr. Land from actually receiving the maximum penalty for his felony offense (count 1), the trial court was still obliged to advise Mr. Land of the applicable statutory maximum penalty. *State v. Buckman*, 195 Wn. App. 224, 230, 381 P.3d 79 (2016) ("Before accepting a plea, a trial court must inform a defendant of both the applicable standard sentencing range and the maximum sentence set by the legislature for the charged crime.").

Blakely's procedural protections did not change the underlying nature of Mr. Land's conviction. Regardless of *Blakely*, the controlled substance offense is properly characterized as a class C felony, punishable by up to five years' imprisonment. *See State v. Knotek*, 136 Wn. App. 412, 425, 149 P.3d 676 (2006); *United States v. Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005). This characterization is important for purposes of potential collateral consequences. *See Murillo*, 422 F.3d at 1154 (federal firearms disenfranchisement is set by statutory maximum penalty, not Washington's standard range sentence); *see also United States v. Rodriguez*, 553 U.S. 377, 390-93, 128 S. Ct. 1783, 170 L. Ed. 2d 719 (2008) (federal recidivism enhancements set by statutory maximum penalty of predicate offense, not maximum penalty of Washington's standard range). Mr. Land was entitled to notice of the serious nature of his offense prior to

entering a plea. The information set forth in the guilty plea statement was therefore fully appropriate.

Mr. Land does not argue that he was ever misled about the consequences of his plea. Mr. Land was assisted by counsel throughout the plea proceedings and he received a sentence consistent with the terms of his plea agreement. No objection was made to Mr. Land's plea procedure during the trial court proceedings. Given these circumstances, we find no constitutional infirmity in the plea process utilized in Mr. Land's case.

CONCLUSION

The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35347-8-III
	)	
DUSTIN LAND,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF SEPTEMBER, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DUSTIN LAND 1003 15TH AVE LEWISTON, ID 83501	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF SEPTEMBER, 2018.

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