

No. 63313-9-I

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

STATE OF WASHINGTON, Respondent,

v.

JOSHUA NEIL WINCHESTER, Appellant.

**FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR.

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether a defendant's guilty plea is voluntary and knowing where the defendant is informed of the standard range and the statutory maximum he is facing and is informed that the court can impose an exceptional sentence for substantial and compelling reasons, although no exceptional sentence is imposed.
2. Whether a waiver of the right to jury trial as part of an agreement to permit a defendant to enter Drug Court is knowing and voluntary where the defendant is advised of the statutory maximum he is facing, but is not informed of the "maximum" he would be facing under Blakely.

C. FACTS.

Under Whatcom County Superior Court cause no. 06-1-01212-0 Winchester was charged by amended information with eight counts of Possession of Stolen Property in the Second Degree, one count of Bail Jumping and one count of Trafficking in Stolen Property in the First Degree on June 29, 2007.¹ CP 43-47. He petitioned to enter Whatcom County Superior Court Drug Court on November 19, 2007. CP 39-42. In addition to agreeing to other terms and conditions of the drug court

¹ Winchester was originally charged in August of 2006 with seven counts of possession of stolen property. CP 33-35.

program, Winchester waived the following rights: (1) speedy trial and speedy arraignment, (2) jury trial, (3) cross-examination of witnesses, (4) have witnesses testify on behalf of the defense, (5) to make pretrial motions, (6) confidentiality of certain information, and (7) to appeal a finding of guilt. CP 41. Winchester reserved certain rights regarding remaining silent, the presumption of innocence, and the right to appeal or collaterally attack any sentence imposed. In exchange for waiving those rights, the State agreed that the charges would be dismissed if he successfully completed the program. CP 41-42. In his petition Winchester was advised that the maximum penalty on the charges was five years and a \$10,000 fine. CP 41. Winchester signed the document which contained the following paragraph just above his signature:

My attorney has explained this Petition to me and we have fully discussed all of the above paragraphs. I understand them all and wish to enter into Drug Court. I have made this decision freely and voluntarily. No one has threatened me or promised me anything other than what is contained in this Petition.

CP 89. Winchester's attorney also acknowledged that he had read and discussed the petition with Winchester and believed that Winchester understood it. The Court granted his petition on December 13, 2007. CP

38.

On October 2, 2007 by amended information the State filed additional charges against Winchester, two counts of Burglary in the Second Degree, Theft in the Third Degree and Bail Jumping under Whatcom County Superior Court cause no. 07-1-00627-6.² CP 92-94. On November 19, 2007 Winchester petitioned to enter into Drug Court on those charges as well. The petition he signed contained the same understandings and waivers of rights and reservations of rights as the other petition, as well as the agreement that the charges would be dismissed upon his successful completion of the program. In his petition Winchester was advised that the maximum penalty on the felony charges was ten years and a \$20,000 fine. CP 88. Winchester signed the document which contained the same paragraphs indicating that he had read the petition, discussed the petition with his attorney, understood the petition, and was freely and voluntarily petitioning to enter Drug Court. CP 42. His attorney likewise signed the petition indicating he had read and discussed the petition with Winchester and believed that Winchester understood it. CP 42. The court granted his petition on December 13, 2007. CP 85.

² Winchester was originally charged with two counts of burglary and the theft. CP 97-98.

On November 24, 2008 the State charged Winchester with Theft in the Second Degree under cause number 08-1-01555-9 for acts he committed on or about November 17 through 20th, 2008. CP 121-22.

Winchester did not successfully complete the drug court program and was terminated from Drug Court on December 11, 2008. CP 31, 81. At the time of the stipulated bench trial on January 8, 2009, the State and Winchester entered into another, separate agreement in which the State agreed to dismiss the bail jumping charge, count seven, and the trafficking charge, count ten, under cause number 06-1-01212-0, and one burglary, count two, under cause number 07-1-00627-6 in exchange for Winchester stipulating that there was sufficient evidence to convict him of the remaining counts. 1/8/09 RP 3-6; 3/5/09 RP 6-7. At the stipulated bench trial, the trial court reviewed the police reports and found Winchester guilty of the remaining counts under both cause numbers, and findings and conclusions of law were entered. 1/8/09 RP 5-6; CP 5-7, 11, 56-58, 61.

At the time of sentencing on the 06 and 07 cause numbers, Winchester entered a guilty plea to the theft charge under cause number 08-1-01555-9. 3/5/09 RP 3-6; CP 110-17. In his guilty plea he was advised that he was facing a standard range of 22-29 months on an offender score of 9, and that the statutory maximum was five years and/or a \$10,000 fine. CP 111. The court also advised him orally of that

sentencing information. 3/5/09 RP 4. At sentencing, with an offender score of 16 Winchester faced a standard range of 22-29 months on the counts under cause no. 06-1-01212-0 and 51-68 months on the burglary and 51-60 months on the bail jumping under cause no. 07-1-00627-6. The court sentenced him to a standard range sentence of 58 months on the burglary and bail jumping counts to run concurrent with the 29 months on the other counts on the other two cause numbers. CP 16, 65, 103; 3/5/09 RP 35.

D. ARGUMENT

Winchester argues that his waivers of his right to jury trial under cause numbers 06-1-01212-0 and 07-1-00627-6 contained in his Drug Court petitions were not valid and that his guilty plea was not valid either. To the extent that Winchester raises any issue other than the validity of his drug court agreement³, Winchester waived his ability to assert it through the stipulations and waivers in the drug court petition. Winchester contends that he was misadvised as to the “actual” maximum sentence on his guilty plea and in his stipulations, asserting that the “actual” maximum sentence, post Blakely⁴, is the top end of the standard range. He also

³ Winchester does not raise any issues regarding sentencing, which he did reserve the right to appeal.

⁴ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

asserts that his guilty plea statement contained incorrect information regarding the possibility of an exceptional sentence. The “actual” maximum sentence that a defendant must be advised of post Blakely is still the statutory maximum under Chapter 9A.20 RCW. In order to enter a valid guilty plea, the defendant must be advised of the standard range he faces and the statutory maximum. Winchester was not misadvised regarding the maximum sentence he was facing and was not misadvised regarding the possibility of an exceptional sentence.

1. Winchester’s drug court petition and subsequent stipulation waived his right to assert issues other than sentencing on appeal.

Winchester contests the waivers of his right to jury trial on the two cause numbers, no. 06-1-01212-0 and no. 07-1-00627-6, but does not otherwise contest the validity of the drug court agreement. As part of his agreement to enter into the drug court program on those two cause numbers, Winchester waived his right to appeal the finding of guilt and only specifically reserved the right to appeal his sentence. He further, and separately, stipulated to the sufficiency of the evidence at his bench trial upon termination from the program. To the extent that Winchester asserts any issue aside from the validity of his drug court contract, he has waived it.

The State of Washington has a strong interest in upholding plea agreements. State v. Perkins, 108 Wn.2d 212, 216, 737 P.2d 250 (1987). “When a technical defect is not considered jurisdictional, plea agreements have been upheld where the plea was entered into voluntarily and knowingly, and the defendant was fully advised of the consequences.” State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980). Plea agreements are considered and treated as contracts and both parties are bound by the terms of valid agreements. In re Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). A stipulation to police reports, combined with waivers of the right to call witnesses and cross-examine witnesses, waives “all subsequent factual, legal, or procedural issues the petitioner might raise.” State v. Melick, 131 Wn. App. 835, 844, 129 P.3d 816, *rev. denied*, 158 Wn.2d 1021 (2006); *accord*, State v. Drum, 143 Wn. App. 608, 617, 181 P.3d 18, *rev. granted*, 164 Wn.2d 1025 (2008).

Winchester entered into a valid agreement with the State in order to benefit from the opportunity to participate in Drug Court and to have the opportunity to have all of those charges dismissed if he successfully completed the program. The only constitutional rights that he reserved at the time he entered into the agreement was the right to remain silent, the right to be presumed innocent and the right to appeal the sentence. He then entered into another agreement in which he stipulated to the

sufficiency of the evidence. The only issue that was specifically reserved in the agreement and was not subsequently waived was sentencing. As Winchester's waivers of his right to jury trial were knowing and voluntary, he may not otherwise challenge his convictions, particularly where he already received the full benefit of the bargain in the drug court contract.

2. **Winchester was not misadvised of the sentencing consequences in his guilty plea, he was informed of both the standard range he was facing and the statutory maximum, all that is required by CrR 4.2.**

Winchester asserts that his guilty plea to theft in the second degree under cause number 08-1-01555-9 was invalid because he was misadvised of the plea's sentencing consequences. Winchester's argument is predicated upon the theory that the maximum he was required to be notified of is the maximum sentence that can be imposed pursuant to Blakely, and *not* the statutory maximum. The court in State v. Kennar, 135 Wn. App. 68, 143 P.3d 326 (2006), *rev. denied*, 161 Wn.2d 1013 (2007) addressed a similar argument and rejected it. Post Blakely the maximum sentence a defendant must be informed of is still the statutory maximum set forth under RCW 9A.20.021. Here, Winchester was informed of both the standard range and the statutory maximum, that which was required by CrR 4.2. He also was properly advised of the possibility of an exceptional sentence, even though the State was not

seeking one and the court did not impose one. Winchester's guilty plea was knowing, voluntary and intelligent.

Due process requires that a guilty plea be knowing, voluntary and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). Failure to inform a defendant of the direct sentencing consequences of a plea renders the plea involuntary. State v. Ross, 129 Wn.2d 279, 288, 916 P.2d 405 (1996); *see also*, State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) ("A defendant must understand the sentencing consequences for a guilty plea to be valid."). The voluntariness of a plea may be raised for the first time on appeal. Walsh, 143 Wn.2d at 7-9.

Under CrR 4.2, before accepting a plea, the defendant must be informed of both the standard sentencing range as well as the statutory maximum. State v. Kennar, 135 Wn. App. at 75. The "statutory maximum" specifically relates to the statutory maximum as set forth in Chapter 9A.20 RCW. *Id.* at 74-75; State v. Toney, 149 Wn. App. 787, 795, 205 P.3d 944 (2009). "Statutory maximum" does not refer to the top end of the standard range. Toney, 149 Wn. App. at 795-96; *accord*, State v. Knotek, 136 Wn. App. 412, 425, 149 P.3d 676 (2006), *rev. denied*, 161 Wn.2d 1013 (2007). Blakely did not change the statutory maximum a court may impose, it only modified the procedure by which the maximum sentence could be imposed. Knotek, 136 Wn. App. at 425. "Because a

defendant's offender score and standard sentence range are not finally determined by the court until the time of sentencing, the Sixth Amendment concerns addressed in *Blakely* do not apply until that time.” Kennar, 135 Wn. App. at 76.

Winchester makes very nearly the same argument that the defendant made in State v. Kennar, 135 Wn. App. 68, 71-72, 143 P.3d 326 (2006). In that case the defendant asserted that his guilty plea had not been knowing and voluntary because it was based on the erroneous belief that he was potentially facing a greater sentence than the top end of the standard range, and that the trial court had erred by informing him, post Blakely, that the maximum he faced was the statutory maximum, life, instead of the top end of the standard range. *Id.* at 73-74. The court determined that Blakely implications and concerns arise at sentencing and not at the time of the plea colloquy. *Id.* at 75. The court concluded that because the defendant had been informed of the correct maximum he faced, the statutory maximum, the trial court had not misadvised the defendant and upheld the defendant’s plea as knowing, voluntary and intelligent. *Id.*

Winchester was properly informed of the standard range he was facing as well as the statutory maximum for the crime of second degree theft. CP 111. There was no misadvisement as to the maximum sentence

that could be imposed. Winchester was also not misadvised about the possibility of an exceptional sentence. The State did not provide notice that it was seeking an exceptional sentence and it did not seek one. The plea statement form properly advised Winchester that the court could impose an exceptional sentence on its own if he had an offender score of greater than 9 and he was being sentenced on multiple counts. CP 113. He however did not have an offender score greater than 9 on this charge, his offender score was a “9.” CP 111. Winchester’s plea was voluntary and knowing.

3. Winchester voluntarily, knowingly, and intelligently waived his right to a jury trial.

Winchester asserts that his waiver of his constitutional right to a jury trial contained in the Drug Court petition was not valid because he misadvised of the maximum sentence he was facing. Winchester analogizes his petition to a guilty plea. He contends that post Blakely he should have been informed of the top end of the standard range and not the statutory maximum for the crime(s). Blakely does not apply in this pre-plea, pre-trial context. Moreover, until a defendant has been found guilty or indicated what he is willing to plead to, any advice regarding the standard range would be premature. Winchester was properly informed of the maximum sentence that he was facing.

In order to show a valid waiver of a constitutional right, the record must demonstrate that the waiver was knowing, intelligent and voluntary. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). The validity of the waiver of a constitutional right, as well as the inquiry required by the court to establish the waiver, will depend on the nature of the right being waived, the circumstances of each case and the experience and capabilities of the defendant. *Id.* at 725. For example, courts demand a rigorous inquiry of any defendant seeking to waive the right to counsel or to enter a guilty plea but a less demanding inquiry is required when a defendant seeks to waive his right to trial before a jury. *Id.* at 720.

In order to waive the right to a jury trial, there must be some personal expression by the defendant of his desire to waive the right, although an on-the-record colloquy or written waiver is not required. Stegall, 124 Wn.2d at 725; State v. Ramirez-Dominguez, 140 Wn. App. 233, 240, 165 P.3d 391 (2007). Courts also consider whether defense counsel communicates that defendant's waiver is knowing, intelligent, and voluntary. Ramirez-Dominguez, 140 Wn. App. at 240. A written waiver is strong evidence that the defendant validly waived his right to a jury trial. State v. Ashue, 145 Wn. App. 492, 503, 188 P.3d 522 (2008); State v. Pierce, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Under CrR 6.1 a defendant may waive the right to jury trial, with consent of the court, by

signing a written waiver. CrR 6.1(a). No Washington case has required more than a written waiver. Ashue, 145 Wn. App. at 503.

In Ashue, the defendant entered into a written pretrial diversion agreement similar to the drug court agreement in this case. She was advised of the constitutional rights she was waiving by entering into the agreement. She signed the agreement acknowledging that she had read the stipulation and waiver, that her attorney had fully explained the agreement and that she understood them and agreed to them as part of entering into the diversion agreement. Id. at 503. The court upheld the defendant's waiver.⁵ Like the waiver in Ashue, Winchester's written waiver of his right to jury trial within the Drug Court petitions was valid.

Winchester likens his waivers and stipulations within the petition to an Alford plea. A drug court contract, however, is not the equivalent of a guilty plea. Drum, 143 Wn. App. at 620. A drug court contract does not require written notice of all consequences of the agreement in order to meet due process. Id. at 618-19. At the time Winchester submitted his petition he was properly advised of the statutory maximum sentence he was facing. It wasn't until after he was terminated from the drug court

⁵ The court also engaged the defendant in a brief colloquy with the defendant about her understanding of the program and the fact that if she failed to complete the program the court would decide the case upon the stipulated police reports. Id. at 504.

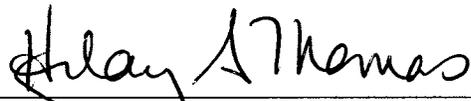
program that he entered into a separate agreement stipulating to the sufficiency of the evidence. Winchester's drug court petition and subsequent evidentiary stipulation at his bench trial did not require the same notices as a guilty plea in order to meet due process.

In this case, Winchester petitioned to enter into the Drug Court program. He was properly advised of his constitutional right to a jury trial and the requirements and conditions of the program. As was argued in the previous section, he was not misinformed of the maximum sentence he faced. Winchester was informed of the rights he was giving up, discussed them with his attorney, understood them and entered into the agreement voluntarily and knowingly. Winchester's waiver of his right to a jury trial contained in the drug court petitions was valid and Winchester may not now challenge his convictions.

E. CONCLUSION

For the foregoing reasons, the State requests that Winchester's appeal be denied and his convictions affirmed.

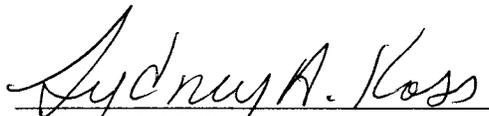
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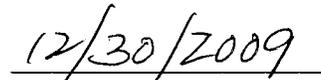

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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellants' counsel, Vanessa Mi-Jo Lee addressed as follows:

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LEGAL ASSISTANT


DATE