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COA NO. 64002-0-I

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

REC'D

MAY 21 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

AMNON ASHE,

Appellant.

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

The Honorable Jim Rogers, Judge

MAY 21 10 44 13
COURT OF APPEALS

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying withdrawal of appellant's guilty plea.

Issue Pertaining to Assignment of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. The written plea agreement misinformed appellant that community custody would be imposed as part of his sentence. Must appellant be allowed to withdraw his plea because the plea agreement misinformed him of a direct consequence of his plea?

B. STATEMENT OF THE CASE

The State charged appellant Amnon Ashe with unlawful issuance of a bank check, first degree theft, and second degree trafficking in stolen property. CP 5-6; 1RP 2-3. Ashe pleaded guilty to the theft and trafficking charges. CP 7-16.

The "Statement of Defendant on Plea of Guilty" lists a number of paragraphs under the heading "I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT . . ." CP 7-16. Paragraph (4)(f) of the felony plea form states:

In addition to confinement, the judge will sentence me to a period of community supervision, community placement or community custody.

For crimes committed prior to July 1, 2000, the judge will sentence me to: (A) community supervision for a period of up to one year; or (B) to community placement or community custody for a period up to three years or up to

the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge _____.]

For crimes committed on or after July 1, 2000, the judge will sentence me to the community custody range which is from ___ to ___ months or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, unless the judge finds substantial and compelling reasons to do otherwise. During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions being imposed. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

CP 10.

The second paragraph is crossed out. CP 10. The third paragraph is not crossed out or initialed. CP 10. The plea form signed by Ashe states "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty.' I have no further questions to ask the judge." CP 16.

At the plea hearing, the court accepted Ashe's guilty plea as knowing, voluntary, and intelligent. 1RP¹ 12. There was no reference to community custody at the plea hearing. 1RP 2-13. The court

¹ This brief references the verbatim report of proceedings as follows: 1RP - 5/27/08; 2RP - 12/29/08; 3RP - 2/13/09.

subsequently entered an order amending the plea agreement to reflect the value of the stolen property at issue. CP 28-29.

Before sentencing, Ashe moved to withdraw his plea. CP 85-89; 2RP 1-3. Ashe argued his plea was invalid because his previous attorney misadvised him that his felonies would be converted to misdemeanors after he pled guilty to them. CP 89. He only entered a guilty plea because he believed this conversion would take place, which would allow him to possess a firearm and remain in the military in his current position. CP 89; 3RP 5-9. His military career would effectively be over if his guilty plea were not set aside. 3RP 5-6.

In response, the State submitted a written declaration from the attorney who represented Ashe at the plea stage. CP 51-53. In that declaration, the attorney claimed he did not tell Ashe his felonies would be converted to misdemeanors. CP 52.

Ashe testified at the plea withdrawal hearing. 3RP 4-23. The trial court denied the motion. 3RP 28-31.

The court sentenced Ashe, who had no criminal history, to concurrent work release terms of two months for first degree theft and three months for second degree trafficking in stolen property. CP 35-38. The charge of unlawful issuance of a bank check was dismissed. CP 36.

Ashe was not sentenced to a term of community custody. CP 38. No one mentioned community custody at the sentencing hearing. 3RP 31-39. Neither the prosecutor nor the judge pointed out the plea agreement retained a community custody provision. This appeal follows. CP 43.

C. ARGUMENT

1. THE GUILTY PLEA IS INVALID BECAUSE ASHE WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.

Ashe's guilty plea is invalid because he was misinformed that community custody would be imposed as part of his sentence. Ashe is entitled to withdraw his plea for this reason.

a. The Plea Form Wrongly Informed Ashe That He Would Be Sentenced To Community Custody As A Consequence Of Pleading Guilty.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. V and XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. 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.'" State v. Mendoza, 157 Wn.2d 582, 587, 141

P.3d 49 (2006). "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 knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91; In re Pers. Restraint of Quinn, ___ Wn. App. ___ 226 P.3d 208, 219 (2010). A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

Mandatory community custody or community placement is a direct consequence because it affects the punishment flowing immediately from the guilty plea and imposes significant restrictions on a defendant's constitutional freedoms. Ross, 129 Wn.2d at 285-86; Quinn, 226 P.3d at 219.

In Ashe's case, the plea form sets forth, in discrete paragraphs, a number of consequences flowing from the plea. These consequences are applicable by default. To opt out of the consequence, the relevant

paragraph must be stricken and initialed by both the judge and the defendant.

The paragraph informing Ashe that the judge would sentence him to community custody for crimes committed after July 1, 2000 was not stricken or initialed. CP 10. The plea form plainly states without qualification that "In addition to confinement, the judge will sentence me to a period of community supervision, community placement or community custody." CP 10.

In this manner, Ashe was misinformed about a direct consequence of his plea because community custody could not be imposed for any of his convictions. See Former RCW 9.94A.545² (listing offenses subject to community custody where sentence of confinement is one year or less); Former RCW 9.94A.715(1)³ (specifying offenses subject to community custody).

The fact that the trial court did not ultimately sentence Ashe to community custody confirms Ashe was misadvised about a direct consequence of his plea. A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless

² Laws of 2006, ch. 128 § 4 (effective June 7, 2006).

³ Laws of 2006, ch. 130 § 2 (effective June 7, 2006).

of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91.

In Mendoza, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where 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.

The same logic applies to Ashe's case. The face of the plea form shows he was affirmatively misinformed about a direct consequence in the form of community custody. A trial judge has an obligation not to accept a guilty plea 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." State v. Easterlin, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) (quoting CrR 4.2(d)). The trial judge failed in this regard.

To prevail, Ashe need not show reliance on the incorrect community custody provision 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.").

The Mendoza Court 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).

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Ashe should be allowed to withdraw his plea because the plea agreement misinformed him that he would receive community custody as a consequence of pleading guilty.

b. This Constitutional Error Is Preserved For Review.

Ashe may raise this error on appeal even though he did not raise this particular argument as a ground for withdrawing his plea at the trial level. An invalid guilty plea based on misinformation of sentencing

consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589 (citing State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

Ashe did not waive the error by failing to object at sentencing because no one brought the misinformation to his attention. When a defendant "is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea." Mendoza, 157 Wn.2d at 591. The waiver rule applies to misinformation regarding imposition of community custody. Quinn, 226 P.3d at 220-21.

Mendoza waived the right to challenge the validity of his plea because he was "clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and the defendant d[id] not object or move to withdraw the plea on that basis before he [was] sentenced." Mendoza, 157 Wn.2d at 592. The Court distinguished Mendoza's situation from circumstances in which a defendant may not be deemed to have waived the right to challenge a plea, such as where the defendant was not informed of the mistake until after sentencing. Id. at 591 (citing Walsh, 143 Wn.2d at 7).

Ashe was never informed before sentencing or at the sentencing hearing that, contrary to his guilty plea, he was not subject to community custody. Ashe was not informed he was subject to a less onerous sentence. Following the rule set forth in Mendoza, there is no waiver here.

D. CONCLUSION

For the reasons stated, this Court should allow Ashe to withdraw his guilty plea.

DATED this 21st day of May 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64002-0-1
)	
AMNON ASHE,)	
)	
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 21ST DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMNON ASHE
33122 1ST PLACE SW, #702
FEDERAL WAY, WA 98023

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MAY, 2010.

x Patrick Mayovsky

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