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NO. 64002-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMNON ASHE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
VIEWING THE PLEA AGREEMENT AS A WHOLE AND IN CONTEXT, ASHE HAS FAILED TO SHOW THAT HE WAS MISADVISED AS TO COMMUNITY CUSTODY	4
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Boykin v. Alabama, 395 U.S. 238,
89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)..... 4

Washington State:

Berg v. Hudesman, 115 Wn.2d 657,
801 P.2d 222 (1990)..... 8

State v. Barton, 93 Wn.2d 301,
609 P.2d 1353 (1980)..... 5

State v. Branch, 129 Wn.2d 635,
919 P.2d 1228 (1996)..... 4, 5

State v. Mendoza, 157 Wn.2d 582,
141 P.3d 49 (2006)..... 5, 6

State v. Oliva, 117 Wn. App. 773,
73 P.3d 1016 (2003)..... 7

State v. Ross, 129 Wn.2d 279,
916 P.2d 405 (1996)..... 5, 6

State v. Sledge, 133 Wn.2d 828,
947 P.2d 1199 (1997)..... 7

State v. Walsh, 143 Wn.2d 1,
17 P.3d 591 (2001)..... 5, 6

Stender v. Twin City Foods, Inc., 82 Wn.2d 250,
510 P.2d 221 (1973)..... 8

Wood v. Morris, 87 Wn.2d 501,
554 P.2d 1032 (1976)..... 4

Statutes

Washington State:

Laws of 2006, ch. 128, sec. 4..... 7
RCW 9.94A.545 6
RCW 9.94A.728 2

Rules and Regulations

Washington State:

CrR 4.2..... 4, 5

A. ISSUE PRESENTED.

Whether the defendant should be precluded from withdrawing his guilty plea where the plea agreement, when viewed as a whole and in context, did not misadvise him regarding community custody.

B. STATEMENT OF THE CASE.

Amnon Ashe was charged by information with the crime of unlawful issuance of checks or drafts. CP 1. The State amended the information to add additional charges of theft in the first degree and trafficking in stolen property in the first degree. CP 5-6. The crimes occurred in September of 2006. CP 18-19.

Ashe agreed to plead guilty to theft in the first degree and trafficking in stolen property in the second degree, and the State agreed to dismiss the charge of unlawful issuance of checks or drafts. CP 7, 23. The Statement of Defendant on Plea of Guilty correctly informed Ashe that the standard range for theft was two to six months, and the standard range for trafficking was three to eight months. CP 8, 24-25. The State agreed to recommend a standard range sentence of four months of work release. CP 10, 27. The State also advised that it would recommend that Ashe pay

restitution, court costs, a victim penalty assessment and be prohibited from contact with the victim. CP 10, 27. The State was not recommending imposition of a period of community custody. CP 10, 27. The community custody section of the State's Sentence Recommendation was left blank. CP 27.

At the plea hearing, the prosecutor conducted an oral colloquy with the defendant, reviewing the consequences of the plea of guilty, including the standard range, the maximum term, the maximum fine, the victim penalty assessment, restitution, and loss of right to possess a firearm. RP 5/27/08 2-9. There was no discussion of community custody. The court accepted the plea. RP 5/27/08 12-13.

The plea form included a paragraph that read, in part: "In addition to confinement, the judge will sentence me to a period of community supervision, community placement or community custody. . . . For crimes committed on or after June 1, 2000, the judge will sentence me to the community custody range which is from __ months to __ months or up to the period of earned early release awarded pursuant to 9.94A.728, whichever is longer, unless the judge finds substantial and compelling reasons to do otherwise." CP 10. The instructions to the form state that the

paragraph should have been stricken and initialed by the defendant and the judge if not applicable. CP 10. The paragraph was not stricken or initialed. CP 10. The blanks were not filled in. CP 10.

Prior to sentencing, the defendant moved to withdraw his plea, contending that he had been misadvised by his attorney that the felonies that he was pleading guilty to would be converted to misdemeanors. CP 85-89. In response, the State submitted a declaration from the attorney, stating that he explained the consequences of pleading guilty and never suggested that the crimes could be converted to misdemeanors. CP 51-53. After hearing testimony from the defendant, the court denied the motion to withdraw the guilty plea, characterizing it as "a classic case of buyer's remorse." RP 2/13/09 28-31.

At sentencing, the court imposed a sentence of three months of work release. CP 38. The court did not impose community custody. CP 38. There was no discussion of community custody at sentencing. RP 2/13/09 31-39.

C. ARGUMENT.

VIEWING THE PLEA AGREEMENT AS A WHOLE AND IN CONTEXT, ASHE HAS FAILED TO SHOW THAT HE WAS MISADVISED AS TO COMMUNITY CUSTODY.

Ashe contends for the first time on appeal that he should be allowed to withdraw his guilty plea because the plea form incorrectly advised him that the court would impose an unspecified term of community custody. Ashe's claim should be rejected. Viewing the plea agreement as a whole and in context, Ashe was not misadvised about community custody.

The requirements for a guilty plea come from the Constitution and from CrR 4.2. In order for a plea to be constitutionally sufficient, the record must demonstrate that the defendant knowingly waived three important federal rights: the privilege against self-incrimination, the right to trial by a jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). See also Wood v. Morris, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976).

CrR 4.2 contains additional procedural safeguards designed to ensure that the defendant's rights are protected during a guilty plea. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). The procedural safeguards of CrR 4.2 are not constitutionally

mandated. Branch, 129 Wn.2d at 642.¹ CrR 4.2(d) mandates that a plea of guilty shall not be accepted until the court ascertains that the plea is voluntary, that the defendant is competent, and that the defendant understands the nature of the charge and the consequences of the plea.

In order for a plea to comport with the requirements of CrR 4.2, the defendant must be advised of the direct consequences of his plea. State v. Ross, 129 Wn.2d 279, 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." State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

A plea is considered involuntary, and may be withdrawn, if the defendant is misinformed about sentencing consequences resulting in a longer sentence than anticipated. State v. Mendoza, 157 Wn.2d 582, 587-88, 141 P.3d 49 (2006). A defendant may also withdraw his guilty plea when the plea form failed to inform him of mandatory community placement. Ross, 129 Wn.2d at 288. In State v. Ross, the state supreme court found that community

¹ But see State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) (holding that failure to advise defendant of correct standard range constituted a constitutional error).

placement was a direct consequence because it affected "the punishment flowing immediately from the guilty plea" and "imposes significant restrictions on a defendant's constitutional freedoms." Id. at 286. Because Ross was not explicitly informed of the mandatory community placement his plea was deemed to be involuntary, and the court held that he was entitled to withdraw it. Id. at 288. In Mendoza, the court held that a guilty plea may be deemed involuntary when based on misinformation about the standard range, regardless of whether the actual standard range is lower or higher than anticipated. Mendoza, 157 Wn.2d at 591. A challenge to the voluntariness of a guilty plea may be raised for the first time on appeal. Walsh, 143 Wn.2d at 8.

In the present case, Ashe contends that his plea was involuntary, and thus constitutes a manifest injustice, because page four of the Statement of Defendant on Plea of Guilty stated that a term of community custody would be imposed. He argues that pursuant to Ross and Mendoza, his plea was involuntary because he was advised that community custody would be imposed when community custody was not authorized.

Ashe is correct that community custody was not authorized. Pursuant to former RCW 9.94A.545, the court did not have

authority to impose community custody for a sentence of less than one year unless the crime was a sex offense, a violent offense, a crime against a person or a felony drug offense. See Laws of 2006, ch. 128, sec. 4. In this case, the court was not statutorily authorized to impose a term of community custody. For this reason, the State did not recommend community custody and the court did not impose community custody.

Ashe is mistaken that the reference to community custody in the plea statement rendered his plea involuntary. Plea agreements are contracts and are analyzed under basic contract principles. State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Plea agreements must be read in the context in which they are made, and viewed as a whole. State v. Oliva, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003). As the state supreme court has explained:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222, 228 (1990) (quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). This is known as the "context rule." Id.

Applying the context rule to the plea agreement in the present case, Ashe was not misadvised about community custody. The context rule requires this Court to consider the agreement as a whole, and to consider the circumstances surrounding the making of the agreement and the subsequent conduct of the parties. When viewed as a whole, the plea agreement did not advise Ashe that the court would impose a term of community custody. While paragraph 6(f) was not stricken as it should have been, the blanks were not filled in and thus the most reasonable reading is that no community custody range was applicable. CP 10. Other portions of the plea agreement clearly stated that the State was not recommending community custody. In the two places where the State's sentence recommendation was set forth, community custody is not mentioned and the community custody boxes were left blank. CP 10, 27. Community custody was not discussed at the plea hearing or at sentencing, and there was no objection by either party to the fact that the court's sentence did not impose community custody. The motion to withdraw the guilty plea was brought on

another basis, and no mention of community custody was made during that motion. Utilizing the context rule to interpret the plea agreement in this case, the most reasonable interpretation is that the defendant was not misadvised that he would serve a term of community custody.

Because the defendant was not misadvised about community custody, he cannot establish a manifest injustice entitling him to withdraw his plea.

D. CONCLUSION.

The defendant's convictions should be affirmed.

DATED this 14th day of July, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ASHE, Cause No. 64002-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

7/14/10
Date

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