

64348-7

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No. 64348-7-1

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

STATE OF WASHINGTON,
Respondent,
v.
BENJAMIN SMALLS,
Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Smalls was misinformed about the community custody that would follow his sentence, a mandatory consequence of his conviction, rendering his guilty plea involuntary under the due process clause of the Fourteenth Amendment.

2. The trial court erred in sentencing Smalls to 48 months of community custody instead of the three years authorized by statute.

3. The use of juvenile adjudications to enhance Small's maximum punishment violated Small's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires a guilty plea be knowing, voluntary, and intelligent. A plea is rendered involuntary where a defendant is misinformed of a direct consequence of the plea. When Smalls pleaded guilty, he was informed he would be sentenced to a range of 24-48 months of community custody. At sentencing, in response to a legislative change to the Sentencing Reform Act of 1981 ("SRA"), the court imposed a fixed term of 48 months of community custody. Where the court was statutorily authorized to impose only three years of community custody, was Smalls' guilty plea rendered

involuntary based upon the misinformation? (Assignments of Error 1 and 2)

2. The Sixth Amendment guarantees a criminal defendant the right to a jury trial on every element of the charged offense, and the Fourteenth Amendment guarantees due process of law. The sentencing court included three juvenile adjudications in Smalls' criminal history even though he did not have the right to have the right to a jury trial in the juvenile proceedings. Did the court violate Smalls' constitutional rights to a jury trial and to due process when it included the prior juvenile adjudications in his criminal history and in the calculation of his offender score, thus raising the statutory maximum term? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Based on events that occurred in September 2002, appellant Benjamin Smalls was charged by amended information with one count of murder in the second degree with a firearm enhancement and one count of assault in the second degree with a firearm enhancement. CP 9-10. Smalls entered a plea agreement with the State in which the State agreed to dismiss the firearm enhancement on the second-degree assault count and to dismiss

pending assault in the second degree charges in another case(?).
CP 14-15, 30.

At the plea colloquy, on November 14, 2008, the prosecutor stated his intention to conduct a detailed colloquy and to inventory Smalls' prior convictions "so . . . we can all be sure that Mr. Smalls doesn't suffer from any misunderstanding like he apparently did last time here []." Id. The prosecutor confirmed that Smalls had three prior juvenile adjudications, for robbery in the first degree, unlawful possession of a firearm, and possession of narcotics. 11/14/08 RP 8. The prosecutor also confirmed that Smalls had been convicted of four felonies as an adult (all subsequent to the September 2002 shooting). 11/14/08 RP10.

Then, after discussing the State's sentence recommendation, the prosecutor stated, "On . . . Page 4 . . . it says that, 'For all crimes committed after July 1, 2000 the judge will sentence me to the mandatory community custody range which is 24 to 48 months.' You understand that will be a condition of your sentence as well, don't you Mr. Smalls?" 11/14/08 RP 14. Mr. Smalls responded, "When I get out[?]" Id. The prosecutor confirmed, "Yes, when you get out." 11/14/08 RP 14-15.

Before sentencing and with new counsel, Smalls sought to withdraw his guilty plea.¹ 1/9/09 RP 3-5; CP 37-38. The court denied Smalls' motion and accordingly decided to "proceed to sentencing." 9/25/09 RP 5.

As the prosecutor recited the State's sentencing recommendation, the court interjected:

Counsel, with the recent legislative change it's my understanding that community custody month is to be set at a specific length of time rather than [a range] and I think for serious violent it's 48 months.

9/25/09 RP 11.

The prosecutor responded,

I apologize as – as I think the Court understand[s] this paperwork was prepared back in – in anticipation of a December sentencing date and you are correct, it is 48 months and there is no longer a range of community custody. And I'll – with the Court's permission I'll simply delete the 24 (inaudible) have it be 48 months. I'll initial those changes and ask counsel to do the same thing, your honor.

Id.

Defense counsel objected, noting that "he was pled prior to [presumably] the passing of . . . the new legislation." Defense

¹ The initial basis for the motion to withdraw was concerns about Smalls' competency. CP 37-38. Smalls was evaluated at Western State Hospital and by a second doctor, both of whom concluded Smalls was competent. 9/25/09 RP 4-5.

counsel stated, "I would make that objection . . . for the record to a specific 48 month[s]." 9/25/09 RP 11-12.

The court noted defense counsel's objection and sentenced Smalls to a term of 418 months in custody on the murder count, including the firearm enhancement, and 84 months on the assault in the second degree count. 9/25/09 RP 18; CP 48. The court ordered Smalls serve community custody for a fixed term of 48 months. 9/25/09 RP 18; CP 49. Smalls appeals.

D. ARGUMENT

1. SMALLS WAS MISADVISED REGARDING A MANDATORY CONSEQUENCE OF HIS CONVICTION, RENDERING HIS PLEA INVOLUNTARY IN VIOLATION OF THE FOURTEENTH AMENDMENT.

a. Principles of due process require a guilty plea be knowing, intelligent, and voluntary. To satisfy due process, a guilty plea must be knowing, voluntary and intelligent. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. 14; Wash. Const. art. I, § 3. The failure to correctly advise a defendant of the direct consequences of his guilty plea renders the plea involuntary. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); State v. Miller, 110 Wn.2d

528, 531, 756 P.2d 122 (1988). An involuntary guilty plea creates a “manifest injustice” which requires the guilty plea be set aside. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); CrR 4.2(d).

In Isadore, the defendant was not advised of mandatory community placement. Holding this rendered the plea involuntary, the Court granted the defendant’s personal restraint petition. 151 Wn.2d at 302. As a remedy, the Court held, “[t]he defendant has the initial choice of specific performance or withdrawal of the plea.” Id. at 303 (citing State v. Turley, 149 Wn.2d 395, 399, 69 P.3d 338 (2003) and Miller, 110 Wn.2d at 536); see also Mendoza, 157 Wn.2d at 591 (“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.”).

b. Smalls was misinformed regarding the community placement that would follow his sentence, rendering the plea involuntary. Smalls pleaded guilty to murder in the second degree, which is a serious violent offense. RCW 9.94A.030(41)(ii). At the time that Smalls pleaded guilty, the court was authorized to impose a range of community custody following his term of confinement. WAC 437-20-010 (authorizing a community custody range of 24-48

months for serious violent offenses). But in the interim between when Small pleaded guilty and when he was sentenced, the Legislature amended the SRA to eliminate community custody ranges. According to RCW 9.94A.701, where an offender is sentenced to the custody of the Department of Corrections for a serious violent offense, “the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years[.]” RCW 9.94A.701(1)(b).

Although the trial court was aware that the Legislature had amended the SRA to require a fixed term of community custody, the court wrongly believed the range authorized by statute was 48 months of confinement. 9/25/09 RP 11. Far from clearing up the court’s misconception, the prosecutor contributed to the sentencing error by “confirming” that the community custody which would follow Smalls’ term of confinement was 48 months. Id.

Community custody “produces a definite, immediate and automatic effect on a defendant’s range of punishment” and is a direct consequence of a guilty plea. State v. Ross, 129 Wn.2d 279, 284-85, 916 P.2d 405 (1996) (holding failure to inform defendant of mandatory community placement term rendered guilty plea invalid). Smalls was not merely misinformed regarding this mandatory

consequence of his guilty plea. The court actually imposed an erroneous sentence, requiring Smalls to serve a longer community custody term than is authorized by statute. 9/25/09 RP 18; CP 49.

c. Smalls is entitled to withdraw his plea. “A knowing, voluntary, and intelligent guilty plea requires a meeting of the minds.” Mendoza, 157 Wn.2d at 590. It is immaterial whether the correct sentence is higher or lower than anticipated. Id. at 590-91. “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. Because Smalls was misinformed regarding a direct consequence of his guilty plea, this matter should be remanded to allow Smalls to elect his remedy: specific performance or withdrawal of the plea. Isadore, 151 Wn.2d at 303; accord Mendoza, 157 Wn.2d at 591.

2. SMALLS SEEKS TO EXHAUST HIS STATE REMEDIES AND ASKS THIS COURT TO HOLD HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INCLUSION OF A JUVENILE ADJUDICATION IN HIS SRA OFFENDER SCORE.

a. Juvenile adjudications were used to elevate Smalls' offender score and maximum punishment. Smalls pleaded guilty to one count of murder in the second degree and one count

of assault in the second degree. CP 11-21. In calculating his offender score, in addition to scoring the other current offense, the court included four 2003 convictions and three prior juvenile adjudications. CP 60. One of the prior juvenile adjudications was for robbery in the first degree, one was for a violation of the uniform controlled substances act, and one was for unlawful possession of a firearm. Id.

Because robbery in the first degree is a violent offense, this adjudication added two points to Smalls' offender score. CP 32-33. The other two juvenile adjudications counted together as one point towards Smalls' offender score. Without the juvenile adjudications, the maximum punishment, including the firearm enhancement, that the court could have imposed on the murder count was 335 months confinement. CP 33; RCW 9.94A.510. The maximum punishment the court could have imposed on the assault in the second degree count was 43 months confinement. CP 32; RCW 9.94A.510.

b. The use of juvenile adjudications to elevate Smalls' maximum punishment violated his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law. It is now axiomatic that an accused person's constitutional rights to a jury trial and due process of law require the government

to submit to a jury and prove beyond a reasonable doubt any “fact” upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Cunningham v. California, 549 U.S. 270, 290-91, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); United States v. Booker, 543 U.S. 220, 243-44, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 239-52, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Only prior convictions are excepted from this rule, Almendarez-Torres v. United States, 523 U.S. 224, 243, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and this is because a prior conviction “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” Jones, 526 U.S. at 249; accord Apprendi, 530 U.S. at 488.

In United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit evaluated the Supreme Court’s opinions in Apprendi, Jones, and Almendarez-Torres to determine whether

juvenile adjudications which do not afford the right to a jury trial fall within the narrow prior conviction exception. Concluding they did not, the Court held Jones's recognition of the exception's viability was premised on the prior convictions being subject to the "fundamental triumvirate" of procedural protections – notice, proof beyond a reasonable doubt, and a jury trial guarantee – crucial to due process. Tighe, 266 F.3d at 1193-94.

At least three states have barred the use of non-jury juvenile adjudications to enhance a sentence above the otherwise-available maximum. State v. Harris, 118 P.3d 236 (Ore. 2005); State v. Chatman, 2005 Tenn. Crim. App. LEXIS 368, No. M2003-00806-CCA-R3-CD, appeal denied by, 2005 Tenn. LEXIS 940 (2005); State v. Brown, 879 So.2d 1276 (La. 2004), cert. denied, 543 U.S. 826 (2004). Other courts have appeared to concur in dicta that whether a juvenile adjudication may be utilized to elevate the punishment turns on whether there was a jury trial right in the juvenile proceeding. See e.g. State v. Greist, 121 P.3d 811 (Alas. 2005) (Alaska grants jury trial right to minors in delinquency proceedings for conduct that would be a crime resulting in incarceration if committed by an adult; only these adjudications may enhance a sentence above the otherwise-available maximum);

People v. Taylor, 850 N.E. 2d 134 (Ill. 2006) (noting conflicting authorities, and relying on statutory exclusion of juvenile adjudications from definition of “conviction” to bar their use to enhance sentence).

In Weber, a five-justice majority of the Washington Supreme Court sided with the courts that have found the jury trial guarantee a dispensable right, and so held that whether a prior adjudication may be used to enhance a sentence turns on its reliability, not whether a jury trial right was afforded in the prior proceeding. Weber, 159 Wn.2d at 255. But neither the history of the Sixth Amendment nor the opinions of the United States Supreme Court provide a basis for substituting the right to a jury trial with some other, lesser, process.

To the contrary, as the Blakely opinion made clear, such a reading of Apprendi is fundamentally mistaken:

Our commitment to Apprendi. . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict.

542 U.S. at 305-06.

The reliability analysis engaged in by the Weber majority also fails to account for the differences between the juvenile and adult systems, and accordingly does not address the reason why the due process safeguards required for a juvenile adjudication are less than what is required for an adult conviction.

The juvenile justice system emphasizes rehabilitation rather than assigning criminal responsibility and punishment. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 641 (1971) (plurality opinion). The reason proffered for a less formal and less reliable procedure in juvenile court is that it protects juveniles from the stigma and consequences of conviction as adults. Cf., McKeiver, 403 U.S. at 540 with Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (jury trial in criminal cases is fundamental to our system of justice). Thus while juveniles are entitled to some of the procedural protections necessary to ensure due process, Gault, 387 U.S. at 31-58, the McKeiver plurality refused to require a jury trial for

juveniles on the grounds that it would “remake the juvenile proceeding into a fully adversary process” and end “the idealistic prospect of an intimate, informal protective proceeding.” McKeiver, 403 U.S. at 545.

Notwithstanding a legislative shift toward making the juvenile system more punitive, Washington has continued to assert that juvenile rehabilitation remains the paramount focus of the juvenile system. See State v. Chavez, 163 Wn.2d 262, 269-70, 180 P.3d 1250 (2008); State v. Watson, 146 Wn.2d 947, 952-53, 41 P.3d 66 (2002); Monroe v. Soliz, 132 Wn.2d 414, 419-20, 939 P.2d 205 (1997); State v. Meade, 129 Wn. App. 918, 925, 120 P.3d 975 (2005); State v. J.H., 96 Wn. App. 167, 183, 978 P.2d 1121 (1997). Washington courts still cite the rehabilitative goals of the juvenile justice system as a basis to deny jury trials to juveniles under both the federal and state constitutions. State v. Tai N., 127 Wash. App. 733, 738-39, 113 P.3d 19 (2005). Yet, as the Louisiana Supreme Court recognized, when a court enhances a sentence based on prior juvenile adjudications, the adjudications themselves become criminalized, undermining the purposes of the rehabilitative juvenile system.

The majority opinion of the Washington Supreme Court refuses to recognize this bait-and-switch and so does not identify a due process impediment to the use of juvenile adjudications to enhance the offender score. More importantly, the opinion discounts the significance of the Sixth Amendment jury trial guarantee and so does not follow the Supreme Court's decisions. See Weber, 159 Wn.2d at 261 ("Jones . . . advances the guaranties of 'fair notice, reasonable doubt, and jury trial' as one possible, not the exclusive, basis for the distinctive constitutional treatment of recidivism"); and at 263 ("the Apprendi Court did not specifically identify a jury trial as being a required procedural safeguard").

As found by the dissenting justices, the opinion is fundamentally inconsistent with the Supreme Court's reasons for excluding prior convictions from the Sixth Amendment requirement that facts which increase the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt, and condones a significant violation of due process. See Weber, 159 Wn.2d at 279-88 (Madsen, J., dissenting). This Court should find Weber misapprehends federal constitutional law pertaining to the Sixth Amendment right to a jury trial right and hold the use of juvenile adjudications to elevate

Smalls' maximum punishment violated his rights to a jury trial and due process of law.

E. CONCLUSION

This Court should conclude that the misinformation about a mandatory consequence of Smalls' guilty plea rendered the plea involuntary. This Court should further hold that the use of juvenile adjudications to elevate Smalls' punishment above the otherwise-available statutory maximum violated his Sixth and Fourteenth Amendment rights to a jury trial and due process of law.

DATED this 6th day of April, 2010.

Respectfully submitted:



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