

64348-7

64348-7

NO. 64348-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SMALLS,

Appellant.

2010 JUL 14 10:31 AM
FILED
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN AND GREGORY CANOVA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. SMALLS WAS ACCURATELY ADVISED OF THE COMMUNITY CUSTODY REQUIREMENT AND THUS HE HAS FAILED TO ESTABLISH A MANIFEST INJUSTICE	3
2. THE COURT IMPROPERLY IMPOSED A COMMUNITY CUSTODY PERIOD OF 48 MONTHS	7
3. JUVENILE ADJUDICATIONS WERE PROPERLY INCLUDED IN THE DEFENDANT'S OFFENDER SCORE.....	8
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 8

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 8

Brady v. United States, 397 U.S. 742,
90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) 6

Washington State:

In re Personal Restraint of Isadore,
151 Wn.2d 294, 88 P.3d 390 (2004)..... 4

In re Personal Restraint of Stoudmire,
145 Wn.2d 258, 36 P.3d 1005 (2001)..... 5, 6

State v. Barton, 93 Wn.2d 301,
609 P.2d 1353 (1980)..... 3

State v. Ross, 129 Wn.2d 279,
916 P.2d 405 (1996)..... 4

State v. Walsh, 143 Wn.2d 1,
17 P.3d 591 (2001)..... 4

State v. Weber, 159 Wn.2d 252,
149 P.3d 646 (2006)..... 8

Constitutional Provisions

Federal:

U.S. Const. amend. VI 8

U.S. Const. amend. XIV 8

Statutes

Washington State:

Laws of 2009, ch. 375 6

RCW 9.94A.030 5

RCW 9.94A.701 5, 6, 7

RCW 9.94A.850 5

Rules and Regulations

Washington State:

CrR 4.2 3

Other Authorities

WAC 437-20-010 5

A. ISSUES PRESENTED.

1. Whether the defendant has failed to establish a manifest injustice justifying withdrawal of his guilty plea where he was correctly advised that he would serve a term of community custody, was correctly advised of the range of community custody as provided by the law at the time of the plea, and where the period of community custody that will be imposed is within that range?

2. Whether this matter should be remanded for entry of an order correcting the judgment and sentence to impose the term of community custody now required by statute?

3. Whether the trial court properly included juvenile adjudications in the defendant's offender score as required by statute?

B. STATEMENT OF THE CASE.

Benjamin Smalls was charged with murder in the second degree while armed with a firearm in March of 2008. CP 1-2. In April of 2008, the State amended the information to add a second charge of assault in the second degree while armed with a firearm, involving a second victim. CP 9-10. On November 14, 2008, Smalls pled guilty to murder in the second degree while armed with

a firearm and assault in the second degree without the firearm enhancement. CP 11-36. In addition to dismissing the firearm enhancement for Count II, the State also agreed to dismiss charges pending against Smalls in King County Cause No. 06-1-12112-7 and to recommend a sentence of 418 months of total confinement. CP 14-15, 30, 36. Smalls was advised that the court would impose a community custody range of 24 to 48 months. CP 14, 36. At the plea hearing, the prosecutor conducted an exhaustive colloquy with Smalls, due to Smalls' history of moving to withdraw guilty pleas. RP 11/14/08 4-27. During the oral colloquy, Smalls was again advised that the court would impose community custody with a range of 24 to 48 months. RP 11/14/08 14-15.

After the plea, the defense requested a continuance of the sentencing in order to have Smalls' competency evaluated. CP 37-38. The court ordered a competency evaluation. CP 39-42. Smalls was evaluated and found to be competent. RP 9/25/09 4-5.

Smalls was sentenced on September 25, 2009. CP 45-53. The court imposed a sentence of 418 months of total confinement and 48 months of community custody. CP 48-49.

C. ARGUMENT.

1. SMALLS WAS ACCURATELY ADVISED OF THE COMMUNITY CUSTODY REQUIREMENT AND THUS HE HAS FAILED TO ESTABLISH A MANIFEST INJUSTICE.

Smalls contends that he should be allowed to withdraw his plea because at the time of his plea he was advised that the court would impose a community custody range of 24 to 48 months, but due to subsequent legislative changes he is required to serve community custody of 36 months. This claim should be rejected. Smalls was correctly advised that he would serve a term of community custody. He was correctly advised as to the range of the community custody provided by law at the time of the plea. The new term of community custody, due to legislative changes that occurred after the plea, is 36 months, the midpoint of that range. Smalls cannot establish a manifest injustice in this case.

CrR 4.2(f) provides that withdrawal of a guilty plea may be allowed to correct a manifest injustice. The defendant's failure to understand a direct consequence of his plea constitutes a manifest injustice. State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980). A direct consequence is one which "represents a definite, immediate and largely automatic effect on the range of the

defendant's punishment." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A claim that the defendant was misadvised of a direct consequence of his plea may be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001). Once a defendant establishes that he was misadvised of a direct consequence of the plea, he need not establish that the misadvisement was material to his decision to plead guilty. In re Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004).

In State v. Ross, an outdated plea form completely failed to advise the defendant that his sentence would include a period of mandatory community placement. 129 Wn.2d at 282-83. The state supreme court held that community placement was a direct consequence of the plea and the failure to advise Ross of community placement constituted a manifest injustice justifying withdrawal of the plea. Id. at 288. Similarly, in In re Personal Restraint of Isadore, the plea form completely failed to advise the defendant that the court was required to impose a term of community placement. Id. at 296-97. The supreme court held that the failure to advise Isadore of community placement constituted a manifest injustice justifying withdrawal of his plea. Id. at 298.

In contrast, in In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001), the defendant was advised in the plea form that he would be sentenced to community placement "for at least 1 year." He was sentenced to a two-year term of community placement. Id. at 262. He argued that his plea misadvised him of a direct consequence. Id. at 266. The court rejected this argument, stating:

Stoudmire nevertheless argues that due process requires notice of the *range* of punishment in addition to the mere fact of punishment. We disagree. The plea form gave him adequate notice that mandatory community placement applied and that the prosecutor intended to recommend two years.

Id.

In the present case, a review of the relevant community custody statute is necessary. At the time that Smalls entered his plea of guilty RCW 9.94A.701(1)(b) provided that an offender sentenced for a serious violent offense would receive a term of community custody for a range established under RCW 9.94A.850. Former RCW 9.94A.701 (2008). Murder in the second degree is a serious violent offense. RCW 9.94A.030(41). The range of community custody established for serious violent offenses was 24 to 48 months. WAC 437-20-010. In July of 2009, RCW 9.94A.701

was amended so that the community custody term for serious violent offenses was no longer a range but a set period of three years. Current RCW 9.94A.701(1)(b); Laws of 2009, ch. 375, section 5. The amendment became effective July 26, 2009, and applied retroactively and prospectively to all offenders, whether sentenced before or after the effective date of the statute. Laws of 2009, ch. 375, sec. 20.

Thus, the advisement that Smalls received as to the community custody range was actually correct at the time of the plea, in November of 2008. Smalls was not misadvised as to the community custody range at the time of the plea. A voluntary plea made with proper advisement of the then-existing law is not rendered involuntary because of post-plea changes in the law. Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

Moreover, as in Stoudmire, the advisement that Smalls received was not inconsistent with the period of community custody that the court was required to impose at sentencing. Smalls was informed at the plea that in addition to the confinement time he would be required to serve a term of community custody between 24 to 48 months. With the legislative amendment, Smalls is

required to serve a term of community custody in the midpoint of that range, 36 months. Smalls cannot contend that he was not aware of the requirement of community custody. Nor can he contend that he was not aware the community custody period could be as long as 36 months. He cannot establish that he was misadvised of this direct consequence of his plea. Smalls cannot establish a manifest injustice. His plea was valid. His conviction should be affirmed.

2. THE COURT IMPROPERLY IMPOSED A
COMMUNITY CUSTODY PERIOD OF
48 MONTHS.

As explained, above, RCW 9.94A.701(1)(b), which applies to all sentencing hearings that occur after July 26, 2009, provides that if the offender is sentenced for a serious violent offense, the court shall sentence the offender to community custody for three years. Here, due to confusion over the newly-enacted changes to the community custody periods, the court erroneously imposed community custody for 48 months. This matter should be

remanded for the court to enter an order amending the judgment and sentence to impose the proper term of community custody.

3. JUVENILE ADJUDICATIONS WERE PROPERLY INCLUDED IN THE DEFENDANT'S OFFENDER SCORE.

Smalls contends that it violates the Sixth and Fourteenth Amendments to include juvenile adjudications in a defendant's offender score because juvenile adjudications are not decided by a jury. This claim has been rejected by the Washington Supreme Court in State v. Weber, 159 Wn.2d 252, 255, 149 P.3d 646 (2006):

We hold that prior juvenile adjudications fall under the "prior conviction" exception in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and are not facts that a jury must find under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Weber is controlling. Smalls' claim that his juvenile adjudications could not be included in his offender score must be rejected.

D. CONCLUSION.

The conviction and sentence should be affirmed in all respects except the period of community custody. The matter

should be remanded for entry of an order amending the community custody period.

DATED this 4th day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SMALLS, Cause No. 64348-7-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.



Name
Done in Seattle, Washington

06/04/10
Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUN -4 PM 4:25