

66132-9

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NO. 66132-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

KERMIT SCHREIBER,

Appellant.

REC'D

MAR 24 2011

King County Prosecutor
Appellate Unit

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

The Honorable Sharon Armstrong, Judge
The Honorable Mary Yu, Judge

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KING COUNTY PROSECUTOR
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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
THE GUILTY PLEA WAS INVALID BECAUSE SCHREIBER PLED GUILTY BASED ON A MISTAKEN UNDERSTANDING OF THE SENTENCING RANGE.	5
1. <u>During the plea colloquy, the State repeatedly told Schreiber his standard range was lower than the correctly-calculated range</u>	6
2. <u>Schreiber did not waive his right to challenge his involuntary plea</u>	8
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Quinn</u> 154 Wn. App. 816, 226 P.3d 208 (2010).....	6
<u>State v. Bisson</u> 156 Wn.2d 507, 130 P.3d 820 (2006).....	7
<u>State v. Mendoza</u> 157 Wn.2d 582, 141 P.3d 49 (2006)	6, 8, 9
<u>State v. S.M.</u> 100 Wn. App. 401, 996 P.2d 1111 (2000).....	7
<u>State v. Walsh</u> 143 Wn.2d 1, 17 P.3d 591 (2001)	6, 8, 9
<u>FEDERAL CASES</u>	
<u>North Carolina v. Alford</u> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	1
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 4.2.....	6
Former RCW 9.94A.515 (2007)	7
RAP 2.5	6

A. ASSIGNMENT OF ERROR

The trial court erred in denying the appellant's motion to withdraw his guilty plea.

Issue Pertaining to Assignment of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. During the plea colloquy, the prosecutor repeatedly misinformed the appellant that his standard range was zero to three months rather than one to three months. Because misinformation as to a direct consequence of a plea renders the plea involuntary, must the appellant be permitted to withdraw his plea?

B. STATEMENT OF THE CASE¹

The State charged Kermit Schreiber with second degree assault. CP 1-3. The charging documents alleged Schreiber pushed Thomas Pierce, who fell and fractured his knee, which was weak from a prior injury. CP 2.

On July 21, 2009, Schreiber entered an Alford plea² to the inferior degree offense of third degree assault. CP 5-22; 2RP 2. During the plea

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 2/18/09 and 6/29/09; 2RP – 7/21/09; 3RP – 9/25/09; 4RP – 10/15/09; 5RP – 11/6/09; 6RP – 11/20/09; 7RP – 9/29/10.

² North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

hearing, the State and Schreiber engaged in colloquy regarding the written

“Statement of Defendant on Plea of Guilty”:

[The State:] At the top of page two, paragraph five there are constitutional rights you are giving up by pleading guilty

. At the bottom of that page it talks about the standard range, given the severity of the crime and criminal history: maximum term is five years, ten thousand dollars; *standard range: zero to three months. Do you understand that?*

[Schreiber:] Yes

.

[The State:] Paragraph G talks about prosecutor’s recommendation. Prosecutor is recommending 90 days confinement, 30 days of community service Do you understand that [?]

[Schreiber:] *It’s zero to 90 days?*³

[The State:] *Range[] is zero to 90 days. The prosecutor’s recommendation is 90 days. You understand your attorney can make a recommendation between zero to 90 days?*

[Schreiber:] *Okay.*

[The State:] You understand the sentencing judge . . . doesn’t have to follow the recommendations of the prosecutor or your attorney. She can do whatever she thinks is appropriate within the standard range?

[Schreiber:] *Okay.*

2RP 3-4 (emphasis added).

The court found Schreiber’s plea was knowing and voluntary and found a factual basis for the plea based on the State’s probable cause

³ The Statement of Defendant lists the standard range as one to three months. CP 6. An attachment to the statement, however, incorrectly lists the seriousness level as two rather than three. Compare CP 21 (State’s “General Scoring Form”) with former RCW 9.94A.515 (2007) (“Crimes included within each seriousness level”).

certification. 2RP 12. The court found Schreiber guilty of third degree assault. 2RP 12.

Sentencing was continued for two months. Before sentencing could occur, however, Schreiber protested his innocence and told the court he wished to withdraw his plea. 3RP 5-6. After defense counsel, Julie Lawry, stated her belief that the plea colloquy was “solid” and said she knew of no basis for withdrawal, the court permitted Lawry to withdraw. 3RP 6-8. The court continued the hearing so Schreiber could obtain new counsel to raise his motion. 3RP 8.

The hearing was continued twice so Schreiber’s new attorney, Carlos Gonzalez, could contact an eyewitness who, according to Schreiber, could establish his innocence. 4RP 2-4; 5RP 2-4.

Nearly two months after the court allowed Lawry to withdraw, Gonzalez told the court Schreiber’s eyewitness, “Valentino,” was proving elusive. Gonzalez informed the court that Schreiber nonetheless wished to proceed with the motion. 6RP 4. Gonzalez added that there was an additional witness prepared to testify as to Schreiber’s peaceful character and Pierce’s belligerence. 6RP 3.

The court denied Schreiber's motion and proceeded with sentencing.⁴ 6RP 6. Based on a standard range of one to three months, the State recommended three months of confinement with 30 days converted to community restitution. Gonzalez asserted the low end of the standard range was appropriate. 6RP 7. The court, however, noticed an apparent discrepancy in the calculation of Schreiber's sentencing range. 6RP 10. The court noted that if the State's forms were correct, Schreiber's range should be zero to three months based on an offender score of zero and a seriousness level of two. 6RP 8, 10.

After reviewing the statutes, the prosecutor admitted the offense scoring form mistakenly listed the seriousness level for third degree assault as two, rather than three. The correct range was therefore one to three months. 6RP 10-11; CP 25. Gonzalez acknowledged the plea form correctly referred to the standard range as one to three months. 6RP 7. The court sentenced Schreiber to three months of confinement and converted 30 days to community restitution. 6RP 13-14; CP 27.

Nine months later, Schreiber filed a pro se motion to withdraw his plea. He asserted he contacted the eyewitness, who was prepared to testify

⁴ The court assured Schreiber he could bring a motion based on newly discovered evidence at any time, even if it occurred after sentencing. 6RP 6.

Schreiber was innocent of the charges. Schreiber also claimed original attorney Lawry coerced him into pleading guilty. CP 35-39.

The court reappointed Gonzalez. 7RP 2. At a hearing the following month, Gonzalez said he had contact information for Valentino and had spoken with him, but their call was cut off and they were unable to complete the conversation. 7RP 2. The State objected, arguing in part that Schreiber failed to support the motion with affidavits and that Schreiber's claim was precluded because he filed an unsuccessful personal restraint petition raising the same issues.⁵ 7RP 4. The court agreed with the State and denied Schreiber's motion to withdraw his plea. CP 47.

C. ARGUMENT

THE GUILTY PLEA WAS INVALID BECAUSE SCHREIBER PLED GUILTY BASED ON A MISTAKEN UNDERSTANDING OF THE SENTENCING RANGE.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. At the time Schreiber entered his plea, the prosecutor repeatedly assured him that his standard range was lower than the actual standard range. Schreiber was thus misinformed as to a direct consequence of a plea, rendering the plea involuntary. Because Schreiber did not waive his right to

⁵ CP 32-34 ("Certificate of Finality" and order dismissing Schreiber's personal restraint petition under case no. 64910-8-I).

raise this claim, which may be raised for the first time on appeal, this Court should reverse the order denying Schreiber's motion to withdraw his plea.

1. During the plea colloquy, the State repeatedly told Schreiber his standard range was lower than the correctly-calculated range.

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). This standard is reflected in CrR 4.2(d), which provides 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." Mendoza, 157 Wn.2d at 587.

A guilty plea is not made knowingly when it is based on misinformation regarding sentencing consequences. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). This is so regardless of whether the actual sentencing range is lower or higher than previously believed. Id. at 838 (quoting Mendoza, 157 Wn.2d at 591). An accused's misunderstanding of sentencing consequences when pleading guilty constitutes a manifest error affecting a constitutional right. Mendoza, 157 Wn.2d at 589 (quoting State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001); RAP 2.5(a)(3)).

In Walsh, the Supreme Court permitted Walsh to argue for the first time on appeal that his plea was involuntary. 143 Wn.2d 1. Between the

plea hearing and sentencing, the State discovered Walsh's offender score and standard range were higher than initially thought. Nothing in the record indicated Walsh was advised of this correction before sentencing. Rather, the parties simply proceeded under the higher score and range. *Id.* at 7. Noting that Walsh was neither advised of the misunderstanding nor offered an opportunity to withdraw his plea, the Court found the plea involuntary and permitted withdrawal. *Id.* at 9.

The situation here is similar. The plea colloquy shows that at the time Schreiber entered his plea, he understood the sentencing range to be zero to three months. While the plea form arguably set forth the correct range, the State repeatedly assured Schreiber the sentencing range was zero to three months. See State v. S.M., 100 Wn. App. 401, 414-15, 996 P.2d 1111 (2000) (contents of written plea statement not dispositive in establishing voluntariness of plea). Significantly, the prosecutor told Schreiber he would be permitted to argue for a sentence anywhere in that range. 2RP 3-4. In other words, Schreiber pled guilty with the understanding there was some hope that he could receive a sentence that did not include confinement.

Moreover, an attachment to the Statement of Defendant form listed the crime's seriousness level as two, which would have corresponded to the zero to three range, creating an ambiguity in the plea forms. CP 21; former

RCW 9.94A.515 (2007); State v. Bisson, 156 Wn.2d 507, 523, 130 P.3d 820 (2006) (plea agreements that are reasonably susceptible to different interpretations are ambiguous). Thus, the State cannot show that Schreiber pled guilty with a correct understanding of the applicable sentencing range.

Because the plea colloquy establishes Schreiber pleaded guilty without knowledge of the correct sentencing range, the plea was involuntary. This Court should reverse the trial court's ruling and permit Schreiber to withdraw the plea. Walsh, 143 Wn.2d at 9.

2. Schreiber did not waive his right to challenge his involuntary plea.

In response, the State may argue Schreiber waived his claim based on replacement counsel's acknowledgement at sentencing that the plea forms set forth the correct standard range. This Court should, however, reject such an argument.

In Mendoza, the Supreme Court held that a defendant is generally permitted to withdraw a guilty plea as involuntary where the plea is based on misinformation regarding the applicable sentencing range, even when the correct range is lower than anticipated. 157 Wn.2d at 584.

The Court found, however, that Mendoza waived his right to challenge the plea. Id. at 592. Although Mendoza's plea may not have been knowing, voluntary, and intelligent when entered, the Court found he

waived his right to challenge it because (1) he was advised of the correct range before sentencing and (2) sentenced within a *lower* standard range than set forth in the plea agreement. Id. at 591-92.

This case does not meet the Mendoza requirements to show waiver. Although Schreiber's counsel acknowledged the correct standard range – though not the correct seriousness level – was set forth in the plea forms, Schreiber was sentenced within a *higher* standard range than that discussed during the plea colloquy. Accordingly, Walsh controls the outcome here, and this Court should permit Schreiber to withdraw his plea.

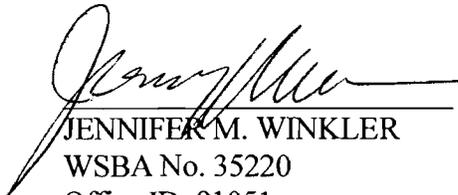
D. CONCLUSION

For the foregoing reasons, this Court should permit Schreiber to withdraw his guilty plea.

DATED this 24th day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66132-9-1
)	
KERMIT SCHREIBER,)	
)	
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 24TH DAY OF MARCH, 2011, 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] KERMIT SCHREIBER
 8609 244TH ST SW
 EDMONDS, WA 98026

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MARCH, 2011.

x *Patrick Mayovsky*