

71144-0

71144-0

COA NO. 71144-0-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

ERIK BARNES,

Appellant.

---

---

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

The Honorable Thomas J. Wynne, Judge

---

---

BRIEF OF APPELLANT

---

---

DANA M. NELSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

2014 MAR 24 PM 3:55

~~COURT OF APPEALS DIV 1  
STATE OF WASHINGTON~~  
FILED

**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> .....	4
1. THE GUILTY PLEA IS INVALID BECAUSE BARNES WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.....	4
a. <u>Barnes Was Misinformed He Would Be Sentenced            To Community Custody As A Consequence Of            Pleading Guilty</u> .....	5
b. <u>This Constitutional Error Is Preserved For            Review</u> .....	10
D. <u>CONCLUSION</u> .....	12

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>In re Pers. Restraint of Bradley,</u> 165 Wn.2d 934, 205 P.3d 123 (2009).....	9
<u>In re Pers. Restraint of Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004).....	5, 8
<u>In re Pers. Restraint of Quinn,</u> 154 Wn. App. 816, 226 P.3d 208 (2010).....	5, 6, 11
<u>State v. Barton,</u> 93 Wn.2d 301, 609 P.2d 1353 (1980).....	6
<u>State v. Branch,</u> 129 Wn.2d 635, 919 P.2d 1228(1996).....	5
<u>State v. Easterlin,</u> 159 Wn.2d 203, 149 P.3d 366 (2006).....	7
<u>State v. Mendoza,</u> 157 Wn.2d 582, 141 P.3d 49 (2006).....	5, 7, 8, 10, 11
<u>State v. Ross,</u> 129 Wn.2d 279, 916 P.2d 405 (1996).....	5, 6
<u>State v. Turley,</u> 149 Wn.2d 395, 69 P.3d 338 (2003).....	9
<u>State v. Walsh,</u> 143 Wn.2d 1, 17 P.3d 591 (2001).....	10, 11
<u>State v. Weyrich,</u> 163 Wn.2d 556, 182 P.3d 965 (2008).....	8

**TABLE OF AUTHORITIES** (CONT'D)

Page

**RULES, STATUTES AND OTHERS**

CrR 4.2(d) .....	5
RAP 2.5(a)(3).....	10
RCW 9.94A.701 .....	6
RCW 9.94A.702 .....	6
U.S. Const. Amend. V .....	5
U.S. Const. Amend. XIV .....	5
Wash. Const. art. I, § 3 .....	5

A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. The written plea agreement and court misinformed appellant that 18-36 months of community custody would be imposed as part of his sentence for first degree unlawful possession of a firearm. Must appellant be allowed to withdraw his plea – as well as his pleas to other offenses that were entered as part of the package plea deal – because he was misinformed about a direct consequence of one of the pleas?

B. STATEMENT OF THE CASE

Under cause no. 12-1-02050-1, the state charged Barnes with possessing methamphetamine. CP 69-70. On March 1, 2013, he entered a plea to the charged offense. CP 46-61. In exchange, the state agreed to recommend a 24-month sentence, to run concurrently with the sentences imposed under cause no. 12-1-01700-4. CP 55. The plea agreement indicated: “This Plea Agreement is dependent upon the defendant entering a plea of guilty in all other cause numbers included in the State’s Plea offer.” CP 54.

Under cause no. 12-1-01700-4, the state charged Barnes with one count of unlawful possession of a firearm in the first degree and one count of possessing methamphetamine with the intent to deliver. CP 119-120. On March 1, 2013, he entered pleas to the charged offenses. CP 98-114. In exchange, the state agreed to recommend 90 months on both counts to be served concurrently with the sentence imposed under cause no. 12-1-02050-1. CP 107. The plea agreement indicated: "This Plea Agreement is dependent upon the defendant entering a plea of guilty in all other cause numbers included in the State's plea offer." CP 106.

The plea paperwork indicated Barnes was subject to 12 months of community custody for the simple possession charge under cause no. 12-1-02050-1. CP 47, 56. The plea paperwork for cause no. 12-1-01700-4 indicated Barnes was subject to 18-36 months of community custody for the unlawful possession of a firearm count and 12 months of community custody for the possession with intent count. CP 99-100, 108.

At the combined plea hearing, the court reiterated that under cause no. 12-1-01700-4, Barnes was subject to 18-36 months of community custody for count I and 12 months of community custody for count II. CP 19. The court did not say anything about community custody on the simple possession charge. CP 4. The court found Barnes' pleas were knowing, voluntary and intelligent. CP 21.

Sentencing was postponed to allow Barnes to be evaluated for a possible drug offender sentencing alternative (DOSA). CP 22, 62-63. Ultimately, the evaluator recommended against the sentencing alternative. CP 31.

Before sentencing, Barnes moved to withdraw his pleas under both cause numbers. CP 86-97. Barnes argued his pleas were invalid because his attorney failed to advise him of the court's discretion to deny a DOSA and his offender score and standard ranges for the offenses. CP 84-85, 87, 89.

At the motion to withdraw hearing on November 1, 2013, the state called Barnes' attorney at the time of the plea – Gurjit Pandher – to testify.<sup>1</sup> Pandher did not remember specifically what he and Barnes discussed but asserted it was his normal practice to inform a client of his offender score standard sentence range. RP 4-5. It was also his normal practice to explain the court's sentencing discretion with respect to imposing a DOSA. RP 4.

Barnes testified at the hearing as well. RP 6-10. The court found Barnes was advised about his points and the discretionary nature of the DOSA and denied the motion. RP 14.

---

<sup>1</sup> A transcript of the plea hearing was also provided to the court. CP 91-97.

After denying the motion to withdraw, the court proceeded immediately to sentencing. For the first time, the prosecutor asserted the firearm possession count did not actually have any community custody. RP 15-16. The court noted the “plea paperwork says 18 to 36 months community custody on Count I.” RP 16. The court stated the plea paperwork was in error but concluded, “It’s not prejudicial to the defendant.” RP 16. The prosecutor agreed: “Correct, it’s in the defendant’s favor.” RP 16. The prosecutor continued with her recommendation. RP 16.

Under cause no. 12-1-02050-1 (the simple possession charge), the court imposed 24 months of confinement and 12 months of community custody. CP 3-13. Under cause no. 12-1-01700-4, the court imposed 90 months on each count to run concurrently with each other and the sentence on the other cause number. CP 75. The court imposed 12 months of community custody on count II. CP 76.

This appeal follows. CP 1-2.

C. ARGUMENT

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

Barnes’ guilty plea to unlawful possession of a firearm is invalid because he was misinformed that 18-36 months of community custody

would be imposed as part of his sentence. Because this plea was entered as part of a package deal, Barnes is entitled to withdraw his pleas to each of the three offenses.

- a. Barnes Was Misinformed 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, 154Wn. App. 816,

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 Barnes' case, the plea paperwork and the court informed him that he would be subject to 18-36 months of community custody for the unlawful possession of a firearm. In this manner, Barnes was misinformed about a direct consequence of his plea because community custody could not be imposed for this offense. See RCW 9.94A.701 (listing offenses subject to community custody); RCW 9.94A.702 (listing offenses subject to community custody where sentence of confinement is one year or less).

The prosecutor and court confirmed briefly at sentencing that Barnes was not actually subject to community custody for the unlawful possession of a firearm offense. Although the prosecutor and court noted

the error was in Barnes' favor, a guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless 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 Barnes' case. The plea paperwork and the court's statement at the plea hearing show 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, Barnes need not show reliance on the incorrect community custody advisement. "[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. Barnes 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.

He should also be allowed to withdraw his pleas to simple possession and possession as methamphetamine as they were entered as part of a package deal. In re Pers. Restraint of Bradley, 165 Wash.2d 934, 205 P.3d 123 (2009). Bradley held that a defendant may withdraw guilty pleas for multiple convictions, where one was based on misinformation regarding a direct consequence of a plea and one was not, if they are part of a “package deal.” Bradley, 165 Wash.2d at 941, 205 P.3d 123.

The Bradley court explained,

A plea bargain is a “package deal” if the agreements as to the individual charges are indivisible from one another. This court looks to objective manifestations of intent in determining whether a plea agreement was meant to be indivisible. Where “pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding,” the pleas are indivisible from one another.

Bradley, 165 Wash.2d 934 at 941–42, 205 P.3d 123 (citations omitted) (quoting State v. Turley, 149 Wash.2d 395, 400, 69 P.3d 338 (2003)). A plea agreement can be indivisible where the pleas are described in different documents that reference one another. Bradley, 165 Wash.2d at 942–43, 205 P.3d 123.

The undisputed record here shows that Barnes’ pleas were negotiated as a “package deal.” The plea paperwork for each references the other. The prosecutor’s end of the bargain was to recommend

concurrent sentencing. And the plea paperwork for each cause expressly states: “This Plea Agreement is dependent upon the defendant entering a plea of guilty in all other cause numbers included in the State’s plea offer.” CP 54, 106. Moreover, the pleas were accepted at the same time in a single proceeding. They are indivisible and Barnes is therefore entitled to withdraw his plea to each one.

b. The Constitutional Error Is Preserved For Review.

Barnes may raise this error on appeal even though he did not raise this particular argument as a ground for withdrawing his pleas 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)).

Barnes did not waive the error by failing to object at sentencing. The error here was not brought up until the middle of the state’s presentation, and no one skipped a beat. Barnes was not afforded any opportunity to consider the new information. Rather, the prosecutor and court presumed that because Barnes was advised his sentence would be *more* onerous, the error was not “prejudicial.”

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).

Unlike Mendoza, Barnes was not clearly informed of the less onerous sentence or given the opportunity to object or withdraw his pleas. Following the rule set forth in Mendoza, there is no waiver here.

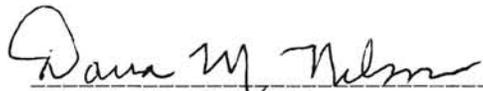
D. CONCLUSION

For the reasons stated, this Court should allow Barnes to withdraw his pleas.

DATED this 21<sup>st</sup> day of March 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", is written over a horizontal line.

DANA M. NELSON  
WSBA No. 28239  
Office ID No. 91051  
Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71144-0-1
	)	
ERIK BARNES,	)	
	)	
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 24<sup>TH</sup> DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201  
[Diane.Kremenich@co.snohomish.wa.us](mailto:Diane.Kremenich@co.snohomish.wa.us)
  
- [X] ERIK BARNES  
DOC NO. 948722  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF MARCH 2014.

X *Patrick Mayovsky*