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COURT OF APPEALS
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STATE OF WASHINGTON
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No. 33644-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHELLE KNOTEK,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Michelle Knotek appeals her convictions of second degree murder and first degree manslaughter contending her guilty pleas are not constitutionally valid in that she was not properly advised of the direct consequences of her plea.

B. ASSIGNMENT OF ERROR

Ms. Knotek's guilty pleas are invalid under the Fourteenth Amendment Due Process Clause.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Fourteenth Amendment Due Process Clause requires a guilty plea be entered knowingly, intelligently and voluntarily. If the defendant is misadvised about the applicable maximum sentence for the offense or other direct consequences of a conviction the resulting plea is not entered knowingly, voluntarily and intelligently. Ms. Knotek was misadvised about both the maximum sentence that could be imposed for the offense for which she was charged and the proper term of community placement. Was her guilty plea invalid?

D. STATEMENT OF CASE

Ms. Knotek pleaded guilty to one count each of second degree murder and first degree manslaughter. CP 245-51; 6/18/04 RP 21. The trial court and the Statement of Defendant on Plea of Guilty informed Ms. Knotek the maximum sentence for each offense was life imprisonment. CP 246; 6/18/04 RP 7. The documents and the trial court also informed Ms. Knotek she could face an exceptional sentence above the standard range if the court determined such a sentence was proper. CP 248; 6/18/04 RP 10. One portion of the statement informed Ms. Knotek she faced only 24 months community custody for the second degree murder conviction. CP 246 (Paragraph 6(a)). Yet on the following page she was told she would face 24 months community placement or a period equal to any earned early release time. CP 247 (Paragraph 6(f)).

E. ARGUMENT

BECAUSE MS. KNOTEK WAS NOT PROPERLY ADVISED OF THE DIRECT CONSEQUENCES OF HER GUILTY PLEA, THE PLEA WAS NOT KNOWINGLY OR VOLUNTARILY ENTERED

1. Due process requires a defendant be properly advised of the direct consequences of her guilty plea. The Fourteenth

Amendment's Due Process Clause requires that a defendant's guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); see also, In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.")

"Where a plea agreement is based on misinformation . . . generally the defendant may choose . . . withdrawal of the guilty plea." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. Miller, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. Walsh, 143 Wn.2d at 8.

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. Boykin, 395 U.S. at 242. "The record of a plea hearing or clear and

convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood v. Morris, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

2. Ms. Knotek was misadvised of the maximum penalty she faced. The trial court and the Statement of Defendant on Plea of Guilty informed Ms. Knotek the maximum sentence for the charged crimes was life imprisonment. CP 246; 6/18/04 7. The documents and the trial court also informed Ms. Knotek she could face an exceptional sentence above the standard range if the court determined such a sentence was proper. CP 248; 6/18/04 RP 10. Ms. Knotek was also told she faced only 24 months community custody for the second degree murder conviction. CP 246 (Paragraph 6(a)). Yet on the following page she was told she would face 24 months community placement or a period equal to any earned early release time. CP 247 (Paragraph 6(f)).

a. Ms. Knotek was misadvised of the proper range of community custody. "Community Placement" is:

> that period during which the offender is subject to the conditions of community custody and/or post-release supervision which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to

> community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

RCW 9.94A.030(5). "Community Custody"

> is that portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to the controls placed on the inmate's movement and activities by the department of corrections.

RCW 9.94A.030(4).

Ms. Knotek was informed that she faced a "community custody range" of 24 months for the murder conviction. CP 246 (Paragraph 6(a)). She was alternatively informed that she faced "community placement" of 24 months or a period equal to any earned early release time. CP 247 (Paragraph 6(f)). In fact there was no "community custody range" for the murder count as it was committed prior to the enactment of RCW 9.94A.717 establishing such ranges. Instead, Ms. Knotek was subject to a term of community placement of 24 months or the period of earned early release, whichever is longer. RCW 9.94A.700(2)(b). Further, while expressly stating the terms of confinement were to be served consecutively, the statement makes no mention of whether the term

of community placement for Count I, and the range of community custody for Count II, would be served consecutively or concurrently.

Community placement is a direct consequence of a conviction. Turley, 149 Wn.2d at 399. The failure to properly advise Ms. Knotek of the community placement component of her sentence is a failure to properly advise her of a direct consequence of her guilty plea. Because she was not properly informed of a direct consequence of her guilty plea, Ms. Knotek's plea was not knowingly and voluntarily made. Isadore, 151 Wn.2d at 298.

Ms. Knotek need not demonstrate that the misinformation regarding community custody was material to her decision to plead guilty. The Supreme Court has recently rejected such a requirement saying a materiality test:

> conflicts with this court's jurisprudence. This court has repeatedly stated that a defendant must be informed of all direct consequences of a guilty plea, and that failure to inform the defendant of a direct consequence renders the plea invalid. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Isadore, 151 Wn.2d at 301. The Court said further:

> We decline to adopt 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. This hindsight task is one that appellate courts should not undertake. 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 . . . . Rather, we adhere to the analytical framework applied in Ross and Walsh.

Isadore, 151 Wn.2d at 302.

The State cannot meet its burden of demonstrating from the record that Ms. Knotek's guilty plea was knowing, voluntary and intelligent. Therefore Ms. Knotek is entitled to withdraw her plea.

b. Ms. Knotek was misadvised of the maximum penalty for the offenses. The relevant maximum sentence is a direct consequence of a guilty plea. Walsh, 143 Wn.2d at 8-9; State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." Barton, 93 Wn.2d at 305.

Pursuant to RCW 9A.20.021(1)(a), a person convicted of a Class A felony cannot be sentenced to a term in excess of life imprisonment with. However, Blakely v. Washington rejected the notion that this life term under RCW 9A.20.021(1)(a) was the statutory maximum for a Class A offense. 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Instead, the Court noted the maximum sentence was "the maximum sentence a judge may

impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* (Emphasis in the original.) Id.

Under the rule of Blakely, the maximum sentences for Ms. Knotek's offenses were 164 and 102 months for the murder and manslaughter charges respectively.[1] Those terms are the maximum sentence the judge could have imposed for a conviction for the offense of which Ms. Knotek was charged and convicted; second degree murder and first degree manslaughter. RCW 9.94A.530. Ms. Knotek was improperly advised of the maximum penalty for the offense to which she was pleading guilty.

In addition, Ms. Knotek was told the trial court could impose an exceptional sentence above the standard range if "the judge finds substantial and compelling reasons" to do so. CP 248 (Paragraph 6(h)); CP 10. In fact, pursuant to Blakely the trial court could not have imposed an exceptional sentence absent either a jury finding of the requisite facts or a voluntary waiver of the rights to notice, a jury, and proof beyond a reasonable doubt on the facts necessary to support an exceptional sentence.

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[1] Pursuant to the consecutive sentence provisions of RCW 9.94A.589(1)(b), and following the Washington Supreme Court's recent decision in State v. Cubias, 155 Wn.2d 549, 553-55, 120 P.3d 929 (2005), the maximum sentence in this case could be viewed as 266 months. But in any event, Ms. Knotek was told the maximum term was "life" not 266 months

Ms. Knotek was misadvised of the maximum term of confinement and of the availability of an exceptional sentence. As discussed above, Ms. Knotek need not demonstrate this misadvisement was material to her decision to plead guilty. Isadore, 151 Wn.2d at 302. Nonetheless, it is simple common sense that the erroneous information that if she proceeded to trial she faced the possibility of a substantial higher sentence weighed in her decision to plead guilty. The statement Ms. Knotek and her attorneys provided for sentencing illustrate this. Ms. Knotek stated "I realize that even if I lost one of the charges the State would most likely request an exceptional sentence." CP 238. The statement submitted by her attorneys provided "Ms. Knotek understands that even if she were to go to trial on these matters and be convicted of the alternative charges of Manslaughter in the First Degree . . . she may be facing the prospect of an exceptional sentence . . . that may far exceed" the State's recommendation in the plea agreement. CP 234. Thus, the prospect of an exceptional sentence following trial was a factor in Ms. Knotek's decision to plead guilty.

3. Ms. Knotek is entitled to withdraw her involuntary plea. Where a defendant is misadvised of the direct consequences of her guilty plea, the plea is involuntary and she is entitled to withdraw

the plea. Isadore, 151 Wn.2d at 303; Walsh, 143 Wn.2d at 8. Because Ms. Knotek was misadvised of the direct consequences of her plea, this Court must reverse her convictions and remand to permit Ms. Knotek to withdraw her guilty plea.

F. CONCLUSION

The Court must reverse Ms. Knotek's convictions and remand to permit her to withdraw her pleas.

Respectfully submitted this 15th day of February, 2006,

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STATE OF WASHINGTON, RESPONDENT, v. MICHELLE KNOTEK, APPELLANT.	)))))))))	NO. 33644-8-II

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DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 15TH DAY OF FEBRUARY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF FEBRUARY, 2006.

X_____