

No. 33644-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,  
Respondent,  
v.  
MICHELLE KNOTEK,  
Appellant.

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

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REPLY BRIEF OF APPELLANT

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FILED  
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STATE OF WASHINGTON  
BY  GUILTY

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A. ARGUMENT

THE COURT'S MISADVISEMENT OF THE  
MAXIMUM SENTENCE RENDERED MS. KNOTEK'S  
PLEA INVOLUNTARY

Michelle Knotek argues her guilty plea was not knowingly and voluntarily entered because she was misadvised of the maximum sentence for the crimes to which she was pleading guilty. The court advised her the maximum sentence was life imprisonment. In light of the decision in Blakely v. Washington<sup>1</sup>, the maximum possible sentence was the high end of the standard range, not the statutory maximum. Accordingly, Ms. Knotek submits the misadvisement rendered her guilty plea involuntary and allows her to withdraw the plea. 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."); State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001) (misadvisement of the relevant maximum sentence is a direct consequence of a guilty plea).

The State responds that advising Ms. Knotek that her maximum sentence was life was not a misstatement of the law because, the State claims, it could have charged here with

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<sup>1</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

aggravating factors and proven those facts to the jury. Brief of Respondent at 11. In fact the State goes further and baldly claims that it fully intended to do so. Id. n.3. Aside from the complete absence of any cite to the record to support this fanciful claim, the State preserves the secret by not revealing precisely what aggravating factors it “intended” to submit to the jury. Nor is the State deterred by the thorny legal question of how it would have done so in light of the absence of any legal authority to submit such factors to the jury. See, State v. Hughes, 154 Wn.2d 118, 151, 110 P.3d 192 (2005). But beyond this, the State’s response implicitly recognizes precisely the point Ms. Knotek has raised, that based on the charged offenses the court could not have lawfully imposed a sentence of life imprisonment. As such she was misadvised of the consequences of her plea.

Finally, the State responds that even if Ms. Knotek was misadvised of the consequences of her plea she should nonetheless be prevented from withdrawing it. Brief of Respondent at 15-19 (citing Isadore, 151 Wn.2d at 16). Due process 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 plea is neither intelligently nor voluntarily made

unless the defendant is afforded aware of the “true nature of the charge against him.” Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d (1976) (citing, Smith v. O’Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed.2d 859 (1941)). Where the plea is involuntary it cannot constitutionally support the conviction and the conviction must be reversed. Henderson, 426 U.S. at 644-45; see also, United States v. Dominguez-Benitez, 542 U.S. 74, 84 n.10, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). Dominguez-Benitez noted that harmless error could never apply to constitutionally involuntary plea because in such circumstance the “the conviction must be reversed.) 542 U.S. at 84 n.10 (citing Boykin, 395 U.S. at 243). Thus, to the extent Isadore suggests an involuntary plea may nonetheless be enforced upon the State demonstrating undue prejudice it is contrary to the United State’s Supreme Court’s precedent.

Beyond this, the State’s efforts to demonstrate the supposed prejudice it would suffer is premised on speculation and wholly unsupported by the record. Indeed in the three page discussion of what the State would have done, the State’s brief does not provide a single citation to the trial court record. “Allegations of fact without support in the record will not be considered by an appellate court.”

Northlake Marine Works v. City of Seattle, 70 Wn.App. 491, 513, 857 P.2d 283 (1993); see also, In re the Dependency of K.S.C., 137 Wn.2d 918, 932, 976 P.2d 113 (1999) (“Portions of a brief which contain factual material not submitted to or considered by the trial court should be stricken”). Because the State offers to support from the record of its contention, the Court should disregard and strike those portions of the State’s brief in which the State speculates as to what it might have done.

B. CONCLUSION

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

Respectfully submitted this 17<sup>th</sup> day of May, 2006,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

**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 17<sup>TH</sup> DAY OF MAY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY 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 16<sup>TH</sup> DAY OF MAY, 2006.

x \_\_\_\_\_ *gril*

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