

No. 36481-6-II

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

STATE OF WASHINGTON

Respondent,

v.

CARL CUNNINGHAM,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

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

The Honorable Vicki Hogan

APPELLANT'S RESPONSE BRIEF

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I. IDENTITY OF MOVING PARTY

Appellant Carl Cunningham renews the request for relief as set forth in the Opening Brief of Appellant.

II. PROCEDURAL STATUS

On November 26, 2007, Appellant Carl Cunningham filed a timely appeal. Opening Brief of Appellant. Instead of addressing the substantive issues, the Respondent, on January 14, 2008, filed a Motion to Dismiss the Appeal on procedural grounds. Appellant, responding solely to the state's procedural argument, filed its response on January 31, 2008. On February 14, 2008, Commissioner Schmidt denied the respondent's motion to dismiss the appeal. The state did not move to modify the Commissioner's ruling denying the motion to dismiss.

Consequently, the state filed its response brief addressing the substantive matters for the first time on February 28, 2008. The appellant, therefore, had not had an opportunity to submit its reply until now.

III. ARGUMENT IN REPLY

The government sets forth three positions to suggest that appellant's assignments of error should be denied. First, the government resurrects the identical procedural argument it previously authored claiming that this court should not address the merits of appellant's brief. Second, the government argues that the trial court was within its discretion to deny credit for time served while Mr. Cunningham was in custody under this cause number and bail from the date the conviction was mandated to the date he was sentenced. Finally, the government claims that Mr. Cunningham, although misinformed of a direct consequence of his plea, nevertheless waived his right to challenge the voluntariness of that plea. For reasons set out below, each one of the government's arguments fail.

1. Alleged Waiver of Appeal

The government's first argument is a return to its claim that Mr. Cunningham should be procedurally barred from appealing under the theory that he waived his appellate rights pursuant to plea negotiations. Again, this motion was denied by Commissioner Schmidt and the state did not move to modify the Commissioner's ruling denying the motion to dismiss. Nevertheless, for reasons addressed below, the state's argument must fail.

(a) Any Such Waiver Was Not Intelligently, Voluntarily or the With Complete Understanding of the Consequences

The Washington constitution guarantees citizens accused of a crime "the right to appeal in all cases." Wash. Const. Art. I, §22. A constitutional right to appeal may be waived if the waiver is voluntary, knowing, and intelligent. City of Seattle v. Klein, 161 Wn.2d 554, 166 P.3d 1149 (2007). The state, however, must prove that a waiver of the right to appeal is voluntarily, knowingly and intelligently waived. Klein, 161 Wn.2d 554, State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978).

The state argues that Mr. Cunningham waived his right to appeal his guilty plea, citing a provision of a Stipulation on Prior Record and Offender Score. Brief of Respondent (BOR), page 6 – 7. Assuming, arguendo, that Mr. Cunningham waived his right to appeal his conviction, an alleged involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001).

Courts have consistently held that a defendant may withdraw his guilty plea when he was not informed (or misinformed) of mandatory community placement because the sentencing term constitutes a "direct consequence" of a guilty plea. State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006), State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996). Furthermore, a defendant who is misinformed of a direct consequence – of which community placement is such a consequence –

is not required to show the information was material to his decision to plead guilty. State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006), In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004).

It is clear from the court documents as well as the court's colloquy that Mr. Cunningham was misinformed about a direct consequence of his plea. Mr. Cunningham entered a plea of guilty to the charge of First Degree Manslaughter from an incident that occurred in 1992. As such, the statutory maximum sentence for that charge – a Class B Felony – was 120 months (10 years). RCW 9A.21.021(1)(b). In 1992, community placement was not an option for First Degree Manslaughter.

Nevertheless, Mr. Cunningham was (mis)informed – in writing and orally by the court – that community placement was, in fact, a direct consequence of his plea. First, the Statement of Plea of Guilty expressly noted in at least two sections that, as a direct consequence of the plea, the court would impose 12 months of community placement. Statement on Plea of Guilty, page 2, section 6(a) and (e). Specifically, section 6(e) noted:

If this crime is a vehicular homicide, vehicular assault or a serious violent offense, the judge will order me to serve at least two [crossed out in the original and replaced with a written "one" notation] years of community placement.
(Emphasis added).

Second, the court, during the colloquy further (mis)informed Mr. Cunningham that community placement was a direct consequence of the plea.

THE COURT: It's (first degree manslaughter) as strike. Community Placement for 12 months upon your release from prison; you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: And that the total sentence cannot exceed 120 months, and community placement can only be for the period of time that you earn for early release. So there's a condition of community placement. You understand that?

THE DEFENDANT: I do, Your Honor.

VRP 2/23/07, page 23, lines 3 – 13.

Even though the Statement of Plea of Guilty and the court's oral colloquy (mis)informed Mr. Cunningham that community placement "will" be ordered, the same judge at the of sentencing Mr. Cunningham noted that "with regards to the community placement, there is no community placement, as it was not an option in 1992 on this count." VRP 6/15/2007, pages 40-41. Consequently, Mr. Cunningham was misinformed that 12 months of community placement would be ordered and coupled with the 116 months he had already served believed that he had served the statutory maximum sentence allowed.

Whether a direct consequence of a sentence is higher or lower than anticipated is irrelevant. A knowing, voluntary and intelligent guilty plea requires a meeting of the minds.

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006). As the Mendoza court noted:

In determining whether the plea is constitutionally valid, we decline to engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain. Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. 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.

State v. Mendoza, 157 Wash.2d 582, 590-591, 141 P.3d 49 (2006).

Part and parcel of a valid waiver of a right is the understanding of the right to which one is waiving. Mr. Cunningham was misinformed about a direct consequence of his plea, thus making the plea invalid. Consequently, Mr. Cunningham cannot be deemed to have waived a right to appeal an invalid guilty plea.

(b) A Defendant Cannot Waive a Right to Appeal a Sentence that Exceeds the Statutory Maximum

Imposition of a sentence that is not authorized by the Sentencing Reform Act (SRA) is fundamental defective and justifies collateral relief. State v. West, 154 Wn.2d 204, 110 P.3d 1122 (2005). An individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) (“a plea bargain agreement cannot exceed the statutory authority given to the courts”).

Mr. Cunningham was being sentenced to Manslaughter in the First Degree, which carried as statutory maximum sentence of 120 months (10 years). RCW 9A.21.021(1)(b). In 1992, Mr. Cunningham was sentenced to 116 months for the same offense under Cause No. 92-1-00443-9. He began serving that time. In May, 2006, the Washington State Supreme Court vacated the conviction. PRP of Carl Cunningham, No. 77746-2. Mr. Cunningham was constitutionally afforded credit for time served from 1992. State v. Phelan, 100 Wn.2d 508, 671 P.2d 1212 (1983). Consequently, at the time Mr. Cunningham entered a plea and was to be sentenced for the same offense, he could only be subject to four months (120 days). Inexplicably, the trial court imposed an additional 395 days in jail. VRP 6/15/2007, pages 39 – 42. In so doing, the trial court exceeded the statutory maximum sentence authorized by law.

2. Credit for Time Served

The trial court denied giving Mr. Cunningham credit for the date of he was arraigned on the amended charge (July 13, 2006) to the date of sentencing (June 15, 2007). The court cited “intent of 9.94A” for its conclusion. VRP 6/15/2007, page 39, lines 17 -24. Although the trial court does not specifically cite to a provision of RCW 9.94A, presumably it was referring to

RCW 9.94A.505(6), which states that 't}he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.'¹

The state, citing State v. Williams, 59 Wn.App. 379, 796 P.2d 1301 (1990), argues that the court was within its discretion to deny credit under this cause number if Mr. Cunningham was serving time under a separate case. BOR 9 – 12. It is unclear from the record, however, whether Mr. Cunningham was in fact given credit for time served for another case while he was incarcerated in the Pierce County jail pending this case. VRP – 41.² If the Department of Corrections did not honor credit for time served while Mr. Cunningham was serving time in the Pierce County jail awaiting the outcome of this case, then this wrongful denial of credit for time served or good-time earned would result in the unlawful restraint of Mr. Cunningham. In Re Personal Restraint Petition of Costello, 131 Wn.App. 828, 129 P.3d 827 (2006). If the Department of Correction did honor the credit for time served, then the state's position under State v. Williams appears to be valid.

3. Mr. Cunningham Did Not Waive His Right to Appeal the Voluntariness of His Plea

The state does not appear to take issue that Mr. Cunningham was misinformed about a direct consequence of his plea since it acknowledges that “[A]t the plea hearing, the court misadvised the defendant that his plea of guilty to manslaughter required community placement...” BOR, at 14. As set forth in detail above, there can be little doubt that Mr.

¹ Formerly RCW 9.94.120(14).

² When Mr. Cunningham inquires whether he gets credit for time served on the “other” case (robbery) during the arraignment and sentence of this case, the court answers “I don’t have the information on the robbery, so I can’t answer your question.” VRP-41.

Cunningham was erroneously informed about mandatory community placement attaching to the plea.

Instead, the state takes the position that Mr. Cunningham waived his right to challenge the voluntariness of his plea, citing State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006). However, the state's overarching reliance on Mendoza is unfounded in law or fact.

In Mendoza, the court limited a defendant's waiver of a right to challenge the validity of a plea agreement when: (1) the miscalculation results in a less onerous penalty than written in the plea agreement; (2) the defendant is informed of the less onerous standard range before he is sentenced; and (3) the defendant is given the opportunity to withdraw the plea or object but does not. State v. Blanks, 139 Wn.App 543, 161 P.3d 455 (2007), State v. Codiga, 175 P.3d 1082 (2008).

First, Mendoza, as well as subsequent cases citing to it, involved the situation of an erroneous offender scores and standard ranges. State v. Mendoza, 157 Wn.2d 582 (offenders score during the plea was miscalculated as 7, resulting in a standard range of 51 – 60, but was actually a 6 with a range of 41 – 54); State v. Blanks, 139 Wn.App 543 (at the time of the plea, the offender score was miscalculated as a 6, resulting in a standard range of 98- 130, where the correct calculation was a 5 and range from 77 – 102 months); and State v. Codiga, 175 P.3d 1082 (offender score was miscalculated as a 7, with a range of 108 – 144 months, when in actuality the defendant's offender score was an 8, resulting in a range of 129 – 171). Here, the erroneous information did not involve an offender score or standard range, but instead Mr. Cunningham was misadvised about a mandatory 12 months community placement.

Second, Mendoza's waiver exception is limited to the situation in which a defendant was informed of a less onerous standard range before being sentenced, but did not object or seek to withdraw to plea.

When a guilty plea is based on misinformation, including a miscalculated offender score that resulted in an incorrect higher standard range, the defendant may move to withdraw the plea based on involuntariness. However, if the defendant 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 does not object or move to withdraw the plea on that basis before he is sentenced, the defendant waives the right to challenge the voluntariness of the plea.

State v. Mendoza, 157 Wash.2d 582, 592, 141 P.3d 49, 54 (2006) (emphasis added), see also State v. Blanks, 139 Wn.App 543 (incorrect range was 98- 130, where the correct calculation was 77 – 102 months). In Codiga, the court did extend the waiver exception to a situation where the corrected standard range was in fact higher; however, the court relied specifically on the theory that the defendant assumed the risk that discovery of additional criminal history would increase the standard range. State v. Codiga, 175 P.3d 1082.³

That is not the case here. In fact, the defense argued that the one year community placement the court informed was mandatory, plus the 116 months Mr. Cunningham had previously been sentenced and served prohibited the court from imposing any additional jail time. VRP – 15, citing State v. Zaval-Reynoso, 127 Wn.App. 119 (2005).⁴ Instead, the court, in concluding that the mandatory 12 month community placement was not authorized by law –

³ In Codiga, the defendant withheld that he had previously been convicted of a misdemeanor thus preventing a previous conviction from “washing out.” Consequently, at the time of sentencing the prior offense counted toward his offender score and standard range. The court concluded that the defendant assumed the risk that the additional criminal history would be uncovered. State v. Codiga, 175 P.3d 1082

⁴ In Zaval-Reynoso, the court held that the court’s imposition of community custody of 9 – 12 months plus his standard range sentence of 114 months, thus the total months imposed (123 – 136) exceeded the 120 month maximum term. State v. Zaval-Reynoso, 127 Wn.App. at 123 (2005).

even though it was specifically part of the plea - imposed additional time that exceeded the statutory maximum. Consequently, even if the court were to extend the Mendoza decision beyond “offender score” to include other incorrect sentencing consequences (i.e., community placement), the “corrected” sentence increased – not lowered – the punishment anticipated at the time of the plea.

Moreover, Mr. Cunningham did not withhold or incorrectly reveal his criminal history thus assuming the risk of additional criminal history being discovered as discussed in Codiga. Instead, Mr. Cunningham was misinformed of the legal consequence of his plea, and as noted in Codiga should not be held accountable:

In contrast, a defendant should *not* be charged with knowing the *legal* impact of his or her criminal history on the offender score. Where a criminal history is correct and complete, but the attorneys miscalculate the resulting offender score, then the defendant should not be burdened with assuming the risk of legal mistake.

State v. Codiga, 175 P.3d at 1090 (emphasis in original); citing State v. Miller, 110 Wn.2d 528, 529, 756 P.2d 122 (1988).

Finally, even assuming the Mendoza waiver exception applies to situations beyond less onerous standard ranges, Mr. Cunningham did not did not idly acquiesce to the erroneous sentencing consequence. Unlike Mendoza and Blanks, Mr. Cunningham affirmatively requested specific performance of the plea terms prior to being sentenced. As mentioned, due process requires that defendant’s guilty plea be knowing, voluntary and intelligent. State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006), In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); State v. Miller, 110 Wn.2d 528, 531, 756 P.2s 122 (1988). As such, a defendant must be properly

informed of all direct consequences of his guilty plea, which community placement is such a direct consequence. State v. Turley, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). Consequently, a defendant who enters into an involuntary plea may request specific performance or withdraw of the plea. State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988).

At the time of the sentencing and consistent with its sentencing memorandum, the defense argued that the court was bound to the terms of the plea agreement and colloquy and was therefore required to impose 12 months of community placement. VRP – 15. The court acknowledged the defense’s affirmative position when it inquired of the state:

It [the guilty plea] does indicated 12 months, but there was a notation that we talked about then the total sentence cannot exceed 120 months, so the community placement term can only be for the period of time that the Defendant earns for early release. And I don’t know if the State wants to address that issue raised by Counsel or not. (Emphasis added) VRP – 23.

It is clear from the record that the defense affirmatively sought the terms of the plea agreement be followed. Conversely, by taking such a position, the defense, prior to being sentenced, openly objected to the modification of the plea terms - which is all that is required. Codiga, 175 P.3d at 1091 (*Either* a motion to withdraw *or* objection at sentencing is all that Mendoza requires) (emphasis in the original), citing Mendoza, 157 Wn.2d at 591-92.

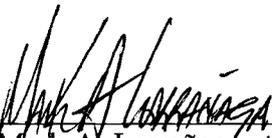
Mr. Cunningham was misinformed about a direct consequence of his plea. This erroneous sentencing consequence makes the plea involuntary and consequently permits Mr. Cunningham to seek to withdraw or seek specific performance. As noted above, the waiver exception carved out in Mendoza does not apply to the facts presented here. Nevertheless, Mr. Cunningham argued for the terms of the plea to be imposed, thus negating any suggestion that he passively or implicitly waived his right to withdraw the plea.

IV. CONCLUSION

Mr. Cunningham, while entering his plea, was misinformed in writing and during the court's colloquy that mandatory community placement would be a direct consequence of his plea. This was in error and consequently an involuntary plea that may be challenged on appeal. Moreover, a plea bargain agreement cannot exceed the statutory maximum authority given to the courts. Therefore, Mr. Cunningham is legally permitted to challenge the court's sentence that exceeded the sentence permitted by law.

Furthermore, Mr. Cunningham did not waive his right to challenge an involuntarily plea under the limited factual and legal exception carved out in State v. Mendoza. Because the court misinformed Mr. Cunningham of a perceived mandatory 12 months community placement, a condition that was not authorized by law, the plea was involuntary and subject to specific performance.

DATED: March 18, 2008

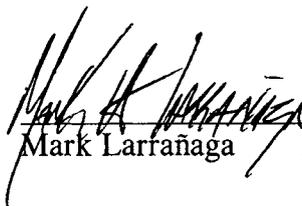

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CERTIFICATE OF SERVICE

I certify that on the 18th day of March, 2008, a true and correct copy of the APPELLANT'S RESPONSE BRIEF was served upon the following individuals by depositing in the United States Mail, first class, postage paid:

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