

NO. 38723-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

HOWARD GUTENDORF,

Appellant.

FILED
STATE OF WASHINGTON
DEPT. OF
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CLERK OF COURT
CLARK COUNTY

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

The Honorable Robert Harris, Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

1. Mr. Gutendorf’s guilty plea was not knowingly, voluntarily, and intelligently made. 1

2. The trial court erred in accepting Mr. Gutendorf’s guilty plea because Mr. Gutendorf was not advised that he was pleading guilty to a life sentence. 1

3. The trial court erred in accepting Mr. Gutendorf’s guilty plea when Mr. Gutendorf was misadvised that the sexual motivation enhancement was not a mandatory minimum sentence. 1

4. The trial court erred in accepting Mr. Gutendorf’s guilty plea when Mr. Gutendorf was not properly advised of a direct consequence of his plea: that the sexual motivation enhancement was a mandatory minimum sentence. 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

A guilty plea is involuntary and violates due process if the accused is not informed of all direct consequences of the plea. Mr. Gutendorf was misinformed about the length of his sentence. Must Mr. Gutendorf be permitted to withdraw his guilty plea? 1

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS ... 1

D. ARGUMENT..... 10

MR. GUTENDORF SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE HE WAS MISINFORMED AS TO THE DIRECT CONSEQUENCES OF HIS PLEA. 10

(i) Mr. Gutendorf was never advised that he was pleading guilty to a life sentence..... 11

(ii) Mr. Gutendorf was never advised that the sexual motivation enhancement was a mandatory minimum sentence. 15

E. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23
L.Ed.2d 274 (1969) 19

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d
390 (2004)14, 15, 20

In Re Personal Restraint of Murillo, 134 Wn.App. 521, 142
P.3d 615 (2006) 15

In re Personal Restraint of Williams, 21 Wn.App. 238, 583
P.2d 1262 (1978).....21

State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980)...14,
19

State v. Dixon, 38 Wn. App. 74, 683 P.2d 1144 (1984) ..16

State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001) .16,
17

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006)..20

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996)..... 14

State v. Smith, 137 Wn.App. 431, 153 P.3d 898 (2007) .20

State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974)16

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001)..... 15

State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008) .14

State v. Zhao, 157 Wn.2d 188, 137 P.3d 835 (2006)16, 17

Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1974) 21

Statutes

RCW 9.94A.533(8)(b) 21

RCW 9.94A.712..... 10, 13, 15

Rules

CrR 4.2(f)16

A. ASSIGNMENT OF ERROR

1. Mr. Gutendorf's guilty plea was not knowingly, voluntarily, and intelligently made.

2. The trial court erred in accepting Mr. Gutendorf's guilty plea because Mr. Gutendorf was not advised that he was pleading guilty to a life sentence.

3. The trial court erred in accepting Mr. Gutendorf's guilty plea when Mr. Gutendorf was misadvised that the sexual motivation enhancement was not a mandatory minimum sentence.

4. The trial court erred in accepting Mr. Gutendorf's guilty plea when Mr. Gutendorf was not properly advised of a direct consequence of his plea: that the sexual motivation enhancement was a mandatory minimum sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A guilty plea is involuntary and violates due process if the accused is not informed of all direct consequences of the plea. Mr. Gutendorf was misinformed about the length of his sentence. Must Mr. Gutendorf be permitted to withdraw his guilty plea?

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Howard Gutendorf was originally charged with child molestation in the first degree, a class A felony. CP 1; RCW 94.44.083. When the prosecutor offered Mr. Gutendorf a plea to an alternative charge, assault in the second degree with sexual motivation, also a class A

felony, Mr. Gutendorf accepted the plea offer and pleaded guilty. CP 16; RCW 9.94A.030(47), 9.94A.835; 9A.36.021(2)(b). As part of his change of plea, Mr. Gutendorf had to accept the prosecutor's plea offer: "[T]he State and the defense stipulate that the sentence shall be . . . 39 months (15 months plus 24 months on the sexual motivation enhancement)." CP 16

To effect his *Alford*¹ plea, Mr. Gutendorf, represented by counsel Barrar, presented a standard Statement of Defendant on Plea of Guilty to Sex Offense to the court. CP 3-221. The pre-printed plea form, read in part:

6. In Considering the Consequences of my Guilty Plea, I Understand That:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a *Standard Sentence Range* as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f).)	MAXIMUM TERM AND FINE
1	3	13-17 months	24 months	37-41 months		Life and \$50,000
2						
3						

* (F) Firearm, (D) Other deadly weapon, (SM) Sexual Motivation, RCW 9.94A.533(B), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude.

¹ *North Carolina V. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed. 162 (1970);

CP 4.

At the plea hearing, the court told Mr. Gutendorf that he would only be sentenced within his range of 37-41 months. "Standard range is 13 to 17 months, plus a 24-month enhancement, which give you a range then of 37 to 41 months." RP 3.

When the court discussed community custody and what might happen to Mr. Gutendorf after completing his standard range, the following exchange occurred:

THE COURT: You'll be under the supervision of the Department of Corrections. That would be –

MS. RIDDELL²: For life.

THE COURT: -- for life. And –

MR. BARRAR: That means, that – we had talked about that when your sentence is up, they can hold you on an indeterminate sentence, pending their determination of your dangerousness.

MS. RIDDELL: And even when he got out, he would still be on probation for life.

MR. BARRAR: Probation, and reporting requirements for life. This is the lifetime aspect of this we talked about yesterday.

² The prosecutor

MR. GUTENDORF: (inaudible) required for sex offenders for –

MR. BARRAR: Life.

MR. GUTENDORF: -- (inaudible) probation

MR. BARRAR: Probation. You're going to be supervised for life when you get out.

THE COURT: Do you understand that?

MR. GUTENDORF: I didn't understand that part. (inaudible) he needs to explain that to me.

MR. BARRAR: They're going to check on you regularly, where you're living, where you're working, things like that.

. . .

MS. RIDDELL: Okay. Well, the probation is like check in – you have a probation officer. You check in with them. They check in with you.

MR. BARRAR: For life.

THE COURT: Yeah.

MS. RIDDELL: For life, yes, because it's –

THE COURT: They'll do an assessment that will give you a range –

MR. GUTENDORF: I was told two years.

THE COURT: Huh?

MR. GUTENDORF: I was told two years post-prison supervision.

MR. BARRAR: If I said that, I was in error. We talked at length about the life aspect of this and what you'd need to do to get out and things like that. But this is up to you, Howard.

THE COURT: Okay.

MR. GUTENDORF: I just have a problem because I didn't do it.

...

THE COURT: Okay. They'll do a risk – but they'll do a risk assessment. This is a scoring sheet which will reference your previous crimes as I also – the incident taking place, your education, certain habits of drinking, alcohol, drugs, things of this nature. It'll get a score. That score will range – give a – the Department of Corrections a range of how intense the supervision will be.

Because it is a sex offense, it is not (inaudible) a little bit, so they don't give total weight to the risk assessment. But at the same time, they do give consideration to that. So, whether you'll be on a supervision situation of once a month or once a week, it – that can range from – and as circumstances evolve as time goes on, it generally, if everything is in compliance, it becomes less strict.

...

MR. BARRAR: And all the classes you take when you're in custody and your development on this issue will go a long way towards the supervision. That's what we talked about, so.

...
THE COURT: If there's community violations, there can be penalties levied and – which includes more restrictive sentence type of situation, placed back in the Department of Corrections. Do you understand that?

MR. GUTENDORF: Say again, Your Honor.

THE COURT: If you violate the terms of your community custody, the Department of Corrections can sentence you up to 60 days per violation or revoke your early release, or additional conditions or additional violations and place you in a more restrictive confinement status.

MR. GUTENDORF: Yeah.

THE COURT: The prosecutor is –

MR. BARRAR: Recommending 39 months, Your Honor.

THE COURT: All right. Recommending 39 months.

MS. RIDDELL: We have an agreed recommendation to 39 months.

THE COURT: Now, you understand I don't have to follow the recommendations. I must, however, impose a sentence within the standard range unless I find substantial compelling reasons not to do so. If I go outside the standard range, either you or the State may appeal. If I sentence within the standard range, no one may appeal. Do you understand that?

MR. GUTENDORF: Yes, Your Honor.

RP 4-9.

The above discussion did nothing to clarify, and likely only confused, the information included in the following boilerplate paragraph from the plea form and applicable to Mr. Gutendorf's charge:

(f) ...

For sex offenses committed on or after September 1, 2001: (i) Sentencing under RCW 9.94A.712: If this offense is any of the offenses listed in subsections (aa) or (bb), below, the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the Indeterminate Sentence Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody. In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the period of community custody I will be under the supervision of the Department of Corrections and I will have restrictions and requirements placed upon me, which may include electronic monitoring, and I may be required to participate in rehabilitative programs.

(aa) If the current offense is any of these offenses or attempt to commit any of these offenses:

Rape in the first degree	Rape in the second degree
Rape of a child in the first degree committed when I was at least 18 years old	Rape of a child in the second degree committed when I was at least 18 years old
Child molestation in the first degree committed when I was at least 18 years old	Indecent liberties by forcible compulsion
Any of the following offenses with a finding of sexual motivation:	
Murder in the first degree	Murder in the second degree
Homicide by abuse	Kidnapping in the first degree
Kidnapping in the second degree	Assault in the first degree

Assault in the second degree	Assault of a child in the first degree
Assault of a child in the second degree	Burglary in the first degree

CP 5.

Furthermore, no one told Mr. Gutendorf that no part of the 24 month sexual motivation enhancement was subject to good time credits and was, in essence, a 24 month mandatory minimum sentence. Although the Statement on Plea of Guilty made for easy notification, providing a boilerplate paragraph as below, the paragraph was lined out on the plea form.

Notification Relating to Specific Crimes: If Any of the Following Paragraphs *Do Not Apply*, They Should Be Stricken and Initialed by the Defendant and the Judge.

...

- (u) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[p].

CP 9.

After accepting the sentence, the court ordered a pre-sentence investigation and set a sentencing date. RP 14-15. At that next hearing, and prior to any sentence

being imposed, Mr. Gutendorf told the court that he wanted to withdraw his plea. RP 19-21. The court set the case over. RP 26-27.

Another attorney, Edward Dunkerly, was appointed to file a Motion to Withdraw Guilty Plea on Mr. Gutendorf's behalf. CP 22. In his affidavit in support of the motion, Mr. Gutendorf explained that attorney Barrar assured him that his community custody would only last two years. CP 25-26. And that when he learned at the plea hearing that community custody was for life, he was upset and did not know what to do as he had already signed the plea paperwork. CP 26.

At the motion on the hearing, the court did not take any testimony. After brief argument from counsel, the court denied Mr. Gutendorf's motion. RP 29-32. At a later sentencing hearing, neither the prosecutor, defense counsel Dunkerly, nor the court mentioned that Mr. Gutendorf plead to a class A felony under RCW 9.94A.712 with a life term and only the possibility of release after completing at least a minimum term. Instead, Mr.

Gutendorf was only told that total actual confinement was 37-41 months. CP 4; RP 46. The court sentenced Mr. Gutendorf to "37 months, indicating the maximum penalty could be life." RP 47.

Mr. Gutendorf timely appeals all portions of his judgment and sentence. CP 42.

D. ARGUMENT

MR. GUTENDORF SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE HE WAS MISINFORMED AS TO THE DIRECT CONSEQUENCES OF HIS PLEA.

A guilty plea is involuntary unless the accused is informed of the direct consequences of the plea prior to the acceptance of the plea. *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Direct consequences are those which are definite, immediate, and largely automatic. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A guilty plea based on incomplete information may be withdrawn

whether or not a particular direct consequence was material to the decision to plead guilty. *Isadore*, 151 Wn.2d at 302. An involuntary plea may be challenged for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001).

(i) Mr. Gutendorf was never advised that he was pleading guilty to a life sentence.

The sentence required by statute for Mr. Gutendorf's crime, second degree assault with sexual motivation, is life in prison. RCW 9.94A.712; *In Re Personal Restraint of Murillo*, 134 Wn.App. 521, 531, 142 P.3d 615 (2006). Yet, neither the judge, nor the prosecutor, nor defense counsel, told Mr. Gutendorf that he was pleading to a life sentence and that at the very earliest he could – possibly - be released to community custody was after serving at least 37 months in prison. Because Mr. Gutendorf was never advised that he was pleading guilty to a life sentence, he is entitled to withdraw his guilty plea.

A defendant must be allowed to withdraw her guilty plea whenever necessary to correct a manifest injustice.

State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001); *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974); *State v. Dixon*, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984) (manifest injustice standard also applies to motions to withdraw *Alford* pleas)).

"Manifest injustice includes instances where '(1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.' " *Zhao*, 157 Wn.2d at 197 (quoting *Marshall*, 144 Wn.2d at 281).

Mr. Gutendorf's plea was not knowingly and voluntarily entered because he was misinformed about his sentence. He was not told that he was pleading to a life sentence. Instead, he was told that by his plea he had to join in the prosecutor's recommendation of a mere 39 months. CP 16. During the plea, the court told Mr. Gutendorf that he would be on community custody for life - rather than in prison for life. Defense counsel Barrar

jumped into the discussion with the following erroneous advice echoed by the prosecutor:

MR. BARRAR: That means, that – we had talked about that when your sentence is up, they can hold you on an indeterminate sentence, pending their determination of your dangerousness.

MS. RIDDELL: And even when he got out, he would still be on probation for life.

MR. BARRAR: Probation, and reporting requirements for life. This is the lifetime aspect of this we talked about yesterday.

RP 5.

Mr. Gutendorf was left to believe that (1) he can only be held a little longer than the agreed stipulation of 39 months but only while a *determination of dangerousness* is made and then he will be (2) released to lifelong community custody. Could this information be any more wrong? Apparently it can be more wrong because the court also offered the following erroneous reassurance that community custody was waiting at the end of the minimum term:

THE COURT: Okay. They'll do a risk – but they'll do a risk assessment. This is a scoring sheet which

involuntary if the defendant is not advised of all direct consequences of that plea, including the length of her sentence. *State v. Smith*, 137 Wn.App. 431, 437, 153 P.3d 898 (2007)) (citing *Isadore*, 151 Wn.2d at 300). This is so regardless of whether the actual sentencing range is lower or higher than anticipated. *Smith*, 137 Wn.App. at 437 (quoting *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006)). Mr. Gutendorf was never properly advised of the fact that he was pleading to a life sentence. As such, his plea fails because it was not voluntary.

(ii) Mr. Gutendorf was never advised that the sexual motivation enhancement was a mandatory minimum sentence.

Direct consequences of a conviction include the mandatory minimum sentence for the crime. *Wood v. Morris*, 87 Wn.2d 501, 513, 554 P.2d 1032 (1974), and that certain sentences must be served consecutively, *In re Personal Restraint of Williams*, 21 Wn.App. 238, 240-41, 583 P.2d 1262 (1978). The sexual motivation

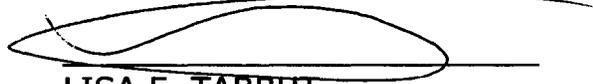
enhancement is a mandatory minimum sentence. RCW 9.94A.533(8)(b). A defendant is obligated to spend all 24 months of the enhancement in custody and is not eligible for any time off for good behavior. RCW 9.94A.533(8)(b). Additionally, because the enhancement is served in total confinement, the additional time on the minimum portion of Mr. Gutendorf's sentence does not commence until he has completed the mandatory enhancement time.

Nothing in the record establishes that Mr. Gutendorf was made aware of the mandatory minimum portion of his sentence. In fact, the record is to the contrary because the mandatory minimum provision was stricken from Mr. Gutendorf's plea form. CP 9. Without the proper advice on this direct consequence of his plea, Mr. Gutendorf's plea was not voluntary. The court's acceptance of his plea was a manifest injustice. Mr. Gutendorf should be allowed to withdraw his plea.

E. CONCLUSION

For the foregoing reasons, Mr. Gutendorf should be allowed to withdraw his plea.

Respectfully submitted this 26th day of May 2009.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

LISA E. TABBUT
WSBA #21344
Attorney for Appellant

COURT OF APPEALS
DIVISION II

CD 1007 09 PM 1:43

STATE OF WASHINGTON
BY ca
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed Appellant's Brief to:

Michael C. Kinnie
Clark County Prosecuting Attorney's Office
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And that the envelope also contained the copy of the verbatim report of proceedings;

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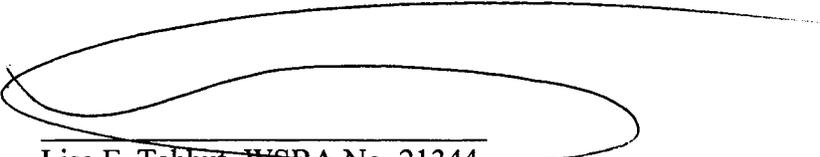
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 26, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on May 26, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant