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COURT OF APPEALS
DIVISION II

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NO. 39606-8

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL GUMATAOTAO PALOMO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 08-1-04795-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant's plea was voluntary when he was made aware of his potential sentences and knowingly went forward with his plea.
2. Whether the trial court properly sentenced defendant on counts I and II.

B. STATEMENT OF THE CASE.

1. Facts

On October 13, 2008, the Pierce County Prosecutor's Office filed an information charging MICHAEL GUMATAOTAO PALOMO, hereinafter "defendant," with the following:

Count I: Child molestation in the first degree occurring sometime between the 15th day of June, 2000 and the 14th day of June 2005.

Count II: Child molestation in the first degree occurring sometime between the 15th day of June, 2000 and the 14th day of June, 2005.

Count III: Rape of a child in the second degree occurring sometime between the 15th day of June, 2005 and the 14th day of June, 2007.

Count IV: Rape of a child in the second degree occurring sometime between the 15th day of June, 2005 and the 14th day of June, 2007.

Count V: Rape of a child in the third degree occurring on or about the 6th day of November, 2007.

Count VI: Incest in the first degree occurring sometime between the 15th day of June, 2005 and the 6th day of November, 2007.

CP 1-2.

All six crimes were committed on his 12 year old daughter with whom he fathered a child. CP 4-18, 41-54. On May 8, 2009, defendant pleaded guilty to all the offenses. CP 4-18.

On June 26, 2009, defendant was sentenced to 198 months to life on Count I, 198 months to life on Count II, 240 months to life on Count III, 240 months to life on Count IV, 60 months on Count V, and 102 months on Count VI. CP 19-34. Defendant was sentenced to community custody for life on Counts I, II, III and IV, and 36-48 months of community custody on Count VI. CP 19-34. No community custody was imposed for Count V. CP 19-34. Defendant filed a timely notice of appeal. CP 35-36.

C. ARGUMENT.

1. DEFENDANT'S PLEA WAS VOLUNTARY AS HE WAS MADE AWARE OF HIS POTENTIAL SENTENCES AND KNOWINGLY WENT FORWARD WITH HIS PLEA.

A 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.” CrR 4.2. The State bears the burden of proving the validity of a guilty plea. *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). The record from the plea hearing must establish that the plea was entered voluntarily and intelligently. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) *citing Wood*, 87 Wn.2d at 511. When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), *citing State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent, and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally

inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In the present case, defendant challenges the voluntariness of his plea by claiming that he was misinformed about the sentencing consequences of his plea. This challenge fails as there was ample evidence in the record to show defendant understood the sentencing consequences of his plea and voluntarily agreed to plead guilty and be sentenced accordingly.

Defendant’s “Statement on Plea of Guilty to Sex Offense,” herein after known as “Plea Form,” states the sentencing consequences of his plea and contains written and highlighted portions emphasizing such consequences. CP 4-18. Under the description of counts I and II, defendant handwrote that the crimes occurred “between 6/15/00 and 6/14/05.” CP 4-18. In calculating his standard sentence range for counts I and II, there is a handwritten range of 149-198 months for each. CP 4-18. In this same section, the community custody range is handwritten in both counts I and II and reads “depending on when 3 years to life.” CP 4-18.

Towards the end of the Plea Form, subsection (f) details the variation in sentences pursuant to when the offenses were committed. CP 4-18. It lists the following three time periods and how the sentences vary with each: sex offenses committed prior to July 1, 2000; sex offenses committed on or after July 1, 2000, but prior to September 1, 2001; sex offenses committed on or after September 1, 2001; and sex offenses committed on or after March 20, 2006. CP 4-18. Each of these sections are titled in bold and underlined. CP 4-18. The length of community custody for sex offenses committed on or after July 1, 2000, but prior to September 1, 2001, is circled in blue pen. CP 4-18. The date of September 1, 2001, is circled in blue pen in the heading that reads “for sex offenses committed on or after September 1, 2001.” CP 4-18. The statement that the Indeterminate Sentence Review Board has the ability to increase defendant’s sentence at its discretion is circled in blue pen in the description for sex offenses committed on or after September 1, 2001. CP 4-18. The paragraphs detailing the sentence “for sex offenses committed on or after July 1, 200 but prior to September 1, 2001,” and “for sex offenses committed on or after September 1, 2001,” have blue hand drawn brackets on the right hand side of them. CP 4-18. These markings suggest that someone, probably defense counsel, drew defendant’s attention to these paragraphs and discussed the provisions with him. Defendant also signed the “Plea Form” at the end of the document. CP 4-18.

During the plea, defense counsel described to the court how he had gone over the plea agreement with defendant. RP 2-4. He stated they had discussed defendant's potential sentences and believed defendant was entering the plea knowingly, intelligently and voluntarily. RP 2-4. The court also inquired into defendant's understanding of the plea forms. RP 5. When asked if he had any problem reading or understanding the plea forms and attachments included in it, defendant replied "no problem, your honor." RP 5. The court asked defendant several questions regarding sentencing and defendant responded that he understood and was aware of the potential sentences he could receive. RP 5-7.

Defendant's plea was voluntary in the present case based on the facts of this case and the presumption that defendant's plea is voluntary once he has received the information. *In re Ness*, 70 Wn. App. at 821. The Plea Form contained multiple statements and descriptions of defendant's potential sentencing ranges. It also contained multiple highlighted and circled portions to emphasize these differentiations. Defendant signed the Plea Form acknowledging that he understood its contents. Defense counsel went over the form with defendant and believed defendant understood and was entering a plea voluntarily. Defendant was questioned about his plea by the court and stated that he understood the Plea Form. He raised no questions or concerns during the plea. As such, defendant's argument that he misunderstood the potential sentences fails. Defendant's plea was voluntary.

2. THE COURT PROPERLY SENTENCED DEFENDANT ON COUNTS I AND II.

The statutory right to plead guilty is a right to plead guilty to the information as charged. *State v. Bowerman*, 115 Wn.2d 794, 798, 802 P.2d 116 (1990). Defendants may not pick and choose what portions of the information to plead guilty to. Nothing in the court rules require that a defendant be allowed to plead guilty to a lesser offense solely to avoid the harsher punishment of the greater offense. *State v. Duhaime*, 29 Wn. App 842, 852, 631 P.2d 964 (1981). Rather, a defendant pleads guilty to the information as charged and admits to criminal acts which occurred on any of the dates as listed in the information.

In the present case, defendant pleaded guilty to two counts of first degree child molestation. CP 4-18. Both counts were alleged in the information to have occurred between the 15th day of June, 2000, and the 14th day of June, 2005. CP 1-2. During this time period, the legislature authorized three different sentences of community custody, depending on the date of the crime. CP 4-18. For sex offenses committed prior to July 1, 2000, the term of community custody is three years or up to the period of earned early release, whichever is longer. CP 4-18. For sex offenses committed on or after July 1, 2000, but prior to September 1, 2001, the term of community custody is 36 to 48 months or up to the period of earned release, whichever is longer. CP 4-18. For sex offenses committed on or after September 1, 2001, the term of community custody is the

period of time defendant is released from total confinement before the expiration of the maximum sentence. CP 4-18. As a result, the dates to which defendant pleaded guilty to two counts of first degree child molestation include three potential community custody sentences.

In accordance with the law and judicial discretion, the court sentenced defendant to a term of community custody for the remainder of defendant's life on both counts. CP 19-34. In essence, the court sentenced defendant to the term of community custody imposed for sex offenses committed on or after September 1, 2001, although defendant's information on this crime included dates prior to September, 1, 2001. Defendant argues that he should be entitled to a term of community custody of 36-48 months for the range for sex offenses committed on or after July 1, 2000, but prior to September 1, 2001. He alleges that a court must prove that the charged conduct occurred after the effective date of the more punitive amendment to be sentenced to that, otherwise, he is entitled to the least punitive sentence. *See* Brief of Appellant, 14.

Defendant misunderstands that when a defendant pleads guilty to an information, he pleads guilty to the information as charged. ***Bowerman***, 115 Wn.2d 798. As such, he admits that the illegal conduct took place throughout the time period in which he is charged. He can therefore be sentenced to any authorized sentence during that time period as he admits guilt.

Defendant's reliance on *State v. Parker*, 132 Wn.2d 182, 837 P.2d 575 (1997), is misplaced. *Parker* is factually distinct from the present case as it involved a jury trial. In that case:

Parker was charged with committing the crimes during a five-year period. The penalties were increased during the fourth year of the period. Evidence was given showing Parker committed the acts before the increase in penalties. **The State was not required to prove he committed the acts after the penalty increase.**

Parker, 132 Wn.2d at 191 (emphasis added).

The court held that Parker's rights were violated when he was sentenced using increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties. *Id.* In contrast, defendant in the present case pleaded guilty. By pleading guilty, he admitted that the acts occurred during the potential sentencing range. The proof of defendant's act in this case comes by his own admission, and the sentencing court was allowed to sentence defendant to any of the authorized sentences.

This is similar to the rationale that was used in *State v. Crabtree*, 141 Wn.2d 57, 9 P.3d 814 (2000). In that case, Crabtree pleaded guilty to two offenses which the information stated had occurred over a three month period between June 1, 1988, and August 31, 1988. *Crabtree*, 141 Wn.2d at 585. His community placement sentence for those crimes was imposed under a statute that came into effect July 1, 1988, one month into

the dates of his crimes. *Id.* On appeal, the court rejected Crabtree's argument that the community placement statute applied only to crimes after July 1, 1998. *Id.* They reasoned that in pleading guilty, Crabtree had admitted he committed two crimes between June 1, 1988, and August 31, 1988. *Id.* The court held that constituted an admission of his crimes between July 1 and August 31, and he was thus sentenced for crimes he admitted occurred after the effective date of the statute.

Similarly, defendant in the present case was sentenced to crimes he admitted occurred during the statutory period he was sentenced under. The State was not required to prove he committed the acts when he admitted them by pleading guilty. As such, the court properly imposed a term of community custody for the remainder of defendant's life for his two counts of first degree child molestation.

The defendant does not dispute the substantive portions of the sentence on Counts I and II. Defendant disputes only the community custody portion of the sentence imposed on Counts I and II. Defendant also does not dispute his sentences on Counts III and IV, for which he is serving on community custody for the remainder of his life. CP 19-34. The defendant is not entitled to withdraw his plea in this case. Rather, if the court finds that the community custody portion of the sentence for Counts I and II are incorrect, his remedy would be to remand for re-

sentencing on the community custody sentences of Counts I and II only.
On Counts III and IV, defendant's sentence of 240 months to life with life
on community custody is valid.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court
affirm defendant's conviction and sentence.

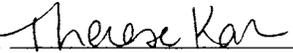
DATED: March 18, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Chelsey Mclean
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

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