

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 41703-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER DRYDEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 9

**Dryden's Plea Was Knowingly, Intelligently, and
Voluntarily Made** 9

a. Dryden was adequately informed as to the elements
of the crimes and there was a factual basis for his
pleas. 10

b. Dryden was not misinformed about the maximum
possible penalties. 12

c. Dryden's sentencing is not governed by the Juvenile
Justice Act, and the Court should not consider this
issue as it has not been properly briefed. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Table of Cases

Cook v. Brateng, 158 Wash.App. 777,
794, _____ P.3d ____ (2010) 14

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801,
809, 828 P.2d 549 (1992) 14

Henderson v. Morgan, 426 U.S. 637, 649 n. 2, 46
S. Ct. 2253, 49 L.Ed. 2d 108 (1976) 12

In re Hilyard, 39 Wash. App. 723, 727,
695 P.2d 596 (1985) 10

In re Vensel, 88 Wn.2d 552, 554,
564 P.2d 326 (1977))) 10

<u>State v. Bradshaw</u> , 152 Wn.2d 528, 538, 98 P.3d 1190 (2004)	10
<u>State v. Holsworth</u> , 93 Wn.2d 148, 153, 607 P.2d 845 (1980)	10
<u>State v. Kennar</u> , 135 Wash. App. 68, 72, 143 P.3d 326 (2006) (citing <u>In re Isadore</u> , 151 Wn.2d 294, 297, 88 P.3d 390 (2004)).	9, 10
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006)	13
<u>State v. Thomas</u> , 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004)	14

STATUTES

RCW 13.40.180	14
RCW 69.50.4013(1)	10
RCW 9.94A	14
RCW 9.94A.525(1)	15
RCW 9.94A.535	15
RCW 9.94A.589.	15
RCW 9.94A.589(1)(a)	14
RCW 9A.82.055	11

Table of Court Rules

CrR 4.2	10
RAP 10.3(c)	14

COUNTERSTATEMENT OF THE CASE

In Grays Harbor County cause number 10-1-1-4 Mr. Dryden was charged by Information filed on January 4, 2010, with Possession of Methamphetamine for an offense that occurred on January 2, 2010. CP 1-2. Dryden pled guilty as charged on May 3, 2010. CP 3-11. The plea agreement provided that the maximum term for the offense was five years. The Statement of Defendant on Plea of Guilty provided in section 6(a) that the maximum possible penalty was five years and/or \$10,000.00 fine. CP 4. In section 11 of the Statement of Defendant on Plea of Guilty the defendant wrote: "On 1-02-2010 in Grays Harbor County I was in possession of methamphetamine." CP 9. When Dryden pled guilty on May 3, 2010, the following exchange took place between the court and Mr. Dryden:

The Court: You are Christopher Dryden?

The Defendant: I am, sir.

The Court: Mr. Dryden, I've got two documents here. One of them is called a plea agreement. The other one is called a statement of defendant on plea of guilty.

First of all, the plea agreement. Do you understand judges do not have to follow plea agreements?

The Defendant: I'm aware of that, sir.

The Court: Regarding the statement of defendant on plea of guilty, did you read this document?

The Defendant: Yes, I did, sir.

The Court: Did you understand it?

The Defendant: Yes, I do.

The Court: Questions about it?

The Defendant: No, sir.

The Court: The charge is possession of methamphetamine, and what's your plea?

The Defendant: Guilty, sir.

The Court: What did you do?

The Defendant: On January 2nd, I had methamphetamine in my possession.

The Court: You know it's illegal?

The Defendant: Yes, sir.

The Court: And it was here in Grays Harbor County, Washington?

The Defendant: Yes.

RP 5-3-10, 2-3.

In Grays Harbor County cause number 10-1-207-6 the defendant was charged by Information filed on May 28, 2010, with Possession of Methamphetamine for an offense that occurred on May 27, 2010. CP 1-2. Mr. Dryden pled guilty as charged on June 28, 2010. CP 9-17. The plea agreement in cause number 10-1-207-6 provided that the maximum term was five years. CP 4-8. The Statement of Defendant on Plea of Guilty provided in section 6(a) that the maximum term and fine was five years and \$10,000.00. CP 10. In section 11 of the Statement of Defendant on Plea of Guilty the defendant wrote: "On May 27, 2010, in Grays Harbor

County I was in possession of methamphetamine.” CP 16. When Dryden
pled guilty on June 28, 2010, the following exchange occurred between
Mr. Dryden and the court:

The Court: You are Christopher Dryden?

The Defendant: I am, Your Honor.

The Court: Cause 10-1-207-6. Mr. Dryden,
I’ve been handed documents which indicate
you’re going to plead guilty to a drug
violation; is that correct?

The Defendant: Yes, it is, Your Honor.

The Court: Now, that would be possession
of methamphetamine; is that correct?

The Defendant: Yes, it is.

The Court: I have a plea agreement. Do you
understand we don’t have to follow plea
agreements?

The Defendant: I do understand that, Your
Honor.

The Court: The statement of defendant on
plea of guilty, did you read it?

The Defendant: Yes, I did, Your Honor.

The Court: Did you understand it?

The Defendant: I did.

The Court: Any questions?

The defendant: No, sir.

The Court: Well, possession of methamphetamine,
what’s your plea?

The Defendant: Guilty, Your Honor.

The Court: What did you do?

The Defendant: When I was confronted by the police and they searched my body I had methamphetamines on me.

The Court: Did you know you had them?

The Defendant: Yes, I did.

The Court: You knew it was illegal?

The Defendant: Yes, sir.

The Court: Is this May 27th of 2010?

The Defendant: Yes, it was, Your Honor.

The Court: Did it happen in Grays Harbor County, Washington?

The Defendant: It did.

The Court: Plea of guilty is accepted.

RP 6-28-2010, 3-5

In Grays Harbor County cause number 10-1-318-8 Dryden was charged by Information filed on August 16, 2010, with Trafficking in Stolen Property in the First Degree for an offense that occurred on July 2, 2010. CP 1-2. Dryden pled guilty to an Amended Information charging Trafficking in Stolen Property in the Second Degree on September 13, 2010. CP 3; 4-12. In 10-1-318-8 the Statement of Defendant provided in section 6(a) that the maximum term was five years and \$10,000.00. CP 5. In section 11 of the Statement of Defendant on Plea of Guilty the defendant wrote: "On 7-2-2010, in Grays Harbor County, WA, I recklessly

trafficked in stolen property.” CP 10. During the guilty plea hearing the following exchange occurred between the court and Mr. Dryden:

The Court: All right. Just give me a second here. Please state your name.

The Defendant: Christopher Brian Dryden, Your Honor.

The Court: Do you read and write well?

The Defendant: Yes, I do, Your Honor.

The Court: All right. I take it there's no objection to the amended information; is that correct?

Ms. Kleespie: That's correct, Your Honor.

The Court: And you have had sufficient time to go forward with the plea today?

Ms. Kleespie: Yes, I have.

The Court: All right. You understand the situation.

The Defendant: I do, Your Honor.

The Court: All right. And did you carefully read this plea agreement.

The Defendant: I have, Your Honor.

The Court: And did you understand everything in it?

The Defendant: I did.

The Court: Okay. Do you have any questions of me regarding the plea agreement?

The Defendant: No, I do not.

The Court: Okay. And you understand

that the recommendation of the prosecutor is going to be eight months in jail?

The Defendant: I understand it, Your Honor.

The Court: And that the prosecutor may agree to credit for successful inpatient drug treatment?

The Defendant: Yes, sir.

The Court: Do you also understand that the top of the range is 12 months with your criminal history?

The Defendant: I'm well aware of it, Your Honor.

The Court: Is your criminal history accurately set forth here?

The Defendant: yes, it is, Your Honor.

The Court: And you do understand that the judge at sentencing could give you the top of the range, he doesn't have to follow the prosecutor's recommendation?

The Defendant: I'm aware of that, Your Honor.

The Court: And you signed it after you read it and understood it?

The Defendant: Yes. Yes, Your Honor.

The Court: I'll find it's consistent with the interest of justice and prosecutorial standards.

Did you also carefully read the statement of defendant on plea of guilty?

The Defendant: Yes, I did, Your Honor.

The Court: And did you understand everything in it?

The Defendant: Yes, I did.

The Court: And you discussed it with your attorney?

The Defendant: Yes, he did discuss it with me.

The Court: Do you have any questions of me regarding this?

The Defendant: No, I don't.

The Court: Did you pay close attention to your constitutional rights on the bottom of the front page and going on top of the second page?

The Defendant: I did, Your Honor.

The Court: Do you understand those rights and understand you're giving up those rights when you plead guilty?

The Defendant: I'm aware of it.

The Court: How do you plead to the amended charge of traffic in stolen property in the second degree?

The Defendant: Guilty, Your Honor.

The Court: Did you on or about July 2, 2010 in Grays Harbor County Washington recklessly traffic in stolen property belonging to U.S. Cellular?

The Defendant: I did, Your Honor.

The Court: Has anyone forced you to plead guilty?

The Defendant: No.

The Court: Any promises made other than the plea agreement?

The Defendant: No, Your Honor.

The Court: Do you understand you may not

possess, own or have under your control any firearm unless your right to do so is restored by court of record?

The Defendant: I'm aware of that, Your Honor.

The Court: All right. And did you sign this statement after you carefully read it and understood everything?

The Defendant: Yes, I did, Your Honor.

The Court: I'll find that you've knowingly, intelligently and voluntarily made that plea, that you understand the charge and the consequence of your plea, that there is a factual basis for your plea and you are in fact guilty.

RP 9-13-2010, 7-10

All three statements of the defendant on plea of guilty were signed by the defendant. All three provided that he had been provided with a copy of the Information or the Amended Information. Section 12 of each Statement of the Defendant on Plea of Not Guilty, immediately preceding the defendant's signature, provided:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "offender registration" attachment, if applicable. I understand them all. I have been given a copy of this statement of defendant on plea of guilty. I have no further questions to ask the judge.

Dryden's lawyers also signed the Statements of Defendant on Plea of Guilty immediately below the statement, "I have read and discussed this statement with the defendant. I believe the defendant is competent and fully understands this statement." CP 10 (1-4); CP 16 (207-6); CP 11 (318-8).

Mr. Dryden was sentenced on all three cause numbers on January 10, 2011. In cause number 10-1-1-4 Dryden was sentenced six months in the Grays Harbor County Jail consecutive to 10-1-207-6 and 10-1-318-8. CP 12-18. In cause number 10-1-207-6 Dryden was sentenced to six months in the Grays Harbor County Jail consecutive with 10-1-1-4 and 10-1-318-8. CP 18-26. In cause number 10-1-318-8 Dryden was sentenced to twelve months in the Grays Harbor County Jail consecutive with 10-1-1-4 and 10-1-207-6. CP 18-26. This appeal followed.

ARGUMENT

Dryden's Plea Was Knowingly, Intelligently, and Voluntarily Made.

Dryden contends that his plea was not voluntary, because the record does not contain an adequate factual basis for his pleas of guilty, and that he was misinformed as to the maximum possible penalties. Therefore, he argues, his due process rights were violated, and his convictions must be vacated and he be allowed to withdraw his pleas. Dryden is incorrect on several grounds.

Due process requires that a defendant's plea of guilty must be knowing, intelligent, and voluntary. State v. Kennar, 135 Wash. App. 68, 72, 143 P.3d 326 (2006) (citing In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)). These requirements are met if the defendant understands the elements of the offense, the direct consequences of the guilty plea, and that he is waiving his right to remain silent, confront his accusers, and

have a trial by jury. State v. Holsworth, 93 Wn.2d 148, 153, 607 P.2d 845 (1980); In re Hilyard, 39 Wash. App. 723, 727, 695 P.2d 596 (1985).

Criminal Rule 4.2 provides procedures that a trial court should follow before accepting a defendant's plea of guilty. Although Rule 4.2 was designed to ensure that a defendant's constitutional rights are protected, the procedures outlined therein are not themselves constitutionally compelled. E.g., Kennar, 135 Wash.App. at 72-73; Hilyard, 39 Wash.App. at 726-27 ("CrR 4.2 is not the embodiment of a constitutionally valid plea; strict adherence to the rule is 'not a constitutionally mandated procedure.' (quoting In re Vensel, 88 Wn.2d 552, 554, 564 P.2d 326 (1977))).

a. Dryden was adequately informed as to the elements of the crimes and there was a factual basis for his pleas.

Dryden implies that his due process rights were violated because he did not get notice of the elements of the crimes that he was pleading to. "There is nothing in the record to indicate that Dryden understood which facts supported the elements of the crimes charged." (Brief of Appellant, page 7). This is unsupported by the record.

The elements that need to be proved to convict a defendant of possession of controlled substance are the fact of possession and the nature of substance. RCW 69.50.4013(1); State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

The elements of Trafficking in Stolen Property in the Second Degree are that the defendant recklessly traffic in stolen property. RCW 9A.82.055.

In each of the drug cases below the defendant admitted on the record that he possessed methamphetamine in Grays Harbor County on the date charged and that he knew it was illegal. RP 5/3/10, 2-3; RP 6/28/10, 3-5. In cause number 10-1-318-8 wherein Mr. Dryden pled guilty to an amended information charging Trafficking in Stolen Property in the Second Degree, he admitted on the record that he had read both the plea agreement and the statement of the defendant on plea of guilty, that he had reviewed them with his attorney, that he understood them, that he had no questions of the court, and that he recklessly trafficked in stolen property in the second degree. RP 9/13/10 7-10.

As noted previously, the defendant also signed all three statements and in each one stated in his own words what he did.

Thus, Dryden received actual notice of the elements of the crime to which he pled guilty.

Furthermore, the record contained an adequate factual basis to support Dryden's pleas. Dryden admitted that he was pleading guilty "as charged" in the information in each case. Where a defendant has knowledge of the contents of the information, as here, "his plea of guilty may well be deemed a factual admission that he did what he was charged with doing so that a judgment of conviction may validly be entered against

him.” Henderson v. Morgan, 426 U.S. 637, 649 n. 2, 46 S. Ct. 2253, 49 L.Ed. 2d 108 (1976). In other words, his plea of guilty is a tacit admission that every element of the crime is true.

b. Dryden was not misinformed about the maximum possible penalties.

Dryden was correctly advised in each Statement on Plea of Guilty of the maximum penalty and fine in each case. Each Statement of Defendant on Plea of Guilty in section 6 (a) advised the defendant that each crime carried a maximum sentence and fine of 5 years and \$10,000. Contrary to appellant’s assertion that Dryden was advised that the maximum possible penalty was 5 years in prison or a \$10,000.00 fine (Brief of Appellant page 3), in section 6(a) of each Statement of Defendant on Plea of Guilty in the column “maximum term and fine” (emphasis added) was written “5 years and/or \$10,000 fine” (10-1-1-4) CP 4, “5 years \$10,000.00” (10-1-207-6) CP 10, and “5yrs./\$10k” (10-1-318-8) CP 5.

The only discrepancy is that in the plea agreements in 10-1-1-4 and 10-1-207-6 the maximum penalty was set forth as 5 years incarceration, but no fine was mentioned. Significantly, no fine was imposed at sentencing. However, as already shown, Dryden was correctly informed of the maximum term and fine in the Statements of Defendant on Plea of Guilty. Dryden indicated no confusion and did not seek clarification of this discrepancy. Because Dryden was correctly advised on the maximum

fine in the Statement of Defendant on Plea of Guilty he has failed to establish that his plea was involuntary.

In any event, Dryden has waived his challenge. In State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) the defendant learned at sentencing that his standard range was lower than he had been advised. Mendoza at 585. The Supreme Court held that under the circumstances that it would not inquire into the materiality of the mis-advisement in the defendant's subjected decision to plead guilty. Mendoza at 590. However, the court held that Mendoza had waived his right to challenge the voluntariness of his plea at sentencing when he did not object to the lower standard range. The court stated:

[I]f 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 his plea.

Mendoza at 592. In other words, if the defendant does not timely seek withdrawal upon learning that he was mis-advised of a consequence, the defendant waives his challenge. Dryden did not object or move to withdraw his plea when faced with the discrepancy between the two plea agreements and the Statements of Defendant on Plea of Guilty. Consequently, Dryden has waived his challenge to the voluntariness of his pleas on that basis.

c. Dryden’s sentencing is not governed by the Juvenile Justice Act, and the Court should not consider this issue as it has not been properly briefed.

For whatever reason appellant cites the RCW 13.40.180 in arguing that Mr. Dryden’s sentences should have been imposed concurrently, not consecutively. Brief of Appellant, page 11. RCW Chapter 13.40 is the Juvenile Justice Act of 1977. Mr. Dryden is an adult, not a juvenile. His sentencing is governed by the Sentencing Reform Act of 1981, RCW 9.94A. Thus, this issue should not be considered by the Court. “Appellate courts need not consider arguments that are unsupported by pertinent authority, references to the record, or meaningful analysis.” Cook v. Brateng, 158 Wash.App. 777, 794, ____ P.3d ____ (2010); State v. Thomas, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004)(“this court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.”). Furthermore, argument and authority raised for the first time in a reply brief is too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(c). Accordingly, this issue should not be considered on appeal.

Be that as it may, in the event that the court wants to consider this issue, Mr. Dryden’s sentencing is governed by RCW 9.94A.589(1)(a) which provides in pertinent part as follows:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses,

the sentence range for each current offense should be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . . Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

RCW 9.94A.525(1) provides that “[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.” None of the aggravating factors set forth in RCW 9.94A.535 are present in this case, nor did the court make any findings that any aggravating factors existed justifying an exceptional sentence.

CONCLUSION

Dryden was adequately informed of the elements of the crimes charged and there was a factual basis for each one of his pleas. He was not misinformed as to the maximum possible penalties. The issue as to consecutive sentences has not been properly briefed and should not be considered by this court. For all these reasons appellant’s convictions and sentences should be affirmed and this appeal dismissed. In the event that the court does consider the issue as to sentencing, this case should be

remanded to the trial court for re-sentencing. In all other respects,
appellant's convictions and sentences should be affirmed.

DATED this 17 day of November, 2011.

Respectfully Submitted,

By: William A. Leras
WILLIAM A. LERAS
Deputy Prosecuting Attorney
WSBA #15489

WAL/lh

COUNT OF APPEALS
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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v.

DECLARATION OF MAILING

CHRISTOPHER DRYDEN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 17th day of November, 2011, I mailed a copy of the Brief of Respondent to Lise Ellner, Law Offices of Lise Ellner, P. O. Box 2711, Vashon, WA 98070, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17th day of November, 2011, at Montesano, Washington.

Barbara Chapman