

NO. 42254-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT D. PITKIN,

Appellant.

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

The Honorable Stephen Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in accepting Mr. Pitkin's guilty plea when the plea was not knowing, voluntary, and intelligent.

2. It was error to fail to advise Mr. Pitkin of the statutory maximum penalty for each of the seven crimes to which he pleaded guilty.

3. Because Mr. Pitkin's plea was taken in error, his exceptional sentence was entered in error.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A guilty plea is only constitutionally valid if it is knowing, voluntary, and intelligent. A guilty plea is only knowing, voluntary, and intelligent if the defendant is advised of all the direct consequences of his plea. The statutory maximum penalty for each crime pled to is a direct consequence. Mr. Pitkin pleaded guilty to 64 charges made up of seven different crimes. In pleading guilty, he was only advised of a partial statutory maximum penalty for one of the crimes and not advised of any statutory maximum penalty for the remaining six crimes. Was Mr. Pitkin's guilty plea knowing, voluntary, and intelligent?

C. STATEMENT OF THE CASE

Mr. Pitkin, with the assistance of defense counsel, worked out a plea deal with the prosecutor. RP ("Report of Proceedings") at 1-2. Mr. Pitkin would plead guilty to all 64 counts in a Second Amended

Information and the parties would make a joint recommendation for an 18-year exceptional sentence. RP at 1-2; CP (“Clerk’s Papers”) 48. The 64 counts were comprised of seven crimes: residential burglary,¹ second degree burglary,² attempted second degree burglary,³ theft of a firearm,⁴ first degree theft,⁵ second degree theft,⁶ and third degree theft.⁷ CP 3-20.

As part of the plea, Mr. Pitkin filled out a standard Statement of Defendant on a Plea of Guilty. CP 21-49. That section of the plea form where the “maximum term and fine” must be listed was blank except for the words “see offer attached.” CP 22. The prosecutor’s plea offer, which was attached to the guilty plea form, made no mention of the statutory maximum penalty for any crime. CP 48; See Appendix attached (Plea Agreement).

Mr. Pitkin appeared before the trial court, presented his guilty plea form, and entered a guilty plea to all 64 counts in the Second Amended Information. RP at 1-23. During the plea colloquy with the trial court, the only mention of a statutory maximum penalty was for the third degree theft. RP at 19. Even then, the court only said that Mr. Pitkin could “get

¹ RCW 9A.52.025

² RCW 9A.52.030

³ RCW 9A.28.020 & 9A.52.030

⁴ RCW 9A.56.300

⁵ RCW 9A.56.030

⁶ RCW 9A.56.040

⁷ RCW 9A.56.050

up to one year in jail and two years of supervision.” RP at 19. There was nothing about the statutory maximum fine. RP at 19.

Sentencing immediately followed the plea. RP at 24-39. The trial court handed down a 20-year exceptional sentence. RP at 37; CP 63-65. As the Judgment and Sentence wasn’t ready, the trial court set the case over for signing. RP at 37-38.

A few days later, the trial court reviewed the Judgment and Sentence, made a few clarifications to it, and signed it. RP at 49-43. None of the clarifications had anything to do with explaining the statutory maximum penalty to Mr. Pitkin. RP at 40-42. In fact, nothing was mentioned about statutory maximum penalties. RP at 40-43. The Judgment and Sentence lists the “maximum term” for each count using only the language “Class B,” “Class C,” and “365 Days.” CP 57-60. Mr. Pitkin signed the Judgment and Sentence, as did defense counsel and the prosecutor. CP at 73.

During the signing hearing, Mr. Pitkin handed the trial court his Notice of Appeal. RP at 42; CP 77.

D. ARGUMENT

**BECAUSE HE WAS NOT ADVISED OF THE STATUTORY
MAXIMUM PENALTY FOR HIS CRIMES, MR. PITKIN IS
ENTITLED TO WITHDRAW HIS GUILTY PLEA.**

Mr. Pitkin was not advised of the statutory maximum penalty for any of the seven crimes to which he pleaded guilty. As such, Mr. Pitkin did not make a knowing, voluntary, and intelligent guilty plea. Mr. Pitkin is entitled to withdraw his guilty plea.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Weyrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). In addition to this constitutional minimum, CrR 4.2 also endorses safeguards to ensure the voluntariness of guilty pleas:

The 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 (d); *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980).

If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that has a “definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Ross*, 129 Wn.2d at 284. The statutory maximum for a charged crime is a direct consequence of a guilty plea. *Weyrich*, 163 Wn.2d at 557; *In re Stockwell*, 161 Wn. App. 329, 335, 254 P.3d 899 (2011)⁸; *See also* CrR 4.2(g), no. 6(a).

A defendant is entitled to withdraw his 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)) (“The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.”). A ‘manifest injustice’ is “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). 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. Because a plea that is not knowing, voluntary, and

⁸ Petition for Discretionary Review (No. 86001-7) stayed pending outcome of *In re Pers. Restraint of Jeffrey Coats* (No. 83544-6) (oral argument heard January 20, 2011).

intelligent is an involuntary plea, it is a manifest injustice and a defendant is entitled to challenge an involuntary guilty plea for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Importantly, 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; *Stockwell*, 161 Wn. App. at 336. The burden of showing a manifest injustice sufficient to warrant withdrawal of a guilty plea rests with the defendant. *State v. Codiga*, 162 Wn.2d 912, 929, 175 P.3d 1082 (2008).

Mr. Pitkin’s guilty plea was involuntary because he was not advised of the statutory maximum penalties for any of the seven crimes to which he pleaded guilty.

The guilty plea form was silent. It just read, “see offer attached.”

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*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1		See offer attached			
2					
3					

CP 52.

But that offer, the prosecutor's Plea Agreement, was silent. There is nothing in the Plea Agreement about statutory maximum penalties. See Plea Agreement attached as Appendix.

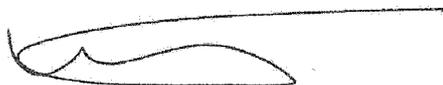
The closest anyone came to advising Mr. Pitkin of any statutory maximum penalty was when the trial court mentioned a portion of the statutory maximum penalty for third degree theft. "[T]he theft in the third degrees are gross misdemeanors. For each of those you can get up to one year in jail and two years of supervision." RP at 19. Even in this succinct explanation, the trial court got it wrong; the court failed to mention third degree theft's \$5,000 statutory maximum fine. RCW 9A.56.050; RCW 9A.20.021(2).

Because Mr. Pitkin was not advised of the statutory maximum penalty for any of the seven offenses to which he pleaded guilty, his guilty plea was not knowing, voluntary, and intelligent. Due process dictates that Mr. Pitkin be allowed to withdraw his guilty plea and have his 20-year exceptional sentence set aside.

E. CONCLUSION

Mr. Pitkin's case should be remanded to the trial court for further action on the withdrawal of his guilty plea.

Respectfully submitted this 4th day of November 2011.



LISA E. TABBUT/WSBA #21344
Attorney for Robert Pitkin

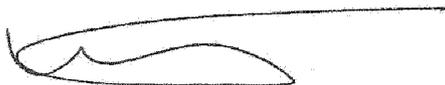
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.gov; and (2) the Court of Appeals, Division II; and (3) I mailed it to Robert D. Pitkin/DOC#987660, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

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

Signed November 4, 2011, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Robert Pitkin

PLEA AGREEMENT

APPENDIX

Defendant Robert Atkin

Cause Number(s): 11-1-00359-8

Deputy Prosecutor: LAURINE Defense Attorney: Blondin

The above-named individuals agree to enter into the plea agreement, which is accepted only by a guilty plea on or before the first pre-trial or _____.

The defendant shall plead guilty to Counts: All counts of the Original/Amended Information. 11 Amend CTR to Res Burg and remove DWE

The Prosecutor will dismiss Count/Cause: _____

The defendant agrees that the Prosecutor's Statement of the Defendant's Criminal History is accurate and that all out-of-state convictions used to calculate the offender score are the equivalent of Washington felonies. If there are other convictions that exist and the defendant does not reveal them prior to pleading guilty, this agreement is void and the Prosecutor may proceed on all charges, and the defendant will be re-sentenced upon conviction according to his or her correct and complete criminal history.

The Defendant agrees that his/her standard range is Res Burg 63-84 mos; Burg 2: 51-60 mos; Attempt Burg 2 38.25-51; Theft 1 43-52 mos; Theft Breach 77-102; UPPA 87-116; Theft 2: 22-24 mos; Theft 3 36 days
 The Prosecutor will recommend the following sentence: The parties agree to the following sentence:

Exceptional sentence of 18 yrs
All are high end of standard range and concurrent except

CT 1 @ 60 mos consecutive to ct 4 @ 80 mos, consecutive to CT LXIV @ 60 mos total of 216 mos or 18 yrs.
 The defendant agrees not to seek a SSOSA, DOSA or PSA sentence.

The Prosecutor's recommendation is based upon the following: interest of justice and AS unscored crimes - A has an offender score of 142 on burgs 80 on thefts

The defendant agrees to pay restitution on all charged counts. The defendant agrees that restitution is \$ TBD

If the cause involves a Violation of the Uniform Controlled Substances Act, the Prosecutor will recommend a \$250 or \$500 contribution to the Prosecutor's Drug Enforcement Fund. If the cause involves domestic violence, the Prosecutor will recommend a \$100 Domestic Violence Assessment. The Prosecutor will recommend all statutory costs, fines and fees.

Defendant Date: _____

[Signature]
Defense Attorney Date: _____

[Signature] 36871
Deputy Prosecutor Date: 8-2-11

Afford Plea? Yes _____ No _____
Plea date: _____

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COWLITZ COUNTY ASSIGNED COUNSEL

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Case Name: State v. Robert D. Pitkin

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- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
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- Reply to Response to Personal Restraint Petition
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Sender Name: Lisa E Tabbut - Email: **lisa.tabbut@comcast.net**

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sasserm@co.cowlitz.wa.gov

CERTIFICATE OF MAILING

State of Washington, Respondent, v. Robert D. Pitkin, Appellant
No. 42254-9-II

I certify that I mailed a copy of the verbatim report of proceedings to:

Robert D. Pitkin/DOC#987660
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

All postage prepaid, on September 27, 2011.

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 November 4, 2011.



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COWLITZ COUNTY ASSIGNED COUNSEL

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- Brief: ____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
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