

NO. 42254-9-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT D. PITKIN,

Appellant.

BRIEF OF RESPONDENT

**JASON LAURINE
WSBA # 36871
Deputy Prosecutor
for Respondent**

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A. STATEMENT OF THE CASE

On June 6, 2011, Robert Pitkin pled guilty to sixty four counts associated with a string of burglaries he committed in Longview, Washington. RP 1-39; CP 20. Pitkin, with the assistance of defense counsel, negotiated a plea agreement that required him to plea to all counts of the second amended information, and agree to an exceptional sentence of 18 years in prison. RP 1-2; CP 20. In consideration of this plea, the State dismissed the greater charge of burglary in the first degree. CP 20.

Pitkin's Statement of Defendant on Plea of Guilty indicated that he understood a joint, agreed recommendation of 18 years or 216 months would be presented to the court. CP 20:4. The highest standard range Pitkin was facing was 77 to 102 months on his theft of a firearm in the first degree charge. CP 20, 21; RP

In the interest of time and expediency, the court chose to truncate the plea. RP 2-3. During the colloquy, Pitkin's defense counsel informed the court that Pitkin's offender score on the burglary counts was 142. The State then informed the court that Pitkin's offender score on the theft counts was 8. Following this exchange, the trial court inquired whether Pitkin understood that his offender score far exceeded the maximum under the SRA. Pitkin acknowledged that he did understand. The trial court then

inquired whether Pitkin understood that his excessive score was a basis for an exceptional sentence above the standard ranges for the offenses. Pitkin affirmed that he understood.

During his colloquy and in his judgment and sentence, Pitkin acknowledged the standard ranges for the crimes to which he pleaded guilty. RP 19; CP 20. Pitkin acknowledged in section 6, paragraph (a) that the offer attached to his statement on plea of guilty accurately reflected his standard range of confinement. CP 20:2. The plea agreement attached to Pitkin's State of Defendant on Plea of Guilty enumerated the standard ranges for each offense. CP 20. In addition, the trial court advised him of these standard ranges, and Pitkin acknowledged them. RP 19. The trial court did not inform Pitkin of the maximum range on his felony convictions.

Pitkin signed his statement, acknowledging that he was making a recommendation in excess of the highest standard range of 77-102 months; he agreed to 216 months. CP 20:4, 8. The trial court also inquired of Pitkin if he understood the agreed recommendation of an exceptional sentence of 18 months. It then informed Pitkin that it did not have to follow the recommendation and that if it found a basis for an exceptional sentence, it could exceed the recommendation. The trial court then asked

Pitkin if he understood these points. Again, Pitkin stated “yes, I do.” RP 21:2-9.

After Pitkin pled guilty to all 64 counts, the court asked him whether he had any questions regarding his rights. Pitkin stated he did not. Pitkin then stated that he was entering his plea freely and voluntarily. RP 23.

In his sentencing request to the court, Pitkin’s attorney stated that Pitkin was “effectively expecting to receive a sentence in great excess of what some people would receive for what the general public would perceive as more egregious crimes...the jointly proposed recommended sentence of 18 years almost doubles the sentence that he received last time.” RP 27-28. Through his attorney, Pitkin asked the trial court to follow the agreed recommendation and “impose an exceptional sentence of 18 years.” RP 30: 11-12. The sentencing court then denied the agreed recommendation of 18 years prison, imposing 20 years. RP 35-37. When handing down the sentence, the court does mention maximum ranges. RP 37.

On June 10, 2011, Pitkin signed the judgment and sentence without requesting to withdraw his plea. Pitkin’s Judgment and Sentence contained a statement of a complete assessment of the counts to which Pitkin pleaded guilty in paragraph 2.3 and its accompanying appendix. CP 22.

That paragraph contains a grid which enumerates the count, the offender score, the seriousness level, the standard range of each count, and the maximum term associated with each count. For each of the 64 counts the defendant pleaded guilty to and was sentenced, listed in the grid was a corresponding maximum term of B, C or 365 days. CP 22 A further acknowledgement that Pitkin had been apprised of the contents within the judgment and sentence was made to the court by defense counsel. RP 40.

B. ISSUE

Did the appellant make a knowing, intelligent and voluntary when he makes and agreed recommendation for an exceptional sentence in far excess of the maximum range for any one crime he committed regardless of not being informed of the maximum range by the sentencing court?

C. ARGUMENT

Generally, a voluntary guilty plea acts as a waiver of the right to appeal. *State v. Smith*, 134 Wash.2d 849, 852, 953 P.2d 810 (1998). Due process requires that a defendant's guilty plea be made knowing, intelligent, and voluntary. *State v. Mendoza*, 157 Wash.2d 582, 587, 141 P.3d 49 (2006). A court must not accept a plea of guilty without first

determining that it is made voluntarily, competently and with an understanding of the nature of the charges and consequences of the plea. CrR 4.2(d). The length of the sentence is a direct consequence of the plea and the plea may be deemed involuntary when it is based on mutual mistake regarding the offender score or the sentencing range. *Mendoza*, 157 Wash.2d at 590-91, 141 P.3d 49.

Pitkin acknowledged his standard range on multiple occasions; notable were his defendant's statement on plea of guilty and his colloquy. Pitkin acknowledged in section 6, paragraph (a) that the attached offer reflected his standard range of confinement. CP 20: 2. The attached plea agreement set out the standard ranges for the crimes to which he pleaded guilty.

While the trial court may not have gone over the maximum ranges with Pitkin, it did inform him of the standard ranges and inquired about the agreed exceptional sentence. Pitkin agreed to an exceptional sentence that far exceeded the maximum sentences for either of his class B or Class C felony convictions. He was aware of the length of the sentence and agreed to that sentence in consideration of the dismissal of burglary in the first degree. CP 20.

While signed and entered, subsequent to the plea, Pitkin's Judgment and Sentence contained a statement in paragraph 2.3 and it's

accompanying Appendix, of a complete assessment of the counts to which the defendant pleaded guilty. That paragraph contains the grid which enumerates the count, the offender score, the seriousness level, the standard range of each count, and the maximum term associated with each count. For each of the 65 counts for which the defendant was sentenced, that grid listed a maximum term of either B, C or 365 days. A class B felony carries with it a maximum term of 10 years, while a class C felony carries a maximum term of 5 years. RCW 9A.20.021(b) and RCW 9A.20.021(c). The defendant acknowledged these ranges when he signed the judgment and sentence.

There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made. *In re Pers. Restraint of Breedlove*, 138 Wash.2d 298, 309, 979 P.2d 417 (1999). However, withdrawal of a guilty plea should be permitted to correct a manifest injustice. The non-exclusive criteria which constitutes manifest injustice include 1) the denial of effective counsel; 2) the defendant or one authorized by the defendant did not ratify the plea; 3) the plea was involuntary; or 4) the prosecution breached the plea agreement. *State v. Wakefield*, 130 Wash.2d 464, 472, 925 P.2d 183 (1996).

Precedent that a guilty plea may be deemed involuntary when based on misinformation. *State v. Weyrich*, 163 Wash.2d 554, 557, 182

P.3d 965 (2008). In that case, the defendant moved to withdraw his pleas of guilty, arguing that he had been misinformed about the possible sentence he faced. He stated that because of the misinformation his pleas were not knowingly, voluntarily, and intelligently made because of errors on the judgment and sentence. 163 Wash.2d at 556. The Supreme Court held that the defendant did not waive the error but timely moved to withdraw his pleas before sentencing.

Unlike *Weyrich*, Pitkin's Judgment and Sentence correctly reflects the maximum ranges for each crime. During sentencing, Pitkin's attorney acknowledged reviewing the judgment and sentence prior to signing. (RP 40: 13). *Weyrich* does not suggest that the court must deem Pitkin's plea involuntary, it merely states that a plea is involuntary if the mistake affected his decision to plea. The language the court uses is that a court "may" deem a plea involuntary. The word "may" gives a court an opportunity to review circumstances surrounding the plea before making the determination that the plea was made voluntarily, or not. Had the word "shall" been used, no such abilities would be given to the court. Here, given all circumstances, including the failure to inform of the maximum ranges, it is clear that Pitkin's plea was voluntary. This is supported by the fact he entered an agreed recommendation for an exceptional sentence of 216 months.

1. In order to prevent prejudice to the State, Pitkin should be held to specific performance of the plea agreement.

If the court finds that Pitkin did not make a voluntary plea after agreeing to an exceptional sentence of 18 years, but receiving 20, the State requests that the court require specific performance of the plea agreement. Due to the large number of victims, the excessive number of witnesses, and the amount of evidence the state would have to retrieve, the state would be prejudiced if Pitkin is allowed to withdraw his plea. Where plea agreements are claimed to be involuntary, the rule is that the defendant's choice of remedy controls unless it would be unjust. If the State would be prejudiced in presenting its case by the passage of time, it can ask that the defendant's remedy be limited to specific performance. *State v. Van Buren*, 101 Wash.App 206, 212, n. 2, 2 P.3d 991 (2000).

If a defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history and the nature of the agreement and the reasons for the agreement shall be made part of the record. CrR 4.2(e). Plea agreements are regarded and interpreted as contracts, and the parties are bound by the terms of a valid plea agreement. *Breedlove*, 138 Wash.2d at 309, 979 P.2d 417. Pitkin agreed to an

exceptional sentence of 18 years, or a total of 216 months. CP 20:4. There was no mistake in the fact Pitkin understood the agreed recommendation; he enumerated his understanding of his plea and the agreed recommendation in paragraph (g) on page 4 of his statement of defendant on plea of guilty. CP 20:4 Both Pitkin and his attorney ratified the statement of defendant on plea of guilty. CP 20: 8, and Pitkin's defense counsel signed the State's plea agreement on behalf of Pitkin. CP 20.

A defendant who challenges the sentence before the trial court will be immediately faced with the decision of revoking his plea and going to trial or being re-sentenced before a different judge. By instead appealing, he will be able to delay this choice for the approximate two years of the appeal process, by which time the State's witnesses may be unavailable and or memories may have faded. Generally, the better policy is to require a party to preserve any issues by objecting within the trial court setting, creating a factual record for the appellate court to review; however, errors on constitutional level can be heard for the first time. RAP 2.5. Here, Pitkin did not avail himself of the opportunity to request a withdrawal of his plea. Instead, he opted to pursue the issue of whether or not his plea was voluntary at the appellate level. While it is his right to do so, his choice has placed the state in a position that prejudices its ability to effectively prosecute.

In some instances, and the present case is one, the choice of plea withdrawal would be unfair because the State has detrimentally relied on the bargain and would be handicapped in obtaining witnesses after the length of time between plea and appellate process. By the time the appeal process is complete, nearly two years will have elapsed. Such a length of time may cause witnesses to be unavailable, or memories to change, or evidence to have been destroyed, lost, or returned. *See United States v. Jerry*, 487 F.2d 600 (3d Cir. 1973) (it is within allowable judicial discretion to consider potential prejudice to the Government when determining whether to allow withdrawal of a plea).

Here, the State did not breach the plea agreement. This issue was caused by a sentencing court that chose to rush what was a lengthy plea. The State made certain to correct the trial court on numerous occasions, but still mistakes were made. If the court finds that Pitkin did not make a knowing and voluntary plea, the State requests specific enforcement of the plea agreement in order to avoid further prejudice.

D. CONCLUSION

Because Pitkin agreed to an exceptional sentence 18 years, beyond the maximum range of his charged crimes, the court should find that he made a knowing and voluntary plea. If the court does not find the plea to be voluntary, Pitkin should be held to specific performance of the plea agreement in order to avoid prejudice to the state.

Respectfully submitted this 12th day of March, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By:

A handwritten signature in black ink, appearing to read "Jason Laurine", written over a horizontal line.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on March 12th, 2012.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 12, 2012 - 9:55 AM

Transmittal Letter

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