

No. 47061-6

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

NICHOLAS ALAN HARKEY,

Defendant/Appellant.

REPLY BRIEF

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I. MR. HARKEY’S PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY

A. Mr. Harkey Was Not Correctly Informed of the Direct Consequences of His Plea

“Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent.” *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)). “A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.” *Id.* at 298. Because a plea of guilty is more than a confession, it is itself a conviction, presuming voluntariness from a silent record is impermissible; the record must contain affirmative evidence that the plea was knowing, voluntary and intelligent. *Boykin v. Ala*, 395 U.S. at 242-43.

Under former RCW 9.94A.712(3) (2004), the court was required to sentence Mr. Harkey to the statutory maximum – life imprisonment – and to set a minimum term within the standard sentence range, unless he qualified for an exceptional sentence. *In re Pers. Restraint of Murillo*, 134 Wn. App. 521, 524, 142 P.3d 615 (2006); RCW 9A.20.021(1)(a) (maximum sentence for class A felonies). The term ultimately served is then subject to determination

by the indeterminate sentencing review board of the state department of corrections. Chapter 9.95 RCW. The court was further required to sentence Mr. Harkey to lifetime community custody under the supervision of the department following his release from total confinement. Former RCW 9.94A.712(5).

Mr. Murillo's plea statement was similar to Mr. Harkey's plea statement, which indicated that the outside "standard range of actual confinement" was the high end of the standard range, when it is actually life imprisonment for a sex offender subject to indeterminate sentencing. *Compare* 134 Wn. App. at 525 *with* CP:8. Like Mr. Harkey's plea statement, Mr. Murillo's plea statement included preprinted language describing indeterminate sentencing for the sex offenses to which he had pleaded guilty. 134 Wn. App. at 525. Nonetheless, because Mr. Murillo's plea was accepted without mention by the court that it must impose a maximum sentence, that the sentence within the standard range would represent only a minimum term, or that he was subject to a life term of community custody, Division III of this Court held that Mr. Murillo must be allowed to withdraw his plea.

The State argues that *Murillo* is distinguishable because the court at Mr. Harkey's change of plea hearing was clearer about the

maximum term to which he would be sentenced; but this effort to distinguish *Murillo* is unpersuasive. As in *Murillo*, conflicting statements were included in the plea statement and the comments of the judge reinforced the impression that the standard range was the range of “actual confinement.”

Before the change of plea hearing, Mr. Harkey had reviewed the 14-page plea statement (page count including “Appendix A”). The portions of the statement that had been completed with sentence range information specific to him were incorrect – the “standard range of actual confinement” indicated that the outside of the range was the high end of the standard range rather than life. CP 8 (§ 6(a)). The disclosure of the sentence that would be recommended by the prosecutor (“Appendix A”) said that the “State shall remain free to recommend any sentence, but the Defense may argue for SSOSA ...” It continued that, “If the SSOSA option is used, the parties stipulate to 114 months of the above-listed standard range in prison ...” with no indication this was a minimum sentence and no mention of a lifetime maximum. *Id.*

Given these problems with the plea statement, the fact that Mr. Harkey confirmed that he had reviewed it does not help the State. The preprinted portions of the 14-page document provided conflicting (and

correct) information about indeterminate sentencing – it cannot overcome the case-specific mistakes in this case any more than they did in *Murillo*.

The court made similar conflicting statements to Mr. Harkey; these reinforced rather than clarified the misleading information in the plea statement. The court stated:

THE COURT: This crime carries with it a maximum sentence of life imprisonment and a \$20,000 fine. Based upon your criminal record, the standard range for actual confinement is between 86 to 114 months.

* * *

THE COURT: ... As I said, the standard range for actual confinement is between 86 to 114 months.

Now, in addition to that there would be costs, fines.

Now, the prosecution has made a recommendation to me; are you familiar with what that recommendation is?

MR. HARKEY: Yeah.

THE COURT: They recommend a standard range, but it gives you the opportunity to argue for SOSA; do you understand the recommendation?

* * *

THE COURT: Now, under this type of sentence, I would sentence you to life with a request for a

minimum period of time to be served. It's up to the review board, the sentencing board, in order to indicate what sentence you would actually receive, but they would take into consideration my recommendation with regard to the minimum amount.

As indicated, you may or may not qualify for the SOSA requirement. And you understand what that means? Okay. And with regards to SOSA, if you fail to comply with that, you would be sentenced, you'd be brought back and be resentenced and that would be toward the maximum of this range,; do you understand that? Okay.

6/11/04 RP:5-9.

It was at this point that Mr. Harkey did not respond other than with an "okay." *The judge himself indicated that he could not tell whether or not Mr. Harkey understood the sentencing consequences.*

6/11/04 RP:9. The hearing ended at that point without any plea being accepted. *Id.*

Clearly, there was an insufficient acknowledgement that he understood the sentencing consequences at this first, aborted plea hearing – the court itself stated so on the record.

At the change of plea hearing held three days later, the Court merely summarized what was said at the previous hearing, again informing Mr. Harkey that his "standard range for actual confinement is between 86-114 months." 6/14/04 TR:2.

Mr. Harkey's criminal history included in his judgment and sentence indicates that his only prior adult conviction had been for a VUCSA/marijuana violation, a crime for which there is also a standard range and a maximum term, but for which he would have received a determinate sentence. Given Mr. Harkey's lack of experience with indeterminate sentencing, the court's reference to a "maximum term ... of life" could clearly have been understood to refer to the statutory maximum, not a mandatory maximum that would be imposed on Mr. Harkey.

B. There is No Affirmative Evidence on the Record that Mr. Harkey Understood the Consequences of His Plea

As stated above, the plea statement itself contained conflicting information; the critical paragraph here is the one that contains the handwritten, individualized information for Mr. Harkey's case – paragraph 6.a. And that paragraph states that the *Total Actual Confinement* is 86-114 months. CP:8.

While the judge at the initial, aborted plea hearing did make a statement that he "would sentence you to life with a request for a minimum period of time to be served. It's up to the review board, the sentencing board, in order to indicate what sentence you would actually

receive, but they would take into consideration my recommendation with regard to the minimum amount. ..." (6/11/04 RP:8); it was at this point that Mr. Harkey became unable to respond to the judge's questions. The judge himself stated that he would not take the plea because he could not tell whether Mr. Harkey understood the consequences: "Well, I'm seeing a great deal of reluctance on this, and I don't understand whether it's because you're uncertain about that, uncertain about the consequences, but I'm reluctant to take a plea unless I have a firm acknowledgment that he's going to wish to plead guilty at this time." 6/11/04/ RP:9.

At the change of plea hearing on June 14, the court did not take any steps to confirm that Mr. Harkey actually understood the "determinate-plus" sentencing scheme that applied to his crime. Instead, he repeated the incorrect advice that his "standard range for actual confinement is between 86 to 114 months." 6/14/04 RP:2. Although the court did refer to the maximum term of life, it did not inform Mr. Harkey that this was a mandatory maximum to which he would automatically be sentenced. *See* 6/14/04 RP:2.

II. CONCLUSION

Mr. Harkey was not informed of the correct sentencing consequences of his plea. His plea was not voluntary, knowing, or intelligent, and thus a manifest injustice. Mr. Harkey should be permitted to withdraw his plea.

Alternatively, this case should be remanded to the sentencing court to vacate the unconstitutional condition barring all contact with his children.

DATED this 14th day of December, 2015.

Respectfully submitted,



Stacy Kinzer WSBA #31268
Attorney for Defendant/Movant
Nicholas Alan Harkey

CERTIFICATE OF SERVICE

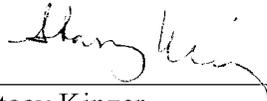
Today I addressed electronic mail addressed to the attorney for the respondent, Anne Crusier, containing a copy of the REPLY BRIEF in *State v. Harkey*, No. 47061-6, in the Court of Appeals, Division II, for the State of Washington;

and mailed a copy via U.S. Mail, to:

Nicholas Alan Harkey #845524
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of December, 2015.



Stacy Kinzer
Done in Seattle, Washington

STACY KINZER LAW OFFICE

December 14, 2015 - 4:48 PM

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