

NO. 47061-6-II

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

STATE OF WASHINGTON, Respondent

v.

NICHOLAS ALAN HARKEY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.04-1-00532-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Harkey's plea was knowing, intelligent, and voluntary. He was not misadvised about the direct consequences of his plea.**
- II. **Harkey's judgment and sentence should be corrected as to his conditions of community custody, to clarify that the provision of his judgment that disallows contact with minors does not include his minor biological children.**

STATEMENT OF THE CASE

When Mr. Harkey was twenty-three years old, he raped twelve year-old A.R.L. CP 5. He elected to plead guilty to rape of a child in the second degree and seek a SSOSA sentence. RP (6-11-04) at p. 7, RP (6-14-04) at p. 2, 7. Harkey first appeared before the trial court to enter a guilty plea on June 11, 2004. RP (6-11-04). Harkey completed a statement of defendant on plea of guilty. CP 7-15. In the statement of defendant on plea of guilty, Harkey was advised of his standard range and the maximum term of his sentence. CP 8. He was advised that because he was pleading guilty to rape of a child in the second degree, he would be sentenced pursuant to RCW 9.94A.712, and that the court would impose a sentence of life in prison, which was equal to the maximum term, and that the court would further impose a minimum term of confinement within the standard range. CP 9, at paragraph (6) (f). Harkey was advised that "The minimum term of confinement that is imposed may be increased by the

Indeterminate Sentence Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from community custody.” CP 9. He was advised that he would be on community custody for life. CP 9.

At the June 11th hearing, Harkey was advised that his standard range of total confinement was 84 to 116 months. RP 5.¹ He was advised that his community custody period would be for life. RP (6-11-04), p. 5. He was advised he would have to register as a sex offender for up to his life. RP 5-6. He was advised that he would be sentenced to life, with a minimum period of time to be served. RP (6-11-04), p. 8. He was advised that the sentencing review board would determine the sentence he would actually serve. RP (6-11-04), p. 8. When asked if, with these consequences in mind, he wished to plead guilty, Mr. Harkey expressed reluctance, said he was having an “anxiety attack,” and the court recessed the hearing. RP (6-11-04), p. 9.

Harkey came back before the court on June 14, 2004. The court asked Harkey if he wished to proceed with his guilty plea, and Harkey

¹ At the time of sentencing, it was discovered that Harkey’s actual standard range was 102 to 136 months to life. CP 48, RP (10-18-04) at p. 5. However, Harkey agreed, at the time of his plea, that if additional criminal history was found prior to sentencing, he would be bound by the new standard range. *Id.* Further, Harkey did not seek to withdraw his plea on this basis and does not raise any issue with respect to the new standard range in this direct appeal. See *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006) (When a defendant learns that the standard range is incorrect prior to the court entering the sentence, and he does not seek to withdraw his plea on that basis, he waives his right to challenge the voluntariness of his plea on appeal.)

replied “yes.” RP (June 14, 2004), p. 1. The court again confirmed with Harkey that he has no difficulty reading or writing, that he understood what he was charged with, and the rights he was giving up by pleading guilty. RP (June 14, 2004), p. 1-2. The court reiterated that Harkey faced a maximum term of life, community custody for life, and a standard range of 84 to 116 months. RP (June 14, 2004), p. 2. The court reiterated that the sentencing review board would determine the actual length of his confinement, to which Harkey confirmed his understanding by saying “Yes.” RP (June 14, 2004), p. 2. Finally, the court said:

Court: Okay. Now, knowing all these rights that are being waived and the consequences that you face, at this time do you wish to plead guilty to the charge of Rape of a Child in the Second Degree?

Mr. Harkey: Yes.

Court: You’re making this decision to plead guilty freely and voluntarily?

Harkey: Yes.

RP (June 14, 2004), p. 2-3.

Mr. Harkey confirmed that he signed the statement of defendant on plea of guilty, and that it was a true statement. RP (June 14, 2004), p. 3.

This untimely appeal followed.²

² Although this appeal is untimely in the usual sense, the State was unable to show that Mr. Harkey knowingly and voluntarily waived his right to appeal.

ARGUMENT

I. Harkey's plea was knowing, intelligent, and voluntary. He was not misadvised about the direct consequences of his plea.

Harkey argues that he was misinformed about a direct consequence of his guilty plea. Specifically, he claims that both his statement of defendant on plea of guilty and the court's oral colloquy misinformed him that he would potentially face life in prison as a result of his plea. Harkey's claim lacks support in the record and his judgment and sentence should be affirmed.

a. Written statement of plea of guilty

Harkey's statement of defendant on plea of guilty advised him of his standard confinement range. CP 8. His statement correctly advised him that he would be placed on community custody for up to the period of his life. CP 8. His statement correctly advised him that if he was entering a plea of guilty to rape of a child in the second degree, committed while he was over the age of eighteen, he would be sentenced to a maximum term of confinement equal to the statutory maximum sentence. CP 9. He was advised that the maximum statutory sentence in his case was life in prison. CP 8. The statement of defendant on plea of guilty states:

If this offense is for any of the offenses listed in subsections (aa) or (bb), below, the judge will impose a maximum term of confinement consisting of the statutory

maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the Indeterminate Sentencing Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody. In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the period of community custody I will be under the supervision of the Department of Corrections and I will have restrictions and requirements placed upon me and I may be required to participate in rehabilitative programs.

CP 9.

The statement of defendant on plea of guilty contains Mr. Harkey's signature, right below the following statement: "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. 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." CP 13. The judge confirmed, by his signature, that the statement of defendant on plea of guilty was signed by the defendant in open court in the presence of his lawyer and the court, and that the defendant had previously read the entire statement and that he understood it in full. CP 13. The appendix attached to the statement of defendant on plea of guilty contains the offer of settlement from the State,

in which the standard range of confinement is referred to as the “minimum standard range sentence.” CP 14. The maximum term of sentence is clearly stated as “Life.” CP 14. The appendix also states: “The defendant shall also be sentenced to Community Custody under the supervision of the Department of Corrections and the ISRB for any period of time the *person is released from confinement before the expiration of the maximum sentence.*” CP 14 (emphasis added).

To satisfy due process requirements, courts, before accepting a guilty plea, must inform the defendant of the direct consequences of such a plea, including both the applicable standard range and the maximum sentence for the charged offense as determined by the legislature. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *In re Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); *State v. Kennar*, 135 Wn.App. 68, 74–75, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007). “Knowledge of the direct consequences of the plea can be satisfied by the plea documents.” *State v. Codiga*, 162 Wn.2d 912, 923, 175 P.3d 1082 (2008) (citing *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001)). Due process does not require that the court “orally question the defendant to ascertain whether he or she understands the consequences of the plea and the nature of the offense,” and may rely on the defendant's plea form, attached documents, and the defendant's confirmation that he

reviewed the form with his attorney and understood. *Codiga* at 923-24. (citing *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980)). “When a defendant completes a 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, 811 (1998).

Harkey’s complaint about his statement of defendant on plea of guilty is not very clear. He generally complains that it is confusing, but he doesn’t point specifically misleading paragraphs that would render his plea unconstitutional. He complains that although he was fully informed that the maximum penalty for his offense was life, such an advisement doesn’t really mean anything because in the regular felony context, the maximum penalty is simply theoretical. See Brief of Appellant at 13. But even if it were excusable for Harkey to simply ignore the clearly stated maximum penalty for his offense, he doesn’t explain how he couldn’t have known, having read paragraph (6) (f), that he faced potential incarceration up to his natural life. He appears to complain that the sheer length of paragraph somehow renders it confusing, but this argument is not persuasive. He appears to suggest that when a crime falls within the scope of former RCW 9.94A.712, an enhanced plea form of some kind is required, where the defendant is told something more than what he is

already told in paragraph (6) (f). But Harkey cites no case which holds that the language found in paragraph (6) (f) is insufficient as a matter of law in cases which are sentenced under former RCW 9.94A.712 or RCW 9.94A.507. Harkey makes much of the fact that the plea form says “Standard Range Actual Confinement,” rather than “standard minimum term of confinement,” or something along those lines. But the form is correct.³ The standard range describes the period of time within which the judge can select the amount of time that the defendant *must* serve in confinement as a result of his plea. Whether it is termed a standard range of actual confinement, or a standard range of minimum actual confinement, the advisement is correct.

Because Harkey was unambiguously informed that the court would impose a life sentence with a standard range of confinement for time that he must serve at a minimum, he was adequately informed of the direct consequence of his plea that he faced life in prison as a result of his plea.

Likewise, the trial court’s oral colloquy with Mr. Harkey adequately advised him of the direct consequences of his plea. The court did not make any remark that undermined the clear notifications Harkey received in his statement of defendant on plea of guilty. As noted in the statement of facts, above, the trial court advised Harkey he was facing

³ The language “Standard Range of Actual Confinement” is the language that appears on the form currently published on the Washington Courts website. See ***

lifetime community custody and potential lifetime sex offender registration. RP (6-11-04) at p. 5-6, 8. Harkey was advised by the trial court that the sentence the court would impose would be a life sentence with a minimum time to be served in confinement, which the court advised would be between 84 and 116 months. RP (6-11-04), p. 6, 8. The court advised Harkey that the sentencing review board would determine the actual length of the sentence he would serve. RP (6-11-04) at p. 8. The court's clear meaning on this point was that although the defendant would be serving a mandatory period of actual total confinement, he may be required to serve additional time beyond that based on the determination of the sentencing review board, up to his life. Although the reluctance of the defendant to plead guilty resulted in the court recessing the June 11th, 2004 hearing, the advisements given to the defendant were adequate and complete. When the parties and the court reconvened on June 14, 2004, the court again told Harkey that his maximum term in prison was life, that his maximum term of probation was life, that his standard range of confinement was 84 to 116 months, and that sentencing review board would determine the actual length of his sentence. RP (6-14-04) at p. 2. The court asked "[d]o you recall all those consequences?" Id. Harkey replied that he did. Harkey then pleaded guilty to rape of a child in the second degree. RP 2-3.

In arguing that the trial court's colloquy was insufficient, Harkey first argues that the trial court did not inform him that he could be held beyond his mandatory initial term of confinement. But the record belies this claim. The court twice told Harkey that his actual length of sentence would be determined by the indeterminate sentence review board. Harkey next complains that at the first sentencing hearing, Harkey appeared overwhelmed when the direct consequences of his plea were explained to him. That's true. But Harkey ignores the fact that rather than proceed to trial, Harkey returned to the court three days later and voluntarily entered a plea of guilty without reservation. Harkey's singular focus on what occurred at the June 11th hearing ignores the fact that Harkey voluntarily returned to the court to enter a plea of guilty on June 14th. In essence, Harkey appears to believe that where a defendant backs out of a plea hearing, expressing reticence, he cannot then change his mind and return to court with the intention of pleading guilty. But Harkey cites no authority for the proposition that a trial court may not later accept a guilty plea from a defendant who, having intended to plead guilty on a prior occasion, backed out of the plea. Harkey has not shown he was incompetent at the June 11th hearing. Rather, he was reticent and scared. This is a significant difference between the two. If Harkey had any misimpressions about the consequences of his plea at the June 11th

hearing, those misimpressions were corrected at the June 14th hearing. But Harkey did not have any misimpression following the June 11th hearing. In fact, it was because he fully understood the consequences of his plea that he became scared and withdrew his intent to plead guilty at the June 11th hearing. Harkey's reaction at the June 11th hearing supports the inference that he was fully advised of the consequences of this plea. Nevertheless, with the assistance of counsel, he elected to plead guilty three days later and seek a sentence under SSOSA.

Harkey's reliance on *In re Personal Restraint of Murillo*, 134 Wn.App. 521, 142 P.3d 615 (2006), is misplaced. In *Murillo*, the defendant was explicitly misadvised about the sentence he faced. The trial court told Murillo that his standard range was 51 to 68 months, and said "And I have to impose sentence within that range. I guess I can go low, but I cannot go above under the present law." *Murillo* at 526. The trial court used the portion of the judgment form used for sentences *not* subject to RCW 9.94A.712 to memorialize the 59 ½ month sentence. *Id.* The portion of the form used for sentences under .712 was left blank. *Id.* The court said nothing about community custody at the guilty plea hearing, and the portion of the guilty plea form which would set forth the term of community custody was left blank. *Id.* The mistakes in *Murillo* were numerous and significant. The remarks of the court undermined any

correct advisement which might have appeared in the statement of defendant on plea of guilty, and the statement, moreover, bore mistakes.

Here, Harkey was correctly informed of the direct consequences of his plea, both in his written statement of defendant on plea of guilty and by the court during the oral colloquy. Harkey has not overcome the strong presumption that his plea was voluntary where his plea form contained correct language about the sentence he would face and he admitted to reviewing it, fully discussing it with his lawyer, understanding it, and he signed it. Harkey's plea was knowing, intelligent, and voluntary. His conviction should be affirmed.

II. Harkey's judgment and sentence should be corrected as to his conditions of community custody, to clarify that the provision of his judgment that disallows contact with minors does not include his minor biological children.

Harkey asks this Court to order that his judgment and sentence be amended to reflect that he should be permitted to contact his minor biological children, who were not victims of his crime. The State agrees, and asks this Court to remand this case to the trial court to amend the judgment and sentence in this fashion.

CONCLUSION

Mr. Harkey's conviction should be affirmed, but his judgment and sentence should be amended.

DATED this 6th day of November, 2015.

Respectfully submitted:

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November 06, 2015 - 4:00 PM

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