

No. 50219-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY DENATALE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-00040-3
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Anthony DeNatale's guilty plea was involuntary because a mutual mistake resulted in him being misinformed about the sentencing consequences of the plea agreement.
2. The determinate sentence imposed by the trial court is contrary to law.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the Sentencing Reform Act requires a court to sentence an offender with Anthony DeNatale's current convictions and criminal history to an indeterminate sentence consisting of a minimum and maximum term of confinement, but where his plea agreement included a joint recommendation for a determinate sentence, was DeNatale misinformed of the sentencing consequences of his plea thus rendering his plea involuntary? (Assignments of Error 1 & 2)
2. Where the Sentencing Reform Act requires a court to sentence an offender with Anthony DeNatale's current convictions and criminal history to an indeterminate sentence consisting of a minimum and maximum term of confinement, is DeNatale's determinate sentence contrary to

law? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The State charged Anthony DeNatale by Information with four counts of rape of a child in the first degree (RCW 9A.44.073). (CP 3-5) The State also alleged that the offenses were domestic violence incidents (RCW 10.99.020) and were aggravated because DeNatale used his position of trust to facilitate the commission of the offenses (RCW 9.94A.535(3)(n)). (CP 3-5) The charges were based on allegations that DeNatale committed different sexual acts with his granddaughter, E.S., when she was less than 12 years old. (CP 1-2, 3-5)

DeNatale and the State negotiated a plea agreement whereby the State would reduce the charges and DeNatale would stipulate to an exceptional sentence. (RP 279-82) The State filed an Amended Information charging one count of child molestation in the second degree (RCW 9A.44.086) and five counts of rape of a child in the third degree (RCW 9A.44.079). (CP 54-56) DeNatale and the prosecutor agreed to a joint recommendation consisting of the standard range maximum for the first five counts, to be served consecutively, for a total of 30 months of confinement. (CP 57, 61; RP 280, 294) They also agreed to recommend a 60 month term of

community custody in lieu of incarceration for the sixth count. (CP 57, 61; RP 280, 294)

As part of his plea, DeNatale acknowledged that the State could likely prove the greater original charges, but was pleading guilty to the lesser crimes to take advantage of the State's offer and to save E.S. and her family the stress of a trial. (CP 65; RP 290, 291-97) The trial court found that DeNatale was acting freely and voluntarily, and accepted his guilty plea. (RP 298)

The State subsequently discovered that the agreed upon sentencing recommendation was not authorized by law because count six, third degree rape of a child, cannot be subject to an exceptional sentence downward. (RP 301-02; CP 79) To fix the error and preserve the negotiated sentence recommendation, the parties asked the court to allow DeNatale to withdraw his plea and to allow the State to file a Second Amended Information changing count six from rape of a child in the third degree to assault of a child in the third degree (RCW 9A.36.031). (RP 302-03; CP 81-83)

The court granted both requests, and accepted DeNatale's plea to the Second Amended Information. (RP 302-12; CP 80, 84-93) The court also adopted the joint sentencing recommendation. (RP 312-13, 316-17; CP 101, 103-04, 114-18) DeNatale filed a

timely notice of appeal. (CP 119)

IV. ARGUMENT & AUTHORITIES

“A plea agreement functions as a contract in which the defendant exchanges his guilty plea for some bargained-for concession from the State: dropping of charges, a sentencing recommendation, etc.” *State v. Barber*, 170 Wn.2d 854, 859, 248 P.3d 494, 497 (2011) (citing *State v. Sledge*, 133 Wn.2d 828, 838-40, 947 P.2d 1199 (1997)). Given the contractual nature of plea agreements, issues about how they are interpreted are questions of law this court must review de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); *In re Hudgens*, 156 Wn. App. 411, 416, 233 P.3d 566, 568 (2010).

Due process requires that a guilty plea must be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). If a defendant is misinformed about the sentencing consequences, his plea is involuntary. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).¹ And an involuntary plea creates a manifest injustice.

¹ Overruled on other grounds by *Barber*, 170 Wn.2d at 856.

Isadore, 151 Wn.2d at 298. A “manifest injustice” is “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974); *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991).

The Sentencing Reform Act provides that a sentencing court “shall impose punishment” per RCW 9.94A.507 for certain sex offenses. RCW 9.94A.505(2)(a)(ix). Under RCW 9.94A.507(1)(b), an offender being sentenced for a “sex offense” must be sentenced to an indeterminate term if he has a prior conviction for a “two strike” sex offense included in RCW 9.94A.030(38)(b). (The full text of RCW 9.94A.507 is attached in the Appendix.)

The sentence must contain a minimum term of confinement that falls within the standard range, according to the seriousness level of the offense and the offender score, and a maximum term equaling the statutory maximum sentence for the offense. RCW 9.94A.507(3). The minimum term may also constitute an exceptional sentence as provided by RCW 9.94A.535. RCW 9.94A.507(3)(c)(i).

Offenders sentenced under this statute fall under the purview of the Indeterminate Sentence Review Board through the maximum term of the sentence, and those released from prison are

supervised by the Department of Corrections and remain on community custody through the maximum term of the sentence. RCW 9.94A.507(5).

In 2001, DeNatale was convicted of two counts of child molestation in the first degree, a “strike” sex offense included in RCW 9.94A.030(38)(b). In the current case, he pleaded guilty to second degree child molestation and third degree rape of a child, both included in the SRA’s definition of “sex offense.” RCW 9.94A.030(47)(a)(i). At sentencing, the court adopted the joint recommendation of a 360 month determinate sentence followed by 60 months of community custody. (CP 103-04; RP 312-13, 316-17) But under RCW 9.94A.507(1)(b), DeNatale should have received an indeterminate sentence consisting of a minimum term and a maximum term.

The court’s sentencing authority is controlled by statute. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). The constitutional separation of powers doctrine precludes the judiciary from imposing a sentence that is not expressly authorized by statute, because “the trial court’s discretion in sentencing is that which is given by the Legislature.” *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). Consequently, the trial court

lacked the authority to impose a determinate sentence because DeNatale's offense and criminal history required the court to sentence him under RCW 9.94A.507.

Neither the parties nor the court seemed aware that RCW 9.94A.507 applied to DeNatale's sentence. DeNatale was clearly misinformed as to a direct consequence of his plea, rendering his plea invalid. *Barber*, 170 Wn.2d at 858 (citing *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003)).

However, "specific performance is not an available remedy in cases of mutual mistake. Where the parties have agreed to a sentence that is contrary to law, the defendant may elect to withdraw his plea.... The remedy of specific performance was intended to address the State's breach of a plea agreement ... and is not appropriately extended to the mutual-mistake context." *Barber*, 170 Wn.2d at 873. Accordingly, DeNatale must be allowed to withdraw his plea. *Barber*, 170 Wn.2d at 873.

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V. CONCLUSION

DeNatale was misinformed about the sentencing consequences of his plea, and his plea was therefore involuntary and invalid. Accordingly, DeNatale's case should be remanded to the Superior Court to allow him to withdraw his plea.

DATED: August 14, 2017



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CERTIFICATE OF MAILING

I certify that on 08/14/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Anthony DeNatale, DOC# 823752, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

ATTACHMENT
RCW 9.94A.507

West's Revised Code of Washington Annotated
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)
Sentencing

West's RCWA 9.94A.507

9.94A.507. Sentencing of sex offenders

Effective: August 1, 2009

Currentness

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); or

(b) Has a prior conviction for an offense listed in *RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.95.420 through 9.95.435.

(b) An offender released by the board under RCW 9.95.420 is subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

Credits

[2008 c 231 § 33, eff. Aug. 1, 2009. Prior: 2006 c 124 § 3, eff. July 1, 2006; (2006 c 124 § 2 expired July 1, 2006); 2006 c 122 § 5, eff. July 1, 2006; (2006 c 122 § 4 expired July 1, 2006); 2005 c 436 § 2, eff. July 24, 2005; 2004 c 176 § 3, eff. July 1, 2005; prior: 2001 2nd sp.s. c 12 § 303. Formerly RCW 9.94A.712.]

Notes of Decisions (5)

West's RCWA 9.94A.507, WA ST 9.94A.507

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