

FILED
Court of Appeals
Division II
State of Washington
12/4/2017 1:57 PM
NO. 50219-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DENATALE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 16-1-00040-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's challenge to the validity of his knowing, intelligent, and voluntary guilty plea be rejected when he was properly advised of the statutory maximum sentence and applicable standard range for each offense to which he pleaded guilty, and the parties' joint sentencing recommendation was authorized by RCW 9.94A.507(3)?
2. Whether this Court should remand the matter for correction of the scrivener's error in the judgment and sentence?

B. STATEMENT OF THE CASE.

1. Procedure and Facts Relevant to Appeal

On January 4, 2016, the Pierce County Prosecutor's Office charged ANTHONY DENATALE (hereinafter "defendant") with four counts of Rape of a Child in the First Degree. CP 3-5. Each count was charged as a domestic violence incident and aggravated by defendant's use of his position of trust, confidence, or fiduciary responsibility to facilitate the

commission of the crime. *Id.* The State also filed a Persistent Offender Notice. CP 6-7.

According to the Declaration for Determination of Probable Cause, defendant repeatedly sexually abused his step-granddaughter, E.S., when she was ten and eleven years old. CP 1-2. *See also* RP 29-30.

E.S. was forensically interviewed... During the interview E.S. disclosed multiple incidents of abuse, with the last time being approximately a week before Christmas and the first time when she was ten years old. During the first incident, E.S. said the defendant took her into his room and talked to her about if she loved him and about telling anybody. They went into the garage where she said she had to suck his "pee pee." E.S. said it wasn't going well that time but it got better with practice. E.S. disclosed another time when they were in the garage. She was laying down on her back with her legs spread. E.S. said the defendant pulled down his pants and "pushed" his "Pee pee" on hers, "under," where the pee comes out. She described the defendant grabbing his penis and pushing it in and said it hurt for several days when she peed. E.S. described the defendant performing oral sex on her more than one time. E.S. said it happened in the garage a couple of times and in his room the rest of the time. E.S. described having to perform oral sex on the defendant "many many times." She described "practicing" and said that practicing involved using suckers and candy canes. E.S. demonstrated how she practiced and said the defendant told her to just use her tongue. E.S. said she and the defendant got better at it the more they did it. She described three times when the defendant would "pee" in her mouth and she swallowed it each time. During the last incident, E.S. said she was in the car with the defendant when he showed her a wallet full of money he'd given her and then gave her a cell phone. The defendant told E.S. she couldn't let her parents find the phone and put his number in it. They then went to a store for her to shop with her money. After the store, E.S. said

they were driving back to the defendant's house and he told E.S. to pull down her pants and underwear, which she did. E.S. said the defendant touched her "pee pee" with his fingers, unzipped his pants and "poked" his "big hairy pee pee" out of the hole in his underwear. E.S. said she had to take off her seatbelt and lean over and perform oral sex as the defendant drove. E.S. said she had to move her mouth back and forth until his "pee pee" "started to water" in her mouth, which she swallowed.

CP 1-2. *See also*, RP¹ 290 (court reviews probable cause declaration), 303 (defendant admits conduct based on original information).

The case was called for trial on January 26, 2017. RP 1-3. On February 1, 2017, midway through jury selection, defendant pleaded guilty to an amended information which charged him with one count of Child Molestation in the Second Degree and five counts of Rape of a Child in the Third Degree, all domestic violence related. CP 54-56, 57-66; RP 279-98. The parties later jointly moved to allow defendant to withdraw his February 1, 2017, guilty plea in order to correct an error of law necessary to achieve the intent of the parties' sentencing recommendation. CP 79; RP 301-02. The court granted the motion and allowed defendant to withdraw his February 1, 2017, guilty plea. CP 80; RP 302.

¹ The verbatim report of proceedings is contained in three volumes. The volume from September 2, 2016, is paginated separately and will be referred to by date (i.e., 9/2/16 RP) followed by the page number. The remaining two volumes are paginated consecutively and will be referred to as "RP" followed by the page number.

On April 14, 2017, defendant pleaded guilty to one count of Child Molestation in the Second Degree, four counts of Rape of a Child in the Third Degree, and one count of Assault of a Child in the Third Degree, all domestic violence related. CP 81-83, 84-93; RP 302-12. In his statement on plea of guilty, defendant admitted the following:

I BELIEVE I AM NOT GUILTY OF THE AMENDED CHARGES, BUT I FULLY ADMIT THAT I HAD SEXUAL INTERCOURSE WITH E.S. WHEN SHE WAS UNDER THE AGE OF 12 AND I WAS MORE THAN 24 MONTHS OLDER THAN HER, AND NOT MARRIED TO HER, ON AT LEAST FOUR OCCASIONS ALL HAPPENING IN PIERCE COUNTY BETWEEN 12/1/14 AND 12/21/15. I AM PLEADING GUILTY TO TAKE ADVANTAGE OF THE STATE'S OFFER AND I BELIEVE I AM GUILTY OF THE CHARGES IN THE ORIGINAL INFORMATION AND WOULD BE FOUND GUILTY AT TRIAL. E.S. IS A FAMILY MEMBER.

CP 92. Defendant stipulated to prior convictions of Child Molestation in the First Degree. CP 94-96. The State notified the court on the record, in defendant's presence, that defendant was subject to review by the Indeterminate Sentence Review Board (ISRB) due to his prior conviction. RP 301. After a colloquy, the court accepted defendant's plea of guilty, finding it to be knowingly, intelligently, and voluntarily made. CP 93; RP 304-312.

The State recommended, and defendant agreed to, an exceptional sentence to the statutory maximum on all counts to run consecutively for a

total of 360 months confinement and sixty months of community custody.² CP 88, 114-118; RP 307, 312-13. Defendant was notified that due to his prior convictions of Child Molestation in the First Degree, the court would impose a maximum term of confinement consisting of the statutory maximum sentence and a minimum term of confinement either within the standard range or outside the standard range if the court found an exceptional sentence appropriate for his current offenses of Child Molestation in the Second Degree and Rape of a Child in the Third Degree. CP 86-87.

The court followed the recommendation of the parties and sentenced defendant to the statutory maximum for each count and ran each count consecutive to one another for a total of 360 months confinement and 60 months of community custody. CP 114-118, 97-111; RP 316. The court did not specify a minimum term of confinement and a maximum term of confinement in the judgment and sentence. *See* CP 103-105. Defendant filed a timely notice of appeal. CP 119-134. The court

² The parties specifically recommended an exceptional sentence of 120 months on Count I (second degree child molestation), an exceptional sentence of 60 months on Counts II through V (third degree rape of a child), and an exceptional sentence of zero months confinement but 60 months community custody on Count VI (third degree assault of a child), with all counts to run consecutively to one another. RP 312-13; CP 88, 114-118.

subsequently signed a proposed motion and order signaling its intention to enter a corrected judgment and sentence as to Counts I-V.³ CP 145-148.

C. ARGUMENT.

1. DEFENDANT'S CHALLENGE TO THE VALIDITY OF HIS KNOWING, INTELLIGENT, AND VOLUNTARY GUILTY PLEA SHOULD BE REJECTED, BECAUSE DEFENDANT WAS PROPERLY INFORMED OF THE SENTENCING CONSEQUENCES OF HIS PLEA AND THE JOINT SENTENCING RECOMMENDATION WAS LAWFUL.

The enforcement of valid plea agreements is of profound public importance. *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008).

A valid plea agreement is regarded as a contract, and both parties are bound by its terms. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). A guilty plea is valid when the totality of the circumstances show it was knowing, intelligent and voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); *Wood v. Morris*, 87 Wn.2d 501, 503, 505-06, 554 P.2d 1032 (1976).

Courts will only permit a plea to be withdrawn to correct manifest injustice. *Codiga*, 162 Wn.2d at 922-23 (citing CrR 4.2(f)). A manifest

³ It appears the trial court entered the proposed motion and order at a hearing in which defendant and trial counsel were present. CP 145-148, 149-150. The verbatim report of proceedings from that hearing was not requested by the parties but may be germane to the issues raised in this appeal. This Court may direct the supplementation of the report of proceedings per RAP 9.10.

injustice occurs when: (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) counsel was ineffective; or (4) the plea agreement was not kept. *State v. DeClue*, 157 Wn. App. 787, 792, 239 P.3d 377 (2010). The defendant bears the burden of proving manifest injustice, which is injustice that is obvious, directly observable, overt, and not obscure. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996); *State v. Pugh*, 153 Wn. App. 569, 577, 222 P.3d 821 (2009) (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). “Because of the many safeguards that precede a guilty plea, the manifest injustice standard for a plea withdrawal is demanding.” *Pugh*, 153 Wn. App. at 577.

Due process requires that a defendant’s guilty plea be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011); *Codiga*, 162 Wn.2d at 922. The criminal rules reflect this principle by requiring that the trial court not accept a guilty plea without first determining that the plea was made “voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). *See also, State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (a knowing and intelligent guilty plea must be made with a correct understanding of the charge(s) and the consequences of pleading guilty). This rule provides further safeguards to

protect a defendant against an involuntary plea. *Robinson*, 172 Wn.2d at 792; *State v. Knotek*, 136 Wn. App. 412, 424, 149 P.3d 676 (2006).

“The State bears the burden of proving the validity of a guilty plea,” including the defendant’s “[k]nowledge of the direct consequences” of the plea, which the State may prove from the record or by clear and convincing evidence. *Ross*, 129 Wn.2d at 287. When a defendant completes a written plea statement and admits to reading, understanding, and signing the statement, a strong presumption arises that the plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *see also Branch*, 129 Wn.2d at 642 (“a defendant’s signature on a plea statement is strong evidence of a plea’s voluntariness”). Additionally, when a judge orally inquires of the defendant and becomes satisfied of voluntariness on the record, the presumption of voluntariness is “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982).

Prior to acceptance of a guilty plea, “[a] defendant ‘must be informed of all the direct consequences of his plea.’” *State v. A.N.J.*, 168 Wn.2d 91, 113–14, 225 P.3d 956 (2010) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). Both the statutory maximum sentence determined by the legislature and the applicable standard sentence range are direct consequences of a guilty plea about which a

defendant must be informed to satisfy due process requirements. *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); *State v. Kennar*, 135 Wn. App. 68, 74–75, 143 P.3d 326 (2006).

A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *overruled on other grounds by State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011). Because a defendant's failure to understand the sentencing consequences of a guilty plea constitutes a manifest error affecting a constitutional right, a defendant may challenge the voluntariness of a plea for the first time on appeal. *Mendoza*, 157 Wn.2d at 587-91.

Here, defendant was properly advised of the statutory maximum sentence and applicable standard range for each offense to which he pleaded guilty. There is no dispute that the maximum sentence for second degree child molestation, a class B felony, is 10 years, and that the applicable standard range for defendant was 87 to 116 months. RCW 9A.44.086(2) (second degree child molestation is a class B felony); RCW 9A.20.021(1)(b) (maximum sentence for a class B felony is ten years); RCW 9.94A.510. There is no dispute that the maximum sentence for third degree rape of a child and third degree assault of a child, both class C

felonies, is five years, and that the applicable standard ranges for defendant were 60 to 60 months and 51 to 60 months, respectively. RCW 9A.44.079(2) (third degree rape of a child is a class C felony); RCW 9A.36.140(2) (third degree assault of a child is a class C felony); RCW 9A.20.021(1)(c) (maximum sentence for a class C felony is five years); RCW 9.94A.510. Defendant was informed of all of the above in his statement on plea of guilty. CP 85. *See also*, CP 58, 94-96, 115; RP 303.

During the plea hearing, defense counsel advised the court that he reviewed the plea form with his client, and he believed defendant was “making a knowing, intelligent, and voluntary decision to plead guilty.” RP 303. The court proceeded to engage in a colloquy with defendant to establish whether he understood the consequences of his guilty plea and whether he entered the plea voluntarily. RP 304-12. During the colloquy the following exchange occurred:

The Court: And you have had the opportunity to read and go over the statement of defendant on plea of guilty with your attorney?

Defendant: Yes, ma'am, the best I could.

...

The Court: ... Was he able to answer all the questions that you had concerning this statement of defendant on plea of guilty?

Defendant: Yes.

...

The Court: All right. Do you also understand that as to count one, child molestation in the second degree, that the maximum sentence the Court can impose is ten years and \$20,000?

Defendant: Yes, ma'am.

The Court: All right. And as to counts two through five, rape of a child in the third degree, you understand that the maximum sentence is five years and \$10,000 each?

Defendant: Yes, ma'am.

The Court: And as to Count No. 6, in the second amended complaint, assault of a child in the third degree, that the maximum sentence, again, is five years and \$10,000.

Defendant: Yes, ma'am.

...

The Court: Do you need any further time to talk with your attorney before entering your plea today, sir?

Defendant: No, ma'am.

The Court: Okay. Is your plea being made freely and voluntarily today, sir?

Defendant: Yes, ma'am.

RP 307-11. The court accepted defendant's pleas "as being freely and voluntarily, knowingly, and intelligently given." RP 312.

Defendant was correctly informed of the direct consequences of his plea, including the statutory maximum sentence and applicable

standard range for each charge. The record establishes his plea was knowingly, intelligent and voluntary. Defendant, however, claims that he was misinformed of the sentencing consequences of his plea, because the parties jointly recommended a determinate sentence but RCW 9.94A.507 required an indeterminate sentence. Brief of Appellant at 1, 5-7.

Defendant asks to withdraw his guilty plea. Brf. of App. at 7. *See State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011) (a defendant may elect to withdraw his plea where the parties agree to a sentence that is contrary to law). Defendant's argument fails, because his claim of error is one of form over substance. Here, although RCW 9.94A.507 applied to Counts I through V, the joint recommendation of the parties, which in practical effect resulted in a determinate sentence, was authorized by law.

An offender who is not a persistent offender shall be sentenced under RCW 9.94A.507 if he has a prior conviction for a "strike" offense and is convicted of any sex offense other than failure to register. RCW 9.94A.507(1)(b). Defendant's prior convictions of child molestation in the first degree are strike offenses, and his current convictions of child molestation in the second degree (Count I) and rape of a child in the third degree (Counts II through V) are sex offenses. RCW 9.94A.030(38)(b) ("[p]ersistent offender"), (47)(a)(i) ("[s]ex offense"). *See* CP 94-96. The

sentencing provisions of RCW 9.94A.507 therefore applied to defendant as to Counts I through V.

However, RCW 9.94A.507(3) provides,

(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.**

(Emphasis added). RCW 9.94A.535(2)(a) allows the court to impose an aggravated exceptional sentence if “[t]he defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.”

Here, the parties stipulated and agreed to an exceptional sentence outside the standard range, and the court found the exceptional sentence to be consistent with and in the furtherance of the interests of justice and the purposes of the sentencing reform act. CP 114-118; RP 301, 312-15. As allowed by RCW 9.94A.507(3), the parties agreed to the statutory

maximum for Counts I through V. If the statutory maximum is the “maximum term” pursuant to RCW 9.94A.507(3)(b), and the statutory maximum is also the “minimum term” pursuant to RCW 9.94A.507(3)(c), then the “indeterminate” sentence under RCW 9.94A.507(3) becomes the functional equivalent of a determinate sentence. Thus, defendant’s agreed sentence of 120 months on Count I functions the same as an “indeterminate” sentence of 120 to 120 months, and his agreed sentence of 60 months on Counts II through V functions the same as an “indeterminate” sentence of 60 to 60 months. The parties recommended a sentence that was in accordance with the law and specifically allowed by RCW 9.94A.507(3).

Additionally, the statutory maximum and the applicable standard range for Counts II through V, rape of a child in the third degree, was 60 months. RCW 9A.44.079(2); RCW 9A.20.021(1)(c); RCW 9.94A.510. Pursuant to RCW 9.94A.507(3), the maximum term would therefore be 60 months, and the minimum term would be 60 months. The practical effect of an indeterminate sentence of 60 to 60 months is again a determine sentence of 60 months. The State recommended 60 months, and the sentencing court imposed 60 months.

Moreover, defendant was informed in the plea form that RCW 9.94A.507 applied if the crime(s) to which he pleaded guilty were sex

offenses and he had a prior conviction for child molestation in the first degree. CP 86-87. *See also*, RP 301 (State informed court that due to defendant's prior conviction, he was subject to the ISRB). As discussed above, defendant pleaded guilty to sex offenses. *See also*, CP 84 (caption of plea form identifies same as plea to sex offense).

The fact that the trial court did not specifically inform defendant during the plea colloquy that he would be subject to an indeterminate sentence did not render defendant's guilty plea involuntary. Again, defendant was informed of the maximum sentence and applicable standard range for each offense to which he pleaded guilty. *See State v. Buckman*, 195 Wn. App. 224, 228-30, 381 P.3d 79 (2016), *review granted*, 187 Wn.2d 1008 (2017) (trial court's failure to inform defendant during plea colloquy that if he pled guilty to second degree child rape he could be subject to an indeterminate sentence did not render defendant's guilty plea involuntary, where defendant was informed of both the maximum sentence and applicable standard range for the charged crime).

Defendant was not misinformed of the sentencing consequences of his plea. He was correctly informed of the statutory maximum and applicable standard range for each charge, and the parties recommended a sentence permitted by RCW 9.94A.507(3). Defendant's argument elevates form over substance, and the substance of the agreed upon sentencing

recommendation was lawful. The totality of the circumstances demonstrate that defendant's plea was voluntary, and his convictions should be affirmed.

2. THIS COURT SHOULD REMAND THE MATTER TO THE TRIAL COURT FOR CORRECTION OF THE SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE.

A trial court may only impose sentences that statutes authorize. *State v. Albright*, 144 Wn. App. 566, 568, 183 P.3d 1094 (2008). A defendant may challenge a sentence that is contrary to law for the first time on appeal. *State v. Hood*, 196 Wn. App. 127, 138, 382 P.3d 710 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 331 (2017). Here, as argued above, the substance of the parties' sentencing recommendation was authorized by RCW 9.94A.507(3). The trial court followed the parties' recommendation and imposed the agreed upon sentence. RP 316-17; CP 97-111, 114-118. The substance of the sentence imposed was therefore authorized by statute. However, the State agrees that the form of the sentence imposed should reflect a maximum term and a minimum term as to Counts I through V (even though the maximum term and minimum will be the same number). The trial court essentially made a scrivener's error by failing to specify a maximum term and minimum term when it lawfully imposed the functional equivalent of a determinate sentence.

Clerical mistakes in judgments and orders may be corrected by the court at any time on the motion of any party. CrR 7.8(a). A scrivener's error is one that, when amended, would correctly convey the intention of the trial court, as expressed in the record at trial. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011); *see also Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). The amended judgment should either correct the language to reflect the trial court's intention or add the language that the trial court inadvertently omitted. *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016); CrR 7.8(a).

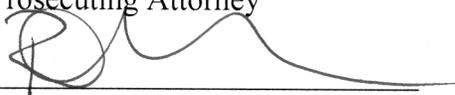
Here, the trial court has already entered a proposed motion and order signaling its intention to correct the judgment and sentence. CP 145-148. The State agrees this matter should be remanded to the trial court for correction of the judgment and sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions but remand for correction of the judgment and sentence.

DATED: December 4, 2017

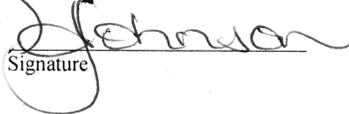
MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/4/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

December 04, 2017 - 1:57 PM

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Appellate Court Case Title: State of Washington, Respondent v Anthony Denatale, Appellant
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