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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESUS GORDILLO-REYES, APPELLANT

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

No. 16-1-02448-5

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**Brief of Respondent**

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

1. Does appellant's claim that his guilty plea should be withdrawn, presented for the first time on appeal, establish a manifest error affecting a constitutional right?
2. Was community custody a direct consequence of appellant's plea of guilty to an agreed exceptional sentence?
3. Was community custody a mandatory element of appellant's sentence?
4. Did appellant, at sentencing, waive any objection to ambiguities relating to a never-imposed community custody possibility?
5. Did the trial court err when it failed to consider appellant's parental needs when appellant never presented those parental needs to the trial court?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Appellant was originally charged with one count of rape of a child in the first degree, and three counts of child molestation in the first degree. CP 1-3. Three separate victims were alleged. *Id.*

Appellant reached a plea agreement with the State. This is memorialized in the Statement of Defendant on Plea of Guilty. CP 11. Appellant would plead guilty to an agreed exceptional sentence. *Id. See also* CP 37-39. The recommended conditions of that agreed exceptional sentence are specified on the Statement of Defendant on Plea of Guilty. *Id.* These specified conditions did not include community placement. *Id.* Appellant pled guilty. *Id.*; 2/3/17 VRP 4-20. Appellant received the agreed exceptional sentence he requested. CP 22-36.

At the time he pled guilty, appellant was advised by the trial court that he was subject to community custody. 2/3/17 VRP 12. The trial court did not speak to the duration of community custody that appellant was subject to. *Id.* Appellant's plea form includes the following sentence: "If the period of confinement is over one year, or if my crime is failure to register as a sex offender, and this is my second or subsequent conviction of that crime, the judge will sentence me to community custody for 36 months or up to the period of earned release, whichever is longer. CP 10.

The State agrees with appellant that if appellant had received a standard range sentence in this case, the community placement imposed would have been truncated lower than 36 months pursuant to 9.94A.701(9).<sup>1</sup>

The record below is devoid of any facts relating to the substance of the conversations between appellant and his lawyer prior to his plea of guilty. Defendant raises his objections to his plea of guilty for the first time on appeal.

Appellant's statement on plea of guilty states, at paragraph 6(c): "I waive any right to challenge the acceptance of my guilty plea on the grounds that my offender score or standard range is lower than what is listed in paragraph 6(a)." CP 8.

As part of his "120 month (agreed exceptional sentence), appellant agreed to "—NO contact minors" in the Statement of Defendant on Plea of Guilty. CP 11. The sentencing court imposed that condition. CP 35. Appellant never requested any modification of this requirement. 4/14/17 VRP 27-28.

Appellant asserts that on or around June 13, 2017, he wrote a letter to the sentencing court asking for contact with his daughter. Appellant's

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<sup>1</sup> There is no dispute about appellant's standard range: 87-116 months. CP 8. If appellant would have received a low end standard range sentence, 3 months of community custody would have been truncated from his community placement. RCW 9.94A.701(9). If appellant had received a high end standard range sentence, thirty two months would have been truncated from his community placement. *Id.*

Brief at 5; CP 48-50. Appellant remains represented by counsel. The record is devoid of any indication that appellant, through counsel, with proper notice to the State, ever properly noted this motion for hearing.

C. ARGUMENT.

1. APPELLANT HAS NOT DEMONSTRATED  
MANIFEST ERROR AFFECTING A  
CONSTITUTIONAL RIGHT.

Appellant's guilty plea withdrawal argument—presented for the first time on appeal—does not establish a “manifest error affecting a constitutional right.” RAP 2.5(a); *State v. Oseguera Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999). The record in this case contains no “statement made by the defendant to the effect the defendant would not have agreed to plead “guilty” if the defendant had been informed” of the correct community placement term. *State v. Oseguera Acevedo*, 137 Wn.2d at 203.

In this case, as in *Oseguera Acevedo*, the defendant “has not claimed, nor even suggested, he would have insisted upon going to trial if he had been fully informed of the community placement requirement.” *Id.* at 196. In *Oseguera Acevedo*,

[the defendant] is an undocumented alien from Mexico who has once been deported, returned to this country illegally, and will most likely be deported again upon his release from prison. He will not likely ever be available to serve a term of community placement. The reference to community placement in *Ross* that it produces a “definite, immediate

and automatic effect on a defendant's range of punishment” simply does not apply. One cannot logically conclude Respondent Oseguera's mandatory term of community placement is a “direct consequence” of his plea of guilty.

*Oseguera Acevedo*, 137 Wn.2d 179, 196, 970 P.2d 299, 307 (1999). In this case, respondent—consistently and without variation—agreed to, and received, a sentence recommendation including no community placement whatsoever. CP 11; CP 8; 2/7/17 RP; 4/14/17 RP.

These two circumstances in *Oseguera Acevedo* (no assertion by the defendant and no likelihood of community placement, anyway) were outcome determinative:

Respondent Oseguera was not specifically advised that a mandatory period of one year in community placement following his prison term would result from his plea of guilty in this case to possession of cocaine with intent to deliver. However, his expected deportation upon release from prison satisfies us that his term of community placement was not a “direct consequence” of his plea of guilty. His plea of guilty was voluntary and not the product of a “manifest” constitutional error.

*Oseguera Acevedo*, 137 Wn.2d at 198.

*Oseguera Acevedo* is controlling authority. Appellant has not established manifest error affecting a constitutional right, and accordingly has not satisfied RAP 2.5(a).

2. NONDISCRETIONARY COMMUNITY CUSTODY WAS NOT A DIRECT CONSEQUENCE OF APPELLANT'S PLEA STATEMENT WHICH AUTHORIZED THE SENTENCING COURT TO IMPOSE AN EXCEPTIONAL SENTENCE UPWARD.

Appellant's plea of guilty presented two distinct and interrelated events to the trial court: (1) appellant's plea of guilty; and (2) appellant's agreement to the imposition of an exceptional sentence. CP 11. That agreement to an exceptional sentence meant that community placement could no longer be a *mandatory* condition of appellant's sentence. While the sentencing court *could* impose a standard range sentence along with the required RCW 9.94A.701(9) community placement, the sentencing court was no longer *required* to do so. At sentencing, the sentencing court would be free to impose community custody, and equally free to dispense with it.

Appellant, represented by counsel, was competently advised regarding all the direct consequences of an agreed exceptional sentence.<sup>2</sup> Appellant, for the first time on appeal, argues that he was misadvised on the mandatory community custody consequence of a standard range

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<sup>2</sup> Courts must impose a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

sentence—a sentencing option that appellant knowingly, voluntarily, and intelligently forwent.

Appellant’s argument ultimately depends upon *State v. Ross*, 129 Wn.2d 279, 284-88, 916 P.2d 405, 409 (1996) for its holding that mandatory community placement is a direct consequence of appellant’s plea. In *Ross*

the question concerns whether Defendant understood the consequences of his plea. A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. The court has distinguished direct from collateral consequences by whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.

(citations and quotation marks omitted) *State v. Ross*, 129 Wn.2d at 284.

While mandatory community placement is a direct consequence of a standard range sentence, it is not a direct consequence of a sentencing when the imposition of community placement is wholly discretionary.

Community placement, even when imposed pursuant to a standard range sentence, is not that “definite.” *Ross*, 129 Wn.2d at 284.

Appellant’s standard range sentence was 87-116 months for each of his four child molestation in the second degree offenses. CP 8. Had appellant received a standard range sentence, the sentencing court would have been obligated to impose a term of community custody somewhere between four months and thirty-three months pursuant to RCW

9.94A.701(9).<sup>3</sup> But “[b]ecause an offender may reduce his term of confinement through earned early release, the exact amount of time he will serve on community custody ‘can almost never be determined when the sentence is imposed by the court.’” *State v. Bruch*, 182 Wn.2d 854, 862-63, 346 P.3d 724 (2015) (citing *In re Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)). When appellant asserts “The standard range of 87-116 months on crimes with 120 month statutory maximums does not allow for 36 months of community custody because the sentence would exceed the 120 month statutory maximum,”<sup>4</sup> appellant is plain wrong—because it just might. *Bruch* explains why. *Bruch*, 182 Wn.2d at 861-63. In this agreed exceptional sentence case, community placement was at its most indefinite, because the sentencing court had complete discretion to abandon it completely. CP 29.

Community placement was also neither an “immediate” effect nor an “automatic” effect of appellant’s plea. *Ross*, 129 Wn.2d at 284. Once the parties agreed to the propriety of an exceptional sentence, community placement became discretionary, as evidenced by the sentence appellant received. CP 29; *See State v. Hudnall*, 116 Wn. App. 190, 194-98, 64 P.3d 687 (2003).

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<sup>3</sup> Because the statutory maximum for each Child Molestation in the Second Degree offense was ten years. CP 8.

<sup>4</sup> Appellant’s Brief at 8.

Appellant has failed to demonstrate that a discretionary community placement term that was not imposed in this case was definite, immediate, and automatic. Accordingly, appellant has failed to demonstrate that the discretionary community placement was a direct consequence of appellant's plea. Appellant should not be allowed to withdraw his guilty plea.

3. ALTERNATIVELY, APPELLANT WAIVED ANY ERROR RESULTING FROM AN OVERSTATEMENT OF APPELLANT'S COMMUNITY CUSTODY EXPOSURE AT THE TIME OF HIS PLEA.

Appellant's statement on plea of guilty states that "if the period of confinement is over one year . . . the judge will sentence me to community custody for 36 months or up to the period of earned release, whichever is longer." CP 9. The judge, at the time of the plea, mentioned community custody (although she did not address its length). 2/3/17 VRP 12. On the other hand, the plea form at paragraph 6(a) explicitly left "community custody" blank, and at paragraph 6(g) advised the trial court that the parties were agreeing to an exceptional sentence with no community custody. The prosecuting attorney also stated that community custody was not being sought. 2/3/17 VRP 30-31.

It is not fair to say, given the thin record before this court, that defendant was misadvised regarding standard range community custody.

The advisement regarding community custody at the time of appellant's plea was ambiguous. However, at the outset of appellant's sentencing, the State asserted: "The State's recommendation is as follows: An agreed exceptional sentence of 120 months without community custody upon release." 4/14/17 VRP 22. Appellant's counsel did not object. *Id.* at 27. Appellant asked the court to follow the State's recommendation. *Id.* The court did so. *Id.*

Appellant, at sentencing, was unambiguously advised of the exceptional, non-standard, sentence he was actually facing, and he agreed to that sentence. Appellant waived any objection to the ambiguous plea form. *State v. Mendoza*, 157 Wn.2d 582, 591-92, 141 P.3d 49, 54 (2006).

4. GIVEN THE EVIDENCE BEFORE THE SENTENCING COURT, THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED THE NO CONTACT WITH MINORS CONDITION OF SENTENCE.

RCW 9.94A.505 states that:

As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

RCWA § 9.94A.505. Appellant had three minor victims,<sup>5</sup> and appellant agreed to the imposition of the no contact with minors provision.<sup>6</sup> Given these undisputed facts, the sentencing court did not abuse its discretion when it imposed the no contact with minors sentence.

Had the sentencing court been advised at sentencing that appellant had an ongoing parenting interest with a minor child, the sentencing court's factual predicate would have been much different and the sentencing court would have been obligated to consider appellant's right to parent in the context of the no contact with minors sentencing condition. But, given the facts before the sentencing court, appellant cannot fairly claim that the sentencing court abused its discretion by failing to *sua sponte* discover evidence of appellant's parental needs.

Appellant presents three cases which express the defendant's right to parent in the context of a criminal sentencing. Appellant's Brief at 12-16. However, in each of those cases the sentencing court expressly prohibited the defendant from contact with his child.<sup>7</sup> In this case, the order never mentioned appellant's child, and was entered, not only without

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<sup>5</sup> CP 22-36; CP 4-6.

<sup>6</sup> CP 11; 2/3/17 VRP 12.

<sup>7</sup> *In re Rainey*, 168 Wn.2d 367, 370, 229 P.3d 686, 687 (2010); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246, 1247 (2001); *State v. Letourneau*, 100 Wn. App. 424, 430, 997 P.2d 436, 440 (2000).

objection, but by agreement. CP 11. Appellant has not asserted that his counsel was ineffective in failing to raise the 'right to parent' issue and has presented nothing to suggest that the sentencing court was obligated to raise the issue on its own motion.

Since there is no showing that facts suggesting appellant's 'right to parent' were ever properly before the sentencing court, appellant has not demonstrated that the sentencing court abused its discretion when it imposed the no contact with minors sentencing condition in this case.

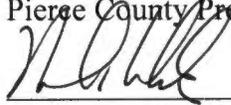
D. CONCLUSION.

Appellant's claim that his guilty plea should be withdrawn, raised for the first time on appeal, should be rejected because appellant has not demonstrated a manifest injustice affecting a constitutional right.

Alternatively, community custody was not a direct consequence of appellant's plea of guilty to an agreed exceptional sentence. Alternatively, appellant waived any ambiguity in his plea form when he asked the sentencing court to sentence him to an agreed and unambiguously presented exceptional sentence.

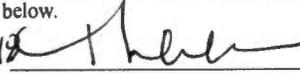
Appellant has failed to demonstrate that the sentencing court erred when it failed to consider appellant's parenting needs when appellant never presented any of those parenting needs to the sentencing court.

DATED: February 26, 2018.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail or~~  
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**PIERCE COUNTY PROSECUTING ATTORNEY**

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