

FILED
Court of Appeals
Division II
State of Washington
3/1/2018 10:17 AM
NO. 50642-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID LEE PARKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 15-1-03703-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Where defendant entered a guilty plea with the understanding that the State would recommend a Drug Offender Sentencing Alternative (DOSA) sentence, is defendant entitled to withdraw his guilty plea when his standard range was correctly calculated and there was an ultimately corrected scrivener's error regarding the mid-point of his standard range sentence? 1

B. STATEMENT OF THE CASE..... 1

 1. FACTS 1

C. ARGUMENT..... 4

 1. DEFENDANT IS NOT ENTITLED TO WITHDRAW HIS GUILTY PLEA WHEN HE WAS INFORMED OF THE CORRECT STANDARD RANGE SENTENCE AND THE SCRIVENER'S ERROR FROM SENTENCING HAS ALREADY BEEN CORRECTED. 4

D. CONCLUSION..... 15

Table of Authorities

State Cases

<i>In re Fonseca</i> , 132 Wn. App. 464, 469, 132 P.3d 154 (2006).....	7
<i>In re Personal Restraint Petition of Keane</i> , 95 Wn.2d 203, 622 P.2d 360 (1980).....	6
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 113-114, 225 P.3d 956 (2010).....	6
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011)	13, 14, 15
<i>State v. Davis</i> , 160 Wn. App. 471, 478, 248 P.3d 121 (2011).....	9
<i>State v. Durgeloh</i> , 180 Wn. App. 1023, 2014 WL 1389051 at * 6 fn. 18 (2014)	13
<i>State v. Hender</i> , 180 Wn. App. 895, 900, 324 P.3d 780 (2014).....	11
<i>State v. Klump</i> , 80 Wn. App. 391, 397, 909 P.2d 317 (1996).....	10
<i>State v. Knotek</i> , 136 Wn. App. 412, 423, 149 P.3d 676 (2006)	5
<i>State v. Mendoza</i> , 157 Wn.2d 582, 141 P.3d 49 (2006).....	13, 14
<i>State v. Moore</i> , 176 Wn. App. 1001, 2013 WL 4105179 (August 2, 2013)	12, 13
<i>State v. Moten</i> , 95 Wn. App. 927, 976 P.2d 1286 (1999)	11, 12
<i>State v. Perez</i> , 33 Wn. App.2d 268, 261, 654 P.2d 708 (1982).....	6
<i>State v. Pugh</i> , 153 Wn. App. 569, 577, 222 P.3d 821 (2009)	5
<i>State v. Ross</i> , 129 Wn.2d 279, 287, 916 P.2d 405 (1996)	7, 8
<i>State v. S.M.</i> , 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)	5
<i>State v. Smith</i> , 137 Wn. App. 431, 437-438, 153 P.3d 898 (2007).....	7, 8

<i>State v. Smith</i> , 142 Wn. App. 122, 129, 173 P.3d 973 (2007)	8
<i>State v. Snapp</i> , 119 Wn. App. 614, 626, 82 P.3d 252 (2004)	10, 12
<i>State v. Taylor</i> , 83 Wn.2d 594, 597, 521 P.2d 699 (1974) (<i>superseded by statute on other grounds as stated in State v. Lamb</i> , 175 Wn.2d 121, 128, 285 P.3d 27 (2012)).....	5
<i>State v. Turley</i> , 149 Wn.2d 395, 399, 69 P.3d 338 (2003).....	14
<i>State v. Ward</i> , 123 Wn.2d 488, 512, 869 P.2d 1062 (1994).....	7
<i>State v. Weydrich</i> , 163 Wn.2d 554, 556, 182 P.3d 965 (2008)	6
Federal and Other Jurisdictions	
<i>McCarthy v. United States</i> , 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).....	6
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	1
Statutes	
RCW 9.94A.662(a)	8, 11
Rules and Regulations	
CrR 4.2(d)	4
CrR 4.2(f).....	4
CrR 7.8.....	9
CrR 7.8(a)	9, 11
GR 14.1	13
RAP 2.5(a)(3).....	5

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

1. Where defendant entered a guilty plea with the understanding that the State would recommend a Drug Offender Sentencing Alternative (DOSA) sentence, is defendant entitled to withdraw his guilty plea when his standard range was correctly calculated and there was an ultimately corrected scrivener's error regarding the mid-point of his standard range sentence?

B. STATEMENT OF THE CASE.

1. FACTS

Appellant David Lee Parker, hereinafter the "defendant," was charged with one count each of unlawful possession of a firearm, possession of a stolen firearm, unlawful possession of a stolen vehicle, attempting to elude a police vehicle, and bail jumping. CP 7-9.

On April 19, 2017, on the second day of trial the defendant entered a guilty plea pursuant to a plea bargain in which the state dismissed the stolen firearm and bail jumping charges. CP 14-23; RP 71.¹ He entered an *Alford*² plea as to the stolen vehicle charge and a factual plea for the

¹ The verbatim reports of proceedings are contained in six volumes with consecutive pagination.

² *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

eluding and unlawful possession of a firearm and eluding charges. CP 14-23. As part of the plea agreement, the State agreed to recommend that defendant be sentenced to a DOSA on all three counts. CP 14-23.

Prior to the court accepting defendant's guilty plea the court undertook an extensive colloquy with defendant. RP 62-71. Among the questions the court asked defendant was if he understood that for Count I, his standard range sentence was 77-102 months, with a maximum term of ten years and \$20,000. RP 65. The court also asked if defendant understood that the State was recommending that all three counts were to run concurrent to each other based upon the mid-point of Count I. RP 65.

The plea statement included a mathematical scrivener's error. CP 14-23. RP 65. The court repeated the scrivener's error during the colloquy thus informing the defendant that the State's sentencing recommendation would be 94.5 months instead of the correct 89.5 months. *Id.* The court also asked the defendant if he understood that the court was not bound by the State's recommendation and could sentence defendant to any amount allowed by law. RP 66-67. The defendant acknowledged that he understood. *Id.* The court next asked if defendant understood that if additional criminal history was discovered, his standard range sentence could increase and the State's recommendation could increase. RP 67. Finally, the court asked defendant if he was aware that he could not appeal

any sentence within the standard range. *Id.* To all of these questions defendant stated that he understood them and did not have questions. *Id.*

Immediately before sentencing defendant filed a Motion to Withdraw Guilty Plea, based on grounds that are different from the grounds asserted in this appeal. CP 24-26. Defendant claimed (1) that his arm had been twisted “emotionally” to plead because of his son, and (2) that he claimed to have access to new evidence that was pertinent to the stolen vehicle charge. RP 92-93. The court denied defendant’s motion, noting how defendant had a long colloquy with the court where defendant indicated he was pleading freely and voluntarily and that no one made any threats against him or forced him to plead guilty. CP 208-215.

On July 21, 2017, defendant was sentenced to a DOSA on all three counts. CP 187-201; RP 111-112. His standard range sentence was correctly calculated at 77-102 months of confinement on the unlawful possession of a firearm charge, the crime with the highest standard range. CP 187-201. All other sentences were to run concurrent to that count. *Id.* The mathematical scrivener’s error from the plea statement was carried through to the State’s sentencing recommendation and adopted by the court. *Id.*; RP 88. The defendant filed a notice of appeal on the same day he was sentenced. CP 202.

Approximately four to six weeks after the sentencing, the Caseload Forecast Council sent a letter to the sentencing court informing it of the error.³ CP 218-219. The Council noted that the mid-point of the sentence is actually 89.5 months, resulting in a DOSA sentence of 44.75 months of incarceration with DOC and 44.75 months of community custody. *Id.* The court issued an Order Correcting Judgment and Sentence to amend defendant's DOSA sentence to the correct mid-point. CP 220-222.

C. ARGUMENT.

1. DEFENDANT IS NOT ENTITLED TO WITHDRAW HIS GUILTY PLEA WHEN HE WAS INFORMED OF THE CORRECT STANDARD RANGE SENTENCE AND THE SCRIVENER'S ERROR FROM SENTENCING HAS ALREADY BEEN CORRECTED.

Superior Court Criminal Rules (CrR) provide that a court will not accept a plea of guilty unless the court is first able to determine that the defendant made such voluntarily, competently, and with the understanding of the nature of the charge and consequence of the plea. CrR 4.2(d). A court will allow a defendant to withdraw a guilty plea when such is necessary to correct a "manifest injustice." CrR 4.2(f).

Manifest injustice is injustice that is obvious, directly observable, overt, and not obscure. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d

³ The letter was sent from the Caseload Forecast Council on August 25, 2017, and filed by the sentencing court on September 13, 2017.

676 (2006). The four indicia of manifest injustice are (1) denial of effective assistance of counsel; (2) failure of the defendant or one authorized by him to do so to ratify the plea; (3) involuntary plea; and (4) violation of plea agreement by the prosecution. *State v. Pugh*, 153 Wn. App. 569, 577, 222 P.3d 821 (2009); *see also State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974) (*superseded by statute on other grounds as stated in State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012)). In this case, none of the indicia of manifest injustice are present.

The State bears the burden of proving the validity of a guilty plea, while the defendant has the burden of proving manifest injustice. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

On appeal the defendant does not assert the same bases for his claim that his plea was involuntary that he asserted in the motion to withdraw his plea. CP 208-215. Instead he relies on RAP 2.5(a)(3) and claims that the mathematical scrivener's error constitutes a "manifest error affecting a constitutional right" which may be asserted for the first time on appeal. Thus his claim on appeal may be upheld only if the scrivener's error is both constitutional and manifest.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Weydrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008). A guilty plea is voluntary if the defendant possesses an understanding of the law in relation to the facts. *In re Personal Restraint Petition of Keane*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)).

When a defendant fills out a written statement on a guilty plea and acknowledges that they have read and understood such, and that its contents are accurate, the written statement provides prima facie verification of the plea's voluntariness. *State v. Perez*, 33 Wn. App.2d 268, 261, 654 P.2d 708 (1982). When a judge then orally inquires of the defendant and satisfies himself on the record of the existence of the criteria necessary for a showing of voluntariness, the presumption of voluntariness is well-nigh irrefutable. *Id.* at 622.

- a. The issue defendant raises is a collateral consequence, not a direct consequence of his plea.

A defendant must be informed of all of the direct consequences of his plea prior to the court accepting a guilty plea. *State v. A.N.J.*, 168 Wn.2d 91, 113-114, 225 P.3d 956 (2010). Defendant's knowledge of the direct consequences of a guilty plea may be satisfied from the record of

the plea hearing or clear and convincing extrinsic evidence. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

A defendant is not required to be advised of all possible collateral consequences of his plea. *State v. Ward*, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). The distinction between a direct consequence and collateral consequence of a plea turns on whether the result represents a definite, immediate, and largely automatic effect on the range of defendant's punishment. *Id.* (internal citations omitted). When a consequence is discretionary and therefore not automatically imposed by the court, it is a collateral consequence of the plea. *Ward*, 123 Wn.2d at 513.

In the context of punishments, a court examines whether the effect enhances the defendant's sentence or alters the standards of punishment to determine if it is a direct consequence. *Ross*, 129 Wn.2d at 285. For instance, a defendant's sentence range or eligibility for a sentencing alternative are considered direct consequences. See *State v. Smith*, 137 Wn. App. 431, 437-438, 153 P.3d 898 (2007); *In re Fonseca*, 132 Wn. App. 464, 469, 132 P.3d 154 (2006).

In light of the foregoing, the direct consequence of a guilty plea in which includes a DOSA sentencing recommendation is DOSA eligibility, the defendant's offender score, and his subsequent standard range sentence. The exact amount of time, however, of a DOSA sentence is a

collateral consequence. This is because a DOSA sentence is not automatically entered by a court just because it is the State's recommendation. DOSA does not enhance the defendant's sentence and does not alter the standards of punishments imposed on defendant. *See State v. Smith*, 142 Wn. App. 122, 129, 173 P.3d 973 (2007) ("...the DOSA statute clearly gives trial courts discretion to impose DOSA sentence 'if the court determines that a sentence under this section is appropriate.' "); *Ross*, 129 Wn.2d at 285.

Defendant does not argue that he was misinformed about his DOSA eligibility or that his offender score and standard sentence range were miscalculated. *See* Brf. of App. at 4. His sole challenge is to a mathematical error in the State's sentencing recommendation concerning the mid-point of his correctly imposed standard range sentence. *Id.* The recommended sentence length would be based on the mid-point of defendant's standard sentence range as required by statute. CP 14-23; RCW 9.94A.662(a). Defendant was correctly told that his standard sentence range for Count I was 77-102 months. CP 14-23. The court accepted such as defendant's standard sentence range. CP 187-201. The correct standard range sentence is the relevant direct consequence of his plea. *Smith*, 137 Wn. App. at 437-438.

The court's discretion and ultimate decision to impose a DOSA sentence is a collateral consequence of his plea. There was no guarantee the court would give defendant a DOSA sentence, something the court made sure to tell defendant during his guilty plea colloquy. RP 66-67. Because a DOSA sentence was not automatically imposed as part of defendant's plea agreement, any DOSA sentence imposed was a collateral consequence. Since the imposition of a DOSA sentence was a collateral consequence of defendant's guilty plea, he is not entitled to withdraw his plea because of a miscalculation of the mid-point of his standard range sentence. As such, this Court should affirm the trial court's acceptance of his guilty plea.

- b. Defendant is not entitled to resentencing based upon a scrivener's error as to the mid-point of his correctly calculated standard range sentence.

A scrivener's error or a clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CrR 7.8(a). The test to determine whether a clerical error exists under CrR 7.8 or if it is a judicial error is to look to “whether the judgment, as

amended, embodies the trial court's intention, as expressed in the record at trial” *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004) (quoting *State v. Klump*, 80 Wn. App. 391, 397, 909 P.2d 317 (1996)). If the amended judgment either corrects the language to reflect the court’s intention or adds language the court inadvertently omitted, the error is clerical in nature. *Id.* at 627. Otherwise, the error is judicial and the court cannot amend the judgment and sentence. *Id.*

Here, when the record is viewed as a whole, it is clear that the amended judgment and sentence correctly reflects the court’s intention and the intention of the parties. The defendant does not argue otherwise. The language in the defendant’s plea statement indicates that the recommendation was for a DOSA sentence, to which defendant would be sentenced to the mid-range point of his standard range sentence. CP 14-23. At the change of plea hearing, the State said the recommendation was a DOSA sentence where sentencing would be the mid-range on all counts. RP 61. During the court’s colloquy with defendant, the court asked defendant if he understood that the State’s recommendation was to sentence defendant to the mid-point, to which defendant responded, “yes.” RP 65. At sentencing, both parties again asked the court to follow the recommendation of a DOSA sentence. RP 107, 109. The court followed

the parties' recommendation of imposing a DOSA sentence. CP 187-201; RP 111.

All of the above clearly indicate defendant's intention to request a DOSA sentence. The court had no discretion as to the length of time defendant would be in the custody of DOC and the length of time defendant would be on community custody. Such is mandated by statute that defendant serve a period of confinement of one-half the mid-point and the other half in the community. RCW 9.94A.662(a); *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014). The same day the court filed the letter from the Caseload Forecast Council indicating the correct mid-point for defendant's DOSA, the court filed the Order Correcting Judgment and Sentence to reflect the proper mid-point and DOSA sentence. This is the exact type of amendment envisioned by CrR 7.8(a) where the court corrects a judgment to ensure its original intention is being met.

A case that is analogous to the present case is *State v. Moten*, 95 Wn. App. 927, 976 P.2d 1286 (1999). In *Moten*, defendant entered an *Alford* plea to one count of criminal solicitation for a violation of the Uniform Controlled Substances Act (VUCSA). *Moten*, 95 Wn. App. at 928-929. His judgment and sentence indicated that he was sentenced for a completed VUCSA delivery, not solicitation. *Moten*, 95 Wn. App. at 929. However, the record clearly indicated that defendant had only been

convicted of solicitation. *Id.* As such, it was an “obvious scrivener’s error” on the judgment and sentence. *Id.*

Here, the situation is analogous to *Moten*. Defendant entered an *Alford* plea on one count. CP 14-23. The record clearly indicated that the sentencing court intended to give him a DOSA sentence. RP 107-111; CP 187-201. The obvious scrivener’s error in his judgment and sentence is the incorrectly calculated mid-point of his standard range sentence. Nothing else changed regarding his offender score, sentence range, and to what crimes he pled guilty. Because the error here was only a scrivener’s error or clerical mistake as to the mid-point of defendant’s standard range sentence, this Court should affirm his judgment and sentence as the court made the proper correction.

A trial court may correct a clerical error in the judgement and sentence. *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004). Similar corrections have been approved of in other cases. In *State v. Moore*, 176 Wn. App. 1001, 2013 WL 4105179 (August 2, 2013), the court found that where the court incorrectly calculated defendant’s total time of confinement, the proper remedy was to remand to the trial court for correction of the judgment and sentence to meet the court’s intentions.

Moore, 2013 WL 4105179 at * 1.⁴ A similar correction was approved for an incorrect calculation of sentence enhancements. See *State v. Durgeloh*, 180 Wn. App. 1023, 2014 WL 1389051 at * 6 fn. 18 (2014). In this case, the math error should also be remedied by correcting the error, something the sentencing court has already done.

Defendant claims that this case is similar to *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006), and *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011). See Brf. of App. at 6. He is mistaken. In both instances the procedural posture is significantly different than this case. In *Mendoza*, defendant was told after his plea was entered that he faced a lower standard sentence range than what was indicated in his plea agreement. *Mendoza*, 157 Wn.2d at 590. The court held that when a defendant is misinformed about a direct consequence of the plea, including a miscalculated offender score, the plea may be withdrawn. *Mendoza*, 157 Wn.2d at 584.

A DOSA recommendation is different than an offender score. It is discretionary and therefore not a direct consequence of a plea. See Section C.1.b *infra*. Even if it was, *Mendoza* is still distinguishable from this case. There, the issue was that defendant was given an incorrect offender score

⁴ GR 14.1 allows for citations to unpublished opinions filed on or after March 1, 2013 for persuasive value only as the court deems appropriate.

and hence an incorrect sentence range. *Mendoza*, 157 Wn.2d at 584, 591. Here, defendant was given his correct offender score and sentence range. CP14-23, 187-201. Defendant receiving the correct offender score and sentence range distinguishes this case from *Mendoza*. This Court should give *Mendoza* minimal weight, if any.

Barber is also easily distinguishable from this case. There, defendant was not informed that his felony DUI conviction carried a mandatory term of community custody. *Barber*, 170 Wn.2d at 856-857. The court reiterated that failure to inform a defendant of mandatory community custody renders the plea invalid. *Barber*, 170 Wn.2d at 858 (citing *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003)).

Here the defendant was correctly informed that if a DOSA was entered, he would receive half of the mid-point in DOC and the other half on community custody. RP 65-66. Unlike in *Barber* and *Turley*, defendant here was correctly informed that he would be required to serve community custody on a DOSA. He was told of what would be the mandatory time on community custody. *Id.* While the court miscalculated what the mid-point is, defendant was properly told in his colloquy that the court was not bound to that sentence and he could be sentenced to the maximum penalty under the law. RP 66-67. Defendant was always properly informed that a DOSA sentence is based on the mid-point of a standard range sentence.

See RP 61, 65. Such is sufficient to make his guilty plea knowing, intelligent, and voluntary. As such, this Court should give minimal consideration to *Barber*.

Because any error here was only a scrivener's error and this case is easily distinguishable from cases where a defendant was misinformed about his offender score, standard sentence range, and community custody, this Court should affirm his judgment and sentence as the court made the proper correction.

D. CONCLUSION.

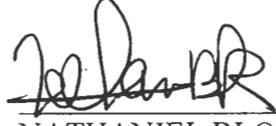
For the aforementioned reasons, the State asks that you affirm defendant's judgment and sentence from below.

DATED: Wednesday, February 28, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298



NATHANIEL BLOCK
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ²U.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.

3-1-10 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 01, 2018 - 10:17 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50642-4
Appellate Court Case Title: State of Washington, Respondent v. David L. Parker, Appellant
Superior Court Case Number: 15-1-03703-1

The following documents have been uploaded:

- 506424_Briefs_20180301101116D2477201_9432.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Parker Response Brief.pdf

A copy of the uploaded files will be sent to:

- SCCAttorney@yahoo.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: James S. Schacht - Email: jschach@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180301101116D2477201