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Court of Appeals
Division II
State of Washington
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NO. 50748-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL COMPTON,

Appellant.

Appeal from Pierce County Superior Court
Honorable Stephanie A. Arend
No. 14-1-01620-6

APPELLANT'S BRIEF

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I. INTRODUCTION

Defendant appeals the trial court's denial of his motion to withdraw his guilty plea for Burglary and Assault 3rd Degree. Neither the plea form nor the explicit oral colloquy of the court informed the Defendant that he would also be subject to community custody for the Assault. The trial court erroneously found that the addition of community custody for the Assault made no difference because it was concurrent with and of the same duration as the Burglary count. In fact, the Defendant will likely be subject to additional punishment during community custody because a violent conviction, Assault, is being added to probation's purview; and multiple additional terms of his custody could change because of it. The unknown addition of community custody was precisely the grounds the Supreme Court found in *Ross* to be sufficient to withdraw a guilty plea. Defendant should be allowed the same, based on the failure to inform him he would be subject to probation for his violent conviction.

II. ASSIGNMENTS OF ERROR

The trial court erred when it denied Defendant's motion to withdraw his plea of guilty.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether Defendant's plea was made knowingly when the Statement of Defendant on Plea of Guilty and the oral instruction of the court omitted the fact that Count II, a violent crime, would also carry community custody supervision.

Whether concurrent community custody for multiple convictions, especially a violent conviction, is additional punishment for a defendant than if community custody was only for one nonviolent conviction.

IV. STATEMENT OF CASE

Defendant pled guilty to two felony counts on March 17, 2017. The *Statement of Defendant on Plea of Guilty* did not specify that Count II, Assault in the Third Degree, carried with it community custody as Count I did. CP 12-21. During Defendant's colloquy with the court, no mention was made of community custody being associated with Count II:

THE COURT: I'm going to ask you questions about some of the paragraphs on this form. If there's anything at all that I ask that you don't understand, or if at any time you want to have further conversation with your attorney, I want to you interrupt me. Okay?

THE DEFENDANT: Okay.

THE COURT: Okay. It's real important that you get your questions answered before I ask you for a plea.

THE DEFENDANT: Yeah.

THE COURT: All right? So this says, the Second Amended Information lists Count 1, burglary in the first degree; Count 2, assault in the third degree. It sets forth the elements of each of those crimes. It states they carry the following sentencings: Count 1, life in prison and a \$50,000 fine. Your standard sentence range is 21 to 27 months, followed by 18 months of community custody. Count 2, maximum sentence, five years in prison, a \$10,000 fine. Your standard sentence range, 3 to 8 months. Do you understand the crimes with which you are charged?

THE DEFENDANT: Yes, Your Honor.

See VRP 5-6 (Change of Plea).

In fact, a few minutes later the court *explicitly stated* that community custody was only associated with Count I:

THE COURT: And as long as the Court sentences you within your standard sentence range for each of the two counts, plus the community custody on Count 1, you cannot appeal that sentence? You understand that?

See VRP 7 (Change of Plea).

It was discovered upon review that pursuant to statute, Count II would also require community custody supervision. VRP 4 8-9-17. The error required an amended Judgment and Sentence consistent with the court's sentencing. Upon hearing of this, defense noted the matter for withdrawal of his plea on August 9, 2017. Both the defense and the State submitted briefing. Specifically, the State cited to *State v Smith* (137 Wash.App. 431, 438 153 P.3d 898 (2007)) which stated that the failure to include concurrent *incarceration* time for other counts on a plea of guilty was harmless because the amount of punishment would be the same regardless. As will be argued *infra*, *Smith* is distinguishable because it involves incarceration, not community custody terms. The community custody statutes give probation vast authority to set forth terms of supervision based on the convicted crimes, which would clearly subject defendant to *additional* punishment if more crimes were added, unlike concurrent and unchanging incarceration. At the conclusion of the hearing, the court rendered its decision:

THE COURT: I agree with Mr. Lane's analysis and the analogy to the case of State of Washington versus Smith, in that while there -- and again, lacking a transcript of the colloquy that I had, I don't know if he was orally advised

regarding community custody on the second count. But in light of the fact that both counsel agree it would have been 12 months, and he's going to be serving 18 months community custody on the other count, there is no practical or legal consequence, as far as I'm concerned, difference between the two. And so he's been appropriately advised of the consequences.

See VRP 7-8 (Sentencing)

V. ARGUMENT

A. LAW

1. Standard of Review

A trial court's ruling on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. Zhao*, 157 Wash.2d 188, 197, 137 P.3d 835 (2006) (citing *State v. Marshall*, 144 Wash.2d 266, 280, 27 P.3d 192 (2001)). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Dixon*, 159 Wash.2d 65, 75, 147 P.3d 991 (2006).

2. Manifest Injustice

A court may permit withdrawal of a guilty plea in accordance with CrR 4.2(f):

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

A defendant bears the burden of proving manifest injustice, defined as “obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wash.2d 37, 42, 820 P.2d 505 (1991).

An involuntary plea produces a manifest injustice sufficient to permit withdrawal. *Saas* at 42; *State v. Moore*, 75 Wash. App. 166, 171-72;

876 P.2d 959 (1994). Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Barton*, 93 Wash.2d 301, 304; 609 P.2d 1353 (1980). Beyond this constitutional minimum, CrR 4.2 details further safeguards on the voluntariness of pleas:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d); see *Barton* at 304.

A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. *Barton* at 305. The distinction between direct and collateral consequences is “ ‘whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.’ ” *Barton*, at 305.

3. Community Custody as Direct Consequence

Mandatory community placement produces a definite, immediate and automatic effect on a defendant's range of punishment. *State v. Ross*, 129 Wash.2d 279, 284; 916 P.2d 405 (1996). As stated in *Ross*:

Community placement imposes a punishment as well. To identify a punishment in the context of a direct consequence of a guilty plea, we examine whether the effect enhances the defendant's sentence or alters the standard of punishment. *Ward*, 123 Wash.2d at 513, 869 P.2d 1062; *Barton*, 93 Wash.2d at 306, 609 P.2d 1353. The State mischaracterizes the purposes of community *286 placement as merely rehabilitative and regulatory. See *Ward*, 123 Wash.2d at 513, 869 P.2d 1062; *State v. Perkins*, 108 Wash.2d 212, 218, 737 P.2d 250 (1987); *In re Estavillo*, 69 Wash.App. 401, 404, 848 P.2d 1335 (deciding sex offender registration serves regulatory rather than punitive

function), review denied, 122 Wash.2d 1003, 859 P.2d 602 (1993). Community placement primarily furthers the punitive purposes of deterrence and protection. See *In re Davis*, 67 Wash.App. 1, 9 n. 5, 834 P.2d 92 (1992) (describing community placement as “part of an inmate's punishment” requiring explicit statutory authorization); **410 *State v. Miles*, 66 Wash.App. 365, 368, 832 P.2d 500 (noting enhanced sentences for crimes committed while on community placement further purposes of protection and deterrence), review denied, 120 Wash.2d 1012, 844 P.2d 435 (1992).

“[C]ommunity placement imposes significant restrictions on a defendant's constitutional freedoms.” *Id.* at 287. As such, the *Ross* court permitted the defendant to withdraw his guilty plea on the basis that defendant was not informed of his community custody time.

4. Concurrent Community Custody is Additional Punishment

Defendant was not informed that the Assault charge against him carried community custody just as the Burglary did. As set forth below, the statutory scheme for community custody clearly gives probation vast authority to specify, add, or modify terms to his community supervision. This is additional punishment, unforeseen by the defendant when he pled guilty:

RCW 9.94A.703

Community custody—Conditions.

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) Mandatory conditions. As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-

ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

[...]

(2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from possessing or consuming alcohol; or

(f) Comply with any crime-related prohibitions.

At the trial level, the state cited to *State v Smith*, where the Court of Appeals stated that an incorrect calculation of defendant's standard range on his plea agreement was not a manifest injustice justifying withdrawal of the plea because the "punishment would be the same":

Here, the plea agreement stated that count I carried a 14- to 18-month standard range, and that count II carried a 0- to 12-month standard range sentence. In fact, count II carried a 14- to 18-month standard range sentence. But **902 RCW 9.94A.589(1)(a) requires the sentences for counts I and II to run concurrently. Accordingly, Smith faced an 18-month sentence at the maximum, and the plea agreement bound the State to recommend a 14-month sentence. Although the plea agreement stated an incorrect standard range sentence for count II, Smith was not misinformed about a direct consequence of his guilty plea because he received the same punishment under the correct sentencing range that he would have received under the erroneous range.

See State v Smith, 137 Wash.App. 431, 438; 153 P.3d 898 (2007).

B. ANALYSIS

Clearly, the community custody statutes give probation authority to add, subtract, or modify terms of custody based on the crimes associated with that custody. Unlike incarceration, a probation officer has the discretion to increase or decrease punishment at will. It is highly probable that probation will increase the terms of community supervision against this Defendant because his probation officer will take note of the violent crime (Assault) associated with the supervision. Had the defendant appeared at probation with just one non-violent crime, Burglary, his community custody would likely be far different than when he presents with both Burglary and Assault 3rd Degree. Now Defendant will be subject to community custody for a *violent* crime. As is evident from the broad discretion in RCW

9.94A.700's, probation has authority, and likely will exercise that authority, to *add* to defendant's punishment.

The addition of punishment is precisely what the Supreme Court sought to prevent in *Ross*. This is why *Ross* permits defendants to withdraw their guilty pleas. This Defendant did not foresee that punishment when he pled because it was not in the document nor in the oral colloquy with the court. In fact, the court *explicitly told* Defendant there was only community custody associated with his non-violent Burglary charge. *Smith* is certainly correct that concurrent incarceration time does not "add" punishment to a defendant, but that does not mean that concurrent community supervision in the hands of a probation officer imbued with vast authority under the statutes is equivalent. It is unreasonable to presume that probation will subject to the defendant to the same punishment for a Burglarly/Assault 3rd community custody order than would have been imposed with a Burglary order. The defendant is subject to additional punishment he did not and could not foresee and he should be permitted to withdraw his guilty plea.

VI. CONCLUSION

The Judgment and Sentence should be vacated and this matter remanded so Defendant may withdraw his plea of guilty.

Respectfully submitted this 12th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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Daniel W. Compton, DOC #401410
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PO Box 769
Connell, WA 99326

DATED this 12th day of February, 2018, South Bend, Washington.

/s/ Tamron Clevenger _____
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