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NO. 50748-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL COMPTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 14-1-01620-6

Brief of Respondent

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

1. Did the court properly deny defendant's motion to withdraw his guilty plea when no manifest injustice resulted from the initial misstatement of community custody, and when the defendant indicated that his reason for the withdrawal was regret?

B. STATEMENT OF THE CASE.

On April 28, 2014, Appellant Daniel Compton (the "defendant") was charged with first degree burglary and second degree assault for an incident that occurred on April 26, 2014. CP 1-2. On March 17, 2017, he pleaded guilty to the burglary charge and to a lesser charge of third degree assault. CP 5-6, 12-21; 1 RP 3-5.

At the plea hearing, the court went over the elements of the crimes and the sentencing recommendation associated with each crime. 1 RP 5-7. Defendant confirmed that he was pleading guilty freely and voluntarily. 1 RP 10. Defendant's Statement on Plea of Guilty indicated that the burglary carried a sentence of 21-27 months incarceration with 18 months community custody, and that the assault carried 3-8 months incarceration. CP 12-13. The statement was silent as to community custody for the assault but should have indicated that 12 months community custody applied to that charge. CP 13. The plea colloquy reflected the sentencing consequence ranges from defendant's written plea statement. 1 RP 5-6.

Before sentencing, the trial court brought the community custody omission to the parties' attention. 4-7-17 RP 2. The court noted that the plea form did not reference the mandatory community custody required on the assault charge. 4-7-17 RP 3. The defendant's stand-in attorney thereupon asked the defendant if the knowledge of community custody affected his decision to plead guilty:

> **Mr. Ryan**: would that – the fact that you were not advised that there's 12 months of community custody on Assault 3 . . . would that have affected your decision to plead guilty?
>
> **Defendant**: Yeah, in a way, maybe, probably. I think so yeah. I think I feel I would – should of went to trial, I think, now that I've looked at my case better but I've seen everything, but it is what is. I'll deal with it[.]

4-7-17 RP 4-5. The defendant further stated, "I kinda feel that I was pressured into taking the plea." 4-7-17 RP 6. The court set sentencing over to facilitate further inquiry into the validity of the guilty plea. 4-7-17 RP 7. Defendant waived his right to speedy sentencing. 4-7-17 RP 7.

On May 5, 2017, defendant wrote a letter to the court in which he expressed concern about his appointed attorney and requested new counsel. CP 24-25. After a hearing on the matter, the court appointed new counsel. CP 33. On July 14, 2017, the defendant's new counsel moved to withdraw his guilty plea. CP 36-39. The sole basis for the motion was the community custody issue. *Id.*

The plea withdrawal hearing was held on August 9, 2017. 3 RP 4. Defendant argued that a mandatory period of community custody is a direct consequence of the plea and thus, his motion should be granted. 3 RP 4-5. The State argued that there was no direct consequence to the misstated community custody requirement on the assault charge where defendant would be serving 18 months of community custody on the burglary charge. 3 RP 6-7. The court agreed with the state and denied the motion. 3 RP 8. It found that:

> [I]n light of the fact that both counsel agree it would have been 12 months [on count II], 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.

3 RP 7-8.

Five days later, defendant submitted a pro se affidavit in support of his motion. CP 70-71. He argued that a manifest injustice occurred based on ineffective assistance of defense counsel. CP 71. He also stated that he maintained his innocence despite formal recitations of guilt, and should thus be allowed to withdraw his plea. CP 71.

The court sentenced defendant to the low-end of the standard sentencing range. The sentence included 21 months in prison on the burglary, 3 months on the assault, 18 months community custody on the

burglary, and 12 months on the assault, all of which was to run concurrent. CP 52-66. 3 RP 8. Defendant received credit for 84 days served. 3 RP 12. This appeal was timely filed on August 15, 2017. CP 72.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE NO MANIFEST INJUSTICE RESULTED FROM THE MISSTATEMENT IN THE WRITTEN PLEA STATEMENT.

The court rule that applies to guilty plea withdrawal motions provides, "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." CrR 4.2(f). The manifest injustice standard is demanding, and requires "an injustice that is obvious, directly observable, overt [and] not obscure." ***State v. Smith***, 137 Wn. App. 431, 438, 153 P.3d 898 (2007), quoting ***State v. Mendoza***, 157 Wn.2d 582, 586, 141 P.3d 49 (2006). The defendant has the burden of showing that a manifest injustice has occurred. ***State v. Turley***, 149 Wn.2d 395, 398, 69 P.3d 338 (2003).

The trial court's ruling on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. ***State v. Zhao***, 157 Wn.2d 186, 197, 137 P.3d 835 (2006). 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 Wn.2d 65, 75, 147 P.3d 991 (2006).

The Supreme Court has identified four circumstances which may constitute a manifest injustice. ***State v. Wakefield***, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). They are (1) denial of effective assistance of counsel, (2) a guilty plea not ratified by defendant, (3) an involuntary plea, or (4) a plea agreement not kept by prosecution. *Id.* In this case, defendant claims that his plea was involuntary.

A "strong presumption" of voluntariness applies when a defendant has admitted to reading, understanding, and signing a plea form. ***State v. Smith***, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). A defendant's statement on the record that he is entering the plea voluntarily is "highly persuasive." ***State v. Osborne***, 102 Wn.2d 87, 97, 684 P.2d 683 (1984), quoting ***State v. Frederick***, 100 Wn.2d 550, 556, 674 P.2d 136 (1983). A "bare allegation" of coercion in a defendant's affidavit is not sufficient to overcome such "highly persuasive" evidence. *Id.* Nor is a subsequent expression of regret for pleading guilty. ***State v. Norval***, 35 Wn. App. 775, 784, 669 P.2d 1264, 1269 (1983).

The presumption of voluntariness can in some instances be overcome when it is based on misinformation regarding a direct consequence of the plea. ***State v. Smith***, 137 Wn. App. at 438. A direct

consequence "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." ***State v. Ross***, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The length of a sentence of confinement is a direct consequence of a guilty plea. ***State v. Mendoza***, 157 Wn.2d at 590. Mandatory community custody may be a direct consequence of a plea where it affects the length of a sentence. ***Ross***, 129 Wn.2d at 284. However if a term of community placement is found to be "not definite, not immediate and having no automatic effect on a defendant's range of punishment," it is not a direct consequence of the defendant's guilty plea and the plea should be considered voluntary. ***State v. Oseguera Acevedo***, 137 Wn.2d 179, 203, 970 P.2d 299, 311 (1999).

A misstatement in a guilty plea that is of no importance is not a direct consequence of a guilty plea that will justify withdrawal. ***State v. Smith***, 137 Wn. App. at 438; ***Oseguera Acevedo***, 137 Wn.2d at 203. In ***Smith***, this Court reviewed a motion to withdraw a guilty plea that was based on the trial court's misstatement of defendant's term of confinement. The trial court advised the defendant that his conviction on the first of two counts carried a term of 14 to 18 months imprisonment while his conviction on the second count carried a term of 0 to 12 months. *Id.* at 435. The conviction on the second count actually carried 14 to 18 months, but the sentences would run concurrently with each other. *Id.* at

438. This Court held that, "[a]lthough the plea agreement stated an incorrect standard range sentence for count II, [the defendant] 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." *Id.*

In ***Smith***, the total sentencing range was 14 to 18 months on both counts. The range for count II did not affect the defendant's overall range. *Id.* The Supreme Court came to a similar conclusion in ***Oseguera Acevedo,*** *supra*, where community placement was the issue. ***State v. Oseguera Acevedo***, 137 Wn.2d at 198. The defendant in ***Osegura Acevedo*** moved to withdraw his plea, stating: "[t]he only reason I pled that way is because I felt overwhelmed. Mr. Delong told me I should plead guilty as . . . he didn't feel like he had enough experience to be of any real help to me in this case." *Id.* at 188. He also stated that "there seems to be a lot of confusion about my case or a tangle and I don't feel right about it and that's why I want to take my plea back and fight it." *Id.* at 189.

The Supreme Court found that the community placement part of the defendant's sentence was not a definite and direct consequence of the plea. *Id.* at 198. Because the defendant was subject to deportation following his sentence and would likely never serve the community placement term, the court found no evidence showing that the community

placement term was material to the defendant's decision to plead guilty. *Id.* at 194. Thus, because the omitted term of community placement did not affect the defendant's actual sentence he would serve, it was not a direct consequence of his plea. *Id.*

The reasoning from both ***Smith*** and ***Oseguera Acevedo*** applies here. The incorrect advisement of community custody as to the assault count was inconsequential. The defendant was required to serve 14 to 18 months community custody on count I and the two terms of community custody would run concurrently. CP 52-66. Thus, the defendant's total term of community custody was unaffected. The defendant would receive the same punishment under the correctly stated range of community custody as under the erroneously stated range. The fact that this case involves community custody, rather than prison time, does not differentiate it from ***Smith***. An erroneously stated sentencing consequence is not a direct consequence where it does not affect the length of time to be served by the defendant. ***State v. Smith***, 137 Wn. App. at 438.

In addition, the defendant's own statements showed that the omitted community custody term was not material to his decision to plead guilty. 4-7-17 RP 4-5. At no point did defendant assert that the omitted term of community custody constituted the reason for his decision to plead guilty. *Id.* Rather, he indicated that he subsequently regretted his decision

to plead guilty and stated that, in retrospect, he wished he had gone to trial. This is not a valid basis for withdrawal. ***State v. Norval,*** 35 Wn. App. at 784. When prompted as to whether the community custody term on count II affected his decision to plead guilty, he stated that "I think I feel I would – should of went to trial, I think, now that I've looked at my case better but I've seen everything, but it is what is. I'll deal with it[.]" 4-7-17 RP 4-5. He also stated that he felt pressured into taking the plea. 4-7-17 RP 6. These statements are directly analogous to those made by the defendant in ***Oseguera Acevedo***, which the court found to be insufficient to establish that the community custody term was a material part of the plea bargain. ***State v. Oseguera Acevedo***, 137 Wn.2d at 196.

The Supreme Court recently considered the effect of a misstated community custody term in the context of a CrR 7.8 motion to vacate a guilty plea. ***State v. Buckman***, 190 Wn.2d 51, 409 P.3d 193 (2018). In ***Buckman***, the defendant was misinformed that he faced lifetime community custody, when he actually faced only three years. *Id.* at 59. Relying on ***Mendoza***, the court found the defendant's plea involuntary where he was advised of a community custody term that was different from the actual term he would be serving. *Id.* (citing ***State v. Mendoza***, 157 Wn.2d at 591). Nevertheless, the court also held that the trial court had properly denied the defendant's motion to withdraw his plea. *Id.* at 71.

This was because the defendant "failed to show actual and substantial prejudice sufficient to warrant relief and therefore [we] deny his motion to withdraw his guilty plea." *Id.*

The omitted term of community custody in this case likewise caused no prejudice. In ***Buckman***, the misstated community custody term represented a direct consequence but it was not shown to have been material. Similarly, in this case there has been no showing that the incorrect advisement had a material effect on the defendant's decision to plead guilty. Thus, like ***Buckman***, there has been no showing of prejudice nor manifest injustice. From the beginning, the defendant in this case was informed that he faced a total of 18 months of community custody. The omitted term of community custody for count two did not change that. Thus, it was not a direct consequence of his plea, rendering it voluntary.

Defendant relies on a misstatement case in which community placement was entirely lacking in the defendant's guilty plea as a result of "an outdated plea form lacking that community placement warning." ***State v. Ross***, 129 Wn.2d 279, 282, 916 P.2d 405 (1996). For obvious reasons, ***Ross*** bears little resemblance to this case. There, the court found that the omitted term of mandatory community placement was a direct consequence of the defendant's guilty plea where "mandatory community placement enhanced defendant's minimum sentence and altered the

standard of punishment applicable." *Id.* at 287-88. Because the addition of the mandatory 12 months community custody increased the defendant's total sentence beyond the state's recommendation in the plea agreement, the court concluded the plea was involuntary. *Id.; See also* ***State v. Rawson***, 94 Wn. App. 293, 296, 971 P.2d 578 (1999).

This case does not involve a situation in which defendant's sentence was enhanced or altered by an omitted term of community custody. Defendant knew he was going to serve a total of 18 months of community custody. The community custody term that applied to count II did not change the defendant's sentence. He would serve the exact same amount of time on community custody under both the correct and erroneous sentencing range. Defendant's reliance on ***Ross*** is misplaced.

Defendant also asserts that, unlike ***Smith***, community custody for a violent crime such as assault represents additional potential punishment.[1] The defendant's claim relies on the assertion that "probation has authority, and likely will exercise that authority, to *add* to defendant's punishment." App. Brief at 8-9. As stated above, a direct consequence is found only when it largely automatically affects the range of the defendant's sentence.

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[1] Appellate courts will not consider issues raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." ***State v. MacFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing ***State v. Scott***, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); RAP 2.5. This argument was not submitted to the trial court.

State v. Oseguera Acevedo, 137 Wn.2d at 203. A probation officer exercising the powers within his or her discretion does not automatically affect the range of a defendant's sentence. *See* RCW 9.94A.703. Moreover, this argument overlooks that the first degree burglary is itself a violent crime and can be expected to warrant a similar level of supervision. RCW 9.94A.030(55). Thus, defendant's argument fails.

D. CONCLUSION.

Defendant fails to demonstrate that the omitted term of community custody was a direct consequence of his guilty plea where it did not affect the length of his sentence. Because no manifest injustice exists permitting withdrawal of a guilty plea under CrR 4.2(f), the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. Defendant's conviction should be affirmed.

DATED: April 16, 2018.

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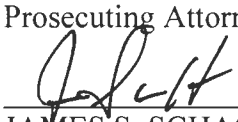

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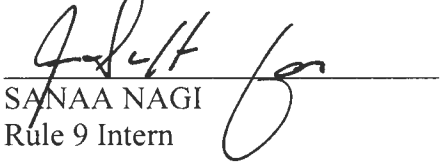

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4.16.18 Theresa Kar

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