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NO. 51791-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HAXTON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's motion to withdraw his guilty plea. CP 97-101.

2. The trial court erred in finding appellant's challenge to his guilty plea was limited to a claim of ineffective assistance of counsel. CP 100 (Conclusion of Law 3).

3. The trial court erred in finding appellant claimed his attorney "may" have misinformed him about the standard ranges he faced if convicted of all charged crimes. CP 100 (Conclusion of Law 16).

4. The trial court erred in concluding a seven-year difference between the actual standard range if convicted on all charged offenses and the standard range appellant was told by his counsel he would face if convicted of all charged offenses is not "large enough" to warrant a finding the plea would not have been entered had appellant known the correct standard ranges. CP 101 (Conclusions of Law 19 & 20).

Issues Pertaining to Assignments of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Leading up to entry of a guilty to only one of the three charged offenses, defense counsel led appellant to erroneously believe he faced 20+ years to life if convicted of all three charges, when in fact he faced only 10+ years to life. Based the erroneous prospect of 20+ years to life, appellant

accepted the State's offer to plead to one of the charged offense, for which he faced approximately 5+ years to life. Prior to sentencing, appellant moved to withdraw his plea.

1. Did the trial court erred in finding appellant's motion to withdraw his guilty plea was based only on a claim of ineffective assistance of counsel, when appellant also sought to withdraw his plea because it was not a knowing, voluntary and intelligently entered plea as a result misinformation about the potential sentencing consequences of a trial?

2. Where appellant's uncontroverted testimony was that appellant was affirmatively misinformed by counsel that he faced 20+ years to life in prison if convicted at trial and never learned of the error before accepting the plea offer, did the trial court err in finding appellant merely "may" have been misinformed by counsel?

3. Did the trial court err in concluding a seven-year difference in sentencing consequences is not significant enough to impact a defendant's decision whether to accept a plea offer to one charge or take all three charges to trial?

B. STATEMENT OF THE CASE

In September 2016, the Thurston County Prosecutor charged appellant Michael Haxton with two counts of attempted first degree child rape and one count of attempted second degree child rape. CP 5-6. The charges were filed after Haxton showed up at a residence he thought was the home of a mother with children aged 6, 11, and 12, with whom he had allegedly arranged to engage in sex acts with her children but turned out to be a law enforcement sting operation. CP 3-4.

On June 5, 2017, Haxton, in consultation with his attorney, Robert Quillian, pled guilty to attempted second degree rape of a child and the other two charges were dismissed on the prosecution's motion. CP 17-28 (Statement of Defendant on Plea of guilty); CP 48-56 (verbatim report of proceeding for June 5, 2017, attached to a subsequently filed motion to withdraw guilty plea, CP 43-56).

On July 17, 2017, prior to sentencing, Haxton filed a pro se motion to withdraw his plea. CP 38. As a result, on July 31, 2017, Quillian withdrew as Haxton's counsel. CP 39.

On October 17, 2017, Haxton's new counsel, Arnaldo Cabrera, filed a motion to withdraw Haxton's guilty plea. CP 43-56. The motion argues Haxton received ineffective assistance of counsel from Quillian based on Quillian's failure to properly investigate, hiding evidence from

Haxton, providing incorrect legal advice and subjecting Haxton to “extreme duress.” CP 45. Cabera was allowed to withdraw as Haxton’s counsel on November 20, 2017, due to a breakdown in communications. 1RP<sup>1</sup> 5-8.

A hearing on the motion filed by Cabera was heard December 18, 2017, before the Honorable Erik D Price, Judge. 2RP 1. Haxton was represented at the hearing by attorney Kevin Griffin. 2RP 2. The only evidence presented was the testimony of Haxton, and two exhibits, Haxton’s written statement on plea of guilty (Ex. 1), and the prosecution’s written plea offer to Quillian, Haxton’s initial attorney (Ex. 2).

Haxton testified Quillian did no investigation into his case. 2RP 8-25. Haxton confirmed, however, that they had discussed the potential sentencing consequences, and Quillian informed him that if he took all three charges to trial and was convicted, he was facing a sentence of 20 to 22 years because he would have an offender score of “9,” three points for each conviction. 2RP 26-28. Haxton said the prospect of a 20+ year prison terms “was a big factor in my decision” to plead guilty. 2RP 30.

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<sup>1</sup> There were three volumes of verbatim report of proceeding prepared for this appeal and will be referenced as follows: 1RP – 1/20/17; 2RP – 12/18/17; and 3RP – 1/8/18 (sentencing). As previously noted, there is also a report of proceeding for the June 5, 2017 plea hearing, referenced herein as CP 48-56.

Haxton denied Quillian ever informed him that because his alleged crimes were “attempts,” he would only face 75% of the standard range for the completed crime. 2RP 28.

Following entry of his guilty plea to the one charge, Haxton learned from subsequent counsel, Cabera, that if convicted of all three charges his offender score would be “6 “instead of “9”, and that his standard range for each offense would be only 75% of the standard range for the completed crime, which works out to “a little over ten years to 13-and-a-half years.” 2RP 29. When asked if knowing the correct sentence faced if convicted would have made a difference in his decision-making, Haxton agreed it would given the “risk of serving 10 to 13-and-a-half years . . . seemed considerably less than” the 20+ years he had erroneously been led to believe. 2RP 30-31.

In response, the prosecution submitted a copy of the plea offer it claimed it provided Quillian, which sets forth the proper offender score and standard ranges for Haxton’s alleged offenses. 2RP 61-63. Haxton then retook the witness stand and testified he had never seen the plea offer prior to entry of his plea. 2RP 65-66.

In its oral ruling denying the motion to withdraw guilty plea, the court noted it would have liked to have heard from Quillian at the hearing. 2RP 68. The court, after reviewing the substance of Haxton’s claims,

identified two central themes, which were whether Quillian was ineffective for failing to investigate the case, and secondly whether Quillian mis-advised Haxton about the potential standard range sentences. 2RP 72.

With regard to the lack of investigation, the court noted there was no basis to determine what if anything a more thorough investigation would have done for the defense, and therefore Haxton could not show prejudice, even if Quillian's performance was deficient. 2RP 73-74.

With regard to the mis-advisement on possible punishment, the court's oral ruling focused on whether it could find Haxton would not have pled guilty had he known the risk of trial was only 13+ years instead of 20+ years. 2RP 76-77. It then gave the following ruling.

The Court is skeptical that Mr. Quillian would have missed the range having been provided with the plea offer by the State. I am not prepared to make a finding that he did not. I am not prepared to make a finding whether he did or he didn't make that representation. I think there are reasons to question both the recollection and the motivations of Mr. Haxton in his testimony today but not sufficient to disregard everything Mr. Haxton said. Mr. Haxton has testified about other aspects in a way that does not indicate this is a fabrication, but even without making a finding as to whether Mr. Quillian did or didn't make that representation, the Court concludes that there has been an insufficient showing that Mr. Haxton would not have pled guilty if he had been told 13 years instead of 20. Again, that is based both on the Court's evaluation of Exhibit 2, the testimony of Mr. Haxton, as well as the delta between 13 years and 60 months, all in the context of course of

whether or not the bar of manifest injustice has been reached.

2RP 77-78. A written order was entered, followed by written findings of fact and conclusions of law. CP 97-101.

C. ARGUMENT

HAXTON'S GUILTY PLEA WAS INVALID BECAUSE IT WAS BASED ON AFFIRMATIVE MISINFORMATION ABOUT THE CONSEQUENCES FACED.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Haxton entered his Alford plea under the false impression that if he exercised his constitutional right trial and lost, he faced 20+ years in prison. Haxton, however, was only facing 10+ years if convicted as charged. Because Haxton was affirmatively misinformed about the consequences of pleading guilty his plea was not knowing, voluntary and intelligent and the trial court erred in denying his presentence motion to withdraw his plea.

Due Process requires a guilty plea be knowing, voluntary, and intelligent. State v. Buckman, 190 Wn.2d 51, 409 P.3d 193, 198 (2018); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). It is well established that a defendant "must be informed of all the direct consequences of his plea prior to acceptance of a guilty 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)). This standard is

reflected in CrR 4.2(d), which provides the trial 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.”

Consequences of pleading guilty include waiving numerous important constitutional rights intended to safeguard individuals against government overreach. These include the right to trial, right to confront accusers and the right to present a defense. State v. MacDonald, 183 Wn2d 1, 8, 346 P.3d 748 (2015); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21 & 22. Whether to waive these rights in favor of a government offer to compromise is a significant decision with lasting consequences.

Before a decision to accept a government’s offer to compromise can be made intelligently, a defendant must be aware of the potential risks of acceptance and nonacceptance. A.N.J., 168 Wn.2d at 113-14. Some aspects of the risk should be easy to quantify and compare, such as the sentencing consequences a trial might produce weighed against the sentencing consequences the government’s compromise offer provides. No doubt the relative difference between the consequences is a significant and weighty factor in the decision. See Buckman, 409 P.3d at 198 (defendant pleaded guilty to avoid life sentence).

If a defendant concludes the benefits of a government plea offer do not sufficiently outweigh the risks of trial, that defendant will decide not to waive constitutional rights and instead go to trial. On the other hand, if the defendant concludes the benefits of plea offer outweigh the risks of trial, that defendant will waive their rights and accept the offer.

How each defendant weighs the risks depends on the specific circumstances of each defendant. For example, defendant "A" may determine that if the sentence contemplated by the government's compromise offer is 25% or less of the sentence that could result following conviction at trial, the government's offer should be accepted. Defendant "B," however, might require the sentence in the compromise offer be no greater than 20% of the potential sentence resulting from a trial conviction. Thus, if conviction at trial would result in a 20-year sentence, defendant "A" would accept the government's offer of five years or less in prison in exchange for waiving various constitutional rights, whereas defendant "B" would not accept anything greater than a four-year prison sentence to accept the offer.

Here, Haxton was misled into believing he faced 20+ years in prison if convicted at trial, when he faced only 10+ years instead. As Haxton noted at the withdrawal hearing, a 10+ years sentence is significantly less risk than a 20+ years sentence, significant enough it

would have made a difference in his decision whether to accept the government's compromise offer or go to trial. 2RP 30-31. And the trial court acknowledged Haxton's claim in its written and oral rulings but concluded Haxton had failed to prove it sufficiently to constitute a manifest injustice. CP 100-01 (Conclusions of Law 2, 17-20); 2RP 77-78.

Affirmative misinformation about even just collateral consequences of a guilty plea can render a guilty plea unknowing and involuntary. A.N.J., 168 Wn.2d at 116; State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). In A.N.J., a juvenile defendant pleaded guilty to a sex offense after being wrongly advised it could be purged from his record once he became an adult. 168 Wn.2d at 116. The Washington Supreme Court concluded such affirmative misinformation warranted allowing withdrawal of the guilty plea, even though it pertained to a collateral rather than a direct consequence. 168 Wn.2d at 117.

Similarly, in Stowe, it was reversible error not to allow withdrawal of a guilty plea when it was based on an affirmative misrepresentation by trial counsel regarding a collateral consequence, namely, whether pleading guilty would affect Stowe's military career. 71 Wn. App. at 188-89. This Court stated that although "defense counsel does not have an obligation to inform his client of all possible collateral consequences of a guilty plea," the question is "not whether counsel failed to inform defendant of collateral

consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea.” 71 Wn. App. at 187. “[D]ifferent considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.” 71 Wn. App. at 187 (quoting In re Pers. Restraint of Peters, 50 Wn. App. 702, 707 n .3, 750 P.2d 643 (1988)).

This Court found Stowe's counsel's performance deficient because counsel (1) knew Stowe wanted to continue his military career, (2) affirmatively misinformed Stowe he could maintain his military career despite the plea, and (3) failed to conduct any research before inaccurately advising Stowe. 71 Wn. App. at 188. Because Stowe had specifically asked about his ability to continue his military career and relied on his attorney's misinformation in deciding to plead guilty, this Court concluded Stowe was prejudiced by his attorney's deficient performance. 71 Wn. App. at 188–89.

The situation here is similar to that in A.N.J. and Stowe. Defense counsel led Haxton to believe pleading guilty would avoid the prospect of a 20+ year prison term, when in fact Haxton only faced a 10+ year prison term if convicted on all three charges, a difference in consequences that would have changed Haxton’s decision on whether to plead or go to trial. 2RP 29-31.

Unfortunately, the trial court conducted a subjective inquiry into whether Haxton would have pleaded guilty had he know the correct sentencing risks of a trial on all three charges versus a plea to only one. Instead of an objective inquiry into whether such a difference could have led a rational person not to plead guilty, the court supplanted its personal belief that the difference was not enough to have changed Haxton's plea, despite no evidence contradicting Haxton's claim that it would have. CP 100-01 (Conclusions of Law 2, 17-20); 2RP 29-31, 77-78. In other words, the trial court denied Haxton's motion to withdraw his guilty plea because it found he failed to prove actual prejudice. This was not the correct standard.

When a defendant challenges the constitutionality of his guilty plea prior to sentencing, "[t]he defendant need not establish a causal link between the misinformation and his decision to plead guilty." State v. Weyrich, 163 Wash. 2d 554, 557, 182 P.3d 965 (2008). Thus, Haxton was not required to show he would have gone to trial had he know the correct potential sentencing consequences, which is the standard the trial court erroneously applied. Instead, upon showing his plea was entered in the context of incorrect information about the potential sentencing consequences, he was entitled to withdraw the plea. Id.

D. CONCLUSION

For the foregoing reasons, this Court should permit Haxton to withdraw his guilty plea.

DATED this 19<sup>th</sup> day of April 2018.

Respectfully submitted,

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