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No. 52013-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN FULLERTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Mr. Fullerton did not knowingly, intelligently, and voluntarily waive his constitutional rights before entering into the pretrial diversion agreement with the State.

- a. The State must establish Mr. Fullerton knowingly, intelligently, and voluntarily waived his constitutional rights when he entered into the pretrial diversion contract.

A waiver of constitutional rights must be knowing, intelligent, and voluntary. U.S. Const. amend. XIV; Const. art. I, § 3; *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. 2d. 2d (1970) (acknowledging waiver of right to trial must be knowing, intelligent, voluntary); *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (holding due process requires constitutional rights against self-incrimination, to trial by jury, and to confrontation must be “voluntarily and understandingly” waived); *Johnson v. Zerbst*, 304 U.S. 458, 465-69, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (waiver of right to counsel must be competent and intelligent); *see also State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010) (“Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charges and enters into the plea intelligently and voluntarily.”).

In *Boykin*, the United States Supreme Court held a guilty plea may not stand without proof the defendant voluntarily, intelligently, and understandingly waived the constitutional rights encompassed by the plea. 395 U.S. at 243. Specifically, the Court recognized the rights against self-incrimination, the right to trial by jury, and the right to confrontation. *Id.* Where a defendant does not “voluntarily and understandingly” waive these rights, he does not voluntarily and understandingly enter his guilty plea and, thus, the plea may not stand. *Id.* at 244.

In its response, the State argues the same protections do not apply in this case because Mr. Fullerton entered into a pretrial diversion contract, rather than a plea agreement. *See* Resp. Br. at 7-8. But under *Boykin* and its progeny, it is not the label of “guilty plea” or the particular vehicle by which rights are waived that inures due process protections. Rather, it is the identity of the particular constitutional rights being waived that requires due process be satisfied.¹

The Washington Supreme Court recognized as much in *Wood v. Morris*, 87 Wn.2d 501, 505-06, 554 P.2d 1032 (1976). In *Wood*, the

¹ Guilty pleas incur certain additional procedural protections by statute and court rule as well. *See* CrR 4.2; RCW 9.94A.431 – 9.94A.460, 10.40.200.

Court acknowledged that *Boykin* “established as a matter of constitutional due process that a guilty plea may stand only if the record in some manner indicates *an intelligent and voluntary waiver of the three enumerated constitutional rights*,” referring to the waiver of the rights to trial by jury, to confrontation, and against self-incrimination. 87 Wn.2d at 506 (emphasis added); *accord State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980). Thus, in order for a court to enforce a waiver of certain constitutional rights, the State must establish the defendant knowingly, intelligently, and voluntarily waived those rights.

- b. A waiver of constitutional rights is not knowing, intelligent, and voluntary unless the defendant is informed of all direct consequences of the waiver.

A voluntary waiver of constitutional rights requires the defendant be informed of all direct consequences of the waiver. *Brady*, 397 U.S. at 748 (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). A direct consequence of a guilty plea by which one’s constitutional rights are

waived includes consequences affecting the range of the defendant's punishment. *Ross*, 129 Wn.2d at 284. Our courts have long held the statutory maximum term and length of a sentence are direct consequences of a plea. *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); *see also State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). Thus, a waiver of core constitutional rights is involuntary where a defendant is not accurately informed of the sentencing consequences. *Weyrich*, 163 Wn.2d at 556-57.

- c. Mr. Fullerton's waiver of his constitutional rights was not knowing, intelligent, and voluntary where Mr. Fullerton was not informed of the statutory maximum terms and standard range.

Mr. Fullerton's diversion contract included both stipulations and waivers. CP 172. Mr. Fullerton agreed to a stipulated facts trial and agreed not to mount legal or factual challenges to the admissibility or the content of the State's evidence. CP 172. He also waived his constitutional rights to a jury trial, to a speedy trial, to his right against self-incrimination, to confront the witnesses against him, to compel witnesses to testify in his defense, and the right to testify himself. CP 172. Thus, Mr. Fullerton waived the three core rights protected by due

process under *Boykin*, in addition to several other fundamental constitutional rights.

However, the diversion agreement did not state the statutory maximum terms or the standard range for the crimes of which Mr. Fullerton had been accused, and the court did not advise Mr. Fullerton of these consequences before accepting Mr. Fullerton's waiver as valid. 3/30/18 RP 5-7. The State argues Mr. Fullerton's waiver was valid because the mental health coordinator and defense counsel reviewed the diversion contract with Mr. Fullerton before he signed it. Resp. Br. at 11-12. But because this contract did not address the consequences Mr. Fullerton faced at sentencing, Mr. Fullerton's review of the document is immaterial. The State also argues Mr. Fullerton's waiver was valid because he had previously been arraigned on the charges against him. 3/27/18 RP 3; Resp. Br. at 12. While the court named the charges against Mr. Fullerton at the earlier arraignment, it did not refer to these charges when later accepting the diversion agreement and at no point discussed the penalties Mr. Fullerton faced.

In fact, at both the arraignment and the hearing at which the court accepted the pretrial diversion contract, the court only discussed the *dismissal* of the charges with Mr. Fullerton. At arraignment on the

amended information, Mr. Fullerton informed the court, “I was under the impression you were going to dismiss charges about a year ago.” 3/27/18 RP 12. Referring to pretrial diversion, the court responded, “Well, that’s what this program is about. If we do this, then at the end the charges will be dismissed.” 3/27/18 RP 12.

Similarly, before accepting the pretrial diversion agreement, the court only asked Mr. Fullerton, “Do you understand that by doing this, you’re giving up some rights but you’re giving yourself the opportunity to go through this program and if you do this and you complete this successfully these charges will go away?” 3/30/18 RP 6. At no point did the court advise Mr. Fullerton of the consequences if he failed to comply with the agreement.

Finally, the State argues Mr. Fullerton did not need to be advised of the penalties he faced because he entered a diversion agreement rather than a guilty plea. Resp. Br. at 12-13. This claim should be rejected.

In *State v. Ashue*, this Court recognized that any waiver of constitutional rights, even as part of a diversion agreement, must be knowing, intelligent, and voluntary. 145 Wn. App. 492, 502-04, 188 P.3d 522 (2008). In fact, in *Ashue* this Court engaged in the very

analysis the State argues the court need not engage in because the waiver of rights is not by a guilty plea. The Court explained:

It is well established that constitutional rights are subject to waiver by an accused if he or she knowingly, intelligently, and voluntarily waives them. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). The burden to establish a valid waiver is upon the prosecution. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

Id. at 502.

The State relies, instead, on *State v. Drum*, in which this Court declined to apply due process protections to a diversion contract because such contracts are not guilty pleas. 143 Wn. App. 608, 617-20, 181 P.3d 18 (2008). However, our supreme court specifically declined to affirm *Drum* on the Court of Appeal's reasoning that due process does not require a defendant enter a drug court contract knowingly, intelligently, and voluntarily and with an understanding of the consequences of the contract. *State v. Drum*, 168 Wn.2d 23, 26, 225 P.3d 237 (2010) ("We affirm Drum's conviction, though for different grounds."). Instead, the court examined the drug court contract and held the defendant's stipulation to the sufficiency of the evidence did not bind the trial court because courts are not bound to stipulations to legal conclusions. *Id.* at 34. Therefore, the court found the defendant did not

waive her right to “an independent finding of guilt beyond a reasonable doubt” under the drug court contract. *Id.*

In addition, *Drum* was predicated on a comparison of nonstatutory contracts (as was entered in Mr. Fullerton’s case) to the deferred prosecution statute, which typically require a stipulation of facts but does not require a waiver of all core constitutional rights. 143 Wn. App. at 616 (citing to Chapter 10.05 RCW). In this way, the analysis in *Drum* is flawed, and this Court should decline to follow the reasoning of this unaffirmed portion of the Court of Appeals’ opinion.

d. The convictions should be vacated.

Mr. Fullerton is entitled to due process protections because the agreement induced a waiver of the core constitutional rights identified by the Supreme Court in *Boykin*. That he did so when entering into a pretrial diversion agreement, instead of a plea agreement, does not alter the requirement that Mr. Fullerton be informed of all direct consequences of his waiver. Because Mr. Fullerton was not advised of the penalties he faced, his waiver was not knowing, intelligent, and voluntary.

The remedy for an involuntary waiver of rights based on misinformation is a withdrawal of the waiver. This often occurs in the

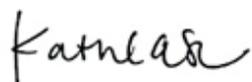
context of a waiver of rights through a guilty plea. Where an agreement by which a defendant waives core constitutional rights does not comply with due process requirements, a defendant is entitled to withdraw the agreement. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001) (recognizing defendants are entitled to withdraw guilty pleas based on misinformation); *Barber*, 170 Wn.2d at 855 (withdrawal of plea is remedy for involuntary plea). This Court should vacate the convictions and remand for trial.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should vacate Mr. Fullerton's convictions and remand for trial.

DATED this 4th day of April, 2019.

Respectfully submitted,



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