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Court of Appeals
Division II
State of Washington
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NO. 53938-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KELSEY PHILLIPS,

Appellant.

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

APPELLANT'S OPENING BRIEF

TIFFINIE MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711
tiffinie@washapp.org

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A. INTRODUCTION

Kelsey Phillips entered guilty pleas to two cases. After he pled, Mr. Phillips learned of several inconsistent and exculpatory statements made by witnesses and co-defendants. He revealed his attorney had unrelentingly instructed him to plead guilty despite his reluctance to do so. Moreover, he was misinformed of the maximum possible sentence in his case. Because Mr. Phillips's attorney was constitutionally ineffective, and because he was misinformed of his potential maximum sentence, his guilty pleas were not knowingly, voluntarily, or intelligently made. This Court should allow Mr. Phillips to withdraw his pleas.

B. ASSIGNMENTS OF ERROR

1. Mr. Phillips was misinformed of the consequences of his guilty pleas, his pleas violate the Due Process Clause of the Fourteenth Amendment.
2. Mr. Phillips was denied his right to the effective assistance of counsel under the Sixth Amendment and Article I, section 22.
3. The trial court erred when it denied Mr. Phillips's motions to withdraw his guilty pleas because his pleas were involuntary and unintelligent.

4. The court erred in entering findings of fact IV, IX, X, XI, XII. CP 48.

5. The court erred in concluding defense counsel provided effective assistance of counsel. Conclusion of Law II. CP 51.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. If the defendant is misadvised about the direct sentencing consequences, including the applicable maximum sentence for the offense and term of community custody, the resulting plea is not entered knowingly, voluntarily and intelligently. Where Mr. Phillips was misadvised about the maximum sentence that could be imposed was his guilty plea invalid?

2. A defendant has a Sixth Amendment right to the effective assistance of counsel, including during the plea bargaining process. This right includes the right to be kept informed of important developments. Here, Mr. Phillips's counsel failed to inform him of contradictory and exculpatory statements made by witnesses and co-defendants, and urged him to plead guilty before disclosing the contents of these statements. Was Mr. Phillips denied his right to the effective assistance of counsel, rendering his pleas invalid?

D. STATEMENT OF THE CASE

As part of a negotiated resolution, Mr. Phillips pled guilty on April 3, 2018 to one count of first degree assault and two counts of second degree assault. CP 8-19. The first degree assault and one of the second degree assault counts included deadly weapon enhancements. CP 8-19. The charges stemmed from a drive-by shooting incident in which Mr. Phillips was in the car but did not shoot at anyone. CP 18. Three other people were also in the car, including Shamille Bullard, Tatiana Isaacs-Jackson, and Demetrius Crawford. RP 19. The persons fired upon included Jazmyn Cunningham, Germarkus Anthony, and Nicholas Miller. RP 20. Following his plea, Mr. Phillips moved to withdraw it on the basis that his attorney had failed to inform him of important contradictory and exculpatory statements made by various witnesses and co-defendants. CP 23-28.

Although nearly all involved gave statements to police or participated in interviews by counsel, Mr. Phillips did not know the content of these statements until after he pled guilty. RP 19. He learned after the fact the complainants had identified Mr. Bullard and Mr. Crawford as the shooters. RP 20. He also learned Ms. Isaacs-Jackson had stated she did not see who was shooting but did not see Mr.

Phillips with a gun. RP 23. This information was not provided by defense counsel; rather Mr. Phillips's mother informed him of these statements subsequent to the plea. RP 21.

On May 21, 2018, Mr. Phillips pled guilty to first degree assault in an unrelated shooting incident. CP 101-13. Mr. Bullard was also involved. RP 64. In interviews, the complainants, Juan and Edgardo Arroyo, identified the shooter as the driver of the car involved, and described the driver as light-skinned. RP 61. These descriptions were inconsistent with Mr. Phillips's alleged role and physical appearance. RP 61-62. Moreover, Mr. Bullard made several inconsistent statements: one denying he was present or aware of the shooting, one identifying Mr. Phillips was the shooter, and one acknowledging he was present but blaming Mr. Phillips for the shooting. RP 65.

As in the earlier case, Mr. Phillips did not learn of these statements until after he pled, when his mother sent him copies of the transcribed interviews. RP 62. He moved to withdraw his May 21 plea simultaneous with his motion on the April 3 plea. CP 117-22.

At the hearing on the motion to withdraw his plea, Mr. Phillips was adamant he would not have pled guilty if he had known about the multiple contradictory and exculpatory statements made by the

complainants and co-defendants. RP 15. He told the court he “would rather have went to trial and fought for my life,” and felt “very confused” when he learned of the statements after pleading guilty. RP 15.

Defense counsel denied Mr. Phillips’s assertions she had failed to inform him of discovery or witness statements. RP 93-123. Although she had dated letters indicating she had provided certain information to Mr. Phillips, she admitted she did not recall when she actually delivered the letters or information to him. RP 125. She assumed it was prior to entering his pleas, but did not know specifically. RP 125.

While counsel prepared discovery summaries which she stated she provided to Mr. Phillips, her summaries did not include any notations regarding when defense interviews with witnesses took place or when she discussed specific information with him. RP 129. She did not keep a record of when she provided materials to Mr. Phillips. RP 132. Despite her failure to keep such records, she was certain she provided discovery summaries, transcripts, and other evidence to Mr. Phillips prior to his pleas. RP 132.

Following the hearing, the court denied Mr. Phillips's motion. RP 150; CP 51. In both pleas, Mr. Phillips was informed that first degree assault carries a maximum sentence of life in prison. CP 9, 102.

E. ARGUMENT

1. Mr. Phillips was misinformed of the consequences of his guilty pleas.

a. The Due Process Clause of the Fourteenth Amendment requires a guilty plea to be knowing, intelligent, and voluntary.

Due process requires a guilty plea to be knowing, intelligent, and voluntary before it is accepted. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006) (citing *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)). When a person pleads guilty:

He . . . stands witness against himself and is shielded by the Fifth Amendment from being compelled to do so – hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his constitutional right to trial before a jury or a judge. 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.

Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). A trial court may not accept a guilty plea “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.” CrR 4.2(d).

Because a defendant waives significant constitutional rights upon entering a guilty plea, the State bears the burden of ensuring the record of the plea demonstrates the plea was knowingly and voluntarily entered. *Boykin*, 395 U.S. at 242. “[T]he record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea.” *Wood v. Morris*, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

A guilty plea is involuntary if the defendant is misadvised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *see also Isadore*, 151 Wn.2d at 298 (“a guilty plea is not knowingly made when it is based on misinformation of sentencing consequences”) (citing *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)). A direct consequence is one which results in a “definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d

1364, 1366 (4th Cir. 1973); *see also State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

The length of a sentence is a direct consequence of a guilty plea. *Mendoza*, 157 Wn.2d at 590. Therefore, a guilty plea is not knowing, intelligent, and voluntary if a defendant is misinformed about the length of a sentence, regardless of whether the actual sentencing range is lower or higher than a defendant was advised. *Id.* at 591.

Moreover, a defendant is not required to show the misinformation was material to his decision to plead guilty:

We have . . . declined to adopt an analysis that focuses on the materiality of the sentencing consequence to the defendant's subjective decision to plead guilty. . . . Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea.

Mendoza, 157 Wn.2d at 590-91 (internal citations omitted); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009).

b. Mr. Phillips was misinformed in her guilty pleas of the maximum sentence.

The relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State*

v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A “defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea.” *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Mr. Phillips’s guilty pleas both state the maximum sentence for first degree assault is life imprisonment. CP 9, 102. RCW 9A.20.021(a) provides the maximum terms for various degrees of felony convictions. Class A felonies such as first degree assault may be punished with up to life imprisonment.

However, as the Supreme Court ruled in *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), while a certain term imprisonment may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. Instead, the Court noted the maximum sentence was “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” *Id.* (Emphasis in the original.)

The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id.* Here, the standard range is the maximum possible sentence the court could

impose for the offenses of which Mr. Phillips was convicted. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law.

Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). These factors essentially require egregious criminal history that enables an offender commit “free crimes” that go unpunished and renders the standard range to be unduly trivial. RCW 9.94A.535(2). Mr. Phillips’s standard range fully accounted for his criminal history of this nature and an exceptional sentence based on unscored criminal convictions would be unreasonable and unauthorized.

There were no circumstances in Mr. Phillips’s case which would have permitted the imposition of any sentence above the standard range. Thus, the “maximum term” was not “life” as the pleas stated. Rather, the maximum was the top-end of the respective standard

ranges. Mr. Phillips was misadvised of the maximum punishment he faced as a consequence of his guilty pleas. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 W.2d 1013(2007). *Knotek* is directly on point. There the Court acknowledged that before pleading guilty, a defendant needs to understand the “direct consequences of her guilty plea, not the maximum potential sentence if she went to trial...” *Id.* at 424 n.8. The *Knotek* Court further agreed that *Blakely* “reduced the maximum terms of confinement to which the court could sentence Knotek post-*Blakely* as a result of her pre-*Blakely* plea - [to] the top end of the standard ranges” *Id.* at 425. Thus, where a defendant is told the maximum sentence is life when in fact it is the top of the standard range the defendant is misadvised of the consequences of the plea.

Mr. Phillips was not properly informed of the consequences of his pleas, and he must be permitted to withdraw it.

c. Because the court misinformed him of the consequences of his plea, Mr. Williams is entitled to withdraw his plea.

Where a defendant is misinformed of the sentencing consequences, the plea is involuntary and the defendant may choose to withdraw his plea. *Mendoza*, 157 Wn.2d at 591. Courts do not engage

in a subjective inquiry into a defendant's risk calculation and the reasons underlying the decision to plea. *Id.* at 590-91.

Here, Mr. Phillips entered his guilty pleas under the mistaken belief he faced a maximum possible sentence of life imprisonment. He was misinformed as to his sentencing consequences by his counsel, the plea paperwork, and the trial court, thus rendering his pleas involuntary. This Court should permit him to withdraw his pleas.

2. Mr. Phillips's counsel was constitutionally ineffective, rendering his plea involuntary, and he must be allowed to withdraw it.

a. A defendant is deprived of his constitutional right to the effective assistance of counsel if the attorney's performance is deficient and the deficiency prejudiced the defendant.

Criminal defendants are entitled to the effective assistance of counsel under the Sixth Amendment and article I, section 22. *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015). The right to the effective assistance of counsel includes the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993)); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Counsel must "consult with the defendant on important decisions and [] keep the defendant informed of important

developments in the course of the prosecution.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A plea is rendered involuntary or unintelligent by counsel’s ineffective assistance if the defendant satisfies the two-prong test in *Strickland. Id.* A defendant meets this burden where counsel’s performance was objectively unreasonable and that deficient performance prejudiced the defendant. *Id.* at 687.

b. Mr. Phillips’s counsel was deficient because she failed to keep him apprised of statements made by witnesses and co-defendants.

Mr. Phillips satisfied the first *Strickland* prong because his counsel failed to inform him prior to entry of his pleas of multiple statements made by witnesses and co-defendants which were contradictory and/or exculpatory in nature. Counsel must, a minimum, keep a client informed of developments in a case. *Strickland*, 466 U.S. at 688. This duty necessarily includes informing a client when witnesses and co-defendants have made contradictory or exculpatory statements,

Here, witnesses and co-defendants across both cases made multiple statements tending to cast doubt on Mr. Phillips’s involvement in either incident. For example, Mr. Bullard, a co-defendant, first

claimed he was not aware of the Arroyo shooting, then claimed he was aware of it and believed Mr. Phillips was the shooter, and finally admitted he had been present at the shooting but still identified Mr. Phillips as the shooter. The Arroyos also identified their shooter as a light skinned male driving a car, which was inconsistent with Mr. Phillips's physical appearance and alleged role in the incident. Ms. Isaacs-Jackson, the driver during the drive-by shooting, stated Mr. Phillips was not the shooter in that incident and did not have a gun with him.

Mr. Phillips only learned of these statements after entering guilty pleas in both cases, and moreover, he learned of them through his mother rather than his counsel. Although defense counsel believed she had informed Mr. Phillips of these statements, she had no record of when she provided the information and self-servingly claimed it must have been prior to entry of the pleas. Counsel's failure to keep Mr. Phillips informed regarding the evidence in his cases renders her performance deficient.

c. *Counsel's deficient performance prejudiced Mr. Phillips because absent the failure to keep him informed, he would have exercised his right to trial.*

To satisfy the prejudice prong under *Strickland*, a defendant challenging a guilty plea must show there is a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. *Sandoval*, 171 Wn.2d at 174-75 (citing *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993)). A reasonable probability exists where the defendant convinces the court it would have been rational, under the circumstances, to reject a plea bargain. *Sandoval*, 171 Wn.2d at 175.

Here, Mr. Phillips was clear he would not have pled guilty to either case had known of the contradictory and exculpatory statements made by witnesses. Regardless of the potential consequences of pursuing a trial, the inconsistent statements were of such a nature as to change the calculus for Mr. Phillips, and he would have "fought" for his life rather than plead guilty. RP 15. Thus, there was a reasonable probability, but for counsel's deficient performance, Mr. Phillips would have insisted on going to trial.

d. Because Mr. Phillips was deprived of his constitutional right to the effective assistance of counsel, he must be permitted to withdraw his guilty plea.

Mr. Phillips has carried his burden under *Strickland* demonstrating his counsel was constitutionally deficient and he was prejudiced by counsel's deficient performance. Thus, Mr. Phillips's plea is rendered involuntary and unintelligent, and he must be allowed to withdraw it. *See Sandoval*, 171 Wn.2d at 169.

F. CONCLUSION

Because Mr. Phillips was misinformed of his maximum possible sentence, and because his counsel's performance fell below the standard of reasonableness, his guilty pleas were involuntary. This Court should remand this matter so Mr. Phillips may withdraw his guilty pleas.

DATED this 30th day of March 2020.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma (51420)

Attorney for Appellant

Washington Appellate Project (91052)

1511 Third Ave, Ste 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2711

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v.)	NO. 53938-1-II
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KELSEY PHILLIPS,)	
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Appellant.)	

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