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No. 54480-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY FARWELL,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Timothy Farwell entered a guilty plea after being incorrectly advised of the possible maximum sentence the court could impose. Because he did not enter his guilty plea knowingly, intelligently, and voluntarily, this Court should reverse and remand to the Superior Court. Alternatively, this Court should strike the discretionary legal financial obligations (LFOs) entered in this case.

B. ASSIGNMENTS OF ERROR

1. Mr. Farwell's plea was not entered knowingly, intelligently and voluntarily where he was advised of an impossible statutory maximum.

2. The court erred in imposing discretionary LFOs when the court intended to impose only mandatory costs, requiring reversal to correct this error in the judgment and sentence.

3. Alternatively, the court erred in imposing discretionary LFOs without conducting the required inquiry of whether Mr. Farwell could pay them.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment requires a guilty plea to be entered knowingly, intelligently and voluntarily. Was Mr. Farwell's guilty plea invalid where it was premised on advisement of an impossible statutory maximum term?

2. RCW 10.01.160(3) prohibits the court from imposing discretionary LFOs on an indigent person and requires the court to conduct an individualized inquiry into a person's ability to pay if the court does impose non-mandatory costs. Here the court found Mr. Farwell indigent for the purposes of trial and appeal, and stated an intent to impose only mandatory costs, but the court imposed several discretionary LFOs without assessing his ability to pay them. Should this Court strike imposition of the LFOs or alternatively remand for the court to inquire into Mr. Farwell's ability to pay discretionary costs?

D. STATEMENT OF THE CASE

Mr. Farwell pleaded to the reduced charge of assault in the third degree (domestic violence) and misdemeanor bail jumping. CP 13-26. The standard range sentence for third degree assault was 1-3 months. CP 14. But Mr. Farwell was

informed that if he pleaded guilty he faced up to five years for a class C felony—a sentence that the court could not legally impose. CP 14; RP 12/6/19 RP 4, 5-6.

Pursuant to the parties' agreement, the court sentenced Mr. Farwell to the recommended term of 60 days in jail for the assault and suspended a 364-day sentence for the misdemeanor. CP 31; 41.

Mr. Farwell is disabled, has significant medical expenses, and receives State assistance to pay for food. CP 79. The court found him indigent for purposes of appeal. CP 79. Mr. Farwell was also appointed counsel at trial due to his indigence. Supp. CP ___ (Sub. no 123). The court stated its intent to impose only mandatory costs on Mr. Farwell, but the form judgment includes several discretionary costs, including the domestic violence assessment and probation supervision fees. CP 42-43.

E. ARGUMENT

1. **Mr. Farwell’s guilty plea was not knowing, intelligent, and voluntary because he was misinformed about the maximum sentence the court could impose.**

- a. Due process protections require a guilty plea be made knowingly, intelligently and voluntarily.

The Due Process Clause of the Fourteenth Amendment requires that a defendant’s guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); U.S. Const. amend. XIV, § 1. When a person pleads guilty, he waives the fundamental right to a trial by jury. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

“Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). The accused must be informed of the direct consequences of pleading guilty. *Id.* at 284. “A direct consequence is one that has a ‘definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” *Bradley*, 165 Wn.2d at 939

(quoting *Ross*, 129 Wn.2d at 284). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

When a person is misinformed of the possible sentencing consequences, a guilty plea is involuntary. *State v. Buckman*, 190 Wn.2d 51, 58, 409 P.3d 193 (2018); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (“A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.”). Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Mendoza*, 157 Wn.2d at 590-91.

Moreover, a defendant is not required to show that the misinformation was material to his decision to plead guilty. “[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea [a]bsent 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 [regardless of any showing of materiality].” *Id.* at 590-91; *accord, Bradley*, 165 Wn.2d at 939.

- b. Because Mr. Farwell was misinformed of the possible maximum sentence the court could impose, he is entitled to withdraw his guilty plea.

In *Blakely v. Washington*, the Supreme Court defined a maximum sentence as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Importantly, the maximum sentence that may be imposed in a particular case is not the statutory maximum. *See id.* The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea based on the defendant’s offender score. *Id.* A hypothetical maximum sentence faced by another offender is irrelevant. *Buckman*, 190 Wn.2d at 59.

The maximum possible sentence the court could impose for Mr. Farwell’s offenses was the standard range sentence of 1-3 months for assault in the third degree plus 364 days for the misdemeanor offense.¹ CP 14; RCW 9.94A.515 (seriousness level

¹ A 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

III for assault in the third degree); RCW 9.94A.510 (1-3 month standard range based on offender score of “0”).

Mr. Farwell faced only a standard range sentence of 1-3 months for the charged felony offense, and 0-364 days for the charged misdemeanor offense. CP 14, 40. Though Mr. Farwell’s guilty plea included a table that set forth the “standard range” sentence and the “maximum term and fine,” the plea form did not inform him that the standard range sentence, in addition to the maximum on his misdemeanor conviction, was the only effective maximum sentence the court could impose. CP 14. To the contrary, the court erroneously informed him he faced a five year sentence: “On this charge, an offender score of zero, standard range of 1 to 3 months, 12 months’ community custody, max term of 5 years, max fine of \$10,000.” 12/6/19 RP 4.

Then again, the Court continued to restate a five year maximum as if it were a possible sentence:

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). No such facts are present or alleged here.

THE COURT: Again, an offender score of zero, 1 to 3 months, 12 months' probation with DOC, meaning follow-up treatment. Understood?

MR. FARWELL: Yes.

THE COURT: Five years, \$10,000 fine. Any questions about your score ranges and treatment -- or score ranges and DOC probation?

MR. FARWELL: No.

12/6/19 RP 5-6. Mr. Farwell was misinformed about the sentence he faced because there was no circumstances in which the court could impose a sentence above the statutory maximum, or up to five years; the State gave no notice of an aggravator, and there was no basis for the court to find one. *See, e.g.*, RCW 9.94A.535, .537. This misstatement was reiterated in the court's advisement about his rights on appeal, where the court informed Mr. Farwell that he could appeal only if the court imposed a sentence above the three month maximum, standard range sentence. 12/6/19 RP 5.

The trial court could not have imposed any sentence above the standard range plus the maximum misdemeanor time of 364 days. Consequently, the "maximum term" was not "five years" as he was advised. CP 14; 12/6/19 RP 4. Rather, the

maximum was the top-end of the standard range, which was only three months on the felony offense, and 364 days for the misdemeanor offense. Mr. Farwell was thus misadvised of the maximum punishment he faced as a consequence of his guilty plea. *State v. Knotek*, 136 Wn. App. 412, 425, 149 P.3d 676 (2006).

Knotek is directly on point. There, the court reiterated that before pleading guilty, a defendant needs to understand the “direct consequences of her guilty plea, not the maximum potential sentence if she [or another defendant] went to trial.” *Id.* at 424 n.8 (citing *Ross*, 129 Wn.2d at 284). The *Knotek* court further agreed that *Blakely* “reduced the maximum terms of confinement to which the court could sentence Knotek . . . [to] the top end of the standard range[] . . .” *Id.* at 425. The top of the standard range was the “effective maximum” for the defendant’s plea. *Id.* Thus, where a defendant is told the maximum sentence is five years when in fact the effective

maximum sentence is the top of the standard range, the defendant is misadvised of the consequences of the plea.²

Likewise, in *Buckman*, the defendant’s plea statement set forth the possible sentencing consequences which incorrectly informed him he was subject to life in prison. *Buckman*, 190 Wn.2d at 59. This rendered his guilty plea involuntary.³ *Id.* As *Mendoza* made clear, it does not matter whether the misadvisement was material to Mr. Farwell’s decision to plead guilty. 157 Wn.2d at 590-91.

“Where a plea agreement is based on misinformation . . . generally the defendant may choose . . . withdrawal of the guilty plea.” *State v. Walsh*, 143 Wn.2d 1, 9, 17 P.3d 591 (2001) (citing *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988)). Because Mr. Farwell was misinformed of the actual maximum sentence

² *Knotek* concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she “clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose.” 136 Wn. App. at 426. In this case, no discussion of *Blakely* ever occurred—the court simply told Mr. Farwell he could appeal if he imposed a sentence above the standard range. 12/6/19 RP 5.

³ *Buckman* challenged his guilty plea through collateral attack, rather than on appeal, so unlike in Mr. Farwell’s case, he was required to establish “actual and substantial prejudice” in addition to showing the plea was involuntary. *Buckman*, 190 Wn.2d at 60.

that could be imposed, the Court should remand for him to withdraw his plea.

2. The trial court imposed discretionary legal financial obligations without inquiring whether Mr. Farwell was indigent

- a. The domestic violence penalty assessment and probation supervision fees are discretionary costs.

RCW 10.99.080(1) allows, but does not require, courts to impose a penalty assessment of a maximum one hundred dollars for any adult convicted of a crime involving domestic violence. The statute encourages courts to consider a defendant's ability to pay when determining whether to impose this penalty assessment. RCW 10.99.080(5). The plain language of the statute authorizing the domestic violence penalty assessment indicates this is a discretionary fee. *State v. Smith*, 9 Wn. App.2d 122, 127-28, 442 P.3d 265 (2019) (RCW 10.99.080 is not mandatory and courts should inquire into effect of imposing this fee on the defendant).

Likewise, supervision fees as a condition of community custody are a discretionary legal financial obligation because they "are waivable by the trial court." *State v. Dillon*, 12 Wn.

App.2d 133, 152, 456 P.3d 1199 (2020), *review denied*, 195 Wn.2d 1022 (2020); *accord*, *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

- b. Courts may not impose discretionary legal financial obligations on the indigent or without inquiry into a person's ability to pay them.

Courts may not impose discretionary legal financial obligations on defendants who have been found indigent. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). If a court does impose discretionary costs, it must conduct an individualized inquiry into a person's current and future ability to pay them. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). This inquiry must include consideration of a person's incarceration, other debts, restitution, past and future employment, income, assets, financial resources, and living expenses, but may include consideration of any relevant factor. *Ramirez*, 191 Wn.2d at 743-44; *Blazina*, 182 Wn.2d at 839 (describing list of relevant factors as "nonexhaustive").

Without an individualized inquiry affirmatively establishing a person's ability to pay, the statute prohibits a court from imposing discretionary costs. RCW 10.01.160(3).

Erroneously entered discretionary legal financial obligations must be stricken from the judgment and sentence when it appears the “trial court intended to waive all discretionary LFOs,” but “inadvertently imposed” discretionary costs. *Dillon*, 12 Wn. App.2d at 152.

- c. The discretionary costs should be stricken where the court stated its intent to impose mandatory costs.

Here, the trial judge did not make an individualized inquiry into Mr. Farwell’s ability to pay, but after hearing he was disabled and applying for social security, the court stated it would not impose discretionary costs: “I’ll waive discretion [sic] and fines and costs.” 12/6/19 RP 15. The trial judge crossed out this section indicating whether Mr. Farwell was able to pay legal financial obligations in both the misdemeanor and felony judgments and sentences. CP 30; CP 41. Still, the form judgment orders him to “pay supervision fees as determined by DOC” CP 42 and to pay a \$100 domestic violence assessment. CP 43. Notably, the trial court otherwise imposed only the mandatory LFOs. CP 43. The court previously appointed counsel

then found Mr. Farwell to be indigent for purposes of appeal.
Supp. CP ____ (Sub. no. 123); CP 82-84.

The court's finding that Mr. Farwell was indigent, and its stated intent to waive discretionary costs establishes an intent to impose only mandatory costs. *Dillon*, 12 Wn. App.2d at 152. Even if this Court determined the court's findings were not adequate to establish indigency, the court was required to engage in an analysis of Mr. Farwell's ability to pay before imposing discretionary costs, which it failed to do here before imposing several discretionary legal financial obligations. *Blazina*, 182 Wn.2d at 839.

Because the court intended to impose only mandatory fees, but included several discretionary legal financial obligations, this Court should remand with a directive to the court to strike the imposition of the domestic violence penalty and supervision fee from Mr. Farwell's judgment and sentence. *Ramirez*, 191 Wn.2d at 747-50 (reversing and remanding for trial court to amend judgment and sentence to strike discretionary LFOs); *Lundstrom*, 6 Wn. App. 2d at 396 n.3 (following *Ramirez* and reversing imposition of discretionary

LFOs and remanding where trial court intended to impose only mandatory costs but imposed costs of community custody); *State v. Lewis*, 12 Wn. App.2d 1038, 2020 WL 1033580, at *17-18 (2020) (unpublished, cited pursuant to GR 14.1) (reversal and remand required where trial court did not use criteria for assessing indigency before imposing certain LFOs, including domestic violence assessment).

F. CONCLUSION

Mr. Farwell's guilty plea was not voluntary where he was advised of an impossible maximum sentence; the matter should thus be remanded to the trial court for Mr. Farwell to withdraw his plea. Alternatively, remand is necessary for the trial court to strike the discretionary costs or conduct an adequate inquiry into Mr. Farwell's ability to pay the discretionary costs.

DATED this 23rd day of July, 2020.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
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TIMOTHY FARWELL,)	
)	
Appellant.)	

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