

FILED

JUL 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302831

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RANDALL BORING

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY
The Honorable Allen C. Nielson

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

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A. ASSIGNMENTS OF ERROR

1. Mr. Boring pleaded guilty to aggravated crimes without fully understanding the direct consequences.

2. Mr. Boring's attorney did not actually and substantially assist him in determining whether to plead guilty.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether Mr. Boring's guilty plea is invalid because his attorney failed to advise him of the direct consequences pleading guilty to crimes with aggravating circumstances would have on his sentence?

C. STATEMENT OF THE CASE

Christopher Randall Boring (Mr. Boring) worked as a supervisor at Hewes Marine Company (Hewes), a local, family-owned business that manufactures and sells welded aluminum fishing boats.¹ Mr. Boring worked at Hewes for a number of years before he was caught selling Hewes' aluminum to a recycling company as scrap metal. According to the State, between August 2007 and August 2012, Mr. Boring sold approximately \$200,000 worth of aluminum. 7/22/11 RP 13; 8/22/11 RP 32-33; CP 3-7; CP 1-2; 7/22/11 RP 15.

The State charged Mr. Boring with aggravated first-degree theft and aggravated first-degree trafficking in stolen property. The State alleged that both crimes were major economic offenses because:

¹ This information about Hewes Marine Company, Inc. was taken from www.hewescraft.com.

They involved multiple victims or multiple incidents per victim;
They involved an actual monetary loss substantially greater than typical for this offense;
They involved a high degree of sophistication or planning or occurred over a lengthy period of time;
and
The defendant used his or her position of trust, confidence or fiduciary responsibility to commit them.

CP 1-2 (emphasis added.)

Mr. Boring agreed to plead guilty to the aggravated charges. In exchange for his plea, the State agreed to recommend that the court sentence Mr. Boring to 48 months in prison. The State also agreed not to file additional charges. 6/28/11 RP 4; 7/22/11 RP 6-8.

At the plea hearing, the judge asked Mr. Boring if he had gone over the guilty plea with his attorney; if he had any questions about entering the plea; if he understood that he was waiving certain constitutional rights set out in the plea form; and if he understood that the court would sentence him. CP 65-73; 7/22/11 RP 9-10. Mr. Boring answered yes to each question and the judge accepted his plea. 7/22/11 RP 15.

At sentencing, as previously agreed, the State recommended 48 months incarceration. 8/22/11 RP 32. The judge found that “by duration, number of criminal occurrences, and dollar amounts, this was the largest theft and trafficking case in that jurisdiction in over the last 20 years.” The judge concluded that justice would be best served by imposing an exceptional sentence outside the standard range. CP 151-152; CP 153-154. With that, the

judge rejected the State's recommendation and sentenced Mr. Boring to 72 months in prison. 8/22/11 RP 107. Mr. Boring appealed. CP 120-121.

D. ARGUMENT

MR. BORING'S PLEA IS INVALID BECAUSE HIS ATTORNEY FAILED TO ADVISE HIM OF THE DIRECT CONSEQUENCES PLEADING GUILTY TO CRIMES WITH AGGRAVATING CIRCUMSTANCES WOULD HAVE ON HIS SENTENCE.

a. Mr. Boring challenges the voluntariness of his plea for first time on appeal. Due process requires that a guilty plea be knowing, voluntary, and intelligent. U.S. Const. amends. V, XIV; Wash. Const. art. I, §§ 3, 22; Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1079, 23 L.Ed.2d 274 (1969); State v. Codiga, 162 Wash.2d 912, 922, 175 P.3d 1082 (2008); In re Pers. Restraint of Isadore, 151 Wash.2d 294, 297, 88 P.3d 390 (2004). This Court will consider the totality of the circumstances to determine if a defendant's guilty plea was knowing, voluntary, and intelligent. Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); State v. Branch, 129 Wash.2d 635, 642, 919 P.2d 1228 (1996).

As a general rule, this Court may refuse to review any claim of error, which was not raised in the trial court. However, a party may raise an issue that involves a "manifest error affecting a constitutional right for the first time in appellate court." RAP 2.5(a)(3); State v. Scott, 110 Wash.2d 682, 684, 757 P.2d 492 (1988).

Mr. Boring is allowed to challenge the voluntariness of his guilty plea for the first time here. He maintains that he did not understand the sentencing

consequences of pleading guilty because his attorney failed to properly advise him. Our courts have long recognized a claim that a defendant failed to understand the consequences of his plea involves an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Mendoza, 157 Wash.2d 582, 589, 141 P.3d 49 (2006) (*citing* State v. Walsh, 143 Wash.2d 1, 7–8, 17 P.3d 591 (2001)).

1. Mr. Boring did not understand that he could expose himself to a sentence higher than that recommended by the State when he pleaded guilty to crimes with aggravating circumstances. A defendant must be informed of the direct consequences of his guilty plea. In re Pers. Restraint of Isadore, 151 Wash.2d 294, 298, 88 P.3d 390 (2004); State v. Paul, 103 Wash.App. 487, 494-95, 12 P.3d 1036 (2000); State v. Miller, 110 Wash.2d 528, 531, 756 P.2d 122 (1988).

A direct consequence has a “definite, immediate and largely automatic effect on the range of the defendant's punishment.” State v. Ross, 129 Wash.2d 279, 285, 916 P.2d 405 (1996) (*quoting* State v. Barton, 93 Wash.2d 301, 304-5, 609 P.2d 1353 (1980)). For example, our courts have found mandatory community placement to be a direct consequence of the plea. State v. Isadore, 151 Wash.2d at 298. A mandatory minimum sentence resulting in a more onerous punishment is a direct consequence of a plea. State v. Miller, 110 Wash.2d at 531-32. And, an incorrect standard sentencing range-whether higher or lower than anticipated-also constitutes a direct

consequence, which may create an involuntary plea. See State v. Walsh, 143 Wash.2d 1, 3-4, 17 P.3d 591 (2001) (plea agreement involuntary where standard range at sentencing was higher than stated in the plea agreement); State v. Mendoza, 157 Wash.2d 582, 590, 141 P.3d 49 (2006) (lower standard sentencing range can yield an involuntary plea).

Mr. Boring maintains that aggravating circumstances also constitute a direct consequence. The reason being, aggravating circumstances “are ‘aggravation of penalty’ provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense.” State v. Kincaid, 103 Wash.2d 304, 312; 692 P.2d 823 (1985); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). When Mr. Boring pleaded guilty to aggravated first-degree theft and to aggravated first-degree trafficking in stolen property, he did so without understanding that because these crimes carried aggravating circumstances, the court could impose a more onerous sentence than what the State recommended. CP 65-73.

Mr. Boring recognizes that “when he filled out the written statement on plea of guilty and acknowledged that he read it, understood it, and that its contents were true, the written statement would provide prima facie verification of his plea’s voluntariness.” In re Keene, 95 Wash.2d 203, 206-07, 622 P.2d 360 (1980). He also recognizes that “when the judge inquired of him on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” State v. Perez, 33

Wash.App. 258, 261-62, 654 P.2d 708 (1982); State v. Hystad, 36 Wash.App. 42, 45, 671 P.2d 793 (1983). However, Mr. Boring insists that he only pleaded guilty because his attorney failed to advise him of the consequences.

2. Mr. Boring received ineffective assistance of counsel. A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. State v. Sutherby, 165 Wash.2d 870, 883, 204 P.3d 916 (2009). State and Federal constitutions guarantee a defendant the right to effective assistance of counsel at trial. U.S. Const. amend VI; Wash.Const. art 1 § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). The right to effective assistance of counsel also encompasses the plea process. State v. Sandoval, 171 Wash.2d 163, 169, 249 P.3d 1015 (2011); In re Pers. Restraint of Riley, 122 Wash.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). In fact, an attorney's faulty advice can render a defendant's guilty plea involuntary or unintelligent. Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366 (1985); McMann v. Richardson, 397 U.S. at 770-71.

This Court will begin with a strong presumption that counsel provided adequate and effective representation. McFarland, 127 Wash.2d at 335. However, a defendant can prevail in an ineffective assistance of counsel claim, if he can prove (i) his trial counsel's performance was deficient and (ii) this deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

(i) Trial counsel's performance was deficient. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wash.App. 909, 912, 68 P.3d 1145 (2003). In order to satisfy this prong in the plea bargaining process, Mr. Boring must demonstrate that his attorney failed to "actually and substantially" assist him in determining whether to plead guilty. State v. Brown, 159 Wash.App. 366, 371, 245 P.3d 776 (2011) citing State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wash.App. 229, 232, 633 P.2d 901, review denied, 96 Wash.2d 1023 (1981)).

Mr. Boring insists that his attorney did not discuss with him the possible direct consequences of pleading guilty to aggravated crimes. State v. Holley, 75 Wash.App. 191, 197, 876 P.2d 973 (1994) (quoting State v. Malik, 37 Wash.App. 414, 417, 680 P.2d 770, review denied, 102 Wash.2d 1023 (1984)). He maintains that instead of cautioning him about the effect aggravating circumstances could have on his sentence, his attorney assured him that the judge would not consider them to determine sentencing but would instead rely on the State's recommendation.

(ii) Trial counsel's advice prejudiced Mr. Boring. Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have differed, undermining our confidence in the outcome. Strickland, 466 U.S. at 694.

To prove prejudice, Mr. Boring must show that his lawyer's "constitutionally ineffective performance affected the outcome of the plea process" by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366 (1985).

Here, Mr. Boring pleaded guilty because he relied on his attorney's assertion that the judge would not use the aggravating factors to impose a sentence higher than what the State recommended. 8/22/11 RP 32; 8/22/11 RP 102-107. He insists that had his attorney advised him, he would not have pleaded guilty and would have taken his chances at trial instead.

b. Withdrawal of a guilty plea is an available remedy if the plea was based on misinformation regarding direct consequences. A defendant may withdraw a guilty plea if necessary to correct a manifest injustice. In re Pers. Restraint of Isadore, 151 Wash.2d 297, 298, 88 P.3d 390 (2004). A manifest injustice is one that is "obvious, directly observable, overt, not obscure." State v. Osborne, 102 Wash.2d 87, 97, 684 P.2d 683 (1984) (quoting State v. Taylor, 83 Wash.2d 594, 596, 521 P.2d 699 (1974)).

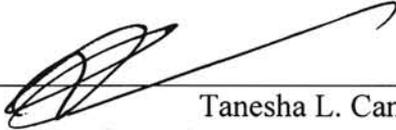
There are four non-exclusive per se indicia of manifest injustice. The four per se indicia of manifest injustice are "(1) denial of effective counsel, (2) plea ... not ratified by the defendant or one authorized [by him] to do so, (3) plea was involuntary, and (4) plea agreement was not kept by the prosecution." Taylor, 83 Wash.2d at 597, 521 P.2d 699 (internal quotations

omitted). Although the manifest injustice requirement is a demanding standard, Mr. Boring believes he has proven that he failed to understand the consequences of his plea because he was denied effective assistance of counsel. Id. In order to correct this manifest injustice, Mr. Boring should be allowed to withdraw the plea and to invoke his right to trial.

E. CONCLUSION

For the reasons set forth above, Mr. Boring respectfully asks this Court to allow him to withdraw his guilty plea.

Respectfully submitted this 23rd day of J-17, 2012.



Tanesha L. Canzater
Law Offices of Tanesha L. Canzater
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362-2435
Canz2@aol.com

FILED

TANESHA LA'TRELLE CANZATER, ESQUIRE
Law Offices of Tanesha L. Canzater
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435 (mobile office)
Canz2@aol.com

JUL 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DECLARATION OF SERVICE

July 23, 2012

Court of Appeals Case No. 302831

Case Name: *State of Washington v. Christopher Randall Boring*

I declare under penalty and perjury of the laws of the State of Washington that on **Monday, July 23, 2012**, I filed an APPELLANT'S OPENING BRIEF plus one copy with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties, by depositing in the United States of America mails an addressed postage paid envelope to the following:

DIVISION THREE COURT OF APPEALS
Renee S. Townsley, Clerk/Administrator
500 North Cedar Street
Spokane, WA 99201

STEVENS COUNTY PROSECUTING ATTORNEYS OFFICE
Timothy Rasmussen, Prosecutor
215 South Oak Street, Room 209
Colville, WA 99114-2862

AIRWAY HEIGHTS CORRECTIONS CENTER
Christopher Randall Boring, DOC# 351876
PO Box 1899
Airway Heights, WA 99001-1899



Tanesha L. Canzater, WSBA # 34341
Attorney for Christopher Randall Boring