

**FILED**

JUL 03 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 30467-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

FLINT G. HASTINGS, Appellant.

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BRIEF OF APPELLANT

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Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

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## I. ASSIGNMENTS OF ERROR

A. The court erred by sentencing Flint G. Hastings to concurrent sentences of 130 months on count 1 (second degree rape of a child) and 34 months on count 2 (second degree rape of a child) for total confinement of 130 months in the amended felony judgment and sentence.

B. The court erred by simply stating as to count 2, third degree rape of a child, that "THE COMBINATION OF CONFINEMENT & COMMUNITY CUSTODY SHALL NOT EXCEED THE STATUTORY MAXIMUM OF FIVE (5) YEARS FOR A CLASS C FELONY ON COUNT 2."

### Issues Pertaining to Assignments of Error

1. When the plea agreement stated the prosecution would recommend 104 months on count 1 and 26 months on count 2, to run concurrently, is Mr. Hastings entitled to specifically enforce the plea agreement for confinement of 104 months? (Assignment of Error A).

2. Alternatively, should this Court find the plea agreement ambiguous, is Mr. Hastings entitled to withdraw his guilty plea? (Assignment of Error A).

3. Did the court err by simply making a notation on the amended judgment and sentence that the total term of confinement and community custody could not exceed the statutory maximum for count 2? (Assignment of Error B).

## II. STATEMENT OF THE CASE

Mr. Hastings was charged by information on March 20, 2006, with one count of first degree rape of a child and one count of third degree rape of a child. (CP 1). Pursuant to a plea bargain, he pleaded guilty to an amended information charging him with one count of second degree rape of child and one count of third degree rape of a child. (CP 62, 64-82, 91).

The court sentenced him to consecutive sentences of 102 months for second degree rape of a child and 34 months for third degree rape of a child, resulting in total confinement of 136 months. (CP 91-103). The plea agreement, however, stated the prosecution would recommend 104 months on count 1 and 26 months on count 2, to run concurrently. (CP 78). The agreement further provided “[t]he terms in counts 1 and 2 to be concurrent for a total term of 130 months (with all but 12 months suspended (if eligible for SSOSA).” (*Id.*).

Mr. Hastings filed a personal restraint petition on July 6, 2010. (CP 158). On August 17, 2011, this Court remanded to the superior court for clarification and amendment of the judgment and sentence. (CP 157).

On November 15, 2011, the superior court held a hearing on modification of the sentence on remand. (RP 78). As to the propriety of running the sentences on counts 1 and 2 consecutively, the State conceded the sentences had to run concurrently as there was no basis for an exceptional sentence. (RP 80-81, 83). The court concurred. (RP 86). The other issue involved count 2, third degree rape of a child, where the superior court had ordered a 34-month sentence and 36-48 months of community custody, thus exceeding the five-year statutory maximum for the class C felony. (CP 160). The State conceded the appropriate remedy was remand to amend the sentence with respect to count 2 "to explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." (CP 160). The amended judgment and sentence accordingly provided:

Count 2: THE COMBINATION OF CONFINEMENT & COMMUNITY CUSTODY SHALL NOT EXCEED THE STATUTORY MAXIMUM OF FIVE (5) YEARS FOR A CLASS C FELONY ON COUNT 2. (CP 276).

Arguing the plea agreement called for the prosecution's recommendation of 104 months on count 1 and 26 months on count 2, to run concurrently, the defense asked for a 104-month sentence. (RP 82, 84).

The superior court filed on November 15, 2011, an amended judgment and sentence imposing 130 months on count 1 and 34 months on count 2, to run concurrently, for total confinement of 130 months. (CP 276). Mr. Hastings appealed. (CP 287). He subsequently amended the notice of appeal to include a December 6, 2011 order clarifying the judgment and sentence in that Mr. Hastings was sentenced under RCW 9.94A.172 (recodified in RCW 9.94A.507, effective August 1, 2009, Laws of 2008, ch. 231 § 56).

### III. ARGUMENT

A. Because the plea agreement recited the State's recommendation would be 104 months on count 1 and 26 months on count 2, to run concurrently, Mr. Hastings is entitled to specific performance of the 104-month sentence.

Since a plea agreement is a contract, issues as to its interpretation are questions of law reviewed de novo. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003).

In order for a guilty plea to be voluntary and valid, the defendant must understand the sentencing consequences of his plea. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *o'ruled in part*, *State v. Barber*, 170 Wn.2d 854, 872-73, 248 P.3d 494 (2011). If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *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. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). "Where the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea." *Miller*, 110 Wn.2d at 536. Here, Mr. Hastings was misinformed of, and thus misunderstood, the sentencing consequences of his plea.

The agreement unambiguously states the prosecution's recommendation was for sentences of 104 months and 26 months, to run concurrently. (CP 78). The further recitation that the terms in counts 1 and 2 would be concurrent for a total term of 130 months is plainly a scrivener's error. (*Id.*; RP 85). Although the plea agreement called for a 104-month sentence, the State asked

for 130 months contrary to the plain terms of the agreement. (RP 62). On remand, the State asked for 136 months, again contravening the agreement. (RP 81).

As stated in *Miller*, 110 Wn.2d at 536, “[t]he integrity of the plea bargaining process requires that once the court has accepted the plea, it cannot ignore the terms of the bargain, unless the defendant . . . chooses to withdraw the plea.” Mr. Hastings did not withdraw his plea. His remedy is specific performance of the total sentence of 104 months as confirmed by the unambiguous terms of the plea agreement. The court erred by imposing a 130-month sentence on remand.

B. Alternatively, should this Court find the plea agreement ambiguous, Mr. Hastings is entitled to withdraw his guilty plea.

In *State v. Bisson*, 156 Wn.2d 507, 523-24, 130 P.3d 820 (2006), our Supreme Court “declined to hold that specific performance is an available remedy for an ambiguous provision in a plea agreement.” If this Court finds the agreement ambiguous, Mr. Hastings is nonetheless entitled to withdraw his guilty plea.

The *Bisson* court, 156 Wn.2d at 523, stated a plea agreement is ambiguous when it is reasonably susceptible to different interpretations. If the agreement is indeed ambiguous, it

must be strictly construed in favor of the accused. *Id.* Even so, Mr. Hastings maintains the plea agreement is unambiguous as the only discrepancy between the concurrent 104-month sentence on count 1 and the 26-month sentence on count 2 is the error in adding the two terms for a 130-month total, mistakenly making the sentences consecutive. The plea agreement is therefore not susceptible to different interpretations. The State is stuck with its bargain; Mr. Hastings is entitled to specific performance. *Miller, supra.*

But if the agreement is ambiguous, Mr. Hastings may nonetheless withdraw his guilty plea. *Bisson*, 156 Wn.2d at 519-20.

C. The court erred in its notation on the amended judgment and sentence that, as to count 2, the total term of confinement and community custody could not exceed the statutory maximum.

In accordance with *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P. 3d 1023 (2009), the court noted on the amended judgment and sentence as to count 2:

THE COMBINATION OF CONFINEMENT &  
COMMUNITY CUSTODY SHALL NOT EXCEED  
THE STATUTORY MAXIMUM OF FIVE (5)  
YEARS FOR A CLASS C FELONY ON COUNT 2.  
(CP 276).

But *State v. Boyd*, \_\_\_ Wn.2d \_\_\_, 275 P.3d 321, 322-23, (2012), disapproved of this practice:

Under RCW 9.94A.701(9), first enacted in 2009, the community custody term specified by RCW 9.94A.701 “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” As this court explained in *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011), following the enactment of this statute, the “*Brooks* notation” procedure no longer complies with statutory requirements. We held there that RCW 9.94A.701(9) applies retroactively, but for those sentenced before the enactment of the statute (as was the case in *Franklin*), it is the responsibility of the Department of Corrections to reduce the term of community custody to bring the total term within the statutory maximum. *Franklin*, 172 Wn.2d at 839-41. Thus, we held that remand for resentencing was not necessary in that case. See *id.* at 840 (directive that court reduce term of community custody to avoid sentence in excess of statutory maximum only applies when court first imposes sentence).

Unlike the defendant in *Franklin*, Boyd was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. See Laws of 2009, ch. 375 § 5. Thus, the trial court, not the Department of Corrections, was required to reduce Boyd’s term of community custody to avoid a sentence in excess of the statutory maximum. The trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the *Brooks* notation.

Mr. Hastings was resentenced after the July 26, 2009 effective date of RCW 9.94A.701(9). The *Brooks* notation was thus inappropriate. The case must be remanded to the trial court to either amend the community custody term or resentence Mr.

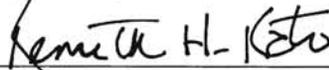
Hastings on count 2 consistent with RCW 9.94A.701(9). *Boyd*, 275 P.3d at 323.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hastings respectfully urges this Court (1) to order specific performance of the 104-month sentence in the plea agreement or, alternatively, to allow him to withdraw his guilty plea, and (2) remand to the trial court to either amend the community custody term or resentence him on count 2 consistent with RCW 9.94A.701(9).

DATED this 3<sup>rd</sup> day of July, 2012.

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I certify that on July 3, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Timothy Rasmussen, Stevens County Prosecutor, 215 S. Oak St., Colville, WA 99114; and Flint G. Hastings, # 300866, Airway Heights C.C., PO Box 2049 – Unit MB-24-L, Airway Heights, WA 99001.

