

30872-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

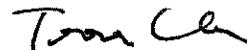
ROBERTO R. ARROYO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Is there any requirement that, in order for a defendant to make a voluntary plea, a judge must orally remind a defendant of the judge's sentencing discretion, information which is already clear in the Statement of Defendant on Plea of Guilty (CrR 4.2(g)(6)(h))?
2. When a judge does not adopt the prosecutor's sentencing recommendation, must the Defendant be permitted to withdraw his guilty plea?

IV. STATEMENT OF THE CASE

The Defendant Roberto Arroyo pled guilty to Escape from Community Custody and Possession of a Controlled Substance (marijuana) by a Prisoner. CP 21, 24; RP 7.

The guilty plea statement explains that the prosecutor would recommend one thing, but the judge would not be bound by the prosecutor's recommendation.

- (g) The prosecuting attorney will make the following recommendation to the judge: With a plea to these charges, **the prosecutor will recommend credit for time served.**
- (h) **The judge does not have to follow anyone's recommendation as to sentence.** The judge must impose a sentence within the standard range unless it finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:
 - (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
 - (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
 - (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
 - (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an

exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

If the court imposes a standard range sentence, then no one may appeal the sentence. If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence.

CP 16-17 (emphasis added).

At the change of plea hearing, the Defendant orally told the judge that he had read through the statement, gone over it with counsel, understood it, and had no questions about it. RP 2. The Defendant explained that he completed 11th grade, had his GED, and had no difficulty reading, writing, or understanding English. RP 3, 8. *See also* CP 13.

The Defendant also signed the Statement of Defendant on Plea of Guilty immediately after this language:

My lawyer has explained to me, and we have fully discussed all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 21. Immediately below that, is the attorney's certification that her client "fully understands" the Statement.

I have read and discussed this statement with the defendant and I believe that the defendant is competent and fully understands the statement.

CP 21. And below that the judge checked two boxes which state:

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- (b) The defendant's lawyer had previously read to him or her the entire statement and that the defendant understood it in full;

CP 21. The Defendant raised his right hand and swore that the information in the Statement of Defendant on Plea of Guilty was true. RP 7.

At the sentencing hearing, the parties requested the Defendant's release with a credit-for-time-served sentence of 62 days. RP 11-13. The judge imposed concurrent sentences, with the greater sentence (in count two) being 180 days. RP 15.

V. ARGUMENT

THE DEFENDANT'S GUILTY PLEA WAS MADE WITH A FULL UNDERSTANDING THAT THE COURT WAS NOT BOUND BY THE PROSECUTOR'S RECOMMENDATION.

The Defendant has declared that "the sentences were within the standard range." Appellant's Brief at 3. Therefore, the Defendant cannot challenge the sentence. *See* RCW 9.94A.585(1)(a sentence within the range shall not be appealed). The Defendant can only challenge the voluntariness

of the plea.

The Defendant first claims a violation of RCW 9.94A.431, which states:

(1) If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The prosecutor shall inform the court on the record whether the victim or victims of all crimes against persons, as defined in RCW 9.94A.411, covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement. The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

(2) The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea.

RCW 9.94A.431.

The Defendant suggests that any judicial act of discretion which deviates from the parties' recommendation is an "implicit" judicial finding that the parties' recommendation is not consistent with the interests of justice.

Appellant's Brief at 1. The defense misinterprets the statute.

When the court determines that a plea negotiation has arrived at a result inconsistent with the interests of justice, the court *refuses to accept the plea*. The court informs the parties that “they are not bound by the agreement and that the defendant may withdraw the defendant’s plea of guilty, if one has been made, and enter a plea of not guilty.” RCW 9.94A.431(1). This did not happen in Mr. Arroyo’s case. The court accepted the change of plea. Therefore, there was no determination that agreement was contrary to the interests of justice, and there was no requirement of the judge to advise the parties that they were not bound.

See e.g. State v. Conwell, 141 Wn.2d 901, 10 P.3d 1056 (2000). In that case, the parties reached an agreement with which the court could not abide. The Defendant had shot at a crowd killing the person with whom he had been sparring. *State v. Conwell*, 141 Wn.2d at 903. He was about to plead guilty to misdemeanors (a weapons violation and reckless endangerment), resulting in a mere 90 day sentence. *State v. Conwell*, 141 Wn.2d at 904. The victim’s family was very upset. *State v. Conwell*, 141 Wn.2d at 906. The trial court rejected the guilty plea and the plea agreement. *State v. Conwell*, 141 Wn.2d at 905. When the defendant sought discretionary review and demanded the right to plead guilty to the

misdemeanor charges, the Washington Supreme Court explained that the right to plead guilty is qualified by the court's duties to "determine if the [plea] agreement is consistent with the interests of justice." *State v. Corwell*, 141 Wn.2d at 908, *citing* former RCW 9.94A.090¹. It is this situation that is contemplated in RCW 9.94A.431(1).

The Defendant's suggestion is that the judge is somehow obligated to enforce the parties' agreement or else permit the Defendant to withdraw his plea. This suggestion is in conflict with the statutes and case law. The sentencing judge is not a party to the negotiation and is not bound by the parties' recommendations. RCW 9.94A.431(2) ("The sentencing judge is not bound by any recommendations contained in an allowed plea agreement"); RCW 9.94A.585(1)(a sentence within the range shall not be appealed); *State v. Sledge*, 133 Wn.2d 828, 839 n.6, 947 P.2d 1199 (1997); *State v. Koivu*, 68 Wn. App. 689, 871, 847 P.2d 13, *review denied* 121 Wn.2d 1026, 854 P.2d 1085 (1993); *State v. Jones*, 46 Wn. App. 67, 70, 729 P.2d 642 (1986).

The Defendant complains that the superior court judge did not orally advise him that the judge's hands were not tied by the prosecutor's recommendation. Appellant's Brief at 4. But the statute only requires that the Defendant *be* informed, not that *the court* orally inform him. RCW

¹ RCW 9.94A.431 is the former RCW 9.94A.090.

9.94A.431(2). And this information was already contained in the Statement of Defendant on Plea of Guilty which the Defendant repeatedly acknowledged he had read and understood in its entirety and without any questions. RCW 9.94A.431(2) is, therefore, satisfied.

This Court has rejected any practice which would require the trial court to inform the defendant of a right to withdraw a guilty plea, for the reason that the court would not be adopting the prosecutor's recommendation. *State v. Weaver*, 46 Wn. App. 35, 40, 729 P.2d 64 (1986), review denied 107 Wn.2d 1031 (1987).

The Defendant relies on cases outside of Washington state courts. As the opinion in *State v. Weaver* made clear, the analysis from other jurisdictions is not persuasive on this point, because they rely on the interpretation of different court rules:

In support of his argument, Mr. Weaver cites cases from other jurisdictions which hold the defendant must be informed of his right to withdraw his plea where the court chooses to disregard the recommended sentence. *See People v. Johnson*, 10 Cal.3d 868, 112 Cal.Rptr. 556, 519 P.2d 604 (1974); *People v. Wright*, 194 Colo. 448, 573 P.2d 551 (1978); *Thomas v. State*, 327 So.2d 63 (Fla. Dist. Ct. App. 1976); *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978). We reject these cases for they are not based on criminal procedure similar to our CrR 4.2(f) and RCW 9.94A.090(2). *See State v. Taylor*, 83 Wash.2d 594, 595-96, 521 P.2d 699 (1974).

State v. Weaver, 46 Wn. App. at 39-40. The case cited by the Defendant, *U.S. v. Kennell*, 15 F.3d 134 (9th Cir. 1994), relies on the interpretation of a federal rule (Fed. R. Crim. P. 11(e)) which has no application here.

Only a manifest injustice would permit the withdrawal of a plea. *State v. Weaver*, 46 Wn. App. at 40-41. The court's discretion within the standard range, which is explicitly set out in the Statement of Defendant on Plea of Guilty, is not a manifest injustice.

The Defendant argues that *Weaver* is distinguishable, because it did not involve a plea agreement – Weaver pled as charged. Appellant's Brief at 6. But the same can be said for Mr. Arroyo; he pled guilty to all charges in the amended information which was an increase from the original information. CP 4-5, 10-12; RP 1-2. Like Mr. Weaver, by pleading guilty Mr. Arroyo did not receive a benefit insofar as the charges go. Their cases are the same in this respect.

Even were the facts different, this topic has no relevance to the *Weaver* court's decision.

Whether Mr. Weaver's statement constitutes a plea bargain agreement **need not be decided**. Assuming arguendo it was an agreement, the trial court adequately informed Mr. Weaver of the consequences of the plea, specifically the maximum penalty and the fact the court was not bound by the prosecutor's recommended sentence.

State v. Weaver, 46 Wn. App. at 38 (emphasis added).

The Defendant notes that in *Weaver*, the court *orally* advised the defendant that it would not be bound by the prosecutor's recommendation for an exceptional up sentence. Appellant's Brief at 6; *State v. Weaver*, 46 Wn. App. at 38. While this fact is different from the facts in Mr. Arroyo's case, it does not take away from the court's language that it would not be persuaded by other jurisdictions which were applying *different* court rules which, unlike Washington, require an oral advisement by the judge. *State v. Weaver*, 46 Wn. App. at 39. Our statute does not require the court to advise a defendant orally of what he has already acknowledged. Our court rule does not permit the withdrawal of a plea where the record demonstrates that the Defendant understood the consequences of his guilty plea.

The Defendant's suggestion that he "lacked a full and fair understanding of the consequence of his guilty plea" (Appellant's Brief at 5) lacks any factual support in the record. The Defendant is not new to the court procedures. CP 23. Nowhere is there any suggestion that the Defendant was surprised that the court could do what it did – not in the transcript at the time of sentencing and not in any subsequent filing. CP 40-42; RP 16. Rather, the record is replete with the Defendant's understanding of the plea statement.

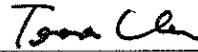
And that plea statement explicitly states that the judge does not have to follow anyone's recommendation with regard to sentence. CP 16. On this record there is no manifest injustice justifying a withdrawal of the plea.

VI. CONCLUSION

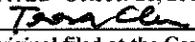
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 26, 2012.

Respectfully submitted:



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<p>Andrea Burkhart <Andrea@BurkhartandBurkhart.com></p> <p>Roberto Arroyo 330 W. Chestnut Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 26, 2012, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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