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NOVEMBER 26, 2014
Court of Appeals
Division III
State of Washington

No. 32357-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSE F. MANDUJANO,

Defendant/Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Mandujano's guilty plea was not knowing, intelligent or voluntary, where he was not informed until after sentencing that his convictions required an indeterminate sentence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was Mr. Mandujano's guilty plea knowing, voluntary and intelligent, where he was not informed until after sentencing that his convictions required an indeterminate sentence consisting of a maximum term of life and a minimum term of confinement?

C. STATEMENT OF THE CASE

Jose Mandujano pled guilty with the aid of an interpreter to first degree rape of a child and first degree child molestation. 9/17/13 RP 4. The Court confirmed that Mr. Mandujano had reviewed the guilty plea statement with his attorney and that he understood it and signed it. 9/17/13 RP 3. Paragraph 6(g) of the guilty plea statement provided in pertinent part:

The prosecuting attorney will make the following recommendation to the judge:

Recommend a sentence of 129 months on Count 1 and 96 [months] on Count 2 . . .

CP 59.

The Court asked Mr. Mandujano if he understood count one had a standard range of 129 to 171 months with a maximum term of life and count two had a standard range of 72 to 96 months with a maximum term of life. Mr. Mandujano answered “yes.” 9/17/13 RP 4.

The Court did not advise Mr. Mandujano of the indeterminate sentencing required for sex offenses committed after July 12, 2001, discuss paragraph 6(f) in his statement on plea of guilty, or advise him that a life sentence was a possible outcome of pleading guilty to the charge despite the sentence imposed by the court. 9/17/13 RP 2-5; CP 57.

At sentencing, the Court sentenced Mr. Mandujano to “129 months on Count I [and] 96 months on Count II, with a maximum of life.” 10/29/13 RP 3. The judgment and sentence indicated standard ranges of 129 to 171 months 72 to 96 months respectively with maximum terms of life. CP 21. Paragraph 4.5(a) of the judgment and sentence showed total confinement of 129 months on count one and 96 months on count two. CP 26. Paragraph 4.5(b) for sex offenses sentenced under RCW 9.94A.507 was not used. CP 26. No mention was made of a minimum or maximum term of confinement as required for sex offenses. 10/29/13 RP 2–6.

Approximately four months after Mr. Mandujano was sentenced, the State moved to amend the sentence by adding the words “to life” to the original sentence imposed in order to reflect an indeterminate sentence.

2/25/14 RP 2-4. Mr. Mandujano argued such an amendment would incorrectly state what the court ordered at sentencing. *Id.* The court signed the amended judgment and sentence. 2/25/14 RP. This appeal followed. CP 2-3.

D. ARGUMENT

1. Mr. Mandujano’s guilty plea was not knowing, voluntary and intelligent, where he was not informed until after sentencing that his convictions required an indeterminate sentence consisting of a maximum term of life and a minimum term of confinement.

An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. *State v. Walsh*, 143 Wn.2d 1, 7–8, 17 P.3d 591 (2001).

Due process under the United States and Washington State constitutions requires that a plea of guilty be made knowingly, intelligently and voluntarily. U.S. Const. amend. 14; Wash. Const. art 1 § 3; *PRP of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004), citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *PRP*

of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A defendant enters a valid plea only if he makes a knowing, voluntary, and intelligent decision based on an understanding of the charge and the consequences. *State v. McDermond*, 112 Wn. App. 239, 243–44, 47 P.3d 600 (2002). A guilty plea is not knowingly made when it is based upon misinformation of sentencing consequences. *Isadore*, 151 Wn.2d at 298, citing *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). A defendant need not be informed of all possible consequences of his plea, but he must at least be informed of all direct consequences of the plea. *Isadore*, 151 Wn.2d at 298, citing *Ross*, 129 Wn.2d at 284.

A guilty plea is constitutionally involuntary when a defendant is misinformed about a direct consequence of pleading guilty. *State v. Mendoza*, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A plea will be overturned based on defective advice when the advice relates to a direct as opposed to a collateral consequence of the plea that materially affects the defendant's decision to plead. *McDermond*, 112 Wn. App. at 247. The possibility of a life sentence is a direct, not a collateral, consequence of pleading guilty. *McDermond*, 112 Wn. App. at 248.

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin*, 395 U.S. at 242. “The record of a plea hearing or clear and convincing extrinsic evidence 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, 502–03, 554 P.2d 1032 (1976).

In *PRP of Murillo*, 134 Wn. App. 521, 142 P.3d 615 (2006), the court of appeals held a defendant who was not advised properly of the requirement of a maximum sentence of life for his offense and of the community custody range of his sentence did not enter a plea knowingly, intelligently or voluntarily. In *Murillo*, this Court pointed out: (1) although the required sentence was life imprisonment, the court that accepted Murillo’s plea “told Mr. Murillo otherwise: ‘I guess I can go low [below the standard range minimum sentence], but I cannot go above under the present law’”; (2) “the sentencing court wrote the determinate sentence of 59-1/2 months in the portion of the judgment form used for sentences not subject to [former] RCW 9.94A.712, while leaving blank the portion of the judgment form that related to sentences subject to [former]RCW 9.94A.712”; and (3) misunderstandings regarding the term

of community custody and the term of confinement and maximum term of sentence were apparent from colloquy and the written plea agreement.

Murillo, 134 Wn. App. at 531.

The facts of this case are very similar to those in *Murillo*. Mr. Mandujano signed a plea agreement which stated in boilerplate language that the sentence required by statute for his crimes was life imprisonment and the court would impose a minimum term of confinement. CP 57. But paragraph 6(g) of the guilty plea statement indicated the prosecuting attorney would recommend a sentence of 129 months on Count 1 and 96 [months] on Count 2 and made no mention of an indeterminate sentence. CP 59.

Moreover, the court that accepted his plea told him count one had a standard range of 129 to 171 months with a maximum term of life and count two had a standard range of 72 to 96 months with a maximum term of life. The Court did not advise Mr. Mandujano of the indeterminate sentencing required for sex offenses, discuss paragraph 6(f) in his statement on plea of guilty, or advise him that a life sentence was a possible outcome of pleading guilty to the charge despite the sentence imposed by the court. 9/17/13 RP 2-5; CP 57.

At the sentencing hearing, the error continued. Although the State

recommended an indeterminate sentence, the Court sentenced Mr. Mandujano to “129 months on Count I [and] 96 months on Count II, with a maximum of life.” 10/29/13 RP 3. Furthermore, the judgment and sentence indicated standard ranges of 129 to 171 months 72 to 96 months respectively with maximum terms of life. CP 21. Paragraph 4.5(a) of the judgment and sentence showed total confinement of 129 months on count one and 96 months on count two. CP 26. Paragraph 4.5(b) for sex offenses sentenced under RCW 9.94A.507 was not used. CP 26. No mention was made of a minimum or maximum term of confinement as required for sex offenses. 10/29/13 RP 2–6.

Based on the information in the record, Mr. Mandujano was misinformed as to his potential life sentence by both his attorney and the trial court. The misinformation was particularly egregious in this case because Mr. Mandujano does not speak or understand English. See 9/17/13 CP 2-4. Mr. Mandujano was not correctly informed of the consequence of his plea until nearly four months after sentencing, when an order was entered amending the Judgment and Sentence by adding the words “to life” in order to reflect an indeterminate sentence. 2/25/14 RP 2-4.

Criminal rules of procedure impose a duty on our trial courts to ensure that a defendant's guilty pleas are knowingly, voluntarily, and intelligently made. Criminal Rule 4.2(d) affirmatively imposes this duty. *Murillo*, 134 Wn. App. at 531. That duty was not met here. The court either misunderstood and/or did not communicate the sentencing consequences. Since Mr. Mandujano's guilty plea was not knowingly, intelligently, and voluntarily made, the result is a manifest injustice of a constitutional magnitude. Therefore, Mr. Mandujano must be given the opportunity to withdraw his guilty plea. *Murillo*, 134 Wn. App. at 531.

E. CONCLUSION

For the reasons stated, the Court should vacate the lower court's finding of guilt and remand to allow Mr. Mandujano the opportunity to withdraw his guilty plea.

Respectfully submitted on November 26, 2014,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on November 26, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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