

FILED
June 23, 2015
Court of Appeals
Division III
State of Washington

No. 32717-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GUILLERMO GOMEZ,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The guilty plea was involuntary due to misinformation from a mutual mistake over the offender score and standard range.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was the guilty plea involuntary due to misinformation from a mutual mistake over the offender score and standard range? If so, should the case should be remanded to allow Mr. Gomez the opportunity to choose between specific enforcement of the plea agreement or withdrawal of the guilty plea?

C. STATEMENT OF THE CASE

Mr. Gomez pled guilty to second degree burglary and second degree theft in exchange for the State agreeing to dismiss three other charges. RP 3-4; CP 3-11. The guilty plea statement indicates an offender score of one with standard ranges of 9-12 months and 3-8 months, respectively, as well as the State's recommendation of 10.5 months and concurrent sentences. CP 5. The prosecutor and the Court also recited these same standard ranges to Mr. Gomez at the guilty plea hearing. RP 3-5.

Two months later at the sentencing hearing, the prosecutor recited an offender score of five with standard ranges of 17-22 and 4-12,

respectively. RP 9. There was no discussion or mention of the lower offender score and standard ranges previously stated at the guilty plea hearing or in the guilty plea statement. RP 8-15. The Court imposed a sentence of 17 months on the burglary based on an offender score of 5. CP 14. The judgment and sentence reflects these same numbers. CP 32-33. This appeal followed. CP 25-26.

D. ARGUMENT

Since the guilty plea was involuntary due to misinformation from a mutual mistake over the offender score and standard range, the case should be remanded to allow Mr. Gomez the opportunity to choose between specific enforcement of the plea agreement or withdrawal of the guilty plea.

As a preliminary matter, Mr. Gomez did not raise this issue in the court below. However, RAP 2.5(a)(3) provides that “manifest error affecting a constitutional right” may be raised for the first time on appeal. A defendant gives up constitutional rights by agreeing to a plea agreement, and, because fundamental rights of the accused are at issue, due process considerations come into play. *State v. Van Buren*, 101 Wn. App. 206, 211, 2 P.3d 991 (2000); *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). A claim of error based upon a breach of a plea agreement

involves an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Walsh*, 143 Wash. 2d 1, 8, 17 P.3d 591 (2001). Similarly, a guilty plea entered into with an erroneous belief about a lower standard range is invalid. *Walsh*, 143 Wn.2d at 8, 17 P.3d 591. A challenge to the validity of the guilty plea based on misinformation from a mutual mistake may be raised for the first time on appeal. *Walsh*, 143 Wn.2d at 6, 17 P.3d 591.

CrR 4.2(f) allows a defendant to withdraw his guilty plea whenever it appears that the withdrawal is necessary to correct a manifest injustice. Manifest injustice occurs when a defendant receives misinformation about the direct consequences of his or her guilty plea, resulting in an involuntary plea. See *Walsh*, 143 Wn.2d at 8–9, 17 P.3d 591 (citing *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988)); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006).

In *Walsh*, the defendant pleaded guilty based on an erroneous standard range that was lower than the correct range. Our Supreme Court held that "Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence." *Walsh*, 143 Wn.2d at 8-9, 17 P.3d 591. The Court rejected the State's argument that Walsh implicitly elected to specifically enforce the agreement by

proceeding with sentencing with the prosecutor recommending the low end of the standard range, because the record did not support any such election, and Walsh clearly was not advised either of the misunderstanding or of the available remedies. *Walsh*, 143 Wn.2d at 9, 17 P.3d 591.

The situation here is similar to *Walsh*. Both parties mistakenly believed the offender score was one at the guilty plea hearing, when in fact it was five. The prosecutor did not correct this mistake until the Court had proceeded to sentencing. There was no subsequent discussion with Mr. Gomez as to why his offender score and standard range increased from what had been previously stated during the guilty plea, or why it appeared different on the judgment and sentence. He was not given any choice over proceeding to sentencing, and he was also not advised of the available remedies. Since Mr. Gomez pleaded guilty based on an erroneous standard range that was lower than the correct range, the guilty plea was involuntary and thus invalid.

Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. *Walsh*, 143 Wn.2d at 8-9 (citing *Miller*, 110 Wash.2d at 531, 756 P.2d 122). The defendant's choice of remedy does not control, however, if there are compelling reasons not

to allow that remedy. *Id.* The State bears the burden of showing a defendant's choice of remedy is unjust. *State v. Moore*, 75 Wash.App. 166, 173, 876 P.2d 959(1994) (defendant was allowed his choice of remedy where the State did not argue it would be prejudiced by withdrawal of the plea but instead conceded it could still procure its key witness for trial); see also *Van Buren*, 101 Wash.App. at 212 n. 2, 2 P.3d 991.

Therefore, the case should be remanded to allow Mr. Gomez the opportunity to choose between specific enforcement of the agreement or withdrawal of the guilty plea.

E. CONCLUSION

For the reasons stated, the case should be remanded for further proceedings.

Respectfully submitted June 23, 2015,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 23, 2015, 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 the brief of appellant:

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