

No. 34605-6

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KYLE JOHNSON,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The State complains that this appeal is untimely. That issue has been repeatedly decided against the State and is not a proper response to Mr. Johnson's assignments of error. The State then argues that this Court should not consider the issues raised in this appeal because they were not raised before and are *res judicata*. An issue raised on direct appeal for the first time is not barred by the doctrine of *res judicata*.

Regarding the merits of Johnson's claim, the State argues that community supervision is a collateral consequence of a guilty plea. But, community supervision constitutes the range of punishment that can be imposed at sentencing because of the guilty plea. It is not a consequence that might be imposed by some other governmental agency.

The State concedes that Johnson was misinformed of his standard range during his guilty plea and that a different range was used at sentencing. The State also fails to point to any place in the record where Johnson was offered an opportunity to withdraw his plea because of the mistake. As a result, the facts—as conceded by the State—merit a remand for withdrawal of the plea.

The State fails to respond to Johnson's argument that the law has changed regarding affirmative misadvice of the possible future use of a conviction at a trial on another matter.

The State implicitly acknowledges that no record of Johnson's arraignment exists and has previously disclaimed any interest in attempting to recreate the

record. The State then argues that because the record no longer exists Johnson cannot prove a closure of the courtroom at arraignment. Where the record has been lost or destroyed through no fault of Johnson, he is not obliged to wait for post-conviction to raise the issue. Instead, reversal is required.

II. ARGUMENT

A. Mr. Johnson's plea was involuntary because he was not informed that community supervision was a possible direct consequence.

It is undisputed that Mr. Johnson was not told that community supervision was part of the range of punishment that could be imposed due to his guilty plea. Because community supervision is not mandatory, the State argues it is a collateral consequence. But, the distinction between direct and collateral consequence of a plea does not turn on whether the condition is a mandatory or discretionary consequence of a guilty plea, as the caselaw below demonstrates.

A defendant may withdraw a guilty plea under CrR 4.2(f) “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Knotek*, 136 Wash.App. 412, 423, 149 P.3d 676 (2006). “The State bears the burden of proving the validity of a guilty plea,” including the defendant's “[k]nowledge of the direct consequences” of the plea, which the State may prove from the record or by clear and convincing extrinsic evidence. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996).

Despite the State's blanket proclamation that there are no cases recognizing a discretionary sentencing condition as a direct consequence of a guilty plea, *State v.*

Cameron, 30 Wash. App. 229, 234, 633 P.2d 901, 905 (1981), holds that restitution (a discretionary consequence) is a direct consequence of entering a guilty plea.

Likewise, the statutory maximum sentence is a direct consequence of a guilty plea even in cases where the sentencing court possesses only the authority to impose a lesser sentence. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) (reversing because the defendant was misinformed as to the maximum term).

In contrast, a collateral consequence is a secondary, indirect outcome of a guilty plea. If the distinction turned on whether the consequence was mandatory, then there are many direct consequences of a guilty plea that require advisement at the time of plea, including ineligibility to vote; state hospital notification of conviction; ineligibility to act as a personal representative, trustee, or notice agent; and more. *See National Inventory of Collateral Consequences of Conviction, Washington State* at <https://niccc.csgjusticecenter.org/search/?jurisdiction=48>.

That is why, for example, sexual offender registration which is mandatory is collateral. Although the duty to register flows from a conviction for a felony sex offense, it does not enhance the sentence or punishment. Registration as a sex offender does not alter the standard of punishment. “Because registration as a sex offender does not alter the standard of punishment, we hold the duty to register is collateral, and not a direct, consequence of a guilty plea.” *State v. A.N.J.*, 168 Wash. 2d 91, 114–15, 225 P.3d 956, 968 (2010).

Instead, a defendant must understand the sentencing consequences for a guilty plea to be valid.” *State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988).

- B.1. Mr. Johnson’s plea was involuntary because he was affirmatively misinformed that his guilty plea would benefit his pending murder charge by making evidence otherwise admissible, inadmissible—which was not true.
- B.2. Mr. Johnson was denied his right to effective assistance of counsel when counsel failed to explain at the time of Johnson’s guilty plea that the benefit offered by the State—which the plea was based upon—was wholly illusory.

Mr. Johnson contends that this assignment of error, which is admittedly similar to the issue raised in Johnson’s pre-judgment appeal, is not controlled by the previous decision because it is based on a different legal theory—one that has changed over time. The State does not contest this point.

More specifically, Johnson argues that he was affirmatively misled regarding the promised benefit in his plea agreement. Although the State assures this Court that the benefit from the plea agreement was not illusory, the State does not explain just how this charge/conviction could have been used in the State’s case-in-chief in a trial on a then-pending charge.

Because the State has utterly failed to make even a minimal showing of any benefit to Johnson, this Court should reverse.

- C. At sentencing, the court erred by not offering Johnson an opportunity to withdraw his plea when it concluded that it was infected by a mutual mistake.

The State’s response to this assignment of error makes the error undeniably clear. The State’s *Response* states that “(t)he written statement on plea of guilty did indeed provide that the standard range was 0 - 12 months based upon an offender score of “0,” while according to the State the Judgment and Sentence in this matter correctly stated that

the Appellant's offender score was '1' (no priors, but an 'other current offenses') and the correct standard range was 3 - 8 months of incarceration." In other words, the State admits that Johnson's guilty plea was based on a mistake of fact.

The State then argues that the mistake in the guilty plea is of no moment because "it is clear from the record that prior to imposing sentence the Appellant was informed of the correct standard range" and he did not move to withdraw his guilty plea based on the mistake.

The State's argument is unguided by the law. The law places the burden on the court to inform a defendant whose guilty plea is based on a mistake that he is entitled to withdraw his plea. It does not require a defendant to raise the issue himself. *State v. Walsh*, 143 Wash. 2d 1, 9, 17 P.3d 591 (2001), rejected the exact argument the State makes here:

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

Having admitted that the Johnson's guilty plea was based on a mistake regarding the standard range and acknowledging that Johnson was not informed of his right to withdraw the plea at sentencing, the State has effectively (if unwittingly) conceded that reversal is required.

D. Mr. Johnson assigns error to the failure to conduct his arraignment in open court.

The State seeks to disadvantage Johnson's right to appeal by asking this Court to hold him responsible for the loss of the record of proceeding by state actors and for the State's refusal to attempt to recreate the record.

In light of the State's position that this appeal should be decided in light of the limited available record, Johnson renews his request to apply the law applicable to appeals where the record is insufficient to allow review of an assignment of error.

A criminal defendant must have a "record of sufficient completeness" for appellate review of potential errors. *State v. Larson*, 62 Wash.2d 64, 66, 381 P.2d 120 (1963) (citing *Draper v. Washington*, 372 U.S. 487, 495–96, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963)). But a "complete verbatim transcript" is not required. *State v. Tilton*, 149 Wash.2d 775, 781, 72 P.3d 735 (2003) (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S.Ct. 410, 414, 30 L.Ed.2d 372 (1971)). Nevertheless, an alternative method must allow counsel to determine which issues to raise on appeal and to "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *State v. Jackson*, 87 Wash.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper*, 372 U.S. at 495). If the reconstructed record fails to recount events material to issues on appeal satisfactorily, the appellate court must order a new trial. *Tilton*, 149 Wash.2d at 783.

This Court should do just that.

III. CONCLUSION

This Court should reverse and remand with directions to vacate the judgment and permit Johnson to withdraw his guilty plea.

DATED this 8th day of October 2017.

Respectfully Submitted:

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