No. 34605-6

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE JOHNSON,

Appellant.

FILED

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Court of Appeals
Division III
State of Washington

APPELLANT'S OPENING BRIEF

On Appeal from Asotin County Superior Court
Case No. 89-1-00015-8

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I. INTRODUCTION

This is an appeal from a judgment and sentence on two counts of custodial assault. Mr. Johnson challenges the guilty plea on several grounds. He claims the plea was invalid because he was not informed of a direct consequence (community supervision) and was given misleading information about a collateral consequence (the use of these conviction in a then-pending aggravated murder charge). When Johnson was sentenced, the judge concluded that Johnson's plea was based on a mutual mistake regarding the offender score/sentence range (the judge was wrong), but did not offer Johnson an opportunity to withdraw his guilty plea as the law requires.

Finally, portions of the record have been destroyed. Johnson raises a public trial claim and urges this Court to reverse because the record is insufficient and incomplete.

II. ASSIGNMENTS OF ERROR

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

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.

C. At sentencing, the court used a sentence range different than the range that Johnson was told applied when he pleaded guilty. The court erred

by not offering Johnson an opportunity to withdraw his plea when it concluded that it was infected by a mutual mistake.

D. Mr. Johnson assigns error to the failure to conduct his arraignment in open court. The loss of the trial court record makes it impossible for Mr. Johnson to establish this claim. Johnson should not be required to raise this claim in post-conviction where a different and demanding standard of review applies.

III. STATEMENT OF THE CASE

Mr. Johnson was charged in Asotin County Superior Court with two counts of custodial assault. CP 1-2. On October 9, 1989, he entered a guilty plea to both counts. CP 3-5. The plea agreement stated that, in return for the plea of guilty, the State would not use "these convictions in its case-in-chief" in a pending aggravated murder case, but "reserves any evidentiary use of these convictions permitted by the rules of evidence or other authority for impeachment, rebuttal, or sentencing in this or any other cause, including the defendant's above referenced prosecution for aggravated murder in the first degree." CP 12.

Shortly thereafter, Johnson sought to withdraw his guilty plea. CP 7-17. A hearing was held on June 1, 1990, and the motion was denied. CP 39. Johnson filed an appeal before he was sentenced. CP 40. This Court upheld the decision denying the motion to withdraw the guilty plea reasoning that Johnson had been misadvised regarding a collateral consequence of his guilty plea.

On June 28, 1990, Johnson was sentenced. CP 41-44. The sentencing judge found that Johnson had an offender score of "1" and a corresponding sentence range of 3-8 months. The sentencing judge, who obviously concluded that Johnson's plea

was based on a mutual mistake about the offender score and sentence range, did not offer Johnson an opportunity to withdraw his plea (or for specific performance).

IV. ARGUMENT

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

When Mr. Johnson pleaded guilty, he was informed of various consequences of his plea. However, he was not told that the sentencing judge had the complete discretion to impose up to a year of community supervision. The only mention of community supervision was a mention that the instant conviction could be used to revoke community supervision previously imposed for another conviction.

Community placement is a direct consequence of a guilty plea. *In re Isadore*, 151 Wash. 2d 294, 301, 88 P.3d 390, 394 (2004). By the same reasoning, so is community supervision.

Under CrR 4.2(d), a court " 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." *State v. Walsh,* 143 Wash.2d 1, 5-6, 17 P.3d 591 (2001). "Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." *State v. Ross,* 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. V and XIV, Wash. Const. art. I,§ 3.

A guilty plea is otherwise invalid. *State v. Branch,* 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made

voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" *State v. Mendoza,* 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." *In re Pers. Restraint of Isadore,* 151 Wn.2d 294. 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." *Id.*

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. *Mendoza,* 157 Wn.2d at 584, 590-91; *In re Pers. Restraint of Quinn,* 154Wn. App. 816, 226 P.3d 208, 219 (2010). A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Ross,* 129 Wn.2d at 284 (internal quotation marks omitted) (quoting *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353(1980)). For example, 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). The relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)

"A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in

the plea. *Mendoza*, 157 Wn.2d at 591.

"[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." *Mendoza,* 157 Wn.2d at 589; *see also State v. Weyrich,* 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty.").

The *Mendoza* Court specifically rejected "an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty" because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." *Mendoza,* 157 Wn.2d at 590 (quoting *Isadore,* 151 Wn.2d at 302).

It is the State's burden to ensure the record of a guilty plea affirmatively 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).

Moreover, a defendant is not required to show the misinformation was material to his decision to plead guilty. "[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea .... Absent a showing that the defendant was correctly informed of all of the direct

consequences of his guilty plea, the defendant may move to withdraw the plea [regardless of any showing of materiality]." *Mendoza*, 157 Wn.2d at 590-91; *accord Bradley*, 165 Wn.2d at 939.

In this case, Johnson was not informed that community supervision could be imposed as a possible punishment. It does not matter that community supervision was not imposed. Johnson is only required to show that community supervision was a direct consequence. It was and Johnson should be permitted to withdraw his guilty plea.

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.

Because this is a direct appeal, Johnson is entitled to application of the law as it currently exists. *Matter of St. Pierre*, 118 Wash. 2d 321, 327, 823 P.2d 492, 495 (1992).

When a criminal defendant is affirmatively misadvised about a collateral consequence of a guilty plea, that misadvice renders the plea invalid. A.N.J. citing *State v. Stowe,* 71 Wash.App. 182, 188, 858 P.2d 267 (1993) (When there are "additional consequences of an unquestionable serious nature ..., it may be manifestly unjust to hold the defendant to his earlier bargain."); *State v. McCollum,* 88 Wash.App. 977, 982, 947 P.2d 1235 (1997).

Plea agreements are contracts, and the law imposes on the prosecutor an implied promise to act in good faith. *State v. Harrison,* 148 Wash.2d 550, 556, 61 P.3d 1104 (2003).

Mr. Johnson pleaded guilty in return for a promise by the prosecutor not to use his "convictions" in its case-in-chief in a pending aggravated murder charge, although the State essentially reserved the right to use the convictions for all other purposes.

The State's promise was illusory. The convictions were never admissible in the State's case-in-chief in the aggravated murder case. At best, the convictions were only admissible for the purposes reserved by the State in the agreement. In fact, there was no benefit to Johnson by the State's supposed concession.

Because Johnson pleaded guilty based on this illusory promise, he has shown that he was given affirmative misadvice about a material aspect of his plea.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *In re Pers. Restraint of Riley*, 122 Wash.2d 772, 780, 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. McMann, 397 U.S. at 770–71. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland v. Washington*, 466 U.S. 668 (1984), test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant.

Johnson satisfies both prongs. Johnson's guilty plea was based on an illusory benefit. Defense counsel had an obligation to explain that fact, but the record is silent.

This Court should reverse and remand to allow Johnson to withdraw his guilty plea either reason advanced in this assignment of error.

C. At sentencing, the court used a sentence range different than the range that Johnson was told applied when he pleaded guilty. The court erred by not offering Johnson an opportunity to withdraw his plea when it concluded that it was infected by a mutual mistake.

Where the parties have agreed to an unlawful sentence based on mutual mistake, the defendant may elect to withdraw his plea; but specific performance may not be used to bind the court to enforce an illegal sentence. *State v. Barber,* 170 Wash.2d 854, 872–73, 248 P.3d 494 (2011). Specific performance is available to compel the State to follow through with its promises, but not to compel the imposition of an illegal sentence in cases of mutual mistake. *Barber,* 170 Wash.2d at 872–73.

A trial court must allow withdrawal of a guilty plea "to correct a manifest injustice." CrR 4.2(f); *State v. Walsh*, 143 Wash. 2d 1, 6, 17 P.3d 591, 593 (2001).

Here, Johnson was not offered an opportunity to withdraw his plea; the new standard range was not brought to his attention at the sentencing hearing. *Walsh,* 143 Wash. 2d at 7.

In this case, the sentencing court concluded that the parties were mistaken about the standard range when Johnson pleaded guilty. The guilty plea statement stated that Johnson had an offender score of "0" and a range of 0-12 months. CP 3.

The sentencing judge concluded that Johnson's range was 3-8 months with an offender score of "1." CP 42.

In fact, the guilty plea statement was correct, but the sentencing judge was obliged to inform Johnson of what he concluded was an error prior to imposing sentence. Because the sentencing judge did not do so, the law required the judge to give Johnson an opportunity to withdraw his plea. This case should be reversed and remanded to now allow Johnson that opportunity.

D. Mr. Johnson assigns error to the failure to conduct his arraignment in open court. The loss of the trial court record makes it impossible for Mr. Johnson to establish this claim. Johnson should not be required to raise this claim in post-conviction where a different and demanding standard of review applies.

Both the state and federal constitutions guarantee criminal defendants the right to a public trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The Washington Constitution also guarantees the right of an open trial to the public. WASH. CONST. art. I, § 10. "These related constitutional provisions 'serve complimentary and interdependent functions in assuring fairness of our judicial system,' " and "are often collectively called 'the public trial right.' " *State v. Love,* 183 Wash.2d 598, 605, 354 P.3d 841 (2015) (quoting *State v. Bone–Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995)).

Arraignment have historically been performed in open court. This principle is well established. "[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence." *Smith v. Doe*, 538 U.S. 84, 98–99 (2003); *see also* 22 C.J.S. *Criminal Procedure and Rights of the Accused* § 193, at

567 (2016) ("The arraignment should be held *in open court*, at stated terms, whether regular or adjourned, of which the general public has been advised." (emphasis added) (footnote and citation omitted)).

In Washington, the concept of public arraignments is found in case law dating back more than a century. In *State v. Philip*, our Supreme Court recognized that "a defendant must be arraigned before the court." 44 Wash. 615, 618, 87 P. 955 (1906) (citing Ballinger's Ann. Codes & St. § 6884); *see also State v. Nelson*, 39 Wash. 221, 224, 81 P. 721 (1905) ("The order of arraignment ... was delivered to the appellant in open court."). In short, both experience and logic compel the conclusion that an arraignment on a substantive amendment to the information implicates the right to a public trial. *Matter of Eagle,* 195 Wash. App. 51, 65, 383 P.3d 1042, 1049 (2016).

On collateral review, however, a meritorious public trial violation is not presumed prejudicial. *In re Pers. Restraint of Coggin*, 182 Wash.2d 115, 119–20, 340 P.3d 810 (2014). Rather, a petitioner claiming a public trial violation for the first time on collateral review must show actual and substantial prejudice. *Coggin*, 182 Wash.2d at 116.

Johnson seeks to raise this issue on direct appeal. However, the record is deficient. In response to Mr. Johnson's motion to dismiss, this Court ruled that because Johnson had not specified what other record pertinent to his appeal is missing he was not entitled to reversal. In this assignment of error, he has done just that.

Johnson cannot be held accountable for the missing or destroyed record. RCW 2.08.030 provides: "[t]he superior courts are courts of record. . .". The accepted definition of a "court of record" is "[a] court that is required to keep a record of its proceedings, and that may fine or imprison for contempt." Black's Law Dictionary 358 (7th ed. 1999). "[I]t is the duty . . . of each county clerk for each of the courts for which he is clerk . . . . [t]o record the proceedings of the court." RCW 2.32.050, .050(2).

If a state provides for a direct appeal as of right from a criminal conviction, it must also provide "certain minimum safeguards necessary to make that appeal 'adequate and effective.' " *Evitts v. Lucey,* 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (quoting *Griffin v. Illinois,* 351 U.S. 12, 20, 76 S.Ct. 585, 100 L.Ed. 891 (1956)); *see also Coe v. Thurman,* 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause.").

In *Boyd v. Newland,* the Ninth Circuit applied these principles in granting the habeas petition of an indigent defendant who had been denied a copy of his voir dire transcript because the state court had, in violation of clearly established federal law, determined that the transcript was not necessary to his *Batson* appeal. 467 F.3d 1139 (9th Cir.2006). That court held that "all defendants ... have a right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis." *Id.* at 1150.

Mr. Johnson has similarly been denied access to a complete record. This Court should reverse.

V. CONCLUSION

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

DATED this 24th day of April, 2017.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I efiled the attached Opening Brief causing a copy to be sent to opposing counsel:

asotinprosecutor@gmail.com

April 24, 2017//Portland, OR /s/Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE
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Comments:

No Comments were entered.

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