

NO. 34944-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

AARON FALETOGO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Robert L. Zagelow, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant's guilty plea was not knowing and voluntary because he was misinformed as to the standard sentencing range for third degree assault.

2. The appellant's nine-month sentence exceeds the three-to-eight-month standard range for the offense.

Issues Pertaining to Assignments of Error

1. The appellant was misinformed as to the standard sentencing range for third degree assault. Where, as a result, the appellant's guilty plea was not knowing and voluntary, should he be permitted to withdraw the plea?

2. Does the appellant's nine-month sentence exceed the three-to-eight-month standard range for the offense?

B. STATEMENT OF THE CASE

The State charged appellant Aaron Faletogo with second degree assault based on events occurring on March 25, 2001. CP 3-4; former RCW 9A.36.021(1)(c) (1997).

Faletogo ultimately pleaded guilty to third degree assault. CP 5-6 (amended information, charging third degree assault based on bodily harm inflicted with criminal negligence); CP 7-13 (statement of defendant on plea of guilty); former RCW 9A.36.031(1)(d) (1999).

Faletogo was informed that, based on an offender score of one, his standard range was three to nine months of incarceration. CP 8 (statement of defendant on plea of guilty); RP 4 (plea hearing).

In fact, the standard range for the offense was three to eight months. See former RCW 9.94A.310 (2000) (sentencing grid); former RCW 9.94A.320 (2000) (crimes included within each seriousness level, and assigning to third degree assault a seriousness level of “III”).¹

At sentencing, the State recommended the purported “high end,” or nine months of incarceration. RP 7.

The court sentenced Faletogo to the recommended nine months of incarceration plus 12 months of community custody.² CP 21; RP 8.

Faletogo appeals.³ CP 49-58, 62.

¹ Under the currently-applicable statutes, seriousness level and standard range remain the same as they did in March of 2001. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (crimes included within each seriousness level).

² Faletogo was also informed he could be sentenced to nine to 18 months of community custody. RP 4; CP 8; see former RCW 9.94A.120(11)(a) (2000); WAC 437-20-010 (2000) (setting community custody ranges). In fact, the statutory community custody term was 12 months where the prison term was one year or less. RP 8 CP 9; former RCW 9.84A.383 (1999). At sentencing, the court asked the deputy prosecutor why 12 months was being imposed rather than the nine-to-18-month range. The deputy prosecutor responded, “[d]on’t ask me why.” RP 8.

³ On April 12, 2017, a commissioner of this Court ruled that the appeal could go forward even though the notice of appeal was belatedly filed. On

C. ARGUMENT

THE GUILTY PLEA IS INVALID BECAUSE FALETOGO WAS MISINFORMED ABOUT A DIRECT SENTENCING CONSEQUENCE OF HIS PLEA.

Faletogo was misinformed about the standard range for his offense and then sentenced to a term outside the proper standard range, based on offender score and seriousness level. His plea was therefore invalid. On remand, Faletogo should be permitted to withdraw his plea if he chooses to do so.

1. Due process requires that a guilty plea be entered voluntarily and intelligently, with knowledge of the consequences.

Due process requires that pleas be entered voluntarily and intelligently. The plea in this case did not satisfy this standard.

“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); accord U.S. CONST. Amend. XIV, CONST. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). This standard is reflected in CrR 4.2(d), which provides that “the trial court ‘shall not accept a plea of guilty,

July 11, 2017, a panel of this Court denied the State’s motion to modify the commissioner’s ruling.

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).

2. Faletogo may raise this issue for the first time on appeal.

Faletogo may raise the issue of the voluntariness of his plea for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001). An invalid guilty plea based on misinformation of direct sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589.

3. Faletogo is entitled to relief in this case.

Faletogo is entitled to relief. 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. 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)). A guilty plea is deemed involuntary regardless of whether the actual sentence received was more onerous or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91.

In Mendoza, for example, the Supreme Court held that a defendant may withdraw a guilty plea based on involuntariness where a plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated during plea negotiation. Id. at 584. “Absent a showing that the defendant was correctly informed of all . . . the direct consequences of his guilty plea, [he] may move to withdraw the plea.” Id. at 591. Misinformation that purports to increase punishment invalidates a plea in the same manner as misinformation that purports to reduce punishment. Id. at 590-91.

To prevail on a direct appeal, moreover, an accused need not prove that the incorrect standard range affected his decision to plead guilty. “[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.” Id. 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.”).

“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 In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)).

An involuntary plea based on misinformation about a direct sentencing consequence results in a manifest injustice. Mendoza, 157 Wn.2d at 584, 590-91. Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Id. at 584 (case involving appeal); cf. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 596, 316 P.3d 1007 (2014) (denying relief because misstatement of maximum term was raised in personal restraint petition, and petitioner could not show prejudice related to plea; but noting that, on a direct appeal “error would be presumed prejudicial and, unless waived, would support Stockwell’s motion to withdraw his plea.”).

Here, Faletogo is raising this claim on a direct appeal. Under Mendoza, he should be allowed the choice whether to withdraw his plea because he was misinformed as to the standard range for the crime, rendering the plea involuntary.

4. Unlike the Mendoza appellant, Faletogo did not waive the error.

Finally, Faletogo did not waive the error by failing to object at sentencing because—unlike in the case of Mendoza himself—no one brought the misinformation to Faletogo’s attention.

The State may defeat an appellate challenge to the voluntariness of a plea only “by showing that the defendant *was in fact fully informed of the sentencing consequences of the plea* during the period in which a motion to withdraw it could be made.” Mendoza, 157 Wn.2d at 591 (emphasis added). For example, when a defendant “is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea.” Id.

Mendoza himself waived the right to challenge his plea because he was “clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and [Mendoza] d[id] not object or move to withdraw the plea on that basis before he [was] sentenced.” Id. at 592. The Court distinguished Mendoza’s situation from circumstances in which a defendant will not be deemed to have waived the challenge, such as where he or she was not informed of the mistake until after sentencing. Id. at 591 (citing Walsh, 143 Wn.2d at 7).

Faletogo was not informed before sentencing or at sentencing that the standard range was three to eight months rather than three to nine months. RP 4, 7-9. Indeed, Faletogo was sentenced to nine months of incarceration, outside the standard range. RP 8.

In summary, under the rule set forth in Mendoza, Faletogo is entitled to relief. Moreover, under Mendoza, Faletogo did not waive his challenge to the validity of the plea.

This Court should remand so Faletogo may withdraw his plea, if he chooses to do so, or otherwise for the imposition of a standard range sentence under the applicable statutes. State v. Wakefield, 130 Wn.2d 464, 476, 925 P.2d 183 (1996); cf. State v. Barber, 170 Wn.2d 854, 874, 248 P.3d 494 (2011) (disapproving of specific performance as a remedy where it would allow for the imposition of an illegal sentence, overruling prior precedent).

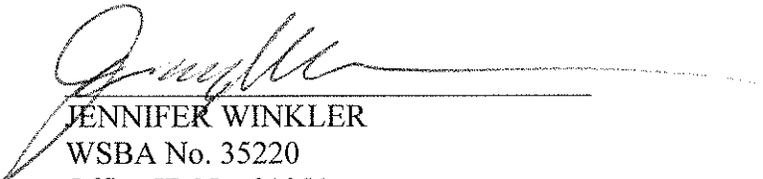
D. CONCLUSION

This Court should remand so Faletogo may withdraw his plea, if he elects to do so.

DATED this 20th day of September, 2017.

Respectfully submitted,

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