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Court of Appeals
Division III
State of Washington
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No. 35347-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN LAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF ASOTIN

APPELLANT'S REPLY BRIEF

KATE BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

Mr. Land is entitled to withdraw his guilty plea because he was misadvised about the maximum sentence the court could impose, which rendered his plea involuntary.

a. The court's warning that it could impose the maximum statutory sentence was misinformation that rendered Mr. Land's plea involuntary.

Mr. Land's plea was involuntary because he was told that he faced a maximum sentence that the court could not in fact impose.

Mr. Land's guilty plea was not voluntary because he was misinformed of his possible sentencing consequences. *State v. Buckman*, ___ Wn.2d ___, 409 P.3d 193, 198 (Feb. 1, 2018). The prosecutor confuses misinformation with being "overly informed" in claiming that the court's warning that Mr. Land faced the statutory maximum was not misinformation. Brief of Respondent (BOR) at 9. The prosecutor relies on *State v. Kennar* in support of its argument. BOR at 9 (citing *State v. Kennar*, 135 Wn. App. 68, 73-76, 143 P.3d 326 (2006)). But *State v. Kennar* rests on a proposition that does not apply in Mr. Land's case:

Because a defendant's offender score and standard sentence range are not finally determined by the court until the time of sentencing, the Sixth Amendment concerns addressed in *Blakely* do not apply until that time. Thus, when Kennar

entered his guilty plea the maximum peril he faced was, in fact, life in prison. He was correctly informed of this by the trial court.

Kennar, 135 Wn. App. at 76 (emphasis added).

By contrast, here, there was no possibility that Mr. Land faced the maximum statutory sentence of five years and a \$10,000 fine as he was advised when he entered his plea. CP 11. The State gave no notice of aggravating factors as would be required prior to entry of the plea. RCW 9.94A.535. And even if Mr. Land's offender score went from zero to nine at sentencing, possession of a controlled substance is a level 1 offense with a possible maximum standard range sentence of 24 months. *See* RCW 9.94A.525(7); RCW 9.94A.518 (RCW 69.50.4013(1) is a Level 1 offense); RCW 9.94A.517 (maximum standard range for Level 1 offense with an offender score of 6-9+ is 24 months). It is simply incorrect to say the "maximum peril" he faced was in fact the maximum statutory sentence as was true for the defendant in *Kennar*. *Id.* at 76. Thus *Kennar* does not apply.

Further, *Kennar* incorrectly analyzes Criminal Rule 4.2 to require advising the defendant of the statutory maximum sentence established by the legislature. CrR 4.2 does not require advisement of

the statutory maximum, which may only be applicable to hypothetical other defendants. Rather, CrR 4.2(d) provides:

Voluntariness. The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Nothing in the rule requires the trial court inform the defendant of the statutory “maximum.” Instead, the rule requires the court to inform the defendant of the consequences of his plea. “A direct consequence is one that has a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) (internal quotations omitted). The length of a sentence is a direct consequence of a guilty plea. *Id* (citing *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006)). The hypothetical statutory maximum as set by the legislature is not a direct consequence of the plea if it does not apply to the defendant when he enters his plea. *See Buckman*, 409 P.3d at 198 (“that a hypothetical third party charged with the same crime might face life in prison is irrelevant.”)

The *Kennar* court also looked to the plea agreement form set forth in CrR 4.2(g) to support its holding. 135 Wn. App. at 74.

However, that form does not state that the statutory maximum term must be held out as the maximum applicable term. *See* CrR 4.2 (g) & Form. Rather, the form indicates the “standard range” sentence and the “maximum term and fine” should be supplied. *Id.* The form provides, in relevant part:

(b) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements *	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1					
2					
3					

*The sentencing enhancement codes are: (RPh) Robbery of a pharmacy, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude. The following enhancements will run consecutively to all other parts of my entire sentence, including other enhancements and other counts: (F) Firearm, (D) Other deadly weapon, (V) VUCSA in protected zone, (JP) Juvenile present, (VH) Veh. Hom., see RCW 9.94A.533(7), (P16) Passenger(s) under age

The “maximum term,” *i.e.*, the maximum applicable term, is not coextensive with the statutory maximum term that could be applied on other hypothetical defendants. As *State v. Knotek* recognized, without an aggravator the statutory maximum is not a direct consequence of the plea. 136 Wn. App. 412, 424 n. 8, 149 P.3d 676 (2006). This Court

should reject *Kennar's* reasoning because it incorrectly assumes the statutory maximum is a direct consequence required by CrR 4.2.

b. Mr. Land is entitled to withdraw his guilty plea.

The prosecutor correctly acknowledges that a defendant may challenge the voluntariness of his plea for the first time on appeal. BOR at 10 (citing *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001)); RAP 2.5(a). This is precisely Mr. Land's challenge; thus there is no question he may appeal entry of his involuntary plea. Yet the prosecutor tries to distinguish Mr. Land's case, arguing it was not sufficiently developed for review. BOR at 11. This argument is meritless—the incorrect information that rendered Mr. Land's plea involuntary is contained in the plea form and in the guilty plea colloquy. There is no question this error is manifest. *See Kennar*, 135 Wn. App. at 71; *Knotek*, 136 Wn. App. at 422-23.

“Where a plea agreement is based on misinformation generally the defendant may choose . . . withdrawal of the guilty plea.” *Walsh*, 143 Wn.2d at 8 (citing *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). A guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. *Id.* This is not, as claimed by the prosecutor, a remedy

that is not yet ripe. BOR at 12. It is a constitutional deficiency that entitles Mr. Land to withdraw his guilty plea.

B. CONCLUSION

The court misadvised Mr. Land of the possible maximum sentence he faced when he entered his guilty plea. This rendered his plea involuntary, and he is entitled to withdraw it.

DATED this 22nd day of February, 2018.

Respectfully submitted,

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Ste 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
E-mail: katebenward@washapp.org

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DUSTIN LAND,)	
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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

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