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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 THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

APPELLANT'S OPENING 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. SUMMARY OF ARGUMENT

Dustin Land entered a guilty plea after being incorrectly advised of the possible maximum sentence the court could impose. Because he did not enter his guilty plea knowingly and voluntarily, he asks this court to allow him to withdraw his guilty plea.

B. ASSIGNMENT OF ERROR

Mr. Land's plea was not entered knowingly, intelligently and voluntarily where he was advised of an impossible statutory maximum.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Fourteenth Amendment requires a guilty plea to be entered knowingly, intelligently and voluntarily. Was Mr. Land's guilty plea invalid where it was premised on advisement of an impossible statutory maximum term?

D. STATEMENT OF THE CASE

Dustin Land was charged with Possession of a Controlled Substance for possessing the drug used to treat opiate dependence, buprenorphine. CP 5, 6; RP 4. He was also charged with the

misdemeanor offense of theft in the third degree, for taking about \$20 of food from the grocery store. CP 2, 7; RP 4-5.

Mr. Land had an offender score of zero. CP 11. His standard sentencing range was calculated to be 0-6 months for the felony controlled substance offense, and 0-364 days for the misdemeanor theft. CP 11, 18. Mr. Land was informed that the offense of possession of a controlled substance was a class C felony, which carried a maximum penalty of five years and a \$5000 dollar fine. CP 6; 11; 18; RP 5. This advisement of the maximum term was also included in his plea form and the judgment and sentence. CP 11; 18.

Mr. Land entered a plea of guilty to both charges, and received a sentence of 57 days to serve on Count I, with 364 days suspended for the misdemeanor offense of theft. CP 20. The court imposed \$3690 in court costs. RP 18. Mr. Land appeals entry of his guilty plea.

E. ARGUMENT

Mr. Land's guilty plea was not knowing, intelligent, and voluntary because he was misinformed about the maximum sentence the court could impose.

1. Due process protections require a guilty plea be made knowingly, intelligently and voluntarily.

The Due Process Clause of the Fourteenth Amendment requires that a defendant's guilty plea be knowing, voluntary, and intelligent.

Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); U.S. Const. amend. 14. When a person pleads guilty, he waives his protection from self-incrimination and the right to a trial by jury.

Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Such “[w]aivers of constitutional rights not only must be voluntary 1 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). “A direct consequence is one that has a ‘definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” *Bradley*, 165 Wn.2d at 939 (quoting *Ross*, 129 Wn.2d at 284).

“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). 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). 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.

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.

2. Because Mr. Land was misinformed of the possible maximum sentence the court could impose, he is entitled to withdraw his guilty plea.

In *Blakely v. Washington*, the Supreme Court recognized the maximum sentence was “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Importantly, the maximum sentence that may be imposed in a particular case is not the statutory maximum. *See id.* The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id.*

Here, the standard range plus 364 days for the misdemeanor offense is the maximum possible sentence the court could impose for

Mr. Land's charged offenses. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law. Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). No such facts are present or alleged here.

Mr. Land thus faced only a standard range sentence of 0-6 months for the charged felony offense, and 0-364 days for the charged misdemeanor offense. CP 11, 18. There were no circumstances in Mr. Land's case which would have permitted the imposition of any sentence above the standard range plus the maximum misdemeanor time of 364 days.¹ Consequently, the "maximum term" was not "5

¹ While the Sentencing Reform Act places substantial constraints on a court's discretion in felony sentencing, "no similar legislation restricts the trial courts discretion in sentencing for misdemeanors or gross misdemeanors." *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009).

years” as he was advised. CP 11, 18; RP 5. Rather, the maximum was the top-end of the standard range, which was only six months on the felony offense, and 364 days for the misdemeanor offense. Mr. Land was thus misadvised of the maximum punishment he faced as a consequence of his guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013(2007).²

Knotek is directly on point. There, the court reiterates that before pleading guilty, a defendant needs to understand the “direct consequences of her guilty plea, not the maximum potential sentence if she [or another defendant] went to trial. . . .” *Id.* at 424 n.8 (citing *Ross*, 129 Wn.2d at 284). The *Knotek* court further agreed that *Blakely* “reduced the maximum terms of confinement to which the court could sentence Knotek . . . [to] the top end of the standard range[]” *Id.* at 425. The top of the standard range was the “effective maximum” for the defendant’s plea. *Id.* Thus, where a defendant is told the maximum sentence is five years when in fact the effective maximum sentence is

² This issue can be decided for the first time on appeal because it is a manifest error affecting a constitutional right. *Knotek*, 136 Wn. App. at 422-23; *State v. Kennar*, 135 Wn. App. 68, 71, 143 P.3d 326 (2006).

the top of the standard range, the defendant is misadvised of the consequences of the plea.³

Though Mr. Land's guilty plea included a table that supplied the "standard range" sentence and the "maximum term and fine," this did not inform him that the standard range sentence, in addition to the maximum on his misdemeanor conviction, was the only effective maximum sentence the court could impose. CP 11. "Where a plea agreement is based on misinformation generally the defendant may choose . . . withdrawal of the guilty plea." *State v. Walsh*, 143 Wn.2d 1, 9, 17 P.3d 591 (2001) (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.* As *Mendoza* made clear, it does not matter whether the misadvisement was material to Mr. Land's decision to plead guilty. 157 Wn.2d at 590-91.

³ *Knotek* concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she "clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose." 136 Wn. App. at 426. In this case, no discussion of *Blakely* ever occurred.

Because Mr. Land was misinformed of the actual maximum sentence that could be imposed, the Court should remand for an opportunity for Mr. Land to withdraw his plea.

F. CONCLUSION

Mr. Land's guilty plea was not voluntary where he was advised of an impossible maximum sentence; the matter should thus be remanded to the trial court for a hearing to determine whether Mr. Land desires to withdraw his plea.

DATED this 30th day of November, 2017.

Respectfully submitted,

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

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v.)	NO. 35347-8-III
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DUSTIN LAND,)	
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APPELLANT.)	

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

WASHINGTON APPELLATE PROJECT

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