

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

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

DUSTIN J. LAND, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. WAS THE APPELLANT ADEQUATELY ADVISED OF THE MAXIMUM SENTENCE AS REQUIRED BY CrR 4.2 AND DUE PROCESS?
2. SHOULD THIS COURT REVIEW THE CLAIM OF ERROR WHERE THE ISSUE IS NOT RIPE AND WHERE NO CLAIM WAS MADE NOR MOTION FILED BELOW?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT WAS ADEQUATELY ADVISED OF THE DIRECT CONSEQUENCES OF HIS PLEA, INCLUDING THE MAXIMUM SENTENCE, AS REQUIRED BY CrR 4.2 AND DUE PROCESS.
2. THE APPELLANT'S CLAIMS SHOULD NOT BE REVIEWED WHERE THE APPELLANT FAILED TO FILE ANY MOTION TO WITHDRAW HIS GUILTY PLEA AND WHERE HE DOESN'T YET ACTUALLY SEEK WITHDRAWAL THEREOF.

III. STATEMENT OF THE CASE

The Appellant, Dustin J. Land, was arrested on February 25, 2017, for theft from his employer, and found at that time, to be in possession of Suboxone, a prescription drug that contains buprenorphine, a controlled substance. Clerks Papers (CP) 1-3. Prior to that time, the Appellant had been employed at Rick's Family Foods, a grocery store in Clarkston, Asotin County, Washington. CP 1. On that date and at the conclusion of his shift, the Appellant had taken some food items, concealed them in boxes, and left the store without paying. CP 1. This had been an issue for the Appellant previously and he had been warned about taking store merchandise without paying. CP 1-2. Because of his repeated thefts, the manager summoned the police who responded to the Appellant's address and contacted him there. CP 2.

Upon contact, the Appellant initially denied stealing any items, but subsequently admitted to taking a few smaller items. CP 2. The Appellant was placed under arrest for Theft in the Third Degree and his person was searched incident to arrest. CP 2. The arresting officer found a plastic tube containing seven round Suboxone pills. CP 2. The Appellant claimed that he had a prescription for the pills, but when asked by the officer, his wife didn't seem to know anything about it. CP 3.

The Appellant was charged with Possession of a Controlled Substance (Buprenorphine) and Theft in the Third Degree. CP 6-7. The Information filed herein advised the Appellant that, with regard to the felony drug charge, he could be punished by up to five years incarceration and a fine of ten-thousand dollars (\$10,000.00). CP 6. The Information further advised that, on the gross misdemeanor theft charge, he could be punished with up to three-hundred sixty-four days incarceration and a fine of up to five-thousand dollars (\$5,000.00). CP 7. On March 13, 2017, the Appellant was arraigned on these charges, at which time the Court advised him accordingly of these maximum possible punishments. RP 4-5. When asked, the Appellant advised that he understood the maximum penalties associated with these crimes. RP 5.

No prescription was ever produced and, ultimately, the Appellant pled guilty, pursuant to a plea agreement, to both charges with a recommendation of time served plus an additional thirty days incarceration converted to two-hundred forty (240) hours of community service. CP 8. The State further agreed to recommend that all time imposed on the Theft Third Degree charge be suspended. CP 8. In perfecting his pleas, the Appellant executed a signed, written statement on plea of guilty. CP 10-15. Attached thereto was a copy of the scoring sheet for the felony drug possession crime advising that, based upon his criminal history, his standard

range was zero (0) to six (6) months. CP 16. Within the Statement on Plea of Guilty was the advisement in Paragraph 6(a) which stated: "Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows." CP 11 (*emphasis in original*). Immediately thereafter was the table which set forth his standard range of zero (0) to six (6) months on Count 1 and zero (0) to three-hundred sixty-four (364) days on Count 2. CP 11. He was further advised therein of the statutory maximum penalties of five years and three-hundred sixty-four (364) days respectively. CP 11. In paragraph 6(h), the Appellant was advised and thereby acknowledged as follows:

- (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:
 - (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
 - (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
 - (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge

agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

- (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

If the Court imposes a standard range sentence, then no one may appeal the sentence. If the Court imposes an exceptional sentence after a contested hearing, either the State or I can appeal the sentence.

CP 12. The Appellant signed the Statement on Plea, affirming that he had read and understood all the advisements contained therein. CP 13.

At the time of entry of his plea, the Appellant was advised, along with other offenders who were changing their pleas, regarding his rights. RP Vol. A,¹ 5-6 The judge individually inquired of the Appellant whether he understood the oral and written advisements

¹The court gave an oral advisement to all defendant's present that day who were entering pleas of guilty and this occurred during the handling of an earlier defendant's case. The Appellant did not designate this portion of the hearing and transcription of this portion was separately requested by the State. Because a different transcriber handled the State's request, page numbering was duplicated. The State therefore, and in accordance with the transcriber's designation, refers to the supplemental transcripts as Volume A to differentiate from the initial transcripts obtained by the Appellant.

and the Appellant confirmed that he understood them. RP 18-19. After questioning the Appellant, the court determined that the Appellant understood the consequences of pleading guilty and that his pleas were knowingly and voluntarily made and accepted his pleas to the two charges. RP 20. The Appellant was then sentenced in accordance with the plea agreement. RP 22, CP 17-25. The Appellant did not request to withdraw his pleas prior to sentencing, nor did he file any motion after sentencing to withdraw his pleas of guilty.

The Appellant filed notice of appeal. CP 26. He now claims that, despite having been advised of both the standard range and statutory maximum possible penalties, that his pleas were involuntary in that he was “misadvised” of the maximum penalties. Appellant’s Opening Brief, (hereinafter Brief) p. 1. Therein, he requests the rather amorphous remedy of “remand to the trial court for a hearing to determine whether Mr. Land desires to withdraw his plea.” Brief, p. 8. Because his appeal is without merit and, in light of his requested remedy, not truly ripe for consideration, this Court should deny review and/or affirm the Appellant’s convictions as supported by knowing, intelligent, and voluntary pleas of guilty.

IV. DISCUSSION

The Appellant argues that he was misadvised of a direct consequence of his pleas of guilty. His argument is based upon a

misconstruction of the maximum penalty. He argues that the maximum punishment is the top end of the standard range and not the RCW 9A.20 statutory maximum. He therefore claims he was "misadvised" of a direct consequence of his plea. Because the law does not support his argument, his claim fails. Further, his claim is fatally flawed factually. The Appellant was advised of the statutory maximum, the standard range, and the circumstances upon which the court could impose a sentence outside that standard range. The Appellant fails to meet his burden of demonstrating a manifest injustice. See State v. Hurt, 107 Wn.App. 816, 829, 27 P.3d 1276 (Div. III, 2001). Finally, the remedy sought by the Appellant demonstrates that his claim is neither ripe for consideration, nor does it constitute a manifest error which should be reviewed for the first time on appeal. For these reasons, the Appellant's claim should be denied and the convictions affirmed.

1. THE APPELLANT WAS ADEQUATELY ADVISED OF THE DIRECT CONSEQUENCES OF HIS PLEA, INCLUDING THE MAXIMUM SENTENCE, AS REQUIRED BY CrR 4.2 AND DUE PROCESS.

Due Process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). See also In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005

(2001). A guilty plea is not knowingly made when it is entered based on misinformation of sentencing consequences. See State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). An offender need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. See In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004). "A defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea." State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008).

In the present case, the Appellant was advised of the statutory maximums for the crimes to which he ultimately pled. He was so advised in the Information, and again at his arraignment. He was then reminded of these maximums in his written statement on plea of guilty. Faced with this clear evidence, the Appellant instead argues that "statutory maximum" doesn't mean the RCW 9A.20 maximums (five years for a C felony, 364 days for a gross misdemeanor, etc.) but rather the maximums under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Therein, the U.S. Supreme Court determined that, for the purposes of enhancement of sentence and the requirement that the State plead and prove additional enhancing facts, other than convictions, beyond a reasonable doubt, the "statutory maximum" was, under the SRA (RCW 9.94A), the

proscribed standard ranges. *Id.* The Appellant argues that, based upon Blakely, the trial court misadvised him concerning maximum punishment by not advising concerning the standard range instead of the statutory maximum. This argument has been soundly rejected in this state.

In State v. Kennar, 135 Wn. App. 68, 72, 143 P.3d 326 (Div. I, 2006) the Court rejected this very argument.² In Kennar, the Court held:

CrR 4.2 requires the trial court to inform a defendant of both the applicable standard sentence range and the maximum sentence for the charged offense as determined by the legislature.

135 Wn.App. at 75. The Kennar court noted that Blakely was a sentencing case, not a plea-entry case and therein held:

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. His plea was knowingly, intelligently, and voluntarily entered. There was no error.

Id. at 76. Here, the Appellant was advised of the RCW 9A.20.021 maximum sentences for the crimes to which he was pleading. He

²Interestingly, the Appellant cites to Kennar in his brief in support of his position that his claim may be raised for the first time on appeal, but noticeably absent is any discussion of its application to his claim or assertion why Kennar is not dispositive of the issue presented. Brief, p. 6, fn. 2.

was therefore properly and sufficiently advised of the direct consequences of his pleas.

Even assuming the Appellant's argument were correct: that the court should have advised him of his standard range, he was so advised. In the Statement on Plea, he was told that his standard range for felony Possession of a Controlled Substance was zero to six months. He was further advised regarding possible circumstances that could authorize deviation from this proscribed sentence. Even assuming his argument was not legally fatally flawed, he was advised in accordance with his mis-definition of "statutory maximum. To the extent that his argument, like the argument propounded in Kenner, is that he was "overly informed," this Court should likewise reject his claim. He was fully advised concerning the sentencing consequences of entering his plea. His claim should therefore be summarily rejected.

2. THE APPELLANT'S CLAIMS SHOULD NOT BE REVIEWED WHERE THE APPELLANT FAILED TO FILE ANY MOTION TO WITHDRAW HIS GUILTY PLEA AND WHERE HE DOESN'T YET ACTUALLY SEEK WITHDRAWAL THEREOF.

Notably absent from the record is any objection below or any motion to the trial court requesting withdrawal of his guilty plea. The State recognizes that a motion pursuant to CrR 7.8 to withdraw a guilty plea is not necessarily a prerequisite to appellate review of an involuntary plea. See State v. Walsh, 143 Wn.2d 1, 17 P.3d 591

(2001). However, in Walsh, as cited by the Appellant, there was no dispute that the defendant therein was misadvised of his actual standard range based upon a scoring error. *Id.* at 4-5. Walsh is factually distinguishable from the present case.

RAP 2.5(a) requires that errors be preserved by timely objection below. One exception is if the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). Thereunder, the Appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009).

Here, unlike the defendant in Walsh, it is not obvious from the record of any mis-advisement, nor is it apparent that there was any actionable misunderstanding about the direct consequences of his pleas of guilty. In Walsh, there was no doubt that the defendant's offender score was miscalculated based upon a legal error. 143 Wn.2d at 4. Here, there is no such claim of a miscalculated offender score, nor did the State seek a sentence greater than that agreed to in the Plea Agreement.

Had the Appellant sought withdrawal of his plea by motion below, there would be a record upon which this Court could consider claims of error. This shortcoming in the Appellant's argument herein is made more apparent when viewed in light of his requested remedy: that this Court remand the matter so that he can decide whether he wishes to withdraw his guilty plea. He doesn't even seek withdrawal, but rather, merely the opportunity to "mull it over" and decide if that is something he wants to do. Regardless of this appeal, if he chooses to do so, he can. He doesn't need a favorable ruling from this Court to allow him to file a CrR 7.8 motion below. Effectively then, the Appellant's claim is therefore not ripe, as there is not really an effective remedy that this Court is being asked to provide. What he is asking this Court to do is enter a judgement in his favor and then he'll decide if he wants to file a suit. Once he files the appropriate motion, he can request that this Court review an order resulting therefrom, assuming he is dissatisfied with the trial court's ruling. In light of his ambivalence, this Court should decline review.

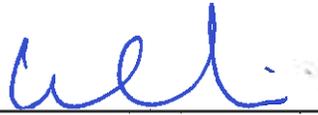
V. CONCLUSION

The Appellant's arguments are factually and legally flawed. The Appellant was fully and adequately advised of the direct consequences of his pleas of guilty. His claim to the contrary and his "legal" premise support his argument has previously been rejected.

Finally, his claims are not preserved and further not ripe for review considering his requested "remedy." The State respectfully requests this Court issue a decision affirming his convictions substantively, or in the alternative, decline review procedurally.

Dated this 23rd day of January, 2018.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

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DUSTIN J. LAND,

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Court of Appeals No: 35347-8-III

DECLARATION OF SERVICE

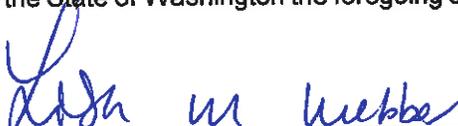
DECLARATION

On January 23, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

Kate Benward
katebenward@washapp.org

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on January 23, 2018.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

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