

79127-9

No. 24027-4-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOHN SHANNON CODIGA,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	2
B.	STATEMENT OF THE CASE.....	2
C.	ARGUMENT.....	4
	No. 1. The trial court violated Mr. Codiga’s right to due process when it accepted his plea without determining that he understood the nature of the charges and the law in relation to the facts of those charges.....	4
	No. 2. The trial court violated Mr. Codiga’s right to due process when it accepted his plea without adequately informing him of the consequences of the plea.....	7
	No. 3. The guilty plea was involuntary, based upon the mutual mistake about the standard range.....	8
D.	CONCLUSION.....	9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>McCarthy v. United States</u> , 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).....	5
<u>In re PRP of Keene</u> , 95 Wn.2d 203, 622 P.2d 360 (1981).....	5
<u>In re PRP of Taylor</u> , 31 Wn.App. 254, 640 P.2d 737 (1982).....	6, 7

<u>State v. Barton</u> , 93 Wn.2d 301, 609 P.2d 1353 (1980).....	4
<u>State v. Miller</u> , 110 Wn.2d 528, 756 P.2d 122(1988).....	7
<u>State v. Paul</u> , 103 Wn.App. 487, 12 P.3d 1036 (2000).....	7
<u>State v. S.M.</u> , 100 Wn.App. 401, 996 P.2d 1111, (2000).....	4
<u>State v. Smith</u> , 134 Wn.2d 849, 953 P.2d 810 (1998).....	5
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	4, 8
<u>Wood v. Morris</u> , 87 Wn.2d 501, 554 P.2d 1032 (1976).....	4

Court Rules

CrR 4.2(d).....	7
-----------------	---

A. ASSIGNMENTS OF ERROR

1. The trial court erred in accepting the guilty plea without first determining that Mr. Codiga understood the nature of the charges and the law in relation to the facts of those charges.

2. The trial court erred in accepting the guilty plea without adequately informing Mr. Codiga of the consequences of the plea.

3. The trial court erred in not finding that the guilty plea was involuntary based upon the mutual mistake about the standard range.

Issues Pertaining to Assignments of Error

1. Did the trial court violate Mr. Codiga's right to due process when it accepted his plea without determining that he understood the nature of the charges and the law in relation to the facts of those charges?

2. Did the trial court violate Mr. Codiga's right to due process when it accepted his plea without adequately informing him of the consequences of the plea?

3. Was the guilty plea involuntary based upon the mutual mistake about the standard range?

B. STATEMENT OF THE CASE

Mr. Codiga pled guilty to three counts of first-degree child molestation in exchange for having two counts dismissed. (11/30 RP 2)
The prosecutor informed the trial court that Mr. Codiga had one prior Class B felony that would count one point toward his offender score, and one prior Class C felony that "we believe would wash out," resulting in an offender score of seven, and a standard range of 108-144 months. (11/30 RP 4-5)

The trial court found Mr. Codiga's plea to be knowing, intelligent, and voluntary. (11/30 RP 14-15) However, the court did not inform Mr. Codiga or ask him if he understood or agreed with his criminal history, his offender score, his standard range, the statutory maximum, and the period of community supervision. The court also failed to inform Mr. Codiga that should the court find additional criminal history, his standard range would increase but his plea would still be binding. (11/30 RP 10-15)

The trial court also found there was a factual basis for the plea based on Mr. Codiga's adoption of the probable cause statement and his stipulation that there was a sufficient factual basis in the probable cause statement to support his plea. (11/30 RP 14-15)

At the sentencing hearing, the prosecutor noted that the Presentence Investigation Report counted the prior Class C felony, for which Mr. Codiga received a six month sentence and 12 months community supervision in August 1997. This resulted in an offender score of 8 with a standard range of 129-171 months. Mr. Codiga argued that the prior Class C felony washed out, but the court found misdemeanor convictions in 2001 and 2002 tolled the washout period. (2/8 RP 14-16)

The court imposed a minimum term sentence of 150 months. (2/8 RP 36-37) Mr. Codiga later filed a motion to withdraw his guilty plea

based on the discrepancy in his offender score between the guilty plea and sentencing hearings. The trial court transferred this motion to the court of appeals as a personal restraint petition pursuant to CrR 7.8(c)(2). (6/9 RP 3-9) The PRP has been consolidated with this direct appeal.

C. ARGUMENT

Issue No. 1. The trial court violated Mr. Codiga's right to due process when it accepted his plea without determining that he understood the nature of the charges and the law in relation to the facts of those charges.

Under CrR 4.2(d) 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." State v. Walsh, 143 Wn.2d 1, 5-6, 17 P.3d 591 (2001); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). "[F]ailure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew." State v. S.M., 100 Wn.App. 401, 413, 996 P.2d 1111, (2000), *citing* Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). But a guilty plea is not truly voluntary " 'unless the defendant possesses an understanding of the law in relation to the facts.' " In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1981) (*quoting* McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

The judge must determine " 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information.' " Keene, 95 Wn.2d at 209, 622 P.2d 360 (*quoting* McCarthy, 394 U.S. at 467, 89 S.Ct. 1166). Requiring this examination protects a defendant " 'who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.' " Keene, 95 Wn.2d at 209, 622 P.2d 360 (*quoting* McCarthy, 394 U.S. at 467, 89 S.Ct. 1166).

To satisfy the CrR 4.2(d) factual basis requirement, there must be sufficient evidence for a jury to conclude that the defendant is guilty and this evidence must be developed on the record at the time the plea is taken; it may not be deferred until sentencing. Keene, 95 Wn.2d at 210, 622 P.2d 360.

[T]he factual basis [requirement] may be satisfied by a recitation of facts the prosecutor would prove at trial. Where the prosecutor's factual statement is orally acknowledged by the defendant or where the court orally interrogates the defendant concerning his conduct, the constitutional requirements are satisfied and both society and the defendant are better served. Where, however, the court relies only on the written statement of the defendant on the guilty plea form, it must insure the facts admitted amount to the violation charged. Anything less endangers the finality of the plea.

In re PRP of Taylor, 31 Wn.App. 254, 259, 640 P.2d 737 (1982).

Here, the record does not show that Mr. Codiga understood the law in relation to the facts. At the plea hearing, the Court did not ask Mr. Codiga anything about the facts. It did not ask Mr. Codiga whether he knew the meaning of "molestation" in a legal sense or inquire into his understanding of the nature of the charges. Instead, the Court relied solely on Mr. Codiga's adoption of the probable cause statement and his stipulation that there was a sufficient factual basis in the probable cause statement to support his plea.

The factual basis requirement of CrR 4.2(d) was clearly not satisfied. There was no recitation of the facts by the prosecutor as to what he would prove at trial. Nor did Mr. Codiga orally acknowledge any factual statement submitted by the prosecutor. The Court also failed to

determine on the record whether the facts in the probable cause statement amounted to the violation charged. See Taylor, *supra*.

Because the record does not affirmatively show that Mr. Codiga understood the law in relation to the facts or entered the plea intelligently and voluntarily, the court violated his right to due process when it accepted the plea. Consequently, the plea should be set aside.

Issue No. 2. The trial court violated Mr. Codiga's right to due process when it accepted his plea without adequately informing him of the consequences of the plea.

A plea is also involuntary if it is not made with an understanding of all the direct consequences of the plea. CrR 4.2(d); State v. Paul, 103 Wn.App. 487, 494-95, 12 P.3d 1036 (2000). "An involuntary plea constitutes a manifest injustice." Paul, 103 Wn.App. at 494, 12 P.3d 1036. One direct consequence of a plea is the sentencing range. Paul, 103 Wn.App. at 495, 12 P.3d 1036. "A defendant must understand the sentencing consequences for a guilty plea to be valid." State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122(1988).

Here, the Court did not inform Mr. Codiga or ask him if he understood his standard range, the maximum sentence, his offender score, his criminal history, or period of community custody/placement. The

Court also failed to inform Mr. Codiga that if the court found there was additional criminal history, his offender score and standard range would change but his guilty plea would still be binding. Since the Court failed to assure that Mr. Codiga fully understood the sentencing consequences, the guilty plea was invalid.

Issue No. 3. The guilty plea was involuntary, based upon the mutual mistake about the standard range.

A guilty plea entered into with an erroneous belief about a lower standard range is invalid. State v. Walsh, 143 Wn.2d 1, 17 P.3d 591(2001). A challenge to the validity of the guilty plea based on mutual mistake may be raised for the first time on appeal. Walsh, 143 Wn.2d at 6, 17 P.3d 591.

In Walsh, the defendant pleaded guilty based on an erroneous standard range that was lower than the correct range. Our Supreme Court held that "Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence." Walsh, 143 Wn.2d at 8-9, 17 P.3d 591.

The situation here is identical to Walsh. Both parties mistakenly believed the offender score was seven at the guilty plea hearing, when in fact it was eight. Therefore, the guilty plea was invalid.

D. CONCLUSION

For the reasons stated, the plea should be set aside, and the case remanded for further proceedings.

Respectfully submitted November 10, 2005.

A handwritten signature in cursive script, appearing to read "D. N. Gasch", is written above a horizontal line.

David N. Gasch
Attorney for Appellant