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DIVISION ONE  
FEB 11 2010

63104-7

No. 63104-7-1

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

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STATE OF WASHINGTON,

Respondent,

v.

IVAN FLUKER,

Appellant.

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

The Honorable Richard McDermott  
The Honorable Sharon Armstrong

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

AMBIGUITY IN FLUKER'S PLEA BARGAIN  
RENDERED THE PLEA INVOLUNTARY,  
REQUIRING REMAND SO HE MAY DECIDE  
WHETHER TO WITHDRAW HIS PLEA.

Fundamental principles of due process require a guilty plea be knowing, intelligent, and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3. Ambiguity in a plea bargain renders the guilty plea involuntary. State v. Bisson, 156 Wn.2d 507, 521-23, 130 P.3d 820 (2006).

Even though Ivan Fluker's plea bargain with the State failed to clearly explain that the firearm enhancement which followed his sentence had to be served consecutively to all terms of confinement, the State contends Fluker's plea bargain was not ambiguous. Although Bisson is directly on point and discussed extensively in Fluker's opening brief, the State does not address or attempt to distinguish this case. Under Bisson, Fluker's plea bargain was ambiguous, and consequently involuntary. The State's contentions to the contrary must be rejected.

The gist of the State’s argument is that because Fluker initially wished to withdraw his guilty plea for reasons other than the ambiguous advisement regarding the sentence that would follow his plea, this Court should conclude that Fluker’s current claim of involuntariness is contrived. Br. Resp. 7, 9-10. The appellate prosecutor – the same prosecutor who appeared at Fluker’s sentencing proceeding – again accuses Fluker’s trial counsel of being “totally disingenuous” in arguing “that he was somehow confused about his standard range at the time of the plea.” Br. Resp. at 10.<sup>1</sup> Setting aside for the moment the impropriety of the prosecutor’s accusation, the prosecutor’s post hoc efforts to reconstruct Fluker’s state of mind are contrary to settled precedent:

We decline to adopt an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant’s subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. 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. If the test is limited to an assertion of materiality by the defendant, it is of no consequence as any defendant could make that after-the-fact claim.

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<sup>1</sup> The prosecutor also incorrectly asserts that “Fluker failed to mention in his opening brief” that the prosecutor’s written recommendation – a separate document from the statement of defendant on plea of guilty – noted the State would recommend a 62-month sentence. Br. Resp. at 2 n. 1. The 62-month written recommendation is actually referenced in two places. Br. App. at 5, 13.

Isadore, 151 Wn.2d at 302. See also State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) (in per curiam opinion, Court reaffirms that defendant need not establish a causal link between misinformation and his decision to plead guilty).

Here, although the prosecutor wrote in one document that the State would recommend a 62-month sentence, this recommendation was not duplicated in the guilty plea form or discussed with Fluker at his guilty plea hearing. The guilty plea form stated only that the prosecutor would recommend:

I. 26 mo., concurrent w/ ct II, credit for time served; II 12+ mo, concurrent w/ ct I, credit for time served, plus 36 month f/a enhancement (consecutive); \$500 VPA, dv. bat. trtmnt; no contact Latoya Minnifield, Jarvae Lindsay; dismissal ct III and f/a enhancement ct I; no adtnl charges; restitution if any; \$100 dna fee, court costs, recoupment for apptd counsel.

CP 14.

This recommendation, coupled with the ambiguous language in the preprinted plea form, created an ambiguity regarding the sentence that would follow the guilty plea. See CP 15; Bisson, 156 Wn.2d at 517, 521-23. When the prosecutor at sentencing mistakenly concluded that the sentence should be 48 months of confinement instead of the 62 months mandated by statute, RCW

9.94A.533, defense counsel agreed that this was Fluker's understanding of the sentence that would be imposed. 3/2/09 RP 14-15; 3/3/09 RP 6-7. The same prosecutor would now like this Court to believe that defense counsel was deliberately deceiving the sentencing court. Br. Resp. at 9-10.

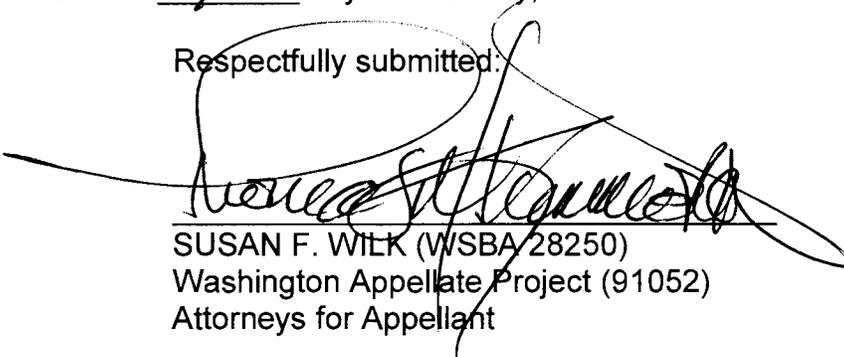
The prosecutor's unfounded allegation should be rejected. This Court should conclude that under Bisson, an ambiguity was created by the lack of clarity in the State's recommendation. Fluker's guilty plea consequently was involuntary. Under the rule of lenity, Fluker is entitled to have this matter remanded so he may decide whether to withdraw his plea. Bisson, 156 Wn.2d at 523.

B. CONCLUSION

This Court should conclude that ambiguity in the State's sentencing recommendation rendered Fluker's guilty plea involuntary, requiring reversal and remand.

DATED this 15 day of February, 2010.

Respectfully submitted:



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Attorneys for Appellant

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	COA NO. 63104-7
Respondent,	)	
	)	
v.	)	
	)	
IVAN FLUKER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 1ST DAY OF FEBRUARY, 2010, A COPY OF *APPELLANT'S REPLY BRIEF* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES LISTED.

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**SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF FEBRUARY, 2010**

x 