

63570-1

63570-1

NO. 63570-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
STEVEN MILLER,
Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Steven Miller pled guilty based on his understanding that he was eligible for and his attorney would ask the court to impose a treatment based sentence under the statutory sex offender sentencing alternative program. Miller particularly desired a treatment-based sentence because he had serious medical needs, including a mechanical aorta, and had several strokes, and these required regular medical treatment that he did not believe he would receive if incarcerated. After he pled guilty, Miller learned he was statutorily ineligible for a treatment-based sentence. On appeal, Miller argues that his plea was involuntary because he was not informed of the direct sentencing consequences of the guilty plea and was further told he could not file an appeal based on his plea or sentence.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred by denying Miller's motion to withdraw his guilty plea when the plea was not entered knowingly, intelligently, and voluntarily.

2. Miller was denied his right to effective assistance of counsel due to his lawyer's failure to understand or accurately explain the sentencing consequences of pleading guilty.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a defendant does not accurately understand the sentencing consequences when pleading guilty, the plea does not constitute a knowing, intelligent, and voluntary waiver of the rights attendant to a trial. Here, Miller waived his trial rights and pled guilty based on his understanding that he was eligible for a treatment-based sentencing alternative, and yet after pleading guilty, he learned that the governing statute barred him from receiving any such sentence. Where the defendant's guilty plea is based on an incorrect understanding of sentencing consequences and the defendant is not given an opportunity to withdraw the plea, is the plea involuntary and must the trial court grant a later motion to withdraw the guilty plea?

2. The right to effective assistance of counsel includes the right to be correctly informed of the sentencing consequences of a guilty plea. Here, defense counsel admitted at sentencing that she misconstrued Miller's eligibility for a sentencing alternative and her proposed sentences for Miller were plainly unauthorized by the statutes controlling the court's sentencing authority. Was Miller denied effective assistance of counsel when he gave up his right to

trial based on his attorney's deficient understanding of the sentencing consequences following a guilty plea?

D. STATEMENT OF THE CASE.

At the time Steven Miller agreed to plead guilty to three sex offenses, he had suffered several strokes and risked another his implanted mechanical aortic valve was properly administered, and his medical doctor believed he would not live for more than a few years. RP 48.¹ He pled guilty because he believed he was eligible for sex offender treatment under the special sex offender sentencing alternative (SSOSA), and he did not believe he would survive unless he received sophisticated medical care available only outside of a prison. CP 45.

Miller understood that his attorney would ask for an exceptional sentence below the standard range and would ask the court to impose community supervision rather than incarceration, while the prosecution would recommend a standard range sentence. RP 4, 13, 42-43, 52; CP 45. He understood that while the court would decide whether to impose a treatment-based sentence, he was eligible and could legitimately request such a

¹ The verbatim report of proceeding consists of a single volume from February 17, 2006, and is referred to herein as "RP."

sentence. RP 27, 52. His trial attorney submitted evaluations showing the benefit he would receive from a non-incarceration, treatment sentence. Supp. CP __, sub. no. 86A (Defense Presentence Report). His family told the court of his serious health condition and the dour prediction by his doctors that he had no more than five years to live. RP 47-51.

But at sentencing, Miller's attorney acknowledged the prosecution was likely correct and in fact, Miller was not eligible for a SSOSA. RP 43-44. Rather than a SSOSA, Defense counsel proposed a sentence of 10-13 years on electronic home monitoring, but the prosecution and court agreed no such sentence would be legally authorized. RP 53-54.

The court agreed that Miller was amenable to treatment, but was unconvinced he deserved an exceptional sentence below the standard range based on his claim of diminished capacity and found that a SSOSA sentence would not be authorized by law. RP 56-57. Thus the court ordered Miller serve a standard range sentence of a minimum of 189 months incarceration, with a lifetime maximum under the indeterminate sentence scheme. RP 60.

The court also told Miller he did not have the right to file an appeal. The “notice of rights on appeal” form crossed off the section discussing the right to appeal. Supp. CP ___, sub. no. 92. Miller did not file a direct appeal but later filed a pro se motion to withdraw his guilty plea, complaining that he “was under the impression” that he would be sentenced to house arrest and could do a SSOSA program. CP 45. The trial court transferred his motion to this Court for further consideration. Court of Appeals Commissioner James Verellen ruled that Miller’s motion to withdraw his guilty plea should be treated as a direct appeal from the trial court’s refusal to grant his motion.

E. ARGUMENT.

1. THE COURT IMPROPERLY REFUSED MILLER’S REQUEST TO WITHDRAW HIS GUILTY PLEA WHEN HIS ATTORNEY DID NOT ACCURATELY INFORM HIM OF THE DIRECT SENTENCE CONSEQUENCES

- a. Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). To be valid, a plea must represent a voluntary and intelligent choice among the

alternatives available to the defendant. In re Personal Restraint of Peters, 50 Wn.App. 702, 704, 750 P.2d 643 (1988). The remedy for an invalid plea is the opportunity to withdraw the plea. State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988).

By court rule, Washington permits a defendant to withdraw a guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). This section further provides, “If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.” Id. CrR 7.8(b)(5) allows a motion to withdraw a plea if made in a reasonable time, based on a reason justifying relief.²

A defendant must understand the sentencing consequences for a guilty plea to be valid. Miller, 110 Wn.2d at 531. A guilty plea may be deemed involuntary where there is a mistake of fact or law and where this mistake forms part of the basis for the defendant's plea. State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001). A defendant may challenge the voluntariness of a plea when the defendant receives misinformation about direct sentencing consequences. Miller, 110 Wn.2d at 531.

² Other limitations on motions for relief from judgment, such as newly discovered evidence, are not pertinent here.

b. A plea is involuntary when the defendant mistakenly believes he is eligible for a reduced, treatment-based sentence. In State v. Kissee, 88 Wn.App. 817, 820, 947 P.2d 262 (1997), the defendant pled guilty with the understanding that the prosecution would recommend either prison time or a SSOSA if the court found the defendant amenable to treatment. “In truth, Kissee was not eligible for a SSOSA sentence.” Id. Although the trial court denied Kissee’s motion to withdraw his guilty plea due to post-plea discovery of his SSOSA ineligibility, the Court of Appeals found the guilty plea involuntary because Kissee believed he was eligible for a SSOSA at the time he pled guilty.

The Kissee Court ruled, “one’s eligibility for a SSOSA is a direct sentencing consequence,” that produces a definite and immediate effect on the range of available punishment. Id. at 822. Kissee’s mistaken understanding of his SSOSA eligibility constituted a failure to adequately understand the direct sentencing consequences necessary for a voluntary plea.

Likewise, the court ruled that “DOSAs ineligibility is a direct consequence” and the misunderstanding of the defendant’s eligibility of a drug offender sentencing alternative rendered the plea involuntary in In re Pers. Restraint of Fonseca, 132 Wn.App.

464, 469, 132 P.3d 154 (2006). Similarly, another court reasoned that a defendant may not have pled guilty if he knew of his SSOSA ineligibility, and found a guilty plea involuntary on this based in State v. Adams, 119 Wn.App. 373, 378, 82 P.3d 1195 (2003).

c. Miller mistakenly believed he was eligible for a treatment-based SSOSA sentence when he entered his guilty plea.

Miller's attorney actively and zealously pursued a SSOSA sentence for Miller. Defense counsel scheduled a court hearing for Miller to enter his plea and receive his sentence on the same day, which was an unusual occurrence in this trial court, because Miller's attorney wanted Miller to avoid the automatic detention that would follow his guilty plea if the court granted a SSOSA sentence, and his medical needs made incarceration particularly harsh for Miller.

RP 3.

Defense counsel filed a presentence report containing legal and factual arguments favoring a reduced sentence for Miller. Because counsel apparently understood that Miller could not receive a SSOSA if his standard range sentence was greater than 11 years, counsel asked for an exceptional sentence below the standard range. RP 43. Specifically, defense counsel asked the court, "to exercise its statutorily authorized discretion and sentence

[Miller] to a SSOSA of 36 months, with credit for 24 months confinement.” Supp. CP __, sub. no. 86A, p. 8 (Defense Presentence Report).

Miller also asked the court to impose a SSOSA sentence, and told the court he would really benefit from counseling because he was sorry for his actions and he did not understand why he committed these offenses. RP 51-52. The court agreed Miller was amenable to treatment but refused to consider giving him a SSOSA because he was not statutorily eligible based on the length of the standard range. RP 52-53, 56. The court also ruled it had no authority to craft an alternative sentence involving years of electronic home monitoring without sending Miller to prison, and would not order a short sentence of less than one year with electronic home monitoring given the gravity of the offenses and the lack of accountability that would follow from such a short sentence. RP 53-54. The court imposed a mid-range sentence of 189 months incarceration.

As the prosecution argued during the sentencing hearing, SSOSA eligibility is determined by the legislature and contained in the governing statute, RCW 9.94A.670(2). The court lacks authority to impose a sentencing alternative that is not statutorily

authorized. State v. Shove, 113 Wn.2d 83, 89 n.3, 776 P.2d 132 (1989). The version of RCW 9.94A.670(2) in effect at the time of the underlying offenses provided that an offender is eligible for a SSOSA if convicted of an eligible offense, has no prior sex offense convictions, and:

The offender's standard sentencing range for the offense includes the possibility of confinement for less than eleven years.

RCW 9.94A.670(2)(c) (2002). Upon reviewing this language, defense counsel conceded that the prosecution was likely correct, and Miller may not be statutorily eligible for a SSOSA because his standard range would not permit a sentence of less than eleven years. RP 43. The low end of Miller's standard range sentence for one count of rape in the first degree was 162 months, which is over 13 years. RP 10. Because statutes are construed to so that no words are superfluous and giving effect to the plain meaning of the words, the SSOSA statute authorized the court to impose a SSOSA sentence only if the offender's standard range allowed for a sentence of less than 11 years, regardless of the length of the sentence actually imposed by the court. RCW 9.94A.670(2)(c); State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) ("If

the plain language of the statute is unambiguous, the court's inquiry is at an end.”).

There is no question that Miller pled guilty with the expectation and belief the court would consider imposing a SSOSA sentence, and he specifically arranged a sentencing hearing so that he could seek immediate release if he received a SSOSA, rather than the mandatory incarceration that would follow a standard range term. RP 3. When he pled guilty, Miller did not know he was categorically ineligible for a SSOSA based on the length of his standard sentencing range. No one offered Miller the opportunity to withdraw his guilty plea when his attorney and the court agreed he was ineligible for a SSOSA even if he received an exceptional sentence below the standard range.

Alternatively, defense counsel asked the court for a multi-year sentence involving no incarceration but rather electronic home monitoring for 10 to 13 years. RP 53. Again, the court lacked authority to impose such a sentence. RP 54. RCW 9.94A.680 authorizes “alternatives to total confinement” but only if the offender receives a sentence “of one year or less.” No provision of the SRA allows a court to completely bypass a prison sentence for a class A sex offense outside of the SSOSA program.

Miller was advised he could not file a direct appeal after his guilty plea. Supp. CP __, sub. no. 92. The notice of his rights crossed off the direct appeal section and the trial court explicitly warned him that he could not appeal from the sentencing proceeding unless the court gave him an illegal sentence. RP 27. But while the court did not illegally sentence him, because it imposed a standard range term, the court did not explain to him that because he pled guilty based on the invalid premise that he could request consideration of a SSOSA, this misunderstanding would provide him the right to withdraw his plea if he so desired. In Miller's later motion to withdraw his guilty plea, he explained that he thought he had been promised a treatment-based sentence and he did not receive one. CP 44-45.

Miller's failure to understand a direct sentencing consequence undermines the validity of his plea. He did not waive his right to a trial and pled guilty with his eyes open as to the direct sentencing consequences of the plea. Accordingly, his guilty plea was not voluntary and he should be allowed the opportunity to withdraw his guilty plea.

2. DEFENSE COUNSEL'S FAILURE TO UNDERSTAND MILLER'S SENTENCING ELIGIBILITY UNDER GOVERNING LAW

CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

a. Miller had the right to effective assistance of counsel. The right to effective assistance of counsel is guaranteed by the Sixth Amendment and Washington Constitution, Article I, section 22. When an attorney's performance was deficient, and the deficient performance prejudiced the defense, the conviction may not stand. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The constitutional guarantee of the right to the assistance of counsel recognizes that "the average defendant does not have the professional legal skill to protect himself" when facing a criminal prosecution. Johnson v. Zerbst, 304 U.S. 458, 462-63, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Defense counsel must provide sufficient information so an accused person may make an informed decision as to whether to plead guilty. In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). In McCready, the court found counsel's performance deficient when the attorney did not explain the consequences of rejecting a guilty plea and facing a far greater sentence in convicted after trial. The same analysis applies here,

where counsel did not accurately explain the direct consequences of accepting a plea and waiving trial.

According to ABA Standards, when a client considers pleading guilty, the defense attorney must advise him or her of “possible collateral consequences that might ensue from entry of the plea.” ABA Standards on Plea of Guilty, 14.3-2(f). ABA Standards direct defense counsel advising a client about a guilty plea to “address considerations deemed important” by the client or the lawyer. *Id.* at 14.3-2(b).

In the context of guilty pleas, Washington has long dictated that a defense attorney’s effective performance requires he or she “actually and substantially assist[s] the client in deciding whether to plead guilty.” State v. Holley, 75 Wn.App. 191, 197, 876 P.2d 973 (1994). When counsel misrepresents the applicable law, including the collateral consequence of a plea, the defendant must be allowed to withdraw the plea. State v. Stowe, 71 Wn.App. 182, 187-89, 858 P.2d 267 (1993); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (counsel’s advice about the parole eligibility after a guilty plea must fall “within the range of competence demanded of attorneys in criminal cases.”).

In Stowe, an attorney misadvised his client that if he pled guilty he would be able to continue serving in the Army. 71 Wn.App. at 188. Despite the “collateral” nature of military service, the Stowe Court found that an issue of attorney misadvice must be analyzed under ineffective assistance of counsel principles. Id. at 187. The court asked whether counsel’s misadvice was unreasonable and so prejudicial to deny effective assistance of counsel. In Stowe, counsel admitted he did not research the issue before inaccurately advising his client he would be able to serve in the Army notwithstanding his conviction. Id. at 188. Because the defendant informed counsel of his interest in remaining in the Army and relied on the attorney’s advice, the court found he was prejudiced by the lawyer’s misadvice. Id. at 189.

Like Stowe, Miller relied on his attorney’s efforts to convince the court that he could receive a sentence of treatment rather than incarceration. He was induced to accept a plea based on this understanding.

Yet during the sentencing proceeding, defense counsel agreed that Miller was likely ineligible for a SSOSA and she had not realized his ineligibility until this sentencing hearing. As discussed *supra*, the sentencing court’s authority is strictly dictated by statute

and the court lacks independent authority to craft sentences, other than to decrease a sentence based on the exceptional sentence criteria. The statutory language of SSOSA eligibility undeniably required a standard range sentence of less than 11 years and Miller's standard range was higher than 11 years, and accordingly, he could not receive one even if he received an exceptional sentence below the standard range.

Rather than taking a break from the proceedings and conferring with Miller about whether he wished to continue with the plea under these circumstances, counsel pushed forward with sentencing and offered another alternative that was also unauthorized by the sentencing law of length electronic home monitoring. RP 53-53. Counsel realized the unreasonableness of asking the court to impose a sentence of less than one year based on the seriousness of the charges, as she had asked in the written presentence motion, and therefore asked for a far longer term of community supervision, but the court lacked authority to create such a sentence. RP 53-54. Counsel's advice that Miller could receive a SSOSA, or even a treatment-based sentence of many years in length, was objectively unreasonable under the governing statutory sentencing scheme. Counsel's failure to understand and

accurately advise Miller about the direct sentencing consequences of his guilty plea constitutes deficient performance.

b. Miller was prejudiced by his attorney's ineffective assistance of counsel and should be allowed to withdraw his plea.

Miller pled guilty because he wanted a treatment-based sentence. In addition to his desire to receive counseling about his actions, he had severe health problems including a mechanical aorta that required expertise and diligence in its sensitive monitoring. A doctor diagnosed him with five years left to live, and he did not want to spend those final years in prison and in extremely poor health. RP 45, 48, 50-51.

But by pleading guilty, Miller faced only a mandatory and non-negotiable prison sentence, be it a lesser exceptional sentence or a greater standard range term. Even under the low end of the standard range, he faced more than 13 years in prison as a minimum. Under these circumstances, where Miller did not expect to survive for many more years and he could not receive a community-based sentence of treatment, Miller's benefit from a guilty plea was non-existent. It is reasonably probable he would not have pled guilty had he understood the mandatory, automatic consequences of his plea. Miller's was prejudiced by his attorney's

failure to understand and explain the largely automatic consequences of his plea and he should be allowed the opportunity to withdraw his plea after consulting with competent counsel.

F. CONCLUSION.

For the foregoing reasons, Mr. Miller respectfully requests this Court remand his case so that he may have the opportunity to withdraw his guilty plea.

DATED this 21st day of October 2009.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON)	
Respondent)	CoA No. 63570-1
)	
v.)	
)	
STEVEN MILLER,)	
Appellant.)	

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 20TH DAY OF OCTOBER, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

[X] Steven Miller
888378
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OCTOBER, 2009

x. Ann Joyce