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NO. 71144-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIK V. BARNES

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

2014 MAY 21 AM 11:26

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUE

When the defendant pleaded guilty, he was told that his community custody range was 18-36 months. At sentencing, he was informed that the community custody term was only 12 months. He did not move to withdraw his plea on this basis. Has he waived the argument that misinformation concerning sentencing consequences entitled him to withdraw his plea?

II. STATEMENT OF THE CASE

The defendant (appellant), Erik Barnes, was charged under separate cause numbers with three counts: possession of a controlled substance, first degree unlawful possession of a firearm, and possession of a controlled substance with intent to deliver. CP 69, 119. At a single plea hearing, he pleaded guilty to all three charges. In the plea statements, he was told that the standard sentence ranges were 12+-24 months confinement plus 12 months' community custody for drug possession, 87-116 months' confinement plus 18-36 months community custody for the weapons charge, and 60+-120 months confinement plus 12 months' community custody for possession with intent to deliver. CP 47, 99.

The Department of Corrections prepared a DOSA risk assessment report. This report concluded that a DOSA sentence would “not appropriately mitigate his continued risk of future re-offense.” CP 31. The defendant then moved to withdraw his guilty pleas. CP 86-90. He claimed that he did not know that a DOSA sentence was discretionary. He also claimed that he “did not know what my felony points or standard sentence range was prior to the judge telling me.” CP 84-85. The court conducted a factual hearing on these allegations. It determined that the defendant understood the sentence range and the discretionary nature of DOSA. It therefore denied the motion to withdraw the plea. Sent. hg. RP 13-14.

The court then proceeded to sentencing. The prosecutor advised the court that there was no community custody on the firearm charge. Sent. RP 15-16. She recommended 90 months confinement on the weapon charge, 90 months on the possession with intent to deliver, and 24 months on the drug possession, all to be served concurrently. She also recommended 12-month terms of community custody on the two drug charges. Sent. RP 15-17.

Both defense counsel and the defendant then addressed the court. Defense counsel asked the court to follow the prosecutor’s

recommendation. The defendant asked the court for an appeal bond. Sent. RP 18-19. The court sentenced the defendant in accordance with the parties' recommendations. Sent. RP 19-20; CP 3-13, 71-82.

III. ARGUMENT

WHEN A DEFENDANT IS ADVISED THAT THE SENTENCE RANGE IS LOWER THAN HE EXPECTS, AND HE MAKES NO REQUEST TO WITHDRAW HIS PLEA ON THAT GROUND, HE WAIVES HIS RIGHT TO SEEK WITHDRAWAL.

At the time he pleaded guilty, the defendant was informed that he was subject to a term of community custody on one of the counts. In fact, he was not subject to such a term on that count. For the first time on appeal, the defendant claims that this error entitles him to withdraw his plea.

As the defendant points out, an error of this nature can give a defendant the right to withdraw his plea. This right can, however, be waived. "[W]hen the defendant is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea." State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). There is no requirement that the defendant be expressly told that he can withdraw his plea. Nor need there be

any “waiting period” between the advisement of the error and sentencing. State v. Blanks, 139 Wn.2d 543, 161 P.3d 455 (2007).

Mendoza and Blanks provide two contrasting examples of how this rule applies. In Mendoza, the defendant was advised at sentencing that the standard range was lower than he had previously been told. He moved to withdraw his plea based on a claim of ineffective assistance of counsel. On appeal, he claimed that he was entitled to withdraw his plea because he had been misadvised of the standard range. The Supreme Court held that he had waived this claim:

After being advised of the mistake, [the defendant] did not object to the State's lower sentence recommendation. And, although [the defendant] sought to withdraw his plea for other reasons, he did not mention the corrected standard range as one of his concerns. Because [the defendant] did not object to sentencing or move to withdraw his plea as involuntary and because his lower sentence is statutorily authorized, we conclude that [he] waived his right to challenge the voluntariness of his guilty plea.

Id. at 592.

Blanks involved a different sequence of events. There, the defendant moved to withdraw his guilty plea prior to sentencing. The court denied this motion. At sentencing, the court determined that two of the defendant's prior convictions encompassed the

same criminal conduct, which reduced his standard sentence range. The defendant made no further attempt to withdraw his plea. Blanks, 139 Wn. App. 543, 546-47 ¶¶ 1-2.

On appeal, the defendant argued that he pleaded guilty based on a misunderstanding of the offender score. As in Mendoza, the court held that he had waived this argument:

[The defendant] argues that he was not given enough time because the trial court ruled on his offender score directly before it sentenced him. But Mendoza requires only the “opportunity to withdraw the plea,” not a waiting period. [The defendant] was informed of the miscalculation, it worked in his favor, and he did not move to withdraw his plea on this basis. Therefore, [he] impliedly waived this argument.

Id. at 550 ¶ 14.

Looking at these two cases together, it is clear that the sequence of events makes no difference. In Mendoza, the defendant’s motion to withdraw his plea came after he was advised of the miscalculated offender score. In Blanks, the motion came before the defendant received this advice. In both cases, the motion was based on grounds unrelated to the miscalculation. Since neither defendant relied on the miscalculated offender score as a basis to withdraw the plea, both waived any claim to withdraw their pleas on this basis.

The present case is substantially identical to Blanks. After unsuccessfully moving to withdraw his guilty plea, the defendant learned that the actual term of community custody was less than he had believed. After receiving this advice, both he and his attorney had the opportunity to address the court. Sent. RP 18-19. Either could have asked the court to allow the defendant to withdraw his plea based on the lessened term of community custody. Neither did so. As in Blanks, their failure to act waived any argument that the decreased term warranted withdrawal of the plea. Blanks, 139 Wn.2d at 549 ¶ 13. Since the defendant has waived this argument, his guilty plea is binding.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on May 20, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent