

NO. 71313-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARLON ROBERTO ALDRIDGE,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
APR 15 2015

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. A defendant's guilty plea is involuntary when he is misinformed about the direct consequences of his plea. Here, Aldridge was told that his crime of Assault in the First Degree carried a mandatory minimum sentence of five years. In light of the stipulated facts regarding his crime—that Aldridge shot another man in the torso—this advisement was correct. Did the trial court act within its discretion when it denied Aldridge's motion to withdraw his guilty plea on the basis that he was misinformed about the mandatory minimum sentence?

2. A court has broad discretion to sentence a defendant anywhere within the standard range. Here, at the plea hearing and the sentencing proceeding, the court was reminded that it could sentence Aldridge anywhere within the standard range. The court then followed the parties' joint recommendation and imposed a high-end sentence of 171 months. In doing so, the court commented that it felt "constrained" to follow the joint recommendation, but did not suggest that it was legally required to do so. Aldridge did not object. Did Aldridge invite any error by recommending the sentence that the court imposed? Should this court decline to reach the issue pursuant to RAP 2.5(a), because Aldridge did not preserve it for review? If not, did the trial court properly exercise its discretion in sentencing Aldridge?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 12, 2011, the State of Washington charged the defendant, Marlon Roberto Aldridge, with one count of Assault in the First Degree with a firearm enhancement and one count of Unlawful Possession of a Firearm in the First Degree. CP 1-2. The case was assigned to the Honorable Douglass North for trial, which began on August 19, 2013.

1RP 1-3.¹

Midway through jury selection, Aldridge entered a guilty plea to one count of Assault in the First Degree and one count of Unlawful Possession of a Firearm in the First Degree, in exchange for the State's dismissal of the firearm enhancement. CP 67-79; 2RP 2-5. In entering his plea, Aldridge was informed orally and in writing that his crime of first-degree assault carried with it a mandatory minimum five-year sentence. 2RP 15; CP 71, 80. Further, the parties agreed that each would recommend a sentence of 171 months in custody, the high end of the standard range. 2RP 12-15; CP 71, 84.

A few months later, and prior to sentencing, Aldridge moved to withdraw his guilty plea. CP 113-27; 3RP 12. He alleged that his plea

¹ The State follows Aldridge's convention for referring to the three volumes of the Verbatim Report of Proceedings.

was involuntary because he did not understand that he was bound to recommend the high end of the standard sentencing range (framed as a claim of ineffective assistance of counsel), and because he was misinformed about the mandatory minimum sentence for assault.

CP 113-27; 3RP 59-63. The trial court denied the motion. 3RP 65-67; CP 102-03.

At sentencing, the State and Aldridge both recommended that the court impose the 171-month sentence for which the parties had bargained. 3RP 87-88; CP 84, 88. The court acknowledged that agreement, and imposed sentence consistent with it: 171 months in custody. 3RP 98-99; CP 92. Neither the parties nor the court addressed the mandatory minimum sentence for Assault in the First Degree, and the Judgment and Sentence does not reflect it. CP 89-98. This appeal timely followed. CP 99.

2. SUBSTANTIVE FACTS²

On July 2, 2012, at about 2:45 a.m., Reginald Carey was in the area of Second Avenue and Bell Street in downtown Seattle for the purpose of purchasing drugs. He got into an altercation with a man who had previously sold him bunk (an imitation substance instead of the drug

² Because Aldridge entered a plea of guilty, this factual summary is drawn from the Certification for Determination of Probable Cause, to which Aldridge stipulated, and the Statement of Defendant on Plea of Guilty. CP 4-6, 78, 80.

he was seeking). Aldridge intervened. Carey, who claimed that Aldridge had been harassing him earlier in the evening, struck Aldridge in the face, knocking him down. Carey walked away.

Aldridge got up, walked in the same direction Carey had gone, got a gun, and shot at him. The bullet entered Carey's groin and exited through his buttocks. Carey fled, then later collapsed, bleeding profusely. Multiple people identified Aldridge as the shooter, either because they were at the scene of the shooting or because they recognized him in surveillance video which captured the assault.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY DENIED ALDRIDGE'S MOTION TO WITHDRAW HIS GUILTY PLEA.**

Aldridge contends that his guilty plea was invalid because he was incorrectly informed that a five-year mandatory minimum sentence would "automatically" be imposed for his first degree assault conviction, when that mandatory minimum was not in fact automatic. He argues that he is entitled to withdraw his plea in its entirety for this reason. This Court should reject Aldridge's claim because he was accurately informed of the sentencing consequences of his guilty plea, notwithstanding the fact that the trial court failed to impose those consequences.

A motion to withdraw a plea of guilty prior to sentencing is governed by CrR 4.2(f). That rule states, in pertinent part, that “[t]he court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” A manifest injustice is one which is obvious, directly observable, and not obscure. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Because due process requires that a defendant’s guilty plea be entered into knowingly, voluntarily, and intelligently, an involuntary plea is a manifest injustice warranting withdrawal. Id. at 597; In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)).

When a defendant is not apprised of a direct consequence of his plea, the plea is involuntary. State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). Direct consequences include the length of the sentence, mandatory community placement, and a mandatory minimum sentence. See, e.g., State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) (standard range); Isadore, 151 Wn.2d 294 (community placement); State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988) (mandatory minimum), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

Where guilty pleas are based upon misinformation, the Supreme Court has held them involuntary regardless of whether the misinformation was

material to the defendant's decision to plead guilty, and regardless of whether the correct information resulted in greater or lesser punishment than anticipated in the plea agreement. In re Bradley, 165 Wn.2d 934, 940, 205 P.3d 123 (2009) (citing Mendoza, 157 Wn.2d at 591; Isadore, 151 Wn.2d at 302).

The defendant has the burden of establishing a manifest injustice "in light of all the surrounding facts of his case." State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984). Proving a manifest injustice is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.23d 942 (2012).

Here, Aldridge contends that he was misadvised that he was "automatically" subject to a mandatory minimum sentence of five years.³ Brief of Appellant at 6. But Aldridge was properly advised of the direct consequences of his plea, so his argument must be rejected.

³ During the five-year mandatory minimum period, the offender does not earn early release credit. RCW 9.94A.540(2). Accordingly, even though Aldridge was aware that he would serve more than five years, the five-year mandatory minimum has additional consequences.

Aldridge is correct that the five-year mandatory minimum does not automatically apply to every first-degree assault. Instead, it applies to those assaults committed when “the offender used force or means likely to result in death.” RCW 9.94A.540(1)(b); In re Tran, 154 Wn.2d 323, 328, 111 P.3d 1168 (2005). But Aldridge was never told that the five-year mandatory minimum was “automatic,” as he now claims. The word “automatic” never appears in either the Statement of Defendant on Plea of Guilty or the transcript of the plea colloquy. Nor did Aldridge testify that he was told that it was automatic. And, Aldridge provides no citation to the record in support of this claim.

Although the five-year mandatory minimum does not automatically apply to every Assault in the First Degree, Aldridge was informed that it did apply to him. 2RP 15; CP 71, 80. This advice was correct for a number of reasons.

First, in pleading guilty, Aldridge stated that he was pleading guilty “as charged in the information.” CP 78. In doing so, he admitted to all of the elements of the charged crime, whether or not he specifically admitted the element in his plea. In re Fuamaila, 131 Wn. App. 908, 923, 131 P.3d 318 (2006), citing McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). One of these elements was that Aldridge committed the assault with “force and means likely to produce

great bodily harm or death.” CP 1. “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of any bodily part or organ.”

RCW 9A.04.110(4)(c). There was no admission or evidence in the Certification that Carey suffered a permanent disfigurement or loss or impairment of any bodily part. Thus, the effect of Aldridge’s plea was to admit that he committed the assault with force and means likely to produce either “bodily injury which creates a probability of death” or death—either of which is “force or means likely to result in death.”

RCW 9.94A.540(1)(b).

Second, in his Statement of Defendant on Plea of Guilty, Aldridge acknowledged that, “with intent to inflict great bodily harm, I did assault Reginald Carey by shooting him with a firearm.” CP 78. He stipulated to the facts set forth in the Certification for Determination of Probable Cause. CP 80. That document showed that Aldridge shot Carey with a firearm, hitting him in the groin; the bullet exited through Carey’s buttocks. CP 4-5. As a matter of law, shooting a person with a firearm constitutes “force and means likely to result in death.” For instance, in the criminal code, a firearm is by definition a deadly weapon. RCW 9A.04.110(6). Further, all firearms are included in the legal definition of deadly weapon

for purposes of the sentencing enhancement. RCW 9.94A.825; State v. McGrew, 156 Wn. App. 546, 559, 234 P.3d 268 (2010). A deadly weapon is further defined there as “an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9.94A.825.

Additionally, Washington courts have repeatedly held that firing a gun at a person is sufficient evidence of intent to kill. E.g., State v. Hoffman, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991); State v. Odom, 83 Wn.2d 541, 550, 520 P.2d 152 (1974). And, the vast majority of homicides committed in the United States are committed with a firearm. E.g., Federal Bureau of Investigation, Crime in the United States, 2012, Table 7, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_7_murder_types_of_weapons_used_percent_distribution_by_region_2012.xls (visited August 27, 2014) (showing firearms were used in 69.3% of reported homicides). Thus, Aldridge’s admission that he shot Carey with a firearm was an admission that he used an implement likely to produce death.

Third, that Aldridge’s conduct constituted the use of force and means likely to produce death is reinforced by his own lawyer’s testimony. At the hearing on the motion to withdraw the plea, Aldridge’s

attorney testified that he advised Aldridge that the mandatory minimum applied to his case because, although application of the mandatory minimum turned on the circumstances of the crime, in his view “those circumstances [did] exist.” 3RP 58. Indeed, in rejecting Aldridge’s motion to withdraw his plea, the court explicitly agreed. 3RP 66-67 (“[I]t clearly applies here.”).

Despite these facts, Aldridge argues that the mandatory minimum sentence did not apply to him because, pursuant to the Supreme Court’s recent decision in Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), any fact that increases the mandatory minimum must be submitted to the jury, and there was no such jury finding here. While the principle of Alleyne likely does apply to the mandatory minimum sentence prescribed by RCW 9.94A.540(1)(b), Aldridge ignores the fact that he pled guilty, waiving any right to such factfinding. CP 68 (waiving rights to jury trial and proof beyond a reasonable doubt, among others). Accordingly, as he stipulated to facts that established that he committed the offense of Assault in the First Degree with force and means likely to result in death, the mandatory minimum sentence applied. Aldridge was correctly informed of that fact. His plea was not involuntary.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING SENTENCE.

Aldridge contends that the trial court erred because it was unaware that it had the discretion to impose any sentence within the standard range. This argument has no merit. The trial court imposed a standard-range sentence of 171 months of incarceration, as both Aldridge and the State recommended. Aldridge did not object to the court's process for arriving at that sentence. Accordingly, any error was both invited and waived. Finally, the record simply does not support the claim that the trial court was unaware of its discretion. Aldridge's claim should be rejected.

First, any error by the sentencing court was invited. It is well established that a defendant may not set up an error in the trial court and then complain of it on appeal. State v. Henderson, 114 Wn.2d 867, 869-71, 792 P.2d 514 (1990). The invited error doctrine applies even when the alleged error is of constitutional magnitude. E.g., City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The doctrine requires an affirmative act on behalf of the defendant. In re Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000). Here, Aldridge explicitly asked the court to impose a 171-month sentence. 3RP 87-88; CP 84, 87-88. He cannot be heard to complain that the court did so.

Second, Aldridge failed to object to the trial court's process of selecting an appropriate sentence. Thus, any error stemming from this process is not reviewable on appeal unless he demonstrates an error of constitutional magnitude and prejudice to his trial rights. He has not shown either.

Generally, an appellate court will not consider an issue raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection could have given the trial court an opportunity to correct any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

RAP 2.5(a)(3) permits the defendant to raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926. The purposes of this exception in RAP 2.5 are to correct any "serious injustice to the accused" and to preserve the fairness and integrity of the judicial proceedings. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To warrant review, however, any such alleged error must be truly of constitutional magnitude. Id. (citation omitted); Kirkman, 159 Wn.2d at 926. Moreover, it must be "manifest," meaning that the defendant must demonstrate actual

prejudice to his rights at trial, and that prejudice must appear in the record. Kirkman, 159 Wn.2d at 926-27; McFarland, 127 Wn.2d at 334. “Actual prejudice,” in turn, means that the alleged error had “practical and identifiable consequences” in the trial. O’Hara, 167 Wn.2d at 99 (citations omitted). This exception to the ordinary requirement that an error be preserved by a timely objection at trial must be construed narrowly. Kirkman, 159 Wn.2d at 935.

Here, Aldridge objects for the first time on appeal that the trial court erred by failing to recognize that it had discretion to sentence him anywhere within the standard range. This is not a claim of constitutional magnitude. Aldridge cites to no constitutional provision in his argument on this issue, and his assertion that a court’s misunderstanding of the applicable law is a fundamental defect resulting in a complete miscarriage of justice implies that such a misunderstanding is nonconstitutional in nature. Brief of Appellant at 14, citing In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007). As such, it falls within no exception to RAP 2.5(a). This appeal is procedurally barred.

Finally, even if this Court reaches the merits of Aldridge’s claim, it should reject it. Aldridge contends that the failure to exercise any meaningful discretion in determining the sentence is an abuse of discretion. Brief of Appellant at 12, citing State v. Grayson, 154 Wn.2d

333, 335, 111 P.3d 1183 (2005). He also contends that the trial court fails to exercise its broad discretion when it erroneously believes that it has none. Brief of Appellant at 12, citing State v. McGill, 112 Wn. App. 95, 98-99, 47 P.3d 173 (2002). While these propositions of law are generally correct, they are not applicable here, because the trial court here did not erroneously believe that it had no discretion in sentencing Aldridge. To the contrary, it knew it did have discretion.

At the plea hearing on August 20, 2013, held before the same court that conducted the later sentencing proceeding, Aldridge was orally advised that the court did not have to follow the parties' joint recommendation. 2RP 15. The written Statement of Defendant on Plea of Guilty itself said, "The judge does not have to follow anyone's recommendation as to sentence." CP 71. The court signed this document, and initialed the page on which this statement appeared. CP 71, 79.

At the beginning of the sentencing hearing, the State reminded the court that there was a standard sentencing range. 3RP 86. The State's written submission to the court in support of its recommendation also made clear that a range applied to structure the court's discretion. CP 80-84. Aldridge's sentencing memorandum also advised the court that a range applied. CP 87. Thus, nothing in the parties' submissions would have led the court to believe that its discretion was constrained; to the

contrary, the court was correctly advised, at least impliedly, that it could sentence Aldridge to anywhere within the standard range.

The court's remarks at sentencing also reflect that it was aware of its authority. In choosing to follow the parties' joint recommendation the court said, "Okay, well I appreciate everybody's thoughts about this. I feel really constrained, though, to follow the parties' agreement and so I will sentence in accordance with the parties' agreement." 3RP 98-99. In context, it is clear that the court was not concluding that it was legally required to follow the joint recommendation, but that it believed that it should do so. This meaning is especially apparent in light of the court's response to Aldridge's mother's request that he serve his sentence in Washington. Recognizing the limits of its authority, the court said, "Okay, well I appreciate your request, ma'am. Unfortunately, I don't have any control over the Department of Corrections. All I can do is sentence somebody to the Department of Corrections and then they determine where to send them." 3RP 89-90 (emphasis added). By contrast, the court did not suggest that it had no authority to impose a sentence other than the 171 months that both parties recommended.

In short, the record does not support a claim that the court erroneously believed that it had no discretion in sentencing Aldridge. It

knew it had discretion, and appropriately exercised it. Aldridge's claim should be rejected.

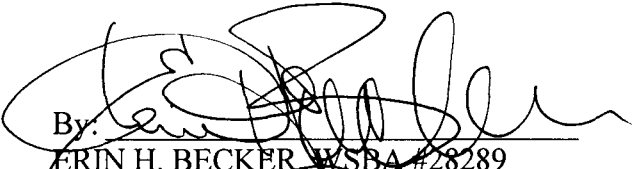
D. CONCLUSION

For all of the foregoing reasons, Aldridge's convictions and sentence should be affirmed.

DATED this 2nd day of September, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MARLON ALDRIDGE, Cause No. 71313-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of September, 2014



Name
Done in Seattle, Washington

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