

Supreme Court No. _____
Court of Appeals No. 48623-7-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRENDA WING,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Brenda Wing, the petitioner, asks this Court to review the Court of Appeals' decision issued on July 18, 2017. The Court of Appeals denied Ms. Wing's motion for reconsideration on August 18, 2017. Copies of these rulings are attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Criminal defendants have a state constitutional right to appeal. The Court of Appeals correctly ruled that Ms. Wing's guilty plea was involuntary and ordered she be permitted to withdraw her plea. The court, however, refused to address the separate and distinct issue of whether the prosecution had materially breached the plea agreement. The remedy for breach includes specific performance of the plea agreement. Did the Court of Appeals violate Ms. Wing's right to appellate review by refusing to review an issue that would have permitted the additional remedy of specific performance? RAP 13.4(b)(3), (4).

2. This Court has recognized there will be hybrid situations involving both a breach of the plea agreement and mutual mistake by the parties as to the consequences of a plea. This Court explained that specific performance would remain available in these situations when a defendant can prove breach. Did the Court of Appeals contravene this Court's precedent in ruling that the remedy of specific performance is unavailable

in hybrid situations involving both breach and mutual mistake? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

In connection with the death of a young boy, the State charged Brenda Wing with homicide by abuse, or in the alternative, manslaughter in the first degree. CP 1-2, 12. The State further alleged aggravating factors as to both offenses. CP 2-3.

As stated in the affidavit of probable cause, on October 5, 2014, emergency services responded to a call about an unresponsive three-year-old boy, who was later pronounced dead. CP 5. The child had been left in the care of Danny and Brenda Wing,¹ a married couple with three children of their own. CP 5-8; CP 64. The preliminary cause of death was believed to be chronic battered child syndrome. CP 8.

On May 7, 2015, Ms. Wing entered in an agreement with the Lewis County Prosecutor's Office. CP 46-48 ("Proffer Agreement for Brenda A Wing").² Ms. Wing agreed to truthfully disclose what she knew about the abuse and death of the boy, JHW. CP 46 (term 1). The State was permitted to corroborate her statements through an unspecified

¹ For clarity and ease of reading, Mr. Wing is referred to by his first name, Danny.

² A copy of this agreement is contained in "Appendix A" of the Opening Brief.

number of polygraph examinations with the defense examiner being given an opportunity to review the polygraph data. CP 46-47 (term 1). The State agreed to dismiss the current charges and to file other charges without aggravators. CP 46 (terms 1 and 4). These charges were manslaughter in the first degree, third degree assault, two counts of possession of a controlled substance, heroin, and two counts of tampering with a witness. CP 46-47 (terms 1 and 4). Ms. Wing agreed to plead guilty to these charges. CP 46 (terms 1 and 4). The standard range sentence would be 146 to 194 months of confinement. CP 46 (term 1). Although the agreement was signed and dated May 7, 2015, the parties agreed that Ms. Wing would enter her guilty plea to the amended charges between May 1 and May 6, 2015. CP 47 (term 6).

Also on May 7, the State filed an amended information alleging the six charges recounted in the agreement. CP 15-17. Ms. Wing entered guilty pleas to these charges, which the court accepted. 5/7/15RP 6-10. CP 19-27. Ms. Wing executed a waiver of her right to be sentenced within 40 days. 5/7/15RP 10.

On June 2, 2015, Ms. Wing participated in a recorded interview with a detective. CP 49-106. A prosecutor and Ms. Wing's attorney were present. CP 49. In this extensive interview, the transcript of which is 58 pages of mostly single spaced text, Ms. Wing explained the circumstances

surrounding how JHW came into her and Danny's care, the abuse they inflicted, and JHW's death. CP 49-106.³ During one part of the interview, Ms. Wing recounted that JHW had placed his hand over the mouth and nose of the Wings' baby, and that Danny started physically abusing JHW shortly thereafter. CP 68-69.

Ms. Wing submitted to a polygraph administered by Sergeant T.R. Dehart of the Washington State Patrol on September 15, 2015. CP 220-23. Afterward, Sergeant Dehart concluded that Ms. Wing was being deceptive, but the scoring was actually inconclusive. CP 223. Sergeant Dehart was not a licensed polygraphist. RP 9, 15. Washington does not license polygraphists. RP 9, 15. Although Ms. Wing's attorney had not expressly agreed that Sergeant Dehart could speak with Ms. Wing after the interview, Sergeant Dehart did so. CP 223. Sergeant Dehart asked Ms. Wing how she thought she did, to which Ms. Wing said she thought she did "pretty good." CP 223. Sergeant Dehart followed up, asking why she thought so. CP 223. Sergeant Dehart then wrote that after going over the statements again, Ms. Wing told him that she lied *to Danny* about JHW covering her baby's nose and mouth. CP 223. She explained she was scared. CP 223.

³ A summary of this interview is contained in Ms. Wing's Opening Brief. Br. of App. at 7-11.

Shortly thereafter, Ms. Wing called her mother, Shelly Ward, from the county jail. CP 107. In the recorded call, Ms. Wing said that she did not pass the polygraph. CP 107. She explained that this related to her lie to Danny about JHW doing something he did not do. CP 109-11.

On September 29, 2015, the State moved to find Ms. Wing in violation of the agreement and to refile the aggravators. CP 29, 34. Based on Ms. Wing's admission that her account of JHW putting his hand over her baby's mouth and nose was false, the State argued that Ms. Wing was not truthful during her interview on June 2, 2015. CP 32. The State argued this was material because after she made the statement, Danny beat JHW. CP 33-34. The State argued this resulted in a violation of the agreement.

On October 28, 2015, Ms. Wing submitted to a second polygraph selected by the State, this time from a licensed polygraph examiner. CP 158. Ms. Wing provided a statement on four areas related to the abuse of JHW. CP 161. After asking Ms. Wing whether she lied in any part of these statements, the polygraphist concluded that Ms. Wing was deceptive. CP 160.

On November 18, 2015, Ms. Wing moved to enforce the plea agreement or for permission to withdraw her guilty plea. CP 121. She argued there had been no violation of §7(a). CP 126.

The State moved for the court to find that Ms. Wing had violated the agreement by lying during her interview. CP 4, 11-12. Ms. Wing argued she had not violated the agreement and that the State had violated the agreement by seeking to refile the aggravators. RP 7-8; CP 121-22. After hearing brief argument, the court continued the matter, with the understanding that Ms. Wing would take another polygraph. RP 14-16.

Ms. Wing took two more polygraphs conducted by Roger Cook, a licensed polygraphist, on December 11, 2015 and January 21, 2016. CP 195, 198. Questions were asked related to JHW's abuse. CP 196, 199. Mr. Cook concluded that Ms. Wing's responses were consistent with truthfulness. CP 196, 199.

On January 22, 2016, the parties appeared for sentencing and for argument on the issue of whether there had been a breach of the agreement. RP 17. The key provision at issue was §7(a) of the agreement. In its entirety, this section reads:

Ensuring Truthfulness: To ensure Brenda A. Wing testifies consistently with her truthful and complete statement as outlined in number 2 above, the State shall be entitled to refile the Manslaughter in the 1st degree enhancements if the State can demonstrate by a preponderance of evidence to the trier-of-fact that Brenda A. Wing either: —

- (a) provided a false statement regarding a material fact *as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement*, by the defendant's failure of two polygraphs administered by

licensed polygraphists, one of whom is selected by the defense;

CP 47 (emphasis added).⁴

Both sides also submitted written arguments. CP 162-64, 188-89. The State continued to insist that Ms. Wing had been dishonest and that she had therefore violated the agreement. RP 19-23; CP 163. The State additionally argued that three of the statements Ms. Wing made during the October polygraph test were inconsistent with her earlier statement. RP 19-20; CP 163-65. Ms. Wing did not agree that she provided false statements of material fact and noted she had passed two of the three polygraphs that were conducted by licensed polygraphists. RP 24-25; CP 189-90. Therefore, she argued there was no violation of §7(a). RP 24-25; CP 189-90.

Rather than conduct an evidentiary hearing, the court heard from the parties' attorneys in a back and forth discussion. RP 18-38. The court did not hear any testimony and did not listen to the jail recording before ruling. RP 18-39. Despite the plain language of the agreement, the court concluded that Ms. Wing had materially breached the agreement and that

⁴ A footnote as to this provision states that as to polygraphs, "Inconclusive results do not determine truth or deception; therefore a re-test may be administered." CP 47 n.2.

the State had satisfied §7(a). RP 40-41; CP 167-69.⁵ Over Ms. Wing's objection, the State submitted the previously alleged aggravators in a new information. RP 42-44; CP 170-72. The court ruled these aggravators were deemed to be stipulated by Ms. Wing under the agreement. RP 56; CP 169, 178.

The State asked for an exceptional sentence of 660 months along with fines and legal financial obligations. RP 44, 46. The court sentenced Ms. Wing to 416 months of total confinement, which was the same amount of time that Danny Wing had been sentenced to earlier. RP 46, 57; CP 180. The court imposed legal financial obligations. RP 58; CP 182-83.

Ms. Wing appealed. In her appeal, she argued (1) the trial court misconstrued the plain language of the plea agreement and erred in concluding that Ms. Wing, rather than the prosecution, had materially breached the plea agreement; (2) in violation of due process, the court improperly held Ms. Wing in breach without holding an evidentiary hearing; (3) Ms. Wing's guilty plea was involuntary; and (4) the trial court

⁵ A copy of the court's order is attached as "Appendix B" in the Opening Brief.

improperly imposed legal financial against Ms. Wing without conducting a proper inquiry into ability to pay.⁶

The appellate court agreed with Ms. Wing as to the issue of the voluntariness of her plea, but refused to consider the other issues:

Because her guilty plea was premised on an incorrect offender score for the third degree assault conviction rendering her plea involuntary, we reverse and remand to superior court to allow Wing to withdraw her guilty plea, and we do not consider her remaining arguments.

Slip op. 1.

The court noted that Ms. Wing had asked the court to address the issues concerning breach of the plea agreement, but refused the request.

The court reasoned the scoring error made the plea agreement illegal and unenforceable.

At oral argument, appellate counsel requested that we consider whether the State breached the plea agreement before considering the offender score issue. However, because the erroneous offender score renders Wing's plea unlawful, and courts cannot specifically enforce unlawful agreements, we decline Wing's request.

Slip op. 1 n.1.

Ms. Wing filed a motion for reconsideration, explaining the court was incorrect and that specific performance of the plea agreement would

⁶ The issue as to voluntariness of Ms. Wing's plea was raised in a supplemental brief, which the Court of Appeals accepted.

not have resulted in an illegal sentence. She explained the court's reasoning was contrary to State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011). Without explanation, the court denied Ms. Wing's motion for reconsideration.

D. ARGUMENT

The Court of Appeals failed to address Ms. Wing's argument that the State breached the plea agreement. This Court should remand with instruction to review the issue or review the issue itself.

- 1. Ms. Wing had a constitutional right to appeal. The Court of Appeals should have addressed the issue of breach because it would have provided Ms. Wing a broader remedy on remand.**

As a criminal defendant, Ms. Wing had a state constitutional right to appeal. Const. art. I, § 22; State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Ms. Wing assigned error to the trial court's decision finding her, rather than the prosecution, in breach of the plea agreement. Br. of App. at 2. Among other arguments, she argued that the trial court had misinterpreted the plea agreement and that under the plain language of the agreement, the prosecution did not prove Ms. Wing breached the agreement. Br. of App. at 22-34. Rather, the prosecution breached the agreement. Therefore, Ms. Wing argued she is entitled to elect either withdrawal of her plea or specific performance. Br. of App. at 26, 33-34; State v. MacDonald, 183 Wn.2d 1, 21, 346 P.3d 748 (2015) ("The proper

remedy for the breach of a plea agreement is to permit the defendant to elect to withdraw the guilty plea or to seek specific performance.”). As an alternative argument, Ms. Wing argued her plea was involuntary and that she should (at a minimum) be permitted to withdraw it. Supp. Br. of App. at 1-6.

The Court of Appeals agreed with Ms. Wing’s alternative argument that her plea was involuntary and that she would be permitted to withdraw it. Slip. op. at 1; see State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006) (remedy for involuntary plea is withdrawal of plea). The appellate court, however, refused to consider Ms. Wing’s primary argument that the prosecution had breached the plea agreement. Slip. op. at 1 n.1. This leaves Ms. Wing without the remedy of specific performance.

Specific performance of the agreement would result in a total sentence between 146 and 194 months of confinement. This is what Ms. Wing bargained for from the prosecution. CP 46 (term 1(c)). In exchange, the prosecution received guilty pleas to six counts and detailed information from her about what happened to JHW. 5/7/15RP 6-10; CP 49-106. But if Ms. Wing withdraws her plea, the State can pursue charges that could result in a significantly greater sentence, possibly even life

imprisonment. Thus, the availability of the remedy of specific performance is critical.

2. The remedy of specific performance remains available whenever a defendant proves breach of a plea agreement. Specific performance would not have resulted in enforcement of an unlawful agreement.

In declining to reach the issue of whether the prosecution breached the plea agreement, the Court of Appeals reasoned that “the erroneous offender score renders Wing’s plea unlawful, and courts cannot specifically enforce unlawful agreements” Slip. op. at 1. n.1.⁷ This is incorrect because the sentencing court would not be required to impose an illegal sentence by specific performance of the plea agreement. This conclusion conflicts with precedent and (carried to its logical conclusion) impliedly eliminates the remedy of specific performance in cases where a defendant proves both breach of a plea deal and an involuntary plea.

The most pertinent case is State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011). Barber holds that a defendant “is not entitled to specific performance of a plea agreement term that is contrary to law.” Barber, 170 Wn.2d at 873 (emphasis added). A defendant is not entitled to specific performance of an illegal sentence and the remedy of specific

⁷ The appellate court did not cite to authority in support of its conclusion. Op. at 1 n.1. The State also did not argue that specific performance of the plea agreement would be unlawful. Br. of Resp’t & Supp. Br. of Resp’t.

performance is limited to situations where “the State breaches its promise to make a specific charging decision or recommendation to the sentencing court.” *Id.* at 873-74. Thus, the defendant in Barber was not entitled to a sentence without a statutory mandatory term of community custody, as mistakenly agreed to by both parties in the plea agreement, because such a sentence was unlawful. *Id.* at 855-56.

Unlike the defendant in Barber, Ms. Wing alleged a breach of the plea agreement. And the terms that she wishes to enforce do not result in an illegal sentence. Specific performance would entitle her to be sentenced without aggravating factors to the six counts she pleaded guilty to and to the prosecutor recommending a sentence within the standard range on each count. This is what the prosecution promised. CP 46-48.

It is well established that a sentencing court acts contrary to statutory authority when imposing a sentence based on a miscalculated offender score. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002); In re Pers. Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). As the Court of Appeals recognized in its decision, the parties made a mutual mistake as to Ms. Wing’s offender score for third degree assault of a child (count two) and the trial court erroneously accepted the miscalculation. *Op.* at 2-5. Specific performance would not entitle Ms. Wing to be sentenced with a miscalculated offender score.

Barber, 170 Wn.2d at 873. Were Ms. Wing to elect specific performance, the sentencing court would act appropriately in using the correct offender score, which is a “5” rather than a “6.” Barber, 170 Wn.2d at 860 n.1.

This case involves both a breach of the plea agreement and mutual mistake by the parties (and the court) as to the consequences of a plea. Barber recognized there will be these “hybrid situations.” Id. This Court reasoned that specific performance in such situations “entitles the defendant only to the State’s recommendation, not to enforcement of the illegal sentence.” Id. Thus, if the prosecution mistakenly agreed to recommend a low-end sentence of 26 months when the low-end sentence was actually 41 months, the defendant would only be entitled to having the prosecution recommend 26 months. Id. The sentencing court would not be required to accept it. Id.

Here, enforcing the plea agreement would not result in Ms. Wing receiving an illegal sentence. At sentencing, the court would not be required to accept the miscalculated offender score. Id. Indeed, the court would commit legal error by doing so. Goodwin, 146 Wn.2d at 868.

Following the reasoning of Barber, Ms. Wing is entitled to specific performance if she proves the prosecution breached the plea agreement. There is nothing wrong with this. This Court in Barber reaffirmed that

specific performance is an appropriate remedy for breach and explained it was not criticizing this remedy:

Our decision should not be read as a criticism of specific performance. When the State reneges on its promised recommendation or charging decision, specific performance remains an appropriate remedy. Specific performance as a remedy for breach of the plea agreement ensures that the State follows through with its promises, and it thus acts as a deterrent against a prosecutor playing fast and loose with an accused's constitutional rights. The same deterrent purpose is not present where the parties agree to an illegal sentence by mutual mistake. Moreover, specific performance in the breach context has the effect of simply binding the State to its promises, which does not raise the same concerns as specific performance in the context of mutual mistake—namely, binding the trial court to an illegal sentence. Thus, in the breach context, our precedent allows a defendant to elect either specific performance or withdrawal of the plea, subject to compelling reasons not to allow the chosen remedy.

Id. at 873 (internal quotations and citation omitted) (emphasis added).

Accordingly, in hybrid cases, where there is both a mutual mistake in a plea agreement (for example, a miscalculated offender score) and breach of the plea agreement by the prosecution (such as failing to keep a promise as to charges or recommending a particular sentence), the defendant should be permitted the remedy of specific performance. Under the reasoning of footnote 1 of the appellate court's opinion, however, a defendant is not allowed specific performance in hybrid cases. This conflicts with Barber and other precedent holding that defendants are

entitled to specific performance upon proving breach. See, e.g., MacDonald, 183 Wn.2d at 21.

Moreover, this case is not properly decided without addressing the issue of breach. The prosecution was able to reap the benefit of the plea deal without fulfilling its end of the bargain. The prosecution gained invaluable information from Ms. Wing. But rather than abide by the agreement, the prosecution played a fast and loose game of “gotcha,” contending that Ms. Wing had lied. Without substantiating its claims at an evidentiary hearing as required by due process and in contravention of the plain terms of the plea agreement,⁸ the prosecution erroneously persuaded the trial court that Ms. Wing materially breached the agreement. The prosecution then added aggravating factors and sought a sentence of 660 months (55 years) rather than to the agreed sentence of 146 to 194 months (about 12 to 16 years). RP 42-46. Withdrawal of the guilty plea does not remedy this injustice. To properly decide this case, the Court of Appeals should have addressed Ms. Wing’s primary arguments so that the prosecution is held accountable and Ms. Wing is able to receive the benefit of the bargain.

⁸ Br. of App. at 17-34; Reply Br. at 1-14.

3. Review is warranted under the governing criteria.

Review is warranted under the criteria governing review. RAP 13.4(b). Ms. Wing properly briefed and argued the issue of breach of the plea agreement. By refusing to address this issue, the Court of Appeals violated Ms. Wing's constitutional right to appellate review and the norms of appellate review. RAP 13.4(b)(3). The decision is contrary to this Court's precedent indicating that the remedy of specific performance remains available in hybrid situations where a defendant proves both breach of a plea agreement and an involuntary plea. RAP 13.4(b)(1). And whether this remedy remains available in such situations is an issue that will recur and is therefore a matter of substantial public interest. RAP 13.4(b)(4).

E. CONCLUSION

Ms. Wing asks that this Court grant review and remand to the Court of Appeals with instruction to review Ms. Wing's remaining arguments. See State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (remanding case back to Court of Appeals because State "had the right to appeal, and the Court of Appeals erred when it declined to reach the merits of the State's case."). Alternatively, the Court should grant review and adjudicate the remaining issues itself.

DATED this 18th day of September, 2017.

Respectfully submitted,

/s Richard W. Lechich
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Appendix

July 18, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRENDA ANN WING,

Appellant.

No. 48623-7-II

UNPUBLISHED OPINION

WORSWICK, J. — Brenda Wing appeals her convictions and exceptional sentence for first degree manslaughter, third degree assault, possession of a controlled substance and witness tampering stemming from the death by abuse of a child in her care. After Wing pleaded guilty, the superior court determined she had materially breached the proffer agreement, allowed the State to file an amendment to the charging document, and sentenced Wing to an exceptional sentence. Wing makes numerous arguments on appeal. Because her guilty plea was premised on an incorrect offender score for the third degree assault conviction rendering her plea involuntary, we reverse and remand to superior court to allow Wing to withdraw her guilty plea, and we do not consider her remaining arguments.¹

¹ At oral argument, appellate counsel requested that we consider whether the State breached the plea agreement before considering the offender score issue. However, because the erroneous offender score renders Wing's plea unlawful, and courts cannot specifically enforce unlawful agreements, we decline Wing's request.

FACTS

In 2014, Wing and her husband began taking care of a three-year-old child, JHW,² with the consent of JHW's young mother. Within three months of living with the Wings, the child died from physical abuse inflicted upon him by the Wings.

On May 7, 2015, Wing pleaded guilty to first degree manslaughter–domestic violence, third degree assault–domestic violence, two counts of possession of a controlled substance, and two counts of witness tampering. After finding that Wing breached the proffer agreement, the superior court sentenced Wing to 416 months of confinement. Wing appeals.

ANALYSIS

Wing argues that because her guilty plea was premised on an incorrect offender score and incorrect standard range sentence, her guilty plea was involuntary, and thus she should be permitted to withdraw it. Specifically, Wing argues that her offender score for the third degree assault charge was incorrectly calculated at 6, rather than 5. The State concedes that Wing's offender score was incorrect, but nonetheless argues that the erroneous offender score does not invalidate Wing's plea. We agree with Wing.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). CrR 4.2(d) requires a plea be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” Prior to acceptance of a guilty plea, “[a] defendant ‘must be informed of all the direct consequences of [her] plea.’” *State v. A.N.J.*, 168

² This court uses initials to protect the identity of minor victims.

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Wn.2d 91, 113-14, 225 P.3d 956 (2010) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

A defendant may be allowed to withdraw his guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008) (citing CrR 4.2(f)). “An involuntary plea can amount to manifest injustice.” *Codiga*, 162 Wn.2d at 923. A miscalculation of an offender score renders the defendant’s plea involuntary and the plea may be withdrawn. *Codiga*, 162 Wn.2d at 925.

The standard sentencing range under Washington’s Sentencing Reform Act of 1981 (SRA) for any given offense is a function of the offense’s seriousness level and the defendant’s offender score. RCW 9.94A.525. The legislature assigns the seriousness level. Third degree assault of a child is a level III offense. RCW 9.94A.515.

The offender score is calculated by counting the prior and current felony convictions in accordance with RCW 9.94A.525. Current felony offenses are treated as if they were prior offenses when scoring the other crimes being sentenced. RCW 9.94A.525(1), RCW 9.94A.589(1)(a). Wing does not dispute her criminal history. With Wing’s history of four prior felony convictions, plus one current felony conviction (first degree manslaughter), her offender score is 5. RCW 9.94A.525(7). Because third degree assault of a child is a level III offense, Wing’s standard range sentence is 17-22 months. RCW 9.94A.515; RCW 9.94A.510. However, Wing’s offender score was improperly calculated at a 6, and her corresponding standard sentence range was improperly calculated at 22-29 months.

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Because Wing's guilty plea was premised on an incorrect offender score and standard sentence range, her plea was involuntary. When a guilty plea is based on misinformation, including a miscalculated offender score that resulted in an incorrect higher standard range, the defendant may move to withdraw the plea based on involuntariness. *Mendoza*, 157 Wn.2d at 591.

The State argues that because the miscalculated offender score on the third degree assault of a child conviction did not determine Wing's ultimate sentence, there is no manifest injustice to correct and we should affirm the guilty plea. We disagree.

A plea agreement must be treated as indivisible ““when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding.”” *State v. Bisson*, 156 Wn.2d 507, 519, 130 P.3d 820 (2006) (emphasis omitted) (quoting *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003)). Thus, if there is error on one count of an indivisible multicount agreement, the entire plea agreement must be set aside upon request. *Turley*, 149 Wn.2d at 400. Here, Wing's pleas to both charges were made at the same time, in one document, and accepted in a single proceeding. Consequently, the plea agreement is indivisible.

Nonetheless, the State, while acknowledging that no legal authority supports its position, argues that Wing understood the sentence she was facing and that the incorrect offender score on the third degree assault of a child conviction had no impact. The State emphasizes that the two convictions were to run concurrently, and the standard range for the third degree assault charge, as the lesser count, had no bearing on Wing's decision to plead guilty. However, Washington courts have explicitly “decline[d] to adopt an analysis” that would make the determination of the

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voluntariness of a defendant's plea dependent upon "the defendant's subjective decision to plead guilty." *Isadore*, 151 Wn.2d at 302. "A reviewing court cannot determine with certainty how a defendant arrived at [her] personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 940-41, 205 P.3d 123 (2009).

Consequently, because the improperly calculated offender score for Wing's third degree assault of a child conviction rendered her indivisible plea involuntary, we reverse and remand to allow Wing to withdraw her guilty plea.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Johanson, J.


Bjorgen, C.J.

August 18, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRENDA ANN WING,

Appellant.

No. 48623-7-II

ORDER DENYING
MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's July 18, 2017 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Johanson

FOR THE COURT:


JUDGE

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 48623-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Sara Beigh, Lewis County Prosecuting Attorney
[appeals@lewiscountywa.gov]
- petitioner
- Attorney for other party


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Date: September 18, 2017

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- sara.beigh@lewiscountywa.gov
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