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

STATE OF WASHINGTON, Respondent, v. MARLON ROBERTO ALDRIDGE, Appellant.	)	No. 71313-2-I ORDER WITHDRAWING OPINION AND SUBSTITUTING OPINION

Appellant, Marlon Aldridge, moved for reconsideration of this court's opinion filed on March 16, 2015. Respondent, State of Washington, filed an answer to appellant's motion for reconsideration.

The court has determined that the opinion filed on March 16, 2015, shall be withdrawn and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that the opinion filed on March 16, 2015, is withdrawn and a substitute opinion be filed.

DATED this 11th day of May 2015.

Becker, J

Trickey, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARLON ROBERTO ALDRIDGE, Appellant.	)	No. 71313-2-I DIVISION ONE UNPUBLISHED OPINION FILED: May 11, 2015

BECKER, J. — A defendant who pleads guilty to first degree assault is not necessarily subject to a five-year mandatory minimum sentence. To justify the mandatory minimum, the defendant must admit facts equivalent to the facts the State would have had to prove at trial: that the defendant "used force or means likely to result in death or intended to kill the victim." In this case, the defendant admitted less than the State would have had to prove. Because he was misinformed that a mandatory minimum sentence was a direct consequence of his plea, he must be allowed to withdraw the plea.

Late one night in July 2012, two men got into a fight in downtown Seattle. Appellant Marlon Aldridge approached them, and one of the men struck Aldridge in the face and knocked him down. Aldridge hit his head on the curb. Moments later, Aldridge got up, followed the man, and shot him in the groin. The State charged Aldridge with one count of first degree assault with a firearm

enhancement. Because Aldridge had three prior felony convictions for controlled substances (the most recent in 2005), the State also charged him with one count of unlawful possession of a firearm.

After a jury was selected, the State offered to dismiss the firearm enhancement if Aldridge pleaded guilty and agreed to make a joint recommendation for a high-end standard range sentence of 171 months. Aldridge accepted the offer.

Before sentencing, Aldridge—represented by new counsel—moved to withdraw his plea on the ground that he was misinformed that a five-year mandatory minimum applies automatically to assault in the first degree. The trial court denied the motion. Aldridge appeals.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. CrR 4.2(d); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Once a guilty plea is accepted, the trial court may allow withdrawal of the plea only to correct a manifest injustice. CrR 4.2(d). An involuntary guilty plea constitutes a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A plea is involuntary where the defendant is misinformed of a direct consequence of his plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A mandatory minimum sentence is a direct consequence of a guilty plea. Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976). The above-cited case law establishes that Aldridge is entitled to withdraw his plea if he was misinformed that he was subject to a mandatory minimum sentence.

It is undisputed that Aldridge was informed that his plea would necessarily subject him to a mandatory minimum sentence of five years. This is evident from the testimony given at the plea withdrawal hearing by the attorney who represented Aldridge at the time he entered the plea. He was asked if he informed his client "that assault one has a mandatory minimum sentence of at least five years of confinement?," and he answered, "Correct." He then testified that he did not tell Aldridge that not all convictions for first degree assault result in a mandatory minimum sentence:

> Q. And did you explain to Mr. Aldridge that that is not—that is not an absolute state of affairs? That in other words the statutory minimum period of confinement attaches only in certain cases when certain findings are made?
> A. I did not do that in this case because I believe those circumstances do exist.

If Aldridge was misinformed, he does not have to establish that the information he was given was material to his decision to plead guilty. Mendoza, 157 Wn.2d at 590. The court does not "engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain." Mendoza, 157 Wn.2d at 590-91. Although it may seem that concern about a 5-year mandatory minimum is pointless in the context of an agreed recommendation for a 171-month sentence, the State does not make that argument. The State forthrightly acknowledges that "even though Aldridge was aware that he would serve more than five years, the five-year mandatory minimum has additional consequences"—namely, the offender does not earn early release credit during the 5-year period. RCW 9.94A.540(2).

A five-year mandatory minimum sentence applies to offenders convicted of first degree assault only under two conditions: where the offender "used force or means likely to result in death or intended to kill the victim." RCW 9.94A.540(1)(b). This sentencing statute "indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent." In re Pers. Restraint of Tran, 154 Wn.2d 323, 329-30, 111 P.3d 1168 (2005). If the prosecution of Aldridge had proceeded to trial, the State would have had to prove at least one of these conditions to the finder of fact in order to obtain a mandatory minimum sentence. The State acknowledges these principles as the starting point of the analysis.

Aldridge argues that the mandatory minimum cannot be applied to him because there was no jury finding that he either "used force or means likely to result in death" or "intended to kill the victim." But as the State points out, Aldridge waived the right to jury fact-finding by pleading guilty. The question is whether, given the facts that Aldridge admitted by pleading guilty, a mandatory minimum sentence was a direct consequence of his plea.

The State does not argue that Aldridge admitted he intended to kill the victim. The issue is whether he admitted that he used force or means likely to result in death.

Aldridge pleaded guilty to assault in the first degree "as charged in the information." The information specifically alleged that Aldridge assaulted the victim with "force and means likely to produce great bodily harm or death."

"Great bodily harm" means bodily injury which (1) "creates a probability of death," (2) "causes significant serious permanent disfigurement," or (3) "causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4).

Replacing the term "great bodily harm" in the information with its three alternative definitions shows that Aldridge admitted to assaulting the victim using force and means likely to produce (1) bodily injury which creates a probability of death, (2) bodily injury which causes significant serious permanent disfigurement, (3) bodily injury which causes a significant permanent loss or impairment of the function of any bodily part or organ, or (4) death.

Of this list, only (1) and (4) are facts supporting the imposition of the five-year mandatory minimum. Using "force and means likely to produce" "bodily injury" which "creates a probability of death" (the first definition of great bodily harm) is legally indistinguishable from "using force or means likely to result in death" (a fact sufficient to impose the mandatory five-year minimum).

By pleading guilty to a charging document alleging four alternative facts, Aldridge admitted that at least one of those four facts existed, but he did not admit which one. "'[W]hen either "A" or "B" could support a conviction, a defendant who pleads guilty to a charging document alleging "A and B" admits only "A" or "B."'" United States v. Guerrero-Jasso, 752 F.3d 1186, 1191 (9th Cir. 2014), quoting Young v. Holder, 697 F.3d 976, 988 (9th Cir. 2012).

Had Aldridge explicitly admitted to either (1) or (4), he would have admitted facts necessary to impose the mandatory minimum. But he did not.

And the State did not "'seek an explicit admission of any unlawful conduct it seeks to attribute to the defendant' for Apprendi purposes," as was its burden. Guerrero-Jasso, 752 F.3d at 1191, quoting United States v. Hunt, 656 F.3d 906, 912 (9th Cir. 2011).

We conclude that Aldridge did not admit to facts sufficient to support the imposition of the five-year mandatory minimum sentence in RCW 9.94A.540(1)(b). Thus, he was misinformed of a direct consequence of his plea.

Reversed.

Becker, J.

WE CONCUR:

Trickey, J