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JUL 31 2009

King County Prosecutor
Appellate Unit

NO. 62234-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY WILLS,

Appellant.

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

The Honorable Suzanne Barnett, Judge
The Honorable Palmer Robinson, , Judge

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
DIVISION ONE

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A. ARGUMENT IN REPLY

WILLS IS ENTITLED TO WITHDRAW HIS GUILTY PLEAS.

There is no need to demonstrate materiality when a defendant is misinformed concerning a direct sentencing consequence of pleading guilty. State v. Mendoza, 157 Wn.2d 582, 587-590, 141 P.3d 49 (2006). In State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008), the Supreme Court said:

it seems well-settled that the length of the sentence is a direct consequence of the plea and the plea may be deemed involuntary when it is based on mutual mistake regarding the offender score or the sentencing range.

Codiga, 162 Wn.2d at 925 (emphasis added). Thus, a mistake as to the offender score, like a mistake regarding the standard range, is a direct consequence of a plea and dispenses with an affirmative showing of materiality.

The State's argument that the mistaken offender score in Wills' case is not a direct consequence because it did not change his standard ranges is incorrect. In State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008), the defendant was misinformed about the statutory maximum sentences for his offenses. Notably, however, the parties correctly calculated Weyrich's standard ranges and there is no indication the State was seeking an exceptional sentence. Weyrich received sentences within

the standard ranges. Weyrich, 163 Wn.2d at 556. Nonetheless, the Supreme Court reversed, holding that the maximum authorized sentence was a direct consequence of the pleas and that Weyrich need not show a causal link between the mistake and his decision to plead guilty. Id. at 557.

Similarly, in State v. Ross, 129 Wn.2d 279, 283, 916 P.2d 405 (1996), the defendant's standard range was properly calculated and the court imposed a sentence within that range. However, he was never informed of mandatory community placement. The Supreme Court held this was a direct sentencing consequence and allowed Ross to withdraw his pleas. Id. at 284-288.

Weyrich and Ross demonstrate that direct sentencing consequences need not impact the standard range. The Ross Court noted that when deciding if a sentencing consequence produces "a definite, immediate, and automatic effect on a defendant's range of punishment," the question is whether it "enhances the defendant's sentence or alters the standard of punishment." Ross, 129 Wn.2d at 284-285 (citing State v. Ward, 123 Wn.2d 488, 513, 869 P.2d 1062 (1994) and State v. Barton, 93 Wn.2d 301, 306, 609 P.2d 1353 (1980)).

Although a defendant with an offender score of 9 will have the same standard range if his offender score is 10, the “standard of punishment” is altered and the “sentence enhanced” because the higher score qualifies the defendant for an exceptional sentence. See RCW 9.94A.535(2)(c) (authorizing a sentence above the standard range where “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.”).

If that same defendant has an offender score of 11 or 22 or 29, this also automatically impacts the standard of punishment and enhances the sentence because the higher the score, the more likely an exceptional sentence will be imposed. Moreover, the higher the score, the greater the court’s latitude in going beyond the standard range. See State v. Ritchie, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995) (length of an exceptional sentence will be upheld unless it “shocks the conscience” of the reviewing court). An exceptional sentence that shocks the conscience based on an offender score of 11 or even 22 will not have the same shock value when based on a score of 29.

Under the State’s reasoning – requiring a mistake as to both the score and the range – a defendant convicted of a drug offense could

withdraw his guilty plea if, for example, the parties improperly calculated the score as a 3 (instead of a 0, 1, or 2) or as a 6 (instead of a 3, 4, or 5), since the applicable range increases with these scores and is therefore a direct sentencing consequence. See RCW 9.94A.517(1) (indicating identical ranges for each group of scores from “0 to 2,” “3 to 5,” and “6 to 9 or more.”). But other similar mistakes, i.e., if the parties incorrectly calculate a score of 2 instead of 1 or 0, or improperly calculate a score of 9 instead of 6, 7, or 8, there is no direct consequence and therefore no right to withdraw the plea because the range does not change.

As the State recognizes, however, cases on direct consequences reveal that “[m]isinformation concerning myriad circumstances has rendered a plea involuntary and, as a consequence, the defendant has been permitted to withdraw his guilty plea.” Brief of Respondent, at 8. It is difficult to imagine the Supreme Court intended the offender score issue to be parsed in the manner the State now suggests. The Supreme Court has never held that a mistake concerning an offender score must also change the standard range. To the contrary, the Codiga Court indicated that mutual mistake based on a miscalculated “offender score or the sentencing range” authorizes a defendant to withdraw his guilty pleas. Codiga, 162

Wn.2d at 925. Miscalculation of Wills' offender scores is a direct consequence of his pleas.

Although Wills need not demonstrate the materiality of the offender scores to his decision to plead guilty, the record reveals that it was in fact material in his case.

Unless Wills could convince the court his offender score was below 9, his standard ranges would remain the same as calculated by the parties. This was simply not possible given Wills' extensive criminal history; that was a battle that could not be won. But Wills did retain the opportunity to ask for and receive a standard range sentence as a component of the plea deal. That Wills would be seeking concurrent 25-month standard range terms for his offenses was made clear in the Statements on Plea of Guilty and at the plea hearing. CP 10 (both cause numbers); 1RP 7-8. Moreover, the scoring sheets attached to Wills' Statements on Plea of Guilty specifically indicate his offender score is 29 for all offenses, indicating the parties specifically contemplated this score in negotiating the plea deal. CP 23-24 (08-1-04149-9); CP 74-75 (08-1-03634-7).

As discussed in Wills' opening brief, Wills' precise offender score impacted directly his ability to convince the court he should receive the

benefit of this right he had retained as part of the bargaining process – the right to argue for a standard range sentence. Since the higher the offender score, the more likely a sentencing court will impose an exceptional sentence (and a longer one at that), an offender score of 22 makes it more likely the court will impose a standard range sentence. As in Mendoza, this impacts Wills’ risk management decision. It alters calculation of the merits of going to trial versus pleading guilty. See Brief of Appellant, at 8-9.

It is within this context that the language in the plea documents should be interpreted. While those documents indicate the ranges are an essential term of the agreement, they also state that “if the parties are mistaken as to the offender score on any count, neither party is bound by any term of this agreement.” CP 22 (08-1-04149-9); CP 70 (08-1-03634-7). Based on the circumstances of this case, the mutual mistake went “to a basic assumption on which the contract was made” (that Wills’ score was 29) and had “a material effect on the agreed exchange of performances” (whether Wills would receive a standard range sentence). Paopao v. Dept. of Social & Health Servs., 145 Wn. App. 40, 50, 185 P.3d 640 (2008). Therefore, Wills’ offender score was material to his decision to plead guilty.

Finally, the State argues that even if the miscalculated offender score was material to the plea agreements, Wills waived his right to withdraw his pleas by “ratifying” the agreements. Brief of Respondent, at 17. The State is mistaken.

In Codiga, the Supreme Court held that where a scoring discrepancy is brought to the defendant’s attention at sentencing, the plea can be challenged on appeal so long as the defense objected to the offender score calculation. The Supreme Court expressly held that it is not necessary for the defendant to move to withdraw his plea. Codiga, 162 Wn.2d at 921, 930 n.5. At Wills’ sentencing, defense counsel specifically objected to the court’s calculation of the offender score as 29.¹ 2RP 35.

The State attempts to distinguish Codiga, noting that the miscalculated offender score surprised Codiga’s counsel. The State then accuses Wills’ counsel of knowing beforehand that the offender score was

¹ Although Codiga makes it clear a defendant need not move to withdraw his pleas upon discovery of a mutual mistake to preserve the issue for appeal, the State cites State v. Giebler, 22 Wn. App. 640, 591 P.2d 465, review denied, 92 Wn.2d 1013 (1979), in support of a contrary assertion. Brief of Respondent, at 19. Giebler does not involve mutual mistake. Rather, it involves the prosecutor’s breach of a plea bargain by failing to recommend a deferred sentence. Giebler, 22 Wn. App. at 642. In any event, to the extent this 30-year-old Court of Appeals decision conflicts with Codiga, Codiga obviously controls. Indeed, in State v. Walsh, 143 Wn.2d 1, 8 n.2, 17 P.3d 591 (2001), the Supreme Court described the Giebler decision as “unpersuasive.”

miscalculated but lying in wait until sentence had been imposed. Brief of Respondent, at 18-19. This is pure conjecture. The deputy prosecutor had not previously recognized the error. Similarly, defense counsel may not have recognized the error until sentencing when he saw Wills' priors listed on the proposed Judgment form. Neither side seemed prepared to deal with the issue. Defense counsel did not cite to the controlling statute. 2RP 35-36. The prosecutor was unfamiliar with the law on this point, indicating he had not previously discussed the matter with defense counsel. 2RP 37. And everyone apparently agreed (mistakenly) that if the priors from 1980 counted as one offense, Wills' score would be 21. See 2RP 36-38. In fact, the correct score is 22.

Because defense counsel objected at sentencing to the calculation of Wills' offender score, Codiga controls and Wills may move to withdraw his pleas.

B. CONCLUSION

The State has properly conceded that this case must be remanded for proper calculation of Wills' offender scores. For all of the above

reasons, and those contained in Wills' opening brief, this Court also should allow Wills to withdraw his guilty pleas.

DATED this 31st day of July, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62234-0-1
)	
DANNY WILLIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANNY WILLIS
DOC NO. 630040
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P.O. BOX 881000
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2009.

x *Patrick Mayovsky*

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