

63104-7

63104-7

NO. 63104-7-I

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

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

IVAN FLUKER,

Appellant.

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

The Honorable Richard McDermott  
The Honorable Sharon Armstrong

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ambiguity in Mr. Fluker's plea bargain with the State denied him his Fourteenth Amendment right to due process of law.

2. The prosecutor and court's mistake of law at the time of sentencing establish a manifest injustice warranting withdrawal of the guilty plea.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Ambiguity in the terms of a plea bargain renders the bargain involuntary, in violation of due process. The remedy for an ambiguous plea bargain is withdrawal of the plea. Is Mr. Fluker entitled to withdraw his guilty plea where the language of the plea agreement and prosecutor's recommendation created ambiguity regarding whether the term of confinement for a firearm enhancement would follow the total sentence as opposed to the sentence for the count to which it was attached?

C. STATEMENT OF THE CASE

1. Original charges and State's plea offer. Appellant Ivan Fluker was prosecuted in King County in connection with an alleged incident at the home of his estranged girlfriend, Latoya Minnifield. Originally charged with three felony counts and two firearm

enhancements,<sup>1</sup> on the eve of trial Mr. Fluker accepted a plea offer from the State. Pursuant to the plea, the State agreed to dismiss the felony harassment count and the enhancement on the burglary count.

The State recommended Mr. Fluker serve 26 months on Count 1, the burglary count, and a year and a day on Count 2, the assault count, plus 36 months for the firearm enhancement on the assault count. CP 29. The prosecutor's recommendation on the guilty plea form read:

I. 26 mo., concurrent w/ ct II, credit for time served; II 12+ mo, concurrent w/ ct I, credit for time served, plus 36 month f/a enhancement (consecutive); \$500 VPA, dv. bat. trtmnt; no contact Latoya Minnifield, Jarvae Lindsay; dismissal ct III and f/a enhancement ct I; no adtnl charges; restitution if any; \$100 dna fee, court costs, recoupment for apptd counsel.

CP 14.

2. Mr. Fluker's hesitancy at the guilty plea hearing. At the plea hearing, Mr. Fluker was very distressed. 8/4/08 RP 4.<sup>2</sup> When the court attempted to review Mr. Fluker's statement on plea of guilty with him, and asked him whether the statement was true, Mr.

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<sup>1</sup> The State charged Mr. Fluker by information with burglary in the first degree with a firearm enhancement, assault in the second degree with a firearm enhancement, and felony harassment. CP 1-7.

<sup>2</sup> Pertinent transcripts are referenced by date followed by page number.

Fluker responded, "No ma'am." 8/4/08 RP 8. The court inquired why Mr. Fluker was not pleading guilty pursuant to North Carolina v. Alford,<sup>3</sup> and defense counsel explained that an Alford plea was "not available in this case." 8/4/08 RP 8-9. He clarified, "I am not permitted to present an Alford plea to the Court in this case." 8/4/08 RP 9. The court then interrupted the plea colloquy, stating, "I am a bit uncomfortable with this." 8/4/08 RP 11. The court recessed the proceeding and directed Mr. Fluker to discuss the plea offer with his attorney. 8/4/08 RP 11.

When Mr. Fluker returned to court, he agreed to accept the statement in the plea form as true and correct for purposes of the guilty plea and sentencing. 8/4/08 RP 13. His attorney noted that he faced the potential of more serious charges and additional firearm enhancements if he did not plead guilty, and the court observed that Mr. Fluker was "between a rock and a hard place." 8/4/08 RP 13-14. Mr. Fluker indicated he wished to plead guilty. 8/4/08 RP 14-15.

3. Circumstances indicating involuntariness. With new counsel prior to sentencing, Mr. Fluker subsequently moved to

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<sup>3</sup> 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

withdraw his guilty plea. New counsel presented a wealth of collateral information regarding Mr. Fluker's circumstances that may have affected his ability to enter a knowing, intelligent, and voluntary guilty plea. Mr. Fluker, an Iraq war veteran, suffered from post-traumatic stress disorder (PTSD) as a result of his experiences during the war. 12/16/08 RP 5-8.

A different judge heard the motion to withdraw the guilty plea and denied it, ruling, "I think that if there were . . . some proof that the PTSD prevented Mr. Fluker from knowing the consequences of his plea, then I would seriously consider it. But there is no proof to me to indicate that he did not fully understand the consequences of changing the plea." 12/16/08 RP 14.

Mr. Fluker was subsequently referred to Western State Hospital for a competency evaluation. The court initially found the evaluation difficult "to figure out" because "on first blush, it did appear to me it was somewhat contradictory." 3/2/09 RP 5. The court stated, however, "Now that I have read it over about three times, I don't believe it is contradictory", and ruled that Mr. Fluker was competent to plead guilty. 3/2/09 RP 5.

4. The flawed sentencing proceeding. At sentencing, the prosecutor altered the State's written recommendation. The prosecutor noted,

There was an issue with the prosecutor's recommendation. I'll first note that the offender score is a two on both counts. Seriousness level on Count 1 is a seven, making the range twenty-six to thirty-four months. On Count 2, the seriousness level is a 4, making the range twelve to fourteen. There is a firearm enhancement of thirty-six months added to that count.

For some reason, on the prosecutor's recommendation, it says sixty-two months. And I believe that's incorrect because the thirty-six months applies to the twelve and a day, which is Count 2. . . . The firearm enhancement is added on to Count 2. And so the thirty-six months should be thirty-six plus twelve and a day. And that would be forty-eight and a day to fifty months confinement. I believe that should be the correct range.

The prosecutor who filled out the State's recommendation, I believe, was tacking it onto the longest sentence. But I don't believe that that's the correct way to do it.

3/2/09 RP 12.

The court agreed with the prosecutor. 3/2/09 RP 13. The prosecutor concluded, "The State's recommendation, then, for sixty-two months is incorrect and the State cannot recommend more than fifty months without it being an exceptional sentence."

3/2/09 RP 13.

Defense counsel stated,

Thank you. And I appreciate the clarification given by the State. I believe that was the recommendation, as well, the first time we entered sentencing. It's supported by [paragraph (g)] of the plea where the prosecuting attorney will make the following recommendation on Count 1, twenty-six months, concurrent with Count 2. And Count 2 is twelve months and a day concurrent with Count 1, credit for time served, plus thirty-six months of firearm enhancement consecutive to Count 2.

And that's also supported by Paragraph Number 6, which lists the count numbers plus the firearm enhancement will be added, as well as Paragraph J, and 6, where it says, the crime charged in Count 2 includes the firearm deadly weapon enhancement of thirty-six months.

So the State is correct with its recommendation. The sentencing range is forty-eight to fifty months, with a State's recommendation of forty-eight months, which is the bottom of the range, which we join.

3/2/09 RP 14-15. The court followed the agreed recommendation and imposed a sentence of "forty-eight plus." 3/2/09 RP 25.

The next day the parties returned to court. The prosecutor stated he had made an error in calculating the standard range by "suggesting to the Court that the range, the actual total amount should have been forty-eight months instead of the sixty-two, which was negotiated[.]" 3/3/09 RP 3. He accused defense counsel of not having "raised that issue before. But of course jumped on the

bandwagon because it would be in his client's best interest." Id.

The prosecutor urged the court to "impose the sixty-two months."

3/3/09 RP 5.

Defense counsel responded, "I agree with counsel that statutorily, the judge must follow the law in that respect. The problem, there was no plea agreement to that effect." 3/3/09 RP 5.

He noted, "At no point does [the plea agreement] state that the enhancement will follow the longest of the sentences. What it does is give a confusing statement that there will be an enhancement following the sentence." 3/3/09 RP 6. He contended, "There is no clarity to Mr. Fluker as to where the enhancement will follow. There is no record that Mr. Fluker followed or understood that there would be that enhancement – the enhancement would follow count I."

3/3/09 RP 6-7.

The prosecutor accused defense counsel of being "disingenuous," stating, "It's very clear that there has never been a recommendation by the State prior to me, that it was going to be forty-eight months." 3/3/09 RP 8. Defense counsel disagreed:

"What we have is either confusion by the parties or ineffective assistance of counsel by [previous defense counsel], where he did

not clarify that the enhancement would follow the longer of the two sentences.” 3/3/09 RP 15.

The court ruled that the State's prior recommendation and the colloquy during the plea were clear and that the mistake was the sentencing court's. 3/3/09 RP 16-17. The court accordingly resented Mr. Fluker to serve 62 months in prison. 3/3/09 RP 15; CP 65. Mr. Fluker appeals. CP 61.

#### D. ARGUMENT

##### AMBIGUITY REGARDING THE SENTENCING CONSEQUENCES OF MR. FLUKER'S GUILTY PLEA RENDERED THE PLEA INVOLUNTARY.

1. Due Process requires a guilty plea be knowing, intelligent and voluntary. Principles of due process require a guilty plea be knowing, voluntary and intelligent. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. 14; Wash. Const. art. I, § 3. A guilty plea is involuntary where the defendant does not understand the sentencing consequences of his plea. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). An involuntary guilty plea creates a

“manifest injustice” which requires the guilty plea be set aside.

State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); CrR 4.2(d).

2. Ambiguity in a plea agreement renders a guilty plea involuntary. Both principles of contract law and the rule of lenity necessitate that where a term in a plea bargain is ambiguous, the ambiguity must be construed against the State. Bisson, 156 Wn.2d at 521-23. Thus, any ambiguity in the terms of a guilty plea – even where the ambiguous term conflicts with pertinent statutory provisions – is a basis to set aside a guilty plea. Id. at 520-21. In such an instance, although the defendant is not entitled to specific performance of the ambiguous bargain, he is nonetheless entitled to withdraw the guilty plea. Id. at 524-25.

3. The lack of clarity regarding whether the firearm enhancement would follow Mr. Fluker’s term of confinement for count 2 rendered the plea involuntary. RCW 9.94A.533 requires that where an offender is sentenced to serve additional time for a firearm or deadly weapon enhancement, “the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to

a firearm enhancement.” RCW 9.94A.533(3). In this case, however, the plea agreement was ambiguous regarding whether the firearm enhancement would follow Mr. Fluker’s term of confinement for count 2, resulting in a low-end sentence of 48 months and a day, or count 1, resulting in a low-end sentence of 62 months. Neither the plea agreement itself nor the State’s written recommendation in Mr. Fluker’s statement of defendant on plea of guilty specified a total length of confinement. Ambiguity created by this lack of specificity was compounded by the fact that both of these forms stated the 36-month enhancement was being added to count 2, which carried a lesser range than count 1. And at the sentencing hearing on March 2, 2009, defense counsel told the court that the State’s stated recommendation – 48 months and a day instead of 62 months – was consistent with the State’s written recommendation, and with Mr. Fluker’s understanding of the plea bargain. 3/2/09 RP 14-15.

When the prosecutor requested Mr. Fluker be resentenced, he accused defense counsel of being “disingenuous” for representing to the court that Mr. Fluker understood the State’s recommendation to be that he serve 48 months and a day of

confinement, rather than the 62 months mandated by statute. This extraordinary allegation against an officer of the court was unwarranted and unsupported by the record. Nothing in the record suggested that Mr. Fluker's counsel had "jumped on the bandwagon" by intentionally misrepresenting pertinent facts to the court. Indeed, such conduct would be contrary to defense counsel's ethical duties and potentially grounds for bar disciplinary action. See RPC 3.3; 4.1; 8.4.

In the face of the State's accusation, Mr. Fluker's counsel maintained the plea agreement was unclear and that either the parties or prior counsel had created confusion regarding how much time Mr. Fluker should expect to serve. 3/3/05 RP 5-6, 15. Yet the court found that despite the unclear language in the plea agreement and guilty plea form, Mr. Fluker understood the sentence he faced as a consequence of his guilty plea. 3/3/09 RP 16-17. The court was incorrect.

In Bisson, the defendant pleaded guilty to eight criminal counts, five of which carried deadly weapon enhancements. Bisson, 156 Wn.2d at 821. The guilty plea form reflected that the enhancements were "24 months on each count, 5 counts total." Id.

at 22. However, the statement on plea of guilty did not say that the five 24-month enhancements were run consecutively to one another. Id. Instead, the State's preprinted form stated the enhancements had to be served "consecutively to any other term" and "consecutive to any other sentence I have already received or will receive in this or any other cause." Id. Further, because the sentences on the criminal counts to which Bisson was pleading guilty were to run concurrently, "the scoring sheet obscured the requirement that the enhancements be served consecutively to one another." Id. The Supreme Court concluded the imprecise language created an ambiguity and rendered the plea involuntary. Id. at 517.

This case is like Bisson. Both the plea agreement and prosecutor's recommendation failed to advise Mr. Fluker that the firearm enhancement would follow the completion of his sentence on the burglary count, which was the count that carried the longer standard range. The "Statement of Defendant on Plea of Guilty" did explain that the 36-month enhancement was "mandatory and must be served consecutively to any other sentence and any other enhancement I have already received or will receive in this or any

other case.” CP 15. But, like in Bisson, in the very next paragraph, the meaning of this advisement was obscured by the language, “The sentences imposed on counts I and II, except for any weapons enhancement, will run concurrently unless there is a finding of substantial and compelling reasons to do otherwise.” Id. Considering this language in conjunction with the language in the plea agreement and prosecutor’s recommendation, Mr. Fluker could have reasonably concluded that the enhancement on count 2 would run consecutively to his term of confinement on that count only, and concurrently with his sentence on the burglary count.

In finding that Mr. Fluker had to be resentenced, the court failed to appreciate the impact of the ambiguous language on the voluntariness of Mr. Fluker’s plea. The court reasoned,

The enhancement, the thirty-six months, I think, and the reference to that was in reference to the fact that it was going to be attached to count 2 so that it could be reduced from sixty to thirty-six months. And that it would necessarily result in forty-eight months total incarceration.

I think the State’s sentencing recommendation stated, at the same time as the plea agreement was entered and signed by the same deputy prosecutor who took the plea agreement, Ms. Messitt (phonetic), I think that provides further proof that that was what the parties intended and what the plea was.

3/3/09 RP 15-16.

But although the court attempted to infer the parties' intent from the circumstances, the circumstances failed to resolve whether Mr. Fluker was expressly advised regarding the sentence the court was legally obligated to impose. Under the rule of lenity, which requires the ambiguity be construed in Mr. Fluker's favor, the plea was involuntary. Bisson, 156 Wn.2d at 523.

4. This case must be remanded so Mr. Fluker can withdraw his plea. An ambiguous contract provision is not subject to specific performance. Bisson, 156 Wn.2d at 525. However, Mr. Fluker is entitled to have this matter remanded so he can decide whether to withdraw his plea. Id.

E. CONCLUSION

This Court should conclude that Mr. Fluker's plea bargain was ambiguous regarding the sentencing consequences of his guilty plea, rendering the plea involuntary. The remedy is remand so Mr. Fluker may decide whether to withdraw the plea.

DATED this 30th day of September, 2009.

Respectfully submitted:



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63104-7-I
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	)	
IVAN FLUKER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] IVAN FLUKER 328572 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2009.

x \_\_\_\_\_ 

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