

63313-9

63313-9

NO. 63313-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA WINCHESTER,

Appellant.

2009 SEP 30 PM 4:51

FILED
COURT OF APPEALS
STATE OF WASHINGTON

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

BRIEF OF APPELLANT

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

Joshua Winchester appeals his convictions for twelve felony offenses on the grounds that his waivers of his right to a jury trial were not constitutionally valid in that he was not properly advised of the direct sentencing consequences of his plea.

B. ASSIGNMENT OF ERROR.

1. Mr. Winchester's guilty plea is invalid under the Due Process Clause of the Fourteenth Amendment.

2. Mr. Winchester's waivers of jury trial in order to proceed to stipulated bench trial are invalid under the Due Process Clause of the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Fourteenth Amendment Due Process Clause requires a guilty plea be entered knowingly, intelligently and voluntarily. If the defendant is misadvised about the applicable maximum sentence for the offense or other direct consequences of a conviction the resulting plea is not entered knowingly, voluntarily and intelligently. Mr. Winchester was misadvised about the maximum sentence that could be imposed for the offenses for which he was charged. Was his guilty plea invalid? (Assignment of Error 1)

2. A waiver of constitutional trial rights which is executed for the purpose of a stipulated bench trial rather than a guilty plea must also be knowing, voluntary, and intelligent. Mr. Winchester was misadvised about the maximum sentences that could be imposed for the offenses for which he was charged. Were his drug court waivers and stipulations invalid? (Assignment of Error 2)

D. STATEMENT OF THE CASE.

This appeal consolidates three separate matters:

(1) Cause No. 06-1-01212-0, a stipulated bench trial in which Mr. Winchester was convicted of eight counts of Possession of Stolen Property in the Second Degree (CP 11-24);

(2) Cause No. 07-1-00627-6, a stipulated bench trial in which Mr. Winchester was convicted of burglary in the second degree, theft in the third degree, and bail jumping (CP 61-73);

(3) Cause No. 08-1-01555-9, a guilty plea for one count of theft in the second degree (CP 99-109).

The first two matters arose out of drug court orders entered on December 13, 2007. CP 38, 85. The drug court petition in both matters advised Mr. Winchester of the statutory maximum for the charged offenses, but not the maximum sentences actually applicable to his cases. CP 41, 88. Mr. Winchester voluntarily

terminated his drug court participation in both matters on December 11, 2008. CP 31, 81. At the bench trial, in exchange for the dismissal of some charges, he stipulated that the record contained sufficient evidence to convict him on both matters. 1/8/09RP 3-8.

On the third matter, Mr. Winchester entered a guilty plea March 5, 2009. CP 110-17. He was advised both in writing and by oral colloquy of the statutory maximum for second degree theft, but not the maximum sentence actually applicable to his case. CP 111, 3/5/09RP 4.

The judgment and sentence for all three matters were entered on March 5, 2009. CP 11-24, 61-73, 99-109. The Honorable Charles Snyder imposed sentences of 29 months on each count in the first matter, 58 months each on the burglary and bail jumping in the second matter (and zero days on the theft), and 29 months on the third matter, all to be served concurrently with each other. CP 111, 3/5/09RP 4.

Mr. Winchester now appeals all twelve convictions, as he was misadvised of the actual maximum sentence for all of them.

E. ARGUMENT.

MR. WINCHESTER'S WAIVERS OF TRIAL RIGHTS
WERE NOT KNOWINGLY, INTELLIGENTLY, AND
VOLUNTARILY ENTERED DUE TO HIS
MISADVISEMENT OF THE SENTENCING
CONSEQUENCES

1. Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). “A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.” In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

“Where a plea agreement is based on misinformation . . . generally the defendant may choose . . . withdrawal of the guilty plea.” State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. Miller, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. Walsh, 143 Wn.2d at 8; State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006).

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea.” Wood v. Morris, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

2. The same principles apply to the waiver of rights for a stipulated bench trial. CrR 6.1(a) provides, “[c]ases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”

The first two matters in this appeal were tried without a jury, pursuant to CrR 6.1. By the terms of the drug court petitions in those matters, Mr. Winchester waived the following rights:

- a. The right to a speedy trial pursuant to CrR 3.3 and speedy arraignment CrR 3.2;
- b. The right to a jury trial;
- c. The right to see and cross-examine any witness testifying against the defendant;
- d. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and

- e. The right to file and have court hearings with witness testimony on pretrial motions, including the legality of the arrest, search and seizure, and the admissibility of defendant's statements.
- f. The defendant explicitly waives confidentiality as to any information revealed in open court during drug court.
- g. The right to appeal a finding of guilt.

CP 41, 88.

Upon proceeding to the stipulated bench trial, pursuant to this agreement, defense counsel informed the court that Mr. Winchester was stipulating that the police reports contained sufficient evidence to convict him of the charges in both drug court matters. 1/8/09RP 4-5.¹ The court agreed and entered the convictions. 1/8/09RP 5-6. Thus, although still framed as stipulated bench trials, these convictions were functionally indistinguishable from Alford² pleas, in which the defendant does not admit guilt but concedes that the State has produced evidence sufficient for a conviction. Accordingly, Mr. Winchester's waivers in the drug court matters should be analyzed identically to the waiver in the guilty plea case.

¹ Written Findings of Fact and Conclusions of Law were subsequently filed, finding in both cases, "the parties expressly stipulated, on the record, that evidence contained in the police reports submitted in this matter for the court's consideration sustains a finding of guilt" on all counts charged. CP 5 (FF 1), 56 (FF 1).

Even if this Court does not agree that the drug court cases essentially became Alford pleas, it is already established that the waivers required for a stipulated bench trial surrender such fundamental trial rights that the waivers must meet the same standard of being knowingly, intelligently, and voluntarily entered. In State v. Ashue, the defendant contended her waiver of constitutional rights for a stipulated bench trial was not knowing, intelligent, and voluntary because the trial court's colloquy did not include an explanation of the specific rights she was waiving or establish that she understood those rights. 145 Wn. App. 492, 502, 188 P.3d 522 (2008). The Court reiterated the basic principles that "the burden to establish a valid waiver is upon the prosecution" and the court "must indulge every reasonable presumption against waiver of fundamental rights." Id. at 502-03, quoting State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979) and City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). There was no question that these principles apply to the waiver of rights for a stipulated bench trial just as they apply to the waiver of rights for a guilty plea.

² North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

The Court affirmed that a stipulated trial is not the same as a guilty plea, and does not require an extended colloquy. Ashue, 145 Wn. App. at 503, citing Acrey, 103 Wn.2d at 208, 691 P.2d 957; State v. Brand, 55 Wn. App. 780, 785, 780 P.2d 894 (1989). The Court emphasized that the written agreement signed by Ashue listed the constitutional rights being waived and averred that her attorney had fully explained and discussed these rights with her. Ashue, 145 Wn. App. at 503. During the brief colloquy on the record, the judge had summarized the stipulated trial process to which Ashue would be subject if she violated the terms of her diversion program. Id. at 504. Finally, Ashue had not challenged the trial court's finding that her waiver was made knowingly, intelligently, and voluntarily. Id. Therefore, the Court found no basis for Ashue's claim that her waiver was invalid.

None of the protections listed in Ashue were available here to Mr. Winchester. As discussed below, the information regarding his maximum possible sentence was incorrect in every written and oral advisement. Thus, although Ashue is easily distinguishable, requiring the opposite result, its holding is highly illustrative. Ashue demonstrates that although a stipulated bench trial does not require an extended colloquy (nor does Mr. Winchester argue it

should), the waiver must still be knowing, intelligent, and voluntary, and the analysis for determining its validity is substantially similar to the analysis for evaluating a guilty plea. As discussed below, none of Mr. Winchester's waivers, for his guilty plea or for either of his stipulated trials, was valid.

3. Mr. Winchester was misadvised of the maximum sentence. The relevant maximum sentence is a direct consequence of a guilty plea. Walsh, 143 Wn.2d at 8-9; State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). As discussed above, because Mr. Winchester stipulated to the sufficiency of the evidence in the drug court cases, the relevant maximum sentence was similarly a direct consequence of his waivers in those cases.

RCW 9A.20.021(a) provides the maximum terms for various degrees of felony convictions. Class B felony offenses (including second degree burglary) may be punished with up to ten years in prison. Class C felony offenses (including second degree possession of stolen property, second degree theft, and bail jumping) have five year maximum terms.

Yet as the United States Supreme Court ruled in Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), while a certain imprisonment term may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. Instead, the Court noted the maximum sentence was “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (Emphasis in the original.) Id.

Similarly, the maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. Id. Here, the standard range is the maximum possible sentence the court may impose for the offenses of which Mr. Winchester was convicted. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutions’ guarantees of trial by jury and due process of law.

Mr. Winchester was repeatedly and inaccurately informed that the maximum possible term was the statutory maximum. CP 41 (Drug Court Petition for Cause No. 06-1-01212-0, stating maximum penalty for second degree possession of stolen property

is five years and a \$10,000 fine); CP 88 (Drug Court Petition for Cause No. 07-1-00627-6, stating maximum penalty for second degree burglary is ten years and a \$20,000 fine); CP 111 (Guilty Plea Statement, stating maximum penalty for second degree theft is five years and a \$10,000 fine); 3/5/09RP 4 (court stating maximum penalty for second degree theft is five years and a \$10,000 fine). Because the maximum sentence that could be imposed in these matters was actually a standard range term, and not five years for Class C felonies or ten years for Class B felonies, the prosecution and court misadvised Mr. Winchester of the maximum punishment he faced as a consequence of waiving his constitutional rights.

Mr. Winchester was also misadvised with regard to the possibility of an exceptional sentence in his guilty plea. The Guilty Plea Statement informed him that the judge could impose a sentence greater than the standard range solely based on a judicial determination that there were “substantial and compelling reasons” to do so. CP 114.³ This advisement was patently incorrect.

³ The Guilty Plea Statement provides:

Under RCW 9.94A.537(1), the state is required to give notice it will seek a possible exceptional sentence *before* the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). These factors essentially require egregious criminal history that enables an offender commit “free crimes” that go unpunished and renders the standard range to be unduly trivial. RCW 9.94A.535(2). The current offenses added twelve points to Mr. Winchester’s offender score; previously, it was only four. CP 12, 62, 100. Mr. Winchester did not have significant criminal history that was uncouneted by the standard range and an exceptional sentence based on unscored criminal convictions would be unreasonable and unauthorized.

In State v. Kennar, 135 Wn.App. 68, 75, 146 P.3d 125 (2006), rev. denied, 161 P.3d 1031 (2007), the court ruled that the

The judge does not have to follow anyone’s recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

... (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

CP 114.

drafters of CrR 4.2 intended that a court should advise a person pleading guilty of the standard range and the statutory maximum under RCW 9A.20.021.⁴ Although CrR 4.2 does not expressly require such advice, the Kennar Court inferred that CrR 4.2 intended such advice because the standard plea form includes such information. Because the Kennar Court focused on the requirements of CrR 4.2 and did not address any constitutional claim or discuss the actual maximum sentence authorized by law as indicated in Blakely, it does not dictate the analysis or result in the case at bar. Id.

Unlike Kennar, the issue raised in the case at bar is constitutionality of the waivers and not the intent of CrR 4.2. In State v. Knotek, 136 Wn.App. 412, 149 P.3d 676 (2006), rev.

⁴ CrR 4.2 provides in pertinent part:

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

....

denied, 161 P.3d 1031(2007), the Court acknowledged that before pleading guilty, a defendant needs to understand the “direct consequences of her guilty plea, not the maximum potential sentence if she went to trial. . . .” Id. at 424 n.8. The Knotek Court further agreed that Blakely “reduced the maximum terms of confinement to which the court could sentence Knotek post-Blakely as a result of her pre-Blakely plea—[to] the top end of the standard ranges” Id. at 425.

In Knotek, the defendant was advised that no exceptional sentence was available and at the time of sentencing she “clearly understood that Blakely had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose.” Id. at 426. In the case at bar, no discussion of Blakely ever occurred.

As the Supreme Court ruled in Mendoza, a guilty plea is involuntary when “based on misinformation, including a miscalculated offender score that resulted in an incorrect higher standard range.” 157 Wn.2d at 592. Because accurate sentencing information was not conveyed in any of these three cases, Mr. Winchester’s waivers were not knowing, intelligent, and voluntary.

(g) Written Statement. A written statement of the defendant in

See Mendoza, 157 Wn.2d at 592; Isadore, 151 Wn.2d at 302;

Knotek, 136 Wn.App. at 425.

4. Misadvisement of the maximum sentence renders the waivers involuntary without requiring the defendant prove that this information was material to the waivers. In Isadore, the Supreme Court ruled:

We decline to adopt an analysis that requires the appellate court to inquire into the materiality of [the sentencing misadvisement] in the defendant's subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.

Isadore, 151 Wn.2d at 302. Because this Court does not inquire into the materiality of the sentencing misadvisement, the degree to which the misadvisement prompted Mr. Winchester to waive his rights is irrelevant to the issues on appeal.

5. Mr. Winchester is entitled to withdraw his waivers.

Where a defendant is misadvised of the direct consequences of his waivers of constitutional rights, they are involuntary and he is entitled to withdraw them. Isadore, 151 Wn.2d at 303; Walsh, 143 Wn.2d at 8. Mr. Winchester was misadvised of the direct

substantially the form set forth below shall be filed on a plea of guilty:

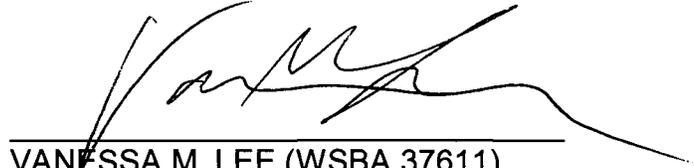
consequences of his waivers, and accordingly, this Court must reverse his convictions and remand the case to permit Mr. Winchester to withdraw his guilty plea and drug court waivers.

F. CONCLUSION.

For the foregoing reasons, Mr. Winchester respectfully requests this Court order that he be permitted to withdraw his waivers on all three matters.

DATED this 30th day of September 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', is written over a horizontal line. The signature is fluid and cursive, extending to the right of the line.

VANESSA M. LEE (WSBA 37611)
Washington Appellate Project (91052)
Attorneys for Petitioner

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 63313-9-I
)	
JOSHUA WINCHESTER,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH 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:

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|------|--|-------------------|-------------------------------------|
| [X] | HILARY THOMAS
WHATCOM COUNTY PROSECUTING ATTORNEY
311 GRAND AVENUE
BELLINGHAM, WA 98225 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | JOSHUA WINCHESTER
739390
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98584 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711