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NO. 68847-2-I

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

REC'D  
NOV 28 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WOODS,

Appellant.

NOV 28 2012  
KIMBERLY PROCHNAU  
JUDGE

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

The Honorable Beth Andrus, Judge  
The Honorable Kimberly Prochnau, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred in denying the appellant's motion to withdraw his guilty plea.

Issue Pertaining to Assignment of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. During plea negotiations defense counsel led Appellant to erroneously believe he would be released after serving only 10 months of the 15-month sentence contemplated by the plea agreements. Because this misinformation was central to Appellant's decision to waive his constitutional rights and plead guilty, must he be permitted to withdraw his guilty pleas?

B. STATEMENT OF THE CASE

The State charged appellant Anthony Woods with possession of cocaine and delivery of cocaine. CP 1-6, 105-09. A plea agreement was reached under which Woods would plead guilt to the possession charge and an amended charge of solicitation to deliver cocaine, and both parties would recommend a 15-month sentence based on an agreed offender score of 5. CP 11-31, 111-30. On June 2, 2011, the trial court accepted Woods' guilty pleas, and on June 24, 2011, it imposed the jointly recommended

15-month sentence. CP 32-40, 131-38; 1RP 16; 2RP 4.<sup>1</sup> At sentencing, Woods was credited with having served 262 days. CP 35.

On August 8, 2011, 307 days into his 15-month sentence, Woods was still incarcerated at DOC, so he filed a pro se motion to withdraw his guilty plea, claiming he had been coerced into pleading guilty and that certain offenses used to calculate his standard range had been used in error. CP 42-51. Sometime between the filing of his pro se motion and January 24, 2012, Woods was released from prison and moved to Vancouver, Washington. 3RP 2-3.

On January 3, 2012, Woods' new counsel filed a motion and supporting brief arguing Woods should be allowed to withdraw his guilty pleas on the basis of ineffective assistance of counsel during the plea process. CP 51-69. Counsel argued Woods' prior counsel, Mark Flora, failed to investigate whether the four out-of-state convictions used in establishing Woods' offender score were legally comparable to felonies in Washington. CP 59-66. Counsel also argued Woods's guilty pleas were involuntary because they were entered with a mistaken understanding of the standard range sentence he faced if he went to trial on the original charges. CP 66-69. Counsel subsequently stated that one additional

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<sup>1</sup> There are five volumes of verbatim report of proceedings referenced as follows: 1RP - June 2, 2011 & March 29, 2012; 2RP - June 24, 2011; 3RP - January 24, 2012; 4RP February 24, 2012; and 5RP - June 7, 2012.

ineffective assistance of counsel claim would be made arguing Flora failed to advise Woods that the Department of Corrections (DOC) could hold him past his anticipated release date if Woods failed to "have a valid address the DOC can confirm." 4RP 4.

At a hearing on the motion, Flora admitted never investigating whether the out-of-state convictions used to calculate Woods' offender score were comparable to Washington felonies, nor did he ever require the State to prove they were properly attributed to Woods. 4RP 13-15. Flora recalled advising Woods that even if they could get his offender score lowered by a point or two, it would not change the standard range sentence he faced if convicted of the original charges, and that either way, he would still be facing a greater sentence than was contemplated by the proposed plea agreement. 4RP 20-21, 32-34. Flora also recalled a discussion with Woods in which it was agreed Woods would be better off pleading guilty and serving the 30 to 40 days left on the sentence contemplated by the plea agreement at DOC rather than remaining incarcerated at the King County Jail for another two months or so in order to investigate his criminal history and potentially go to trial on the original charges. 4RP 35.

When asked whether he had any discussion with Woods about when he would be released under the plea agreement, Flora stated:

. . . I remember the conversation.

My conversation with him was that the DOC would be crazy not to release him. In fact, they turned out to be crazy. I don't know why they didn't release him, [w]hether or not he had an address. We are going to broke and they spent another, I don't know, \$25,000 to house him. It is nuts.

...

. . . I am sure the impression that [Woods] got from me was that I couldn't imagine the Department of Corrections not releasing him.

4RP 25-26.

In arguing Woods should be allowed to withdraw his guilty pleas, counsel argued it was warranted not only due to the offender score problems, but also because Woods was misadvised by Flora about how long he would remain incarcerated, and therefore his pleas were involuntary. 1RP 18-24, 34-36. In response, the State argued Woods failed to show Flora's representation was deficient, and failed to prove any prejudice. 1RP 25-33.

In a written ruling filed April 13, 2012, the court denied Woods' motion. CP 70-77. The court concluded Woods failed to prove the out-of-state convictions were wrongly included in his offender score calculation and failed to convince the court that being held past his expected release date due to the lack of a valid address was a direct consequence of his guilty plea. Id. Woods appeals. CP 78-79.

On June 5, 2012, Woods' counsel filed a "supplemental" motion to withdraw his guilty pleas. CP 80-90. As before, it argued Woods should be allowed to withdraw his guilty pleas on the basis that they were entered without the benefit of effective assistance of counsel. It also argued he should be allowed to withdraw his guilty pleas because his counsel failed to move for his immediate release at the time of sentencing. Id.

At a hearing on June 7, 2012, Woods explained it was his understanding that on the day of sentencing he had already served more time incarcerated than he should under the 15-month sentence proposed under the plea agreement. 5RP 8. The Court once again denied the motion, concluding Woods had failed to establish ineffective assistance of counsel. CP 102; 5RP 9-11. Woods appeals that ruling as well. CP 103-04.

C. ARGUMENT

WOODS' GUILTY PLEA WAS INVALID BECAUSE IT WAS BASED ON AFFIRMATIVE MISINFORMATION FROM HIS COUNSEL ABOUT THE CONSEQUENCES.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Woods entered his guilty pleas with assurance from counsel he would be released after serving only 10 months of the 15-month sentence expected under the plea agreement. Because this was not something counsel could assure, Woods was affirmatively misinformed as to the consequences

pleading guilty and therefore his plea was involuntary. Because Woods did not waive his right to raise this claim, which may be raised for the first time on appeal, this Court should reverse the order denying Woods' motion to withdraw his plea.

Due Process requires that a guilty plea be knowing, voluntary, and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). It is well established that a defendant "must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea." State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). This standard is reflected in CrR 4.2(d), which provides the trial 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."

In State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001), the Supreme Court permitted Walsh to argue for the first time on appeal that his plea was involuntary. Between the plea hearing and sentencing, the State had discovered Walsh's offender score and standard range were higher than initially thought. Nothing in the record indicated Walsh was advised of this correction before sentencing. Rather, the parties simply proceeded under the higher score and range. 143 Wn.2d at 7. Noting Walsh was neither advised

of the misunderstanding nor offered an opportunity to withdraw his plea, the Court found the plea involuntary and permitted withdrawal. 143 Wn.2d at 9.

Affirmative misinformation about a collateral consequence of a guilty plea can also render a guilty plea unknowing and involuntary. A.N.J., 168 Wn.2d at 116; State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). In A.N.J., a juvenile defendant pleaded guilty to a sex offense after being wrongly advised it could be purged from his record once he became an adult. 168 Wn.2d at 116. The Washington Supreme Court concluded such affirmative misinformation warranted allowing withdrawal of the guilty plea, even though it pertained to a collateral rather than a direct consequence. 168 Wn.2d at 117.

Similarly, in Stowe, it was reversible error not to allow withdrawal of a guilty plea when it was based on an affirmative misrepresentation by trial counsel regarding a collateral consequence, namely, whether pleading guilty would affect Stowe's military career. 71 Wn. App. at 188–89. This Court stated that although “defense counsel does not have an obligation to inform his client of all possible collateral consequences of a guilty plea,” the question is “not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea.” 71 Wn. App. at 187.

“[D]ifferent considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.” 71 Wn. App. at 187 (quoting In re Pers. Restraint of Peters, 50 Wn. App. 702, 707 n .3, 750 P.2d 643 (1988)).

This Court found Stowe's counsel's performance deficient because counsel (1) knew Stowe wanted to continue his military career, (2) affirmatively misinformed Stowe he could maintain his military career despite the plea, and (3) failed to conduct any research before inaccurately advising Stowe. 71 Wn. App. at 188. Because Stowe had specifically asked about his ability to continue his military career and relied on his attorney's misinformation in deciding to plead guilty, this Court concluded Stowe was prejudiced by his attorney's deficient performance. 71 Wn. App. at 188–89.

The situation here is similar to that in A.N.J. and Stowe. Defense counsel admitted leading Woods to believe pleading guilty would result in his release after serving only 10 months of the 15-month sentence. 4RP 25-26. On this basis Woods believed he would be release at sentencing so he waived his constitutional rights and plead guilty. 5RP 8.

As it turned out, counsel's claim about release was wrong and Woods guilty pleas were made without a correct understanding of the consequences and were therefore unknowing and involuntary. This Court should reverse

the trial court and permit Woods to withdraw his guilty pleas. A.N.J., 168  
Wn.2d at 117.

D. CONCLUSION

For the foregoing reasons, this Court should permit Woods to  
withdraw his guilty plea.

DATED this 28<sup>th</sup> day of November 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "C. Gibson", written over a horizontal line.

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID. 91051

Attorneys for Appellant

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DIVISION ONE

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COA NO. 68847-2-1

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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 28<sup>TH</sup> DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY WOODS  
6100 BONNER DRIVE  
VANCOUVER, WA 98665

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF NOVEMBER 2012.

x Patrick Mayovsky

2012 NOV 28 PM 4:51  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA