

COA No. 69650-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SCHREIB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable Michael Rickert
The Honorable David Needy

APPELLANT'S OPENING BRIEF ON DIRECT APPEAL

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STATE OF WASHINGTON
DIVISION ONE
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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

MR. SCHREIB MAY SEEK TO WITHDRAW HIS
INVOLUNTARY PLEA ON APPEAL. 5

1. The plea is involuntary on its face and is a manifest
injustice warranting withdrawal. 5

2. Mr. Schreib may seek to withdraw his involuntary plea on
appeal. 8

E. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Hand, 295 P.3d 828, Wash. App. Div. 1, March 04, 2013
(NO. 67935-0-I) 9

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390
(2004) 6,7

State v. Lujan, 38 Wn. App. 735, 688 P.2d 548 (1984), review denied,
103 Wn.2d 1014 (1985) 10

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 6,7,8

State v. Moon, 108 Wn. App. 59, 29 P.3d 734 (2001). 8

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) 7,9

In re Stockwell, 161 Wn. App. 329, 254 P.3d 899 (Wash.App. Div. 2
Apr 19, 2011) (NO. 37230-4-II), review granted, 175 Wn.2d 1005,
284 P.3d 742 (Wash. Sep 06, 2012) (Table, NO. 86001-7) 8

State v. Wakefield, 130 Wn.2d 464, 925 P.2d 183 (1996). 8

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14 6,8

Wash. Const. art. I, § 3 6,8

Wash. Const. art. 1 § 22 9

COURT RULES

CrR 4.2(d). 6

UNITED STATES SUPREME COURT CASES

Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d
274 (1969) 6

A. ASSIGNMENTS OF ERROR

1. Rodney Schreib's plea of guilty was neither knowing, intelligent, nor voluntary where he was misinformed as to the correct period of community custody.

2. Mr. Schreib's involuntary plea establishes a manifest injustice.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Schreib's statement of defendant on plea of guilty states a variety of different community custody periods as sentencing consequences of the plea, none of which the State can show to be correct. Mr. Schreib signed the plea statement. Was the failure of the statement to specify the correct community custody period if Mr. Schreib agreed to plead guilty a failure to properly advise of a "direct consequence" of the plea that rendered it involuntary on its face and thus categorically a manifest injustice?

2. Was Mr. Schreib's waiver of the trial right and guilty plea knowing, intelligent, and voluntary as required by constitutional Due Process and court rule?

3. May Mr. Schreib seek to withdraw his guilty plea on direct appeal, where the involuntariness of the plea is established by the written record on appeal of the trial court proceedings?

C. STATEMENT OF THE CASE

Rodney Schreib, Jr., d.o.b. 10/10/90, allegedly committed acts amounting to child molestation (RCW 9A.44.083) between May 1 and August 31, 2007. CP 1-3; 13-15. He had no prior criminal history, and he disputes the allegations. CP 25-41, CP 4-9. Five days after Mr. Schreib reached the age of 18 on October 10, 2008, Deputy Prosecuting Attorney Rosemary Kaholokula filed an information charging him with four counts of the offense in the first degree. CP 1-3; CP 25-41.

Following further proceedings, on March 26, 2009, Mr. Schreib entered a guilty plea to three counts of first degree child molestation. CP 16-24; 3/26/09RP at 4. The plea statement indicated in completed portions that Mr. Schreib faced a standard sentencing range of 98-130 months and a community custody term of 18-36 months, and that the maximum potential sentence was life. CP 17. The plea form's pre-printed portions address sentencing under RCW 9.94A.712, and state that, for certain offenses including the offense of child molestation in the first degree committed by defendants of at least 18 years old, community custody will be imposed until the expiration of the maximum sentence, however, for

other sex offenses not previously described, community custody is for a period of 36-48 months. CP 18-19.

On May 14, 2009, Mr. Schreib was sentenced to concurrent terms of 98 months incarceration, following which the court alternatively imposed a SSOSA (Special Sex Offender Sentencing Alternative). 5/14/09RP at 3-5; CP 25-41. After imposing the suspended sentence, the trial court did not advise Mr. Schreib of the time limits for filing a direct appeal or a collateral attack. 5/14/09RP at 3-5.

In March and May, 2011, the prosecutor filed a motion for revocation of Mr. Schreib's SSOSA sentence, and Mr. Schreib also filed a pro se motion to dismiss and to withdraw his guilty plea, among several such motions filed by him, CP 4-9, in which Mr. Schreib argued that he was 16 years old at the time of the commission of the offenses charged, that he should have been charged and tried in juvenile court, and that his trial counsel for purposes of the plea had failed to investigate issues prejudicing his rights. He also argued that his counsel had failed to competently advise him regarding the inadmissibility of statements police extracted from him after the interrogating officers directed his father to leave the interview room.

The trial court ultimately ruled that Mr. Schreib's motion to withdraw his guilty plea was governed by CrR 7.8 because it was being made after judgment was entered, but was untimely as outside the one year limit of the latter rule, and, following several hearings, the court granted the State's motion for an Order Modifying Judgment and Sentence, and revoked Mr. Schreib's SSOSA. CP 10, Supp. CP ____, Sub # 138. The sentencing modification order, in section 1.2, amends the original 98-month judgment and sentence, and imposes community custody for "Life." Supp. CP ____, Sub # 138 (imposing community custody "for life pursuant to RCW 9.94A.507 (former RCW 9.94A.712)").

Mr. Schreib appealed from the court's ruling on his plea withdrawal motion. The Court of Appeals, *inter alia*, held that the "life" period of community custody was in excess of the sentencing statutes, and remanded for a reference hearing on the claim by the State that Mr. Schreib had been informed by a Department of Corrections officer of the post-sentencing time limits, thus excusing the trial court's failure to give a warning or advisement to Mr. Schreib at the time of sentencing. State v. Schreib, 172 Wn. App. 1012, 2012 WL 5992113, Wash.App. Div. 1, December 03, 2012 (NO. 67356-4-I).

Mr. Schreib filed the present direct appeal from the judgment and sentence. CP 11-12.

D. ARGUMENT

MR. SCHREIB MAY SEEK TO WITHDRAW HIS INVOLUNTARY PLEA ON APPEAL.

1. The plea is involuntary on its face and is a manifest injustice warranting withdrawal. Mr. Schreib's March, 2009 signature on the State's plea statement of the defendant, indicates that he was advised at one point that the community custody range was 18-36 months, and at another juncture, in that all-important fine print, that it was 36-48 months. The statement of defendant on plea of guilty states:

IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

* * *

COMMUNITY CUSTODY RANGE: 18 – 36 months.

CP 17. Yet then, paragraph (f)(ii)'s fine print in the form language of Mr. Schreib's plea statement addressing his category of offense states that the community custody range is 36-48 months. CP 18-19. As an inescapable result, the State cannot show that Mr. Schreib was correctly advised as to the community custody period.

For example, if Mr. Schreib calculated the period as perhaps being the average of the two conflicting ranges in the document, that number is 33, which the State cannot show to represent any applicable period of community custody in the SRA. For further example, if a defendant is told the sentencing court will have a range of punishment between 1 to 100 if he pleads guilty, this renders the plea involuntary per se if the correct imposable term is solely 50, and the plea's involuntariness is certainly not saved because 50 can be found within 1 to 100. And ultimately, two conflicting advisements can never establish correct advisement. The State cannot show that Mr. Schreib was correctly advised.

It is a well established and fundamental principle of constitutional due process¹ that a guilty plea must be knowing, intelligent and voluntary. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); CrR 4.2(d).

The Washington Supreme Court has unambiguously held that in order for a guilty plea to be knowing, intelligent and

¹ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14. The Washington Constitution provides, at art. 1, § 3, that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

voluntary, the defendant must be correctly informed at the time of the plea of the direct sentencing consequences. Mendoza, 157 Wn.2d at 590-91. Direct sentencing consequences includes not only the term of incarceration, but also the community custody that will be imposed, which is an onerous impingement on freedom. Isadore, 151 Wn.2d at 302; State v. Ross, 129 Wn.2d 279, 285-86, 916 P.2d 405 (1996).

By rule, CrR 4.2 safeguards this right by requiring the trial court to determine that (1) the defendant's plea is voluntary and competently made, with an understanding of the nature of the charge and the consequences of the plea, and (2) that there is a factual basis for the plea. CrR 4.2(d); State v. Ross, 129 Wn.2d at 287.

This procedure was not correctly performed at Mr. Schreib's plea hearing. Where the defendant is misinformed at the time of the plea of a direct sentencing consequence, the plea is deemed not knowing, intelligent or voluntary, regardless of whether the actual sentencing term at issue is more, less or otherwise than what the defendant was told at the time of plea. Mendoza, 157 Wn.2d at 590-91; see also Isadore, 151 Wn.2d at 302 (appellate court cannot discern what weight a defendant gave to each factor

relating to the decision to plead guilty); State v. Moon, 108 Wn. App. 59, 61-64, 29 P.3d 734 (2001).

Here, the misstatement of the community custody sentence in Mr. Schreib's plea constitutes a manifest injustice, as the guilty plea was not knowing, intelligent, and voluntary so as to satisfy federal, and state constitutional due process requirements. See U.S. Const. amend. 14; Wash. Const. art. I, § 3; Boykin, 395 U.S. at 243; Mendoza, 157 Wn.2d at 587; see also State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).²

b. Mr. Schreib may seek to withdraw his involuntary plea on appeal. The full record of circumstances of Mr. Schreib's guilty plea as to the sentence to be imposed makes out the required showing of a "manifest injustice," permitting withdrawal, because the plea documentation failed by any definition to apprise Mr. Schreib of the community custody period – a direct consequence of

² Particularly for an individual whom the State is later able to prove was not successfully able to complete a SSOSA period of community custody conditions, the correct lowest possible, or highest possible period is specifically material to the decision to enter or not enter a plea, not just categorically material, as here. However, in any event, the present case is not a personal restraint petition. See In re Stockwell, 161 Wn. App. 329, 335, 254 P.3d 899 (Wash.App. Div. 2 Apr 19, 2011) (NO. 37230-4-II), review granted, 175 Wn.2d 1005, 284 P.3d 742 (Wash. Sep 06, 2012) (Table, NO. 86001-7) (comparing defendant on direct appeal who must have been correctly informed of length of sentence in trial court; as direct consequence of his plea, if misinformed, plea is involuntary and may be withdrawn).

his decision, and one shown on the face of the trial court record to have been inaccurately stated. See Ross, 129 Wn.2d at 287-88 (use of outdated plea form lacking correct sentencing provisions creates manifest injustice, allowing withdrawal of guilty plea).

Mr. Schreib may seek to withdraw his plea of guilty for the first time on appeal. A defendant is entitled to seek to withdraw his plea on appeal where the error is clear on the record. State v. Walsh, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001) (challenge to voluntariness of plea of guilty can be raised by appellant for the first time on appeal where basis was clear and undisputed from the record).

Mr. Schreib was never properly advised in the Superior Court by oral advisement or document of his time-limited right to appeal, and this is his sole direct appeal filed, under Wash. Const. art. 1 § 22. State v. Hand, 295 P.3d 828, Wash. App. Div. 1, March 04, 2013 (NO. 67935-0-1) ("Article I, section 22 of our state constitution provides: 'In criminal prosecutions the accused shall have ... the right to appeal in all cases.' ").

The failure of the written plea agreement, to specify the correct community custody period applicable if Mr. Schreib admitted guilt without trial, was a failure to advise of a sentencing

consequence deemed by the Washington courts to be “direct,” and thus categorically rendering any plea involuntary and establishing a manifest injustice. In the present case, all of the facts necessary to demonstrate grounds for plea withdrawal are present in the record, and are undisputed. See also State v. Lujan, 38 Wn. App. 735, 688 P.2d 548 (1984), review denied, 103 Wn.2d 1014 (1985) (determining issue of voluntariness based on written plea documentation). Mr. Schreib should be permitted to withdraw his plea.

E. CONCLUSION

For the reasons stated, Mr. Schreib respectfully requests that this Court remand his case to the Superior Court for further proceedings.

DATED this 31 day of May, 2013

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 69650-5-I
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RODNEY SCHREIB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2013, 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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