

FILED
COURT OF APPEALS

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STATE OF WASHINGTON

No. 30336-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

vs.

SHAWN DUNKELBERGER, Appellant.

THURSTON COUNTY SUPERIOR COURT
The Honorable William Thomas McPhee, Judge
The Honorable Paula Casey, Judge
Cause No. 02-1-01152-1

BRIEF OF RESPONDENT

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PM 10/2/11

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following findings of fact following the evidentiary hearing: 2, 3, 4, 5, and 7.
2. The trial court erred in entering the following conclusions of law at the conclusion of the evidentiary hearing: 1, 2, and 3.

II. PROCEDURAL HISTORY

The Defendant in this was charged by Information on July 16, 2002. Pursuant to a plea agreement, the defendant entered a plea of guilty to the first three counts of the information on March 4, 2003. The Honorable Wm. Thomas McPhee accepted the plea. In exchange for the guilty pleas, the State moved for dismissal of the remaining counts. The Honorable Christine Pomeroy sentenced the Defendant on April 15, 2003 following the preparation of a pre-sentence investigation report.

On May 7, 2003, the defendant filed a Notice of Appeal. The Opening Brief of Appellant was filed on or about March 4, 2004. In his brief, defendant challenged the voluntariness of his guilty plea.

On May 7, 2004, the State filed a motion to take additional evidence regarding the issue raised by Appellant. The motion was granted and the matter was stayed and remanded to the trial court to hold an evidentiary hearing on the issue presented.

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On March 9, 2006, a hearing was held before the Honorable Paula Casey. After hearing testimony, the matter was continued for further briefing to April 3, 2006 at which time the court heard arguments and entered findings and conclusions. The final written findings were entered on June 7, 2006. Thereafter the State was directed to file its response brief. However, the State filed a motion to have the transcript from the evidentiary hearing produced prior to filing its response brief. That motion was granted. The transcript has now been filed.

While the State is the respondent in this matter, because of the procedural history of this case, the State is assigning error to several findings of fact and conclusions of law that were entered by the trial court following the evidentiary hearing.

III. STATEMENT OF THE CASE

As indicated previously, on July 16, 2002, appellant Shawn Dunkelberger was charged by Information with five felony counts; one count of Rape of a Child in the First Degree and four counts of Child Molestation in the First Degree. The Rape of a Child charge was alleged to have occurred on or about July 5, 2002. Therefore, this charge fell under a new sentencing scheme for sexual offenses, sometimes referred to as indeterminate-plus sentencing.

Under this scheme, the court sentences a defendant to a minimum and maximum sentence. The minimum would be a term falling within the standard sentence range, which, for these charges, would be 240 to 318 months. The maximum would be the maximum for the offense, which, for these charges, would be life.

Upon completion of the minimum sentence, this case would be reviewed by the Indeterminate Sentence Review Board (ISRB). Generally, the defendant would be presumed eligible for release to community custody. However, if the ISRB found that the defendant would more likely than not re-offend upon release, the ISRB could order the defendant held for an additional two years. The case would be reviewed similarly every two years until the defendant was released to community custody.

At the trial level, the defendant was represented by Don McConnell. In January of 2003, Mr. McConnell received a letter from the defendant asking several questions.¹ One of the questions asked for the standard range of his sentence as charged and what the range was for the State's plea offer.² Mr. McConnell met with the defendant thereafter and went over each of the questions. He explained to the defendant that his

¹ RP 9 (3/6/2006).

² RP 9 (3/6/2006).

range as charged was 318 months to life, while his range with the State's offer was 192 months to life.³

Mr. McConnell explained to the defendant that this sentence was "kind of like the old parole system." He told the defendant that "if he did anything wrong [while in custody] they would re-evaluate him or they would determine whether or not he could be released at that time."⁴ In a later evidentiary hearing, Mr. McConnell testified that he "...explained it as best I could explain it to anybody that he could be kept for his life."⁵ He went on to explain that he told the defendant that "... if you don't take their offer its 318 months to life. They can keep you forever. If you take their offer it's going to be – they are asking for 192 months up to your life." He went on to testify, "I don't know how I could explain it any differently. He could spend the rest of his life in there if he got in there and didn't do as he was supposed to do or they didn't like what he did."⁶ Mr. McConnell testified that he gave the defendant opportunity to ask follow up questions about what he had explained. He testified that "[the

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³ RP 9 (3/6/2006).

⁴ RP 9 (3/6/2006).

⁵ RP 10 (3/6/2006).

⁶ RP 11 (3/6/2006).

defendant] never said to me, I don't understand, I don't know what's going on, or none of this – I never heard of any of this.”⁷

Prior to the entry of the plea, the state extended an offer to resolve the case. The offer was extended by use of a written form outlining the current charges, and the offered plea agreement. The document indicated that the incarceration time being recommended was 192 months to life.⁸

Subsequently, a hearing was set for March 4, 2003 for the defendant to accept the State's plea offer and change his plea to guilty to the first three counts of the information. That hearing was held before the Honorable Wm. Thomas McPhee. Prior to the hearing, Mr. McConnell met with the defendant to complete a statement of defendant on plea of guilty.⁹ In section 6(g) of the statement, Mr. McConnell wrote in the state's recommendation as “(1) 192 months to life, (2) normal costs, assessments and conditions, (3) dismiss counts 4 and 5, (4) not file any additional charges within the prosecutor's knowledge.¹⁰ The defendant did not express any confusion about the sentence range at that time. Nor did the defendant express any confusion about the potential sentence during or after the change of plea hearing.

⁷ RP 11 (3/6/2006).

⁸ RP 6 (3/9/2006).

⁹ RP 13 (3/6/2006).

¹⁰ Findings of Fact and Conclusions of Law, Exhibit A, p.3

In addition to the Statement of Defendant on Plea of Guilty, the state also filed a document entitled “State’s Recommendation for Sentencing on Plea of Guilty.” In this document, a copy of which was also served on the defense, the state outlines the standard range for sentencing as “162 – 216 to life.” The recommended period of incarceration was “192 months to life” in the Department of Corrections.

On April 15, 2003 a sentencing hearing was held before the Honorable Christine Pomeroy. Because Judge Pomeroy had not imposed a sentencing under the new law, the prosecutor provided the following explanation of the sentencing scheme:

[T]he standard range is 162 to 216. The court must impose a minimum term somewhere in between those two ends of the range. *The maximum term that the court must impose here is the maximum of the offense, which is life. So essentially you’re picking minimum term to life.*

Now, the way this will work ultimately, just so the court knows how the sentence will be executed ultimately, is that Mr. Dunkelberger is committed to the Department of Corrections. When he reaches the end of his minimum term, less any good time that might be awarded, 15 percent in this case if he earns it, then his sentence would be reviewed by the Indeterminate Sentence Review Board.

*If the review board found that he was more likely than not to re-offend, they could continue to detain him for a two year period. Every two years thereafter, it would be reviewed. If he was not found more likely than not to re-offend, then he would be released to community custody and be there for the rest of his life. So the Department of Corrections gets jurisdiction over him for life.*¹¹

¹¹ RP 4-5 (3/15/2003) (emphasis added).

This recitation occurred in open court and in the presence of the defendant. The defendant never expressed any confusion or objection about the possible sentence or the sentencing scheme either during or after that hearing.

In fact, during the defense sentencing recommendation, Mr. McConnell argued the sentencing scheme as a reason for the court to impose the low end of the range as the minimum sentence. Mr. McConnell argued:

Your honor, I'm going to ask for a different recommendation, but in essence under the new law it really doesn't change a lot. I'm going to recommend the 162. If the court would adopt that, it would be 162 to life so there is a 30 month difference, but that's really incumbent upon what they deem him at the end of a certain period of time whether or not they think they want to let him out anyway. *The sentence here is actually life unless they decide he will not re-offend.*¹²

The court imposed the following sentence orally:

I am going to give the minimum of 192, as recommended by the PSI, *to life*. I will impose all of the conditions of the PSI and incorporate them in.¹³

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¹² RP 7 (3/15/2003) (emphasis added).

¹³ RP 12 (3/15/2003) (emphasis added).

The defendant, having heard all of these references to the sentencing scheme, never objected or raised concern with his attorney about the sentence.¹⁴

On March 9, 2006, an evidentiary hearing was held before the Honorable Judge Paula Casey. The purpose of the hearing was to supplement the record with respect to the voluntariness of the defendant's guilty plea. At that hearing, the defendant testified that he did not recall writing any letter to Mr. McConnell but did recall meeting with him in the jail.¹⁵ When asked about conversations with Mr. McConnell about the potential sentence, the defendant stated, "The only thing I really recall is the community placement. I don't recall anything about anything about life. I just remember about the life in the community placement..." The defendant went on to explain that he only realized that there was a possibility of his being in prison for life after he was committed to the Department. The defendant said, "That was after most of the proceedings were already done. Actually, after all of the proceedings were done and I was on the chain bus heading to my main institution. It really didn't click or I didn't really understand it until then."¹⁶ When asked if there was some event that caused him to better understand his sentence, the

¹⁴ RP 17 – 19 (3/9/2006).

¹⁵ RP 30 (3/9/2006).

¹⁶ RP (3/9/2006)

defendant testified, “Well, it would probably be after a bunch of people tried to beat me up. And the whole entire harshest reality of where I was actually started to close down around me. It was finally then started to really click what I really started to understand then.”¹⁷ The defendant went on to admit that he was afraid of being assaulted further in prison. He testified that the real incentive for him to withdraw his plea and get out of prison was because he believes he can be rehabilitated.¹⁸

IV. ARGUMENT

1. THE DEFENDANT HAS FAILED TO PROVE A “MANIFEST INJUSTICE” NECESSARY TO SET ASIDE HIS PLEA OF GUILTY.

Defendant claims that his guilty plea was entered without full knowledge of a direct consequence of the plea. More specifically, defendant claims that he did not know that he could be detained in prison longer than the minimum term imposed.

It is important to note that this case does not involve wrong advice by the defendant’s attorney, or any misunderstanding on the part of the attorneys regarding the minimum and maximum sentence. Furthermore, there is nothing in the record to suggest that the defendant was affirmatively given information or advice about the possibility that he

¹⁷ RP 35 (3/9/2006).

¹⁸ RP 38 (3/9/2006).

could be detained for life that was incorrect. At best, the defendant is claiming only that he did not have sufficient understanding of the sentence scheme that would be used, despite his attorneys' efforts to advise him.

Generally, a motion to withdraw a guilty plea (or in this case set aside a guilty plea on appeal) may be granted only to correct a manifest injustice.¹⁹ The defendant bears the burden of proving manifest injustice, defined as "obvious, directly observable, overt, not obscure."²⁰ CrR 4.2(f) imposes a demanding standard on a defendant who seeks to withdraw a guilty plea. There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made.²¹

An involuntary plea is considered a manifest injustice sufficient to permit withdrawal.²² A plea is involuntary if the defendant is not advised or is misadvised about a direct consequence of the plea. In this case, the state does not argue that the minimum and maximum sentence is not a direct consequence of the plea. Rather, the state argues that the defendant has failed to prove a manifest injustice because the evidence supports the conclusion that the defendant did understand the consequences of the plea.

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¹⁹ *CrR 4.2(f)*; *State v. Walsh*, 143 Wn.2d 1 (2001); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

²⁰ *Ross*, at 283-284 (citing *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)).

²¹ *Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001) at 6.

²² *Id.*

The trial court focused its findings on the fact that the defendant was not advised of the complete sentencing scheme under RCW 9.94A.712. However, there is no authority supporting the premise that the defendant must understand all of the details of the sentencing scheme. Rather, the defendant need only understand that he could be detained past the minimum sentence term.

In this case, the defendant's Statement on Defendant on Plea of Guilty clearly indicates that the maximum sentence for the crime of Rape of a Child in the First Degree is life. It also clearly indicates that the state's sentence recommendation was 198 months to life. During the oral inquiry with the defendant, the court asked the defendant if he understood that the prosecutor's sentence recommendation was "192 to life" to which the defendant responded affirmatively. Additionally, a document was filed by the state and served on defense that indicated that the State's recommendation for incarceration was 198 months to life. With all of this, it is clear that the defendant was properly advised that his sentence range included the possibility that he could be held for life. Therefore the defendant has failed in his effort to prove a manifest injustice in this case because he has not demonstrated that he was misadvised about a direct consequence of his plea.

2. THE EVIDENCE FROM THE RECORD OF THE PLEA HEARING AND THE EXTRINSIC EVIDENCE PROVES THAT THE DEFENDANT WAS FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEA.

Even if it is not apparent from the record of the plea hearing that the plea was voluntary, the state may prove the validity of a guilty plea.²³

Knowledge of the direct consequences of a guilty plea may be satisfied from the record of the plea hearing or clear and convincing extrinsic evidence.²⁴ Therefore, any vagueness or ambiguity in the guilty plea process can be overcome if the state produces evidence that the defendant did understand the consequences of his plea.

A trial court's findings of fact must be supported by substantial evidence.²⁵ Additionally, conclusions of law entered by the court must be supported by the findings of fact.²⁶ During the evidentiary hearing, the trial court failed to consider and enter findings with regard to the extrinsic evidence.

When the extrinsic evidence is added to the record, it supports an overwhelming conclusion that the trial court's findings and conclusions are not supported by substantial evidence. Rather, the substantial evidence supports the conclusion that the defendant did understand the sentencing

²³ *Ross*, at 287.

²⁴ *Id.* (citing *Wood v. Morris*, 87 Wn.2d 501, 554 P.2d 1032 at 511 (1976)).

²⁵ *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996).

²⁶ *Id.*

structure for the crimes he plead guilty to, and only now wants to set aside his plea after he was assaulted in prison. In this regard, the trial court erred in not giving due consideration to this extrinsic evidence.

First, the defendant's attorney, Don McConnell, testified that he reviewed the sentence scheme in detail with the defendant, explaining it in the context of both the plea offer, and the potential sentence if the defendant was convicted at trial. He indicated that the defendant did not say anything or ask any questions that gave him concern that the defendant did not understand the sentence that would be recommended. If he had, he indicated that he would not have advised the defendant to enter the guilty plea.

As noted earlier, the documents filed in court demonstrate that the defendant was on notice of the potential sentence. Both the Statement of Defendant on Plea of Guilty, and the State's Recommendation for Sentencing, filed at the time that the plea was taken, indicate that the prosecution's recommendation for incarceration was 198 months to life. Importantly, one should note that this term specifically referred to "incarceration" and not community placement or community custody.

At sentencing, the state provided the sentencing judge with a detailed description of the sentencing scheme, including the fact that the

defendant could continue to be detained beyond the minimum sentence. That detailed explanation provoked no objection or statement from the defendant, not even privately to his lawyer. The defendant's attorney testified that if he felt at any time that the defendant did not understand the sentence recommendation, he would have stopped the proceedings or raised the issue to the court.

In fact, one of the arguments raised by defense at the sentencing hearing for a low-end range sentence relied specifically on the sentencing scheme. Mr. McConnell argued that the appropriate sentence in this case should be the low end of the range because the defendant could be detained beyond that minimum if in fact he continued to pose a risk to the community at the end of his minimum term. Therefore, he argued, the appropriate sentence should be at the low end of the range. Not even this argument provoked any objection from the defendant.

The fact that the defendant had this explained to him several times and never indicated any confusion or misunderstanding indicates that in fact he did understand the plea agreement. Any reasonable defendant facing a sentence that he did not understand or believed was different would raise that concern, if not in court, at least to his attorney privately. The defendant's complete lack of questions, concerns or objections

indicates that he was not sentenced to anything that he wasn't expecting.

The reasonable conclusion from the evidence is that the defendant simply changed his mind about the plea agreement. He testified that he only decided to seek to set aside his plea after he went to prison and was assaulted. He believes that he is in danger while in prison. Further, he testified that he does not consider himself a threat to the public and should not be incarcerated at all. These circumstances, when looked at in their totality, support a conclusion that the defendant understood the plea agreement and entered his plea to avoid a sentencing range that was substantially higher. In doing so, he followed the advice of his attorney and was afforded the opportunity to ask questions and discuss his options with his attorney. He never objected at sentencing despite the clear and detailed explanation provided to the court in his presence and changed his mind only after he was in prison for some time and felt he was in danger.

3. THE DEFENDANT WAIVED HIS RIGHT TO CHALLENGE HIS PLEA WHEN HE FAILED TO RAISE OBJECTION TO THE SENTENCE OR TO HIS PLEA AT HIS SENTENCING HEARING.

At the beginning of the sentencing hearing in this case, in order to advise the court of the sentencing options, the prosecutor provided a detailed explanation of the sentencing scheme, including the way in which the sentence would be carried out. The defendant was present during the

state's explanation. In addition, the defense attorney agreed with the explanation of the state and used that explanation to further his argument for a sentence minimum at the low end of the standard range.

Generally, a defendant may challenge the voluntariness of his plea even though he proceeds with a sentencing hearing.²⁷ However, these challenges are allowed in circumstances where a defendant does not discover the error until after a sentence is imposed.

In *State v. Mendoza*,²⁸ the parties discovered an error in the offender score calculation prior to sentencing. At sentencing, the prosecutor disclosed the error to the sentencing judge and recommended a sentence within the new standard range. The defendant offered no objection and, although he requested to withdraw his plea, he did not ask for the withdrawal on those grounds. Under these circumstances, the Washington Supreme Court determined that the defendant had waived his ability to challenge the voluntariness of his plea on those grounds.

Similarly, in this case, even if one were to believe that the defendant didn't understand at the time of his guilty plea that he could be detained for life, he had clear opportunity to object or ask to withdraw his plea prior to being sentenced. He was present when the sentence scheme was clearly

²⁷ *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006) (citing *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001)).

²⁸ *Id.*

explained to the judge and said nothing. Additionally, he did not even raise concern to his lawyer. Therefore, the court should hold that the defendant waived his ability to challenge his plea.

V. CONCLUSION

Based on the forgoing, the state respectfully submits that the defendant has failed to prove a manifest injustice because the record from the plea hearing indicates that the defendant was properly advised that he could be incarcerated for life. When one adds the extrinsic evidence about the advice he received from his attorney and his failure to object in any way at the sentence, there is a clear and convincing conclusion that the defendant knew the terms of the plea agreement and that he could be incarcerated for life. Finally, he has waived his right to challenge the plea on these grounds when he did not raise the objection at sentencing.

In reality, the defendant's motivation to set aside his plea is his fear of being assaulted in prison, not his alleged lack of understanding of his potential sentence. Therefore, the State respectfully requests that

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this court uphold the defendant's guilty pleas entered in consideration for the plea agreement.

RESPECTFULLY SUBMITTED this 27th day of October, 2006.

EDWARD G. HOLM
Thurston County Prosecuting Attorney

A large, stylized handwritten signature in black ink, appearing to read 'JON TUNHEIM', is written over the text of the Chief Deputy Prosecuting Attorney.

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STATE OF WASHINGTON,
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Appellant.

CERTIFICATE OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, Jamie Keserich, hereby state under penalty of perjury, that I am over the age of 18 years and competent to be a witness in the above-entitled cause, that on the 27th day of October, 2006, I caused to be mailed to the Appellant's Attorney Robert M. Quillian, a copy of Brief of Respondent, by depositing same in the United States mail at Olympia, Washington, addressed as follows:

ROBERT M. MCQUILLIAN
ATTORNEY AT LAW
2633-A PARKMONT LANE SW
OLYMPIA, WA 98502

I hereby swear under penalty of perjury under the laws of the State of Washington, that the above is true and correct.

Signed this 27 day of October, 2006, at Olympia, Washington.


Jamie Keserich
Legal Assistant