

NO. 34077-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN J. SMITH,

Appellant.

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

The Honorable M. Karlynn Haberly, Judge
The Honorable Russell W. Hartman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erroneously denied appellant's motion to withdraw his involuntary guilty plea.

2. The sentencing court erroneously included appellant's prior class C felonies in his offender score.

Issues pertaining to assignments of error

1. When appellant entered his guilty plea, he was misinformed that the potential sentencing range on one of the counts was zero to 12 months. The parties discovered before sentencing that the actual standard range was 14 to 18 months, and appellant moved to withdraw his plea. Where appellant was misinformed about a direct consequence of his plea, did the court err in denying his motion to withdraw it?

2. Appellant was convicted of three class C felonies in 1995 and was incarcerated. He challenged his sentence on appeal and ultimately prevailed. Under the final, corrected Judgment and Sentence, appellant's maximum release date was February 4, 2000. He remained incarcerated pursuant to the erroneous Judgment and Sentence until April 28, 2003, however. Where appellant's confinement past his release date was not pursuant to a felony conviction and not attributable to appellant's

actions, should he receive credit for that time toward the washout period for class C felonies?

B. STATEMENT OF THE CASE

1. Procedural History

On May 5, 2005, the Kitsap County Prosecuting Attorney charged appellant Kevin J. Smith with forgery, second degree theft, second degree possession of stolen property, and unlawful possession of payment instruments. CP 1-11; RCW 9A.60.020(1); RCW 9A.56.020(1)(a), (b); RCW 9A.56.140(1) and RCW 9A.56.160(1)(c); RCW 9A.56.320(2)(a). Pursuant to a plea agreement, the state dismissed the theft and possession of stolen property charges, and Smith pled guilty to forgery (count I) and unlawful possession of payment instruments (count II). CP 42-46. The Honorable M. Karlynn Haberly denied Smith's motion to withdraw his guilty plea. CP 171. Rejecting Smith's challenge to the calculation of his offender score, the Honorable Russell W. Hartman imposed 14-month sentences on each offense. CP 47; 181. Smith filed this timely appeal. CP 189.

2. Motion to withdraw guilty pleas

The plea agreement indicated that the state calculated Smith's offender score as 7, with a standard range on count I of 14 to 18 months. The agreement further indicated that possession of payment instruments

was an unranked felony and thus count II carried a potential sentence of zero to 12 months. CP 43. Under the terms of the plea agreement, Smith retained the right to challenge his criminal history and the calculation of his offender score. If the state prevailed on this issue, the state would recommend a sentence of 14 months. If Smith's offender score was less than seven points, however, the state would recommend a sentence at the top of the ranked standard range. CP 44. Following a colloquy with Smith regarding the terms of the agreement, the Honorable Jay B. Roof accepted Smith's guilty pleas. 4RP¹ 2-10.

Subsequent to the plea hearing but before Smith was sentenced, the parties discovered that, contrary to their understanding at the time the plea agreement was entered, possession of payment instruments was a ranked felony. Thus, rather than the zero to 12 month sentence range described in the plea agreement, the standard range for count II was actually 14 to 18 months. 6RP 2. Smith moved to withdraw his guilty pleas based on this misunderstanding as to the standard range. CP 163-70.

At a hearing before the Honorable M. Karlynn Haberly, Smith argued that since he was incorrectly advised that the standard range was lower than it actually was, his plea was not voluntary and he was entitled

¹ The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—6/24/05; 2RP—6/29/05; 3RP—7/19/05; 4RP—8/17/05; 5RP—9/20/05; 6RP—10/11/05; 7RP—10/24/05; 8RP—11/4/05; 9RP—11/16/05.

to withdraw it. 7RP 8. The court expressed some concern as to whether the plea agreement bound the state to any specific sentence recommendation for count II. 7RP 11. The court noted that when the standard range for an offense is actually higher than the defendant was informed at the time of the guilty plea, then the defendant is allowed to withdraw his plea. But in this case, because the state was bound to a recommendation of 14 months on count I, Smith was not facing a higher sentence even though he was misinformed as to the standard range for count II. 7RP 12-14. Citing CrR 4.2(f) and In re Matthews, 128 Wn. App. 267, 115 P.3d 1043 (2005), the court ruled that Smith had not shown a manifest injustice and denied his motion to withdraw his pleas. 7RP 14; CP 171.

3. Challenge to calculation of offender score

The case proceeded to sentencing before the Honorable Russell W. Hartman. As agreed, Smith challenged the state's calculation of his offender score, arguing that three of his prior class C felony convictions washed out under RCW 9.94A.525(2).

Under that statute, prior class C felonies are not included in the offender score if, since the last date of release from confinement pursuant to a felony conviction, the defendant has spent five consecutive crime-free years in the community. Smith had last been released from incarceration

on April 28, 2003, and the current offenses were committed April 19 and May 2, 2005. It was undisputed, however, that Smith should have been released from confinement no later than February 4, 2000. 9RP 11-12. But due to an erroneous Judgment and Sentence which was overturned on appeal, he was held in custody past his maximum release date. Smith argued that the three plus years he was wrongly incarcerated should not be excluded from the washout period, citing double jeopardy, equal protection, and equitable concerns. 9RP 14-15, 17-18; CP 51-59.

The court rejected Smith's argument. It ruled that the statute unambiguously provides that the washout provision applies only if the defendant spends five years in the community crime free. Since Smith did not, his prior class C felonies should be included in his offender score. 9RP 19.

C. ARGUMENT

1. SINCE SMITH WAS INFORMED THAT HIS STANDARD RANGE WAS LOWER THAN IT ACTUALLY IS, HIS GUILTY PLEA IS INVOLUNTARY AND HE SHOULD BE PERMITTED TO WITHDRAW IT.

A defendant entering a guilty plea gives up significant constitutional rights including the right to confront the state's evidence, the right to present defense witnesses, the right to remain silent, and the right to be found guilty by proof beyond a reasonable doubt. State v.

Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). Due process therefore requires that a guilty plea be knowing, intelligent, and voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

Washington Courts have long held that for a guilty plea to be deemed voluntary, the defendant must be advised of all direct consequences of that plea. In re Personal Restraint of Isadore, 151 Wn.2d 294, 300, 88 P.3d 390 (2004); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (citing State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)); State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); State v. Paul, 103 Wn. App. 487, 494-95, 12 P.3d 1036 (2000).² The standard sentencing range is such a direct consequence. Paul, 103 Wn. App. at 495. A guilty plea is not voluntary or knowingly made when it is based on misinformation as to the standard range sentence. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

In Walsh, the defendant pled guilty in exchange for the state's agreement to recommend a sentence at the low end of the standard range. The defense and prosecution both mistakenly understood the standard range to be 86 to 114 months. Prior to sentencing, however, the parties discovered that the correct standard range was 95 to 125 months, and the

² A defendant's right to be informed of the direct consequences of his plea is also governed by court rule. Under CrR 4.2(f), a court must allow the defendant to withdraw his guilty plea if necessary to correct a manifest injustice. "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

state made its sentencing recommendation based on that range. 143 Wn.2d at 4-5.

On review, the Supreme Court determined that Walsh had established his guilty plea was involuntary based on the mutual misunderstanding about the standard range sentence. It held that, “Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea.” 143 Wn.2d at 8-9.

In Matthews³, supra, this Court interpreted the holding in Walsh to mean that if the defendant is misinformed as to the standard range when pleading guilty, the plea is invalid only if the defendant enters it believing the sentencing range will be lower than it actually is. Matthews, 128 Wn. App. at 271. In Matthews, the defendant pled guilty on two counts. After his conviction and sentence became final, he learned that some of his prior convictions had washed out and as a result, his standard range was actually lower than he believed when he entered his pleas. Matthews sought to withdraw his plea based on this mutual misunderstanding. Id. at 269. This Court held that Matthews’s pleas were not deemed involuntary because he was misinformed that his sentence range would be higher, not lower, than it actually was. Matthews did not show that his plea

³ State v. Matthews (In re Pers. Restraint of Matthews), 128 Wn. App. 267, 115 P.3d 1043 (2005).

constituted a manifest injustice because his sentence could only become less onerous. Id. at 273.

In this case, like Walsh and unlike Matthews, Smith pled guilty believing his standard range on count II was lower than it actually was. Under established Supreme Court precedent, this misinformation about the standard range rendered his plea involuntary, and he is entitled to withdraw his plea unless the state can show compelling reasons why that choice of remedy is unjust. See Walsh, 143 Wn.2d at 8-9.

The court below ruled that Smith had not shown a manifest injustice because, even though his sentence on count II would be higher than Smith had been informed, it would be the same length as the sentence on count I. 7RP 13. The court cited Matthews in denying Smith's motion to withdraw his plea. CP 171. But this Court did not go so far in narrowly construing the Supreme Court's holding in Walsh. Because Smith was informed that his standard range on count II was zero to 12 months, when the actual standard range was 14 to 18 months, his plea was involuntary and he must be permitted to withdraw it.

2. SMITH'S PRIOR CLASS C FELONIES SHOULD NOT BE INCLUDED IN HIS OFFENDER SCORE.

The Legislature has determined that under certain circumstances, a defendant's prior convictions should not be included in the offender score.

For example,

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2).

In this case, Smith's criminal history includes three class C felony convictions from 1995. CP 181. Smith was released from confinement following these convictions in April 2003. Since the current offenses were committed in April and May of 2005, Smith did not spend five consecutive crime-free years in the community prior to the current offenses. Under the terms of the statute, however, only "confinement ... pursuant to a felony conviction" interrupts the five-year washout period.

RCW 9.94A.525(2).

Here, Smith's confinement was pursuant to a felony conviction only until February 4, 2000. It is undisputed that that is the maximum expiration date of his previous felony sentence. 9RP 11-12; CP 162.

After that date, Smith's continued confinement was not pursuant to a felony conviction but rather pursuant to an erroneous Judgment and Sentence. See CP 110, 124, 147-49, 162. Under the circumstances, the period of continued confinement past February 4, 2000, should not be excluded from the washout period.

Moreover, exclusion from the washout period of the time Smith was wrongly incarcerated violates his right to equal protection. The equal protection clause of the Fourteenth Amendment requires that persons similarly situated with respect to the legitimate purposes of the laws receive like treatment. U.S. Const. amend, XIV, § 1; In re Knapp, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). Under the terms of the statute, if a person was arrested, held in jail pending trial, and then acquitted, the time he spent in confinement would not interrupt the washout period because it was not pursuant to a felony conviction, even though that person was out of the community for a period of time. Smith is similarly situated. From February 4, 2000, until April 28, 2003, he was held in confinement not due to a felony conviction but due to an erroneous Judgment and Sentence. Like the person held in jail and ultimately acquitted, Smith's time out of the community was not attributable to his actions. He should receive similar treatment.

Finally, equity entitles Smith to credit for the time he was wrongfully incarcerated, when applying the statutory washout provision. Even if Smith's prior offenses do not wash under the terms of the statute, fairness and equity require that the period Smith was wrongly incarcerated be credited toward his time in the community.

In In re the Personal Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003), the Supreme Court granted similar equitable relief under the doctrine of "credit for time spent at liberty." There, Roach was erroneously released from custody after serving only the lesser of two concurrent sentences. The Department of Corrections soon discovered its error, but Roach was not apprehended until nearly three years later. 140 Wn.2d at 31. Roach filed a personal restraint petition, arguing that he was entitled to equitable relief. The Supreme Court agreed that fairness and equity required the state to give a convicted person "credit against his sentence for time spent at liberty due to the State's mistake." 140 Wn.2d at 37; accord State v. Dalseg, ___ Wn. App. ___ (2006 Wash. App. LEXIS 922, 33101-2-II, filed May 9, 2006) (equity entitled defendants to credit against sentences for time spent in day reporting program which did not meet requirements of work release).

If the state is equitably estopped from denying credit toward a prison sentence for time spent at liberty when a prisoner is erroneously

released, certainly equity precludes the court from increasing Smith's sentence because he was erroneously imprisoned beyond his release date. Smith's prior class C felonies should not be included in his offender score.

D. CONCLUSION

Because Smith was misinformed that his standard range sentence on count II was lower than it actually is, his guilty plea is invalid and he should be permitted to withdraw it. In addition, Smith should receive credit for the time he was wrongly incarcerated, and his prior class C felonies should wash for purposes of calculating his offender score.

DATED this 26th day of May, 2006.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Kevin J. Smith*, Cause No. 34077-1-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 26, 2006

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