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COURT OF APPEALS

05 APR 21 PM 2:21

STATE OF WASHINGTON

BY _____
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NO. 34134-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER J. MAHONE,

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070

PM 4/20/06

(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. The trial court was not authorized to add community placement to appellant's judgment and sentence 10 years after imposition where appellant was not informed during the plea colloquy that community placement was part of the mandatory sentence.

2. The trial court was not authorized to add community placement to appellant's judgment and sentence 10 years after imposition where the plea form failed to indicate that a specific term of community placement was a mandatory condition of sentence and the judgment and sentence failed to impose community placement.

3. Appellant entitled to withdraw his plea on grounds that it was not knowing, voluntary and intelligent where he was not informed of a direct and immediate consequence of his plea.

Issues Presented on Appeal

1. Was the trial court authorized to add community placement to appellant's judgment and sentence 10 years after imposition where appellant was not informed during the plea colloquy that community placement was part of the mandatory sentence?

2. Was the trial court authorized to add community placement to appellant's judgment and sentence 10 years after imposition where the plea

form failed to indicate that a specific term of community placement was a mandatory condition of sentence and the judgment and sentence failed to impose community placement?

3. Was appellant entitled to withdraw his plea on grounds that it was not knowing, voluntary and intelligent where he was not informed of a direct and immediate consequence of his plea?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On September 22, 1995 Sylvester J. Mahone pleaded guilty to murder in the second degree. Supp CP (guilty plea 9-22-95). On October 24, 1995, the Court sentenced Mr. Mahone to the high end of the standard range of 178 months. Supp CP (Judgment and Sentence 10-24-95). On October 14, 2005, the trial court received a letter from the Department of Corrections indicating that Mr. Mahone's judgment and sentence did not contain a provision for the mandatory 24 month community placement. Supp CP (Letter from DOC 10-14-05). On August 17, 2005, the state filed a motion to "correct a clerical error" to add 24 months of community placement to Mr. Mahone's original judgment and sentence. CP 1-14. The state filed a supplemental brief in support of its motion on October 27, 2005. CP 15-36. The court entered an order adding the community placement. CP 72-73, 78-79. On November 2,

2005, Mr. Mahone filed a motion to set aside his guilty plea. CP 37-62. Considering the matter time-barred, the trial court refused to hear the motion and forwarded the motion to the Court of Appeals as a personal restraint petition. CP 80. Mr. Mahone filed a timely notice of appeal. CP 92-95.

Plea Hearing

On September 22, 1995 during the plea hearing, Mr. Mahone indicated that he had read the statement of defendant on plea of guilty. CP 54. The trial court informed Mr. Mahone that the standard range sentence was 134 months to 175 months. The defense corrected the court and informed that the range was 134 months to 178 months. CP 55. The trial court in its plea colloquy with Mr. Mahone discussed the constitutional rights Mr. Mahone would give up by appealing and discussed the nature of the offense, prior criminal history and the Alford plea. CP 55-58. The trial court did not inform Mr. Mahone that there was a mandatory 24 months of community placement on top of incarceration. The court accepted the plea and set the matter over for sentencing. CP 58.

Sentencing Hearing

On October 24, 1995, during the sentencing hearing, the trial court verbally imposed 178 months of incarceration with 24 months of community placement. CP 31, 33. The Judge signed the judgment and sentence but did

not impose the 24 months of community placement. Supp CP (Judgment and Sentence October 24, 1995).

Motion to Correct Omission of Community Placement

Ten years later, on August 17, 2005 and November 18, 2005, at the request of the Department of Corrections, the state moved the superior court for an order amending the original judgment and sentence to correct a “clerical” mistake. CP 1-14; 72-73. The Court granted the motion and added 24 months of community placement. CP 72-73. Mr. Mahone moved the court for an order vacating his plea on grounds that it was not knowing, voluntary and intelligent. CP 37-62. During the November 18, 2005 hearing, the parties agreed that the original sentencing court had not articulated its intent to impose 24 months of community placement during the plea hearing but had done so during the sentencing hearing. RP 10. The trial court determined that the omission of the 24 months community placement was a clerical error and added community placement to the amended judgment and sentence. RP 9. Mr. Mahone filed an appeal as a matter of right challenging the amendment to his judgment and sentence as violating the original plea agreement. He also filed a personal restraint petition challenging the Court’s refusal to allow him to vacate his plea. CP 80.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN AMENDING A JUDGMENT AND SENTENCE TO ADD COMMUNITY PLACEMENT TO A JUDGMENT AND SENTENCE TWN YEARS AFTER IMPOSIOTN OF THE ORIGINAL JUDGMENT AND SENTENCE

CrR 7.8(a) provides the trial court with the opportunity to correct simple clerical mistakes. It provides in relevant part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

State v. Priest, 100 Wn. App. 451, 455-56, 997 P.2d 452 (2000).

The decision to vacate a sentence pursuant to CrR 7.8(b)(5) rests in the sound discretion of the trial court. Discretion is abused when it is manifestly unreasonable, or is exercised based on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In Priest, the defendant was convicted of possession of stolen property. The trial court erroneously imposed sex offender registration. The reviewing Court held that imposition of the registration was a simple clerical error. The trial court reviewed all of the relevant transcripts in making this determination. Priest, 100 Wn. App at 456.

Priest is distinguishable. In the instant case, during the plea hearing there was no mention of community placement and Mr. Mahone was never advised that by pleading guilty he would be subject to a mandatory 24 months of community placement. Rather, one month after Mr. Mahone pleaded guilty, during the sentencing hearing, the trial court simply imposed the mandatory 24 months of community placement without giving Mr. Mahone notice. The judgment and sentence however omitted this provision and Mr. Mahone was essentially left with the plea agreement he bargained for.

Ten years later when the trial court amended the judgment and sentence, the act was not a simple clerical error because Mr. Mahone was never apprised of this direct punitive consequence of pleading guilty. As such, the trial court abused its discretion in granting the state's motion to add

the 24 months of community placement under the guise of correcting a "clerical error".

2. APPELLANT'S PLEA WAS NOT VOLUNTARY BECAUSE IT WAS BASED ON MISINFORMATION REGARDING THE MANDATORY IMPOSITION OF COMMUNITY PLACEMENT.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 [*298] P.3d 1005 (2001). A guilty plea is not knowingly made when the defendant is given erroneous information of sentencing consequences. State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. 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)). Mandatory community placement is a direct consequence of a guilty plea. State v. Turley, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). "[F]ailure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty will render a plea invalid." Turley, 149 Wn.2d at 399.

this court has repeatedly stated that mandatory community placement is one of those direct

consequences of which a defendant must be informed in order for him to make an intelligent and voluntary plea. Turley, 149 Wn.2d at 395.

In re Personal Restraint Petition of Isadore, 151 Wn.2d 294, 301, 88 P.3d 390 (2004).

The State bears the burden of proving the validity of a guilty plea. Wood v. Morris, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). “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.” State v. Ross, 129 Wn.2d at 287, citing, Wood, 87 Wn.2d at 511.

In Ross, The Court held that not only must the defendant be advised that community placement will be imposed, but the court must also explain the implications of community placement, because community placement is no less restrictive than incarceration. The Court further held that the defendant must be so advised during the plea hearing or by clear and convincing extrinsic evidence. Ross, 129 Wn.2d at 287-88. In Ross, the defendant was advised that the court did not have to accept the state’s sentencing recommendation and he was advised of the maximum term applicable. Even though he received a standard range sentence below the maximum, was not specifically advised of the consequences of community

placement. On these grounds, the Court held that his plea was not knowing, voluntary and intelligent. and allowed Ross to withdraw his plea.. Id.

In Isadore, community placement was not indicated on the plea form and the judge did not discuss mandatory community placement during the plea colloquy. Isadore, 151 Wn.2d at 302. The Supreme Court vacated the plea and reiterated that mandatory community placement was a direct consequence of the plea that Isadore was not apprised of. The Court, citing Ross, held that Isadore's plea was not intelligent or voluntary and permitted Isadore to choose his remedy.

The defendant is entitled to choose his remedy between specific performance and withdrawal of the plea. Isadore, 151 Wn.2d at 303, citing, Turley, 149 Wn.2d at 399 (citing Miller, 110 Wn.2d at 536). "The defendant is entitled to the benefit of his original bargain." Isadore, 151 Wn.2d at 303, quoting, State v. Tourtellotte, 88 Wn.2d 579, 585, 564 P.2d 799 (1977). Where due process is implicated, "the terms of the plea agreement may be enforced, notwithstanding statutory language." Isadore, 151 Wn.2d at 302-03, citing, Miller, 110 Wn.2d at 532.

State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1999) is both legally and factually indistinguishable from the instant case. Both Rawson

and Mahone entered Newton pleas. In each case, the trial court failed to inform the defendants that it was required to impose community placement (in Rawson 12 months and in the instant case 24 months). In the instant case, the trial court verbally informed Mahone one month after he pleaded guilty that it was imposing community placement but did not do so and also failed to inform Mahone of community placement during the plea hearing. In each case there was boilerplate language regarding community placement in the plea forms. In Rawson, the community placement paragraph was stricken and in the instant case, this paragraph was not marked as applicable.

“If the trial court fails to explicitly warn the defendant that community placement will be imposed as a consequence of the guilty plea, and such an inadequate form (same as in the instant case) is used, the warning to the defendant is unacceptable under *Ross*.” (Italics in original) Rawson, 94 Wn. App. at 298. The Court in Rawson granted Rawson’s request to withdraw his plea on grounds that the failure to inform his of the community placement rendered the plea unconstitutional..

In the instant case, as in Ross, Isadore and Rawson, the trial court failed to inform Mahone of the mandatory imposition and consequences of community placement. Even though the trial court verbally stated that it

would impose community placement one month after the plea hearing, it did not do so; and the warning one month after the plea hearing was not timely. The state may argue that Mahone could have objected to the addition of community placement during the sentencing hearing, but since the court never imposed community placement, there was no reason for Mahone to raise the issue. Moreover, for ten years the state did not seek to address the issue. Once the state addressed the issue in 2005, Mahone immediately sought to vacate his plea.

Summary

The real issue in the instant case and the cases cited is that the defendants were not informed of a direct consequence of their pleas and in order for a plea to pass constitutional muster, the defendants must be apprised of any mandatory community placement. In the instant case the trial court did not discuss mandatory community placement during the plea hearing and neither did the state or Mahone's attorney. Mahone pleaded guilty believing that he was going to get the benefit of the plea bargain which was for the prosecutor to recommend a standard range sentence that included no more than up to 178 months of incarceration. During the intervening month after the plea was entered, the state did not seek to inform Mahone that 24

months of community placement was mandatory. During the sentencing hearing, the trial court verbally stated that it would impose community placement but failed to do so. Mr. Mahone obtained the benefit of his bargain a standard range sentence not to exceed 178 months. Ten years later the Department of Corrections successfully initiated the move to add community placement. Because Mr. Mahone was not informed of this direct consequence prior to pleading guilty, his plea was not knowing, voluntary and intelligent. The remedy is Mr. Mahone's choice. Mr. Mahone requests withdrawal of his plea.

Isadore, Rawson and Ross are controlling in the instant case. Mr. Mahone bargained for a standard range sentence that did not include community placement. He should be entitled to his choice of remedies. Id.

D. CONCLUSION

Mr. Mahone respectfully requests this Court permit him to withdraw his guilty plea on grounds that the trial court's failure to advise him of a direct consequence of his plea: community placement, rendered his plea involuntary.

DATED this 20th day of April 2006.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's office, appeals department 930 Tacoma Ave. S. County- City Building Rm 946, Tacoma WA 98402 and Sylvester Mahone DOC# 719359/C-2,01, MCC/WSR PO Box 777 Monroe, WA 98272 a true copy of the document to which this certificate is affixed, on April 20, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

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