

NO. 35131-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY BRISCOE,

Appellant.

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STATE OF WASHINGTON

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

The Honorable Lisa Worswick
The Honorable Frederick W. Fleming

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REMAND IS REQUIRED BECAUSE THE TRIAL COURT MISINFORMED BRISCOE OF THE SENTENCING CONSEQUENCES OF HIS PLEA AND THEREFORE HIS PLEA WAS INVOLUNTARY.

The State's argument that Briscoe was properly advised of all direct consequences of his plea is unsubstantiated by the record. Brief of Respondent (BOR) at 10-13. The record clearly reflects that Judge Worswick misinformed Briscoe that the court could not sentence him to community custody:

THE COURT: All right. There's a community custody range here listed for the domestic violence court order violation. My understanding is I can't impose that if 60 months are being imposed because the maximum is 5 years, I don't think the community custody plus the DOC time can be more than 5 years.

12RP 7-8.

To the contrary, the court could impose community custody because Briscoe may earn early release credits and transfer to community custody before serving the entire term of his sentence. However, if the court imposes community custody that could theoretically exceed the statutory maximum, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004).

Based on its misapprehension of the law, the court misinformed Briscoe about the consequences of his plea and it is evident from his remarks that he was “lost” and “confused” that he did not understand the sentencing consequences. 12RP 7-8. Briscoe’s plea was therefore involuntary, which requires a remand for withdrawal of his guilty plea. State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001), In re Pers. Restraint of Murillo, 134 Wn. App. 521, 531, 142 P.3d 615 (2006).

Should this Court determine that remand is not required on this basis, as the state concedes, remand is required to amend the judgment and sentence which fails to expressly set forth the maximum sentence, stating that the total of incarceration and community custody cannot exceed that maximum. Sloan, 121 Wn. App. at 223-24 citing State v. Broadway, 133 Wn. 2d 118, 136, 942 P.2d 363 (1997).

2. REMAND IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING BRISCOE’S MOTION TO WITHDRAW HIS GUILTY PLEA AS UNTIMELY WHEN BRISCOE MADE HIS MOTION PRIOR TO JUDGMENT.

The state misapprehends the doctrine of comity in arguing that Judge Fleming properly applied the “rule of comity” and “notified defendant that his motion should be made in front of Judge Worswick.” BOR at 21. The doctrine of comity allows a court in one jurisdiction to recognize the law in another jurisdiction and has no application to this

case. State v. Medlock, 86 Wn. App. 89, 96, 935 P.2d 693 (1997), review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997).

The state argues further that the “record is sufficient to allow this court to determine defendant’s motion to withdraw his guilty plea should be denied,” citing State v. Davis, 125 Wn. App. 59, 104 P.3d 11 (2004). BOR at 21-22. The state’s reliance on Davis is misplaced. In Davis, this Court determined that “because Davis’s motion was stymied before the factual basis for his motion was presented, we have no record on which to base a decision on the merits of his motion to withdraw his guilty plea.” Davis, 125 Wn. App. at 68, n. 30. As in Davis, Judge Fleming refused to consider the merits of Briscoe’s motion to withdraw his guilty plea:

THE COURT: All right. Mr. Briscoe, what do you want to say about this one?

THE DEFENDANT: Your Honor, I want to withdraw my plea. I never got a chance to get to court to address this situation here because, for one, you know, I want to withdraw my plea --

THE COURT: Let me tell you something, Mr. Briscoe, this plea was entered before Judge Worswick, and if you’re going to make a motion to withdraw your plea, it’s my judgment that you do that before Judge Worswick. But it’s not probably okay with you, and, therefore, in my judgment, you’re not timely in moving to withdraw your plea, so I’m going to deny that motion, and I’m going ahead with sentencing in this cause number.

13RP 11-12.

The record substantiates that the court interrupted Briscoe and stymied his attempt to explain the basis for his motion to withdraw his plea and erroneously concluded that his motion was untimely. Consequently, a remand is required for consideration of Briscoe's motion to withdraw his guilty plea. Davis, 125 Wn. App at 68, 71.

3. REMAND IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN CATEGORICALLY REFUSING TO CONSIDER WHETHER A DOSA WAS APPROPRIATE FOR BRISCOE.

The state argues that the trial court "did in fact articulate several reasons for denying defendant a DOSA." BOR at 16. To the contrary, the record reflects that after the court refused to consider a DOSA and imposed a sentence of 60 months, the court stated that it "very simply" looked at Briscoe's criminal history and decided that Briscoe should receive treatment within the Department of Corrections. 13RP 36-37. The court did not read or consider the presentence chemical dependency investigation screening report that indicated that Briscoe qualified for a DOSA. 13RP 7-9. Furthermore, the court did not read or consider letters written to the court by Briscoe and others in support of a DOSA. 13RP 34. In categorically denying a DOSA by merely looking at Briscoe's criminal history, the court failed to meaningfully consider a DOSA for Briscoe as

required under State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005).

The state's alternative argument, that the court properly denied a DOSA because a DOSA was inconsistent with the terms of the plea agreement, is equally without merit. Although plea agreements are contracts between the state and defendant, the court is not bound by the plea agreement. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Moreover, the plea of guilty statements expressly provide that "[t]he judge may sentence me under the special **drug offender sentencing alternative (DOSA)** if I qualify under RCW 9.94A.660." CP 43, 129, 166.

Remand is required because the court's categorical refusal to meaningfully consider a statutorily authorized sentencing alternative constitutes reversible error.

B. CONCLUSION

For the reasons stated, here and in the opening brief, this Court should remand Mr. Briscoe's case to the superior court for withdrawal of his guilty plea, or in the alternative, for consideration of his motion to withdraw his plea. As a final alternative, this Court should vacate Mr. Briscoe's sentence and remand for resentencing.

DATED this 3rd day of December, 2007.

Respectfully submitted,


VALERIE MARUSHIGE
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Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Karen Watson, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 3rd day of December, 2007 in Kent, Washington.


Valerie Marushige
Attorney at Law
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