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NO. 35258-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

RICHARD W. SAUNDERS,

Appellant.

FILED
COURT OF APPEALS
06 DEC 20 PM 12:20
STATE OF WASHINGTON
BY Chm
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BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00130-3

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not allowing Saunders to withdraw his guilty plea to one counts of robbery in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not allowing Saunders to withdraw his guilty plea to one counts of robbery in the first degree? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

Richard W. Saunders (Saunders) was charged by information filed in Mason County Superior Court with one count of robbery in the first degree. [CP 40-43].

On May 8, 2006, the matter came before the Honorable James B. Sawyer II for a change of plea hearing. [CP 48-59, RP 1-10]. After a colloquy with Saunders in which the court noted that the standard range for Saunders was 36-48 months based on an offender score of one but could be greater if additional criminal history was discovered before sentencing and the court would not be inclined to allow withdrawal of the plea if the sentencing range was different than currently known [CP 50-52, RP 2-5], the court accepted Saunders guilty plea to one count of robbery in the first degree finding there was a factual basis for the plea and that the plea was knowingly, intelligently, and voluntarily entered. [CP 57, RP 9].

Thereafter prior to sentencing, pro se, Saunders filed a motion for withdrawal of his guilty plea claiming in part ineffective assistance of

counsel in entering his plea. [CP 26-31]. On August 21, 2006, the matter came before the Honorable James B. Sawyer II regarding Saunders's motion to withdraw his guilty plea and sentencing. [RP 25-57]. After hearing argument from Saunders and the State, the court denied Saunders's motion to withdraw his guilty plea. [RP 25-40]. The court entered the following written order denying the motion to withdraw the guilty plea:

IT IS HEREBY ORDERED that the defendant's pro se motion to withdraw his plea is denied, the court finding at the time of the plea the defendant entered such plea knowingly and voluntarily, and further finding that such plea is factually supported as to each required element of the crime.

[CP 25].

The court then sentenced Saunders to a standard range sentence of 171–months based on an offender score of 9+ (10)—a sentence more than three times the standard range of which Saunders had been advised at the time his plea of guilty was taken. [CP 7-23; RP 41-54]. Saunders's offender score was based on eight prior felony convictions from California for which no comparability analysis was conducted, one prior felony conviction from Washington, and an additional point for the current offense occurring while Saunders was on community placement. [CP 8, 17]. At sentencing, Saunders's counsel's only argument regarding the

offender score calculation was that some of his convictions “washed out.” [RP 43-52].

Timely notice of appeal was filed on August 21, 2006. [CP 5].

This appeal follows.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN FAILING TO ALLOW SAUNDERS TO WITHDRAW HIS GUILTY PLEA TO ONE COUNT OF ROBBERY IN THE FIRST DEGREE.

Under CrR 4.2(f), the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. State v. Taylor, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). In Taylor, the court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not honored by the prosecution. *See also* State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). Any one of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. State v. Taylor, 83 Wn.2d at 597. However, the four indicia from Taylor are not exclusive and a trial court should examine the totality of the circumstances

when deciding whether a “manifest injustice” exists. State v. Stough, 96 Wn. App. 480, 485, 980 P.2d 298 (1999).

- a. Saunders Did Not Ratify The Plea Of Guilty And Did Not Enter His Plea Of Guilty Knowingly, Voluntarily, And Intelligently Because He Did Not Understand The Sentencing Consequences Of Entering The Guilty Plea And As Such The Trial Court Should Have Granted His Motion to Withdraw His Guilty Plea.

Where a defendant is misinformed regarding the standard sentencing range, the plea is involuntary and constitutes a manifest injustice. State v. Walsh, 143 Wn.2d 1, 6-9, 17 P.3d 591 (2001); State v. Miller, 110 Wn.2d 528, 531-535, 756 P.2d 122 (1988); State v. Mendoza, S.C. Cause No. 77587-7 (August 17, 2006). This is so regardless of the fact that the correct sentencing range is less onerous. State v. Moon, 108 Wn. App. 59, 63-64, 29 P.3d 734 (2001); State v. Murphy, 119 Wn. App. 805, 806, 81 P.3d 122 (2002); In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). The remedy where a plea agreement is based on misinformation as to the standard sentencing range is the defendant’s choice of specific performance of the agreement or withdrawal of the guilty plea unless there are compelling reason not to allow that remedy. Id; State v. Walsh, 143 Wn.2d at 8-9

Here, at the change of plea hearing on May 8, 2006, Saunders believed that his offender score was one and that the standard range

sentence he would face by pleading guilty was 36-48 months as set forth in his statement of defendant on plea of guilty. [CP 32-39, 48-59, RP 2]. However, during the presentation of the plea and colloquy, the court became aware that Saunders may have additional criminal history that could count towards his offender score thus changing the standard range sentence which Saunders would be facing. [CP 48-59, RP 2-3]. While the court explained this possibility to Saunders and, in attempt to insulate the plea from later attack, advised Saunders that if this were to occur the court would be disinclined to allow withdrawal of the plea [CP 48-59, RP 2-6], the fact remains that Saunders was misinformed of the sentence range he was facing at the time the plea of guilty was entered and accepted because it was not known. The court should have halted the proceedings, and set the matter over until an accurate assessment of Saunders's offender score and concomitant sentence range was available. Failing to do this, it cannot be said that Saunders's plea was voluntary in that he was unaware at the time he entered his plea what sentencing consequences he in fact was facing—Saunders ultimately received a sentence more than three times that of the sentence range set forth in his statement of defendant on plea of guilty. This court should reverse the trial court's denial of Saunders's motion to withdraw his guilty plea and allow him to withdraw his plea.

b. Saunders Was Denied Effective Representation Of Counsel In Entering His Plea Of Guilty And As Such The Trial Court Should Have Granted His Motion To Withdraw His Guilty Plea.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel.

Washington Constitution Art. 1 section 22; United States Constitution Amend. 14. To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2025, *rehearing denied*, 467 U.S. 1267 (1984). In 1985, the United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), that the same two part test should be applied in challenges based on ineffective assistance of counsel in the context of guilty pleas. *See also State v. Garcia*, 57 Wn. App. 927, 791 P.2d 244 (1990).

Counsel has an affirmative obligation to assist a defendant "actually and substantially" in determining whether to plead guilty. State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993). When counsel fails to inform the defendant of the applicable law or affirmatively misrepresents a collateral consequence of a plea that results in prejudice to

the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. Stowe, 71 Wn. App. at 188-89. In the context of a guilty plea, the defendant must show that his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty,” and that but for counsel’s failure to adequately advise him, he would not have pleaded guilty. State v. McCollum, 88 Wn. App. 977, 947 P.2d 1235 (1997).

Here, Saunders’s motion to withdraw his guilty plea was based in part on ineffective assistance of counsel in that his counsel had advised him that some of his convictions would “wash out” resulting in a much lower offender score than found by the court at sentencing which was incorrect as a matter of law given the State Supreme Court’s holding in State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004), and in doing so failed to “actually and substantially assist” Saunders in deciding to plead guilty. In addition, Saunders’s counsel failed to present any argument regarding the comparability of Saunders’s eight California convictions to Washington crimes. Had Saunders’s counsel provided effective assistance in requiring the State to meet its burden in this regard there is the possibility that some of these convictions would not have been included in Saunders’s offender score. Moreover, Saunders’s counsel allowed an additional point to be included in Saunders’s offender score based on the

current conviction occurring while Saunders was on community placement. Saunders's counsel provided ineffective assistance by failing to argue against this offender score point based on the fact that this very issue is before the State Supreme Court on Blakely grounds and the conflict within this Division on this very issue. *See Blakely v. Washington*, 542 U.S.296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Jones, 126 Wn. App. 136, 107 P.3d 755 (2005), *review granted* (Supreme Court oral argument held on February 7, 2006); State v. Hochhalter, 131 Wn. App. 506, 128 P.3d 104 (2006); State v. Hunt, 128 Wn. App. 535, 116 P.23d 450 (2005); State v. Giles, No. 33027-0-II (May 2, 2006). Given these facts, it cannot be said that Saunders was afforded effective assistance of counsel where the record demonstrates that Saunders's counsel did not "actually and substantially assist" Saunders in deciding whether to plead guilty given that Saunders pleaded guilty based on the mistaken belief that he would be sentenced based on a much lower offender score than found by the court. This court should reverse the trial court's denial of Saunders's motion to withdraw his guilty plea and allow Saunders to do so.

E. CONCLUSION

Based on the above, Saunders respectfully requests this court to reverse the trial court's decision and allow for the withdrawal of his guilty plea to robbery in the first degree.

DATED this 19th day of December 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of December 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 19th day of December 2006.

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