
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RICHARD ALLEN NAPIER,
Appellant.

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DIVISION II
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APPELLANT'S REPLY BRIEF

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ARGUMENT

Mr. Napier's Guilty Plea Was Not Knowing and Voluntary When He Affirmatively Believed He Could Only Receive a Concurrent Sentence and His Misunderstanding Formed the Basis for the Plea

When the imposition of a consecutive sentence in this case effectively increased Mr. Napier's maximum sentence, failure to inform him of the possibility at the time of his plea violated his due process rights. Appellant's Brief at 8-11. Like Mr. Napier, the State found no Washington cases discussing this point. The State thus suggests that the Court rely on Ninth Circuit authority. However, the cases cited by the State fail to support its contention that "the Ninth Circuit "has consistently held that a consecutive sentence is a collateral consequence of a plea." Brief of Respondent at 4, *id.* at 4-5.

The State first cites Torrey v. Estelle, 842 F.2d 234 (9th Cir. 1988) for its contention. But that case does not decide whether it is necessary for a court to inform a defendant of a possible consecutive sentence at the time of a plea. Instead, it addresses the issue of whether a court must inform the defendant of the

possibility of being resentenced to a maximum term if a state agency determines that the defendant is not amenable to treatment. However, the court did state that "collateral consequences include the possibility that sentences may run consecutively," citing United States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987). 842 F.2d at 236.

The problem with this *dicta*, however, is that Rubalcaba did not hold that a consecutive sentence is a collateral consequence of a plea. In Rubalcaba, the defendant challenged his guilty plea on the grounds that he misunderstood the plea agreement and did not understand that his sentences could be imposed consecutively. The court cited United States v. Hamilton, 568 F.2d 1302 (9th Cir. 1978) for the proposition that a defendant need not be informed of the possibility of consecutive sentences. However, the court also ensured that the defendant had not been promised that his sentences would run concurrently. Rubalcaba, 811 F.2d at 494.

Continuing to trace the line of cases, *Hamilton* also did not hold that a possible consecutive sentence was a collateral consequence of a plea. In that case, the defendant challenged his guilty plea on the grounds that the trial court had not informed him that he could receive consecutive sentences for the two crimes for which he was simultaneously sentenced. The court held that a court need not *explicitly* inform a defendant of the possibility of a consecutive sentence because "the court's power to impose consecutive sentences is explained implicitly in the separate explanation of the possible sentences on each count." *Hamilton*, 568 F.2d at 1304-05 (internal quotation marks and citation omitted). Thus, the court's holding required informing the defendant of such possibility, albeit implicitly. In any event, it did not rule that a consecutive sentence was a collateral consequence of a plea.

Hamilton, on which *Torrey v. Estelle* and *Rubalcaba* ultimately relied, interpreted the then-current version of Federal Rule of Criminal Procedure 11 (Rule 11). The other three cases the State cites interpret a

predecessor version of the rule. But none of them held that a consecutive sentence is a collateral consequence of a plea. *But see, United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997); *United States v. Wills*, 88 F.2d 823 (9th Cir. 1989) (holding whether consequence is collateral depends on whether court had discretion or was mandated; holding consecutive sentence under federal law discretionary).

In that group of cases, *Hinds v. United States*, 428 F.2d 1322 (9th Cir. 1970), is the seminal case; both *Tibbs v. United States*, 459 F.2d 292 (9th Cir. 1972), and *Johnson v. United States*, 460 F.2d 1203 (9th Cir. 1972), rely on *Hinds*. *Hinds* held similarly to *Hamilton*: that advising the defendant of the maximum sentences applicable to each charge was sufficient to “effectively advise[]” the defendant of the consequences of pleading guilty. *Hinds*, 428 F.2d 1322, 1323.

Under these circumstances, if the Court decides to follow the Ninth Circuit’s line of cases the State cites, it should follow *Rubalcaba*, which looked into

the record to determine what the defendant understood about the consecutive versus concurrent nature of his sentence. There the court only held the plea voluntary when it determined from the defendant's statement that he actually understood he would only receive a partially concurrent sentence. Rubalcaba, 811 F.2d at 494.

This Court should make the same inquiry here and consider Mr. Napier's actual understanding at the time of the plea. As the U.S. Supreme Court has held in the context of determining whether Rule 11 has been satisfied, the "nature of the inquiry . . . must necessarily vary from case to case" and "matters of reality, and not mere ritual, should be controlling." McCarthy v. United States, 394 U.S. 459, 467 n. 20, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969) (interpreting a superceded version of Rule 11). Here, the record makes clear that Mr. Napier believed he could only receive a concurrent sentence. Accordingly, if this Court does not hold that a consecutive sentence is a direct consequence of a guilty plea, it should nevertheless

hold that Mr. Napier pleaded guilty pursuant to a material misunderstanding of fact, rendering his plea involuntary. See Brief of Appellant at 11-13.

CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Richard Allen Napier respectfully requests this Court to vacate his conviction.

Dated this 5th day of September, 2007.

Respectfully submitted,



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