

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC 18 PM 4:55

STATE OF WASHINGTON,)
Respondent,)
v.)
A.R.W.)
(D.O.B. 8/2/1992),)
Appellant.)

No. 36375-5-II
MOTION TO MODIFY
COMMISSIONER'S
RULING

I. IDENTITY OF MOVING PARTY

COMES NOW the appellant, A.R.W. (D.O.B. 8/2/1992), and upon all the files, records and proceedings herein, moves this Court for the relief requested below.

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II. STATEMENT OF RELIEF SOUGHT

In order to serve the ends of justice, pursuant to RAP 17.7, A.R.W. moves this Court to modify the Commissioner's Ruling dated December 3, 2007, attached hereto as Appendix A. Upon review, the case should be remanded for a new disposition hearing before a different judge, at which A.R.W. may choose specific performance of the plea promise or the opportunity to withdraw the guilty plea.

III. FACTS RELEVANT TO MOTION

On February 22, 2007, A.R.W. pleaded guilty to one count of threat to bomb or injury property, based on allegations that she wrote on the wall of a bathroom stall at Elma High School, “[f]uck this shit I’ll bomb it during the 6th.” RP 4;¹ CP 3 (Probable cause statement); CP 9 (Plea Statement).

In A.R.W.’s Statement on Plea of Guilty, she stated that she entered her plea with the understanding that the prosecution would recommend local sanctions as the disposition. CP 9. She also stated her understanding that the probation counselor would recommend local sanctions. CP 9. Local sanctions included a maximum of 30 days in detention. CP 6.

At the disposition hearing, the prosecutor and two probation counselors recommended a manifest injustice disposition of 52-60 weeks in a juvenile detention facility. RP 12-15; RP 26-27.

Defense counsel asked for local sanctions with strict probation monitoring by the juvenile court. RP 16-17, 29-30. The trial court imposed a manifest injustice disposition as requested by the State, ordering that A.R.W. serve 52-60 weeks in a juvenile institution.

¹ The verbatim report of proceedings (“RP”), consists of a single volume of consecutively paginated transcripts and will be referred to herein as “RP.”

CP 12-18 (Order on Disposition); CP 20 (Order denying revision without comment); RP 35.

The pertinent facts are discussed in further detail throughout Appellants Motion for Accelerated Review and Appellant's Reply, and are set forth in the Commissioner's Ruling, p. 1-3. The facts as stated in these pleadings are incorporated herein by this reference.

IV. ARGUMENT

A. A.R.W. DID NOT ENTER A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA WHEN SHE WAS EITHER MISLEAD OR MISINFORMED ABOUT THE PROSECUTION AND PROBATION COUNSELOR'S SENTENCING RECOMMENDATIONS

The Commissioner's Ruling accurately states that A.R.W. pleaded guilty with the understanding that the prosecution and probation officer would recommend local sanctions as the disposition. Ruling, at 6. A.R.W.'s understanding of this sentencing recommendation was unambiguously reflected in her written Statement on Plea of Guilty. CP 9. Yet the Commissioner refused to find that A.R.W.'s waiver of her right to trial was not voluntary, knowing, and intelligent even though the prosecution and probation officer sought a manifest injustice disposition rather than the purportedly promised local sanctions.

The Commissioner reasoned that there “is no evidence that the State ever made an agreement” with A.R.W. and therefore she is not entitled to the benefit of receiving such a sentencing recommendation. Id. The Commissioner’s ruling is void of any case law citations and contrary to prevailing law.

a. Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). “A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.” In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

“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.” State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. Miller, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences.

Walsh, 143 Wn.2d at 8; State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006).

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered.

Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood v. Morris, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

b. A.R.W. entered her plea with the understanding that the prosecution and probation would recommend local sanctions. The guilty plea statement expressly provided:

13. I understand that the prosecuting attorney will make the following recommendation to the judge: local sanctions.

14. I understand that the probation counselor will make the following recommendation to the judge: local sanctions.

CP 9. The prosecution did not comment on or offer any contradictory statements about its promised sentencing recommendation when A.R.W. entered her guilty plea. The record of the guilty plea statement expressly promises the prosecution and

Motion for Accelerated Review

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probation counselor will recommend local sanctions.

Unquestionably, A.R.W. waived her right to trial and pleaded guilty with the expectation and understanding that the prosecution and probation officer would recommend local sanctions. CP 9; Commissioner's Ruling, at 6.

c. The plea is involuntary based on the fundamental misunderstanding, if not misrepresentation, of the State's sentencing recommendation. In Isadore, the Supreme Court ruled:

We decline to adopt an analysis that requires the appellate court to inquire into the materiality of [the sentencing misadvisement] in the defendant's subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.

Isadore, 151 Wn.2d at 302. Put simply, A.R.W. pleaded guilty with the understanding that the prosecution and probation officer would recommend local sanctions and they did not do so. CP 9.

The State contends on appeal that it never promised A.R.W. it would recommend local sanctions, and did not sign the Statement on Plea of Guilty. Only the trial judge, defense counsel, and A.R.W. signed the guilty plea statement. The plea colloquy contained no references to the expected sentencing

recommendations. 2/22/07RP 3-6. Because the State did not sign the plea statement, the Commissioner concluded that the State did not actually promise to recommend local sanctions and thus did not breach a plea agreement by seeking a manifest injustice disposition.

Yet even if the State did not actually promise A.R.W. to recommend local sanctions, there is no question A.R.W. believed local sanctions would be the State's sentencing recommendation when she pleaded guilty. CP 9; Commissioner Ruling, at 6. She waived her trial rights based on such an expectation. The prosecution bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. Boykin, 395 U.S. at 242. Here, the record shows that A.R.W. waived her right to trial based on at least a misunderstanding of the State's sentencing recommendation, and this misunderstanding invalidates the voluntariness of the plea. Accordingly, A.R.W. is entitled to either withdraw her plea. Furthermore, because the record shows that A.R.W. entered the plea when under the belief that the State would recommend local sanctions, the State is bounds by the terms of the record and A.R.W. is entitled to receive

specific performance upon remand if she so chooses. See Appellant's Reply, p. 3-4; see also Miller, 110 Wn.2d at 533.

B. THE STATE'S BREACH OF THE PLEA
UNDERMINES THE LAWFULNESS OF THE
SENTENCE AND REQUIRES REVERSAL.

A.R.W. pleaded guilty with the understanding that the prosecution would recommend a particular sentence. She therefore gave important constitutional rights based on the expectation that the prosecution will adhere to the terms of this agreement. State v. Carreno-Maldonado, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). The prosecution's breach of a plea as reflected in the written guilty plea statement is a structural error that is not subject to harmless error review. Id. at 87-88.

Before accepting A.R.W.'s guilty plea, the court asked A.R.W. several questions to ensure she understood the rights she was waiving. 2/22/07RP 3-4. Neither the court nor the State indicated that the prosecution or probation counselor would alter their promised sentencing recommendations. 2/22/07RP 3-6.

Despite the explicit promises in the guilty plea statement, both the prosecutor and probation counselor asked the disposition court to impose a manifest injustice disposition above the standard

range. 4/19/07RP 12, 14-15, 17-19. The State is bound by the inducements expressly conveyed to A.R.W. when she pleaded guilty and there is no basis to infer the prosecution had no knowledge of the promises in the guilty plea statement that were reviewed in open court and entered into the record.

Here, A.R.W. detrimentally relied on both the probation counselor and prosecuting attorney's stated intent to recommend local sanctions when she pleaded guilty. CP 9. A guilty plea may be deemed involuntary where there is a mutual mistake of fact or law and where this mistake forms part of the basis for the defendant's plea. Walsh, 143 Wn.2d at 8-9; Miller, 110 Wn.2d at 531 ("A defendant must understand the sentencing consequences for a guilty plea to be valid.").

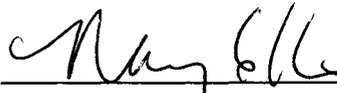
In Walsh, the court found a plea was involuntary based on a mistake about the standard range at the time of plea. 143 Wn.2d at 8. The court ruled that when a defendant does not understand the sentencing consequences of a plea, the plea is involuntary. Id. Similarly, in the case at bar, A.R.W. understood that the probation officer and prosecution promised to recommend local sanctions as part of the guilty plea. CP 9. These State officials' failure to honor that promise, for any reason, undermines the validity of the plea

and renders the plea involuntary. Upon resentencing, A.R.W. may request specific performance of the plea agreement or have the opportunity to withdraw the guilty plea. State v. E.A.J., 116 Wn.App. 777, 785-86, 67 P.3d 518 (2003), rev. denied, 150 Wn.2d 1028 (2004).

V. CONCLUSION

Upon review, this Court should reverse the Commissioner's ruling and remand the case for further proceedings, including offering A.R.W. the opportunity to withdraw her guilty plea.

Respectfully submitted this 18th day of December 2007.



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Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

A.R.W.,¹

Appellant.

No. 36375-5-II DEC - 4 2007

Washington Appellate Project

RULING AFFIRMING
ADJUDICATION AND
DISPOSITION

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DIVISION II

A.R.W. appeals the manifest injustice disposition imposed by the Grays Harbor County Superior Court following her plea of guilty to threatening to bomb or injure property. RCW 9.61.160. She contends that the disposition was based on factors not supported by the record and was contrary to applicable law. She also contends that she is entitled to specific performance of a plea bargain, which she asserts the prosecution and probation counselors breached by recommending a manifest injustice disposition. This court reviewed the matter pursuant to RAP 18.13.

FACTS

On February 22, 2007, A.R.W. pleaded guilty to one count of threatening to bomb property. Her plea arose from a February 2, 2007 incident in which she

¹ Under RAP 3.4, this court changes the title of the case to the juvenile's initials. The ruling uses initials for the juvenile and his family to protect the juvenile's rights to confidentiality.

wrote on the wall of a bathroom stall at Elma High School, "[f]uck this shit I'll bomb it during 6th."²

On April 19, 2007, A.R.W. appeared before the trial court for sentencing on three separate incidents of criminal behavior: (1) a residential burglary and third degree theft, committed in April 2006, which had been subject to a deferred sentence, now being revoked; (2) the bomb threat at issue here; and (3) a forgery committed while A.R.W. was on house arrest pending sentencing for the bomb threat. The prosecution recommended, and the court imposed local sanctions for the burglary, theft and forgery, in the amount of time already served.

As to the bomb threat, the prosecution recommended an upward manifest injustice disposition of 52 to 60 weeks in detention, based on the danger A.R.W. posed in the community. The State informed the court that she had committed the forgery while on house arrest for the bomb threat, and when she committed the residential burglary, she took along two young children she was babysitting, ages three and four. Probation counselors told the court that a predisposition psycho-social evaluation indicated that A.R.W. had anger management, depression, and attention deficit issues. She showed no remorse for her actions and took no responsibility for her behavior, which in this case, had resulted in her expulsion from high school.

² Clerk's Papers (CP) at 3.

The juvenile court commissioner also perceived A.R.W. to be a threat to the community and likely to re-offend. She imposed the 52 to 60 weeks recommended, finding as aggravating factors that:

[(1)] The victim was particularly vulnerable.

[(2)] The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement.

....
[(3)] There are other complaints which have resulted in diversion or a finding or plea of guilty which are not included as criminal history.

[(4)] The standard range is clearly too lenient considering the seriousness of the juvenile's prior adjudications.

[(5)] [The] youth is a clear threat to the community.

[(6)] Counseling is indicated.³

A.R.W. sought revision of this decision; a superior court judge denied her motion, and this appeal followed.

DISCUSSION

A.R.W. challenges the disposition, contending that the record does not support it, and it is based on errors of law. When sentencing a juvenile offender, the trial court must impose a standard range disposition unless it finds that such a sentence would effectuate a manifest injustice. RCW 13.40.160(2). The term "manifest injustice" means a disposition that would either impose an excessive penalty on the juvenile or a disposition that would impose a serious and clear danger to society in light of the purposes of the Juvenile Justice Act (JJA) of 1977. RCW 13.40.020(17). Those purposes include the protection of the public

³ CP at 13.

from juvenile criminal behavior and the provision of necessary treatment and supervision for juvenile offenders. RCW 13.40.010(2)(a) and (f).

To uphold a disposition outside the standard range, the appellate court must find: (1) that the reasons given by the trial court are supported by the record; (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice; and (3) the disposition was neither clearly excessive nor clearly too lenient. RCW 13.40.230(2). The findings must be supported by clear and convincing evidence. RCW 13.40.160(2). The appellate court reviews a trial court's findings of fact under a clearly erroneous standard and will reverse only if substantial evidence fails to support the trial court's conclusion. *State v. T.E.C.*, 122 Wn. App. 9, 18, *review denied*, 152 Wn.2d 1012 (2004).

A.R.W. asserts several errors regarding the court's findings. She argues first that the court failed to satisfy the requirements of JuCR 7.12(e), which requires that "a sentence based upon a finding of manifest injustice . . . shall set forth those portions of the record material to the disposition." For the most part, the court checked boxes on a printed form,⁴ and that is certainly not the preferred method. However, the record in this case is very short, and the court's oral remarks adequately indicate the bases for the findings.

A.R.W. next complains that the court based its decision on the erroneous assumption that she might get a 50 percent reduction in the sentence for good

⁴ The commissioner wrote in the fifth and sixth factors.

time. The record clearly shows that after that supposition was corrected, the commissioner still considered the 52 to 60 week sentence appropriate.

A.R.W. also specifically challenges the first, second, and sixth factors. As to the first, she argues that the court improperly considered the vulnerability of the 80-year-old victim of the forgery.⁵ There is no reason to make such an assumption, particularly in view of the fact that the court imposed only 28 days of detention for that crime, two days less than the time recommended by the State. There was discussion about the seriousness of the threat in the context of all of the events and problems reported on the news, and it is most likely that the victims the commissioner had in mind were the students and teachers at Elma High School.

A.R.W. next challenges the finding regarding recent criminal history, contending that the forgery did not constitute "history" because it occurred after the bomb threat. However, the burglary and theft occurred just 10 months before the bomb threat, and A.R.W. was on probation for those crimes when she made the threat. There is a proper basis for the second finding. See RCW 13.40.150(3)(i)(iv).

A.R.W. also contends that the reference to counseling in the sixth factor is too vague to support the disposition. However, the psycho-social evaluation clearly pointed out problems that needed treatment, including depression and lack of anger control. It is not necessary that the treatment require 52 weeks. The record is clear that the disposition was based not only on treatment needs,

⁵ The trial court must not consider an aggravating factor related to a separate offense. *T.E.C.*, 122 Wn. App. at 24.

but on the need to protect the community. The court expressed concerns about A.R.W.'s uncontrollable behavior, anger problems, failure to accept responsibility, and disregard for the safety of others, including the two young children she involved in the residential burglary.

Finally, A.R.W. contends that the prosecutor and probation counselors breached their promises to her to recommend local sanctions for the bomb threat and she is entitled to specific performance of the plea agreement or withdrawal of her guilty plea. Her statement on plea of guilty indicates her belief that there would be such a recommendation. However, only she and her attorney signed that statement. There is no evidence that the State ever made an agreement with her. This is undoubtedly why defense counsel did not mention it at sentencing or object when the prosecutor and probation officers asked for a manifest injustice disposition.

The record clearly and convincingly supports the disposition. And there is no basis for giving A.R.W. the benefit of a belief that did not culminate in a bargain. Accordingly, it is hereby

ORDERED that the adjudication and disposition are affirmed.

DATED this 3rd day of December, 2007.



Ernetta G. Skerlec
Court Commissioner

cc: Nancy P. Collins
Gordon L. Wright
Hon. Gordon Godfrey
Director of Division of Juvenile Rehabilitation
A.R.W.

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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 36375-5-II** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **Gordon Lyle Wright - Grays Harbor County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 18, 2007

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