

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

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON

2007 NOV -7 PM 4:58

STATE OF WASHINGTON,)	No. 36375-5-II
Respondent,)	
)	REPLY TO STATE'S
v.)	ANSWER REGARDING
)	REVIEW OF JUVENILE'S
A.R.W.)	MANIFEST INJUSTICE
(D.O.B. 8/2/1992),)	DISPOSITION
Appellant.)	

I. ARGUMENT IN REPLY

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

On appeal, the prosecution disavows the plain terms of the guilty plea statement and says it never promised to recommend local sanctions as the disposition if A.R.W. pleaded guilty. This assertion is belied by the record, because A.R.W. and the court signed a guilty plea statement that unequivocally states that A.R.W. entered her guilty plea with the understanding that the prosecutor and probation counselor would recommend local sanctions. Regardless of the prosecution's unsupported factual assertions on appeal, the necessary inquiry is A.R.W. thought when she pleaded

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guilty, not what was in the mind of a prosecutor when A.R.W. waived her right to trial and pleaded guilty.

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. 2/22/07RP

3-6. The written guilty plea statement expressly promises the prosecution and probation counselor will recommend local sanctions and therefore demonstrates the understanding that A.R.W. had at the time she entered his guilty plea.

The fact that the court ordered a diagnostic report and the probation officer provided such a report has no bearing on the representations made to A.R.W. at the time she waived her right to trial and pleaded guilty. The guilty plea statement provides that the plea is entered with the understanding that the probation officer will recommend local sanctions and no one told A.R.W. when she pleaded guilty that this would not be the probation officer's disposition recommendation. CP 9. It is this understanding, in A.R.W.'s mind, that controls whether the guilty plea was knowing, intelligent, and voluntary.

c. A.R.W. is entitled to specific performance of the promises made when she entered her plea. The State makes no argument that there are compelling reasons that A.R.W. be denied specific performance. Walsh, 143 Wn.2d at 9. The State bears the burden of showing that specific performance is unjust and the State makes no such claim in the case at bar. Id. A.R.W. has already served a substantial portion of an unlawfully imposed sentence and it is impossible to guess what injustice could occur that would bar A.R.W. from seeking specific performance. Moreover, specific performance is the appropriate remedy. Id. at 9 n.3 ("the rule is that the defendant's choice of remedy controls unless it would be

unjust. If the State would be prejudiced in presenting its case by the passage of time, it can ask that the defendant's remedy be limited to specific performance."'). If the trial prosecutor and probation counselor both did not intend to induce the guilty plea by promising to recommend local sanctions, they should have made a record of this intent at the time A.R.W. waived her right to a trial and pleaded guilty.

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. Accordingly, A.R.W. is entitled to her choice of remedies upon remand.

B. THE JUVENILE COURT IMPOSED A MANIFEST INJUSTICE DISPOSITION BASED ON FACTORS NOT SUPPORTED BY THE RECORD AND CONTRARY TO THE APPLICABLE LAW, THUS THE DISPOSITION MUST BE REVERSED

The prosecution defends the trial court's imposition of an exceptional sentence on the ground of particular victim vulnerability by concocting a scenario never argued before the trial court and

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never contemplated by the judge. Response at 10. While it is not impossible for the victims of a threat to bomb to be particularly vulnerable, there is simply no factual basis for concluding such vulnerability occurred in the case at bar. There was no record made that school students were blocked in classrooms, unable to flee, or otherwise inconvenienced by the threatening words written on a bathroom stall. The prosecution's imagination of such a possibility does not mean the trial court's aggravating factor justifying a manifest injustice disposition is supported by the record in the case at bar.

The remaining assertions raised by the prosecution are addressed in A.R.W.'s motion for accelerated review and should serve as a basis to reject the manifest injustice disposition for imposition of a disposition within the standard range.

V. CONCLUSION

For the above reasons and those stated in A.R.W.'s motion for accelerated review, this court should remand the case for the opportunity to withdraw the plea or seek specific performance of the premise under which the plea was obtained. The court should also reverse the manifest injustice disposition.

Respectfully submitted this 7th day of November 2007.



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DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 7TH DAY OF NOVEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY TO STATE'S ANSWER RE: REVIEW OF JUVENILE'S MANIFEST INJUSTICE DISPOSITION** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	GORDON LYLE WRIGHT, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
	GRAYS HARBOR CO. PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
	102 W. BROADWAY AVENUE, ROOM 102	<input type="checkbox"/>	_____
	MONTESANO, WA 98563-3621		

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF NOVEMBER, 2007.

x _____ *grl*