

original

FILED
COURT OF APPEALS
DIVISION II

NO. 36481-6

08 FEB 28 PM 12:29

STATE OF WASHINGTON
BY cmh
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARL CUNNINGHAM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 92-1-00443-9

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

1. Should this court refuse to address the merits of defendant’s appeal where defendant knowingly, intelligently and voluntarily waived his right to appeal during the plea proceedings below?1

2. Did the trial court properly deny defendant credit for pre-sentence jail time served on the manslaughter charge where defendant was serving a separate sentence for first degree robbery during that time? (Appellant’s Assignment of Error No. 1).....1

3. Pursuant to State v. Mendoza, has defendant waived his right to challenge on appeal the voluntariness of his plea where defendant was provided correct information regarding the consequences of his plea prior to being sentenced and defendant did not object or move for withdrawal of his plea? (Appellant’s Assignment of Error No. 2).....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....4

1. THIS COURT SHOULD REFUSE TO ADDRESS THE MERITS OF DEFENDANT’S CLAIMS BECAUSE DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO APPEAL DURING THE PLEA PROCEEDINGS BELOW4

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT REFUSED TO AWARD DEFENDANT ANY PRE-SENTENCE JAIL CREDIT ON THE MANSLAUGHTER CONVICTION BECAUSE DEFENDANT WAS SERVING A DOC SENTENCE FOR FIRST DEGREE ROBBERY DURING THAT TIME.9

3. DEFENDANT WAIVED HIS RIGHT TO CHALLENGE ON APPEAL THE VOLUNTARINESS OF HIS PLEA BECAUSE DEFENDANT WAS PROVIDED THE CORRECT INFORMATION REGARDING THE CONSEQUENCES OF HIS PLEA PRIOR TO BEING SENTENCED AND DEFENDANT DID NOT OBJECT OR MOVE TO WITHDRAW HIS PLEA.13

D. CONCLUSION.16

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court refuse to address the merits of defendant's appeal where defendant knowingly, intelligently and voluntarily waived his right to appeal during the plea proceedings below?
2. Did the trial court properly deny defendant credit for pre-sentence jail time served on the manslaughter charge where defendant was serving a separate sentence for first degree robbery during that time? (Appellant's Assignment of Error No. 1)
3. Pursuant to State v. Mendoza, has defendant waived his right to challenge on appeal the voluntariness of his plea where defendant was provided correct information regarding the consequences of his plea prior to being sentenced and defendant did not object or move for withdrawal of his plea? (Appellant's Assignment of Error No. 2)

B. STATEMENT OF THE CASE¹

On April 20, 1992, the State filed a third amended information charging the defendant, CARL CUNNINGHAM, with second degree felony-murder (based on second degree assault), second degree possession of stolen property, first degree burglary, unlawful possession of a controlled substance and second degree assault. CP _____. The case proceeded to jury trial. At trial, the court instructed the jury that first and second degree manslaughter were lesser included offenses of the murder charge. The jury rejected the murder charge, but convicted defendant of first degree manslaughter, in addition to the remaining charges.² CP 1-10. On July 7, 1992, the court sentenced the defendant to 116 months in the Department of Corrections. CP 1-10. On July 21, 1992, the court sentenced defendant to 195 months in cause number 92-1-01239-1 (robbery), and ordered it to run consecutive to the sentence in the present case.³ See CP 37-94.

¹ Many of the facts contained in this section are taken from facts set forth in the State's Sentencing Memorandum filed on May 24, 2007 (CP 37-94) and this Court's Order Transferring Petition filed in COA No. 32937-9-II, on September 14, 2005.

² Defendant entered a plea of guilty pre-trial to the unlawful possession of a controlled substance charge.

³ The court also sentenced defendant on two other cause numbers (92-1-01705-1 and 92-1-02131-7) on July 21, 1992. The court ordered these sentences to run concurrent to the sentence imposed in 92-1-01239-1. See CP 37-94.

In 2005, defendant filed a personal restraint petition claiming that his manslaughter conviction should be reversed because manslaughter is not a lesser-included or inferior degree offense of second degree felony-murder. The Supreme Court agreed and remanded defendant's case to the trial court with directions to vacate the first degree manslaughter conviction without prejudice to the State's refiling that charge. The convictions for the remaining four counts, and the sentences imposed on those counts, remained valid.

On July 13, 2006, defendant appeared before the trial court. The court signed an order vacating defendant's conviction for first degree manslaughter. CP 11-12. The State also filed an amended information as to count I only, charging the defendant with one count of first degree manslaughter. CP 13. The court set bail at \$250,000. CP 14-15.

On February 23, 2007, the defendant entered a Newton plea to first degree manslaughter.⁴ CP 16-23. As part of the plea negotiations, the defendant signed a stipulation on prior record and waiver of right to appeal. CP 24-27, 126-27. The court accepted the guilty plea. On June 15, 2007, the court sentenced the defendant to 120 months and ordered this sentence to run consecutive to the 195-month sentence that defendant

⁴ The State filed a fourth amended information, but it charges the same offense as the previously filed amended information.

was presently serving in cause number 92-1-01239-3 (robbery). CP 100-20.

This timely appeal follows. CP ____.

C. ARGUMENT.

1. THIS COURT SHOULD REFUSE TO ADDRESS THE MERITS OF DEFENDANT'S CLAIMS BECAUSE DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO APPEAL DURING THE PLEA PROCEEDINGS BELOW.

The State maintains its position that defendant waived his right to appeal his conviction and urges this court to address this procedural bar prior to reaching the merits of petitioner's claims.

A defendant may waive his or her right to appeal a conviction so long as the waiver is done intelligently, voluntarily and with an understanding of the consequences. State v. Perkins, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). The court in Perkins observed that discouragement of plea negotiations, including an agreement by a defendant to waive the right to appeal, would operate as a disincentive to prosecutors to offer what particular defendants and their counsel might regard as worthwhile inducements to forgo that right. State v. Lee, 132 Wn.2d 498, 505-06, 939 P.2d 1223 (1997)(citing Perkins, 108 Wn.2d at 216). Further, the policy of settlement litigation is served, provided the "administration of such a settlement is fair, free from oppressiveness, and sensitive to the interests

of both the accused and the State.” Lee, 132 Wn.2d at 506 (citing Perkins, 108 Wn.2d at 216). The court in Perkins further noted that while there is a constitutional right to appeal in this state, there is no valid reason why that right cannot be waived as in the case of other constitutional rights. Perkins, 108 Wn.2d at 217; see also State v. Majors, 94 Wn.2d 354, 358, 616 P.2d 1237 (1980)(court upheld an agreement waiving the right to appeal where the defendant “undisputedly was aware of the consequences of his waiver”); State v. Hall, 18 Wn. App. 844, 573 P.2d 802 (1977)(court held that where the defendant had knowingly waived his right to appeal as part of a plea bargain agreement, he lost the right to raise a speedy trial rule violation by personal restraint petition). Thus, the inquiry is whether the waiver of that right is valid. Perkins, 108 Wn.2d at 217. The State bears the burden on this issue. Id.

Here, defendant agreed to waive his right to appeal as part of permissible plea negotiations. Pursuant to the negotiations, the State agreed to two things: (1) it would not increase the charges to second degree murder, and (2) it would not charge an aggravating factor that would have allowed the State to seek an exceptional sentence. 1RP⁵ 5, 10-12. In exchange, the defendant agreed to plead guilty to first degree manslaughter and to waive his right to appeal and collateral attack. 1RP 5,

10-12. At the plea hearing, defendant signed a stipulation that included a waiver of his right to appeal. The waiver provided:

As part of the plea bargain I reached in this case, I am giving up my right to appeal or take collateral attack on my conviction on any grounds that exist right now except those grounds that are set forth herein[] unless the law should ever change again, like it did to cause me to come back before the court this time (Andress and Hinton).

CP 24-27. Defendant agreed that he had read the document, reviewed it with his attorney, understood all of it and did not have any questions. Id.

The court also reviewed the stipulation in detail with the defendant:

Judge: All right. Then finally, the stipulation on prior record has additional changes on page 4, and that language indicates that as part of the bargain that you've reached, you're giving up your right to appeal or take collateral attack on your conviction on any grounds that exist right now, except for whatever's set forth here in the stipulation on prior record. If the law should ever change again, like it did to bring you back before the Court under Andress and Hinton, and that's the –

Defense: Unless the law should change.

Judge: Unless the law should change. I'm going to change that to "unless." All right. And that's what you want to do this afternoon here, with regard to this right to appeal, Mr. Cunningham?

Defendant: Yeah. ...

⁵ "IRP" refers to the report of proceedings from the plea hearing.

1RP 19-20. Defense counsel agreed that he had reviewed the plea documents with the defendant and he believed the defendant was entering the plea knowingly, intelligently and voluntarily. 1RP 15-16. The court was also convinced that defendant knew what he was doing when he signed the stipulation agreeing to waive his right to appeal:

Judge: All right. Then the stipulation on prior record's been reviewed. I just wanted to make certain that we had affirmative understanding, and that I'm convinced Mr. Cunningham knows what he's doing. I'm convinced that he knows what he's doing, but I want to talk to you about your guilty plea form. ...

1RP 21. At sentencing, the defendant again acknowledged that he was waiving his right to appeal the conviction. Defendant signed, and the court reviewed, an Advice of Right to Appeal document, which contained the following paragraph:

1.1 You have the right to appeal:
[] a determination of guilty after a trial.
WAIVED BY ENTRY OF GUILTY PLEA.
[xx] a sentencing determination relating to offender score, sentencing range, and/or nature of sentences imposed, other than AS LIMITED AND/OR WAIVED BY STIPULATION FILED AT PLEA
[xx] other post convictions motions listed in Rules of Appellate Procedure 2.2.

CP 126-27; 2RP 45. Moreover, even defendant agrees that his ability to appeal his conviction is extremely limited, as evidenced by his comments in his Statement of Additional Grounds for Review (SAG). The first sentence of his brief provides:

For this court's knowledge it is important to note that Cunningham along with the State on his current manslaughter plea attached a stipulation that Cunningham can take a direct appeal on arguments that attack the consecutive v. concurrent nature of this sentence.

SAG, at 1.

The record is clear that defendant was fully and properly advised of his right to appeal and then intelligently, voluntarily and with an understanding of the consequences, expressly waived the same. The waiver was valid. This court should, therefore, refuse to address the merits of defendant's appellate claims.

Assuming this court disagrees with the State's procedural argument, the State has responded below to defendant's claims on the merits.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT REFUSED TO AWARD DEFENDANT ANY PRE-SENTENCE JAIL CREDIT ON THE MANSLAUGHTER CONVICTION BECAUSE DEFENDANT WAS SERVING A DOC SENTENCE FOR FIRST DEGREE ROBBERY DURING THAT TIME.

Defendant claims that the trial court improperly denied him credit for the time he served in Pierce County Jail from the date that his manslaughter conviction was vacated and he entered a plea of not guilty (June 30, 2006), until the case was resolved and he was sentenced on that charge (June 15, 2007). Defendant's claim lacks merit because he was serving a sentence for first-degree robbery during that time; the trial court thus acted within its discretion when it refused to award double credit on the manslaughter charge.

The pre-sentence detention time credit provision is currently set forth in RCW 9.94A.505(6), which provides:

The sentencing court shall give the offender credit for all confinement time served before the sentencing *if that confinement was solely in regard to the offense for which the offender is being sentenced.*

(emphasis added). Courts have long interpreted this provision as allowing credit only if the jail time served is exclusively on the principal underlying

charge. See State v. Williams, *infra*; In re Phelan, *infra*; State v. Davis, 69 Wn. App. 634, 641, 849 P.2d 1283 (1993); State v. Watson, 63 Wn. App. 854, 860, 822 P.2d 327 (1992).

In State v. Williams, 59 Wn. App. 379, 796 P.2d 1301 (1990), Division One addressed a claim almost identical to the one that defendant raises here. In that case, the defendant was arrested on suspicion of robbery and detained in jail on \$50,000 bail. Defendant thereafter entered a plea of guilty to the robbery and, at sentencing, requested credit for the time served since his arrest. The corrections officer opposed the request for credit, stating that Williams was on parole when he was arrested on the robbery charge, that his parole was immediately suspended because of his arrest, and “[h]e was held as a state prisoner at that time until today when . . . the papers [were served].” Williams, 59 Wn. App. at 380. The trial court denied credit. The issue on appeal was whether the trial court erred in failing to award credit for the pre-sentence detention time that Williams spent in jail on the robbery charge. The appellate court held that the trial court acted within its discretion when it denied credit. Relying on RCW 9.94A.505(6), the court reasoned:

If we were to hold as Williams urges, it would be possible for an inmate to receive twice the amount of credit for the time he or she actually served in jail while awaiting trial and sentencing. The Legislature certainly did not intend such absurd result. “Statutes should receive a sensible

construction which will effect the legislative intent and avoid unjust or absurd consequences.”

Williams, 59 Wn. App. at 381 (citing State v. Curwood, 50 Wn. App. 228, 231, 748 P.2d 237 (1987)(quoting In re Hoffer, 34 Wn. App. 82, 84, 659 P.2d 1124 (1983))).

Similarly, in this case, defendant is not entitled to credit for any time served from June 30, 2006 (the date his manslaughter conviction was vacated and a not guilty plea entered), through June 15, 2007 (the date that defendant was sentenced), because defendant was serving a 195-month robbery sentence throughout that period.⁶ CP 37-94. Defendant was not, therefore, confined “solely” on the manslaughter charge during the time he was in jail. As such, the trial court properly refused to award defendant credit for that period on the manslaughter conviction.

Defendant relies on State v. Phelan, 100 Wn.2d 508, 671 P.2d 1212 (1983), for the proposition that a defendant is entitled to credit for any time served while a case is pending. App. Br. at 6-7. But this situation has its limitations, as RCW 9.94A.505(6) so indicates. As our Supreme Court held in In re Phelan, 97 Wn.2d 590, 647 P.2d 1026 (1982):

⁶ The robbery sentence was imposed on July 21, 1992 and ordered to run consecutive to defendant’s earlier sentence in this case. When this case was vacated, defendant immediately started serving the 195-month robbery sentence from cause number 92-1-01239-3. See CP 37-94.

As to the fourth category of jail time where petitioner was awaiting the revocation hearing, we believe petitioner is entitled to credit only if the jail time served was exclusively on the principal underlying charge of second degree rape. At the time petitioner was transferred back to Thurston County on a probation detainer, he was serving a 6-month sentence in Clark County on charges of obstructing a public servant, driving while license was revoked, and two counts of hit and run. That sentence would have expired October 17, 1980. On August 13, 1980, petitioner's revocation hearing was held and his probation was revoked.

Under the reasoning of Reanier [v. Smith], 83 Wn.2d 342, 517 P.2d 949 (1974),] and [State v. Hultman, [92 Wn.2d 736, 600 P.2d 1291 (1979)], it would seem petitioner is entitled to no credit for the time he served in jail while awaiting his revocation hearing. **None of the considerations of due process, equal protection, or multiple punishments arising in Reanier and Hultman appear as to this category of jail time since petitioner was serving time on the Clark County charges – not on the principal underlying charge.** Therefore, petitioner is not entitled to credit against his maximum sentence for the time served while awaiting his probation revocation hearing.

In re Phelan, 97 Wn.2d at 597 (emphasis added).

The defendant's constitutional claims lack merit in light of cases such as Williams and In re Phelan. The trial court properly interpreted RCW 9.94A.505(6) when it denied defendant's request for credit on this case. As such, the trial court did not impose a sentence that required defendant to serve time beyond the statutory maximum. See App. Br. at 5-6. The judgment and sentence should be affirmed.

3. DEFENDANT WAIVED HIS RIGHT TO CHALLENGE ON APPEAL THE VOLUNTARINESS OF HIS PLEA BECAUSE DEFENDANT WAS PROVIDED THE CORRECT INFORMATION REGARDING THE CONSEQUENCES OF HIS PLEA PRIOR TO BEING SENTENCED AND DEFENDANT DID NOT OBJECT OR MOVE TO WITHDRAW HIS PLEA.

Defendant claims that his guilty plea was involuntary because he was told that a one-year term of community placement was required as a condition of his plea, when, in fact, community placement could not legally be imposed for the crime of manslaughter at that time. But because defendant was informed of the correct information (that community placement could *not* be imposed) prior to sentencing, yet never moved to withdraw his plea, defendant has waived his opportunity to challenge the plea on appeal.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A plea meets these conditions only when the defendant is correctly informed about the direct consequences of his plea, including community custody. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)(citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). A defendant need not show that the misinformation was material to his decision to plead guilty. In re PRP of Isadore, 151 Wn.2d 294, 297, 88

P.3d 390 (2004). In addition, it is of no consequence that the misinformation results in a lower sentence than what was believed at the time of the plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). But where a defendant is informed of the correct information before sentencing and has the opportunity to withdraw his plea, he may waive the right to challenge the validity of the plea. Mendoza, 157 Wn.2d at 591.

Here, defendant claims that he was not correctly informed about the range of community placement portion of his punishment. Specifically, defendant claims that he was told he would have to serve 12 months community placement when, in fact, community placement could not legally be imposed at all. Even assuming that he was misinformed, defendant waived his right to challenge the validity of the plea because he did not move for withdrawal at the sentencing hearing when the correct information regarding community placement was provided to him.

At the plea hearing, the court misadvised the defendant that his plea of guilty to manslaughter required community placement for 12 months upon release from prison. 1RP 23. Prior to the sentencing hearing, however, the State filed a sentencing brief acknowledging that

community placement could not be imposed. CP 37-94⁷. Defendant filed a reply to the State's sentencing brief thereby acknowledging receipt of the information contained therein. CP 95-99. At the sentencing hearing, the State again reminded the court and the defendant that community placement could not be imposed. 2RP 12, 23-24. The court also informed the defendant of this fact. 2RP 40-41. Defense counsel acknowledged receipt of this information. 2RP 43. Yet defendant never objected or moved for withdrawal of his plea. Interestingly, defense counsel's primary objective did not appear to be ensuring a knowing plea, but rather to create a possible issue for appeal. See 2RP 43. But in order to preserve the issue for appeal, defendant was required to move for withdrawal of the plea at the time he was provided the correct information regarding community placement. See Mendoza, 157 Wn.2d at 592. Pursuant to Mendoza, the defendant has waived his right to challenge the validity of his plea on this basis.

⁷ See page 9 of the Sentencing Memorandum, wherein the prosecutor states, "The defendant also argues the court cannot impose 'community placement.' Since there was no community placement allowed for the crime of first degree manslaughter in 1992, the State would agree none should be imposed *on this count.*" (emphasis in original)

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's conviction and sentence.

DATED: February 28, 2008.

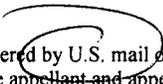
GERALD A. HORNE
Pierce County
Prosecuting Attorney



ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Larranaga

2-28-08 
Date Signature