

NO. 38317-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GONZALES,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S REPLY BRIEF

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PM 4-22-09

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A. ARGUMENT.

1. BECAUSE GONZALES ASKED TO WITHDRAW HIS GUILTY PLEA WHEN HE LEARNED THAT HE WAS MISINFORMED OF THE DIRECT SENTENCING CONSEQUENCES, THIS COURT SHOULD HONOR HIS REQUEST

Upon returning to trial court after this Court's ruling that his offender score had been incorrectly calculated, Gonzales told the trial court that he wanted to withdraw his guilty plea because he pleaded guilty based on an incorrect understanding of his sentencing range. 1/14/05RP 2-3. Gonzales told the court that his misunderstanding of the sentence range constituted a "manifest injustice because I wasn't adequately informed of my sentencing," when he spoke to the court. 1/14/05 RP 13. The sentencing court did not offer him the opportunity to withdraw his plea, and instead told Gonzales that he did not have the right to withdraw his plea. 1/14/05RP 3.

In its Response Brief, the prosecution focuses on the timing of the Supreme Court's ruling in State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006), as it was issued after Gonzales asked to withdraw his plea. The Supreme Court ruled in Mendoza that pleading guilty based on a belief that the standard range is higher

than it should have been may render the plea involuntary and not knowingly entered.

However interesting the prosecution's review of the "timing" of Mendoza and related cases may be, the date of the decision is neither here nor there for purposes of the instant appeal. Gonzales expressly stated his desire to withdraw his plea based on the fact that he was not correctly informed of his standard range.

1/14/05RP 2-3, 13. The decision in Mendoza governs the outcome of the case without resort to any analysis of the trial court's legal acumen or defense counsel's adequacy.

As Mendoza explains, and consistent with numerous cases cited in Appellant's Opening Brief, a guilty plea is involuntary if based on misinformation about a direct sentencing consequence, including a mistaken belief that the standard range is higher than it turns out to be. 157 Wn.2d at 591. Gonzales entered into a plea bargain based on his belief that his offender score was "4," but in fact it was "2," and his standard range decreased from 165-265 months to 144-244 months. 1/14/05RP 4. Gonzales did not plead guilty based on a correct understanding of the direct sentencing consequences and he is entitled the opportunity to withdraw his plea. His case is on direct appeal and there is no question of

retroactivity. See Order on Review, p. 2 (granting direct appeal, issued Sept. 23, 2008). Therefore, the case must be remanded so that Gonzales may avail himself of his requested opportunity to withdraw his guilty plea. Mendoza, 157 Wn.2d at 592.

2. THE OVERLY BROAD NO-CONTACT ORDER IMPOSES A DIRECT SENTENCING CONDITION FOR WHICH GONZALES WAS NOT INFORMED AND UNDERMINES THE VALIDITY OF THE PLEA.

Gonzales pleaded guilty in 2003 pursuant to a plea bargain. The prosecution appropriately concedes that a no-contact order against the decedent's unnamed, extended "family" was neither entered nor requested when Gonzales pleaded guilty in 2003. Resp. Brf. at 7 n.2. It was inserted into the sentence in 2005, after remand, and without informing Gonzales of the change in the terms of his sentencing. CP 72 (2005 Judgment and Sentence); CP 138-54 (2003 Judgment and Sentence); CP 157 (Plea Statement).

A number of cases cited in Gonzales's opening brief explain that a no-contact order is a direct sentencing consequence when imposed as part of a sentence for a criminal conviction. State v. Wilson, 117 Wn.App. 1, 11, 75 P.3d 573, rev. denied, 150 Wn.2d 1016 (2003) (listing no-contact order as one of the direct sentencing consequences entered); State v. Grant, 83 Wn.App. 98,

111, 920 P.2d 609 (1996) (no-contact order imposed as sentencing condition is “continuing consequence” of conviction). This restriction on behavior carries with it penalties and behavioral restrictions, and violation of a no-contact prohibition entered as a condition of sentence is a separate crime. RCW 10.99.050. Any alleged violation thereof subjects the person to mandatory arrest without a warrant. RCW 26.50.110(2). Because it is a direct sentencing consequence, restricting Gonzales’s freedom, he has a right to be informed of this condition prior to entering his plea.

The prosecution offers no cases favoring the position it espouses -- that no-contact orders are collateral, indirect sentencing consequences for which a person need not be advised when pleading guilty. The array of contrary cases, discussing a no-contact order as a direct sentencing consequence, serve as persuasive authority of the recognized consequences and import of such a sentencing restriction.

Moreover, the no-contact order entered against Gonzales was extremely broad and does not give Gonzales fair notice of the persons against whom contact is prohibited. A person must have fair warning of the issuance of a no-contact order and the prohibited conduct. Bouie v. City of Columbia, 378 U.S. 347, 350-

51, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980); RCW 10.99.050.

The no-contact order entered as part of Gonzales's sentence bars him from having contact with the decedent "Mr. Abundiz's family" for the rest of his life. CP 72. The order does not specify which of Mr. Abundiz's family members it includes and does not provide Gonzales with fair notice of this sentencing condition.

Bouie, 378 U.S. at 350-51; Shipp, 93 Wn.2d at 515-16.

Approximately 14 members of Abundiz's family spoke at Gonzales's sentencing, including cousins and people who consider Abundiz family although not blood-relatives. CP 87-99. The court did not restrict the no-contact order to Abundiz's children, if he had them, parents, or grandparents. The breadth of this order in light of Abundiz's extended family cannot provide the fair notice required.

The prosecution implies that Gonzales must wait to litigate the fairness of his notice until he is charged with and prosecuted for a violation of the no-contact order. Resp. Brf. at 8-9. But as the Supreme Court ruled in State v. Bahl, 164 Wn.2d 739, 746-51, 193 P.3d 678 (2008), pre-enforcement challenges to a vague sentencing condition are entirely appropriate and routinely decided on appeal. The overly broad nature of the court's no-contact order

and its authority to issue such an order are purely legal and ripe for review. Id. at 748. Gonzales should not have to wait until he encounters one of Abundiz's cousins to challenge the fairness of this no-contact order or the court's authority to issue such a broad order covering relatives beyond the immediate family members. It serves the interest of judicial efficiency, and prevents unnecessary hardship on Gonzales, to address the issue in the present appeal.

Accordingly, because Gonzales was never informed of this direct sentencing consequence at the time of his plea, its imposition invalidates the plea and renders Gonzales's waiver of his rights less than knowing, intelligent, and voluntary. See Mendoza, 157 Wn.2d at 592. Furthermore, the court lacked statutory authority to issue such an overly broad order covering unnamed individuals without clear connections to the case or even clearly established relationships with the deceased.

3. THE PROSECUTION BREACHED THE PLEA AGREEMENT BY STRENUOUSLY ARGUING THE CULPABILITY OF OTHERS AND BARELY MENTIONING ANY MITIGATING CIRCUMSTANCES FAVORING GONZALES.

The prosecution's explanation of the trial deputy's sentencing advocacy in the Response Brief is not so much wrong as it is extremely misleading. The trial prosecutor may not have

purposefully orchestrated the statements of the 14 family members who spoke of seeking punishment for Gonzales with the intent to undermine the plea, and he may have briefly mentioned his low end sentence recommendation that was the cornerstone of the plea bargain. But the response brief's rendition of the sentencing proceedings is entirely false in its representation of the tenor and flavor of the prosecution's actual advocacy for the lower- end sentence it promised to recommend when it induced Gonzales to plead guilty.

“The State's duty of good faith requires that it not undercut the terms of the agreement **explicitly or implicitly** by conduct evidencing an intent to circumvent the terms of the plea agreement.” State v. Carreno-Maldonado, 135 Wn.App. 77, 83, 143 P.3d 343 (2006) (emphasis added); see also State v. Xavier, 117 Wn.App. 196, 200-02, 69 P.3d 901 (2003) (breach where prosecutor discussed aggravating factors and charges not pursued, and denigrated defendant as “prolific child molester”); State v. Van Buren, 101 Wn.App. 206, 217, 2 P.3d 991, rev. denied, 142 Wn.2d 1015 (2000) (breach where prosecutor only mentioned recommended sentence briefly and discussed probation report's exceptional sentence request in detail).

The prosecutor barely mentioned its sentencing recommendation, and instead focused on the egregious nature of the incident, much of which had no application to Gonzales because he did not plead guilty to these other offenses and was not accused of having been involved in the larger circumstances of the incident. For example, Gonzales was neither accused of nor convicted of any involvement in the arson that occurred, and thus the statement that it was “unclear” who was responsible for the burned body does not apply to Gonzales, because he was not a participant in the arson. See Response Brief, at 20. Gonzales was convicted of participating in a theft, not a robbery, and cannot be sentenced upon offenses for which he was not convicted. Moreover, the prosecution never mentioned Gonzales’s cooperation and did not try to persuade the court that Gonzales was entitled to the sentence which he promised to advocate for as part of the plea bargain. For the reasons discussed in detail in Appellant’s Opening Brief, the prosecutor breached the plea agreement during both sentencing hearings.

B. CONCLUSION.

For the reasons stated herein and in Appellant's Opening Brief, Michael Gonzales respectfully requests this Court remand his case so that Gonzales may withdraw his guilty plea.

DATED this 22nd day of April 2009.

Respectfully submitted,



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Respondent,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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