

No. 41777-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JD JONES BARTON,

Appellant.

FILED
COURT OF APPEALS
11 JUL 13 AM 10:39
SEATTLE, WASHINGTON
BY *MC*
CLERK

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

MR. BARTON MUST BE ALLOWED TO WITHDRAW HIS GUILTY PLEA, BECAUSE IT IS BASED ON THE PARTIES' STIPULATION TO AN ILLEGAL SENTENCE

The State contends Mr. Barton may not withdraw his guilty plea, because he was correctly informed of the statutory maximum sentence for the two assault charges. The State acknowledges Mr. Barton entered the plea agreement on the understanding that the State would recommend an illegal sentence of 180 months. SRB at 6. The State also acknowledges that Mr. Barton in fact received an illegal sentence. But the State contends that because the trial court was not *required* to follow the State's recommendation, Mr. Barton was not misadvised of a direct consequence of the plea and the plea was therefore not involuntary. SRB at 5.

The State is incorrect. It is well-established that where a guilty plea is based upon a plea bargain that cannot be fulfilled because the agreed-upon sentence is illegal, the plea cannot stand. Under those circumstances, a mutual mistake has occurred and the defendant is entitled to withdraw the plea.

The general rule is that where a defendant has entered a guilty plea pursuant to a plea bargain contemplating a particular sentence, the defendant is entitled to withdraw the plea if it is

subsequently determined that the sentence is illegal or unauthorized. Christopher Vaeth, Annotation, Guilty Plea as Affected by Fact that Sentence Contemplated by Plea Bargain is Subsequently Determined to be Illegal or Unauthorized, 87

A.L.R.4th 384, §2 (1991). As the United States Supreme Court stated in Brady v. United States:

"(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes)."

Brady v. United States, 397 U.S. 742, 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (emphasis added) (citation omitted).

In Santobello v. New York, the Court approved of the practice of plea bargaining in general but cautioned that the process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

Those circumstances will vary, but "a constant factor is that when a plea rests in any significant degree on a promise or agreement of

the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id.

The Washington Supreme Court adheres to the general rule that a defendant must be allowed to withdraw his guilty plea when it is based upon the parties' agreement to an illegal sentence. In In re Personal Restraint of Thompson, for instance, Thompson pled guilty pursuant to a plea agreement to first degree rape of a child but the statute creating the offense did not take effect until after the alleged conduct occurred. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 716, 10 P.3d 380 (2000). The court explained, "a plea bargaining agreement cannot exceed the statutory authority given to the courts." Id. at 724 (quoting In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)). Instead, "the actual sentence imposed pursuant to a plea bargain must be statutorily authorized." Id. (quoting In re Pers. Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)). There was no evidence that Thompson understood he would be pleading guilty to an invalid charge in exchange for the State's agreement to drop two other charges. Id. at 721. In fact, it appeared that neither the parties nor the trial court was aware of the error. Id. at 724-25. Thus, because

Thompson did not knowingly plead to an invalid charge, the plea and conviction were invalid. Id. at 724-25, 730.

Similarly, in State v. Barber, Barber pled guilty pursuant to a plea agreement to one count of felony DUI (driving under the influence) in exchange for the State's recommendation of a 51-month sentence to run concurrently with his sentence on another conviction. State v. Barber, 170 Wn.2d 854, 857, 248 P.3d 494 (2011). The State did not agree to recommend community custody and the parties and the court were under the impression it was not required. Id.; id. at 862-63. Subsequently DOC notified the prosecutor's office that the offense carried a mandatory term of community custody. Id. at 857. The Supreme Court explained the guilty plea rested on the parties' "mutual mistake" regarding the community custody requirement. A "mutual mistake" occurs during the plea bargaining process when "the State and the defendant stipulate in the plea agreement to a sentence that is contrary to law." Id. at 859. Thus, "Barber exchanged his guilty plea for a sentence that did not include any term of community custody," and not merely for the State's agreement not to *recommend* community custody. Id. at 862-63. Because the parties agreed to a sentence

that was contrary to law, Barber was entitled to withdraw the plea.
Id. at 873.¹

Courts in other jurisdictions agree that a defendant is entitled to withdraw his guilty plea when the sentence contemplated by a plea bargain is subsequently determined to be illegal. See, e.g., People v. Jackson, 121 Cal. App. 3d 862, 868, 176 Cal. Rptr. 166 (1981) (defendant entitled to withdraw guilty plea where agreed-upon sentence was later determined not to be authorized by statute); Chae v. People, 780 P.2d 481, 486 (Colo. 1989) (illegal sentence recommendation that is material element of plea agreement will render agreement invalid and require that guilty plea be vacated); State v. Hernandez, 107 Idaho 947, 949, 694 P.2d 1295 (1985) (plea based on promise that cannot be met by State must be withdrawn at defendant's insistence); State v. Boswell, 30 Kan. App. 2d 9, 14, 37 P.3d 40 (Kan. Ct. App. 2001) (where plea agreement includes prosecutor's agreement to recommend illegal sentence and court imposes the recommended but illegal sentence, defendant entitled to withdraw plea); State v. Picchini, 508 So.2d 149, 151 (La. App. 4th Cir. 1987) ("If a guilty plea was induced by a promise or plea bargain made and then broken, defendant has a

¹ The court overruled State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988), in part, by holding that specific performance is not an available remedy

right to withdraw the guilty plea."); State v. Parker, 334 Md. 576, 607, 640 A.2d 1104 (Md. 1994) (defendant entitled to withdraw guilty plea where prosecutor agreed to recommend that sentence run concurrently with sentence on federal conviction but judge did not have authority to order that Parker serve time in federal prison); People v. Selikoff, 35 N.Y.2d 227, 238, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974) (any sentence "promise" made by State during plea bargaining is, as matter of law and public policy, conditioned upon its being lawful and appropriate; where it is not, proper remedy is to allow withdrawal of plea); Ex parte Burton, 623 S.W.2d 418, 419 (Tex. Crim. 1981) (if prosecution does not live up to its part of plea bargain and such bargain was used as an inducement for the guilty plea, plea is involuntary and defendant is entitled to withdraw the plea); State ex rel. Morris v. Mohn, 165 W. Va. 145, 147, 267 S.E.2d 443 (1980) ("A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand.").

where a guilty plea rests on the parties' agreement to an illegal sentence.

Here, Mr. Barton pled guilty pursuant to a plea bargain in which the State agreed to recommend an illegal sentence. Mr. Barton and the State "stipulate[d] in the plea agreement to a sentence that [was] contrary to law." See Barber, 170 Wn.2d at 859. Thus, the guilty plea rests on the parties' (and the court's) "mutual mistake" regarding the sentence that was statutorily authorized. Id. In the guilty plea statement, Mr. Barton stated he understood the prosecutor would recommend a sentence of 180 months. CP 320. This encompassed an "agreed exceptional sentence" of 108 months for counts one and two. Id. Similarly, during the guilty plea colloquy, Mr. Barton stated he understood the State would recommend a sentence of 180 months. 10/31/08RP 7-8. The prosecutor asserted, and Mr. Barton agreed, this was an "agreed exceptional sentence." 10/31/08RP 8. The court concurred that an exceptional sentence was appropriate and imposed the agreed-upon illegal 180-month sentence. 10/31/08RP 16.

The State concedes, and this Court has determined, the sentence Mr. Barton received—and the parties agreed upon—was illegal. State v. Barton, noted at 160 Wn. App. 1003, 2011 WL 444436.

As in Thompson, there is no evidence that Mr. Barton understood he was agreeing to an illegal sentence. See Thompson, 141 Wn.2d at 721. In fact, from the record it appears that neither the parties nor the trial court was aware of the error. See id. at 724-25. Because the parties stipulated to an illegal sentence, the plea rests upon a "mutual mistake." Barber, 170 Wn.2d at 859. Mr. Barton is therefore entitled to withdraw the plea. Id. at 873.

Finally, the State contends Mr. Barton previously raised this issue in a personal restraint petition (PRP), No. 40885-6-II. SRB at 7. That is not correct. On October 14, 2009, Mr. Barton, *pro se*, filed a CrR 7.8 motion to withdraw the guilty plea in the trial court. The trial court transferred the motion to this Court for consideration as a PRP. In the motion, Mr. Barton argued: his guilty plea was coerced; his attorney had a conflict of interest; he was actually innocent; the prosecutor committed perjury in the affidavit for certificate of probable cause; the prosecutor failed to preserve exculpatory evidence in bad faith; double jeopardy; and his offender score was miscalculated. He did not argue his guilty plea was invalid because it was based on the parties' stipulation to an illegal sentence.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Barton's guilty plea is invalid because it was entered pursuant to a plea agreement in which the parties agreed to an illegal sentence. He is entitled to withdraw the plea.

Respectfully submitted this 10th day of June 2011.


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JD BARTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JUNE, 2011, 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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