

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

D. CONCLUSION..... 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In Re Personal Restraint of Breedlove
138 Wn.2d 398, 979 P.2d 417 (1999) 6

In Re Personal Restraint of Carle
93 Wn.2d 31, 604 P.2d 1293 (1980) 7

In Re Personal Restraint of Isadore
151 Wn.2d 294, 88 P.3d 390 (2004) 3

State v. Mendoza
157 Wn.2d 582, 141 P.3d 49 (2006) 3, 5-6

State v. Ross
129 Wn.2d 279, 916 P.2d 405 (1996) 3

Statutes

RCW 9.94A.535 4

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Barton's guilty plea was involuntary in violation of due process.

B. STATEMENT OF THE CASE.

On October 31, 2008, Barton pled guilty to Counts I and II, Assault in the Second Degree While Armed with a Deadly Weapon—Firearm and Count III, Unlawful Possession of a Firearm in the First Degree. [RP 10-11].¹ The standard range for each count of assault, given Barton's offender score of 11, was 63 to 84 months. [RP 7]. Each assault count was augmented by 36 months based upon the deadly weapon enhancement under RCW 9.94A.533(3). [CP 52]. Thus the total standard range for each count of assault was 99-120 months, with a maximum of 10 years. [CP 54]. The total standard range on Count III was 77-102 months, with a maximum of 10 years. Id.

The State recommended an exceptional sentence, under RCW 9.94A.535, on counts I and II. [RP 7, 8]. Defense counsel agreed that an exceptional sentence was appropriate. Id. The court accepted the plea bargain agreement, including stipulation to

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the proceedings in the trial court dated October 31, 2008 and October 13, 2009.

an exceptional sentence. [RP 13, 16].² The sentences for Counts I, II and III ran concurrently, while the two 36 month sentences ran consecutively. [RP 16]. Thus Barton's sentence was calculated as 180 months total confinement based upon an exceptional sentence of 108 months on Count I, 108 months on Count II, and 102 months on Count III, plus two 36 month sentences for the deadly weapon enhancement. [CP 56].

On April 22, 2010, Barton, pro se, filed an amended motion to modify and correct his judgment and sentence in the trial court. He argued, among other things, that he should be allowed to withdraw his guilty plea because of the imposition of an illegal sentence. [CP 241]. The trial court denied Barton's amended motion and an order was entered. [CP 314].

On June 24, Barton, pro se, filed a notice of appeal, seeking direct review by the Washington Supreme Court. [CP 317]. On January 6, 2011, the matter was transferred to this Court for determination. While this matter was pending, this Court issued a mandate, dated February 8, 2011, stating that Barton's sentence is vacated and remanded back to the trial court for resentencing.³

² The trial court entered a Findings of Fact and Conclusions of Law that the exceptional sentence was appropriate in the case. [CP 61].

³ State v. Barton, noted at noted at 160 Wn. App. 1003, 2011 WL 444436.

C. ARGUMENT.

1. Barton's guilty plea was voluntary because he was correctly informed of the sentencing consequences.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A defendant may withdraw a guilty plea if it was invalidly entered or if its enforcement would result in a manifest injustice. Id. at 298. A guilty plea is considered involuntary, and withdrawal of the plea is available, if it was based on misinformation regarding direct consequences of the plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A defendant need not be informed of all possible consequences of a plea, but rather, only the direct consequences. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A "direct" consequence includes one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. at 284. Under this definition, courts have held the following consequences to be 'direct': the statutory maximum sentence,⁴ ineligibility for the Special Sex Offender Sentencing Alternative program,⁵ the obligation to pay restitution,⁶

⁴ State v. Vensel, 88 Wn.2d 552, 555, 564 P.2d 326 (1977).

⁵ State v. Kisse, 88 Wn. App. 817, 822, 947 P.2d 262 (1997).

mandatory community placement,⁷ consecutive sentences,⁸ and any mandatory minimum term.⁹

In the present case, the trial court informed Barton of the following prior to his entry of pleas of guilty:

“On Counts I and II with your score of a nine-plus, which you have an 11, the standard range is 63 to 84 months. There is a community custody range of 18 to 36 months, and the maximum term and fine is ten years and \$20,000. On Count III with your score of eight the standard range is 77 to 102 months. The maximum term and fine is ten years and \$20,000. In addition, there is a \$500 crime victim assessment, a \$100 cost to collect a DNA sample.”

[RP 7]. After the trial court advised Barton of the direct consequences of his plea, the court went on to ask the State to explain its *recommendation*, at which time the State informed the court that there is a joint recommendation for a firearm enhancement on each count of assault in the second degree to run consecutively. Furthermore, the State requested an exceptional sentence on Counts I and II under RCW 9.94A.535. [RP 8].¹⁰ Defense counsel agreed that justice was best served by the

⁶ State v. Cameron, 30 Wn. App. 229, 233, 633 P.2d 901, review denied, 96 Wn.2d 1023 (1981).

⁷ State v. Ross, 129 Wn.2d at 284.

⁸ In re Personal Restraint Petition of Williams, 21 Wn. App. 238, 240, 583 P.2d 1262 (1978).

⁹ Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976).

¹⁰ The recommendation proposed by the State was an exceptional sentence of 108 months on Count 1 and 2 followed by two firearm enhancements at 36 months per each enhancement. [RP 7-8].

imposition of an exceptional sentence. [RP 8]. After the State provided the court with its recommendation, the following colloquy occurred:

The Court: The Court does not have to take anybody's sentence recommendations. The Court can give you any sentence in the standard range up to the maximum...Do you understand?

Barton: Yes, ma'am.

After the colloquy, Barton pled guilty to two counts of Assault in the Second Degree While Armed with a Deadly Weapon – Firearm and one count of Unlawful Possession of a Firearm in the First Degree. [RP 10-11].

Barton does not dispute that the information provided to him regarding the statutory maximum of his charges are correct. Instead, Barton argues that because the court followed the State's recommendation and sentenced him to 180 months, he was, therefore, misinformed of the consequences of his plea. That argument, however, is misplaced. The State's proposed sentence is simply a recommendation; it is not a definite effect on Barton's punishment since the court is not required to follow it.

Barton cites State v. Mendoza, 157 Wn.2d 582 for support. In Mendoza, the Washington Supreme Court concluded that a

defendant's plea is involuntary when he is told after his plea is entered that he faced a lower standard range sentence than indicated in the plea agreement. Id. at 590. This case, however, is distinguishable from Mendoza because unlike a standard range, a recommendation for an exceptional sentence during the plea colloquy does not have an "immediate and automatic effect on a defendant's range of punishment" because such recommendation is contingent upon the sentencing court's finding that an exceptional sentence is appropriate in the case. See In re Personal Restraint of Breedlove, 138 Wn.2d 398, 424, 979 P.2d 417 (1999) ("trial court is not bound by any recommendation as to sentencing...must independently determine that the sentence imposed is appropriate).

In the present case, Barton was correctly advised that the statutory maximum for Assault in the Second Degree and Unlawful Possession of a Firearm in the First Degree was 120 months or 10 years. During his plea colloquy, he was simply told that there was a joint *recommendation* for two firearm enhancements *and* an exceptional sentence which there is no authority in law.¹¹ Such

¹¹ See State v. Barton, noted at 160 Wn. App. 1003, 2011 WL 444436 ("although an offender cannot be sentenced in excess of the statutory maximum for any single offense, his total period of confinement can exceed the statutory maximum

recommendation should have been rejected by the trial court. See In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (“when a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence”). The fact that the exceptional sentence was not rejected by the sentencing court does not change the fact that Barton was properly informed of the ten year maximum at the time of his plea.¹²

It should be worth noting that the issue being raised in this appeal was also raised in a Personal Restraint Petition that was brought forth before this Court.¹³ On April 29, 2011, this Court issued an order dismissing the Petition.¹⁴

for the most serious offense when he has committed multiple offenses with firearm enhancements”).

¹² The sentencing error was in fact corrected when this court vacated the sentence and remanded back to trial court for resentencing. See State v. Barton, noted at 106 Wn. App. 1003, 2011 WL 444436

¹³ This Court assigned No. 40885-6-II.

¹⁴ This Court issued its order dismissing the Petition on the basis that the Court has already determined in State v. Barton, noted at 160 Wn. App. 1003, 2011 WL 444436 that there was no merit to Barton’s claims that his guilty plea was a manifest injustice.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this Court to affirm Barton's guilty pleas because he was properly informed of the direct consequences of his plea.

Respectfully submitted this 6 day of May, 2011.



Olivia Zhou, WSBA #41747
Attorney for Respondent

CERTIFICATE OF SERVICE

COURT OF APPEALS
DIVISION II
11 MAY -9 AM 9:41
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

--AND--

MAUREEN M. CYR
WASHINGTON APPELLATE PROJECT
1511 3RD AVE, STE 701
SEATTLE, WA 98101-3635

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6 day of May, 2011, at Olympia, Washington.

[Signature]
Caroline Jones