No. 48787-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEENA SANDBERG,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied Ms. Sandberg's motion to withdraw her guilty plea.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due Process requires a defendant's plea of guilt be accepted by the trial court only upon a showing the accused understands the nature of the charge and has entered the plea intelligently and voluntarily. Where the record does not demonstrate the defendant understood the nature of the charge against her, or was misinformed of the consequences of the plea, the trial court must grant a defendant's motion to withdraw her plea pursuant to CrR 4.2(f). Is reversal required where the trial court denied Ms. Sandberg's motion to withdraw her plea but (1) the record did not demonstrate she understood the elements of third degree assault and (2) she was misinformed of the consequences of her plea?

C. STATEMENT OF THE CASE

Deena Sandberg was charged with third degree assault for digging her fingernails into an officer's arm after the officer escorted her out of a casino. CP 76. Ms. Sandberg had been disruptive during an event at the casino after she determined someone was wrongly

sitting in her assigned seat. CP 76. According to the officer, after Ms. Sandberg was led outside, she dug her fingernails into the officer's arm in an attempt to break free from the officer's grasp. CP 76.

However, Ms. Sandberg suffered from seizures. RP 38 (court describing that Ms. Sandberg suffered a seizure while in court and was taken to the hospital). At her plea hearing on the assault charge, Ms. Sandberg stated she understood she was pleading guilty to assault, but that she had scratched the officer by accident. RP 14. The court did not explain that assault requires intent, and instead asked Ms. Sandberg whether she understood she was giving up important rights, such as the right to a trial. RP 14-15. Ms. Sandberg acknowledged that she understood this. RP 15.

At Ms. Sandberg's scheduled sentencing, defense counsel informed the court that Ms. Sandberg's seizure disorder contributed to the incident. RP 23. Ms. Sandberg explained the assault "was purely an accident." RP 24. When she scratched the officer, she was having a seizure. RP 24. The court gave Ms. Sandberg the opportunity to speak with her attorney, and defense counsel informed the court Ms. Sandberg wished to file a motion to withdraw her plea. CP 24. In

response, the court continued the sentencing hearing and assigned Ms. Sandberg new defense counsel. RP 25.

At the hearing on Ms. Sandberg's motion to withdraw, she explained that she did not understand the nature of the crime, or that accidentally scratching an officer did not constitute assault. RP 56. She also explained that she had been led to believe that, assuming she received a "first-time offender" disposition, the felony conviction would not appear on her record. RP 56; CP 41, 22.

The defense attorney who represented Ms. Sandberg on her guilty plea asserted he had explained to Ms. Sandberg that the elements were "the specific items" required to prove guilt. CP 23. However, he did not represent that he had actually described the elements of assault, and he did not include the elements in the plea form, instead citing to the information. CP 63. The plea form did not indicate he had reviewed the information with Ms. Sandberg and the court did not rely on the information when accepting Ms. Sandberg's guilty plea. RP 18-19; CP 63.

In addition, the plea form indicated Ms. Sandberg faced a maximum term of incarceration of five years, even though the top of

the standard range was only three months and the State did not have a basis upon which to seek an exceptional sentence. CP 64.

The trial court denied Ms. Sandberg's motion to withdraw her guilty plea. RP 69. It sentenced her to 35 days in confinement, with five days credit for time served and 30 days on electronic home monitoring. RP 77; CP 9.

D. ARGUMENT

Deena Sandberg's plea was invalid and this Court should reverse the trial court's denial of her motion to withdraw.

"Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily." *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, §3. This requirement must be satisfied because when an individual pleads guilty, she relinquishes her Fifth Amendment rights and stands "witness against [her]self." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The Due Process standard is reflected in Criminal Rule (CrR) 4.2, which prohibits a court from accepting a plea of guilt unless the court finds the defendant entered the plea "voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Under CrR 4.2(f), a court must permit a defendant to withdraw her guilty plea if necessary to correct a manifest injustice. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). While "manifest injustice" has not been defined, it includes instances where the plea was not voluntary or the right to the effective assistance of counsel was denied. *A.N.J.*, 168 Wn.2d at 119.

Because of the constitutional rights waived by the defendant in order to enter a plea of guilt, the burden is on the State to demonstrate the plea is valid. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996); *Boykin*, 395 U.S. at 242. It must show that the defendant had knowledge of all direct consequences, either through the record or by clear and convincing extrinsic evidence. *Id.*

a. <u>Ms. Sandberg's plea is invalid because she did not understand the nature of the charge.</u>

Ms. Sandberg moved to withdraw her guilty plea prior to sentencing pursuant to CrR 4.2. RP 56; CP 40, 24. Her defense

counsel, who did not represent Ms. Sandberg at the time of her plea, explained Ms. Sandberg did not understand the elements the State was required to prove at trial. RP 56; CP 41, 23.

The record supported Ms. Sandberg's claim. At the plea hearing, when the court asked Ms. Sandberg if she understood the crime to which she was pleading guilty, the following exchange occurred:

> THE COURT: Okay. Alright. So, Ms. Sandberg, I'm told you're going to plead guilty to assault in the third degree. Is that correct, Ma'am?
>
> MS. SANDBERG: Yes.
>
> THE COURT: Do you understand what it is you're pleading guilty to? In other words, what conduct you did that the State alleges constitutes the crime of assault in the third degree?
>
> [DEFENSE COUNSEL]: The third, the police officer. Assaulting the police officer – yeah.
>
> MS. SANDBERG: Yeah.
>
> THE COURT: I'm sorry, Ma'am?
>
> MS. SANDBERG: Yes, on accident.
>
> THE COURT: Okay.
>
> MS. SANDBERG: Not on purpose, on accident I assaulted a…
>
> THE COURT: Okay. Let me explain it.

RP 14.

The trial court then explained that in order to accept Ms. Sandberg's plea of guilt it needed to find she was acting voluntarily. RP 14. It then questioned her about whether she understood the rights she was giving up, such as the right to a trial and an appeal. RP 15. The court did not address whether Ms. Sandberg understood the State would be required to prove intent at trial or that scratching an officer by accident did not constitute assault. CP 73; *State v. Brown*, 140 Wn.2d 456, 470, 998 P.2d 321 (2000) ("[t]o obtain a conviction of assault under [RCW 9A.36.031(1)(g)], the State must prove that a defendant intended to commit and did commit an assault against another person"). Instead, when Ms. Sandberg indicated she had committed an assault "on accident," the trial court moved on to explain the fact that by pleading guilty she waived her right to a trial. RP 14.

At a subsequent hearing, as the court prepared to sentence her, Ms. Sandberg told the court "it was purely an accident." RP 24. This time Ms. Sandberg's statement prompted the court to encourage her to step outside the courtroom and speak with her attorney about whether she wished to withdraw her plea. RP 24. After Ms. Sandberg had the

opportunity to speak with her attorney, defense counsel informed the court she would be moving to withdraw her plea. RP 25. New counsel was appointed. RP 26.

After filing the motion to withdraw, Ms. Sandberg provided a declaration from defense counsel who had represented her on the change of plea. CP 22. In this declaration, defense counsel stated:

> When I discuss the elements of the crime with an individual, when reviewing the change of plea form I say "the elements are the specific items the prosecutor has to prove to a Judge or a jury in order for someone to be found guilty."

CP 23.

However, rather than include the elements of assault in the plea form, defense counsel had simply filled in the blank "The elements are:" with the words "as in the information." CP 63. Defense counsel did not attest in his declaration that he actually reviewed the elements in the information, or otherwise specified what the elements for the crime are, when reviewing the change of plea form with Ms. Sandberg. CP 23. In addition, the information was not attached to the plea form and the trial court did not indicate it had reviewed the information when accepting Ms. Sandberg's plea of guilt. RP 18-19.

Due process is violated where the record does not affirmatively demonstrate the defendant understood the nature of the charges. *A.N.J.*, 168 Wn.2d at 119. In *A.N.J.*, a 12-year-old pled guilty to child molestation in the first degree but later moved to withdraw his plea, arguing in part that he did not understand the charge against him. 168 Wn.2d at 96. The trial court denied the motion, but our supreme court reversed, finding "nothing in the colloquy with the judge shows that A.N.J. understood that the physical act was not itself sexual contact; that it had to be done for sexual gratification." *Id.* at 118. It held that in the absence of evidence in the record that A.N.J. understood the meaning of sexual contact, the court violated Due Process when it accepted the plea. *Id.*

Similarly, nothing in the court's colloquy to Ms. Sandberg demonstrated she understood an accidental act did not constitute assault. When Ms. Sandberg explained she committed assault by accident during the plea, the court made no attempt to correct her and explain assault actually required intent.[1] In addition, the plea

[1] The trial court believed it had given Ms. Sandberg an opportunity to speak with her attorney during the plea colloquy and she had taken advantage of this. RP 64. However, as the trial court acknowledged, this was not reflected in the record. Even if this did occur, the trial court made no efforts to ensure she understood assault requires intent.

agreement itself did not list the elements of assault, and defense counsel asserted that he explained generally what elements are but not that he informed Ms. Sandberg of the actual elements the State was required to prove in order to meet its burden at trial. CP 23.

Because the record did not demonstrate Ms. Sandberg understood the nature of the charge to which she was pleading guilty, the trial court accepted the plea in violation of Due Process and CrR 4.2.

b. The plea is invalid because Ms. Sandberg was misinformed of its consequences.

i. *Ms. Sandberg was misinformed of a direct consequence of her plea.*

A plea is not voluntary where a defendant is not apprised of a direct consequence of the plea. *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) (citing *Ross*, 129 Wn.2d at 284). "A direct consequence is one that has a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) (quoting *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006)).

The relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001);

State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Ms. Sandberg's guilty plea states that the maximum term of her sentence is five years. CP 64. The maximum terms for various degrees of felony convictions are set by statute. RCW 9A.20.021(a). Class C felonies, such as assault in the third degree, may be punished up to five years in prison.

However, as the United States Supreme Court ruled in *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), while a certain term of imprisonment may be permitted under RCW 9A.20.021, it is not the statutory maximum for the charged offense. Instead, the court noted the maximum sentence was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* (Emphasis original.)

The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id.* Here, the standard range is the maximum possible sentence the court could

impose upon Ms. Sandberg for a conviction of assault in the third degree.

The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537. Under RCW 9.94A.537(1), the State is required to give notice if it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). No such factors were present in Ms. Sandberg's case.

Because there were no circumstances in Ms. Sandberg's case that would have permitted the imposition of any sentence above the standard range, the maximum term was not five years, as the plea stated. CP 64. Instead, the maximum term was the top end of the standard range, or three months. CP 64. Ms. Sandberg was misadvised of the maximum punishment she faced as a consequence of her guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006) (*review denied*, 16 Wn.2d 1013 (2007)).

Knotek is directly on point. In *Knotek*, the court acknowledged that before pleading guilty, a defendant needs to understand the "direct

consequences of her *guilty plea*, not the maximum potential sentence if she went to trial." *Id.* at 424, n.8 (emphasis original). This Court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek post-*Blakely* as a result of her pre-*Blakely* plea – the top end of the standard ranges." *Id.* at 425. Thus, because Ms. Sandberg was told the maximum sentence was five years, when in fact it is the top of the standard range, she was misadvised of the consequences of the plea.

ii. *Ms. Sandberg was misinformed of a collateral consequence of her plea.*

The failure to advise the defendant of a collateral consequence of her plea does not rise to a manifest injustice. *A.N.J.*, 168 Wn.2d at 116. However, a defendant is entitled to withdraw her plea under CrR 4.2(f) where she was *misinformed* of a collateral consequence. *Id.* (finding the defendant was entitled to withdraw his plea because he was incorrectly told that his juvenile conviction could be removed from his record when he was older).

Ms. Sandberg's defense counsel stated that he would not have "necessarily advised" Ms. Sandberg that a "first-time offender" disposition would remain on her record as a felony conviction. RP 22. However, this issue was not discussed at the plea hearing and Ms.

Sandberg later explained that, based on her conversations with her attorney, she had understood the "first-time offender" waiver to prevent a felony conviction from appearing on her record. RP 56; CP 41, 22. The record demonstrated Ms. Sandberg had been misinformed of this consequence.

c. Reversal is required.

The fact that Ms. Sandberg moved to withdraw her plea prior to sentencing lends credibility to her claim that she did not understand the consequences of her plea. *A.N.J.*, 168 Wn.2d at 107. Where "the motion is made before any other benefit to the defendant or detriment to the State is known," and the motion is grounded in concerns about whether a plea was made voluntarily, the timing of the motion is entitled to particular weight. *Id.*

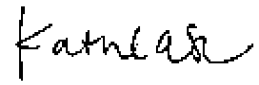
Here, Ms. Sandberg moved to withdraw her plea in the absence of any additional benefit to her, or detriment to the State. *Id.* In addition, her motion was grounded in concerns about whether she acted voluntarily. The record demonstrates she did not understand the nature of the charges against her, and was misinformed of the consequences of her plea. Given this record, and the fact that Ms. Sandberg moved to withdraw her plea before sentencing, this Court should reverse.

E. CONCLUSION

This Court should reverse because Ms. Sandberg did not understand the nature of the charge and because she was misinformed of the consequences of her plea, either of which rendered her plea invalid.

DATED this 26th day of September, 2016.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. DEENA SANDBERG, Appellant.	)))))))))	NO. 48787-0-II

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