

FILED  
AUGUST 24, 2012  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30872-3-III

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STATE OF WASHINGTON, Respondent,

v.

ROBERTO R. ARROYO, Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Roberto Arroyo pled guilty to two charges in exchange for a sentencing recommendation from the State. At the time of accepting the guilty plea, the trial court did not advise Arroyo that it was not a party to the agreement and was not bound by the sentencing recommendation. At sentencing, the trial court declined to follow the recommendation, implicitly finding that it did not meet the interests of justice. The trial court did not provide Arroyo an opportunity to withdraw his guilty plea.

By failing to comply with the requirements of RCW 9.94A.431 and in failing to advise Arroyo that it was not bound by the prosecutor's recommendation as to sentence, the trial court's omissions rendered Arroyo's guilty plea involuntary, because it failed to provide him with critical information needed to evaluate the guilty plea. The judgment and sentence should be reversed and the case remanded to permit Arroyo to consider whether to withdraw his guilty plea.

## **II. ASSIGNMENTS OF ERROR**

ASSIGNMENT OF ERROR 1: The trial court erred in failing to follow the requirements of RCW 9.94A.431 before accepting Arroyo's guilty plea.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Did the trial court err in failing to consider, on the record, whether the plea agreement reached was consistent with the interests of justice and prosecuting standards? YES.

**ISSUE 2:** Did the trial court err in failing to inform Arroyo that he was not bound by the prosecutor's sentencing recommendation? YES.

**ISSUE 3:** Did the trial court err in failing to inform Arroyo that he may withdraw his guilty plea? YES.

### **IV. STATEMENT OF THE CASE**

The State charged Arroyo with Escape from Community Custody and Possession of a Controlled Substance by a Prisoner, both Class C felonies. Clerk's Papers (CP) 10. No pretrial matters were raised under CrR 3.5 or 3.6.

Arroyo entered a guilty plea on April 13, 2012. CP 13. The statement of defendant on plea of guilty stipulated to an offender score of 1 on count 1, with a standard range of 2-4 months; and an offender score of 3 on count 2, with a standard range of 0-12 months. CP 14. In accepting the guilty plea, the trial court engaged in a colloquy with Arroyo, who stated that he understood the statement, reviewed it with his

counsel, and signed it. RP 2-3. The court also reviewed the standard range for both counts, which Arroyo stated he understood. RP 4.

At the time of the guilty plea, the trial court did not inform Arroyo that he was not bound by the prosecuting attorney's recommendation, did not determine on the record whether the recommendation met the interests of justice and prosecution standards, and did not indicate that he perceived any injustice in the agreed sentencing recommendation. RP 1-10.

At sentencing, the parties argued for a sentence of 62 days with credit for all of the days served. RP 11, 13. The trial court did not follow the recommendation, stating,

[T]hese two crimes certainly indicate to me a total lack of respect for the judicial system, for the criminal justice system, for probation, for the jail. And escape from community custody and possession of a controlled substance by a prisoner just basically flaunts your ability to commit crimes and tells the authorities you don't have to comply with the rules that apply to you. So, therefore, I do not believe a sentence at the low end of the range is appropriate in this case.

RP 15.

The trial court imposed a sentence of 180 days on count 2 and 160 days on count 1. RP 15. Both sentences were within the standard range. Again, the trial court did not provide Arroyo with an opportunity to withdraw his

guilty plea after acknowledging that it did not consider the agreed sentence recommendation to be in the interests of justice. RP 11-17.

Arroyo appeals. CP 42.

### **V. ARGUMENT**

Under RCW 9.94A.431, when accepting a plea agreement, the trial court is required to determine if the agreement is consistent with the interests of justice and with prosecuting standards. If the court determines it is not consistent with the interests of justice and with prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

While it is well established that a trial court is not obliged to follow an agreed sentencing recommendation, RCW 9.94A.431 provides protections to defendants by ensuring that they fully understand that the plea agreement is not binding, and by establishing an opportunity to withdraw a guilty plea when a trial court does not agree that the recommendation serves the interests of justice. Here, the trial court failed to advise Arroyo that it was not obligated to follow the plea agreement.

As a result, Arroyo lacked a full and fair understanding of the consequence of his guilty plea, rendering the plea involuntary.

In *U.S. v. Kennell*, 15 F.3d 134 (1994), the Ninth Circuit Court of Appeals vacated a judgment and sentence entered after a guilty plea when the defendant was not advised that the trial court was not bound by the sentencing recommendation. The *Kennell* court held that “the district court’s error cannot be overlooked as a ‘variance from the procedures required by this rule which does not affect substantial rights.’” 15 F.3d at 137 (citation omitted). It further stated,

Our cases teach that the failure of a district judge to give a defendant, who otherwise does not fully understand his rights, one of several warnings required by Rule 11 during the defendant's plea allocution is reversible error. *United States v. Graibe*, 946 F.2d [1428, 1433 (9th Cir. 1991)] (defendant who is unaware of the substantial uncertainty inherent in entering a type (B) plea “does not enter his plea intelligently and knowingly.”); *United States v. Jaramillo-Suarez*, 857 F.2d 1368 (9th Cir.1988) (reversible error for district court not to advise defendant, prior to accepting plea, of maximum sentence allowed); *Carter v. McCarthy*, 806 F.2d 1373 (9th Cir.1986), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987) (reversible error not to advise defendant of mandatory parole term prior to accepting plea).

*Kennell*, 15 F.3d at 137.

This court has previously considered the implications of a trial court’s failure to advise a defendant of the right to withdraw a

guilty plea if the trial court declined to follow the prosecutor's recommendation in *State v. Weaver*, 46 Wn. App. 35, 729 P.2d 64 (1992). However, *Weaver* is inapplicable to the present case for a number of reasons. First, in *Weaver*, the trial court found that there was no plea bargain agreement because there was no benefit to either party; thus, presumably, the requirements of RCW 9.94A.431 (then codified as RCW 9.94A.090(1)) did not apply. 46 Wn. App. at 38. Second, in *Weaver*, the trial court specifically informed the defendant that it was not bound by the prosecuting attorney's sentencing recommendation. *Id.* Where, as in this case, the trial court did not give Arroyo any such advisement, *Kennell* establishes the appropriate standard.

“Due process requires that a defendant's plea be knowing, voluntary and intelligent.” *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001)). Both RCW 9.94A.431 and the case law establish that the defendant must be advised at the time of entering the plea that the trial court is not obligated to follow it. *State v. Henderson*, 99 Wn.

App. 369, 374, 993 P.2d 928 (2000) (*citing State v. Jones*, 46 Wn. App. 67, 70, 729 P.2d 642 (1986)).

The purpose for such a requirement seems apparent: the defendant should not be improperly induced to plead guilty in exchange for a sentence recommendation that is plainly inappropriate and contrary to the interests of justice. Requiring that the trial court advise the defendant that it need not follow the sentence recommendation, determine whether the agreement meets the interests of justice, and provide the defendant with an opportunity to withdraw his guilty plea in the event the trial court rejects the agreement, serves to ensure that plea agreements are based on a knowing calculation and assumption of the risk of an adverse sentencing decision. In the present case, Arroyo was deprived of the information he needed to determine whether the plea agreement was in his best interests.

## **VI. CONCLUSION**

Because the trial court failed to comply with RCW 9.64A.431 and did not advise Arroyo that it was not obligated to follow the plea

agreement, the plea is invalid and the judgment and sentence should be reversed.

RESPECTFULLY SUBMITTED this 2<sup>th</sup> day of August, 2012.



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## DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 24th day of August, 2012 in Walla Walla, Washington.

  
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Andrea Burkhart