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JANUARY 5, 2015

Court of Appeals
Division III
State of Washington

32357-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

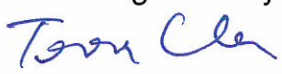
JOSE F. MANDUJANO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction of the Appellant.

III. ISSUE

Was the Defendant's guilty plea voluntarily made where his own Statement of Plea of Guilty acknowledges the indeterminate sentencing requirement and where there is no indication on the record of any contrary understanding?

IV. STATEMENT OF THE CASE

The Defendant Jose Fidel Mandujano was charged with rape of child in the first degree and three counts of child molestation in the first degree against DJG. CP 67-68. All counts regard offenses occurring in 2007 or 2008. CP 67-68. Any sentence of such an offense is mandated under RCW 9.94A.507 to be of indeterminate term with a minimum term within the standard range (unless an

exceptional sentence is appropriate) and with a maximum term of life.

The Defendant pled guilty to the child rape and a single count of child molestation in the first degree. CP 55-66. He acknowledged the crimes in the presentencing interview. CP 48. The offenses were against a 6-7 year old child in the Defendant's wife's daycare. CP 35. DJG disclosed the abuse in order to stop the Defendant's molestation of DJG's younger sibling. CP 36, 51-53.

In the Defendant's Statement on Plea of Guilty, the Defendant acknowledges that "For sex offenses committed on or after September 1, 2001," if the offense is one enumerated in subsection (aa), then "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range" or outside the range if an exception sentence is imposed. CP 57. Both rape of a child in the first degree and child molestation in the first degree are offenses listed at subsection (aa). CP 57. The Defendant's statement acknowledges that the statutory maximum sentence of the offense is life. CP 56.

At the ends of the statement, the Defendant signed his name directly below the paragraph reading:

> My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of the "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 63.

The Defendant's attorney signed his name directly below the paragraph reading:

> I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

CP 63.

At the change of plea hearing, in response to oral inquiries by the Honorable Judge VanderSchoor, the Defendant acknowledged out loud that he had had a chance to review the statement with his attorney, understood the statement, and understood the maximum term. 9/17/13 RP 3-4.

> THE COURT: Have you had a chance to review this statement of defendant with your attorney?
>
> DEFENDANT THROUGH INTERPRETER: Yes.
>
> THE COURT: And do you understand the statement.
>
> DEFENDANT THROUGH INTERPRETER: Yes.
>
> THE COURT: Do you understand by signing this

> statement you are voluntarily pleading guilty to the charges of rape of a child in the first degree and child molestation in the first degree?
>
> DEFENDANT THROUGH INTERPRETER: Yes, I understand.
>
> THE COURT: Do you understand the first of those carries a standard range of 129 months to 171 months with a maximum term and fine of life and $50,000 and the second has a standard range of 72 to 96 months with a maximum term and fine of life and $50,000. Do you understand that?
>
> DEFENDANT THROUGH INTERPRETER: Yes.

9/17/13 RP 3-4.

Prior to the sentencing hearing, the Department of Corrections prepared a Pre-Sentencing Investigation. CP 35-54.

The report explains the mandatory indeterminate sentence:

> ... the sentence must contain a minimum term of confinement that falls within the standard range and a maximum term equaling the statutory maximum for the offense, which in this case is life. ... the sentence must be served in a Department of Corrections prison facility in order to be assessed by the Indeterminate Sentencing Review Board.
>
> ....
>
> The End of Sentence Review Board will set a presumptive risk level and the Department of Corrections will perform a risk assessment and recommend conditions of Community Custody to the ISRB. Prior to the end of the minimum term, the ISRB will determine the likelihood of Mr. Mandujano committing any new sex offense. If his risk for

> recidivism is low, the ISRB will set a release date and impose conditions of Community Custody. If the risk is high, the ISRG will deny release, and set a new minimum term not to exceed two years.
>
> ....
>
> At the end of the minimum term or a later time, if found by the ISRB to be "reasonable," Mr. Mandujano will then release to Community Custody Under both ISRB and the Department of Corrections Supervision. Mr. Mandujano will be supervised in the community for life. Conditions may be modified while on Community Custody by both the Department of Corrections and the ISRB. Hearings for violation behavior will be conducted by the ISRB and could result in revocation, which could result in life imprisonment.

CP 42.

At the sentencing hearing, Judge Vanderschoor imposed a minimum term within the standard range ("120 months on Count I. 96 months on Count II") and imposed the statutorily required maximum term ("with a maximum of life.") 10/29/13 RP 3, ll. 22-23. However, the judge wrote the minimum terms in the wrong section of the judgment and sentence at 4.5(a), rather than at 4.5(b) which is the proper section for sentences of offenses of this type. CP 26.

Catching the error, the prosecutor requested the judgment be amended. 2/25/14 RP 3-4.

Defense counsel did not claim that at the time of the change of plea the Defendant failed to understand that he was facing an

indeterminate sentence. Instead counsel argued that the judge had not made a mistake, but had actually intended to enter a determinate (and, therefore, unlawful) sentence on these offenses. 2/25/14 RP 3-5. Judge Vanderschoor disagreed and entered the amended judgment reflecting the minimum and maximum terms of an indeterminate sentence -- in both sections 4.5(a) and 4.5(b) for good measure. CP 11; 2/25/14 RP 5.

V. ARGUMENT

THE DEFENDANT'S GUILTY PLEA WAS VOLUNTARILY MADE WITH KNOWLEDGE AND UNDERSTANDING OF THE INDETERMINATE SENTENCE REQUIREMENT.

The court will permit a defendant to withdraw a plea "whenever it appears the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). This is a demanding standard. *State v. Bao Sheng Zhao*, 157 Wn.2d 188,197, 137 P.3d 835 (2006); *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974) (the presence of greater safeguards in CrR 4.2 at the time of a plea of guilty mean that courts should exercise greater caution in setting aside a guilty plea once the safeguards have been employed) (the "manifest injustice" requirement has been recognized as a "demanding standard").

In this appeal, the Defendant does not maintain his argument that the superior court intended to and had authority to enter a determinate sentence, contrary to RCW 9.94A.507(3). Rather the Defendant alleges for the first time that he did not know his convictions "required an indeterminate sentence consisting of a maximum term of life and a minimum term of confinement." Appellant's Brief at 3. He acknowledges that this challenge is raised for the first time on appeal. Appellant's Brief at 3.

Because it is raised for the first time on appeal, the argument is without support in the record. The only record in this case is:

- the Defendant's own Statement on Plea of Guilty which provides the correct sentencing information (CP 57),
- the Defendant's signature and oral statement affirming he understood this information (CP 63), and
- the judge's correct statement at the plea hearing regarding the maximum term (9/17/13 RP 4).

In February, the Defendant tried to take advantage of an error in the judgment and sentence. 2/25/14 RP 3-5. But the Defendant's argument then was NOT that he was misinformed of the consequences of his guilty plea. Instead the Defendant tried to

convince the judge that the error had been intentional. This argument was inconsistent with the judge's oral statement at the original sentencing hearing. 10/29/13 RP 3, ll. 22-23 (imposing minimum terms of 129 and 96 months "with a maximum of life."). The same judge who sentenced the Defendant corrected the error, thereby definitively demonstrating the judge's true original intention to impose the statutorily required indeterminate sentence.

A voluntary plea is one that is made with an understanding of the consequences. CrR 4.2(d). The Appellant's Brief claims the Defendant did not understand that the offenses he was pleading to would require indeterminate sentences. He claims that the facts in his case are "very similar" to those in *In re Murillo*, 134 Wn. App. 521, 142 P.3d 615 (2006). Appellant's Brief at 6. The facts are not very similar.

In Mr. Murillo's case, during the guilty plea hearing, the judge indicated that he *could not* impose a sentence greater than the standard range and never mentioned the maximum term of life. *In re Murillo*, 134 Wn. App. at 525. The judge appeared to focus on the need for a legislative fix to *Blakely v. Washington*, a discussion which could have been misinterpreted by the defendant. *In re Murillo*, 134

Wn. App. at 526 ("I have to impose a sentence within that range. I guess I can go low, but I cannot go above under the present law."). In the instant case, the judge correctly informed the Defendant that he was facing a maximum term of life. 9/17/13 RP 4.

In Mr. Murillo's case, his challenge arose in a personal restraint petition to which he attached deposition materials from a class action lawsuit challenging the quality of county public defenders. *In re Murillo*, 134 Wn. App. at 528 (referencing *Best v. Grant County*). In the instant case, the challenge arises in a direct appeal. The record contains no materials similar to the content provided in Mr. Murillo's deposition materials.

Mr. Murillo's trial attorney testified by deposition that he failed to speak with his client about the life maximum. *Id.* In the instant case, there is no such statement. Although the Defendant alleges that he was misinformed by his attorney (Appellant's Brief at 7), he does not cite any record and there is no record in support of this allegation.

Mr. Murillo testified by deposition that his counsel affirmatively misled him about the consequences of his plea, telling him that the maximum time he would serve was the standard range. *In re Murillo*,

134 Wn. App. at 528. In the instant case, there is no such evidence of affirmative misrepresentation.

Mr. Murillo testified that he would not have pled guilty had he known that he faced a possible life sentence. *Id.* There is no such statement in the instant case. Mr. Murillo will be deported upon completion of his confinement. CP 43.

Unlike in *Murillo*, here there is no record that the Defendant misunderstood or was misled about the sentence he was facing. On the contrary, the record is that the Defendant understood the consequences of his plea.

The Defendant claims that he was misinformed by his attorney and the judge. Appellant's Brief at 7. There is no record to support this claim. The Statement prepared by counsel correctly informs of the punishment. CP 57. The judge correctly advised of the maximum life term at the plea hearing, and the Defendant acknowledged his understanding. 9/17/13 RP 4. A month later, after the Defendant had already pled guilty such that nothing new said could bear on the voluntariness of the plea, the judge correctly imposed a minimum term "with a maximum of life" in his oral ruling. 10/29/13 RP 3.

The Defendant claims that he was misinformed because he

does not speak English. Appellant's Brief at 7. There is no evidence that the Defendant was misinformed, much less that he was misinformed due to a language difficulty. The record is that the Defendant was represented by George Trejo (a Spanish speaking attorney) and that court-certified interpreter Ana Armijo read the entire Statement to the Defendant. CP 63-64.

The Defendant implies that the superior court is required to read the guilty plea statement aloud to the Defendant at his change of plea hearing. Appellant's Brief at 7-8. This is incorrect. The court must be satisfied that the plea is voluntary before accepting it. CrR 4.2(d). That is accomplished by the Defendant's lengthy Statement and some additional inquiry. There is no requirement that the court repeat to the Defendant the information already contained in the Statement which the Defendant has read and says he understands.

The record demonstrates the voluntariness of the Defendant's guilty plea. The court did not err in accepting the plea.

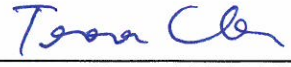
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: January 5, 2015.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 5th day of January, 2015, a copy of the foregoing was delivered to Jose Fidel Mandujano #369079, Appellant, 1830 Eagle Crest Way, Clallam Bay, WA 98326 by

depositing in the mail of the United States of America a properly stamped and addressed envelope and to David Gasch, opposing counsel, gaschlaw@msn.com by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 5th day of January, 2015.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018