

FILED
AUGUST 10, 2016
Court of Appeals
Division III
State of Washington

NO. 33854-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN HOYT,

Appellant.

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

The Honorable Cameron Mitchell, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THE PLEA FORM AND ASSOCIATED COLLOQUY FAILED TO MAKE CLEAR THAT ANY PORTION OF HOYT'S SENTENCE MUST BE SERVED WITHOUT THE ABILITY TO EARN EARLY RELEASE CREDITS.....	1
2. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR REGARDING TWO SCRIVENER'S ERRORS IN HOYT'S JUDGMENT AND SENTENCE AND REMAND FOR CORRECTION OF ALL THREE SCRIVENER'S ERRORS.....	7
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Kinnaman
180 Wn.2d 197, 322 P.3d 1217 (2014)..... 4, 5

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

A. ARGUMENTS IN REPLY¹

1. THE PLEA FORM AND ASSOCIATED COLLOQUY FAILED TO MAKE CLEAR THAT ANY PORTION OF HOYT'S SENTENCE MUST BE SERVED WITHOUT THE ABILITY TO EARN EARLY RELEASE CREDITS.

On appeal, Hoyt asserts he was misinformed about the nature of the sentence he would receive by pleading guilty. BOA at 6-11. Specifically, Hoyt argues he should be allowed to withdraw his plea because the plea agreement failed to inform him that 24 months of whatever sentence imposed would have to be served in total confinement (not subject to reduction by earned early release credits) and consecutive to all other sentencing terms.

In response, the State argues Hoyt was not misinformed about the consequences of pleading guilty because:

*the information made clear he was charged with a deadly weapon enhancement;

¹ Hoyt responds herein to the State's arguments in response regarding the validity of the guilty pleas and the scrivener's errors. The State's claim that Hoyt waived any challenge to the imposition of Legal Financial Obligations (LFOs) was anticipated in the opening brief and will not be address here. Amended Brief of Appellant (BOA) at 14-16. Finally, undersigned counsel has not responded to the State's arguments in it Brief of Respondent (BOR) addressing Hoyt's ineffective assistance of counsel claim in his associated personal restraint petition, as counsel does not represent Hoyt in that context.

*the plea statement indicated "he was charged with Robbery in the First Degree with a deadly weapon-- meaning deadly weapon enhancement [sic];"

*he initialed a section on the plea form acknowledging that he had been charged with one of several possible sentence enhancements and that such enhancement must be served in total confinement and consecutive to all other sentences;

*his plea statement admits committing the robbery while armed with a knife with a blade longer than three inches; and

*because Hoyt had been convicted by a jury of the same offense, which included the deadly weapon enhancement and been sentenced as such, only to have the judgment and sentence reversed on appeal.

BOR at 4-9.

The State's factual assertions are, for the most part,² accurate. But they miss the point. As set forth in Hoyt's opening brief, the plea statement signed by Hoyt (CP 41-49), a copy of which is attached as Appendix B to the opening brief, provides he is charged with "Robbery I - deadly wpn" and "Burg I". BOA at Appendix B at 1. It also informs that the "STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)" is "153-195" and "87-116", with a "MAXIMUM TERM

² The State's claim that Hoyt "was charged with Robbery in the First Degree with a deadly weapon" is correct. BOR at 5. But the State's added language - "meaning deadly weapon enhancement [sic]"- is not, and should be disregarded by this Court.

AND FINE" of "20yr-life 50k." BOA at Appendix B at 2 (emphasis added). There is no term of confinement listed under the section titled "PLUS Enhancements*." Id. The statement includes a paragraph, initialed by Hoyt, which acknowledges the offense or offenses being pled to include a "deadly weapon, firearm, or sexual motivation enhancement." BOA at Appendix B at 7. Finally, it provides the prosecution will recommend a sentence of 171 months, to be served consecutive to Hoyt's Oregon sentences, plus community custody and restitution. BOA at Appendix B at 4.

It is the failure to designate any portion of the proposed 171-month sentence for the robbery conviction that was affirmatively misleading and is why Hoyt should be entitled to withdraw his guilty pleas. The plea statement affirmatively misrepresents the entire proposed term as "STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)." Appendix B at 2 (emphasis added). Although 24 months of the term was suppose to be for the deadly weapon enhancement, that is not what the plea form stated. Nor did the trial court's plea colloquy with Hoyt correct the problem. See 3RP 3-6.

As argued in the opening brief, under State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006), a defendant may withdraw a guilty plea when the plea is based on misinformation regarding the direct

consequences of the plea, including a misrepresented standard range. BOA at 6-11. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." 157 Wn.2d at 591.

Curiously, the State's relies on State v. Kinnaman, 180 Wn.2d 197, 322 P.3d 1217 (2014), to assert Hoyt is not entitled to withdraw his pleas. BOR at 9. Kinnaman provide no support for the State's position.

Kinnaman was charged with attempting to elude with a special sentence enhancement allegation that he endangered others besides himself and the pursuing officer. Kinnaman pled guilty as charged, including to the special endangerment finding, which added 12 months and 1 day to the standard range sentence. At sentencing, however, Kinnaman moved to withdraw a portion of his plea -- only the special endangerment finding -- after he learned the State had no witnesses, arguing the State had insufficient evidence to support finding. The trial court denied the motion, ruling Kinnaman waived any evidentiary challenge by pleading guilty and agreeing to the special finding. 180 Wn.2d at 199.

On appeal, Kinnaman argued he should be allowed to withdraw his plea to the special finding because it had no evidentiary support. He also argued for the first time that the sentence enhancement imposed "was

contrary to law due to a mutual mistake because he agreed to and was sentenced to an additional 12 months but the statute defining the enhancement mandated an additional 12 months and one day." Id. Kinnaman argued that when parties agree to an illegal sentence, "the defendant should be allowed to withdraw 'that part of the plea.'" Id. The Court of Appeals, Division Two, concluded the mistake in the plea form rendered the plea involuntary, and noting plea agreements are indivisible, remanded for the trial court to vacate the plea. Id. at 199-200. The Washington Supreme Court granted Kinnaman's petition for review, which argued "that his plea agreement is divisible in that he should be allowed to withdraw only his agreement to the special finding." Id. at 200.

In reversing Division Two, the Supreme Court noted the sentence imposed conformed with the law, so was not in excess of the trial court's authority. It also noted Kinnaman never argued his plea was involuntary and never sought to withdraw the entire plea. And because pleas are indivisible, Kinnaman could not have the relief requested, which was only to vacate the sentence enhancement portion. Id.

The State misrepresents the Kinnaman decision in its response brief, claiming Kinnaman "argued to the trial court that he should be allowed to withdraw his plea . . ." BOR at 9. Instead, Kinnaman argued he should be allowed to withdraw only a portion of his plea. 180 Wn.2d at

199. This is a significant misrepresentation because it is necessary for the State argument, which seems to be that because the sentence imposed on Hoyt complies with the applicable sentencing statute, he is precluded from withdrawing his plea. This is not what Kinnaman holds. Kinnaman reaffirms that pleas are indivisible, and makes clear that if you ask for relief on appeal that cannot be granted under the law, you will lose. It provides no support, however, for the State's claim that despite errors in the plea form, if the sentence imposed conforms to the law, then a defendant may not withdraw his plea. There is no support in Kinnaman or any other case for this faulty proposition.

As argued in the opening brief, Hoyt was never properly advised that 24 months of the agreed 171-month sentence recommendation would be served as a deadly weapon enhancement and therefore not subject to reduction through earned early release credits. This failure renders Hoyt's guilty pleas unknowing, involuntary and unintelligent, and therefore invalid. This Court should therefore reverse and remand for Hoyt to withdraw his pleas. Mendoza, 157 Wn. 2d at 584.

2. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR REGARDING TWO SCRIVENER'S ERRORS IN HOYT'S JUDGMENT AND SENTENCE AND REMAND FOR CORRECTION OF ALL THREE SCRIVENER'S ERRORS.

The State correctly concedes Hoyt's judgment and sentence erroneously indicates he was convicted by "jury-verdict" on all three charges (robbery, burglary and theft), and erroneously indicates "the court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." BOR at 10. This Court should accept those concessions.

But the State does not concede enough. For example, the State states it "will agree to change" the judgment and sentence to indicate Hoyt was "found guilty on 7-8-08 by plea." BOR at 10. But this too would be an incorrect statement, as Hoyt was found guilty of the theft charge by jury-verdict, and only the burglary and robbery conviction were the result of a plea. CP 6-15, 18-28, 41-49.

The State also fails to recognize the error in section 4.4 of Hoyt's judgment and sentence, offering instead that it "is willing to listen to ways to improve on the language from [section 4.4], but it appears to properly set out the sentence and the enhancement." BOR at 10. As noted in the opening brief, section 4.4 fails to clearly indicate that 24 months of the

171-month sentence are the result of a deadly weapon sentence enhancement because the box associated with that provision is not marked, and therefore is not clearly applicable. BOA at 5-6, 12. This Court should remand for correction of that error, unless of course Hoyt is instead allowed to withdraw his pleas.

B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse the robbery and burglary convictions and the sentences for all three offenses and remand. And even if this Court does not reverse the convictions, remand is still necessary to correct several identified scrivener's errors and for the trial court to engage in a meaningful inquiry into Hoyt's ability to pay the LFOs imposed.

Dated this 10th day of August 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Justin Hoyt

No. 33854-1-III

Certificate of Service

On August 10, 2016, I e-served and mailed the reply brief directed to:

Andrew Miller
Benton County Prosecutors Office
Via Email Per Agreement prosecuting@co.benton.wa.us
andy.miller@co.benton.wa.us

Justin Hoyt, 320994
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

Re Justin Hoyt

Cause No. 33854-1-III, in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

08-10-2016

Date

Done in Seattle, Washington