

No. 79127-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN SHANNON CODIGA,

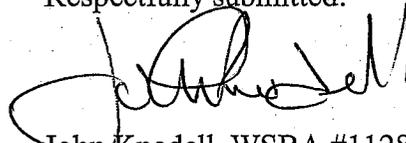
Petitioner.

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PETITION FOR REVIEW

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:



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I. SUPPLEMENTAL ARGUMENT

In coming to its decision, this Court should consider:

- Whether a criminal defendant who pleads guilty is entitled in all cases to know his standard range in advance of his sentencing hearing, although the sentencing hearing is the time when the court resolves offender score challenges.
 - Whether a defendant, who is specifically advised at the time he enters a guilty plea by this Court's language in CrR 4.2(g) that his that his standard range may increase if additional criminal history is found, is entitled to withdraw his plea if criminal history is found before sentencing and his range increases, even if that defendant does not even claim that he relied upon any misrepresentation about his criminal history in deciding to enter his plea.
 - Whether a criminal defendant, who pleads guilty, discovers a change in his standard range, but proceeds with sentencing anyway, has waived his right to withdraw his plea after sentencing.
- A. THE DEFENDANT CANNOT DEMONSTRATE A MANIFEST INJUSTICE JUSTIFYING A WITHDRAWAL OF HIS GUILTY PLEA.

After the Defendant entered his guilty plea, the Department of

Corrections discovered criminal history which was not known to the prosecution at time the Defendant entered that plea. Petitioner argues that because the discovery of this additional criminal history resulted in an increase in his standard range, he now has a right to withdraw his plea.

However, such a step cannot be lightly taken. There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); In re Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). The heavy burden of establishing the propriety of withdrawal is upon the defendant. State v. Osborne, 35 Wn.App. 751, 759, 669 P.2d 908 (1983).

The instant petition raises two separate issues which must not be confused. The first is whether the Defendant was advised of all the direct consequences of his plea. The second is whether he may do so because some defect in the agreement process renders the plea agreement voidable under principals of general contract law.

A defendant may withdraw his guilty plea only if it was invalidly entered or if its enforcement would result in a manifest injustice. CrR 4.2(f); In re Isadore, 151 Wn.2d 294, 297-98, 88 P.3rd 390 (2004). Manifest injustice, however, is a broad term. This court should not treat all claims

falling within its rubric identically, especially when they present qualitatively different problems involving the vindication of fundamentally different values. The defendant who asserts the right to withdraw his plea because he was not advised his sentence would necessarily include mandatory community placement presents a problem entirely different from the defendant who seeks to withdraw his plea because the court discovers he has more criminal history than that known to the court at the time of the defendant's plea. Traditionally, our law has required courts to inform defendants on the record of fundamental legal principles affecting their rights, but has generally discouraged courts from advising criminal defendants about factual matters or the way law is applied to facts. This function has traditionally been served by the defense attorney.

Therefore, our courts have been more willing to allow defendants to withdraw guilty pleas where courts have failed to advise or misadvised defendants about matters of law and to allow them to do so on lesser showings, than in those cases where defendants have claimed they were misadvised about factual matters, or matters within the court's discretion.

The trial court advised the defendant of the direct consequences of his plea by giving him enough information to adequately apprise him of the risks and benefits of pleading guilty.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996), citing State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1990).

A "direct" consequence is one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Examples of direct consequences are the statutory maximum sentence (State v. Vensel, 88 Wn.2d 552, 555, 564 P.2d 326 (1997)), ineligibility for the special sex offender sentencing alternative program (State v. Kisse, 88 Wn.App. 817, 822, 947 P.2d 262 (1997) (defendant improperly advised that the crime to which he pled was a sex crime)), the obligation to pay restitution (State v. Cameron, 30 Wn.App. 229, 233, 633 P.2d 901, rev denied, 96 Wn.2d 1023

(1981)), mandatory community placement (State v. Ross, 129 Wn.2d at 284), mandatory consecutive sentences (In re Williams, 21 Wn.App. 238, 240, 583 P.2d 1262 (1978)), and any mandatory minimum term (Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976)). In all of these cases, the identified “direct consequence” was one which automatically inhered to the crime to which the defendant pled guilty and applied independently of the defendant’s criminal history and offender score.

As one Court has observed:

The common thread of definitive and additional punishment weaves through each “direct” sentencing consequence. See Berry v. United States, 412 Fd.2d 189, 192 (3rd Cir. 1969) (“When one enters a plea of guilty he should be told what the worst to expect. At the plea he is entitled to no less-- at sentence he should expect no more.”); 5 Wayne R. LaFave et al., Criminal Procedure sec 21.4(d), at 167 (2nd ed. 1999) (“Traditionally, the emphasis in the case law has been upon the requirement that the judge inform the defendant of the maximum possible punishment.”) (quoting ABA Standards Relating to Pleas of Guilty 27 (Approved draft, 1968)). In Ross, 129 Wn.2d at 285, our Supreme Court recognized as much: “To identify a punishment in the context of a direct consequence of a guilty plea, we examine whether the effect enhances the defendant’s sentence or alters the standard of punishment.” (citing State v. Ward, 123 Wn.2d 488, 513, 869 P.2d 295 (1994) and Barton, 93 Wn.2d at 306). And in Isadore, 151 Wn.2d at 302, the court specifically noted that it “adhere[d] to the analytical framework applied in Ross.”

In re Matthews, 128 Wn.App. 267, 272, 115 P.3d 1043 (2005).

One court has stated “a sentencing range represents ... a definite, immediate and largely automatic effect on the defendant’s punishment.” State v. Paul, 103 Wn.App. 487, 495, 12 P.3d 1036 (2000), citing State v. Perkins, 46 Wn.App. 333, 338, 730 P.2d 712 (1986) (disapproved on other grounds by State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988)). But this assertion should be read as recognizing the court’s obligation under CrR 4.2 to advise the defendant of a sentencing range based upon the court’s best understanding of the defendant’s offender score at the time the defendant entered his guilty plea and how that range is ultimately determined.

This is demonstrated by the Paul case itself. There, the defendant claimed the right to withdraw his guilty plea because he was not advised “what the sentencing range was.” Paul, 103 Wn.App. at 494. However, at the time the defendant entered his guilty plea, there was uncertainty and dispute between the parties about the defendant’s offender score. The defendant’s score was also increased unexpectedly when his sentencing was delayed until after he was sentenced in another county for additional felonies. Id. at 496. Nonetheless, the appellate court rejected the defendant’s assertion of a right to know his ultimate sentencing range and pointed out that the defendant, when he plead guilty, assumed the risk that his sentencing range could

change. Id. at 496-97.

Furthermore, the authority the Paul court cited does not stand for the proposition that a sentencing range is a direct consequence of a plea agreement. In Perkins, the defendant was allowed to withdraw his plea because prior to the entry of that plea, the prosecution misinformed him by advising that his juvenile criminal history did not contribute to his offender score. State v. Perkins, 46 Wn.App. at 336. The court in Perkins states not that the sentencing range itself is a definite, immediate and largely automatic effect on a defendant's punishment, but only that "advice about the sentencing range" is a direct consequence of the plea. Id. at 338.

The difference is significant. When dealing with motions to withdraw guilty pleas based upon some defect in the guilty plea process, our courts have consistently treated those cases where a manifest injustice has occurred due to failure to inform a defendant of a direct consequence of his plea (see In re Isadore, supra) differently from those where the defendant was induced to enter his guilty plea based upon misinformation given to him by the State. Cf. State v. Walsh, supra; State v. Paul, supra.

B. THE DEFENDANT WAS ENTITLED ONLY TO KNOW BEFORE HE PLED GUILTY THAT THE COURT WOULD SENTENCE HIM TO NO MORE THAN THE STATUTORY MAXIMUM, WITHIN A SENTENCING RANGE, AND HOW THAT RANGE WOULD BE DETERMINED.

Unlike a mandatory minimum sentence, the standard range ultimately determined by the trial court is not automatic. The court must determine the Defendant's standard range at a hearing conducted after his conviction by plea or trial. RCW 9.94A.500(1). It does so based upon the seriousness of the offense and the defendant's criminal history. RCW 9.94A.510, .525. The drafters of the Sentencing Reform Act apparently did not believe a defendant should rely solely upon the State's understanding of his criminal history. Both the prosecuting attorney and the defendant must provide to the trial court their "understanding" of what the defendant's criminal history is. RCW 9.94A.441.

Scoring criminal history often requires the court to make a number of factual determinations such as whether or not any of the Defendant's criminal history encompasses the same criminal conduct. RCW 9.94A.525(5)(a)(i). These determinations often are necessary to resolve outstanding significant disputes between the parties as to the correct standard range. See State v. Paul, supra. Accordingly, there is no way for either party to know the correct

standard range for certain at the time of the entry of plea.

The court, in reality, must advise the defendant of the worst case scenario based upon the best information available to the State. The plea statement may therefore include criminal history with which the defendant disagrees -- which may or may not be scored by the court in a manner consistent with the defendant's position. The most the court can say to the defendant at entry of a guilty plea is "if you plea guilty, you will have to pay restitution if the court finds that the victim has suffered out of pocket expense, you may be supervised, and if your offender score is as listed in the plea agreement, and if the court scores that criminal history in the way that the prosecution has done, the court will sentence you within the standard range given in your statement of plea of guilty unless in its discretion it goes below the range." See State v. Paul, *supra*. In other words, far from being an automatic result of a plea, there is a great deal of uncertainty in the sentencing process regarding the standard range which neither the State nor the defendant can avoid.

This reading of the case law is bolstered by Division Two's analysis in State v. Moore, 75 Wn.App. 166, 876 P.2d 959 (1994). There, the court allowed the defendant to withdraw his guilty plea because before he pled

guilty, he disclosed additional criminal history to the prosecutor who mistakenly assured the defendant it would not affect his offender score. The court stated, however:

Our ruling is narrow. We hold only that a defendant is entitled to set his or her plea aside, when the defendant has disclosed a prior conviction before the plea; both counsel told him it would not count as part of his standard range; and he entered the plea with that understanding. We acknowledge that there may be other situations in which a guilty plea will be valid if the defendant understand that the *judge* determines the standard range at a *sentencing* proceeding, based upon the defendant's criminal history as it then appears; that any range discussed by the *parties* at a *plea* proceeding is necessarily tentative; and that to plead guilty is to assume the risk that the standard range established at the sentencing will be higher than the standard range discussed at the plea.

State v. Moore, 75 Wn.App. at 174.

To require the State to divine the ultimate sentencing range prior to the sentencing hearing is to put the State in an untenable position in every case where there is any dispute about the standard range. Even erring on the side of caution and advising a defendant of the worst case scenario is no guarantee that a defendant will not seek to withdraw his plea on the grounds that his standard range was actually lower than he had been advised by the court. State v. Mendoza, 157 Wn.2d 582, 141 P.3d 349 (2006). A criminal defendant, who is presumably in a better position to know his own criminal

history, particularly where that history may be as in the instant case out of County, or even out of State, will, by remaining silent, in many cases be able to unfairly vacate his plea agreement.

This does not mean, however, that the defendant who was misinformed about his standard range is without recourse to withdraw his plea in the appropriate circumstances. It means only that the defendant who has been advised of the statutory maximum for the offense to which he is pleading, and is also advised that he will be sentenced within the standard range and how the range will be computed, has been informed of all of the “direct” incarceration consequences of his plea. See State v. Moore, supra.

1. *A true “meeting of the minds” occurred when the defendant pled guilty in the instant case.*

To a great extent, plea bargains are construed, and enforced in a manner consistent with general contract law. In addition to due process requirements, a knowing, voluntary, and intelligent guilty plea requires a meeting of the minds. State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988). This cannot occur unless the defendant possesses an understanding of the law in relation to the facts. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1990). But in addition, as with any contract, a true meeting of the minds may not occur and a plea agreement may be voidable due to mutual mistake

by the parties (see Simonson v. Fendell, 101 Wn.2d 88, 675 P.2d 1218 (1984)), unilateral mistake by an aggrieved party (see Town of La Conner v. American Cons. Co., Inc., 21 Wn.App. 336, 585 P.2d 162 (1978)), or misrepresentation by one of the parties (see Williams v. Joslin, 65 Wn.2d 696, 399 P.2d 308 (1965)).

Thus, a guilty plea is not knowingly made when it is based upon misinformation about sentencing consequences, even if the Defendant has been advised of the direct consequences of his plea. State v. Miller, 110 Wn.2d. at 531. In those cases where a defendant seeks to withdraw his plea because the court has misadvised him of his correct sentencing range, our courts employ a contract analysis. In one case, this Court has applied the mutual mistake doctrine to allow a defendant to withdraw a guilty plea because the State misrepresented the way a prior conviction would be scored when computing the defendant's standard sentencing range. State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001).

But the defendant is not entitled to withdraw his plea in every case where the prosecution fails to predict the correct standard range. Consider the following two examples. In the first, the court advises the defendant of both the correct seriousness level and correct criminal history, but

miscalculates the defendant's standard range as 0-90 days when in fact the standard range is 2-5 months. In the second case, the court incorrectly advises the defendant that his standard range is 0-90 days, based upon its belief that the defendant has no criminal history when in fact the defendant has two prior convictions and his correct range is therefore 2-5 months. Plea withdrawal at the defendant's option is appropriate in the first instance, but not the second.

This is because Washington courts have held that where the prosecution, working from reliable data miscalculates the offender's sentencing range and so informs the offender of an incorrect sentencing range, the offender was entitled to rely upon the misrepresentation in the plea bargaining process and withdraw his guilty plea when the miscalculation is later discovered. See State v. Miller, supra; State v. Perkins, supra.

The same result will not hold in those cases where the error in the standard range is the result not of miscalculation, but rather of a reasonable error or lack of information in obtaining the defendant's prior convictions. See State v. Christen, 116 Wn.App. 827, 831, 67 P.3d 1157 (2003). While a defendant may reasonably rely on the court to advise him of the law, he may not reasonably rely on the court to advise him on factual matters, particularly

those peculiarly known to him, such as his previous convictions.

2. *Because the defendant was told that his range could increase if more criminal history than the state was aware of were discovered, he was not misinformed about his standard range.*

There was no misrepresentation in the instant case. The court below advised the defendant that his standard range was based in part on his criminal history, advised him of his standard range based upon the criminal history known to the prosecution at the time of his plea, but also advised the defendant that if additional criminal history were found that his range would increase. CP 9. This advice was not only accurate, but also, given the practical realities of the plea bargain process, as complete as the court's advice could be.

Far from being misinformed, the defendant was specifically informed about the application of the law in relation to the facts in his case. The standard range of which the defendant was informed, was accurate, given the limited information available to the court. The defendant, while he now complains of "mutual mistake," has made no showing that he was unaware of his own criminal history or was surprised in any way at his standard range increased when additional criminal history was found.

Unlike those cases involving the failure of the State to inform the

defendant of a direct consequence of his plea, such as Isadore, a defendant attempting to void a contract under the mutual mistake doctrine has the burden of demonstrating not only that both parties were independently mistaken as to a basic assumption regarding existing facts upon which the parties relied in making the contract, see Restatement (2nd) of Contracts, sec. 152, but also that the mistake changed the bargain so much that the parties seeking to rescind would not have entered into the contract if they had been aware of the mistake. Id. Further, a contracting party cannot avoid the ordinary risks related to uncertainty involved in such transactions by claiming mistake. No. 1 PUD v. WPPSS, 104 Wn.2d 353, 362, 705 P.2d 1195, 1203 (1995).

While application of the mutual mistake doctrine may make some sense when the defendant arguably relies upon the court's miscalculation of his offender score, it makes no sense to apply it in a case where the defendant cannot show that he was unaware of his true criminal history which led to an increase in his standard range; or where he cannot show that he would not have entered into the plea bargain had he known of the increase in the sentence.

The most plausible conclusion from the record below is that the

defendant was aware his prior criminal history. He admitted it freely at the sentencing hearing. He knew his range would increase because he was told so by the court at the time he entered his plea. The record demonstrates that any error in the determination of the standard range in the instant case was not a mistake as to a basic assumption on which the defendant relied to plead guilty. The defendant bargained for a reduction of charges which allowed him to seek a SSOSA sentence. Any error in the instant case did not prevent him from doing so.

3. *Even if the defendant was entitled to know his ultimate sentencing range prior to the entry of his plea, he specifically waived that right as part of the plea bargaining process.*

Under the doctrine of mutual mistake, the party who is seeking to rescind a contract has the burden of proving by a preponderance of the evidence that he does not bear the risk of mistake. One bears the risk of mistake if he was aware at the time the contract was made that he had only limited knowledge of the facts but chose to treat that knowledge as sufficient. Restatement 2nd of Contract sec. 152-54.

Similarly, a defendant may assume the risk of uncertainty about his criminal history in the plea bargaining process. A defendant who, before pleading guilty to a charge, is advised by the court that his standard sentence

range could go up or down before sentencing and manifests an understanding of that fact, assumes the risk that at the time of sentencing the standard sentencing could be higher or lower than anticipated at the time of the entry of plea. See State v. Christen, 116 Wn.App. supra. at 831; State v. Paul, 103 Wn.App. supra. at 495-96.

The court expressly told the defendant in his statement on plea of guilty that his standard range would increase if additional criminal history were found.¹ With knowledge of that fact, and with that advice, the defendant opted to plead. The record before the court indicates he had sound tactical reasons for doing so. The case against him was strong and he had confessed. His best hope was to admit guilt and seek leniency through a SSOSA sentence. Any increase in the standard range due to the discovery of his misdemeanor history did not affect his ability to follow this plan. The defendant intentionally and voluntarily relinquished any right he had to be accurately informed of the standard range at the time that he entered his plea of guilty. State v. Christen, 116 Wn.App. at 832, supra.

It was not unfair for the defendant to assume that risk under our determinate sentencing scheme. It is the defendant who is in the best position

¹The court was required to do so by CrR 4.2. This mandatory advisement is meaningless if a defendant may withdraw his guilty plea in the instant case.

to know what his own criminal history is. To allow defendants to withdraw their pleas under circumstances such as those in this case would encourage defendants to remain silent while the sentencing court is laboring under a misapprehension which the defendant himself is in the best position to correct.

C. THE DEFENDANT WAIVED ANY RIGHT TO CHALLENGE THE VOLUNTARINESS OF HIS PLEA BY KNOWINGLY AND VOLUNTARILY ELECTING TO PROCEED TO SENTENCING AFTER BEING INFORMED OF AN ERROR IN HIS STATEMENT ON PLEA OF GUILTY MISCALCULATING HIS STANDARD RANGE.

The Defendant was charged with five counts of child molestation and pled guilty on November 30, 2004 to only three. In exchange for his plea, the State agreed to make no recommendation and dismissed two of the counts. CP 1-2, 6-16. This was a significant concession to the Defendant because it gave him a standard range which allowed the court to impose a special sex offender sentencing alternative.

When the Defendant appeared for sentencing on February 8, 2005, both parties had received a presentence investigation prepared by the Department of Corrections. That report demonstrated that the standard range indicated in the defendant's statement on plea of guilty was in error. RP February 8, 2005 at 15. The author of the presentence investigation had

discovered a number of the defendant's misdemeanor convictions which were unknown to the State. These misdemeanor convictions prevented an earlier conviction of felony eluding, of which both the State and the defendant were aware, from "washing out." RCW 9.94A.575 (2).

At the sentencing hearing the defendant, through counsel, admitted the existence of the felony eluding charge and the existence of the gross misdemeanor charges which prevented that conviction from washing out. RP February 8, 2005 at 15-16. However, defense counsel specifically stated:

Mr. Earl: ... I would just note that upon the court's ruling that DOC themselves still maintain, and we would also maintain, that the Special Sex Offender Sentencing Alternative is still available to Mr. Codiga - - apart from the ruling of the court just--

The Court: I believe that is so.

RP February 8, 2005 at 17.

The defense attorney then went on to make a lengthy argument in favor of SSOSA. This exchange between defense counsel and the court demonstrates that the defendant was aware of the increase in the standard range, and elected to proceed to sentencing understanding that he was still eligible for the special sex offender alternative in the hopes that he would receive that sentence. Because the defendant was informed before sentencing

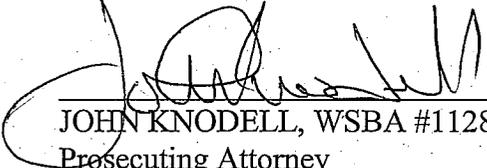
of the error in his sentencing range and because he did not object to the sentencing or move to withdraw the plea before sentencing, and because the defendant was sentenced based upon the correct range, the defendant by his election to proceed waived any challenge to the voluntariness of his plea. State v. Mendoza, 157 Wn.2d at 584, 592.

II. CONCLUSION

For the reasons stated here, the Respondent asks the court to affirm the ruling of the Court of Appeals and Trial Court below.

DATED: Aug 3, 2007.

Respectfully submitted:


JOHN KNODELL, WSBA #11284
Prosecuting Attorney