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43159-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

Robert C. Kinnaman
Petitioner

FILED

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

PETITION FOR REVIEW

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A. **IDENTITY OF PETITIONER:** Robert C. Kinnaman was the Defendant in the Superior Court and Appellant in the Court of Appeals.

B. **DECISION:** Mr. Kinnaman seeks review of the unpublished decision in *State v. Kinnaman*, filed by Division II, August 27, 2013, holding that Kinnaman could not withdraw an involuntary plea without also withdrawing a second plea he wished to maintain. Attached as Appendix A.

C. **ISSUES PRESENTED FOR REVIEW:**

1. Is a guilty plea for attempting to elude a police officer severable from an involuntary guilty plea for the additional offense of endangerment while eluding?

(a) Did the Court of Appeals apply the wrong standard of review?

(b) Does the Court of Appeals' decision conflict with the remedy for an involuntary prescribed in by this Court in *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006)?

(c) Does the Court of Appeals' decision violate due process?

(d) Does the Court of Appeals' decision conflict with statute and court rule?

D. **STATEMENT OF THE CASE:**

The State charged Mr. Kinnaman with attempting to elude a police vehicle in violation of RCW 46.61.024(1). That statute requires the State to prove: (a) a driver of a motor vehicle (b) willfully (c) fails or refuses to immediately bring his or her vehicle to a stop and (d) drives the vehicle in a reckless manner while attempting to elude a pursuing police vehicle after being signaled to stop.

Kinnaman was also charged with endangerment in violation of RCW 9.94A.834(1).¹ The essential element of endangerment is not included in RCW 46.61.024. Rather, it requires proof of the additional element that (e) one or more persons other than the defendant or a pursuing officer were threatened with physical injury or harm by the actions comprising the crime of attempting to elude.

Mr. Kinnaman pled guilty to both charges after being informed by the State that witnesses would testify that he endangered them when his pursuit passed through a highway construction zone. RP 6, 7. After learning there were no such witnesses, Mr. Kinnaman asked the sentencing court to withdraw his endangerment plea on the grounds it was involuntary. The sentencing court refused to allow him to withdraw the plea. RP 21, 22.

¹ Chapter 9.94A RCW is the Sentencing Reform Act, not the Criminal Code, but the Information charged Mr. Kinnaman with attempting to elude and endangering others as two separate offenses "against the peace and dignity of the State of Washington." CP 1-2.

On appeal, Kinnaman unequivocally asserted that he wished to leave the eluding plea intact. But he challenged the voluntariness of the endangerment plea on multiple grounds.

The Court of Appeals was persuaded that the endangerment plea was involuntary on the ground that Kinnaman was misinformed as to the consequences of the plea. Decision at 6-7. Even though the sentencing disparity was only one day, and was in Kinnaman's favor, the Court of Appeals concluded that the endangerment plea was indeed involuntary. The Court held, however, that the two pleas were not severable. Therefore, the Court vacated the entire judgment and sentence and held that Mr. Kinnaman must choose between withdrawing both pleas, or neither. Decision at 8-9.

E. **REASONS THIS COURT SHOULD ACCEPT REVIEW**

(a) The Court of Appeals' decision conflicts with this Court's decision in *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006).

(i) The Court of Appeals applies a different standard of review.

(ii) The Court of Appeals fails to distinguish *Bisson* on its facts. Issue 1, at p. 4; Issue 2, at p.5.

(b) The Court of Appeals decision conflicts with this Court's holding in *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013), which holds that severability of guilty pleas depends on the manifest intent of the parties. *Chambers*, 176 Wn.2d at 581. Issue 3, p. 7

(c) To the degree it conflicts with this Court's decisions, the Court of Appeals decision violates due process.

(d) The Court of Appeals decision conflicts with the applicable statute. Issue 5 at p. 9.

(e) The Court of Appeals decision conflicts with the applicable court rule. Issue 6 at p. 10.

1. THE COURT OF APPEALS APPLIED
THE WRONG STANDARD OF REVIEW.

The Court of Appeals' conclusion that Mr. Kinnaman's pleas were not severable relies on *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). Decision at 8. *Bisson* holds that an issue concerning the interpretation of a plea agreement is a question of law that is reviewed de novo. *Bisson*, 156 Wn.2d at 517. Instead, the Court here applies the abuse of discretion standard that is properly applied to reviewing the denial of a motion to withdraw a guilty plea. Decision at 5, citing *State v. AN.J.*, 168 Wn.2d 91, 106, 225 P3d. 956 (2010).

The Court was not reviewing whether the trial court should have granted Mr. Kinnaman's request to withdraw his involuntary plea, but rather, whether the relationship between the two offenses in the plea agreement is such that the pleas are severable. As this concerns the interpretation of a plea agreement, it should have been reviewed de novo.

2. THE COURT OF APPEALS' DECISION
ERRONEOUSLY EXTENDS THIS COURT'S
HOLDING IN *BISSON*.

The Court of Appeals relies on this Court's holding that the *Bisson* plea agreement was indivisible because all the pleas were set forth in the same document, offered at the same hearing, and accepted in one proceeding. Decision at 8, citing *Bisson*, 156 Wn.2d at 518. Observing that these factors also apply to Kinnaman's two pleas, the Court concluded that his pleas must also be indivisible.

The Court's analysis fails, however, to account for a key distinction between the cases: in *Bisson*, all the guilty pleas — to eight counts of first degree robbery and five deadly weapon enhancements — were based on the same evidence. *Bisson*, 156 Wn.2d at 511. In *Kinnaman*, by contrast, proof of facts sufficient to support conviction for eluding are not sufficient to support a guilty plea to endangerment; the State must prove — or the defendant must plead to — additional facts. Beyond proving that a driver willfully fails to a stop and drove in a reckless manner while attempting to elude police after being signaled to stop, the State must further prove that one or more third parties are actually endangered.

Moreover, the *Bisson* holding relies in turn on *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003). That decision holds that, when a defendant “pleads guilty to multiple counts or charges at the same time, in the same

proceedings, and in the same document, the plea agreement will be treated as indivisible, absent objective evidence of a contrary intent in the agreement.” *Turley*, 149 Wn.2d at 400. However, *Turley* also is distinguishable in that it was the defendant’s preference to withdraw both guilty pleas to two unrelated counts² based on misinformation regarding the consequences of one of them. The facts in that case revealed an objective intent to address all of the charges in a comprehensive plea agreement. *State v. Chambers*, 176 Wn.2d 573, 581, 293 P.3d 1185 (2013) (reversing and remanding in light of the intent of the parties.)

Unlike Kinnaman, Turley sought to withdraw both pleas on the ground that the plea agreement covered both charges. *Turley*, 149 Wn.2d at 397. Division II held that the pleas could not be joined and that Mr. Turley could withdraw only the plea about which he was misinformed. *Turley*, 149 Wn.2d at 397-98. This Court reversed, holding that, absent an objective indication to the contrary in the plea agreement, the court “should allow [the defendant] to withdraw both pleas.” *Turley*, 149 Wn.2d at 396. That is, Turley was permitted to withdraw two pleas entered at the same time but based on different evidence. The reason Bisson was required to withdraw both was because his pleas were based on the same evidence.

As in *Bisson*, the facts constituting actual endangerment here were

² Escape and conspiracy to manufacture methamphetamine. *Turley*, at 396.

neither alleged nor admitted. Rather, the endangerment charge rests on the erroneous assumption that reckless driving constitutes endangerment per se. CP 4, 11. This cannot be correct, since the canons of statutory construction do not permit the courts to render any part of a legislative enactment superfluous. *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177 (2010). Since reckless driving is an essential element of eluding, to equate recklessness with endangerment renders the actual endangerment language (indeed, the entire statute) superfluous, because every eluding charge would automatically allege endangerment. This is not the law.

3. THE COURT OF APPEALS DECISION
CONFLICTS WITH DECISIONS
ESTABLISHING THE PROPER REMEDY
FOR AN INVOLUNTARY PLEA.

The *Bisson* decision reflects this Court's prior holdings that a plea agreement is a contract, and is subject to well-established principles governing the interpretation of contracts. *Bisson*, 156 Wn.2d at 517. Specifically, here, whether terms of a contract are severable or indivisible depends upon the manifestly expressed intent of the parties. *State v. Chambers*, 176 Wn.2d 573, 580-581, 293 P.3d 1185 (2013); *Turley*, 149 Wn.2d at 400.

In treating Turley's plea agreement as a "package deal," the Court reasoned that a plea agreement is a contract between a defendant and the

State, and was, therefore, subject to established principles of contract law. One such principle is that whether provisions are severable or indivisible depends solely on the intent of the parties. *Turley*, 149 Wn.2d at 400; *Berg v. Hudesman*, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990) (the court may review extrinsic evidence to aid in the determination of the parties' intent.)

Here, the fact that the predicate offense of eluding does not require proof of endangerment strongly suggests that both parties to the agreement understood that they were severable. Otherwise, every charge of eluding would automatically be punishable as endangerment while eluding.

4. THE COURT OF APPEALS DECISION
VIOLATES DUE PROCESS.

In the matter of involuntary pleas, this Court recognizes that a defendant "is entitled to the benefit of his original bargain." *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977). This reflects the "constitutional rights implicit in the plea." *Id.* Therefore, if a defendant does not wish to withdraw a plea, that "remedy" may be unjust. "To place the defendant in a position in which he must again bargain with the State is unquestionably to his disadvantage." *Tourtellotte*, 88 Wn.2d at 585.

Mr. Kinnaman's incentive in pleading guilty was to avoid more serious charges. CP 14, para 1.5 ("No other charges out of this case/arrest.") Forcing him now to withdraw both pleas strips him of that advantage.

As a matter of due process, the defendant's preference should be accorded "considerable, if not controlling, weight, inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." *Tourtellotte*, 88 Wn.2d at 585, quoting *Santobello v. New York*, 404 U.S. 257, 267, 92 S. Ct. 495, 501, 30 L. Ed. 2d 427 (1971), (Douglas, J., concurring).

Santobello was a breach case, but this Court in *Miller*³ extended the reasoning to the context of mutual mistake, holding that, even where a defective plea was inadvertent, "the defendant's preference as to remedy should be the primary focus of the court." *Miller*, 110 Wn.2d at 534. In *State v. Barber*, 170 Wn.2d 854, 859, 248 P.3d 494 (2011), the Court overturned *Miller* to the extent it held that specific performance in the mutual mistake context entitled the defendant to enforcement of an illegal sentence. *Barber*, 170 Wn.2d at 860.

Mr. Kinnaman does not seek to enforce the unlawful sentence. Accordingly, the Court of Appeals erred in imposing a remedy contrary to Kinnaman's unequivocal expression of his lawful preference.

5. THE DECISION CONFLICTS WITH
THE APPLICABLE STATUTE.

The Legislature appended a severability clause to the eluding

³ *State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

statute, RCW 46.61.024:

Severability – 1982 1st ex.s. c 47: “See note following RCW 9.41.190.” The referenced note says:

Severability: If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1982 1st ex.s. c 47 § 31.]

This would appear to be dispositive on the issue of the intent of the Legislature with respect to severability. Charges brought under the act are severable. A special allegation of endangerment falls under the act. See RCW 9.94A.834(1): The prosecuting attorney may file a special allegation of endangerment by eluding in a case involving a charge of attempting to elude a police vehicle under RCW 46.61.024.

To justify an additional punishment for endangerment, therefore, the State is required to prove that specific persons, other than the driver and the pursuing officers, were endangered.

6. THE DECISION CONFLICTS WITH THE APPLICABLE COURT RULE.

The intent of the parties may also be gleaned from the language of the governing court rule: if the Information charges two offenses in separate counts, then the defendant shall plead separately to each. CrR 4.2(b).

The Kinnaman Information charges two offenses both require proof of different facts and separately disturbed the peace and dignity of the State

of Washington. CP 1-2. The charge under RCW 46.61.024, is for attempting to elude, while the second is for endangerment, contrary to RCW 9.94A.834(1) and RCW 9.94A.533(11). CP 1-2.

CrR 4.2 also requires the court to allow withdrawal of a guilty plea whenever it appears that the withdrawal is in the interests of justice. CrR 4.2(f). Nothing in the language of CrR 4.2 distinguishes the guilty plea to be withdrawn in CrR 4.2(f) from that pleaded to in CrR 4.2(b).

F. **CONCLUSION:** The Court should accept review, reverse the Court of Appeals and allow Mr. Kinnaman to withdraw the involuntary plea to endangerment while leaving his voluntary plea to attempted eluding intact.

Respectfully submitted this 26th day of September, 2013.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Petition for Review electronically via the Division II upload portal: gfuller@co.grays-harbor.wa.us.

A hard copy was also mailed, first class postage prepaid, to:

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Jordan B McCabe Date: September 26, 2013
Jordan B. McCabe, WSBA No. 27211

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,

v.

Robert C. KINNAMAN, Appellant.

UNPUBLISHED

OPINION

No. 43159–9–II, Aug. 27, 2013.

Appeal from Grays Harbor County Superior Court; Honorable F. Mark McCauley, J. Jordan Broome McCabe, McCabe Law Office, Bellevue, WA, for Appellant. Gerald R. Fuller, Grays Harbor Co. Pros. Ofc., Montesano, WA, for Respondent.

HUNT, P.J.

*1 Robert C. Kinnaman appeals the trial court’s denial of his request to withdraw only the endangerment sentencing enhancement portion of his guilty plea to attempting to elude a pursuing police vehicle. He argues that (1) the trial court erred in imposing a sentencing enhancement that was one day less than required by statute, RCW 9.94A.533(11); ^{FN1} (2) the endangerment enhancement constituted double jeopardy because the State used the same facts to support the attempted eluding charge; (3) there was no sufficient factual basis in his guilty plea statement to support his endangerment enhancement; and (4) the plea agreement failed to explain accurately the nature of the charge and the consequences of his guilty plea—it failed to state the correct statutory sentence length of one year and one day of confinement required for the endangerment enhancement under RCW 9.94A.533(11). Holding that Kinnaman’s guilty plea was involuntary because it stated an incorrect length for the endangerment sentencing enhancement, we reverse the trial court’s denial of his request to withdraw his guilty plea and remand to the trial court to vacate Kinnaman’s entire guilty plea and for further proceedings.

FN1. The legislature amended RCW 9.94A.533 in 2013 and 2012. Laws of 2013, ch. 270, § 2; Laws OF 2012, ch. 42, § 3. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

FACTS

Grays Harbor Deputy Sheriff Kevin Schrader began monitoring traffic after receiving information that Robert C. Kinnaman, who had a warrant out for his arrest, was staying at a nearby trailer park. Schrader followed Kinnaman after he exited the park; but as Schrader's patrol vehicle approached, Kinnaman sped away. Schrader activated his overhead lights; Kinnaman slowed his vehicle and a passenger jumped out of the passenger side of his moving vehicle; Kinnaman ran over the passenger's foot. Thereafter, a high speed chase ensued, ending with Kinnaman's arrest.

The State charged Kinnaman with attempting to elude a pursuing police vehicle, with a special sentencing enhancement allegation that he had endangered one or more persons. Represented by counsel, Kinnaman pleaded guilty to the underlying charge and the special allegation. His statement in support of his guilty plea provided:

I Have Been Informed and Fully Understand that:

[...]

(b) I am charged with: Attempt to elude a Pursuing Police Vehicle. The elements are: [A]n individual driving a motor vehicle drives reckless while having a police motor vehicle properly marked chasing that individual—with the individual threaten physical harm to third persons.

Clerk's Papers (CP) at 4. As to the sentencing enhancements, Kinnaman's statement acknowledged:

"I understand that: (a) Each crime with which I am charged carries a maximum sentence, a fine, and a Standard Sentence Range "; under this section, it also states that Kinnaman's enhancement " [a]dds— 12 months to sentence." CP at 5 (emphasis added by the Court of Appeals). Kinnaman added:

The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On January 10, 2012 I was driving a motor vehicle in GH County in a reckless manner I was being chased by properly marked police motor vehicle

— while I was being chased there were individuals put in danger when I was driving recklessly.

*2 CP at 11.

After Kinnaman signed the guilty plea and the accompanying written statement, the superior court had the following exchange with Kinnaman:

THE COURT: ... How do you plead to the charge of attempt to elude a pursuing police vehicle.

[KINNAMAN]: I plead guilty.

[...]

THE COURT: All right. And it says it's further alleged—do admit that the State's allegation that one or more persons other than you or the police pursuing police officer were threatened with physical injury or harm by the actions of—of your conduct while committing the crime of attempting to elude a police vehicle—

[KINNAMAN]: Yes, Your Honor. There was a construction site going on—there was construction going on the highway and I went through the construction site and I guess the individuals that were working, the flaggers were pretty distraught about it.

[...]

THE COURT: All right.

[KINNAMAN]: I pled guilty to that, too.

THE COURT: Okay. All right. And you did sign this then after carefully read—read everything and understood everything?

[KINNAMAN]: Yes, sir.

THE COURT: I'll find that you knowingly, intelligently and voluntarily made this plea, that you understand the charge and the consequences of your plea, including the consequences of the

enhancing factor and that you are guilty and that there's a factual basis for your plea.

Verbatim Report of Proceedings (VRP) at 12, 13, 14.

Later at sentencing, however, Kinnaman stated, "I'm guilty of the attempt to elude. I am not however guilty of endangerment enhancement... I am now retracting my previous statement on plea of guilty in regard to the enhancement." VRP at 21.

Kinnaman argued that he should be allowed to withdraw the sentencing enhancement portion of his guilty plea because "not one witness [had] come forward" stating that he had endangered someone's life. VRP at 22. The superior court denied Kinnaman's request, stressing, "[T]he prosecutor is not required to bring forward witnesses because you admitted to the aggravating situation. That's what a trial is all about." VRP at 22.

The superior court imposed a standard range sentence of 18 months for the attempting to elude conviction and 12 months for the endangerment enhancement, resulting in a total confinement of 30 months. Kinnaman appeals.

ANALYSIS

I. Guilty Plea

Kinnaman challenges the voluntariness of his appeal because the mandatory sentence for the endangerment enhancement is "12 months [and] 1 day,"^{FN2} but his plea agreement and sentence stated that this enhancement would add only "12 months." ^{FN3} Br. of Appellant at 22 (quoting CP at 5). He argues that the sentencing court "lack[ed] authority to impose punishment less than that authorized by the SRA." Br. of Appellant at 21 (citing *State v. Barber*, 170 Wn.2d 854, 870, 248 P.3d 494 (2011)).

FN2. CP at 27.

FN3. In contrast, Kinnaman sought to withdraw his guilty plea below based solely on his belief that the State could not prove the endangerment enhancement. But because a defendant gives up constitutional rights by entering into a plea agreement, RAP 2.5(a)(3) allows a defendant to challenge the voluntariness of a

guilty plea for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 6–7, 17 P.3d 591 (2001).

The State concedes that there was a “mutual mistake” about the length of the sentencing enhancement, despite the admitted diminutiveness of the error.^{FN4} Br. of Resp’t at 10. Nevertheless, the State argues that we should affirm the trial court’s denial of Kinnaman’s motion to withdraw his guilty plea judgment and sentence, without citing supporting authority. We assume that where counsel cites no authority, counsel has found none after a diligent search; nor are we required to search for authorities to support the State’s argument. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978),

FN4. Although we agree with the dissent that this one-day error is de minimis, in our view the law requires vacation of a guilty plea based on incorrect information about the maximum sentence, regardless of the “size” of the error.

*3 Although the one-day sentencing error in the guilty plea statement was minimal, Kinnaman is correct that it undermines the voluntariness of his guilty plea. Accordingly, we hold that he is entitled to withdraw his guilty plea in its entirety, however, not merely the part pertaining to the sentencing enhancement.

A. Standard of Review

We review for abuse of discretion a superior court’s denial of a motion to withdraw a guilty plea. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). The trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. *State v. Martinez*, 161 Wn. App. 436, 440, 253 P.3d 445, review denied, 172 Wn.2d 1011 (2011). A trial court bases its decision on untenable grounds when it acts without statutory authority by imposing a sentence that is contrary to law. See *State v. Paine*, 69 Wn. App. 873, 882–85, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993).

“The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); see also *State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974). Nonexclusive criteria as to what constitutes a manifest injustice include that the plea was involuntary. *State v. Walsh*, 143

Wn.2d 1, 6, 17 P.3d 591 (2001). An involuntary plea is a manifest injustice, permitting withdrawal of the plea at the defendant's request. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991).

B. Voluntariness

Our Supreme Court has clearly held that, where a defendant is misinformed about the sentencing consequences, his plea is involuntary and he is entitled to withdraw it. *Walsh*, 143 Wn.2d at 4, 8–10 (plea agreement involuntary where correct standard range was higher than range stated in plea agreement); see also *State v. Miller*, 110 Wn.2d 528, 536–37, 756 P.2d 122 (1988) (defendant entitled to withdraw guilty plea where both parties unaware of mandatory minimum sentence), overruled on other grounds by *State v. Barber*, 170 Wn.2d 854, 856, 248 P.3d 494 (2011). A guilty plea may be deemed involuntary when based on misinformation, “regardless of whether the actual sentencing range is lower or higher than anticipated.” *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

Here, it is undisputed that (1) the endangerment enhancement carried a mandatory additional sentence of one year plus one day, RCW 9.94A.533(11); ^{FN5} (2) the plea agreement stated that this sentencing enhancement carried a maximum term of one year; and (3) the trial court imposed only one year of additional confinement for this enhancement. We are aware of no case law addressing a similar mutual mistake of only one day. Yet there does not appear to be an exception to the general rule that a plea agreement must correctly inform the defendant about sentence lengths for the charges and enhancements to which he is pleading guilty. *See Miller*, 110 Wn.2d at 531 (“A defendant must understand the sentencing consequences for a guilty plea to be valid.”). Furthermore, “[a] trial court’s sentencing authority is limited to that expressed in the statutes.” *State v. Skillman*, 60 Wn. App. 837, 838, 809 P.2d 756 (1991). Thus, it is an abuse of discretion to impose a sentence that does not comply with the applicable statute.

FN5. RCW 9.94A.533(11) provides:

An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

*4 We hold that the erroneous sentencing information in the plea agreement rendered Kinnaman’s guilty plea involuntary and, therefore, he was entitled to withdraw his guilty plea on this basis alone. Having held that Kinnaman’s guilty plea was involuntary, we do not reach his remaining arguments for invalidating it.

II. No Severability of Guilty Plea Conviction and Enhancement

Kinnaman seeks to limit vacation of his guilty plea to the endangerment enhancement, leaving intact his guilty plea to attempting to elude. This he cannot do.

There are two possible remedies for an involuntary guilty plea: Withdrawal of the plea or specific performance of the plea agreement.^{FN6} *Barber*, 170 Wn.2d at 855. In cases of mutual mistake, the defendant may elect only to withdraw his plea, which is the remedy Kinnaman seeks here, in part. *Barber*, 170 Wn.2d at 873. The State argues that Kinnaman’s plea agreement is not severable and that his only option is to withdraw his plea in its entirety. The State is correct.

FN6. But a defendant is not entitled to specific performance where, as here, the result would bind the sentencing court to impose a sentence that is contrary to law. *Barber*, 170 Wn.2d at 872–73.

In *State v. Bisson*, 156 Wn.2d 507, 509, 130 P.3d 820 (2006), the Supreme Court examined the severability of a plea bargain involving eight counts of robbery and five deadly weapon enhancements. Bisson argued that he should be able “to choose between the two remedies”—withdrawal of guilty plea to the sentencing enhancements only (partial rescission of the plea agreement) or specific performance of running the weapon enhancement sentences concurrently. *Bisson*, 156 Wn.2d at 518. The Court held that the plea agreement was “ ‘indivisible’ “ because “the pleas to the eight counts and the five weapon enhancements were made contemporaneously, set forth in the same document, and accepted in one proceeding.” *Bisson*, 156 Wn.2d at 519 (citation omitted).^{FN7}

FN7. See also *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003), in which our Supreme Court held that a plea agreement is a “ ‘package deal’ ”:

[When a defendant] pleads guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document, the plea agreement will be treated as indivisible, absent objective evidence of a contrary intent in the agreement.

Turley, 149 Wn.2d at 402. As in Turley, Kinnaman's plea agreement evinced no contrary intent to permit the parties to sever the attempting to elude crime from the endangerment sentence enhancement.

Moreover, Kinnaman provides no persuasive argument in support of such severability. We reject his attempt to distinguish *Turley* and *Bisson* on double jeopardy grounds and assertions of insufficient facts to support the endangerment enhancement, despite candidly acknowledging the Supreme Court's holding in *Bisson* that "multiple pleas made in the same proceeding are not severable." Br. of Appellant at 17.

Kinnaman having demonstrated that he involuntarily entered into his guilty plea, we reverse the trial court's denial of his motion to withdraw his plea, and we remand for vacation of his entire guilty plea and further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I concur: BJORGEN, J.

PENOYAR, J. (Dissent).

*4 I respectfully dissent. The difference between the sentence enhancement on the plea form and that required by law is one day out of twelve months. Just as we accept that a leap year is still a "year," we should accept that this difference is not significant in reviewing the voluntariness of Kinnaman's plea. While twelve months, as opposed to twelve months and a day, would be significant if it determined whether a defendant was going to prison or the county jail, it is not significant here where it is merely one day out of nearly a thousand. I would affirm.

TEXT OF STATUTES CITED

RCW 9.94A.533.(11): An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

RCW 9.94A.834(1): The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

RCW 46.61.024(1): Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

RCW 9.41.190: Severability: If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1982 1st ex.s. c 47 § 31.]

CrR 4.2:

- (b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts, the defendant shall plead separately to each.
- (f) **Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

MCCABE LAW OFFICE

September 26, 2013 - 3:25 PM

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