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WASHINGTON STATE
SUPREME COURT

THE SUPREME COURT OF WASHINGTON

State of Washington, Respondent,	)	No. 93545-9
	)	SUPPLEMENTAL BRIEF, (Petitioner)
v.	)	PURSUANT TO RAP 13.7 (d)
BRIAN WALLACE BUCKMAN, Petitioner	)	

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On November 1, 2011, the State filed Information to charge me with Rape of a child in the 2ND°, pursuant to RCW 9A.44.076. I was 18 days from my 19th birthday. (D.O.B 11/19/92). The State alleges the offense was committed between May 1, 2010 and September 30, 2010, more than (1) year earlier when I was 17 years of age. (See 11/1/11 Information). Do to being over the age of 18 when the State filed Information I was automatically subject to the Superior Court to be prosecuted as an adult offender for a non-violent juvenile offense that cannot exist if I was 18 or older when the crime was committed. On January 26, 2012, my attorney reviewed to me the sentencing consequences of my plea agreement. He advised me that since I'm being charged as an adult offender I'm subject to the harsher sentencing consequences under indeterminate sentencing, pursuant to RCW 9.94A.507, and that due to those consequences the standard range sentence of 86-114-months is my minimum term w/ life being the statutory maximum and Community Custody is the same as the Statutory maximum, which is life.

Pursuant to this information that I'm an offender subject to the indeterminate sentencing consequences under RCW 9.94A.507, my attorney and I were requesting the SSOSA sentence under RCW 9.94A.670 in order to avoid the (2) life sentences under RCW 9.94A.507. Neglected by my attorney, the prosecutor, and the judge; those sentencing consequences under RCW 9.94A.507 were not authorized by and are illegal as RCW 9.94A.507(2) excludes me from those sentencing consequences due to being "17 years of age" when the alleged offense of Rape of a Child in the 2ND° was committed. Had I been correctly advised I would never had pled guilty.

The question presented here is whether or not I was misinformed of the sentencing consequences that resulted in an involuntary plea and if that misinformation constitutes a manifest injustice under CrR 4.2(f).

For purposes of CrR 4.2(f), which provides that a guilty plea may be withdrawn to correct a manifest injustice, an involuntary plea of guilty to a criminal charge constitutes a "manifest injustice."

A defendants guilty plea must 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 Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). And so the court must inform a defendant of all the

direct consequences of the plea, including any term of community custody. Isadore, 151 wn.2d at 298 (citing State v. Ross, 129 wn.2d 279, 284 {142 P.3d 620} 916 P.2d 405 (1996); State v. Turley, 149 wn.2d 395, 399, 69 P.3d (2003)). A guilty plea is not then knowingly made when it is based on misinformation as to the sentencing consequences. State v. Miller, 110 wn.2d 528, 531, 756 P.2d 122 (1988). These constitutional requirements are implemented by court rule here in Washington: "The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d).

A plea is involuntary if the plea is entered without knowledge of the direct sentencing consequences. This is a manifest injustice. CrR 4.2(f); Isadore, 151 wn.2d at 298 (citing Ross, 129 wn.2d at 284; State v. Walsh, 143 wn.2d 1, 8, 17 P.3d 591 (2001) (mutual mistake regarding sentencing consequences renders guilty plea invalid)). The sentence the court will impose is, of course, a direct consequence {134 wn.app. 531} of the plea. Isadore, 151 wn.2d at 298 (citing Miller, 110 wn.2d at 531). And the court must allow a defendant to withdraw a guilty plea to correct that manifest injustice.

It is easily proved that my attorney informed me of the indeterminate sentencing consequences under RCW 9.94A.507 before I pled guilty and entered the plea colloquy. This is shown when you use the sentencing data at paragraph 6(a) on pg. 2 of the plea agreement and compare it to paragraph 6(f)(i) on pg. 3, paragraph 6(f)(ii) on pg. 4, and RCW 9.94A.701.

Paragraph 6(a) provides that each crime which I am charged a carries a maximum sentence, a fine, and a standard sentence range as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE	N/A	COMMUNITY CUSTODY	MAXIMUM TERM
1.)	1	86-114	–	LIFE	LIFE, $50,000 fine

Note: The January 26, 2012, plea agreement and plea colloquy are the only (2) records where the standard range is specifically written and orally said: 86-114 months. All further ecords advise the standard range as: 86-114 months min. w/ statutory max. of life, and lables me as an offender subject to indeterminate sentencing. Additionally, community custody is never mentioned during the plea colloquy, however, in the plea agreement it is labled "LIFE", which is the requirement for community custody sentencing purposes under RCW 9.94A.507 and the judge acknowledged the indeterminate sentence.

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Paragraph 6(f)(i) on pg. 3 provides: Sentencing under RCW 9.94A.507: If this offense is any of the offenses listed in subsection (aa) or (bb), below, 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 standard range if an exceptional sentence is appropriate... In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence.

Subsection (aa) under paragraph 6(f)(i) provides:
1.) Rape of a Child in the 1st° or 2nd° committed when I was at least 18 years old.
2.) Child Molestation in the 1st° committed when I was at least 18 years old.

The fact is the court neglected that the Rape of a Child in the 2ND° that I'm accused of was not committed when I was 18 or older, but supposably when I was 17 years of age. My age at the time of entering the guilty plea was 19. However, it is still a juvenile offense and indeterminate sentencing under RCW 9.94A.507 is unlawful as RCW 9.94A.507(2) provides: "An offender convicted of Rape of a Child in the 1st° or 2nd° or Child Molestation in the 1st° who was 17 years of age or younger at the time of the offense shall not be sentenced under this section." It would be inappropriate to believe that I was correctly informed of the sentencing consequences before I pled guilty and those proper consequences were advised under "determinate sentences" and not indeterminate sentences, especially, when the language expresses indeterminate sentencing under RCW 9.94A.507 in all further records and proceedings. It would also be inappropriate to believe that the court accidently imposed the indeterminate sentence, especially, when the court refused to allow me to withdraw my guilty plea and to even resentence me to a determinate sentence when I discovered the unlawful sentence because they claimed I was correctly sentenced under RCW 9.94A.507. To further validate this claim, the State on appeal argues RCW 9.94A.507(2) does not apply to me and that I was properly sentenced to 114 months min. w/ the Statutory max. of life and community custody for life.

Paragraph 6(f)(ii) on pg. 4 provides the correct sentencing consequences for purposes of sentencing offenders under RCW 9.94A.701 and not RCW 9.94A.507: "If this offense is a sex offense that is not listed in paragraph 6(f)(i), then in addition to sentencing me to a term

of confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the total period of confinement is over one year, or if my crime is failure to register as a sex offender, the judge will sentence me to community custody for 36 months or up to the period of earned release, whichever is longer.

RCW 9.94A.701 (1): "If an offender is subject to the custody of the Dept. for one of the following crimes, the court shall, in addition to other terms of confinement, sentence the offender to community custody for 3 years."

RCW 9.94A.701 (1) (a) provides:

"A sex offense not sentenced under RCW 9.94A.507."

In State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996), Ross filed a motion to withdraw his guilty plea as involuntary. The trial court denied his motion, and the appellate court affirmed that decision. On appeal, the court reversed the trial court's decision, holding that the mandatory community placement constituted a direct consequence of defendants guilty plea, and failure to so inform defendant rendered the plea invalid. The court found that the State's failure to inform defendant that the sentence for the crime which he pleaded guilty included community placement subjected the plea to withdrawal because community custody produced a definite, immediate, and automatic effect on defendants range of punishment. The court held that the State did not meet its burden of proving the validity of the guilty plea. The court concluded that without evidence of an explicit explanation of mandatory community placement, defendant was unable to enter an intelligent, voluntary plea, and that defendant could withdraw his guilty plea to correct the manifest injustice.

Defendant Donald J. Ross has moved to withdraw his guilty plea to (3) counts of Rape of a Child in the 2ND° as involuntary on the basis he was never informed a mandatory 12-month community placement would follow his prison sentence. Court holds that mandatory community placements constitutes a direct consequence of a guilty plea and failure to so inform a defendant renders that plea invalid.

Ordinarily, a defendant will learn of the mandatory community placement prior to pleading guilty in the plea form required by CrR 4.2(g). (paragraph 6(a) on pg. 2).

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In Ross's plea form and in open court, defendant confirmed his knowledge of the maximum and minimum prison terms and the State's recommended sentence of an 89-month prison.

Here the question concerns whether defendant understood the consequences of his plea. A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. Barton, 93 wn.2d at 305. The court has distinguished direct from collateral consequences by "whether the results represent a definite, immediately and largely automatic effect on the range of the defendants punishment." Barton, 93 wn.2d at 305 (quoting Cuthrell v. Director, Patuxent Inst. 475 F.2d 1364, 1366 (4th Cir.).

Immediacy does not necessitate the community placement itself occur immediately upon resentencing. Rather, as this court has repeatedly articulated, it is the "effect on the range of defendants punishment" that must be immediate. State v. Ward, 123 wn.2d 488, 512, 869 P.2d 1062 (1994). In contrast are sentencing conditions where any effect on punishment flows not from the guilty plea itself but from additional proceedings and thus cannot qualify as immediate. State v. Olivas, 122 wn.2d 73, 96, 856 P.2d 1076 (1993); In re Ness, 70 wn.app. 817, 823, 855 P.2d 1191 (1993). Community placement, on the other hand, affects the punishment flowing immediately from the guilty plea.

Defendants knowledge of his maximum prison sentence was insufficient to assure his understanding of the direct consequence of community placement. The plea to which Defendant agreed was not the plea the State now seeks to enforce. Defendant signed a plea agreement believing the State was recommending a total sentence of 89-months, not 101-months. More significantly, mandatory community placement enhanced defendants minimum sentence and [129 wn.2d 288] altered the standard of punishment applicable. Although defendant knew the States recommendation did not bind the trial court, he claims he would not have agreed to such a plea. Without evidence of an explicit explanation of mandatory community placement, we must conclude defendant was unable to enter an intelligent, voluntary plea. As provided in CrR 4.2(f). Defendant may withdraw his guilty plea to correct this manifest injustice. [916 P.2d 411] State v. Saas, 118 wn.2d 37, 42, 820 P.2d 505 (1991).

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The fact is, my guilty plea was not intelligent, voluntary and knowingly made when I based that plea on misinformation regarding my direct sentencing consequences. The language under paragraph 6(f)(ii) and RCW 9.94A.701(1) does not match the sentencing data in paragraph 6(a) of the plea agreement. The community custody in paragraph 6(a) reflects the paragraph 6(f)(i) for offenders subject to indeterminate sentencing under RCW 9.94A.507. All other records after January 26, 2012, lable me as an offender subject to indeterminate sentencing and uses the language "86 to 114 months min. w/ the Statutory max. of life," which is consistent with the information my attorney informed me of on January 26, 2012, before I was forced to plead guilty and petition for the SSOSA to avoid the (2) life sentences.

March 7, 2012, stipulation on prior Criminal Record and Offender Score provides:

Standard Range	N/A	Total Standard	Maximum Term
Min. of 86-114 and		Min. of 86-114 and	Life
max. of life		max. of life	

March 7, 2012, Verbatim Report of Proceedings @ RP.8:6-14, provides:
Mr. O'Rourke: "We're asking the court to impose a middle of the standard range sentence, which in this case would be --- ranges 86 to 114 months to life. The middle of the standard range would be 100 months minimum with the maximum of life. That would be our request based on the standard range.

We are asking that he have community custody for a period up to the statutory maximum, which would be life in this case."

J&S (Felony) Appendix H Community Placement/Custody provides:
"Defendant additionally is sentenced on conviction herein, for the offense under RCW 9.94A.712 committed on or after September 1, 2001, to include up to life community custody."

Not once was I informed that I cannot face a life sentence and was an offender subject to only 86-114 months as a determinate sentence. I was informed,

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*Note: RCW 9.94A.712 was recodified to RCW 9.94A.507 for indeterminate sentencing.

pled guilty to, and sentenced under RCW 9.94A.507, which is unlawful and exceeds any authority of law. I continued with sentencing because those consequences were all I was informed of and at no time did my attorney, the prosecutor, or the judge advise me that I cannot be subject to indeterminate sentencing. Therefore, I did not waive any right to challenge the involuntariness of my guilty plea and had I been correctly informed I would never have pled guilty.

The Courts decision in State v. Mendoza, 157 wn.2d 582, 590 (2006), states that when a guilty plea is based on misinformation, including but not limited to a miscalculated offender score that resulted in an incorrect higher standard range, the defendant may move to withdraw the plea on them grounds based on involuntariness. However, if the defendant was clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and defendant does not object or move or move to withdraw the plea on them basis before he is sentenced, the defendant waives his right to challenge the voluntariness of his plea.

Evidence provides that I was misinformed of the sentencing consequences that led me to plead guilty and not only did the misinformation advise me of the highest sentence possible, but such sentencing consequences were unlawful. It is actual and substantial prejudice to accept a plea deal on the believe that if you don't plead guilty there is a possibility you'll face the rest of your life in prison. CrR4.2(f) and other case law demand that my plea of guilty be withdrawn to correct the manifest injustice.

Conclusion

Remedy is to withdraw the plea of guilty to correct the manifest injustice.

Sincerely,

BRIAN BUCKMAN

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