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COA NO. 64002-0-I

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

REC'D
AUG 20 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

AMNON ASHE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE GUILTY PLEA IS INVALID BECAUSE ASHE WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). That standard is not met when the defendant is misinformed about a direct sentencing consequence, such as imposition of community custody. Id.

The statement signed by Ashe as having been fully understood wrongly specifies "In addition to confinement, the judge will sentence me to a period of community supervision, community placement or community custody." CP 10, 16. The plea form required both Ashe and the trial court to affirmatively opt out of this consequence and neither of them did. CP 10.

The State nonetheless asserts Ashe was not misadvised regarding a direct consequence of his plea because the plea agreement, when viewed in "context," shows he was not misadvised. Brief of Respondent (BOR) at 1. The only case cited by the State that invoked the "context rule" for a plea agreement addressed the issue of whether a prosecutor breached the terms of that agreement. State v. Oliva, 117 Wn. App. 773, 775-76, 73

P.3d 1016 (2003)); see also State v. Sledge, 133 Wn.2d 828, 831, 838-39, 947 P.2d 1199 (1997) (recognizing plea agreements are contracts subject to contract principles in case involving whether prosecutor breached plea agreement); State v. Koivu, 68 Wn. App. 869, 871-72, 847 P.2d 13 (1993) (invoking contract principles and context in which plea agreement made to determine whether prosecutor breached plea agreement).

The context rule has never been applied to determine whether a defendant was misinformed about a direct consequence of his plea. There is good reason for this. The context rule is designed to ascertain the intent of the parties to a contract. Berg v. Hudesman, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990). That rule is designed to address a problem that is not at issue here. The intent of the parties is not at issue.

A defendant does not intend to be misinformed about a direct sentencing consequence. A prosecutor does not intend to misinform a defendant about such a consequence. A judge, in accepting the plea, does not intend to misinform a defendant either.

Rather, the issue is whether, despite everyone's intent that Ashe be correctly informed about the direct consequences of his plea, the plea form nevertheless misinformed him of a direct consequence.

The State correctly cites Sledge for the proposition that plea agreements are contracts subject to basic contract principles. BOR at 7

(citing Sledge, 133 Wn.2d at 838). The State, however, neglects to cite this countervailing warning: "But plea agreements are more than simple common law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play." Sledge, 133 Wn.2d at 839.

The State argues one can cobble together a knowing and intelligent plea by adding up some circumstances showing Ashe was not misadvised. BOR at 8-9. In so doing, the State fails to acknowledge the correct standard for determining whether a defendant is misinformed about a direct consequence.

Again, due process requires an *affirmative showing* that a defendant is correctly informed of all direct consequences of his plea before the plea can be considered intelligent and voluntary. Ross, 129 Wn.2d at 284; State v. Mendoza, 157 Wn.2d 582, 584, 591, 141 P.3d 49 (2006). A defendant may withdraw a guilty plea if the defendant is not *explicitly* informed of mandatory community placement. State v. Rawson, 94 Wn. App. 293, 295, 971 P.2d 578 (1999). That is the correct standard to be applied to this case.

Ashe was never *explicitly* informed that he was not subject to community custody. His plea is therefore invalid.

In Rawson, "[n]either the trial court nor the plea forms explicitly warned Rawson that, as a consequence of his pleas, he would definitely receive 12 months' community placement after his term of incarceration. The trial court engaged in a colloquy but simply did not address community placement either in the plea hearing or the sentencing hearing." Rawson, 94 Wn. App. at 297-98. The court concluded "If the trial court fails to explicitly warn the defendant that community placement will be imposed as a consequence of the guilty plea, and such an inadequate form is used, the warning to the defendant is unacceptable under Ross." Id. at 298.

Similarly, neither the trial court nor the plea form explicitly informed Ashe he would not receive community custody as a consequence of his plea. As in Rawson, the trial court engaged in a colloquy with Ashe but simply did not address the community custody issue. The trial court did nothing to counter the plain language of the plea form that explicitly but erroneously informed Ashe that community custody would be imposed. CP 10. Under Rawson, Ashe's plea is not knowing, voluntary and intelligent.

The State does not and cannot dispute that misinformation that purports to increase punishment invalidates a plea in the same manner as misinformation that purports to reduce punishment. Mendoza, 157 Wn.2d

at 590-91 (guilty plea deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated).

The State may defeat an appellate challenge to the voluntariness of a plea only "by showing that the defendant *was in fact fully informed of the sentencing consequences of the plea* during the period in which a motion to withdraw it could be made." *Id.* at 591 (emphasis added). That did not happen here.

If a trial court fails to explicitly inform the defendant that community custody will not be imposed as a consequence of the guilty plea in a case where the plea statement plainly states community custody will be imposed, then the plea is invalid and withdrawal must be allowed. *Cf. In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 296-97, 302, 88 P.3d 390 (2004) (plea not intelligent or voluntary where plea form did not reference community placement, State specifically told trial court that community placement did not apply, and trial court did not offer any further discussion of community placement); *State v. Skiggn*, 58 Wn. App. 831, 838-39, 795 P.2d 169 (1990) (where defense counsel was primarily responsible for listing the wrong standard sentence range on the plea form and State was partially responsible for not detecting the error, proper remedy was withdrawal of the plea).

"When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness." State v. Branch, 129 Wn.2d 635, 642 n. 2, 919 P.2d 1228 (1996) (quoting State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)). That rule, of course, presumes the written statement on plea of guilty correctly informs the defendant about a direct consequence of the plea.

Following the Branch/Perez rationale, the converse rule must be that the written statement on plea of guilty provides prima facie verification of involuntariness where, as here, a defendant fills out a statement that misinforms him about a direct consequence of the plea and acknowledges that he has read it and understands it and that its contents are true.

That the State's sentencing recommendation did not mention community custody does not show Ashe was explicitly and fully informed he would not be subject to community custody. CP 10, 27. The premise behind the State's argument is that Ashe must have been fully aware that community custody was not part of the sentence because the State did not recommend it. BOR at 8. Yet the plea form unequivocally states community custody will be imposed. Faced with that plain language,

there would be no expectation that the prosecutor would recommend community custody because it appears to apply by operation of law rather than discretion.

Even if the "context rule" applied to the challenge mounted by Ashe on appeal, the context at most shows ambiguity in the terms of the plea. Consistent with the rule of lenity applied to ambiguous statutes, any ambiguity in a plea agreement should be construed against the State and in favor of Ashe. State v. Bisson, 156 Wn.2d 507, 523, 130 P.3d 820 (2006) (citing State v. Wills, 244 Kan. 62, 69, 765 P.2d 1114 (Kan. 1988) ("The plea agreement in the instant case is reasonably susceptible to different interpretation and is therefore ambiguous. Where a statute is ambiguous, we require that it be strictly construed in favor of the accused. [citation omitted] We find no compelling reason to adopt a different rule in interpreting ambiguous plea agreements.")).

In sum, the State may defeat Ashe's appellate challenge to the voluntariness of his plea only by affirmatively showing Ashe was in fact explicitly and fully informed of the sentencing consequences of the plea. Mendoza, 157 Wn.2d at 591; Ross, 129 Wn.2d at 284; Rawson, 94 Wn. App. at 295, 297-98. The State cannot make this showing. The plea is invalid.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should allow Ashe to withdraw his guilty plea.

DATED this 20th day of August 2010.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| Respondent, |) | |
| v. |) | COA NO. 64002-0-1 |
| AMNON ASHE, |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMNON ASHE
33122 1ST PLACE SW, #702
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*