

66679-7

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No. 66679-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW CASTRO,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Castro's guilty plea was not knowingly, intelligently and voluntarily entered because he was misinformed as to the standard range applicable to his minimum term.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant gives up important constitutional rights when he enters a plea of guilty, and as a result the plea must be knowing, intelligent and voluntary. A plea is not voluntary if the defendant is misinformed as to the possible penalty. When Mr. Castro entered his guilty plea, he was informed his minimum term would be set with the standard range of 67 to 89 months, but the sentencing court determined Mr. Castro's standard range was 72 to 96 months based upon a new offense. Where Mr. Castro was not informed that his standard sentence range would increase if he pled guilty to a new offense, must he be permitted to withdraw his guilty plea because he was misinformed of a direct consequence of that plea?

C. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Matthew Castro with a single count of rape of a child in the first degree. CP
1. The prosecutor later agreed to amend the information to charge

Mr. Castro with child molestation in the first degree in exchange for a guilty plea to that offense. CP 21.

The Honorable Michael Heavy permitted the State to amend the information and accepted Mr. Castro's guilty plea to child molestation on October 1, 2010. CP 7, 20 10/1/10RP 2, 11. Mr. Castro was informed that his standard range was 67 to 89 months of incarceration. 10/1/10RP 4, 10. He was also informed of the prosecutor's sentence recommendation. 10/1/10RP 5. The prosecutor told Mr. Castro that the prosecutor's recommendation could "change if additional criminal history were to be discovered before sentencing," but not that his standard sentence range would increase. 10/1/10RP 5. The court also did not explain how the standard sentence range could increase. 10/1/10RP 10-11.

Through substitute counsel, Mr. Castro moved to withdraw his guilty plea prior to sentencing on the grounds that his trial counsel was ineffective for recommending that he plead guilty. CP 32-35; 12/20/10RP 3-4. The Honorable Beth Andrus denied the motion. CP 36; 12/20/10RP 4-5.

Mr. Castro was sentenced after he pled guilty to felony violation of a no-contact order in a separate cause number, and the court included that offense in calculating Mr. Castro's offender

score. CP 38, 44; SuppCP 70 (Presentence Statement of King County Prosecuting Attorney, sub. no. 36, 10/25/10, at page 8); 12/20/10RP 6; 1/12/11RP 2. Mr. Castro's new standard sentence range was therefore 72 to 96 months. CP 38. The court imposed a sentence of 89 months to life in prison. CP 41. Mr. Castro appeals. CP 49-62.

D. ARGUMENT

MR. CASTRO'S GUILTY PLEA WAS NOT
KNOWING, INTELLIGENT AND VOLUNTARY
BECAUSE HE WAS NOT INFORMED OF THE
CORRECT POSSIBLE MINIMUM TERM

When Mr. Castro pled guilty, he was told the standard range for setting his minimum term was 67 to 89 months, but the sentencing court imposed an 89-month minimum term after determining the standard range was 72 to 96 months. During the plea colloquy, the prosecutor explained that the prosecuting attorney's recommendation could change if Mr. Castro had additional criminal history not known at the time of the plea, but he was not told that the standard range would increase if he pled guilty to a new offense prior to sentencing. A guilty plea is not knowing, intelligent or voluntary if the defendant is misinformed as to the sentencing consequences of the plea. Mr. Castro must be

permitted to withdraw his guilty plea because he was misinformed as to the standard sentence range under which his minimum term would be set.

1. A defendant's guilty plea is knowing, intelligent and voluntary only if the defendant is correctly informed of the sentencing consequences of the plea. A criminal defendant waives important constitutional rights when he enters a plea of guilty, and due process requires the plea be knowingly, intelligently and voluntarily entered. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 22; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1079, 23 L.Ed.2d 274 (1969); Personal Restraint of Bradley, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). Due process requires an affirmative showing that the guilty plea is knowing, intelligent and voluntary. Boykin, 394 U.S. at 242-44; State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

A guilty plea is not voluntary unless the defendant understands the direct sentencing consequences of the plea. Bradley, 165 Wn.2d at 939; Ross, 129 Wn.2d at 284. Thus the defendant must be informed of all direct consequences of the plea at the time it is made. Ross, 129 Wn.2d at 284. The length of a sentence is a direct consequence of a guilty plea, as is the

applicable minimum term. Bradley, 165 Wn.2d at 939-40; State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988), overruled on other grounds, State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

2. Mr. Castro was misinformed of the standard range applicable to his minimum term. The SRA creates a grid of standard sentencing ranges based upon the offender's "offender score" and the "seriousness level" of the current offense. RCW 9.94A.510; RCW 9.94A.530(1); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is calculated by counting the defendant's prior and current felony convictions in accordance with the Sentencing Reform Act (SRA). RCW 9.94A.525; Ford, 137 Wn.2d at 479; State v. King, 162 Wn.App. 234, 253 P.3d 120, 122 (2011). In this case, the standard range is used to determine the minimum term. RCW 9.94A.507(1), (3).

When he entered his guilty plea, Mr. Castro was informed that his standard range was 67 to 89 months of incarceration. 10/1/10RP 4, 10; CP 9. But Mr. Castro was not informed that this range would increase if he pled guilty to a new offense prior to sentencing.

The prosecutor's colloquy with Mr. Castro was misleading, as the prosecutor told Mr. Castro that the State's recommendation could change "if additional criminal history were to be discovered before sentencing," but not that his standard range could increase if additional criminal history was discovered or if he pled guilty to a new crime. 10/1/10RP 5. Nor did the court ensure prior to accepting Mr. Castro's guilty plea that he understood that his standard sentence range could increase if he had additional criminal history or pled guilty to a new crime. 10/1/10RP 10-11.

At the time of sentencing, however, Mr. Castro had pled guilty to the crime of felony violation of a no-contact order. The sentencing court included that offense in calculating Mr. Castro's offender score for the current offense, and he was sentenced for both cases at the same hearing. CP 22, 38; 1/12/11RP 2. The increased offender score resulted in an increase in the applicable standard range from 67 to 89 months to a range of 72 to 96 months, and the court sentenced Mr. Castro to an 89-month minimum term. CP 22, 38, 41. Because Mr. Castro was not notified of the correct standard range at the time he entered his guilty plea, his guilty plea was not knowing, intelligent and voluntary.

3. Mr. Castro may raise this issue in his appeal. Mr. Castro moved to withdraw his guilty plea on the basis that he did not receive effective assistance of counsel in determining whether or not to plead guilty, not whether he was correctly informed of the sentencing consequences of his guilty plea. CP 32-35; 12/20/10RP 3-4. However, the validity of an involuntary guilty plea is a manifest constitutional error that may be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); RAP 2.5(a). Thus, Mr. Castro may obtain relief on appeal.

4. Mr. Castro must be permitted to withdraw his guilty plea because he was incorrectly informed of the sentencing consequences of his plea. The court must permit the defendant to withdraw his guilty plea when he has been misinformed as to the applicable minimum term. Bradley, 165 Wn.2d at 939-40 (miscalculated offender score, defendant misinformed of correct standard range); Walsh, 143 Wn.2d at 6-8 (incorrect standard range); Miller, 110 Wn.2d at 529-31 (not informed of minimum term). Mr. Castro was not informed of the correct standard sentence range used to determine his minimum term. This Court should remand his case with instructions he be permitted to

withdraw his guilty plea. Walsh, 143 Wn.2d at 10; King, 253 P.3d at 124.

E. CONCLUSION

Mr. Castro's guilty plea was not knowing, intelligent and voluntary because he was not informed of the correct standard range for determining his minimum term. This Court should remand with instructions to permit Mr. Castro to withdraw his guilty plea.

DATED this 19th day of August 2011.

Respectfully submitted,



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DIVISION ONE**

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MATTHEW CASTRO,)

Appellant.)

NO. 66679-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS, DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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