

FILED  
9-28-16

Court of Appeals  
Division I  
State of Washington

No. 75128-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD FORTIN,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Because he was misadvised of the consequences of conviction Donald Fortin's guilty plea is involuntary.

2. The trial court erred in imposing a sentence greater than permitted by statute.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. A guilty plea violates due process unless it voluntarily made with knowledge of the consequences of conviction. Where a person is misadvised of a consequence of conviction, the resulting plea is involuntary and deprives the person of due process. Failure to register is a class C felony, with a statutory maximum of five years, unless a person has two or more prior felony convictions for failing to register. Mr. Fortin has one prior conviction for failing to register. Was Mr. Fortin's guilty plea voluntary where he was erroneously told the maximum sentence he faced was 10 years?

2. Is the Judgement and Sentence erroneous where it lists the maximum punishment as 10 years?

3. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority for felony offenses. Under RCW 9.94A.701(9) the trial court must reduce the term of community custody where the combined term of community custody and confinement exceeds the statutory maximum for an offense. Where the trial court imposed a 43-

month sentence for a Class C felony yet also imposed a 36-month term of community custody, must this Court order the trial court to correct the erroneous sentence?

C. STATEMENT OF THE CASE

The State charged Mr. Fortin with a single count of failing to register. CP 62-64. Mr. Fortin pleaded guilty. CP 43-62. The guilty plea erroneously stated the offense was a Class B felony with a maximum sentence of 10 years. CP 44.

The court sentenced Mr. Fortin to 43 months confinement and 36 months community custody. CP 2-16.

D. ARGUMENT

**1. Mr. Fortin's guilty plea is not a knowing, intelligent and voluntary waiver of his rights.**

*a. A guilty plea is voluntary when made with knowledge of the consequences of conviction.*

The Fourteenth Amendment's Due Process Clause 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 Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). When a person pleads guilty:

He . . . stands witness against himself and he is shielded by the Fifth Amendment from being compelled to do so – hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is

more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his constitutional right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

*Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970).

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin*, 395 U.S. at 242. “The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea.” *Wood v. Morris*, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *see also, In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (“A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.”)

The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Id.* at 591.

Moreover, a defendant is not required to show the misinformation was material to his decision to plead guilty:

We have . . . declined to adopt an analysis that focuses on the materiality of the sentencing consequence to the defendant's subjective decision to plead guilty. . . . Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea.

*Mendoza*, 157 Wn.2d at 590-91 (Internal citations omitted); *Bradley*, 165 Wn.2d at 939.

*b. Mr. Fortin was misinformed in his guilty plea of the maximum sentence.*

The relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A “defendant must be advised of the maximum sentence which could be imposed

prior to entry of the guilty plea.” *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Mr. Fortin’s guilty plea form stated that his maximum term of confinement was 10 years. CP 44. However, RCW 9A.44.132 provides:

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law.

(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions, the failure to register under this subsection is a class B felony.

Mr. Fortin only has a single prior felony conviction for failure to register. CP 3-4. Therefore, the current offense is a Class C felony.

RCW 9A.44.132(a)(ii). The maximum sentence for a Class C felony is 5 years. RCW 9A.20.021(a).

Mr. Fortin was not properly informed of the consequences of his plea.

*c. Because the court misinformed him of the consequences of his plea, Mr. Fortin is entitled to withdraw his plea should he choose to.*

“Where a plea agreement is based on misinformation generally the defendant may choose . . . withdrawal of the guilty plea.” *Walsh*, 143 Wn.2d at 8 (citing *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d

122 (1988)). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. *Walsh*, 143 Wn.2d at 8. As *Mendoza* made clear, it does not matter whether the misadvisement was material to Mr. Fortin's decision to plead guilty or whether his sentence was more lenient than previously indicated. 157 Wn.2d at 590-91.

**2. The trial court erred in imposing a sentence in excess of that permitted by statute.**

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, Mr. Fortin's maximum sentence is 5 years. RCW 9A.20.020(1)(c); RCW 9A.44.132(1). The Judgment and Sentence, however, states the maximum sentence is 10 years. CP 4. That is plainly wrong.

This error has significant implications on Mr. Fortin's sentence. RCW 9.94A.701(9) requires

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with

the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Under this statute a court “must determine the precise length of community custody at the time of sentencing.” *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011); *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Mr. Fortin’s offense is a Class C felony with a statutory maximum of 60 months. RCW 9A.20.020(1)(c); RCW 9A.44.132(1).

Here, the court imposed 43 months confinement and 36 months of community custody. CP 6-7. That combined term of 79 months exceeds the correct statutory maximum by 19 months. Thus, the term of community custody must be reduced to 17 months. *Boyd*, 174 Wn.2d at 472.

F. CONCLUSION

For the reasons above, Mr. Fortin’s case must be remanded to afford him the opportunity to withdraw his plea should he choose to do so. In any event, he must be resentenced to a term authorized by statute.

Respectfully submitted this 28<sup>TH</sup> day of September, 2016.

s/ Gregory C. Link  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 75128-0-I
	)	
DONALD FORTIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF SEPTEMBER, 2016, 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:

- |                                      |     |                  |
|--------------------------------------|-----|------------------|
| [X] SETH FINE, DPA                   | ( ) | U.S. MAIL        |
| [sfine@snoco.org]                    | ( ) | HAND DELIVERY    |
| SNOHOMISH COUNTY PROSECUTOR'S OFFICE | (X) | AGREED E-SERVICE |
| 3000 ROCKEFELLER                     |     | VIA COA PORTAL   |
| EVERETT, WA 98201                    |     |                  |
| <br>                                 |     |                  |
| [X] DONALD FORTIN                    | (X) | U.S. MAIL        |
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| STAFFORD CREEK CORRECTIONS CENTER    | ( ) | _____            |
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**SIGNED** IN SEATTLE, WASHINGTON, THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2016.



X \_\_\_\_\_

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