

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint
Petition of

ANTHONY LAMOUNT BRADLEY,

Petitioner.

NO. 81045-1

EN BANC

Filed April 16, 2009

STEPHENS, J.—Anthony Bradley pleaded guilty to simple possession of cocaine and possession with intent to deliver. As a result of a miscalculated offender score on the simple possession charge, Bradley was misinformed about the standard range associated with a plea of guilty on that charge. He now argues the misinformation rendered his plea involuntary. He seeks to withdraw both his simple possession plea and his possession with intent to deliver plea, claiming they were part of an indivisible “package deal.” We conclude Bradley’s plea was involuntary and that on the facts before us, his pleas were indivisible.

Facts and Procedural History

Bradley was apprehended in possession of cocaine on May 14, 2002. He was charged by information on May 17 with possession of cocaine with intent to

deliver. Three months later, on August 16, 2002, he was again apprehended with cocaine and charged by information with possession of cocaine with intent to deliver. On September 26, 2002, the State amended the May 14 possession with intent charge to a simple possession charge. Bradley pleaded guilty to both charges that same day.

For the simple possession charge, Bradley's offender score put the standard range for the crime at 33-43 months. His offender score was eight and included one point for his juvenile convictions. For the intent to deliver charge, Bradley's offender score was nine, including two points for juvenile convictions, resulting in a standard range of 87-116 months. Bradley did not challenge the offender score calculations at the plea hearing. Pursuant to his plea agreement, the State agreed to recommend 43 months for simple possession and 87 months for possession with intent to deliver. The court imposed concurrent sentences in accordance with the State's recommendation. The judgment and sentence became final on October 17, 2002. Bradley did not appeal either conviction.

Sometime after the judgment and sentence became final, Bradley learned that his offender score for the simple possession charge had been miscalculated. His juvenile offenses should have "washed out" of his offender score because the possession crime was committed before June 13, 2002. *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004); *see* RCW 9.94A.525(2). Bradley filed a personal restraint petition and, as part of the relief requested, sought to withdraw his plea to possession with intent to deliver. Division One of the Court of Appeals dismissed

the petition on May 18, 2004, reasoning that Bradley's intent to deliver crime occurred after June 13, 2002. Division One did not address Bradley's simple possession charge.

In September 2007, Bradley filed this personal restraint petition, requesting to withdraw both of his pleas. Because the petition appeared to be successive, the Court of Appeals transferred it to this court for consideration. *See In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 19 P.3d 1027 (2001). We retained the petition and appointed counsel for Bradley.

There appears to be no question that Bradley's petition is not successive because Division One did not address or resolve Bradley's arguments concerning his simple possession charge. State's Resp. to Pers. Restraint Pet. at 9 (claiming that any challenge to Bradley's charge for *possession with intent to deliver* is successive). Before this court, Bradley challenges the validity of his plea to simple possession, and, although he does not substantively challenge his intent to deliver plea, he seeks to withdraw both pleas on the ground that they were part of an indivisible "package deal." Suppl. Br. of Pet'r at 5.

The State concedes that Bradley's offender score for his simple possession charge was miscalculated. The State also appears to concede that the miscalculation resulted in a facial invalidity on Bradley's judgment and sentence, allowing him to avoid the one-year time bar to filing a personal restraint petition. However, the State argues that the miscalculation affected only the sentencing range on Bradley's simple possession charge, which was not a direct consequence of his

plea. The State asks that this case be remanded to the trial court so that the trial court may correct the offender score and standard range calculation reflected in the judgment and sentence. In the alternative, the State asks that Bradley be allowed to withdraw only his simple possession plea.

Analysis

Involuntary Plea

“Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent.” *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that has a “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Id.* 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); *State v. Moon*, 108 Wn. App. 59, 63, 29 P.3d 734 (2001). Therefore, misinformation about the length of a sentence renders a plea involuntary, even where the correct sentence may be less than the erroneous sentence included in the plea. *Mendoza*, 157 Wn.2d at 591. This court does not require a defendant to show that the misinformation was material to the plea. *Isadore*, 151 Wn.2d at 302.

Here, Bradley was misinformed as to his offender score and the length of his sentence range for simple possession. Under *Ross* and *Mendoza*, it appears he was

not apprised of a direct consequence of his plea. The State argues, however, that the sentence range was not a direct consequence of the plea. It points out that Bradley was ordered to serve a concurrent sentence and that his other conviction—possession with the intent to deliver—carried a higher standard range than simple possession. Thus, the State argues, the length of Bradley’s sentence for simple possession was not a direct consequence of his plea because it had no practical effect on his sentence; he would have served the same sentence either way.

Relying upon *State v. Osequero Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999) (plurality opinion), the State argues that the particular facts of Bradley’s case mean that there was no direct consequence to his simple possession plea. In *Acevedo*, the defendant was not informed about community custody placement, a direct consequence of a plea. A plurality of this court found that the defendant’s impending deportation rendered community custody a nullity, and therefore it was not a material factor in his decision. *Id.* at 194. Just as *Acevedo*’s deportation may have foreclosed his community custody term, the State argues that Bradley’s concurrent sentences mean he would never have served the lower standard range about which he was misinformed. Suppl. Br. of Resp’t at 10-11.

While the State accurately describes *Acevedo*, its reasoning has been eclipsed by later case law. *See Isadore*, 151 Wn.2d at 301-02. In *Isadore*, we held that a court will not speculate on the possible outcomes had the defendant been properly advised on the direct consequences of his plea. *Id.* at 302. Thus, we reject the State’s invitation to consider the practical effect of Bradley’s actions, as well as

what the State itself might have done under other circumstances. This court cannot rewind the clock and put itself in the shoes of the prosecutor and the defendant as they entered into this plea agreement. As we observed in *Isadore*: “This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.” *Id.* This exercise is tantamount to examining the practical effects of information on a plea under the materiality test we rejected in *Isadore*. Moreover, we have already held that the length of a sentence is a direct consequence of a plea. *Mendoza*, 157 Wn.2d at 590. We conclude that Bradley was not informed about a direct consequence of his plea, and the plea was therefore involuntary.

Remedy

Where a plea is entered into involuntarily, a defendant may choose to specifically enforce the agreement or to withdraw the plea. *State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988). The prosecutor bears the burden of showing that the defendant’s choice would result in an injustice. *Id.*

Here, the State does not argue that withdrawal of the simple possession plea would work an injustice. Therefore, as to the simple possession plea, withdrawal is appropriate. However, Bradley asks to withdraw both his simple possession plea and his plea for possession with intent to deliver.

This remedy is available to a defendant only where, as part of a “package deal,” the defendant was correctly informed of the consequences of one charge, but

not of another charge. *State v. Turley*, 149 Wn.2d 395, 399-401, 69 P.3d 338 (2003). A plea bargain is a “package deal” if the agreements as to the individual charges are indivisible from one another. *See id.* at 400. This court looks to objective manifestations of intent in determining whether a plea agreement was meant to be indivisible. *Id.* Where “pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding,” the pleas are indivisible from one another. *Id.*¹

We do not have before us the colloquy between the sentencing court and Bradley. We do not know to what extent the judge explained the pleas to Bradley, either separately or together. *See id.* (observing that in the sentencing hearing, the trial court “advised Turley of the consequences of his plea, but did not separate these consequences out based on the individual charge.”). Thus, we are not faced with the same factual situation we reviewed in *Turley*, where we held a court *must* regard a plea agreement as indivisible. *Turley* does not purport to exclude other situations where we *may* find indivisibility, however. *Id.* Consistent with *Turley*, we examine the documents produced at Bradley’s sentencing for objective

¹ The concurrence and dissent believe *Turley* set forth “elements” that *must* be met in order to find indivisibility, specifically when pleas to multiple counts or charges are made at the same time, described in one document, and accepted in a single proceeding. Concurrence at 2; dissent at 2. Such a reading misapprehends the contract-based test set forth in *Turley*, which is that we must look to objective manifestations of intent on the face of the plea agreement in order to determine whether the parties intended multiple pleas to be indivisible. *Turley*, 149 Wn.2d at 400. *Turley* did not dictate the only possible set of facts that demonstrate an objective manifestation of intent to make a “package deal.” If the *Turley* facts represented elements, this court would not have found in a later case that a defendant’s pleas were indivisible even though described in separate documents. *See In re Pers. Restraint of Shale*, 160 Wn.2d 489, 493, 158 P.3d 588 (2007).

manifestations of intent.

Bradley's charges were not described in one document, *see id.*, but rather in separate documents linked to each charge. Suppl. Br. of Resp't, App. D ("Statement of Defendant on Plea of Guilty" for simple possession and "Plea Agreement" for simple possession); Suppl. Br. of Resp't, App. E ("Statement of Defendant on Plea of Guilty" for possession with intent to deliver and "Plea Agreement" for possession with intent to deliver). However, each of the separate documents referenced the other charge. In *In re Personal Restraint of Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007), this court found a plea agreement was indivisible where the pleas were described in different documents but referenced in one another. *Id.* at 493-94. *Shale* is not entirely on point because there the defendant committed his separate crimes on the same day, *id.*, while Bradley's crimes were committed approximately three months apart and charged in separate informations. And, as the State notes, the cross-references contained in the plea documents were mandatory to the terms of Bradley's concurrent sentences, under RCW 9.94A.589(1)(a). Suppl. Br. of Resp't at 14-15. A mandatory reference provides little evidence of intent to create a package plea deal. Thus, the fact that the crimes are cross-referenced in the statements and the fact that the statements were entered on the same day does not alone establish an indivisible plea deal. Indeed, if this were sufficient, nearly every concurrent sentence entered on the same day would result in an indivisible plea deal.

The facts here go beyond this common situation, however, and evidence a

“package deal.” Significantly, the minute entries by the clerk indicate that the State amended the original possession with intent to deliver charge to simple possession *on the day of sentencing* on both charges. Suppl. Br. of Resp’t, App. F. This amendment entered on the day of sentencing is an objective manifestation that the pleas were negotiated as part of a package deal. The timing confirms that in return for a plea to two charges, the State agreed to reduce one of the charges to simple possession and recommend concurrent sentencing. This fact aligns this case with those describing indivisible pleas and requires extending the remedy of rescission to both charges against Bradley.²

Conclusion

Bradley was misinformed about a direct consequence of his simple possession plea. Therefore, his plea was involuntary and he is entitled to withdraw it. Because this plea and his plea to possession with intent were entered as part of a package deal, his withdrawal necessarily includes both pleas. We grant the personal

² The concurrence suggests that a fact-finding reference hearing under RAP 16.11(b) would be appropriate to determine the intent of the parties as to indivisibility at the time the pleas were entered. Concurrence at 3. This suggestion cannot be squared with our language in *Turley*: “[a]bsent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. Such a determination, after the fact, would not serve the plea negotiation process.” 149 Wn.2d at 400. In *Turley*, we rejected outright the State’s request for an after-the-fact evidentiary hearing because it would undermine the integrity of the plea negotiation process. Moreover, such a hearing would also be at odds with our reasoning in *Isadore*, in which we cautioned courts against engaging in a hindsight inquiry into the motivations of parties to a plea agreement outside the four corners of the agreement. 151 Wn.2d at 302. Here, we need not and should not require a reference hearing; the documentary record itself evidences an intent to create a package deal.

restraint petition and remand to the trial court for further proceedings consistent with this opinion.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice Tom Chambers
