

SUPREME COURT OF WASHINGTON

State v. Walsh

143 Wash. 2d 1 (2001) · Decided February 8, 2001

OPINION

MADSEN, J.

Madsen, J. The defendant agreed to plead guilty to second degree rape in exchange for the prosecutor's promise to recommend a sentence at the low end of the standard *4range. However, the parties were mistaken about the proper standard range sentence—the standard range is higher than contemplated by the plea agreement.

We hold that the plea agreement was not voluntary and that the defendant is entitled to challenge the plea's validity for the first time on appeal. Facts Defendant Timothy Walsh was originally charged with first degree kidnapping, first degree rape, and second degree assault. He agreed to a reduced charge of second degree rape in exchange for dismissal of the other counts and the prosecutor's promise to recommend the low end of the standard range.¹ The plea form shows that Walsh had one prior conviction for vehicular assault.

Both the defense and the prosecution mistakenly understood that based upon that history, the standard range is 86 to 114 months, and the plea agreement therefore provided that the prosecutor would recommend an 86-month sentence.

In response to the court's questions at the plea hearing, Walsh said that he understood that the maximum sentence for second degree rape is life, and that his standard range is 86 to 114 months. He also said that he understood that in exchange for his guilty plea he was promised only that the prosecutor would recommend a sentence of 86 months. He stated that he understood that the court was not required to follow the State's recommendation.

The court accepted the plea agreement, finding that Walsh entered the guilty plea knowingly, intelligently, and voluntarily. After the plea hearing and before the sentencing hearing, the community corrections officer who prepared the presentence report concluded that the vehicular assault conviction counted as two points, which resulted in a standard range of 95 to 125 months.

The officer asked the court to impose an exceptional sentence of 136 months *5based upon deliberate cruelty to the victim. At sentencing, the prosecutor told the court that the standard range is 95 to 125 months, and recommended the low end of this range, 95 months. Defense counsel asked the court to impose a sentence at the bottom end of the standard range.

Nothing in the record shows that Walsh himself was ever advised or realized before the sentencing proceeding that the standard range is not what the parties believed when the plea agreement was reached and accepted by the court. He was clearly not advised of the new standard range at that proceeding, and nothing suggests he was then aware of the change in the prosecutor's recommendation.

There was simply no discussion of the matter at all. Walsh did not move to withdraw the guilty plea. The court sentenced Walsh to an exceptional sentence of 136 months. Walsh appealed, raising several challenges. The Court of Appeals affirmed, reasoning, among other things, that while Walsh had a right to withdraw his plea once it became apparent that the plea was based upon an incorrect understanding of the standard range, he waived any error by "electing to proceed with the sentencing and by not moving for withdrawal of his plea." *State v. Walsh*, No. 17485-9-III, slip op. at 5 (Wash.

Ct. App. Nov. 16, 1999). We granted Walsh's petition for review. He raises only one issue in the petition: whether a challenge to the voluntariness of a guilty plea is waived if a defendant who enters a plea agreement fails to move to withdraw the guilty plea and proceeds with sentencing after it becomes apparent that the plea is based upon a misunderstanding as to the standard range sentence.

Analysis The plea agreement here conforms to RCW 9.94A.080, which authorizes a prosecutor to agree to dismissal of other counts and to recommend a particular sentence within the sentence range. Pursuant to CrR 4.2(d), the court "shall not accept a plea of guilty, without first *6determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." See *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made. In *re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). However, a trial court must allow withdrawal of a guilty plea "to correct a manifest injustice." CrR 4.2(f). Nonexclusive criteria as to what constitutes manifest injustice include (1) the denial of effective counsel; (2) the defendant or one authorized by the defendant did not ratify the plea; (3) the plea was involuntary; or (4) the prosecution breached the plea agreement.

Wakefield, 130 Wn.2d at 472; *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). Walsh contends that his plea was not voluntary because of the mutual mistake about the standard range sentence and therefore he is entitled to withdraw the plea. While the Court of Appeals agreed that Walsh had the right to withdraw his guilty plea when it became apparent that it was based upon a misunderstanding of the standard range, the court held that Walsh waived the error by electing to proceed with sentencing and failing to move at the trial court for withdrawal.

We disagree. In *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983), this court reviewed a challenge to the voluntariness of a plea agreement which was raised for the first time by way of a personal restraint petition. It follows that the issue can be raised for the first time on appeal. See also *In re Pers. Restraint of James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982).

In *State v. Skiggn*, 58 Wn.App. 831, 795 P.2d 169 (1990), as in this case, an error was made in calculating the standard range. The defendant was given an opportunity to withdraw his plea, but declined, apparently hoping the court would specifically enforce the agreement.

On appeal, the Court of Appeals held that specific performance would be unjust under the circumstances because the error *7was largely attributable to the defense (not the case here). The court held that although the defendant was not entitled to specific performance, he should be given another opportunity to withdraw the plea, now that he knows specific enforcement was not an option.

Skiggn, 58 Wn. App. at 838-39. In accord with these cases, Walsh should be allowed to raise the issue of the validity of his plea for the first time on appeal. He was never even offered an opportunity to withdraw his plea or to seek specific performance; the new standard range was not brought to his attention at the sentencing hearing.

Moreover, RAP 2.5(a)(3) provides that “manifest error affecting a constitutional right” may be raised for the first time on appeal. Division Two of the Court of Appeals recently discussed the rule in the context of a claim raised for the first time on appeal that the prosecution breached a plea agreement by undermining the agreement and arguing for a sentence greater than the agreed-to recommendation.

As that court noted, a defendant gives up constitutional rights by agreeing to a plea agreement and, because fundamental rights of the accused are at issue, due process considerations come into play. *State v. Van Buren*, 101 Wn. App. 206, 211, 2 P.3d 991 (2000); see *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977) (“[a] plea of guilty constitutes a waiver of significant rights by the defendant, among which are the right to a jury trial, to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt”); *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (due process requires that the prosecutor adhere to the plea agreement); *In re Pers.*

Restraint of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987) (due process requires that a guilty plea be knowing, intelligent and voluntary); *State v. Lewis*, 16 Wn. App. 132, 135, 553 P.2d 127 (1976) (same) (citing, among other cases, *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); see *Santobello v. New York*, 404 U.S. 257, 92 S. Ct.

495, 30 L. Ed. 2d 427 (1971). *8The Court of Appeals in *Van Burén* correctly reasoned that a claim of error based upon a breach of a plea agreement involves an issue of constitutional

magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). Similarly, given the fundamental constitutional rights of an accused which are implicated when a defendant pleads guilty, a claim that a guilty plea pursuant to a plea agreement was involuntary due to a misunderstanding about the standard range sentence is the kind of constitutional error that RAP 2.5(a)(3) encompasses.² “[M]anifest” in RAP 2.5(a)(3) means that a showing of actual prejudice is made.

State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Walsh’s claim that his plea was not voluntary is clearly likely to succeed. “A defendant must understand the sentencing consequences for a guilty plea to be valid.” *Miller*, 110 Wn.2d at 531; see *Skiggn*, 58 Wn.

App. 831. Walsh may raise the issue of the involuntariness of his plea for the first time on appeal. Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal *9of the guilty plea.

Miller, 110 Wn.2d 528. The defendant’s choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. *Id.* at 535. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea. See *Miller*, 110 Wn.2d at 536 (State bears the burden of showing defendant’s choice of remedy is unjust); *State v. Moore*, 75 Wn.

App. 166, 173, 876 P.2d 959 (1994) (defendant was allowed his choice of remedy where the State did not argue it would be prejudiced by withdrawal of the plea but instead conceded it could still procure its key witness for trial).³ The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range.

The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.⁴ Finally, there is no merit to the State’s suggestion that defendant’s choice makes no difference because the court imposed an exceptional sentence of 136 months.

The issue here is whether the defendant voluntarily pleaded guilty. Since he did not, imposition of an exceptional sentence based upon that guilty plea cannot stand. *10Walsh is entitled to withdraw his guilty plea.⁵ The Court of Appeals is reversed and this case is remanded for further

proceedings. Alexander, C.J., Smith, Johnson, Ireland, and Bridge, JJ., and Guy and Talmadge, JJ. Pro Tern., concur.

Walsh entered an Alford plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). We find *State v. Giebler*, 22 Wn. App. 640, 642-43, 591 P.2d 465 (1979), unpersuasive. This case was cited by the Court of Appeals for the proposition that the failure to object precluded Walsh from raising a related issue for the first time on appeal, i.e., that the prosecutor breached the agreement by recommending 95 months, the low end of the correct standard range, rather than 86 months as agreed.

In *Giebler*, the defendant contended that the State breached the plea agreement to recommend a deferred sentence, and on appeal sought specific performance. The Court of Appeals held that when it became apparent to the defendant that the State was changing its recommendation, the defendant was under a duty to move to withdraw his plea or to have the agreement specifically enforced.

Giebler, 22 Wn. App. at 644. The failure to object precluded his raising the issue for the first time on appeal. *Id.* *Giebler* does not address RAP 2.5(a)(3), and relies on out of state cases having different rules for raising issues on appeal.

The Court of Appeals said in *Van Burén* that allowing the raising of issues of constitutional magnitude for the first time on appeal can result in a process where the defendant suffers no penalty for failing to avail himself or herself of remedies at the trial court, and may, by appealing the issue of breach of a plea agreement, obtain an additional two years to decide whether to seek withdrawal or specific performance.

State v. Van Buren, 101 Wn. App. 206, 212 n.2, 2 P.3d 991 (2000). The court noted that in that time the State's witnesses may be unavailable or memories may have faded. *Id.* Where plea agreements are claimed to be involuntary or to have been breached by the prosecution, the rule is that the defendant's choice of remedy controls unless it would be unjust. If the State would be prejudiced in presenting its case by the passage of time, it can ask that the defendant's remedy be limited to specific performance.

We note that, in any event, the prosecutor did not make a recommendation in accord with the terms of the plea agreement, which expressly stated that he would recommend an 86-month sentence — there was no attempt to specifically perform. It appears under the facts of this case that the parties will be returned to the status quo ante. See *Santobello v. New York*, 404 U.S. 257, 262-63, 263 n.2, 92 S. Ct.

495, 30 L. Ed. 2d 427 (1971) (the defendant was charged with two felony counts but pleaded guilty to one lesser included offense in exchange for the prosecutor's promise to make no sentence recommendation, and the prosecutor breached the agreement; the Court held that the ultimate

relief to which the defendant was entitled was within the discretion of the state court, but added that “[i]f the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts”); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988) (where a plea agreement is based upon misinformation or the prosecution breaches the plea, the court can allow the accused to withdraw the plea “and be tried anew on the original charges” or grant specific performance).