IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL JESSE GONZALES, Appellant.	No. 38317-9-II Consolidated with No. 34488-2-II UNPUBLISHED OPINION
Personal Restraint Petition of MICHAEL JESSE GONZALES, Petitioner.	

Quinn-Brintnall, J. — Michael Jesse Gonzales pleaded guilty to second degree murder. In his first appeal, Gonzales successfully challenged the calculation of his offender score, and we remanded for resentencing with a lower offender score. Before resentencing, Gonzales sought to withdraw his guilty plea, arguing that the miscalculation of the length of his sentence under the standard sentencing range rendered his plea invalid and that he must be allowed to withdraw it. The trial court denied Gonzales's request. But *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006), mandates that Gonzales be allowed to withdraw his guilty plea. Accordingly, we reverse

the trial court's denial of Gonzales's motion to withdraw his guilty plea and remand.[1]

FACTS

The State charged Gonzales with one count of first degree murder with a firearm enhancement or, in the alternative, one count of second degree murder with a firearm enhancement; first degree robbery with a firearm enhancement; unlawful possession of a controlled substance; and conspiracy to commit first degree robbery. The charges resulted from events where a group of individuals attempted to rob Oscar Abundiz, Jr. during a prearranged drug sale. Abundiz was shot, killed, and later burned in an alleged attempt to cover up the crimes. The incidents occurred on June 14, 2002.

After a partial trial, Gonzales pleaded guilty to one count of second degree murder. In exchange for his guilty plea, the State agreed to, and in fact did, dismiss all other pending charges and recommended a sentence of 180 months confinement. The State calculated Gonzales's offender score as four based on four prior convictions: a 1992 residential burglary (juvenile), a 1993 second degree assault (juvenile), and two 1994 drug convictions. The parties agreed that Gonzales's offender score resulted in a standard sentencing range of 165 to 265 months confinement. The 2003 sentencing court did not follow the parties' joint recommendation and instead sentenced Gonzales to 265 months confinement.

Gonzales appealed, arguing that the sentencing court incorrectly calculated his offender score and that the State breached the plea agreement by failing to advocate for the agreed

[1] We do not reach Gonzales's remaining challenges except to note that the trial court has authority under former RCW 7.69.030 (1999), the victims' rights statute, to specifically prohibit Gonzales from having contact with the victim's *named* family members, relatives, friends, and others who testified against Gonzales or addressed the court at his sentencing hearings.

sentence. The State conceded that because two of Gonzales's adult offenses had washed out of his offender score, his offender score at the time of sentencing should have been two rather than four. We accepted the State's concession and remanded for resentencing under the correct offender score. In light of our decision to remand, we did not reach the additional issues that Gonzales raised in his first appeal.

At the January 14, 2005 resentencing hearing, Gonzales attempted to withdraw his plea. The 2005 resentencing court denied his request, stating that it had no authority to do so because resentencing would inevitably result in a reduction rather than an increase in the sentence. The 2005 resentencing court then determined that Gonzales's lower offender score decreased his standard sentencing range from 165 to 265 months confinement to 144 to 244 months confinement. The State presented the verbatim report of proceedings from the first sentencing hearing, including testimony from the deceased's family and friends. In addition, the State reiterated its belief that the original joint recommendation for 180 months confinement was an appropriate sentence.

The 2005 resentencing court imposed 242 months confinement. Gonzales failed to appeal from his resentencing hearing, but on January 11, 2006, he filed a personal restraint petition (PRP) with this court. In his PRP, Gonzales contended that his lawyer ineffectively assisted him by, among other things, failing to file a direct appeal from the resentencing.

We determined that we could not resolve Gonzales's PRP based solely on the record before us. Therefore, we remanded for the Mason County Superior Court to conduct a reference hearing. We certified eight factual issues for the superior court to resolve. Thereafter, the superior court held a reference hearing and entered findings of fact as to the eight certified

questions. Significantly, the superior court found that Gonzales asked his attorney whether he could appeal and that his attorney replied that he could not, even though Gonzales was entitled to directly appeal from his resentencing as of right under RAP 2.2(a)(1).[2] Thus, we concluded that Gonzales's attorney performed deficiently in a manner that deprived him of a direct appeal. Consequently, we held that Gonzales was entitled to appeal without establishing prejudice of his right to do so. *See In re Pers. Restraint of Frampton*, 45 Wn. App. 554, 559-60, 563, 726 P.2d 486 (1986).

Accordingly, we granted Gonzales's motion to file the late notice of appeal. We accepted Gonzales's appeal and consolidated it with his PRP for review.

ANALYSIS

Voluntariness of Plea

In his direct appeal, Gonzales contends that he did not knowingly, intelligently, and voluntarily enter his guilty plea because he was not aware of all direct sentencing consequences of his plea. We agree.

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)). The constitutional requirements of a voluntary guilty plea are that (1) the defendant is aware that he is waiving his right to remain silent, right to confront his accusers, and right to a jury trial; (2) the defendant is aware of the essential elements of the offense charged; and (3) the defendant is aware of the direct

[2] RAP 2.2(a)(1) states: "Unless otherwise prohibited . . . a party may appeal from . . . [t]he final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs."

consequences of pleading guilty. *In re Pers. Restraint of Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) (citing *State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980)). Likewise, CrR 4.2(d) mandates that the trial court not accept a guilty plea without first determining that a criminal defendant has entered into the plea "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." *See also State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (stating that for a plea to be knowing and voluntary, a criminal defendant must be informed of all direct consequences of his plea). A direct consequence is one that has a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Ross*, 129 Wn.2d at 284 (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). When a defendant's plea is involuntary, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea.[3] *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001). Here, Gonzales seeks to withdraw his plea.

A. Misinformation About Direct Consequence of Guilty Plea

Gonzales correctly bases his contention on the premise that the length of a sentence is a direct consequence of a guilty plea. *Mendoza*, 157 Wn.2d at 590; *In re Isadore*, 151 Wn.2d at 302; *State v. Murphy*, 119 Wn. App. 805, 806, 81 P.3d 122 (2002), *review denied*, 152 Wn.2d 1005 (2004); *State v. Moon*, 108 Wn. App. 59, 63, 29 P.3d 734 (2001). Thus, misinformation about the length of a sentence renders a plea involuntary, even when the correct sentence may be less than the erroneous sentence included in the plea. *Mendoza*, 157 Wn.2d at 591. We do not require a defendant to show that the misinformation was material to the plea. *In re Isadore*, 151

[3] But note that the defendant's choice of remedy does not control if there are compelling reasons not to allow that remedy. *State v. Walsh*, 143 Wn.2d 1, 9, 17 P.3d 591 (2001).

Wn.2d at 302.

Here, it is undisputed that the trial court based Gonzales's original sentence on a miscalculated offender score. Gonzales entered into the plea bargain based on his belief that his offender score was four, but in fact it was two. The lower offender score decreased his standard range from 165 to 265 months confinement to 144 to 244 months confinement. Due to this discrepancy, Gonzales sought to withdraw his plea at the resentencing hearing. But the trial court denied his request and sentenced him under the lower sentencing range. Relying on *Mendoza*, Gonzales argues that the trial court erred when it denied his request to withdraw his plea.

We review a trial court's decision on a motion to withdraw a guilty plea for abuse of discretion. *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997). And we review findings of fact that support the decision for substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

B. Withdrawal of Guilty Plea Under *Mendoza*

As an initial matter, we note that *Mendoza* applies here because Gonzales's case was pending or not yet final when our Supreme Court rendered its decision in *Mendoza*. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (new rules for the conduct of criminal prosecutions apply to all cases pending on direct review or not yet final when the rule is issued) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)); *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455 (2007), *review denied*, 163 Wn.2d 1046 (2008). We are bound by *Mendoza*, which sets forth Washington's current rules regarding withdrawal of pleas. *See In re St. Pierre*, 118 Wn.2d at 326; *Blanks*, 139 Wn. App. at 548.

In *Mendoza*, the Supreme Court held 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." 157 Wn.2d at 591. When the defendant in *Mendoza* pleaded guilty, he believed his offender score was seven. 157 Wn.2d at 584. Before sentencing, he learned that his offender score was, in fact, six. *Mendoza*, 157 Wn.2d at 584. The lower offender score decreased his standard range and, as a result, the State decreased its sentencing recommendation from 60 months confinement to 54 months confinement. *Mendoza*, 157 Wn.2d at 584-85. Both the original recommendation and the amended recommendation were at the high end of the standard sentencing range. *Mendoza*, 157 Wn.2d at 584, 585.

Although the Supreme Court held that the defendant's guilty plea was involuntary because it was based on a miscalculated offender score, it further held that the defendant waived his right to challenge the plea because he squandered his opportunity to object when the sentencing court sentenced him under the lower standard range. *Mendoza*, 157 Wn.2d at 592. Specifically, the Supreme Court held that a defendant waives his right to challenge the validity of a plea agreement that contains a miscalculated penalty when (1) the miscalculation results in a less onerous penalty than written in the plea agreement, (2) the defendant is informed of the less onerous standard range before he is sentenced, and (3) the defendant is given the opportunity to withdraw the plea before sentencing but does not seize that opportunity. *Mendoza*, 157 Wn.2d at 591-92.

Unlike *Mendoza*, here Gonzales has not waived his right to challenge the validity of his plea agreement. *See* 157 Wn.2d at 591-92. Gonzales's plea agreement contained a more onerous penalty range than he was ultimately subject to due to a miscalculated offender score. Once the parties discovered the miscalculated offender score, the sentencing court held a 2005 resentencing

hearing to correct the error. At that 2005 hearing, the parties agreed that, based on a proper calculation of his offender score, Gonzales was subject to a standard sentencing range between 144 and 244 months confinement rather than the original standard sentencing range between 165 and 265 months confinement. And significantly, at the beginning of the 2005 resentencing hearing, the following exchange occurred:

> [Defense Counsel]: I wanted to add one thing in the record. Mr. Gonzales believes that there's a new case that recently came out that would give him the right to withdraw his plea. I'm not aware of that case. Based on the appeal that --
>
> The Court: Nor am I, given that this is a reduction, rather than an increase in the sentence.
>
> [Defense Counsel]: Right. If it was an increase, that would be different. But this is a reduction.
>
> The Court: I agree.
>
> [Defense Counsel]: And so I'm not aware of it, but I do want to raise it on his behalf.
>
> The Court: I'll make a note on the record.
>
> . . . .
>
> The Court: I'm not aware of anything that shows where there's a reduction in potential sentence that it allows a withdrawal of plea.

1 Report of Proceedings (RP) at 2-3.

As evidenced by this exchange, Gonzales unequivocally sought to withdraw his plea when he became aware of the issue and before the sentencing court resentenced him. Furthermore, when the sentencing court provided Gonzales with the opportunity to make a statement, he stated, "But I was under the understanding that if I had pled to a certain guidelines that I could correct the manifest injustice because I wasn't adequately informed of my sentencing." 1 RP at 13.

Accordingly, Gonzales did not waive his right to challenge the voluntariness of his plea on appeal. *See Mendoza*, 157 Wn.2d at 591-92. Moreover, because his guilty plea was based on

misinformation regarding a direct consequence of his plea, i.e., a miscalculated offender score, we hold that Gonzales did not knowingly, voluntarily, or intelligently enter into the bargain. *Mendoza*, 157 Wn.2d at 591. The trial court abused its discretion when it denied his request to withdraw his guilty plea during the 2005 resentencing hearing. *See Mendoza*, 157 Wn.2d at 591; *Padilla*, 84 Wn. App. at 525.

We, therefore, remand to the trial court to allow Gonzales the opportunity to withdraw his guilty plea. *See Mendoza*, 157 Wn.2d at 591; *Walsh*, 143 Wn.2d at 8-9. In doing so, we note that if Gonzales elects to withdraw his guilty plea, the second amended information will be reinstated because it contains the charges on which Gonzales was tried during his original, partial trial.[4]

Because we remand for Gonzales to withdraw his guilty plea, we do not reach the remainder of issues he raises on appeal and in his PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

[4] In addition, we note that statements the prosecutor made during sentencing and/or resentencing in which he stated that he did not believe Gonzales and his co-defendants intended to kill Abundiz are not relevant or admissible evidence. *See* ER 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); ER 402 (irrelevant evidence generally inadmissible).

ARMSTRONG, J.

VAN DEREN, C.J.