IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HOWARD GAIL GUTENDORF, Appellant.	No. 38723-9-II UNPUBLISHED OPINION

Van Deren, C.J. — Howard Gutendorf appeals his sentence on his guilty plea to one count of second degree assault of a child with sexual motivation and the trial court's denial of his motion to withdraw his plea. He argues that his attorney did not advise him that he would face a mandatory life sentence and a mandatory minimum sentence as direct consequences of his plea. In his statement of additional grounds for review (SAG),[1] Gutendorf further contends that his counsel was ineffective. We affirm.

FACTS

On July 26, 2007, the State charged Howard Gutendorf with one count of first degree child molestation. On September 24, 2008, the prosecutor filed a amended information reducing

[1] RAP 10.10

the charge to one count of second degree assault with sexual motivation in exchange for Gutendorf's guilty plea to the reduced charge.

Gutendorf signed a statement of defendant on plea of guilty to sex offense (guilty plea), which stated that the "maximum term" for second degree assault of a child with sexual motivation is "[l]ife" and that "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense." Clerk's Papers (CP) at 3 (emphasis omitted), 5. It also stated that "the judge will impose . . . a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate" and that the standard range, based on his offender score of 3, for second degree assault on a child, is "13-17 months," with an enhancement of "24 months" because the assault was sexually motivated. CP at 5, 3.

During the plea hearing, before Gutendorf entered his plea, he stated that his defense attorney misinformed him that the community custody part of his sentence was for only two years. But after he was advised by the trial court, prosecutor, and his defense attorney that the community custody portion of his sentence would be for life, and not for two years, the court asked him whether he made the plea "of [his] own decision, after advi[c]e of Counsel" and whether he "wish[ed] the Court to accept [his] plea," to which he answered, "Yes." RP at 12.

Before sentencing, Gutendorf moved to withdraw his guilty plea, stating *inter alia* that he "was so scared [that he] accepted the plea bargain" and that his attorney had incorrectly informed him that the community custody term was two years, when it would actually be a life term of community custody. CP at 26. The sentencing court denied Gutendorf's motion, finding that he voluntarily and knowingly entered his plea. The sentencing court sentenced Gutendorf to a

minimum term of 39 months' confinement, a maximum term of life, and community custody upon release from confinement for life.

Gutendorf appeals.

ANALYSIS

I. Motion to Withdraw Plea

Gutendorf argues that the sentencing court improperly denied his motion to withdraw his guilty plea. Specifically, he argues that he involuntarily made the plea because his counsel (1) "never advised [him] that he was pleading guilty to a life sentence" and (2) "never advised [him] that the sexual motivation enhancement was a mandatory minimum sentence."[2] Br. of Appellant at 11, 15 (emphasis omitted). We hold that the sentencing court did not abuse its discretion when it denied Gutendorf's motion to withdraw his plea.

A. Standard of Review

We review a trial court's ruling on a motion to withdraw a guilty plea for an abuse of discretion. *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). Ordinarily, a guilty plea constitutes a waiver by the defendant of his right to appeal, but a guilty plea does not usually preclude the defendant from raising collateral questions such as the circumstances in which he made the plea. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237

[2] Even though Gutendorf failed to raise these two grounds in his motion to the sentencing court, we address them here because an improper denial of a motion to withdraw a guilty plea is a manifest injustice. RAP 2.5(a)(3); *State v. Smith*, 74 Wn. App. 844, 847 n.1, 875 P.2d 1249 (1994).

(1980).

B. Plea Was Voluntary

Due process requires that a defendant knowingly, intelligently, and voluntarily enter a guilty plea. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). CrR 4.2(f), which applies because Gutendorf moved to withdraw his plea before sentencing, provides that, "[t]he court shall allow a defendant to withdraw [his guilty plea] whenever it appears that the withdrawal is necessary to correct a manifest injustice." *See also State v. Smith*, 137 Wn. App. 431, 437, 153 P.3d 898 (2007). The "'manifest injustice'" standard is demanding, and requires "'an injustice that is obvious, directly observable, overt, [and] not obscure.'" *Branch*, 129 Wn.2d at 641 (internal quotation marks omitted) (quoting *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). The defendant has the burden of showing that a manifest injustice has occurred. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003).

A guilty plea is voluntary if the defendant is advised of all direct consequences of that plea. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 300, 88 P.3d 390 (2004); *see also* CrR 4.2(d). A defendant's guilty plea is involuntary when "based on misinformation regarding a direct consequence on the plea." *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). A "direct consequence" is one with a "definite, immediate and automatic effect on a defendant's range of punishment." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The possibility of a life sentence is a direct consequence. *State v. McDermond*, 112 Wn. App. 239, 244-45, 47 P.3d 600 (2002), *overruled on other grounds by Mendoza*, 157 Wn.2d at 590-91. A mandatory minimum sentence is also a direct consequence. *Wood v. Morris*, 87 Wn.2d 501, 513, 554 P.2d 1032 (1974). Here, the guilty plea stated both the possibility that he faced a life sentence[3] and his

mandatory[4] minimum sentence.

Thus, we consider the following "threshold inquiry: Did the plea form omit the [relevant direct consequence of the plea] and did the defendant state that he would not have agreed to plead 'guilty' if he had been informed of that [direct consequence]?" *State v. Rawson*, 94 Wn. App. 293, 296-97, 971 P.2d 578 (1999). We "'follow[ ] the general rule that whether the defendant knew the consequences of his plea is a fact to be determined from all the circumstances.'" *State v. Harvey*, 5 Wn. App. 719, 724, 491 P.2d 660 (1971) (quoting *Meisbauer v. Rhay*, 79 Wn.2d 505, 507, 487 P.2d 1046 (1971)).

The guilty plea that Gutendorf signed states that Gutendorf understood the possibility that he faced a life sentence and a mandatory minimum sentence. The guilty plea said that the "maximum term" for second degree assault of a child with sexual motivation is "[l]ife" and that "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense." CP at 3 (emphasis omitted), 5. It also stated that "the judge will impose

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[3] Gutendorf erroneously refers to "a *mandatory* life sentence." Br. of Appellant at 14 (emphasis added). But a former version of RCW 9.94A.712, *recodified as* RCW 9.94A.507 (Laws of 2008, ch. 231, § 56), which stated the sentencing requirements for second degree assault of a child with sexual motivation, merely

> requires the sentencing court to set a minimum term that may be standard or exceptional . . . permits the Indeterminate Sentence Review Board to set a second minimum term which, if imposed, takes effect at the end of the court's minimum term [and] requires the sentencing court to set a maximum term that equals the statutory maximum sentence.

State v. Borboa, 124 Wn. App. 779, 782-83, 102 P.3d 183 (2004) (*Borboa* was decided December 7, 2004, so our court was referring to an earlier version of the statute, former RCW 9.94A.712 (2001)), *rev'd on other grounds by* 157 Wn.2d 108, 135 P.3d 469 (2006). Thus, Gutendorf did not face a mandatory life sentence, but a *maximum* sentence of life.

[4] Former RCW 9.94A.533(8)(b) (2007) stated, "all sexual motivation enhancements . . . are mandatory."

. . . a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate" and that the standard range for second degree assault on a child, based on the offender score of 3, is "13-17 months," with an additional "24 months" because the assault was sexually motivated. CP at 5, 3.

The colloquy also indicates that Gutendorf understood the possibility that he faced a life sentence, despite his temporary confusion on the term of community custody. Gutendorf stated on the record during the plea colloquy that his counsel misinformed him about the duration of community custody:

> THE COURT: You'll be under the supervision of the Department of Corrections. That would be --
> [PROSECUTOR]: For life.
> THE COURT: – for life. And –
> [DEFENSE COUNSEL]: That means that . . . when your sentence is up, they can hold you on an indeterminate sentence . . .
> [PROSECUTOR]: And even when he got out, he would still be on probation for life.
> [DEFENSE COUNSEL]: Probation, and reporting requirements for life. This is the lifetime aspect of this we talked about yesterday . . . . You're going to be supervised for life when you get out.
> . . . .
> [GUTENDORF]: I was told two years.
> . . . .
> [GUTENDORF]: I was told two years post-prison supervision.
> [DEFENSE COUNSEL]: [I]f I said that, I was in error. We talked at length about the life aspect of this and what you'd need to do to get out and things like that.

RP at 4-6. Furthermore, when discussing the duration of his incarceration, the colloquy indicates that the maximum term was life:

> THE COURT: . . . for sex offenses committed after March 20, 2006, minimum term receive the maximum standard range, which would be the life, I assume, or 25 years, whichever is greater.
> [PROSECUTOR]: It's going to be life in this case, Your Honor. It's a Class A now. Assault Two with Sex Mo[tivation] is a Class A now. And it's a

> 712,[5] [al]so.
>
> . . . .
>
> THE COURT: If you violate the terms of your community custody, the Departmentof Corrections can . . . place you in a more restrictive confinement status.

RP at 8.

Although courts have allowed pleas to be withdrawn when the defendant received inaccurate advice on the consequences of the plea, we note that in those cases the court did not clarify or correct any incorrect advice or misunderstanding before the defendant entered the plea.[6] *See State v. Smith*, 134 Wn. 2d 849, 853, 953 P.2d 810 (1998); *see also In re Allen v. Cranor*, 45 Wn.2d 25, 26, 272 P.2d 153 (1954); *State v. Harvey*, 5 Wn. App. 719, 724, 491 P.2d 660 (1971).

Here, before Gutendorf entered his plea, the trial court, prosecutor, and his defense counsel advised him that community custody following his release from incarceration was for life and not for two years. The guilty plea and the discussion in court also clearly informed him that he could be incarcerated for life on the charge. After these clarifying discussions and before he

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[5] Presumably, "712" refers to former RCW 9.94A.712(1)(a)(ii), (3)(b) (2006), which required a maximum term of "the statutory maximum sentence" for second degree assault of a child with sexual motivation.

[6] In *State v. Smith*, 134 Wn. 2d 849, 853, 953 P.2d 810 (1998), a defendant's plea was set aside when defense counsel's erroneous legal interpretation of the plea statement, that defendant could plead guilty and still reserve the right to appeal the suppression order, was expressed in open court and was uncorrected by either opposing counsel or the trial court.

In *Allen v. Cranor*, 45 Wn.2d 25, 26, 272 P.2d 153 (1954), a defendant's plea was set aside because defendant was misled by the prosecuting officials into believing that the Board of Prison Terms and Paroles had authority to set a minimum term of his confinement when the law prescribed a mandatory life term for the offense in question. Defendant was under this wrong impression when he entered the plea.

In *State v. Harvey*, 5 Wn. App. 719, 724, 491 P.2d 660 (1971), the trial court incorrectly advised a defendant that only the Board of Prison Terms and Paroles could determine his minimum sentence, when consecutive terms imposed by the trial court could have created a mandatory minimum term of 22½ years.

entered his plea, the trial court asked him whether he made the plea "of [his] own decision, after advice of Counsel," and whether he "wish[ed] the Court to accept [his] plea," to which he answered, "Yes." RP at 12. Thus, even though Gutendorf may have had an initial inaccurate impression of the duration of his possible incarceration and community custody, that impression was corrected by the court, prosecutor and his defense counsel before he entered his guilty plea.

"'[F]ollow[ing] the general rule that whether the defendant knew the consequences of his plea is a fact to be determined from all the circumstances,'" *Harvey*, 5 Wn. App. at 724 (quoting *Meisbauer*, 79 Wn.2d at 507), we consider both Gutendorf's signed guilty plea and the colloquy in holding that Gutendorf was properly informed that he faced the possibility of a life sentence and a mandatory minimum sentence before he entered a plea of guilty. Thus, we hold that the sentencing court properly denied Gutendorf's motion to withdraw.

II. Ineffective Assistance

In his SAG, Gutendorf seems to claim that his defense counsel rendered ineffective assistance when defense counsel "lied" to him and "co[ ]erced" him into entering the plea. SAG at 1. But an allegation of coercion, without more, is insufficient to overcome evidence that a defendant's plea is not coerced and will not justify an order allowing withdrawal of the plea. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). When the court asked Gutendorf whether "anyone threatened [him] or promised [him] anything that . . . caused [him] to make th[e] plea," he answered, "No." RP at 12. Gutendorf offers no other evidence that his defense

counsel coerced him. Thus, Gutendorf's argument fails.

We affirm.

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.

Van Deren, C.J.

We concur:

Armstrong, J.

Penoyar, J.