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Washington State
Court of Appeals
Division Two

August 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICHOLAS A. HARKEY, Appellant.	No. 47061-6-II UNPUBLISHED OPINION

SUTTON, J. — Nicholas A. Harkey appeals his conviction resulting from his guilty plea to one count of rape of a child in the second degree. Harkey argues that his plea was not knowing, voluntary, or intelligent because the trial court did not inform him that he could be held beyond the minimum term and did not confirm that he understood the sentencing consequences. Harkey also argues that the lifetime community custody condition that prohibits him from having contact with minor children interferes with his fundamental constitutional right to parent his biological children who are teenagers and were not victims of his crime. We hold that Harkey's plea was voluntary, knowing, and intelligent and we reverse and remand to the sentencing court to reconsider the community custody condition.

FACTS

In 2003, Harkey, then age 23, had sexual intercourse with the victim, who was 12 years old at the time. In March 2004, Harkey was charged with three counts of rape of a child in the second degree.

The State offered to reduce the charge to one count of second degree child rape if he pled guilty, making him eligible for a Special Sex Offender Sentencing Alternative (SSOSA).[1] The plea agreement listed the minimum standard range sentence of "86-114 months" and the maximum term sentence of "life," based on an offender score of one. Clerk's Papers (CP) at 14. The plea agreement also stated that if "additional criminal history [was] discovered prior to sentencing, [Harkey] stipulates to the higher standard ranges and the alteration to this recommendation." CP at 18.

On June 11, 2004, Harkey appeared before the trial court to enter a guilty plea. The trial court reviewed the standard sentencing range, including "a maximum sentence of life imprisonment and a $20,000.00 fine." Verbatim Report of Proceedings (VRP) (June 11, 2004) at 5. The trial court also stated that "the standard range for actual confinement is between 86 to 114 months" and requires "lifetime probation." VRP (June 11, 2004) at 5. The trial court held the following colloquy:

> The Court: Now, under this type of sentence, I would sentence you to life with a request for a minimum period of time to be served. It's up to the review board, the sentencing board, in order to indicate what sentence you would actually receive, but they would take into consideration my recommendation with regard to the minimum amount.
>
> As indicated, you may or may not qualify for the [SSOSA] requirement. And you understand what that means? Okay. And with regard to [SSOSA], if you fail to comply with that, you would be sentenced, you'd be brought back and be resentenced and that would be toward the maximum of this range; do you understand that? Okay.
>
> Knowing all these rights that you're giving up, which includes the right to an appeal, knowing the consequences you face with regard to the requirements, the fines, and the sentence, knowing all of those consequences that you face, do you still wish to plead guilty to this charge at this time?

[1] SSOSA provides offenders who plead guilty to non-violent sex crimes alternative sentencing under RCW 9.94A.670.

Mr. Harkey: Okay.

The Court: You have to tell me that you wish to plead guilty. Do you wish to plead guilty?

Well, I'm seeing a great deal of reluctance on this, and I don't understand whether it's because you're uncertain about that, uncertain about the consequences, but I'm reluctant to take a plea unless I have a firm acknowledgement that he's going to wish to plead guilty at this time.

[Defense Counsel]: Your Honor, I just—I think Mr. Harkey is understanding of the process and the consequences and his options. I think throughout this he has had a very emotional response to just about every phase of this situation, and I think that's what he's dealing with at this point. I'm not sure an additional amount of time would help, but

I mean, is this something that you'd like to do, Nick? We can do it. If not—

Mr. Harkey: I'm having an anxiety attack now.

[Defense Counsel]: Okay.

The Court: Why don't you take a break.

VRP (June 11, 2004) at 8-9. The proceeding was continued.

On June 14, Harkey appeared again before the trial court and entered a plea of guilty. The trial court confirmed that Harkey had no difficulty reading or writing and again discussed the sentencing range with him.

The Court: You do have the right to a trial by a jury, right to remain silent, presumption of innocence, the right to confront witnesses that testify against you, and also the right to an appeal. By pleading guilty you give up all those rights. Do you understand that?

MR. HARKEY: Yes.

The Court: That includes the right to an appeal. Right?

Mr. Harkey: Yes.

> The Court: Okay. We talked about the maximum term you face, which is life, with maximum of life probation, standard range for actual confinement is between 86 to 114 months. Prosecution has made a recommendation. You're familiar with that.
>
> Mr. Harkey: (No audible response.)
>
> The Court: We talked about also the lifetime requirement to register as a sex offender. Loss of the right to public assistance while in custody. The right to a [SSOSA] evaluation. And the sentencing board would determine the actual length of the sentence. Do you recall all those consequences?
>
> Mr. Harkey: Yes.
>
> The Court: Okay. Now, knowing all these rights that are being waived and the consequences that you face, at this time do you wish to plead guilty to the charge of Rape of a Child in the Second Degree?
>
> Mr. Harkey: Yes.
>
> The Court: You're making this decision to plead guilty freely and voluntarily?
>
> Mr. Harkey: Yes.
>
> The Court: Has there been any threats against you or any promises to you to force you to do this?
>
> Mr. Harkey: No.

VRP (June 14, 2004) at 1-3.

Harkey submitted, and the trial court filed, the guilty plea statement, which listed the standard sentencing range and then read "[t]otal [a]ctual [c]onfinement" as "86-114 [months]" and the maximum term as "life."[2] CP at 8. The guilty plea statement had been corrected to list the

[2] RCW 9.94A.507(3) requires the sentencing court to impose both a minimum sentence and a maximum life sentence, the statutory maximum for the crime of second degree child rape. RCW 9.94A.507 was previously codified as RCW 9.94A.712 and has been amended since the events of this case transpired, however, these amendments do not impact the statutory language relied on by this court, therefore we cite to the current version of this statute. Laws of 2008 ch. 231 §§ 33, 56.

community custody range as "[l]ife" and was initialed by the trial court judge. CP at 8. Harkey signed the guilty plea statement, which contained the following clauses:

> (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
>
> . . . .
>
> (f) For sex offenses committed on or after September 1. 2001.
> (i) Sentencing under RCW 9.94A.712: If this offense is for [rape of a child in the second degree committed when the defendant was at least 18 years old], the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. ***The minimum term of confinement that is imposed may be increased by the Indeterminate Sentence Review Board*** if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody.

CP at 8-9 (emphasis added). Defense counsel signed on the last page of the statement: "I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement." CP at 13. Additionally, the trial court's signature appears at the bottom of the statement of defendant: "The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that . . . [t]he defendant had previously read the entire statement above and that the defendant understood it in full." CP at 13.

Harkey appeared before the trial court for sentencing on October 18. The parties stipulated that Harkey had prior criminal convictions that increased his offender score to three and increased

the standard range of the sentence to 102-136 months.[3] The trial court sentenced Mr. Harkey to a "minimum term" of 110 months and a "maximum term" of "life." CP at 48. The trial court also imposed a lifetime community custody condition that Harkey "shall not have any contact with minors" under the age of 18, from the time he is released from confinement. CP at 51, 53. Harkey appealed.

ANALYSIS

I. GUILTY PLEA

Harkey argues that his plea was not knowing, voluntary, or intelligent because the trial court did not inform him that he could be held beyond the minimum term, the trial court did not confirm that he understood the specific sentencing consequences, and the plea documents advised that he would receive a range of actual confinement of 86-114 months. We disagree.

A guilty plea must be made "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d);[4] *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011). "A defendant does not knowingly plead guilty when he bases that plea on misinformation regarding sentencing consequences." *Robinson*, 172 Wn.2d at 790. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the

[3] Harkey had previously been convicted of burglary (.5 points) and malicious mischief (.5 points), and had two previous convictions of manufacture/deliver/possession of marijuana as both a juvenile and an adult (.5 and 1.0 points, respectively).

[4] CrR 4.2(d) provides in its entirety that "[t]he court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

plea. CrR 4.2(d). The record must affirmatively disclose that a criminal defendant's plea of guilty was made "'intelligently and voluntarily, with an understanding of the full consequences of such a plea.'" *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985) (internal quotation marks omitted) (quoting *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980).).

"A defendant need not be informed of all possible consequences of a plea but rather only direct consequences." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). "The length of a sentence is a direct consequence of a guilty plea because it represents 'a definite, immediate and largely automatic effect on [a] defendant's punishment.'" *State v. Smith*, 137 Wn. App. 431, 437, 153 P.3d 898 (2007) (internal quotation marks omitted) (quoting *State v. Mendoza*, 157 Wn.2d 582, 588, 141 P.3d 49 (2006)). Knowledge of the direct consequences of the plea can be satisfied by the plea documents. *State v. Codiga*, 162 Wn.2d 912, 923, 175 P.3d 1082 (2008). A trial judge may rely on the written plea agreement where the defendant told the trial court he had read the agreement and that the statements were truthful; the judge does not need to orally question the defendant to ascertain whether he or she understands the consequences of the plea. *Codiga*, 162 Wn.2d at 923.

Harkey signed the guilty plea statement which stated that the standard sentencing range may increase if any additional criminal history is discovered, that the minimum term of confinement imposed may be increased by the Indeterminate Sentence Review Board (ISRB), and that the judge did not have to follow anyone's recommendation as to the sentence. Additionally, Harkey signed the statement acknowledging that he fully understood the statement and did not have any further questions for the trial court. Defense counsel signed it stating that he had discussed the statement with Harkey and believed him to fully understand it, and the sentencing

court judge signed the statement acknowledging that Harkey asserted that he had previously read the entire statement and understood it in full.

At the June 11 hearing, the trial court clearly stated that it was free to make its own decision regarding sentencing, was not required to follow any recommendations, and that the actual term of the sentence was up to the ISRB. Again at the June 14 hearing, the trial court again clearly stated, "[T]he *maximum* term [Harkey] faced [was] life, with maximum of life probation, standard range for actual confinement is between 86 to 114 months." VRP (June 14, 2004) at 2 (emphasis added).

Harkey argues that his plea was involuntary because he was not informed that the sentence within the standard range would only represent the minimum, and relies on *In re Personal Restraint of Murillo* to support his position. 134 Wn. App. 521, 142 P.3d 615 (2006). In *Murillo*, the court held that the plea agreement was inconclusive as to which sentencing statute was contemplated. 134 Wn. App. at 536. Additionally, the *Murillo* court held that the parties did not agree on what was intended under the agreement. 134 Wn. App. at 536. The sentencing court in *Murillo* wrote down the minimum sentence of 59.5 months in the area designated for crimes sentenced under RCW 9.94A.589 instead of the section specific to sentencing of sex offenders, which was left blank. 134 Wn. App. at 527. The Department of Corrections staff noticed the error and asked that Murillo be resentenced, after which the amended sentence listed the original minimum sentence of 59.5 months and "life" as the maximum sentence. *Murillo*, 134 Wn. App. at 529.

Harkey provides no argument that the plea agreement was inconclusive as to which sentencing statute was contemplated, that there was disagreement as to what was intended, or that the judgment and sentence was incorrect. Unlike *Murillo*, the judgment and sentencing order clearly states 110 months "minimum term" and "life" as the "maximum term." CP at 50.

Although Harkey is correct that the plea documents listed a standard range of 86-114 months, the plea agreement clearly stated that if "additional criminal history [was] discovered prior to sentencing, [Harkey] stipulates to the higher standard ranges and the alteration to this recommendation." CP at 18. Harkey also stipulated that he had prior criminal convictions that increased his offender score to three and increased the standard range of the sentence to 102-136 months.

Therefore, we hold that Harkey's plea was knowing, intelligent, and voluntary when the plea documents advised that the standard sentencing range may increase upon discovery of additional criminal history and the court informed him that he could be held beyond the minimum term.

II. CONDITIONS OF SENTENCE

Harkey argues that the lifetime community custody condition that provides that he "shall not have any contact with minors" interferes with his fundamental constitutional right to parent. Br. of Appellant at 19; CP at 53. We agree.

The Sentencing Reform Act of 1981 authorizes the trial court to impose crime-related prohibitions. RCW 9.94A.505(8). Crime-related prohibitions are orders directly related to the circumstances of the crime and are reviewed for abuse of discretion. Former RCW 9.94A.030(12) (2003);[5] *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). We review sentencing conditions which interfere with a fundamental constitutional right more carefully. *Warren*, 165 Wn.2d at 32.

"Parents have a fundamental liberty interest in the care, custody, and control of their children." *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). The State has a compelling interest in preventing harm to children and, therefore, has an obligation to intervene and protect a child when a parent's "'actions or decisions seriously conflict with the physical or mental health of the child.'" *Ancira*, 107 Wn. App. at 653-54 (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). But limitations on fundamental rights are constitutional only if they are reasonably necessary to accomplish the essential needs of the state. *Ancira*, 107 Wn. App. at 654. Conditions that interfere with fundamental rights must be reasonably necessary in both scope and duration to accomplish the essential needs of the state and public order. *Warren*, 165 Wn.2d at 32; *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010).

In *Rainey*, the court held that the scope of the no-contact order prohibiting Rainey from having any contact with his daughter after he kidnapped her did not violate Rainey's fundamental constitutional right to parent because it was reasonably necessary to protect the daughter and her mother from violence. 168 Wn.2d at 382. However, the court also held that the sentencing court

[5] Former RCW 9.94A.030(12) has been amended to RCW 9.94A.030(10) since the events of this case transpired. *See* Laws of 2016, ch. 81, § 16; Laws of 2008, ch. 231, § 23; Laws of 2005, ch. 436, § 1.

did not articulate any reasonable necessity for the lifetime duration of no-contact order. *Rainey*, 168 Wn.2d at 382. The *Rainey* court struck the no-contact order and remanded for resentencing, so that the sentencing court could address the parameters of the no-contact order. 168 Wn.2d at 382.

In *State v. Letourneau*, the defendant was sentenced for second degree rape of a child. 100 Wn. App. 424, 997 P.2d 436 (2000). The court held that a condition prohibiting Letourneau from unsupervised in-person contact with her biological minor children was not reasonably necessary to prevent her from sexually molesting them, because there was no evidence that she was a pedophile or posed a danger of molesting her children. 100 Wn. App. at 439. The *Letourneau* court struck the condition. 100 Wn. App. at 444.

Here, Harkey's condition of sentence does not allow for any contact with minor children, including his own biological children, for the duration of his lifetime community custody. Harkey's biological children are teenagers and were not victims of his crime. The sentencing court did not articulate any reasonable necessity for the broad scope or lifetime duration of this condition. Thus, we reverse and remand to the sentencing court to reconsider the community custody provision consistent with this opinion.

CONCLUSION

We hold that Harkey's plea was knowing, intelligent, and voluntary when the plea documents advised that the standard sentencing range may increase upon discovery of additional criminal history and the court informed him that he could be held beyond the minimum term. We also hold that Harkey's lifetime community custody condition prohibiting contact with minor

children interferes with his fundamental constitutional right to parent, and we reverse and remand to the sentencing court to reconsider this condition consistent with this opinion.

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 in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

Melnick, J.
MELNICK, J.