IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL GUMATAOTAO PALOMO, Appellant.	No. 39606-8-II UNPUBLISHED OPINION

Armstrong, J. — Michael Gumataotao Palomo seeks to withdraw his guilty plea, arguing that he was not properly advised of the consequences of his plea. Alternatively, he argues that his sentence violates the ex post facto clauses of the state and federal constitutions. We affirm.

FACTS

The State charged Palomo with six counts of sex abuse: two counts of first degree child molestation occurring sometime between June 15, 2000 and June 14, 2005; two counts of second degree child rape occurring sometime between June 15, 2005 and June 14, 2007; third degree child rape occurring on or about November 6, 2007; and first degree incest occurring sometime between June 15, 2005 and November 6, 2007. All six counts were committed on his daughter M.P. with whom he fathered a child.

Palomo pleaded guilty to all offenses. The trial judge sentenced Palomo to 198 months to life on each of the child molestation counts, 240 months to life on each of the first degree child rape counts, 60 months for third degree child rape, and 102 months for incest. The sentence provides that an Indeterminate Sentencing Review Board may increase his minimum terms of confinement on the first four counts. He was also sentenced to community custody for life on the first four counts and 36 to 48 months' community custody on the incest count.

ANALYSIS

I. Voluntariness of Guilty Plea

Palomo seeks the withdrawal of his guilty plea on the grounds that it was involuntary. Specifically, Palomo claims he was not advised that he was subject to three different sentencing schemes depending on when the incidents of child molestation actually occurred. He further contends that he was assured he would receive a determinate sentence on the child molestation counts when, in fact, he received an indeterminate life sentence.

A court shall not accept a guilty plea without determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and consequences of the plea. CrR 4.2(d). Withdrawal of a guilty plea may be necessary to correct a manifest injustice where a defendant establishes that: (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; and (4) the plea agreement was not kept. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). Because an involuntary plea is a manifest injustice, a defendant is entitled to challenge the voluntariness of a guilty plea for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). A direct consequence is one that has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *In re Bradley*, 165 Wn.2d at 939. 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); *see also State v. Moon*, 108 Wn. App. 59, 63, 29 P.3d 734 (2001). We do not require a defendant to show that the misinformation was material to the plea. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Nor must the misinformation have a practical effect on the sentence. *In re Bradley*, 165 Wn.2d at 939-41 (noting that even though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea).

Before September 1, 2001, all sexual offenders were sentenced to a determinate sentence. Former RCW 9.94A.120 (2000). For sex offenses committed before July 1, 2000, the term of community confinement was three years; after July 1, 2000, but before September 1, 2001, the term of community custody was 36 to 48 months. Former WAC 437-20-010 (2000); former RCW 9.94A.040(6) (2000); chapter 34.05 RCW. After September 1, 2001, the legislature changed the law to require a defendant who commits certain sex offenses, including first degree child molestation, to be sentenced to the statutory maximum for the offense and a minimum term confinement. Former RCW 9.94A.712(3) (2001). A sentencing court can also order the defendant to serve any time after release from confinement, up to the expiration of the statutory

maximum, on community custody. Former RCW 9.94A.712(5) (2001). Thus, by pleading guilty to the two counts of child molestation occurring between June 15, 2000 and June 14, 2005, Palomo faced the possibility of both a determinate and indeterminate sentence of confinement and three different community custody sentences.

On counts one and two, the plea agreement states that Palomo faced a standard range confinement of 149 to 198 months with a maximum term of life and a community custody range "[d]epending on when[,] 3 years to life." Clerk's Papers (CP) at 5. The State contends that the plea agreement contained written and highlighted portions emphasizing the various consequences. Indeed, subsection (f) of the plea agreement details the possible sentences depending on when the offenses were committed:

> **For sex offenses committed prior to July 1, 2000:** In addition to sentencing me to confinement, the judge may order me to serve up to one year of community supervision if the total period of confinement ordered is not more than 12 months. If the period of confinement is more than one year, the judge will order me to serve three years of community custody or up to the period of earned early release, whichever is longer.
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> . . .
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> **For sex offenses committed on or after July 1, 2000, but prior to September 1, 2001:** In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the period of confinement is over one year, the judge will sentence me to community custody for a period of 36 to 48 months or up to the period of earned release, whichever is longer.
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> . . .
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> **For sex offenses committed on or after September 1, 2001:** (i) Sentencing under RCW 9.94A.712: If this offense is for any of the offenses listed in subsections (aa) or (bb) below, 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 Sentencing 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. Notably, the length of community custody for crime committed between July 1, 2000 and September 1, 2001, is circled on the original copy. Also circled is the term "Indeterminate Sentencing Review Board," highlighting the fact that sentences committed after September 1, 2001 are indeterminate.

Palomo signed the plea agreement, which includes the following clause: "[M]y lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the 'Offender Registration' Attachment. I understand them all." CP at 16. And at sentencing, the court confirmed that he had no problem reading and understanding the agreement. The court also informed him that the maximum term for the first four counts was life and that because of changes in the statute, he faced potential lifetime community custody. The court explained that with a maximum sentence of life, his ultimate release date would be up to the Department of Corrections. Based on the clearly outlined sentencing scheme in the plea agreement, as well as his plea colloquy, Palomo was informed of all the potential consequences of his plea. There is a strong presumption that where a defendant completes a written plea statement and admits to reading, understanding, and signing it, the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Accordingly, we conclude that Palomo's guilty plea was voluntary.

II. Ex Post Facto

Palomo next argues that the trial court erred in imposing a sentence more punitive than permitted under the ex post facto clauses of the state and federal constitutions. According to Palomo, because the post-September 2001 sentencing scheme is more punitive than its

predecessor, the trial court did not have the authority impose an indeterminate sentence for the two child molestation counts.

A law violates the ex post facto clauses of the state and federal constitutions if it permits a more severe punishment than was permissible when the crime was committed. *State v. Hennings*, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996). Thus, use of increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties violates the ex post facto prohibition. *State v. Parker*, 132 Wn.2d 182, 191-92, 937 P.2d 575 (1997). We review constitutional issues de novo. *Shoop v. Kittitas County*, 149 Wn.2d 29, 33, 65 P.3d 1194 (2003).

When a defendant pleads guilty to an information, he pleads guilty to the information as charged. *State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990). In *In re Personal Restraint of Crabtree*, 141 Wn.2d 577, 585, 9 P.3d 814 (2000), the defendant entered a guilty plea on two sex offenses committed over a three month charging period, which spanned the effective date of the sentencing statute. Thus, the timeframe to which Crabtree assented included one month out of three where the sentencing statute did not apply. *Crabtree*, 141 Wn.2d at 585. But the court found that in pleading guilty to crimes occurring between June 1, 1988 and August 31, 1988, he necessarily admitted to offending between July 1 (the effective date of the statute) and August 31. *Crabtree*, 141 Wn.2d at 585. Moreover, the evidence before the sentencing court—the police report, information, determination of probable cause, guilty plea, plea agreement, and psychological evaluation—showed that Crabtree committed sex offenses after July 1, 1998. *Crabtree*, 141 Wn.2d at 586. The court concluded that there was no ex post facto

violation because Crabtree was convicted of crimes that occurred after the effective date of the statute. *Crabtree*, 141 Wn.2d at 585.

Like the defendant in *Crabtree*, by pleading guilty, Palomo admitted to acts occurring during the potential sentence range, including acts occurring after September 1, 2001. In the plea agreement, Palomo permitted the court to review police reports and the statement of probable cause to establish a factual basis for the plea. Although the evidence as to when Palomo molested M.P. is not exact, both the determination of probable cause and a pre-sentencing investigation report[1] support the inference that Palomo touched M.P. sexually on a regular basis between 2000 and 2005. In particular, the pre-sentence investigation shows that between 2000 and 2007, Palomo would go into M.P.'s room after he had been drinking and touch her vagina with his hands underneath her clothes; that he began touching M.P. sexually when she was about 7 to 8 years old; that he started also having sexual intercourse with her when she was between 10 and 12 years old; and that M.P. reported that it would happen several times a week. Based on these documents, the sentencing court properly concluded that there was a factual basis for accepting Palomo's admission that he committed sexual acts during the period charged in the information. Thus, the court had the authority to sentence him under any of the authorized sentencing schemes. Palomo's argument that his sentence violates the ex post facto prohibition fails.

[1] This report was compiled from various documents filed by the Pierce County Sheriff Department.

Affirmed.

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.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.