IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JD JONES BARTON, Appellant.	No. 41777-4-II Consolidated with No. 42017-1-II UNPUBLISHED OPINION

Van Deren, J. — In this consolidated appeal, JD Jones Barton asserts that he is entitled to withdraw his guilty plea. Barton contends that he did not make a knowing, intelligent and voluntary decision to plead guilty because the trial court and both counsel were incorrect about the trial court's legal authority to impose the agreed exceptional sentence. This appeal follows our unpublished opinion, *State v. Barton*, 160 Wn. App. 1003, 2011 WL 444436, in which we held that Barton's sentence improperly exceeded the statutory maximum for his offenses and remanded for resentencing. Barton also asserts that the trial court erred at resentencing by imposing a term of community custody that again, when combined with his incarceration term, exceeded the statutory maximum sentence. Barton also raises a number of issues in his statement of additional grounds for review (SAG). We remand to the trial court to allow Barton to withdraw his guilty plea, or if Barton decides not to withdraw his plea, to correct his sentence

consistent with this opinion.

FACTS

The State charged Barton by third amended information with two counts of second degree assault and one count of unlawful possession of a firearm. The State's third amended information also alleged that Barton committed the two counts of second degree assault while armed with a firearm. Barton pleaded guilty to the charges on the day the State amended the charges.

Barton's statement of defendant on plea of guilty indicated that his offender score for each of the assault charges was "9+," and that it carried a standard range sentence of 63 to 84 months with a statutory maximum sentence of 10 years. Barton was advised that each assault count had a firearm enhancement of 36 months that ran consecutively to each other and to the base sentence. Barton agreed to the State's recommendation of a 108-month exceptional sentence for each of the assault charges.

At Barton's plea hearing, the following discussion occurred regarding the State's recommended exceptional sentence:

> THE COURT: Did [defense counsel] go over with you the standard range and the maximum on these counts?
> [BARTON]: Yes.
> . . . .
> THE COURT: Okay. On Counts I and II with your score of a nine-plus, which you have an 11, the standard range is 63 to 84 months. There is a community custody range of 18 to 36 months, and the maximum term and fine is ten years and $20,000. . . .
> [BARTON]: Yes, ma'am.
> THE COURT: The prosecutor is going to recommend 180 months total, that the Court impose 108 months — actually, counsel, why don't you explain to me what your understanding is?
> [THE STATE]: Yes. Your Honor, that's 108 months on Count I and II. There's firearm enhancements that are associated with each one of those, and then there's 77 to 102 on the third count, so the firearm enhancements will run consecutive to the underlying 108.

> THE COURT: And that is 36?
> [THE STATE]: 36 for each.
> [DEFENSE COUNSEL]: And then the total would be 180.
> [THE STATE]: This would be an exceptional sentence . . . there is a stipulation by the defense that this is an agreed exceptional sentence. They stipulate that justice is best served by the imposition of this exceptional sentence, so that will need to be on the record as well for the Court to make that finding.
> THE COURT: [Defense counsel], is that your understanding along with Mr. Barton?
> [DEFENSE COUNSEL]: Yes, it is, Your Honor, due to the facts and circumstances of this case and the potential time frame that my client would have been looking at had this gone to trial, I think this is a fair and just resolution of this matter.
> THE COURT: Do you think so too, Mr. Barton?
> [BARTON]: Yes, ma'am.

Report of Proceedings (RP) (Oct. 31, 2008) at 6-9.

After the trial court found that Barton knowingly, intelligently, and voluntarily pleaded guilty, the parties briefly discussed the State's recommended exceptional sentence:

> [THE STATE]: The recommendation before the Court is the exceptional sentence that we have agreed to, 108 months on Count I. On Count II there is the 36-month firearm enhancements on each of those counts that should run consecutive. . . .
> This case was problematic from a couple different standpoints as to how we came up to this resolution. Certainly there's evidentiary issues here, but Mr. Barton himself was facing a substantial amount of time even above what you have before you. I think there's a substantial amount of time, but it probably would have led to incarceration for virtually the rest of his life. So this is — those are some of the factors that were considered in how we came up and negotiated this offer. It's basically a 15-year recommendation which I think is significant.
> The injury that was sustained by the one individual that was shot in the arm was not severe. He was out of the hospital within hours. I'm not aware of any lasting permanent damage. These people are very hard to track down. They are also involved in the criminal justice system. So those are some of the factors that were taken in consideration.
> . . . .
> THE COURT: [Defense counsel], go ahead.
> [DEFENSE COUNSEL]: Thank you, Your Honor.
> Your Honor, I agree with [the State]. There were also some additional factors that I think weighed in as far as factually how the case was laid out as far as being, you know, somewhat potential for a self-defense argument, but due to

> essentially the time that my client would have faced had he been convicted of even two of the charges — had not the resolution been reached he would have even been looking at more time just from that. So I think due to the circumstances that both the State and defense were dealing with in this particular case, I think it was a fair resolution.
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> . . . .
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> THE COURT: . . . I think, given my review of the probable cause statement and what I am hearing today, an exceptional sentence is appropriate. I think that justice would be best served by the Court imposing that. I will adopt it by your agreement.

RP (Oct. 31, 2008) at 14-17.

The trial court imposed the State's recommended exceptional sentence—180 months total confinement based upon an exceptional sentence of 108 months on Count I, 108 months on Count II, and 102 months on Count III, plus two 36-month sentences for the deadly weapon enhancements to run consecutively to each other and the base sentence.

On April 22, 2010, Barton, acting pro se, filed an amended motion to modify and correct judgment and sentence, asserting that his sentence was invalid because it exceeded the statutory maximum. That same day, the trial court entered an order denying Barton's motion to modify and correct his sentence and judgment. On June 24, 2010, Barton, acting pro se, filed a motion seeking discretionary review by our Supreme Court. On January 6, 2011, our Supreme Court transferred Barton's appeal to us and we assigned Court of Appeals cause number 41777-4-II.

Shortly after Barton's second appeal was transferred to us, we issued an unpublished opinion in his first appeal related to the same guilty plea that Barton challenges here. *Barton*, 2011 WL 444436.[1] In *Barton*, we accepted the State's concession that Barton's sentence

[1] "This court may rely on unpublished opinions as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties." *Martin v. Wilbert*, 162 Wn. App. 90, 93 n. 1, 253 P.3d 108, *review denied*, 173 Wn.2d 1002 (2011) (citing *Island County v. Mackie*, 36 Wn. App. 385, 391 n. 3, 675 P.2d 607 (1984)).

exceeded the statutory maximum and remanded to the trial court to sentence Barton to 156 months of incarceration, which sentence included "36 months for the first consecutive firearm enhancement, 36 months for the second consecutive firearm enhancement, and then 84 months for his concurrent base sentences for the two assaults." 2011 WL 444436, at *2. We did not address whether Barton could withdraw his guilty plea based on an improper advisement of the sentencing consequences of his guilty plea.[2] *Barton*, 2011 WL 444436.

At his April 20, 2011, resentencing hearing, Barton requested a stay while this appeal was pending to avoid mooting the issue raised in this appeal. Barton also objected to the trial court's proposed term of community custody. The trial court denied Barton's request for a stay and resentenced Barton to 156 months of incarceration, 84 months for Counts I and II, plus a 36-month enhancement on each of those counts to be served consecutively, and 102 months on Count III to be served concurrently with his base sentence and enhancements on Counts I and II. The trial court also imposed an 18- to 36-month term of community custody. Barton filed a notice of appeal of his corrected judgment and sentence on April 20, 2011, Court of Appeals cause number 42017-1-II.

On April 22, 2011, we requested that the parties advise us whether Barton's appeal in cause number 41777-4-II was moot following our unpublished opinion in *Barton.* On May 9, 2011, a commissioner of this court determined that Barton's appeal in cause number 41777-4-II was not moot. On May 27, 2011, the commissioner dismissed Barton's appeal in cause number 42017-1-II, reasoning that the trial court did not exercise any discretion and, thus, could not

[2] Although we did not address whether Barton could withdraw his guilty plea on the grounds he raises here, we rejected his SAG arguments that asserted he could withdraw his guilty plea on other grounds. *See Barton*, 2011 WL 444436, at *3.

abuse its discretion when it resentenced Barton in accord with our unpublished opinion. On July 13, 2011, we granted Barton's motion to modify the order terminating his appeal in cause number 42017-1-II, reinstated that appeal, and consolidated it with his appeal in cause number 41777-4-II.

ANALYSIS

Withdrawal of Guilty Plea

Barton first contends that he is entitled to withdraw his guilty plea because he was not properly advised about the sentencing consequences of his plea. We agree.

We review a trial court's ruling on a motion to withdraw a guilty plea for 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). 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). A defendant's guilty plea is 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." *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). "[T]he length of the sentence is a direct consequence of pleading guilty." *Mendoza*, 157 Wn.2d at 590.

The State concedes that the parties had agreed to, and the trial court had imposed, a sentence that was not authorized by statute. But the State argues that Barton's guilty plea was voluntary because he was correctly informed about the statutory maximum sentence for his offenses, notwithstanding the prosecutor's and his defense counsel's recommendation for, and the

trial court's imposition of, an invalid sentence above the statutory maximum.

Although Barton was correctly informed about the statutory maximum punishment for his offenses, and the trial court was bound by law to reject the sentencing recommendation for an exceptional sentence, Barton was not advised that the trial court could not impose the exceptional sentence. Thus, Barton's guilty plea was not made knowingly or voluntarily in light of both counsels' and the trial court's mutual mistake of believing that he could be sentenced above the statutory maximum. At its essence, the State's argument asks us to expect from Barton the legal sophistication to understand consequences of his guilty plea that neither his attorney, nor the State, nor the trial court understood.

Even though Barton was told that the statutory maximum punishment for his offenses was 10 years, he was informed that he could be sentenced to 15 years of incarceration, a direct consequence of his decision to plead guilty. *Mendoza*, 157 Wn.2d at 590. Moreover, had Barton not filed pro se motions challenging his sentence, he would still be subject to the invalid recommended sentence above the statutory maximum. Accordingly, Barton was misinformed about the direct consequences of his guilty plea and we remand to the trial court to allow Barton to withdraw his guilty plea.

Community Custody Term

Next, Barton contends that the trial court erred at resentencing by imposing a term of community custody in excess of that allowed by statute. Specifically, Barton argues that any term of community custody, when combined with his term of confinement, still exceeds the statutory maximum sentence for his crimes.[3] Barton thus asserts that the trial court was not authorized to

[3] Barton also asserts, and the State concedes, that the trial court erred at resentencing by imposing an 18- to 36-month community custody term because RCW 9.94A.701(2) provides an18-month

impose any community custody term. The State concedes that the trial court erred in sentencing Barton to an 18- to 36-month community custody term and agrees that we should remand to the trial court to reduce Barton's community custody term to zero. We accept the State's concession and remand to the trial court for a correction of Barton's sentence.

RCW 9.94A.701(9) provides, "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." In *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011), our Supreme Court held that legislature's 2009 amendments to former RCW 9.94A.701 (2008) required trial courts to set a fixed term of community custody that, when combined with the offender's sentence, did not exceed the statutory maximum sentence. The *Franklin* court thus suggested that *Brooks*[4] notations providing for a variable community custody term not to exceed the statutory maximum sentence were no longer viable under RCW 9.94A.701. 172 Wn.2d at 837-40. And, in *Boyd*, our Supreme Court squarely held that *Brooks* notations were no longer viable under RCW 9.94.701(9). 174 Wn.2d at 471-473. Because Barton was sentenced to the statutory maximum term for his offenses, the trial court was required under RCW 9.94.701(9) to reduce his community custody term to zero. *Boyd*, 174 Wn.2d at 472. Accordingly, we remand for a correction of Barton's sentence should he not elect to withdraw his guilty plea.

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community custody term for Barton's offenses. Because we resolve Barton's challenge to the trial court's imposition of a community custody term on the grounds Baron asserts above, we do not address this alternative contention.

[4] *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009) *superseded by statute by State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).

SAG Arguments

In his SAG, Barton repeats the arguments addressed above and we do not address those arguments again here. Additionally, Barton raises a number of issues that we address because they may arise at resentencing should Barton elect not to withdraw his plea.

I. Firearm Sentencing Enhancements

Barton appears to argue that the trial court erred by imposing a sentence that included firearm enhancements on each second degree assault count because the State's information did not allege firearm enhancements. Barton's argument lacks merit because the information clearly alleges firearm enhancements, stating in part:

> Count I — Assault in the second degree, while armed with a deadly weapon — *firearm*, RCW 9A.36.021(1)(c), RCW 9.94A.602 and RCW 9.94A.533(3) — Class B felony:
> In that the defendant, JD Jones Barton, in the State of Washington, on or about April 20, 2008, did intentionally assault [the first victim] with a deadly weapon. *It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.*
> Count II — Assault in the second degree, while armed with a deadly weapon — *firearm*, RCW 9A.36.021(1)(c), RCW 9.94A.602 and RCW 9.94A.533(3) — Class B felony:
> In that the defendant, JD Jones Barton, in the State of Washington, on or about April 20, 2008, did intentionally assault [the second victim] with a deadly weapon. *It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.*

Suppl. Clerk's Papers (CP) at 10 (capitalization, boldface and underline omitted) (emphasis added). Furthermore, Barton indicated on his guilty plea statement that he understood his charges, stating:

> 4. I have been informed and fully understand that::
> . . . .
> (b) I am charged with: 2 c[oun]ts assault [second degree] w[ith] firearm enhancements[,] 1 c[oun]t unlawful possession firearm [first degree.]

Suppl. CP at 12 (capitalization and underline omitted).

Accordingly, Barton's argument that the trial court improperly imposed firearm enhancements pursuant to his guilty plea does not have any support in the record and is without merit.

II. Sentence for Unlawful Possession of a Firearm

Next, Barton argues that the trial court erred at resentencing by sentencing him to 102 months for his unlawful possession of a firearm offense. But Barton does not provide any basis supporting his assertion that the trial court erred by sentencing him to 102 months for unlawful possession of a firearm and the record indicates that the trial court's sentence for that offense was within the standard range. Although Barton is not required to include citations to authority in his SAG, the SAG must inform this court "of the nature and occurrence of alleged errors." RAP 10.10(c). Because Barton's SAG on this issue fails to meet this standard, we do not address it.

III. Offender Score Calculation

Next, Barton asserts that that the trial court erred at resentencing by applying an incorrect offender score for his second degree assault offenses. Specifically, Barton argues that the trial court improperly counted his juvenile offense of harassment as a felony instead of a misdemeanor for purposes of calculating his offender score. This argument fails for a number of reasons. First, the record does not indicate whether Barton's juvenile harassment offense would have been considered a felony under former RCW 9A.46.020(2)(b) (2003) or a misdemeanor under former RCW 9A.46.020(2)(a). The record is thus insufficient to review Barton's claim of error. Moreover, any error in including the juvenile offense of harassment would not have changed the standard range for Barton's second degree assault offenses and would, therefore, be harmless.[5]

State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

IV. Additional SAG Arguments

Barton also argues that the resentencing court was required to investigate his defense counsel's claim that he had a conflict of interest that "produced a negative impact of constitutional dimensions of Barton's rights when he plead [sic] guilty." SAG at 1. It appears that Barton is citing his counsel's statements at resentencing as evidence to support his claim that he is entitled to withdraw his guilty plea. Because we have already determined that Barton may withdraw his guilty plea on different grounds, we do not address this argument. Moreover, at resentencing, Barton's defense counsel did not assert he had a conflict of interest affecting Barton's guilty plea but instead indicated that he was concerned about a potential conflict of interest affecting his representation at resentencing because of Barton's pending appeal at this court.

Finally, Barton argues that the resentencing court erred by failing to grant his request for a stay of proceedings while this appeal was pending to avoid rendering this appeal moot. Because we have determined that the issues raised in this appeal are not moot, any error in not granting a request for a stay of resentencing would be harmless. Accordingly, we do not address this issue.

[5] Assuming that the trial court erred by counting a juvenile misdemeanor offense as a felony, Barton's correct offender score would be 10 rather than 11, but would not change the standard range for his second degree assault offenses. *See* RCW 9.94A.510; former RCW 9.94A.515 (2010); former RCW 9.94A.525(8) (2010).

We remand this matter to the trial court to allow Barton to withdraw his plea or, if Barton decides not to withdraw his plea, for resentencing to reduce his community custody time to zero.

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, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.