IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, v. D.M., Defendant/Appellant.	No. 41998-0-II UNPUBLISHED OPINION

Worswick, A.C.J. — D.M.[1] pleaded guilty to third degree malicious mischief and custodial assault. He now appeals the manifest injustice dispositions above the standard range that the trial court imposed. We reverse and remand to the juvenile court.

FACTS

The State charged D.M. with third degree malicious mischief and custodial assault. According to his statement on plea of guilty, he agreed to plead guilty as charged and the State agreed to recommend a manifest injustice disposition of 52 to 65 weeks of commitment to Juvenile Rehabilitation Administration (JRA), above the standard range of 15 to 36 weeks. In the plea colloquy, the juvenile court asked D.M.:

[1] In order to protect the privacy interests of the appellant, this court changes the title of this case to use the appellant's initials. RAP 3.4.

> Do you understand that the prosecuting attorney is going to argue that [the standard range] punishment is not severe enough and ask that your punishment be increased to 52 to 65 weeks? Do you understand that?

Report of Proceedings (RP) at 5. D.M. said he understood. The court accepted his plea and ordered a psychological evaluation.

At D.M.'s subsequent disposition hearing, his probation counselor recommended a manifest injustice disposition of 100 weeks of commitment to JRA, noting that he had not complied with any resources offered in the community. The deputy prosecutor said she agreed with the probation counselor. The juvenile court imposed a manifest injustice disposition of 208 to 260 weeks of commitment to JRA. The court based its manifest injustice disposition on the following aggravating factors: (1) In the commission of the offense D.M. inflicted or attempted to inflict serious bodily injury to another; (2) D.M.'s failure to appear and comply with any court order, civil or criminal; (3) escalating criminal behavior; (4) that D.M. is a threat to the community and himself; and (5) D.M. is involved in gang activity.

ANALYSIS

First, D.M. argues that the State breached its plea agreement when it failed to recommend a 52 to 65-week disposition and instead supported the probation counselor's recommendation of a 100-week disposition.[2] *State v. Sledge*, 133 Wn.2d 828, 839-40, 947 P.2d 1199 (1997); *State v. Van Buren*, 101 Wn. App. 206, 211-12, 2 P.3d 991 (2000), *review denied*, 142 Wn.2d 1015

[2] A breach of a plea agreement is an issue that, as here, may be raised for the first time on appeal. *State v. Sledge*, 133 Wn.2d at 828, 839, 947 P.2d 1199 (1997); *Van Buren*, 101 Wn. App. at 211-12, 2 P.3d 991 (2000), *review denied*, 142 Wn.2d 1015 (2000).

(2000). The State disputes that it had entered into a plea agreement as to the duration of the disposition, contending that the only evidence of such an agreement is D.M.'s statement on plea of guilty, which the deputy prosecutor did not sign. But the plea colloquy makes clear that there was a plea agreement in which the State promised to recommend a disposition of 52 to 65 weeks. The State concedes that if it did enter into a plea agreement as to the duration of the disposition, then it breached the plea agreement by arguing for a 100-week disposition at D.M.'s sentencing hearing. And it concedes that the remedy for such a breach is to allow D.M. to withdraw his guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006). We accept the State's concession and remand to the juvenile court to allow D.M. to withdraw his guilty plea.

D.M. also argues that the juvenile court judge violated the appearance of fairness doctrine by telling him to "keep his mouth shut," by opining that he is "sociopathic" and by stating that "if someone crossed [D.M.]'s path at the wrong place, at the wrong time, I believe that [D.M.] would have the ability to take that person's life and never look back." RP at 8, 14-15. He asks that we remand to another judge. In light of the juvenile court's expressed opinions about D.M., we grant D.M.s request and remand to a different judge. *See State v. Sledge*, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997).

Finally, D.M. argues that the juvenile court's findings of aggravating factors to support the manifest injustice disposition are unsupported by the record and that his disposition is clearly excessive. Because we remand for withdrawal of D.M.'s guilty plea, we decline to address this issue at this time.

We remand to the juvenile court to allow D.M. to withdraw his guilty plea before a different judge and to conduct appropriate further proceedings.

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.

Worswick, A.C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.