

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JESSE BLAIR DIVIN,

Appellant.

No. 42915-2-II

UNPUBLISHED OPINION

Johanson, A.C.J. — Jesse Divin appeals his plea of guilty to attempted unlawful possession of over 40 grams of marijuana, arguing that his plea was not knowing, intelligent and voluntary.<sup>1</sup> We affirm.

The State charged Divin with unlawful possession of marijuana with intent to deliver. It also alleged that the possession occurred within 1,000 feet of a school bus route stop. The State and Divin entered into a plea agreement in which the State would amend the charge to attempted unlawful possession of over 40 grams of marijuana and Divin would plead guilty to that charge. Divin's statement on plea of guilty stated that the standard sentence range for his offense was 0 to 365 days and that the maximum term and fine were 5 years and \$10,000. At a change in plea and

---

<sup>1</sup> A commissioner of this court initially considered Divin's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

sentencing hearing, the trial court asked Devin if he had had enough time to go over the statement on plea of guilty. Devin said he had. The court asked Devin if he was pleading guilty freely and voluntarily. Devin said he was. The court accepted Devin's plea. The court then made the following statement about sentencing:

One of the things I did forget to go over with you, sir, I should do that now, and that is, there may be a recommendation—I just heard for 11 days—credit for the 11 days. I'm not required to follow that. I'll give it a great deal of consideration. In this case, I could impose up to a year, 365 days.

Report of Proceedings (RP) at 7.

Devin replied "okay" and the court imposed the recommended sentence of 11 days with 11 days credit for time served, plus 12 months of community custody. RP at 7.

Devin now appeals, arguing that the trial court misadvised him as to the maximum penalty for his offense when it said it "could impose up to a year." RP at 7. Because the maximum penalty for attempted unlawful possession of over 40 grams of marijuana is five years, Devin contends that he was misadvised of the sentencing consequences of his plea. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). However, the court did not misadvise Devin when it made its statement about sentencing. Without an allegation of an aggravating circumstance, which the State did not make in its second amended information, the court could not have imposed a sentence longer than the top of the standard range, which was 365 days. The court's statement does not contradict the information that Devin had acknowledged in his statement on plea of guilty that the maximum term for his offense was five years. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). Therefore, Devin does not demonstrate that his plea of guilty was not knowing, intelligent and voluntary. *State v. Knotek*, 136 Wn. App.

No. 42915-2-II

412, 423, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013 (2007).

No. 42915-2-II

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 in accordance with RCW 2.06.040, it is so ordered.

---

Johanson, A.C.J.

We concur:

---

Hunt, J.

---

Van Deren, J.