No. 102326-0
COA No.56579-0-II

IN THE SUPREME COURT
OFTHE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLE WILLYARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder
Cause No. 03-1-01829-9

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO REVIEW

1. Whether there is a basis upon which review should be accepted under RAP 13.4, where the Court of Appeals correctly found that Willyard was not entitled to withdraw her plea and that her motion to withdraw her plea to obstructing was time barred.

2. Whether there is a basis upon which review should be accepted under RAP 13.4, where the Court of Appeals correctly recognized a distinction between a charge that is non-existent at the time of a plea and a charge that exists at the time of the plea but is later determined to be invalid.

B. STATEMENT OF THE CASE

The Appellant, Nicole Willyard, was charged with one count of unlawful possession of a controlled substance and one count of obstructing a public servant in October of 2003. CP 3. Willyard pled guilty as charged to both counts on October 21, 2003, and was sentenced to a total term of

confinement of 14 months. CP 4-12; 13-19. On July 19, 2021, Willyard filed a motion for relief from judgment pursuant to CrR 7.8 arguing that her conviction for bail jumping in Thurston County cause number 03-1-00645-2, which had run concurrent with this cause number, should be vacated pursuant to State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 15, 20-22.[1]

After counsel was appointed in the trial court, Willyard filed a motion to withdraw her guilty plea based on Blake. CP 80, 50-56. Willyard argued that the inclusion of the unlawful possession of a controlled substance conviction rendered the judgment facially invalid and therefore not subject to the time-bar of RCW 10.73.090 and that the plea to obstructing was indivisible from the plea to unlawful possession of a controlled substance. CP 50-56.

[1] Willyard appealed the trial court's ruling regarding cause number 03-1-00645-2 in this Court, No. 56569-2-II, and has petitioned for review to this Court in No. 102325-1 for that cause number.

The State filed a written response which agreed that State v. Blake created a facial invalidity but failed to note that issues regarding the validity of the plea agreement were subject to the time bar. CP 83. The State argued that Willyard could not demonstrate that her plea was involuntary and could not establish actual and substantial prejudice sufficient to prevail in a collateral attack. CP 83-86.

The trial court considered Willyard's motions in 03-1-01829-9 and 03-1-00645-1 during the same hearing. RP 1. In response to the defense claim that the plea was to an unconstitutional and invalid crime, the trial court noted,

> Not when the plea was accepted. I understand your argument that you are now looking back from 2021 back at 2003. But in 2003 it was a crime, there was a plea, it was accepted by the court. There is nothing to indicated in any way, shape, or form it wasn't.

RP 9. Defense counsel analogized the effect of the Blake decision to "rotting wood behind the drywall" in a house that

is later discovered by kids punching a hole in the wall, to argue that the plea was invalid at the time it was entered. RP 11.

The trial court responded,

> You know, our State Supreme Court isn't kids punching a hole in the drywall. They are the top jurists in our state that have gone through an analysis and have reached a legal conclusion that changes the understanding of not just that court but the history of jurisprudence in the State of Washington.

RP 11.

The trial court asked defense counsel how withdrawal of the guilty pleas to obstructing and bail jumping was a just outcome stating,

> How is that a just outcome to come to the Court 18 years after the fact and say now that the plea should be withdrawn based upon a court case from 2021, and now the remedy, the equitable remedy of the Court, is to allow withdrawal of pleas in two separate cause numbers which ultimately would end the case in both of those cases based on the passage of time? How is that appropriate, just, equitable, whatever the term you want to use?

RP 13. The prosecutor argued that the appropriate remedy was to vacate the unlawful possession conviction and argued that the defense proposed remedy was unjust. RP 16.

The trial court noted that the issue was whether there was an appropriate basis to allow Willyard to withdraw her pleas and ruled,

> I don't find that there is. And I say that based upon going through the case law I just don't find it. And if I did, I would agree that with your attorney's argument that, if the Court got to that point, then that argument about things being a package deal, indivisible plea agreement, that analysis then comes to bear. But I don't find that you carry the burden to show that withdrawal of a guilty plea is the right legal appropriate remedy.

RP 22. The trial court found that the "possession of methamphetamine charge" should be vacated and dismissed. RP 22; CP 61-68. The trial court then noted,

> *State v. Blake* is an historic decision. Our case law I think is being redeveloped again to deal with new and continuing issues that really flow from *State v. Blake*. But in the Court's view,

> you haven't satisfied that test for when withdrawal of plea is appropriate.

RP 23.

Division II of the Court of Appeals affirmed the decision of the trial court. State v. Willyard, (Unpublished Opinion) No. 56579-0-II. The Court cited to its published opinion in State v. Olsen, 26 Wn.App.2d 722, 530 P.3d 249 (2023), noting that Willyard was not entitled to withdraw her guilty plea to the unlawful possession of a controlled substance charge and therefore, the motion to withdraw her guilty plea on the obstruction charge was time barred. Unpublished Opinion, at 8. The Court of Appeals also found that Willyard could not demonstrate actual and substantial prejudice as required in a collateral attack. Id. at 8-9. Willyard seeks review of that decision.

C. ARGUMENT

1. The Court of Appeals correctly found that Willyard was not entitled to withdraw her guilty plea on the obstructing charge and that the motion for withdrawal was time

barred.

The facial invalidity from inclusion of unlawful possession of a controlled substance does not open the door to otherwise time barred claims under RCW 10.73.090. RCW 10.73.090(1) provides that no collateral attack on a conviction may be brought more than one year after the judgment becomes final, providing that the judgment is valid on its face and rendered by a court of competent jurisdiction. RCW 10.73.090(3) defines "final" as being the later of the date the decision is filed with the trial court, the date that the appellate court enters a mandate or the date that the United States Supreme Court denies a timely petition for certiorari. RCW 10.73.090(3).

The time bar is mandatory, unless one of the exceptions in RCW 10.73.100 applies. In re the Pers. Restraint of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). RCW 10.73.100 provides a list of six exceptions to the one-year time limit. A claim that a plea was involuntary

due to misinformation does not fall within the exception to the one-year time bar. In re Pers. Restraint of Snively, 180 Wn.2d 28, 320 P.3d 1107 (2014). Facial invalidity is not a "super exception" to the one-year time limit. In re Pers. Restraint of Adams, 178 Wn.2d 417, 309 P.3d 451 (2013). The existence of a facial invalidity only authorizes the court to address the facial invalidity. *Id*. at 425. The court is precluded from considering other time barred claims. Snively, at 28 (community placement ordered for indecent liberties properly struck from judgment and sentence, but the facial invalidity did not allow the defendant to pursue his otherwise time barred claim to withdraw his guilty plea on the grounds he was misadvised of the community custody term); In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (correcting an erroneous portion of a sentence does not affect the finality of those portions of the judgment and sentence what was correct and valid when imposed).

The situation that was before the trial court in this situation is similar to that in In re Pers. Restraint of Smalls, 182 Wn. App. 381, 335 P.3d 381 (2014), *review denied*, 182 Wn.2d 1015 (2015). In that case, the defendant pled guilty to murder and assault. In a collateral attack, the defendant argued that an invalidity in his assault conviction opened the door to withdrawal of his plea on both crimes. Id. at 384. As the State did with the UPCS charge in this case, the State conceded the invalidity in the assault conviction. Id. at 384. Division I of this Court held that "because [Smalls] identifies no facial error relating to his murder conviction, RCW 10.73.090(1) bars this challenge. Small's sole remedy, which, which he has not requested, is correction of his sentence for this conviction." Id. at 384.

As was the case in Smalls, the invalidity of the UPCS count does not create a facial invalidity in the obstructing conviction. For that reason, the only appropriate remedy before the trial court was to vacate the controlled

substance conviction as was done by the trial court. The Court of Appeals correctly noted that the motion to withdraw the plea to the obstructing charge was time barred.

2. The rationale of *State v. Olsen*, finding that unlawful possession of a controlled substance was an existent crime, later invalidated, was correct and the Court of Appeals correctly applied that rationale to find that Willyard was not entitled to withdraw her guilty pleas.

"Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily." State v. A.N.J., 168 Wn.2d 91, 117, 225 P.3d 956 (2010). A plea is knowing and voluntary only when the person pleading guilty understands the plea's consequences, including possible sentencing consequences. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 594-95, 316 P.3d 1007 (2014). A guilty plea may be considered involuntary when it is based on

misinformation regarding a direct consequence of the plea, which includes the statutory maximum and the applicable standard sentence range. State v. Kennar, 135 Wn. App. 68, 74-75, 143 P.3d 326 (2006). When a guilty plea is based on misinformation regarding a direct consequence of the plea, the defendant may move to withdraw the plea based on involuntariness. State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). The defendant bears the burden of establishing that their guilty plea was invalid. State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006).

However, post plea changes in the law do not render a plea involuntary. Brady v. United States 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970) ("[A] voluntary plea of guilty intelligently made in light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.") Whether a plea is voluntary is determined by ascertaining whether

the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of the plea. State v. Lamb, 175 Wn.2d 121, 129, 285 P.3d 27, 31 (2012). In *Lamb,* a defendant pleaded guilty to second degree burglary. Lamb, at 124. At the time, Lamb's juvenile adjudications did not result in the termination of his right to bear firearms. Id. The legislature later amended the law prohibiting possession by persons adjudicated guilty of crimes of violence, including second degree burglary. Id. at 124-25. The court held that failure to advise Lamb of the loss of the right to possess firearms does not render his plea involuntary as the loss of the right was not, at the time of the plea, a consequence of a plea of guilty. Id. at 129.

If a motion for withdrawal of plea is made after judgment, it shall be governed by CrR 7.8, which states that a court "may relieve a party from a final judgment" for several reasons including mistake, newly discovered evidence, fraud, a void judgment, or any other reason

justifying relief." Stockwell, at 595. A motion to withdraw a plea after judgment is a collateral attack. State v. Buckman, 190 Wn.2d 51, 60, 409 P.3d 193 (2018). On collateral review, the petitioner must show not only error, but also actual and substantial prejudice. Id. at 65. Specifically, the defendant must "show that a rational person in their circumstances would have declined to plead guilty and would more likely than not have gone to trial." Id. at 58. A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice. Id. at 67.

In State v. Buckman, the Court held that when the trial court misinformed Buckman of a statutory maximum sentence of the possibility of life in prison rather than 114 months for a juvenile, this misinformation rendered Buckman's plea involuntary. Id. at 60. However, despite demonstrating error, the court denied Buckman's motion to withdraw his plea as he could not prove prejudice. A claim

that had he "been correctly informed ... he would never have pled guilty" was not enough to show that were it not for the constitutional error, a rational person in his situation would more likely than not have rejected the plea and proceeded to trial. *Cf* Lee v. United States, 137 S. Ct. 1958, 1963, 198 L. Ed. 2d 476 (2017) (finding it was not irrational for a defendant facing possible deportation to proceed to trial in the face of overwhelming evidence of guilt, where defendant amply established—and the government did not dispute—that "deportation was the determinative issue" in defendant's decision-making).

At the time of Willyard's plea, Willyard was properly advised of all of the consequences. Even this Court had ruled that RCW 69.50.4013 was a valid charge and those rulings were controlling at the time of Olsen's guilty pleas. *See*, State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981); State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004). In In re Pers. Restraint of Newlun, 158 Wn. App. 28, 35,

240 P.3d 795 (2010), the Court of Appeals considered whether a guilty plea to two counts of identity theft was involuntary because, subsequent to the guilty plea, this Court clarified the unit of prosecution for the offense in State v. Leyda, 157 Wn.2d 335, 337-338, 138 P.3d 610 (2006). Citing to the United States Supreme Court decision in Brady, the Newlun Court found that "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Newlun, at 35, *citing*, United States v. Broce, 488 U.S. 563, 572, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989), quoting, Brady, at 757.

This Court has adopted the rationale of Brady, stating, "Whether a plea is voluntary is determined by ascertaining whether the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of the plea." Lamb, at 129. The fact

that this Court found that convictions based on unlawful possession of a controlled substance are unconstitutional in State v. Blake, many years after Willyard's guilty plea, does not render her plea involuntary, misinformed or otherwise invalid.

In Olsen, the Court of Appeals indicated that "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Olsen, at 729-730, *citing*, United States v. Broce, at 572. The Olsen Court distinguished the UPCS situation from cases which involved a nonexistent crime, because the crime of UPCS was an existent crime which was later invalidated. Olsen, at 728. That distinction was correct.

Most of the cases which discuss "nonexistent crimes" rely on or discuss State ex rel. Evans v. Bhd. of Friends, 41 Wn.2d 133, 143, 247 P.2d 787 (1952), for the

proposition that finding that a statute is unconstitutional and therefore void equates to a finding that the crime charged was non-existent does not adequately consider the rationale of that case and subsequent cases discussing that rationale.

In State ex rel. Evans v. Bhd. of Friends, this Court relied on the U.S. Supreme Court's 1886 opinion Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178 (1886), where Justice Field wrote "An unconstitutional act is not a law; if confers no rights; it imposes no duties it affords no protection; it creates no office; it is, in legal contemplation, as *inoperative as though it had never been passed.*" Evans, at 143 (quoting Norton, at 442, (emphasis added). However, the US Supreme Court and other Federal and State Courts have repeatedly questioned Norton's validity. *See* Dobbert v. Florida, 432 U.S. 282, 298, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977) ("It is quite clear, however, that such broad statements as to the effect

of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination is an operative fact and may have consequences which cannot justly be ignored"). In Dobbert, the defendant made a claim that a law was ex post facto based on the fact that a statute had been declared unconstitutional. Dobbert argued that there was no "valid" death penalty in effect at the time of his crime in Florida. The Supreme Court stated, "Whether or not the old statute would, in the future, withstand collateral attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers." Dobbert, at 297. The fact that the statute was later found to be unconstitutional did not mean that the statute was nonexistent.

In United States v. Poli, 628 F.2d 779, 782 (2nd Cir., 1980), the Court rejected a contention that a statute later

declared unconstitutional should be treated as though it never existed. The Court stated,

> The view that an unconstitutional law should be treated as having had no effects whatsoever from the date of its enactment, see e.g. Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125-1126, 30 L.Ed. 178 (1886), has been replaced by a more realistic approach which recognizes "the actual existence of the statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored."

Id. citing, Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 S. Ct. 317, 318, 84 L.Ed 329 (1940).

The United States Supreme Court has since noted,

> The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is among the most difficult of those which have engaged the attention of the courts, state and federal …. Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct is subject to no set principle of absolute retroactive invalidity but depends upon consideration of particular relations … and particular conduct ... of rights claimed to have

> become vested, of status, or prior determinations deemed to have finality; and of public policy in light of the nature both of the statute and of its previous application.

Lemon v. Kurtzman, 411 U.S. 192, 198-199, 93 S. Ct. 1463, 36 L.Ed.2d 151 (1973).

This Court has acknowledged that the U.S. Supreme Court has abandoned the doctrine discussed in Norton, calling it "antiquated authority." W.R. Grace & Co. v. Dep't of Revenue, 137 Wn.2d 580, 594 n.10, 973 P.2d 1011 (1999).

Because a statute being held unconstitutional does not currently as a matter of law require it be "inoperative as though it had never been passed," relying on Evans to make the claim that Willyard pled guilty to a nonexistent crime is not appropriate. The rationale of Brady applies. Willyard's pleas were knowing, intelligent and voluntary at the time that they were entered. The trial court correctly

found that the Blake decision did not provide a basis for Willyard to withdraw her guilty pleas.

A single charge in a plea agreement being declared void by operation of law does not render a plea agreement invalid. In State v. Knight, 162 Wn.2d 806, 812-813, 174 P.3d 1167 (2008), this Court held that regardless of whether a plea was indivisible, a challenge based on double jeopardy principles did not invalidate the plea agreement. The Court noted, "since the plea agreement has been fully satisfied here, the indivisibility of the plea has no bearing on our analysis." Id. at 813.

The decision of the Court of Appeals was consistent with decisions of this Court. Willyard's argument to the contrary is misplaced. In In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2003), this Court looked at whether felony murder could be predicated on assault based on the statute that was in effect at the time of the crime. The crime did not exist at the time of the offense,

unlike the situation in this case. In In re Pers. Restraint of Thompson, 141 Wn.2d 712, 715, 10 P.3d 380 (2000), the petitioner was convicted of a provision of the statute that was not enacted until two years after the crime. Again, the crime did not exist at the time of the offense. Similarly, in In re Pers. Restraint of Knight, 4 Wn.App.2d 248, 253, 421 P.3d 514 (2018), Knight pled guilty to the charge of attempted manslaughter and the Court held that a person could not attempt to commit manslaughter, therefore the crime of conviction did not exist. None of these cases support Willyard's claim that review should be accepted under RAP 13.4(b).

Willyard's plea was valid when it was entered. The Court of Appeals properly determined that the only proper remedy was to vacate the unlawful possession of a controlled substance conviction. There is no basis upon which this Court should accept review.

D. CONCLUSION

For the reasons stated herein, the State respectfully request that this Court deny the petition for review.

I certify that this document contains 3728 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 29th day of September 2023.

Joseph J.A. Jackson, WSBA# 37306
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 29th day of September 2023.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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