No. 90016-7
COA No. 69309-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GARRIDAN NELSON,

Petitioner.

---

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

The Honorable Eric Z. Lucas

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Garridan Nelson asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Garridan Nelson*, No. 69309-3-I (January 21, 2014). A copy of the decision is in the Appendix at pages A-1 to A-4. A copy of the Court of Appeals February 12, 2014, order denying Mr. Nelson's Motion for Reconsideration is in the Appendix at B-1.

C. ISSUE PRESENTED FOR REVIEW

At the time of entering a guilty plea, a defendant must be properly advised of the sentencing consequences resulting from the guilty pleas. Where the defendant is misadvised, the plea is involuntary and the defendant has the right to move to withdraw the plea. Here, the State conceded that Mr. Nelson was misadvised of the sentencing consequences of his guilty pleas but the trial court failed to advise Mr. Nelson he had the right to withdraw the guilty pleas or allow him to move to withdraw the pleas. Is a significant issue of law under the

United States and Washington Constitutions involved entitling Mr. Nelson to remand to the trial court to allow him to withdraw his involuntary guilty pleas?

D. STATEMENT OF THE CASE

On June 27, 1995, Garridan Nelson pleaded guilty to three counts of first degree murder. CP 58-65. Paragraph 6(h) of the Statement of Defendant on Plea of Guilty advised Mr. Nelson that one of the consequences of his plea to first degree murder was that he was not eligible for "time off for good behavior." CP 60.

The trial court sentenced Mr. Nelson to the upper end of the standard range to the mandatory minimum of 240 months, and 320 months on each count to be served consecutively, for a total sentence of 960 months in prison. CP 55. In paragraph (7) of the Judgment and Sentence, Mr. Nelson was advised that:

> RCW 9.94A.120(4) provides that 240 months on each count is a mandatory minimum during which the defendant is not eligible for community custody, earned early release time, furlough, etc.

CP 55.

Subsequently, in *State v. Cloud,* this Court invalidated a similar portion of RCW 9.94A.120 as it violated the single subject rule under Article II, section 19 of the Washington Constitution. 95 Wn.App. 606,

617-18, 976 P.2d 649 (1999). Based upon the result in *Cloud*, on July 21, 2012, Mr. Nelson filed a Motion to Modify or Correct Judgment and Sentence Pursuant to CrR 7.8, to strike the unconstitutional provision of the statute from his Judgment and Sentence. CP 8-29. In response, the State conceded that Mr. Nelson was entitled to the relief he requested. CP 3-5.

On August 23, 2012, the trial court held a hearing on Mr. Nelson's motion at which Mr. Nelson appeared telephonically. Based upon the State's concession, the court agreed to amend the Judgment and Sentence. RP 2. Mr. Nelson immediately asked the court if he was being remanded for resentencing, to which the court replied:

> THE COURT: No. That's not required. The order – hang on a second. The order caption is Order Amending Judgment and Sentence. That's all we have to do. We don't have to resentence you. Any other questions?
>
> THE DEFENDANT: Well, there were other issues that I would like to have been able to bring up at a sentencing hearing.
>
> THE COURT: Well, I am sure that's true from your point of view. But the only issue that I see is that this relief that you have requested in terms of early release needs to be granted. The process that you outlined is not necessary. All we have to do is amend the Judgment and Sentence. And that's what I intend to do this morning. I will send you a copy of the order. If you have any other issues or any further need for a motion, you can always make those motions.

RP 3.

Mr. Nelson appealed from the trial court's refusal to order a resentencing to allow him to move to withdraw his guilty pleas. CP 1. The Court of Appeals limited itself solely to Mr. Nelson's CrR 7.8 motion and ruled that "[a]dditional claims Nelson might want to litigate relating to the circumstances of his guilty plea and judgment of conviction are not properly before us." Decision at 4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

MR NELSON'S GUILTY PLEAS WERE INVOLUNTARY AND, AS A CONSEQUENCE, HE IS ENTITLED TO WITHDRAW THOSE PLEAS

A defendant may plead guilty if there is a factual basis for the plea and the defendant understands the nature of the charges and enters the plea voluntarily. CrR 4.2(a); *State v. Ford*, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). Due process requires that the guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re the Personal Restraint of Stoudamire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

An appellant may challenge the voluntariness of his plea for the first time on appeal. *State v. Walsh,* 143 Wn.2d 1, 17 P.3d 591 (2001); *State v. Wakefield,* 130 Wn.2d 464, 472, 925 P.2d 183 (1996). In *Walsh,* the defendant raised for the first time on appeal the voluntariness of his plea based upon a mutual mistake regarding the applicable standard range. The Supreme Court ruled that since "[a] defendant must understand the sentencing consequences for a guilty plea to be valid[ ]," the defendant may raise the voluntariness of his plea and move to withdraw the guilty plea for the first time on appeal where it is based upon a misadvisement of the sentencing consequences. *Walsh,* 143 Wn.2d at 8, *quoting State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *overruled on other grounds, State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011).

A plea is involuntary if the plea is entered without knowledge of the direct sentencing consequences, which constitutes a manifest injustice. CrR 4.2 (f); *Isadore*, 151 Wn.2d at 298, citing *Walsh,* 143 Wn.2d at 8 (mutual mistake regarding sentencing consequences renders guilty plea invalid). A trial court must permit withdrawal from a plea agreement where the defendant entered the plea involuntarily. CrR 4.2(f); *State v. Wakefield,* 130 Wn.2d 464, 474-75, 925 P.2d 183

(1996). Further, the trial court must advise the defendant of his right to withdraw the guilty plea prior to resentencing. *Id.* ("A trial court must permit withdrawal of a plea agreement where the defendant entered the plea involuntarily").

Contrary to the Court of Appeals' conclusion that the issues raised by Mr. Garridan related to the unappealed judgment and sentence, the defendant may raise the voluntariness of his plea and move to withdraw the guilty plea *for the first time on appeal* where it is based upon a misadvisement of the sentencing consequences or upon a mutual mistake. *Walsh,* 143 Wn.2d at 8, *quoting Miller,* 110 Wn.2d at 531. Mr. Nelson appealed from the amended judgment and sentence, thus he was allowed to raise the withdrawal of his guilty plea for the first time *in this appeal.*

Further, all parties assumed Mr. Nelson was not eligible for earned release time. Based on the parties' mutual mistake, the court amended the Judgment and Sentence, but failed to advise Mr. Nelson of his right to withdraw his plea and failed to allow him to withdraw his guilty plea. The proper recourse was for the Court of Appeals to remand the matter to allow Mr. Nelson to withdraw his guilty pleas. *See Wakefield,* 130 Wn.2d at 475 ("Given these circumstances, we hold

that Wakefield may withdraw her plea and remand to the trial court for a hearing to give Wakefield this opportunity.")

To the extent the Court of Appeals believed that the hearing before the trial court was not a "sentencing hearing" but merely a ministerial act of amending the judgment and sentence, that determination runs afoul of the decision in *State v. Cloud,* 95 Wn.App. 606, 618, 976 P.2d 649 (1999). In *Cloud*, the Court of Appeals remanded for "imposition of a sentence which permitted Cloud early release, and direct[ed] the trial court to credit Cloud with good time credit he ha[d] already earned." *Cloud*, 95 Wn.App. at 618. Thus, the Court of Appeals was required by *Cloud* to remand the matter for imposition of a sentence which allowed early release, thus constituting a new sentencing hearing.

Further, the remedy for an involuntary plea is clear: the appellate court *must* reverse and remand to the superior court to allow the defendant an opportunity to withdraw his guilty plea. *State v. Lusby,* 105 Wn.App. 257, 263, 18 P.3d 625, *review denied,* 144 Wn.2d 1005 (2001).

This Court should grant review and determine Mr. Nelson had the right to withdraw his guilty plea at the resentencing hearing. As a consequence, this Court should remand for hearing at which Mr. Nelson may move to withdraw his guilty pleas.

F. CONCLUSION

Mr. Nelson asks this Court to grant review, and remand to allow him to withdraw his previously entered guilty pleas.

DATED this 10th day of March 2014.

Respectfully submitted,

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# APPENDIX A

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

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>GARRIDAN ARTHUR NELSON,<br><br>Appellant. | DIVISION ONE<br><br>No. 69309-3-I<br><br>UNPUBLISHED OPINION<br><br>FILED: January 21, 2014 |

DWYER, J. — Garridan Nelson appeals from the superior court's order granting relief on his postconviction motion, brought pursuant to CrR 7.8,[1] to amend his judgment and sentence. Nelson alleges no error with respect to the court's decision on his motion. The scope of our review is limited to the issues raised in the CrR 7.8 motion. Nelson's arguments on appeal relate to the validity of his unappealed underlying judgment and sentence. The time to appeal the judgment and sentence has long since passed. We affirm the court's order which granted Nelson the relief he sought.

I

Garridan Nelson pleaded guilty to three counts of first degree murder in 1995. In exchange for Nelson's plea, the State reduced the charges on two

[1] CrR 7.8(b) permits vacation or modification of a final judgment and sentence for specific enumerated reasons, including (1) mistakes or irregularities in obtaining the judgment; (2) newly discovered evidence; (3) fraud or misrepresentation; (4) a void judgment; or (5) "[a]ny other reason justifying relief from the operation of the judgment."

counts from aggravated murder to first degree murder. The standard sentencing range was between 240 and 320 months on each count.

The sentencing court imposed a 320-month sentence on each count, to run consecutively, for a total sentence of 960 months. The judgment and sentence included a provision stating that Nelson was ineligible for earned early release on the mandatory minimum portions of his sentence (240 months on each count) pursuant to former RCW 9.94A.120(4) (1994).

In July 2012, Nelson filed a CrR 7.8 motion to correct his judgment and sentence, seeking to "strike the unconstitutional provision of RCW 9.94A.120(4) from his judgment and sentence." He also asked to be resentenced in order to "reflect the ability to receive good time on his mandatory minimum term."

Nelson's motion was based on our decision in State v. Cloud, 95 Wn. App. 606, 618, 976 P.2d 649 (1999), which invalidated the provision of former RCW 9.94A.120(4) that made certain first-time offenders, like Nelson, ineligible for early release. In response, the State conceded that Nelson was entitled to relief under Cloud. The State further conceded that the reference to former RCW 9.94A.120(4) should be deleted from Nelson's judgment and sentence.

The superior court held a hearing on Nelson's motion, allowing Nelson to participate by telephone. The State proposed an order amending Nelson's judgment and sentence. Consistent with the ruling in Cloud, the proposed order deleted the language stating that Nelson was not entitled to earned early release

and added that "[t]he defendant is entitled to earned early release on each count."

The superior court informed Nelson that it intended to sign the State's proposed order and asked if Nelson had any questions. The following exchange occurred:

> The Defendant: Am I not being remanded for resentencing?
>
> The Court: No. That's not required. The order—hang on a second. The order caption is Order Amending Judgment and Sentence. That's all we have to do. We don't have to resentence you. Any other questions?
>
> The Defendant: Well, there were issues that I would like to have been able to bring up at a sentencing hearing.
>
> The Court: Well, I am sure that's true from your point of view. But the only issue that I see is that this relief that you have requested in terms of early release needs to be granted. The process that you outlined is not necessary. All we have to do is amend the Judgment and Sentence. And that's what I intend to do this morning. I will send you a copy of the order. If you have any other issues or any further need for a motion, you can always make those motions.

The superior court entered the State's proposed order.

II

On appeal, Nelson asserts no claim of error with respect to the order entered by the superior court. Indeed, this order granted him all of the relief he sought in his CrR 7.8 motion. While, during the hearing, Nelson mentioned some "issues" he might want to raise at a resentencing hearing, he did not specify those issues nor did he ask for any additional relief.

Our task is limited to reviewing those issues brought before the court in Nelson's CrR 7.8 motion and the court's order resolving that motion. Additional

claims Nelson might want to litigate relating to the circumstances of his guilty plea and judgment of conviction are not properly before us.[2] See State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) ("an unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial").

We reject Nelson's present attempt to ignore the postconviction motion proceedings below and attack the judgment and sentence on appeal.[3] We affirm the superior court's order.

Affirmed.

Dwyer, J.

We concur:

Appelwick, J.

Becker, J.

[2] Acknowledging that the only relief sought below was amendment of his judgment and sentence, Nelson suggests that preservation of error rules do not bar his constitutional argument and that he may raise it for the first time on appeal. However, as explained, this is not a direct appeal of the judgment and sentence. Nelson may not raise issues, constitutional or otherwise, that do not relate to the superior court's order on his CrR 7.8 motion because only that order is before us.

[3] We do not address appellant's pro se statement of additional grounds separately because his arguments are adequately addressed in his appellate counsel's brief. See RAP 10.10(a).

# APPENDIX B

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

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>GARRIDAN ARTHUR NELSON,<br><br>Appellant. | DIVISION ONE<br><br>No. 69309-3-I<br><br>ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION |

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 12th day of February, 2014.

FOR THE COURT:

Deny, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69309-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:



☒ respondent Mary Kathleen Webber, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 12, 2014