No. 46773-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Schmitt,

Appellant.

Pierce County Superior Court Cause No. 13-1-04668-9

The Honorable Judge John Hickman

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Schmitt's guilty plea was entered in violation of his Fourteenth Amendment right to due process.

2. Mr. Schmitt pled guilty to reduced charges because he erroneously believed he was facing a persistent offender life sentence.

3. Mr. Schmitt's guilty plea was not entered knowingly, intelligently, and voluntarily, because he did not understand the direct consequences of conviction.

4. The trial court erred by sentencing Mr. Schmitt with offender scores of six (counts one and two) and seven (count three).

5. The trial court erred by including washed-out offenses in Mr. Schmitt's offender score.

6. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence).

7. The trial court erred by entering Finding of Fact No. I.

8. The trial court erred by entering Finding of Fact No. II.

9. The trial court erred by entering Finding of Fact No. III.

10. The trial court erred by entering Finding of Fact No. VI.

ISSUE 1: Must Mr. Schmitt be permitted to withdraw his guilty plea because he was induced to plead guilty by the false threat of a persistent offender life sentence?

ISSUE 2: Must Mr. Schmitt be permitted to withdraw his guilty plea because the parties misunderstood the direct consequences of conviction?

ISSUE 3: Do the parties' misunderstandings about the range of possible consequences of conviction render Mr. Schmitt's guilty plea invalid?

ISSUE 4: If Mr. Schmitt is not permitted to withdraw his plea, must the case be remanded for correction of the offender scores and standard ranges?

11. Mr. Schmitt was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

12. Defense counsel gave Mr. Schmitt incorrect legal advice that prompted him to plead guilty and agree to an exceptional sentence.

ISSUE 5: Was Mr. Schmitt deprived of the effective assistance of counsel by his attorney's erroneous advice concerning the likelihood of a persistent offender life sentence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Because he believed he was facing life without parole, Jacob Schmitt pled guilty to three class B felonies, and agreed to an exceptional sentence of 30 years. RP 3-4; CP 3-4, 5-14, 15-17. In fact, if convicted as originally charged, Mr. Schmitt's standard range would have been 57-75 months.[1] Information, Supp. CP; RCW 9.94A.510-.530.

The prosecutor, defense counsel, and judge all believed Mr. Schmitt qualified as a persistent offender. RP 3-4, 10, 26-27; CP 3, 30-31. Mr. Schmitt's criminal history included a Burglary 1 and Robbery 1 from 1993, either of which qualified as his first strike. CP 16; 21.

Mr. Schmitt also had a second-degree robbery from 1996. CP 16, 21. The parties believed this to be his second strike, making the current offense (also robbery) his third strike. RP 3-4, 10; CP 3, 30-31. This belief was based, in part, on a 2001[2] federal conviction which might have prevented washout of the 1996 robbery. CP 16, 21.

The court found that the 2001 federal conviction was not comparable to a Washington felony, and did not include it in the offender score. RP 16; CP 21. Because the 2001 conviction did not qualify as a

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[1] Mr. Schmitt's original charges included first-degree robbery and attempting to elude. Information, Supp. CP. He did not qualify as a persistent offender, as explained below.

[2] The offense date is given as "8/30/99;" the conviction date is given as "5/4/1." CP 16, 21.

Washington felony, Mr. Schmitt spent a ten-year crime-free period "in the community" within the meaning of the washout provisions of RCW 9.94A.525(2).[3] CP 16, 21.

Although Mr. Schmitt's attorney argued the comparability issue, he did not suggest that the 1996 robbery washed out of the offender score. RP 6-8, 15-16; CP 6, 17. Instead, like the prosecutor and the court, defense counsel believed Mr. Schmitt was facing his third strike if convicted as originally charged. RP 3-4, 10, 21-22, 26-27.

None of the parties recognized that the robbery and Mr. Schmitt's other class B and C convictions washed out of the offender score. RP 6, 8, 9, 11-12, 18; CP 6, 16-17, 21. The plea documents and the transcript indicate an offender score of either 6 or 7 (on counts one and two) and either 7 or 8 (on count three).[4] CP 6, 16-17, 21.

Neither the plea documents, the transcript, nor the judgment and sentence reflect determinations of the offender score and standard range that take into account the washout of Mr. Schmitt's class B and C felonies. CP 6, 16-17, 21. Mr. Schmitt was sentenced with offender scores of 6 (counts one and two) and 7 (count three). CP 21.

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[3] He may have been incarcerated for some portion of that time. However, any incarceration pursuant to his federal conviction did not interrupt the washout period, as explained below.

[4] The court's finding that the federal conviction was not comparable to a Washington felony resulted in offender scores of 6 (on counts one and two) and 7 (on count three).

The court entered findings and conclusions, and sentenced Mr. Schmitt to 30 years in prison. CP 24, 30-33. Mr. Schmitt timely appealed. CP 34.

ARGUMENT

I. Mr. Schmitt's guilty pleas violated due process.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). The record here shows the opposite. Mr. Schmitt's pleas were based on a mistaken belief that he faced life without parole, and on miscalculated offender scores and standard ranges that differed from those calculated by the parties and the court.

A. Mr. Schmitt was induced to plead guilty by the erroneous belief that he faced life without parole on the original charge.

The parties and the court believed that Mr. Schmitt had two prior strikes, and thus would be subject to a persistent offender sentence if convicted as charged. CP 3, 15, 30. In fact, Mr. Schmitt had only one prior strike. This is so because his 1996 conviction for second-degree

robbery—which the parties erroneously believed to be his second strike—washed out of his offender score.[5]

1. Mr. Schmitt's 1996 Robbery 2 washed out, making him ineligible for a persistent-offender sentence.

Second-degree robbery is a class B felony. RCW 9A.56.210. It is subject to a ten-year washout period. RCW 9.94A.525(2)(b). Mr. Schmitt's 1996 robbery washed out because he was "in the community" for a period longer than ten years "without committing any crime that subsequently result[ed] in a conviction." RCW 9.94A.525(2)(b).

Under the washout statute, a person can be "in the community" even when in custody. *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010). Here, after May 4, 2001 (the date of conviction for the federal offense),[6] Mr. Schmitt was "in the community" for more than ten years without committing a crime.

The *Ervin* court held that incarceration does not interrupt a washout period unless the confinement is "pursuant to a felony"

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[5] Although Mr. Schmitt had two additional convictions for most serious offenses, these two convictions do not count as separate strikes. Neither conviction "occurred before the commission of any of the other most serious offenses for which [he] was previously convicted." RCW 9.94A.030(37). Although the record is not completely clear as to the actual offense date of his 1993 robbery conviction (see CP 16, 21), it must have taken place before his conviction on the Burglary 1 charge. Otherwise, his 1996 Robbery 2 would have scored as his third strike.

[6] The documents in the court file show an offense date of "8/30/99" and a conviction date of "5/4/1." CP 16, 21.

conviction. *Id.,* at 822, 826. Here, any confinement following Mr. Schmitt's 2001 federal conviction was not "pursuant to a felony" conviction.

The trial court ruled that Mr. Schmitt's 1999 federal crime was not comparable to a Washington felony, relying on *In re Pers. Restraint of Lavery,* 154 Wn.2d 249, 111 P.3d 837 (2005) and *State v. Thomas*, 135 Wn. App. 474, 479, 144 P.3d 1178 (2006), *as amended* (Oct. 13, 2006). RP 13-16. In *Lavery,* the Washington Supreme Court determined that a federal conviction for bank robbery is not equivalent to second-degree robbery in Washington.[7] *Lavery,* 154 Wn.2d at 261. Federal bank robbery is a general intent crime, while robbery under Washington law requires the specific intent to steal.[8] *Id.*

Under *Ervin,* Mr. Schmitt's wash-out period began in 2001, on the day after his federal conviction. CP 16, 21; RCW 9.94A.525(2)(b). Any period of incarceration imposed pursuant to that conviction did not interrupt the washout period. *Ervin,* 169 Wn.2d 822, 826. The only

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[7] Nor may a sentencing court examine the facts underlying the federal conviction. *Id.,* at 256-258. An accused person has no incentive to develop facts unrelated to the elements of the federal offense. *Id.* Thus regardless of the underlying facts of Mr. Schmitt's 1999 crime, it cannot qualify as second-degree robbery (or any other Washington felony).

[8] The *Thomas* court reached a similar conclusion regarding a California burglary conviction. *Thomas,* 135 Wn. App. at 483-487.

subsequent allegation of criminal activity occurred on December 3, 2013, more than ten consecutive years later. CP 1.

The 1996 robbery conviction therefore washed out of Mr. Schmitt's offender score prior to the current offense. RCW 9.94A.525(2)(b). Had Mr. Schmitt been convicted as originally charged in this case, he would not have been facing a persistent offender sentence. RCW 9.94A.030(37).

2. Mr. Schmitt's guilty pleas were involuntary because they were based on misinformation.

Absent the parties' mistake, Mr. Schmitt had no incentive to stipulate to a 30 year sentence. His standard range, if convicted as charged, was 57-75 months on the robbery charge.[9] *See* Adult Sentencing Manual, p. 412 (Caseload Forecast Council, 2013).

The parties' error concerning the persistent offender issue induced Mr. Schmitt to plead guilty. A mutual mistake of this sort renders a guilty plea involuntary: "Where a plea agreement is based on misinformation… the defendant may choose… withdrawal of the guilty plea." *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001).

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[9] His offender score would have been five: two points each for his Burglary 1 and Robbery 1 convictions from 1993, and one point for the other current offense of attempting to elude. Information, Supp. CP; RCW 9.94A.525.

Mr. Schmitt's guilty plea was based on misinformation. It was therefore involuntary. *Id.* He is entitled to withdraw his plea. *Id.*

B. Mr. Schmitt did not understand the direct consequences of his pleas, because all parties erroneously believed his offender score was at least 6 on counts one and two and at least 7 on count three.

A guilty plea entered without a correct understanding of direct consequences is involuntary. *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006). Here, all parties were mistaken as to the direct consequences of Mr. Schmitt's guilty plea.

As detailed in the clerk's papers, the parties and the court all believed that Mr. Schmitt's offender scores were at least 6 (counts one and two) and 7 (count three). In fact, the correct scores were 4 and 5, respectively.

As noted above, Mr. Schmitt spent ten consecutive years in the community without committing a crime. *Ervin*, 169 Wn.2d at 822, 826. Because of this ten-year period, class B and C felonies washed out of his offender score. RCW 9.94A.525(2). In other words, the custodial assault, the 1996 robbery, and the malicious mischief should not have contributed to the offender score. CP 16, 21.

This left Mr. Schmitt with two prior offenses: a Burglary 1 and a Robbery 1.[10] CP 16, 21. When added to the other current offenses Mr. Schmitt's total scores should have been 4 (counts one and two) and 5 (count three). Instead of the standard ranges calculated by his attorney,[11] his actual standard ranges were 12-14 months (counts one and two) and 17-22 months (count three). *See* RCW 9.94A.510-.530; Sentencing Guidelines Manual, pp. 266, 427.

A mistake as to direct consequences renders a plea involuntary, even when the mistake favors the defendant.[12] *Mendoza*, 157 Wn.2d at 592.[13] Here, the parties believed Mr. Schmitt's offender scores and standard ranges to be higher than they were. However, because he was not told of the correct offender score and standard ranges prior to

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[10] Each of these should have contributed one point to the offender score on counts one and two. The prior burglary would double when scoring the current burglary, meaning the prior offenses contributed a total of three points on count three. RCW 9.94A.525(16).

[11] Set forth in a handwritten note on the stipulation to his prior record, indicating a standard range of 17-22 months for counts one and two and 33-43 months for count three. CP 6, 16-17.

[12] That is why the state took great pains to ensure that Mr. Schmitt understood the dispute in the offender score. However, the record does not suggest that Mr. Schmitt chose to be bound to the agreed exceptional sentence even if the offender score proved to be lower than that calculated by his attorney.

[13] The Supreme Court recognizes an exception when the defendant is informed of the miscalculation prior to sentencing. *Id.* Here, Mr. Schmitt clearly understood his offender scores to be either 6 and 7, or 7 and 8. CP 6, 16-17.

sentencing, he is entitled to withdraw his guilty pleas. *Id.* The case must be remanded to allow him to do so.[14] *Id.*

II. MR. SCHMITT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS.

Mr. Schmitt's attorney unreasonably provided inaccurate legal advice by telling him he was at risk for a life sentence if convicted. There is a reasonable probability that Mr. Schmitt would have rejected the plea offer absent the incorrect advice. He must be allowed to withdraw his plea.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Faulty legal advice can render a guilty plea involuntary or unintelligent. *Id.* A defendant is entitled to withdraw his or her plea if counsel's deficient performance caused prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, the defendant must establish a reasonable probability that he or she would not have pled guilty but for counsel's error. *Sandoval*, 171 Wn.2d at 169.

To provide effective assistance, an attorney must "carry[ ] out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862,

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[14] In the alternative, the case must be remanded for correction of the offender scores and standard ranges.

215 P.3d 177 (2009). In this case, Mr. Schmitt's attorney failed to research the relevant law and provided erroneous legal advice. The incorrect advice prompted Mr. Schmitt to plead guilty and to agree to an exceptional sentence of 30 years in prison.

As noted above, Mr. Schmitt was not facing a third-strike persistent offender sentence. Instead, his highest standard range would have been 57-75 months.

Under these circumstances, a stipulated exceptional sentence of 30 years made no sense. Nothing in the record shows any likelihood of a sentence approaching 30 years upon conviction of the original charges.

Furthermore, even if the prosecutor had alleged some aggravating factor, persuaded a jury to find the aggravator, and successfully argued in favor of an exceptional sentence, Mr. Schmitt still would have had the opportunity to present mitigating evidence. Both the prosecutor and the judge found his mitigation packet persuasive when it came to avoiding the (inapplicable) life sentence; the mitigation evidence would have applied equally to any sentencing proceeding on the original charges. *See* RP 3-4, 21-23, 26-28; CP 3-4; 30-33.

Had Mr. Schmitt learned that he was ineligible for a persistent offender sentence, that he was unlikely to face 30 years in prison, and that his standard range on the original charge would not have exceeded 75

months, he would not have accepted the deal and stipulated to a 30-year sentence. There is a reasonable likelihood he would have not have pled guilty but for counsel's error. *Sandoval*, 171 Wn.2d at 169.

Mr. Schmitt was deprived of the effective assistance of counsel. *Id.* He must be allowed to withdraw his plea. *Id.*

III. STANDARDS OF REVIEW.

Constitutional issues are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). The voluntariness of a guilty plea may be raised for the first time on appeal. *Mendoza*, 157 Wn.2d at 589; *Walsh*, 143 Wn.2d at 4. The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

Claims of ineffective assistance of counsel are also reviewed *de novo*. *In re Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). Ineffective assistance creates a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kyllo*, 166 Wn.2d at 862.

CONCLUSION

Mr. Schmitt pled guilty and stipulated to a 30-year sentence because he mistakenly believed he was facing life without parole. In addition, at the time of the plea, all of the parties were mistaken as to his

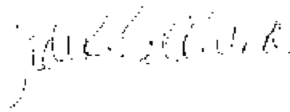
offender score and standard range on the original charges and on the charges to which he pled guilty. His plea was involuntary.

Furthermore, Mr. Schmitt was deprived of the effective assistance of counsel. Defense counsel erroneously believed that Mr. Schmitt faced life without parole. Had counsel realized that Mr. Schmitt's standard range on the original robbery charge was 57-75 months, there is a reasonable likelihood that Mr. Schmitt would not have pled guilty.

The case must be remanded with instructions to allow Mr. Schmitt to withdraw his guilty pleas.

Respectfully submitted on March 6, 2015,

BACKLUND AND MISTRY



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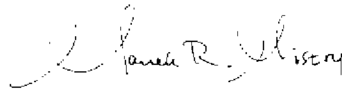

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CERTIFICATE OF SERVICE

I certify that on today's date:

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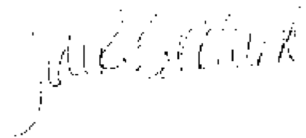
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 6, 2015.



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