NO. 46773-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACOB IVAN SCHMITT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 13-1-04668-9

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the defendant was aware of an issue related to calculation of his offender score but elected to take advantage of the plea agreement and plead guilty, has he sustained his personal restraint burden of proof, or shown that the trial court's acceptance of his guilty plea was a manifest injustice?

2. Where during his guilty plea, the defendant freely and voluntarily stipulated to an exceptional sentence above the standard range, and where the defendant's offender score was correctly calculated, was the defendant's guilty plea freely and voluntarily given with an intelligent understanding of the direct and indirect consequences of his plea?

B. STATEMENT OF THE CASE.

On December 4, 2013, Appellant Jacob Ivan Schmitt (the "defendant") was charged with first degree robbery and eluding a pursuing police vehicle. CP 40-41. The charges arose from a bank robbery the day before with what appeared to have been a firearm. CP 43-44.

On September 12, 2014, the parties appeared for a change of plea and sentencing hearing. RP 3. Prior to that hearing few court appearances were held. The record discloses that (1) the parties anticipated that the robbery charge constituted the defendant's third most serious offense [CP

45.], (2) the defendant's attorney sought and obtained authorization for funds for an expert for a possible mental health defense [CP 46, 48-49.], (3) that the defense attorney actively advocated for mitigation and a plea agreement [CP 45-46.], and (4) the State believed that the defendant had made inculpatory statements at his arraignment [CP 46.].

The defendant's attorney was successful in negotiating a plea agreement. At the September 12, 2014, plea and sentence hearing, the State reduced the robbery to two counts of first degree theft and one count of second degree burglary. CP 1-2. In return the defendant pleaded guilty to the reduced charges, stipulated to his prior criminal history and offender score, and stipulated to an exceptional sentence above the standard range. CP 5-14, 15-17, and 30-33. As part of the guilty plea the defendant provided the trial court with (1) a ten page written plea statement [CP 5-14.], (2) a three page criminal history and offender score stipulation [CP 15-17.], and (3) agreed upon findings of fact and conclusions of law supporting an exceptional sentence above the standard sentencing range [30-33.].

The trial court accepted the amended charges and engaged the defendant in a voluntariness plea colloquy. RP 4, 10-20. The trial court was advised that the parties had a dispute as to the correct calculation of the defendant's offender score but that the defendant wished to consummate the plea agreement nonetheless. CP 6, 17. The trial court assured itself that the defendant wished to plead guilty despite the dispute

and the uncertainty about the offender score. RP 11-12. The court was advised by the defendant's attorney of the issue and of the defendant's position and was also advised by the defense, "I think in the great scheme of things when we're dealing with a sentence in a matter like this and an agreed exceptional sentence upward, it may not make a difference, but I do believe that the Court has to sign off on the plea form and the stipulation of criminal history." RP 8.

The trial court accepted the defendant's argument about his offender score and ruled accordingly. RP 17. It also accepted the primary provision of the plea agreement, namely the parties' stipulation for an exceptional sentence above the standard range and a joint sentencing recommendation of ten years on each count to run consecutive. CP 25, 30 -33. RP 26-27. In addition to a judgment and sentence, the trial court entered findings and conclusions reflecting its exceptional sentence decision. CP 30-33. The defendant filed this timely appeal on October 9, 2014. CP 34.

C. ARGUMENT.

1. THE DEFENDANT CAN MEET NEITHER HIS PERSONAL RESTRAINT BURDEN OF PROOF, NOR THE MANIFEST INJUSTICE GUILTY PLEA STANDARD OF REVIEW, WHERE HE WAS AWARE OF THE OFFENDER SCORE ARGUMENT THAT HE MAKES HERE AND ELECTED TO TAKE ADVANTAGE OF THE PLEA BARGAIN WITH THAT KNOWLEDGE IN MIND.

The standard of review that applies to the defendant's direct appeal differs from the standard that applies to his personal restraint petition. In a personal restraint petition, a petitioner claiming constitutional error must demonstrate actual prejudice from the error before it will be considered on the merits. ***In Re Personal Restraint of Hews***, 99 Wn.2d 80, 85–87, 660 P.2d 263 (1983). *See also* ***In Re Personal Restraint of St. Pierre***, 118 Wn.2d 321, 328–30, 823 P.2d 492 (1992). In addition the petitioner bears the burden of proof by a preponderance of the evidence and where his claim would be supported by other persons, must submit "their affidavits or other corroborative evidence" consisting of competent and admissible evidence. ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992), ***In Re Personal Restraint of St. Pierre,*** 118 Wn.2d at 328. ***Matter of Cook***, 114 Wn.2d 802, 814, 792 P.2d 506(1990).

In this case the defendant has submitted two self-serving declarations to support his personal restraint petition. Those declarations are not corroborated by any other declarations or affidavits, and in

particular are not supported by a declaration from his trial attorney. Nevertheless, if accepted as true, they show that the defendant (1) knew about the washout issue that he raises here before and during his guilty plea and sentencing, and (2) elected to go forward with both in spite of that knowledge. Schmitt Declaration, June 2, 2015, p.2. Schmitt Declaration, June 25, 2015. While the defendant now claims that the issue was not argued to the trial court against his wishes, the fact that it was not argued is evident from the record in the direct appeal and has no bearing on the outcome of the petition or the direct appeal. In short, if the attorneys' and the trial court's view of the washout provisions was correct, the defendant cannot meet his burden of proof because he has no evidence to show unlawful restraint beyond his own misinterpretation of the washout rules.

Insofar as the direct appeal is concerned, the defendant did not bring a motion to withdraw his guilty plea in the trial court. CrR 4.2(f) provides that, "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." A ruling on such a motion is reviewed for abuse of discretion. ***State v. A.N.J.***, 168 Wn.2d 91, 106-07, 225 P.3d 956, 964 (2010). When the motion is made post-judgment the motion is governed by CrR 7.8. The manifest injustice standard was adopted "because an examination of other rules connected to CrR 4.2(f) 'prevents a court from accepting a plea of guilty until it has ascertained

that it was 'made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" *Id.* citing ***State v. Taylor,*** 83 Wn.2d 594, 595, 521 P.2d 699 (1974).

As in the case of the defendant's personal restraint petition, the standard of review for his direct appeal does not support him. If we accept as true that the defendant knew about the washout argument before he elected to plead guilty, that knowledge only supports voluntariness of his guilty plea. The only inference to be drawn is that he had an argument that might or might not have carried the day and he nevertheless elected to plead guilty and take advantage of the certainty that he would not face a life sentence. At any time he could have declined to plead guilty to the theft and burglary charges and instead asked the trial court to let him plead guilty to robbery. He did not do so for the very good reason that he did not wish to risk his life on a questionable statutory interpretation argument.

2. AS PART OF A PLEA AGREEMENT IN WHICH THE STATE GAVE UP PROSECUTING THE DEFENDANT AS A PERSISTENT OFFENDER, THE DEFENDANT FREELY AND VOLUNTARILY STIPULATED TO AN EXCEPTIONAL SENTENCE ABOVE THE STANDARD RANGE AND WAS SENTENCED EXACTLY AS CALLED FOR BY HIS PLEA BARGAIN.

Under due process, a valid guilty plea must be knowing, voluntary, and intelligent in order to satisfy due process. ***In Re Personal Restraint of Isadore***, 151 Wn.2d 294, 297-98, 88 P.3d 390(2004) (A defendant's plea without knowledge of community placement is invalid because "community placement is a direct consequence of a guilty plea."), citing ***Boykin v. Alabama,*** 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) and ***In Re Personal Restraint of Stoudmire,*** 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). Consistent with that standard, a defendant must be informed of all direct consequences of the plea, but need not be informed of all possible consequences. ***In Re Personal Restraint of Isadore***, 151 Wn.2d at 298, citing ***State v. Ross,*** 129 Wn.2d 279, 284, 916 P.2d 405 (1996) and ***State v. Barton,*** 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *Id.*, citing ***State v. Miller,*** 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

One obvious direct sentencing consequence is the defendant's standard range. The Sentencing Reform Act of 1981 established a standard sentencing range for felony offenses in Washington. RCW 9.94A.510. Except for persistent offenders, the sentencing range for a particular offense, committed by a particular defendant, is determined by the seriousness level of the offense and the defendant's offender score. RCW 9.94A.515 and .525. Where a defendant has prior criminal convictions, the offender score is calculated by assigning criminal history points to each prior conviction. RCW 9.94A.525.

The trial court's offender score ruling in this case recognized that not all felony convictions count as criminal history points toward a defendant's offender score. The washout provisions for class B and C prior felony convictions provide that a prior felony conviction shall not be included in a defendant's offender score, "if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years [for a class B conviction, or five years for a class C conviction] in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b) and (c).

The washout provisions have been construed as including both (1) a "trigger clause" which identifies the beginning of the washout period,

and (2) a "continuity/interruption" clause, that specifies what events will interrupt or prevent a conviction from washing out. ***State v. Ervin,*** 169 Wn.2d 815, 821, 239 P.3d 354 (2010), citing ***In Re Personal Restraint of Nichols***, 120 Wn. App. 425, 432, 85 P.3d 955 (2004). The trigger clause serves to either set or re-set the beginning of the ten or five year washout period. For example confinement for a felony probation violation constitutes confinement pursuant to "a felony conviction" and therefore re-sets or postpones the trigger date. ***State v. Mehrabian,*** 175 Wn. App. 678, 714, 308 P.3d 660, *review denied,* 178 Wn.2d 1022, 312 P.3d 650 (2013), relying upon ***State v. Blair***, 57 Wn. App. 512, 789 P.2d 104 (1990). By contrast confinement for a misdemeanor probation violation does not re-set the trigger date because it is not "confinement . . . pursuant to a felony conviction." RCW 9.94A.525(2)(b) and (c), ***State v. Ervin,*** 169 Wn.2d at 826.

The washout provisions are contained in two subsections of the offender score statute related to Washington State convictions. Until 1995 the continuity interruption clause required that a defendant must be convicted of a felony before a prior conviction would washout. Former RCW 9.94A.360(2). ***State v. Watkins***, 86 Wn. App. 852, 854-55, 939 P.2d 1243(1997). In 1995 the clause was amended so that conviction of

any crime, misdemeanor or felony, would suffice to interrupt or reset the washout period. *Id.* at 855-56.

A separate subsection of the offender score statute determines when out-of-state or federal convictions are counted as criminal history points. RCW 9.94A.525(3). Logically speaking, the question of whether an out of state or federal conviction counts in the first place bears no relation to whether it would wash out due to the passage of time and for that reason, the plain meaning of the statute weighs against the defendant's position in this appeal. ***State v. Ervin***, 169 Wn.2d at 820, 239 P.3d 354, 356 (2010) ("The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we "'give effect to that plain meaning.'") quoting ***Dep't of Ecology v. Campbell & Gwinn, LLC***, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Be that as it may, where federal convictions are concerned, the statutory text provides: "Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute." RCW 9.94A.525(3).

The washout provisions affect not only the offender score but also whether the defendant should be considered a persistent offender. RCW 9.94A.030(37). The persistent offender definition states that a persistent offender is a defendant convicted of (1) a "most serious offense" as defined by RCW 9.94A.030(33); and (2) had been previously convicted of "of [two or more] felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525." *Id.*

In this case the defendant claims he was given misinformation about a direct consequence of his guilty plea. His argument would carry more weight if he had been sentenced to a standard range sentence because his offender score would then directly relate to his sentence. But the defendant was not sentenced to a standard range sentence. His sentence was the product of a plea agreement. He stipulated and agreed to a joint recommendation of three consecutive ten year sentences. In return for the defendant's stipulation and agreed recommendation, the State gave up prosecuting the defendant as a persistent offender and reduced his charges to non-strike offenses. CP 5-14, 15-17. The stipulation was accepted by the trial court and the defendant was sentenced to exactly what he bargained for, namely the agreed upon, stipulated sentencing

recommendation of three consecutive 120 month sentences. CP 8, 16-17, 30-33.

The defendant's stipulation could hardly be more explicit concerning his understanding of his offender score and his intent to plead regardless of the trial court's ruling on his standard range. The stipulation stated specifically:

> Although the defendant does not agree with the state's calculation of offender score, the defendant voluntarily, knowingly and intelligently enters into this plea, including the recommendation for an exceptional sentence. CP 17.

The defendant's signature appears immediately after that hand-written term of the plea agreement. *Id.* Furthermore, if the written waiver is not enough, during the plea colloquy the defendant orally responded to direct questions about his offender score and his intention to plead guilty and stipulate to the exceptional sentence: "[THE COURT] Is it your intent to enter this plea no matter what the decision the Court makes in regards to the offender score? MR. SCHMITT: Yes, sir, it is." RP 12.

In this case the defendant was not convicted of a strike offense and was not sentenced to life in prison. CP 22. The wash out argument he makes here would reduce his offender score for each of his three crimes by three points because three class B and C felonies would wash out. CP 19. And while this would leave the defendant with a standard range of

four to twelve months for counts one and two, and 36 to 48 months for count three, RCW 9.94A.510, Table 1, it would have no impact on his exceptional sentence which was imposed pursuant to a negotiated term of a plea agreement pursuant to RCW 9.94A.535(2)(a).

"Plea agreements which are intelligently and voluntarily made, with an understanding of the consequences, are accepted, encouraged and enforced in Washington." ***In Re Personal Restraint of Breedlove***, 138 Wn.2d 298, 310, 979 P.2d 417(1999) (Valid exceptional sentence plea agreement where defendant "was concerned about the possibility that a potential murder conviction would result in a 'most serious offense' classification for purposes of the 'three strikes' law."), citing ***State v. Perkins***, 108 Wn.2d 212, 216, 737 P.2d 250 (1987), ***State v. Talley***, 134 Wn.2d 176, 183, 949 P.2d 358(1998), and ***State v. Lee***, 132 Wn.2d 498, 505-06, 939 P.2d 1223(1997). Although the defendant in this case was sentenced to the exact sentence he negotiated for, he now argues that an alleged error in the calculation of his offender score vitiates the validity of his plea.

The defendant's argument to this Court is not the same argument that he made to the trial court. At sentencing the defendant argued that his 2001 federal bank robbery conviction should not be included in his offender score because it was not comparable to robbery in Washington

under RCW 9.94A.525(3) and ***In Re Personal Restraint of Lavery,*** 154 Wn.2d 249, 256, 111 P.3d 837 (2005). The defendant prevailed on that point. RP 17. He did not argue that comparability of his federal bank robbery affects washout of his class B and C felony convictions. Accordingly, because the defendant did not raise that issue, and because instead he stipulated to an exceptional sentence, the defendant has impliedly waived that issue. ***State v. Nitsch,*** 100 Wn. App. 512, 523, 997 P.2d 1000 (2000), ***State v. O'Neal***, 126 Wn. App. 395, 432-33, 109 P.3d 429 (2005). Furthermore, if implied waiver does not suffice, the defendant's guilty plea included an express waiver:

> If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing. I waive any right to challenge the acceptance of my guilty plea on the grounds that my offender score or standard range is lower than what is listed in paragraph 6(a)" CP 6-7

For the sake of argument, if the defendant has not waived the offender score issue, he nevertheless cannot show that his plea was involuntary. The defendant's argument relates to a crime and a sentencing result that he did not plead guilty to, namely robbery and persistent offender sentencing. The purpose of the plea agreement was to avoid both. Furthermore, his argument requires novel and unprecedented extrapolation of misdemeanor probation violation analysis from ***State v.***

Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). In ***Ervin*** the court construed the continuity interruption clause and reached a common sense, plain-meaning-of-the-statute result: that is, when the continuity interruption clause required a defendant to spend ten or five "consecutive years in the community without committing any crime that subsequently results in a conviction," a misdemeanor probation violation would not suffice. *Id.* at 825-26. A misdemeanor probation violation is not a "crime" and does not result in a new "conviction." It should come as no surprise that such a violation does not interrupt or re-set the washout period. *Id.*

The Supreme Court in ***Ervin*** construed the washout section, not the comparability section related to federal convictions. Comparability is in a separate subsection and is a separate question. RCW 9.94A.525(3). Comparability is an issue that concerns convictions from other states and the federal government. While federal bank robbery may not be comparable to Washington's robbery statutes for scoring purposes under ***Lavery***, that does not make it any less a crime. ***In Re Personal Restraint of Lavery***, 154 Wn.2d 249, 255-56, 111 P.3d 837, 841 (2005). In fact ***Lavery*** categorically stated that federal bank robbery is a crime when it said: "The crime of federal bank robbery is a general intent crime. . . The crime of second degree robbery in Washington, however, requires specific

intent to steal as an essential, nonstatutory element. . . Its definition is therefore narrower than the federal crime's definition." *Id.* (citations omitted.)

To hold as the defendant would have this Court hold in this case would lead to absurd results. First, a defendant could commit a federal crime, serve ten years in a federal penitentiary and yet not be viewed as having committed a "crime that subsequently results in a conviction." RCW 9.94A.525(2)(b) or (c). As has been previously pointed out, federal bank robbery is a crime even if it does not count for offender score purposes. Second, the defendant's imprisonment in a federal penitentiary as a result of a conviction for a federal crime would have no bearing on whether the defendant spent ten or five years "in the community without committing any crime." *Id.* To stretch ***Lavery*** and ***Ervin*** to achieve such results is to stretch them too far.

The defendant's trial court attorney negotiated a favorable plea bargain that avoided a mandatory life sentence. He vigorously represented the defendant even to the extent of arguing an offender score issue that had no bearing on the agreed upon exceptional sentence. The claim that the attorney was ineffective must account for such an outstanding result. Furthermore, in order to prevail on a claim of denial of the Sixth

Amendment right of effective assistance of counsel, a defendant must show:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***In re Personal Restraint of Crace***, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012). "Courts presume counsel's representation was effective . . . The presumption is rebutted if there is no possible tactical explanation for counsel's action . . . Legitimate trial tactics or strategy cannot form the basis for an ineffective assistance of counsel claim." (Citations omitted). ***In Re Personal Restraint of Cross***, 180 Wn.2d 664, 694, 327 P.3d 660, 679-80 (2014), citing ***Strickland v. Washington***, 466 U.S. at 689, ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) and ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

It goes without saying that if the defendant's arguments on appeal are erroneous, if his trial attorney's analysis was correct, the defendant received constitutionally effective legal advice because he faced a life sentence as originally charged. Aside from the federal bank robbery, the defendant had separately committed and served time for two additional robberies that would have been included in his offender score. CP 16. Had the defendant's attorney not pursued mitigation and a plea bargain, it is likely that the defendant would have appeared for sentencing after having been convicted of robbery at trial. The trial court would have had no alternative but to carry out the mandate of persistent offender sentencing. Under these circumstances there can be little doubt that the defendant's trial counsel was performing in the best tradition of criminal defense lawyers, and that the defendant is fortunate that he was not making the argument that he makes here in the trial court after having been convicted of bank robbery at trial. This Court should uphold the defendant's guilty plea and sentence.

D. CONCLUSION.

For the foregoing reasons the State requests that the Court affirm the defendant's conviction and dismiss his personal restraint petition.

DATED: Friday, October 30, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/30/15
Date Signature

PIERCE COUNTY PROSECUTOR

October 30, 2015 - 11:43 AM

Transmittal Letter

Document Uploaded: 4-467739-Respondent's Brief.pdf

Case Name: State v. Jacob Schmitt
Court of Appeals Case Number: 46773-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com