No. 95812-2

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE JOHNSON,

Appellant/Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kyle Johnson 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

The Court of Appeals affirmed Mr. Johnson's conviction by an opinion dated April 3, 2018. A copy of the *Opinion* is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeals dismissed Johnson's appeal without reaching the merits of his claims. The procedural issues presented by the decision below are:

1. Are claims regarding the voluntariness of a guilty plea barred by the doctrine of res judicata where those claims either were not raised in a previous appeal or where, in one instance, there has been a change in the law?

2. Where the relevant record of proceedings has either been lost or destroyed, can the Court of Appeals refuse to review the merits of a defendant's claim based on his failure to produce the record, especially where no recreation hearing was held?

If this Court reaches the merits of Mr. Johnson's claims, the issues presented include:

3. Was Johnson's guilty plea invalid where:

a. the sentencing judge found that the guilty plea was premised on an incorrect offender score, but did not advise Johnson he could withdraw the plea;

b. where Johnson was not informed that community supervision could be imposed; and

c. where Johnson was given affirmative misadvice regarding a collateral consequence?

4. Was Johnson denied his right to be arraigned in open court?

D. STATEMENT OF THE CASE

Kyle Johnson was charged in Asotin County Superior Court with two counts of custodial assault. CP 1-2. On October 9, 1989, he entered a guilty plea to both counts. CP 3-5. At the time, Johnson had a murder charge pending. The plea agreement stated that, in return for the plea of guilty, the State would not use "these convictions in its case-in-chief" in that pending murder trial, but "reserves any evidentiary use of these

convictions permitted by the rules of evidence or other authority for impeachment, rebuttal, or sentencing in this or any other cause, including the defendant's above referenced prosecution for aggravated murder in the first degree." CP 12. The guilty plea statement stated that Johnson had an offender score of "0" and a range of 0-12 months. CP 3.

Shortly thereafter, Johnson sought to withdraw his guilty plea. CP 7-17. A hearing was held on June 1, 1990, and the motion was denied. CP 39. Johnson sought review before he was sentenced. CP 40. The Court of Appeals took review and upheld the decision denying the motion to withdraw the guilty plea reasoning that Johnson had been misadvised regarding a collateral consequence of his guilty plea.

On June 28, 1990, Johnson was sentenced. CP 41-44. The sentencing judge found that Johnson had an offender score of "1" and a corresponding sentence range of 3-8 months. Despite the difference with the guilty plea score of 0, the sentencing judge did not offer Johnson an opportunity to withdraw his plea (or for specific performance).

The record of Johnson's arraignment has been lost or destroyed. In a motion to reverse the conviction, Johnson noted that recreation of the record appeared to be impossible and that the State did not appear to contend otherwise.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Mr. Johnson's challenges to his guilty plea are not barred as res judicata.

An issue raised for the first time on direct appeal is not barred by the doctrine of *res judicata*. There is no re-litigation bar to a challenge to the validity of a guilty plea based on grounds not raised or decided previously. Moreover, a challenge based on the same or similar grounds is proper when there has been an intervening change in the law.

The lower court failed to consider any of these arguments, instead concluding that because the court had rejected Johnson's appeal from the denial of his motion to withdraw his guilty plea on one ground that challenges on other unconsidered grounds were barred. This ruling finds no support and is instead contradicted by all existing Washington caselaw.

It has been long established that the doctrines of res judicata and collateral estoppel apply in criminal cases. See Annot., *Modern Status of Doctrine of Res Judicata in Criminal Cases, Annot.*, 9 A.L.R.3d 203 (1966). These doctrines, as applied to criminal cases, bar relitigation of issues *actually determined* by a former verdict and judgment. State v. Barton, 5 Wash.2d 234, 105 P.2d 63 (1940). Issue preclusion bars successive litigation of an issue of fact or law already litigated and resolved in a valid court determination essential to the prior judgment. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001). The application in a criminal action is a 2-step operation: the first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether the issues raised and resolved in the former prosecution are identical to those sought to be barred in the subsequent action. *State v. Dupard*, 93 Wash. 2d 268, 273–74, 609 P.2d 961, 964 (1980)

But the doctrine is subject to an exception—when governing law is changed by a later authoritative decision. See 18B Charles Alan Wright, Arthur R. Miller & Edward H.

Cooper, *Federal Practice and Procedure* § 4478 (2d ed. 2002) (law of the case); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (2d ed. 2002) (issue preclusion). Similarly, issue preclusion does not apply where "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Restatement (Second) of Judgments* § 28(2) (1982). Therefore, a court is not bound by a previous decision where there is a change in the controlling precedent. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 ("Preclusion is most readily defeated by specific Supreme Court overruling of precedent relied upon in reaching the first decision.").

Here, with one exception Johnson raised new issues. Regarding the one issue he sought to relitigate, he specifically noted that his challenge was based on a change in the law. The complete failure of the lower court to acknowledge these points merits review by this Court.

2. Johnson's guilty plea contained an offender score and standard range different than used at sentencing.

This issue was not raised previously. Nevertheless, the Court of Appeals incorrectly put it under the res judicata umbrella.

If this Court applies (or if the Court of Appeals had applied) existing law, Johnson is entitled to be given an opportunity to withdraw his guilty plea. Johnson's guilty plea and his Judgment and Sentence had different offender scores and corresponding ranges. Nevertheless, at sentencing Johnson was not offered an opportunity to withdraw his plea. The law makes it clear that these facts merit a remand for withdrawal of the plea.

A defendant may withdraw a guilty plea under CrR 4.2(f) "whenever it appears that the withdrawal is necessary to correct a manifest injustice." Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Knotek*, 136 Wash.App. 412, 423, 149 P.3d 676 (2006). "The State bears the burden of proving the validity of a guilty plea," including the defendant's "[k]nowledge of the

direct consequences" of the plea, which the State may prove from the record or by clear and convincing extrinsic evidence. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996).

The law places the burden on the court to inform a defendant whose guilty plea is based on a mistake that he is entitled to withdraw his plea. It does not require a defendant to raise the issue himself. This Court in *State v. Walsh*, 143 Wash. 2d 1, 9, 17 P.3d 591 (2001), rejected the exact argument the State made below:

> The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

The State having conceded that the Johnson's guilty plea was based on a mistake regarding the standard range and acknowledging that Johnson was not informed of his right to withdraw the plea at sentencing, has effectively (if unwittingly) conceded that reversal is required. This Court should accept review.

3. Johnson was not informed of a direct, albeit discretionary condition of his guilty plea.

This issue was also not raised previously and was not decided below. This Court should accept review to determine whether community supervision is a direct or collateral consequence of a guilty plea. Johnson suggests that it is a direct consequence.

A defendant must understand the sentencing consequences for a guilty plea to be valid." *State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988). Community supervision constitutes part of the range of punishment that can be imposed at sentencing. It is not a consequence that might be imposed by some other governmental agency.

State v. Cameron, 30 Wash. App. 229, 234, 633 P.2d 901, 905 (1981), holds that restitution (a discretionary consequence) is a direct consequence of entering a guilty plea. Likewise, the statutory maximum sentence is a direct consequence of a guilty plea even in cases where the sentencing court possesses only the authority to impose a lesser sentence. *State v. Weyrich*, 163

Wn.2d 554, 557, 182 P.3d 965 (2008) (reversing because the defendant was misinformed as to the maximum term).

In contrast, a collateral consequence is a secondary, indirect outcome of a guilty plea. If the distinction turned on whether the consequence was mandatory, then there are many direct consequences of a guilty plea that require advisement at the time of plea, including ineligibility to vote; state hospital notification of conviction; ineligibility to act as a personal representative, trustee, or notice agent; and more. *See National Inventory of Collateral Consequences of Conviction, Washington State* at https://niccc.csgjusticecenter.org/search/?jurisdiction=48.

That is why, for example, sexual offender registration which is mandatory is collateral. Although the duty to register flows from a conviction for a felony sex offense, it does not enhance the sentence or punishment. Registration as a sex offender does not alter the standard of punishment. "Because registration as a sex offender does not alter the standard of punishment, we hold the duty to register is collateral, and not a direct, consequence of a guilty plea." *State v. A.N.J.*, 168 Wash. 2d 91, 114–15, 225 P.3d 956, 968 (2010).

4. Johnson was given affirmative misadvice of a collateral consequence of his guilty plea.

This is the issue that the Court of Appeals found was barred as previously litigated. But, what the lower court failed to either consider or acknowledge is that the law has changed. In addition, Johnson raised it as a claim of ineffective assistance of counsel—not raised previously.

Johnson was affirmatively misled regarding the promised benefit in his plea agreement. It is plain law that a conviction cannot been used in the State's case-in-chief in a trial on a then-pending charge. Counsel's advice was ineffective. *State v. Sandoval*, 171 Wash. 2d 163, 176, 249 P.3d 1015, 1022 (2011)

5. Mr. Johnson assigns error to the failure to conduct his arraignment in open court.

In his opening brief, Johnson claimed that he was arraigned in a closed courtroom. There is no record of Mr. Johnson's arraignment. It was lost or destroyed. Nevertheless, the lower court somehow concluded that no objection was made by defendant to the courtroom closure. It is not apparent where the lower court found this fact.

Then, applying the "manifest error" standard of review, the Court of Appeals declined to consider the merits of Johnson's claim because Johnson failed to submit "any other record" supporting his claim. The lower court's opinion fails to mention that the State did not contest Johnson's assertion that recreation of the missing record was impossible.

A criminal defendant must have a "record of sufficient completeness" for appellate review of potential errors. *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963) (*citing Draper v. Washington*, 372 U.S. 487, 495-96 (1963)). The State's duty to provide an adequate transcript for indigent defendants is based upon both Constitutional guaranties of due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12 (1956). The State's duty includes providing a record that is sufficiently complete in order to permit appellate review: "In terms of a trial record, this means that the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of (his) claims." *Mayer v. Chicago*, 404 U.S. 189, 196 (1971), *quoting Draper,* 372 U.S. at 499.

A "complete verbatim transcript" is not required. *State v. Tilton,* 149 Wash.2d 775, 781, 72 P.3d 735 (2003) (quoting *Mayer v. City of Chicago,* 404 U.S. 189, 194 (1971)). Nevertheless, an alternative method must allow counsel to determine which issues to raise on appeal and to "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *State v. Jackson,* 87 Wash.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper,* 372 U.S. at 495). If the reconstructed record fails to recount events material to issues on appeal satisfactorily, the appellate court must order a new trial. *Tilton,* 149 Wash.2d at 783.

The Court of Appeals does not cite, much less distinguish the above-cited precedent. This Court should accept review.

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III. CONCLUSION

This Court should reverse and remand with directions to vacate the judgment and permit Johnson to withdraw his guilty plea.

DATED this 3rd day of May 2018.

Respectfully Submitted:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KYLE JOHNSON, Appellant.	)))))))))	No. 34605-6-III UNPUBLISHED OPINION

PENNELL, A.C.J. — Kyle Johnson appeals his guilty pleas and convictions pertaining to two counts of custodial assault. We decline review of his claims under the doctrine of res judicata and RAP 2.5.

BACKGROUND

Mr. Johnson's assault convictions arose from an incident that occurred on December 17, 1988. Trial was scheduled for October 9, 1989; however, after June 26, 1989, Mr. Johnson was charged with aggravated murder. *State v. Johnson*, noted at 66 Wn. App. 1044, slip op. at 1 (1992). On October 9, 1989, the State and Mr. Johnson entered into a plea agreement. The agreement provided Mr. Johnson's standard sentence range was 0-12 months based on an offender score of 0. It also provided:

> In consideration of defendant entering guilty pleas . . . plaintiff agrees to make no evidentiary use of these convictions in its case in chief under cause number 89-1-00050-6 in which the defendant is charged with aggravated murder in the first degree; however, plaintiff reserves any evidentiary use of these convictions permitted by the rules of evidence or other authority for impeachment, rebuttal, or sentencing in this or any other cause, including the defendant's above referenced prosecution for aggravated murder in the first degree.

Johnson, slip op. at 1-2 (alteration in original). During the plea hearing, the judge told Mr. Johnson, "There is no right to appeal from the plea of guilty," to which Mr. Johnson responded "Yes." Clerk's Papers at 30. The trial court accepted Mr. Johnson's guilty plea and deferred sentencing until after the aggravated murder trial.

Prior to sentencing, Mr. Johnson moved to withdraw his guilty plea. Mr. Johnson claimed that when he pleaded guilty he failed to understand how his plea could be used against him in his upcoming murder trial. The trial court denied Mr. Johnson's motion and reserved its ruling on the admissibility and use by the State of the assault convictions in the murder trial under ER 404 or ER 609.

On June 8, 1990, Mr. Johnson appealed the trial court's decision to this court. During the pendency of the appeal, Mr. Johnson pleaded guilty to the pending murder charge and the trial court conducted a combined sentencing hearing for Mr. Johnson's assault and murder convictions.

At Mr. Johnson's sentencing hearing, the State represented that Mr. Johnson's "standard range would be three to eight months." Report of Proceedings (June 28, 1990) at 6. The trial court accepted this and sentenced Mr. Johnson to 150 days for each count, to run concurrently with his aggravated murder sentence, based on an offender score of one and the range being three to eight months. The court did not impose a term of community custody.

Mr. Johnson did not appeal the judgment and sentence subsequent to his sentencing hearing. However, the appeal regarding the order denying Mr. Johnson's motion to withdraw his guilty plea remained pending and a decision was filed by this court on July 21, 1992. In that appeal, Mr. Johnson argued: (1) he did not understand how his guilty plea on the assault charges could be used against him at the murder trial, and (2) the State's illusory or deceptive promise induced him into entering the plea. *Johnson*, slip op. at 2-4. Our court denied Mr. Johnson's claim for relief, finding the State's plea agreement promise was neither illusory nor deceptive. *Id.* at 5. The upshot of our court's decision was that Mr. Johnson had not shown his plea was involuntary.

On April 22, 2016, Mr. Johnson filed a notice of appeal of his 1990 judgment and sentence. Our court commissioner granted his motion to extend the time to appeal because Mr. Johnson was affirmatively misadvised in 1989 of his right to appeal the

guilty plea. Commissioner's Ruling, *State v. Johnson*, No. 34605-6-III (Wash. Ct. App. Dec. 13, 2016).

ANALYSIS

Mr. Johnson argues his assault convictions should be reversed because his guilty plea was involuntary and his arraignment was not conducted in open court. The first claim is barred by stare decisis. The second claim fails as it was unpreserved at trial and Mr. Johnson has not established a basis for review under RAP 2.5(a)(3).

Guilty plea challenge and res judicata

The doctrine of res judicata applies in criminal cases. *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961 (1980) (citing *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968)). It serves to prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts and inconvenience to the litigants, and promote judicial economy and judicial finality. *Dupard*, 93 Wn.2d at 272. Res judicata occurs when a prior judgment has a concurrence of identity with respect to the subject matter, cause of action, persons and parties, and the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983) (citing *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225, 588 P.2d 725 (1978)).

Mr. Johnson previously appealed his guilty plea to this court, arguing it was involuntary. At the time of his previous appeal, Mr. Johnson had access to all the information he now claims compels a decision in his favor. Our court considered Mr. Johnson's claims on the merits back in 1992 and ultimately ruled Mr. Johnson had failed to show his plea was involuntary. The voluntariness of Mr. Johnson's plea therefore must be considered the law of the case. RAP 12.2. Mr. Johnson has not demonstrated the interests of justice would be served by reopening our prior decision.

Courtroom closure

Apart from the attack on his guilty plea, Mr. Johnson claims his convictions are invalid because arraignment did not occur in open court. This is an issue that was not raised in the prior appeal. Nor was it raised with the trial court. It therefore will be reviewed on appeal only if Mr. Johnson can show a manifest error implicating the constitutional right to a public trial. RAP 2.5(a)(3).

The manifest error standard requires the trial record be sufficient to fully analyze the defendant's claims. *State v. Koss*, 181 Wn.2d 493, 502-03, 334 P.3d 1042 (2014). We recognize that, beyond the docket entries, it appears there is no longer a record of the arraignment available for transmittal by the trial court. However, Mr. Johnson has not submitted any other record supporting his claim that the arraignment did not occur in

open court. *Id.* at 503-04. We will not excuse his failure to do so. *Id.* at 503 (An "appellant bears the responsibility to provide a record showing that such a closure occurred in the first place."). Given this state of the record, *id.* at 501-02, we decline review of Mr. Johnson's courtroom closure claim under RAP 2.5.

CONCLUSION

Mr. Johnson's judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

ALSEPT & ELLIS

May 02, 2018 - 8:46 PM

Filing Petition for Review

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