Supreme Court No. 100736-1

No. 54597-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH SCHUBERT,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Three years ago, this Court's Commissioner determined Isaiah Schubert's guilty plea was involuntary because his offender score was miscalculated. Mr. Schubert, a first time offender, had filed a *pro se* PRP, and the Court of Appeals denied his request for appointed counsel, even though his PRP raised meritorious issues.

Mr. Schubert returned to the trial court and again complained about his involuntary plea, but the trial court believed it only had the authority to conduct a minor resentencing. On appeal, the Court of Appeals agreed Mr. Schubert's sentence was still unlawful but ruled he was barred from arguing his plea was involuntary because he had previously raised the issue in his PRP, and he had not shown actual and substantial prejudice as required for relief in a PRP.

The Court of Appeals misapplied the law because this Court had previously determined his guilty plea was involuntary. It also improperly required Mr. Schubert meet the PRP prejudice

standard in this direct appeal, which conflicts with opinions of this Court. This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Isaiah Schubert asks this Court to accept review of the Court of Appeals decision dated February 8, 2022. RAP 13.4(b).

C. ISSUE PRESENTED FOR REVIEW

The Due Process Clause of the Fourteenth Amendment and article I, sections 3 and 22 require a guilty plea be entered knowingly, intelligently and voluntarily. If a person has been misadvised about the consequences of a guilty plea, the resulting plea is not entered knowingly, intelligently, and voluntarily. On direct appeal, an appellant must show, at most, that they were prejudiced as a consequence of the invalid plea. The Court of Appeals misapplied the law where it used the wrong standard of review in this direct appeal, rejecting a valid challenge to the voluntariness of a guilty plea that this Court had previously found involuntary. The Court of Appeals opinion is thus in conflict with

this Court's opinions, calling for this Court's review. RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

Mr. Schubert largely relies on the factual history in the Brief of Appellant, pages 3-6. Additional procedural history is included below.

1. Mr. Schubert files a *pro se* PRP before his appeal.

Following Mr. Schubert's guilty plea and before appellate counsel was appointed, Mr. Schubert filed a *pro se* personal restraint petition (PRP) challenging the invalidity of his plea and sentence. The Court of Appeals issued a decision in 2019, granting the PRP in part. In re Pers. Restraint of Isaiah Jacob Schubert, 7 Wn. App. 2d 1007 (2019) (unpublished).[1]

In his PRP, Mr. Schubert requested the appointment of counsel. He argued his offender score of 9 was incorrect, and that he received ineffective assistance of counsel in his pre-trial and

[1] Unpublished opinions are cited to provide guidance to the Court. GR 14.1(a).

plea proceedings. Id. at *1. He argued his plea was involuntary due to an error in his offender score, along with several other errors, including his attorney's failure to allege same criminal conduct. Id.

Even though the Court of Appeals agreed that Mr. Schubert raised meritorious issues in his PRP, the Court denied Mr. Schubert's request for counsel. Id. at *2. The Court agreed Mr. Schubert's offender score was miscalculated, and his score on count one should have been an 8. Id. at *1. The Court found Mr. Schubert had waived any same criminal conduct argument as part of his plea and denied the PRP on the other grounds raised. These grounds included merger, ineffective assistance of trial counsel, and the involuntariness of the plea due to the miscalculation. Id. at *2. The Court of Appeals relied on In re Pers. Restraint of Coats in determining an error in a judgment and sentence does not render a plea involuntary. Id. at *2 (citing Coats, 173 Wn.2d 123, 141, 267 P.3d 324 (2011)).

Mr. Schubert sought this Court's discretionary review. In re Pers. Restraint of Schubert, No. 96934-5, at *2 (July 26, 2019).[2] This Court's Deputy Commissioner agreed the miscalculation of the offender score "rendered the plea involuntary." Appendix B at 2 (citing State v. Buckman, 190 Wn.2d 51, 59-60, 409 P.3d 193 (2018)). However, the Court denied review, finding Mr. Schubert had not met the "actual and substantial prejudice" standard required for a collateral attack. Id. at 2-3.[3]

2. Mr. Schubert returns to court for resentencing.

In February 2020, the case was remanded to Thurston County for resentencing on the scoring error the Court of Appeals recognized in the PRP. Mr. Schubert appeared with new counsel

[2] The State moved to admit the 2019 Supreme Court ruling denying review, pursuant to RAP 9.11. The ruling is part of this cause number, per an agreed order settling the record. CP __, sub. no. 129. The Deputy Commissioner's ruling is attached as Appendix B.

[3] This Court specifically criticized the Court of Appeals' reliance on Coats for the erroneous finding that Mr. Schubert's guilty plea was not involuntary. Appendix B at 2 n.1.

and filed a CrR 7.8 motion to withdraw his guilty plea. 2/3/20 RP 4-9; CP 64-71. Mr. Schubert argued his plea was involuntary because he was misinformed about the sentencing consequences. CP 69-70. He also argued if he had been properly advised by counsel, particularly regarding his sentencing calculation, he would have rejected the plea and proceeded to trial. CP 70.

The court denied Mr. Schubert's motion to withdraw his plea, saying the voluntariness of the plea was previously raised and decided in the PRP. 2/3/20 RP 9. Mr. Schubert argued the court must apply the less onerous prejudice standard than the "actual and substantial prejudice" required in a PRP. 2/3/20 RP 7. Mr. Schubert argued he would not have pleaded guilty if he had not been misinformed of the sentencing consequences and asked for an evidentiary hearing in order to further develop the record regarding prejudice. 2/3/20 RP 8; CP 65-66, 70. The court denied this request. 2/3/20 RP 9.

Mr. Schubert also argued he should be resentenced on the remaining counts, since the parties agreed the offender scores

were incorrect on counts 2-7. 2/3/20 RP 10. Even though the trial court acknowledged the scoring error had "infected … the other counts, as well," the court refused to resentence Mr. Schubert on counts 2-7. 2/3/20 RP 12, 18-19.[4]

3. Mr. Schubert files a direct appeal.

Mr. Schubert argued on direct appeal that the trial court should have granted his motion to withdraw his guilty plea because the plea was involuntary; the trial court erred when it failed to correct the erroneous offender scores on counts 2-7; and the court erred by imposing discretionary legal financial obligations and interest on unpaid fees. Brief of Appellant. The Court of Appeals properly agreed with Mr. Schubert on the second and third issues. Appendix A at 7 (Court of Appeals opinion).

[4] In an agreed order issued after the resentencing hearing, the court amended the community custody term for count 1 to 18 months, rather than 36. CP 98. Mr. Schubert does not seek review on the same criminal conduct or merger issues here.

However, the Court of Appeals affirmed the trial court's ruling denying Mr. Schubert's motion to withdraw his guilty plea on two bases – 1) that he was attempting to expand the scope of the remanded PRP to include a previously rejected argument; and in the alternative, 2) that he fails to show "actual and substantial prejudice." Appendix A at 4-5.

Mr. Schubert seeks this Court's review. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. As this Court already recognized, Mr. Schubert's plea was involuntary because he was misadvised of the sentencing consequences of his guilty plea.

This Court's Deputy Commissioner determined in a 2019 ruling that "the [offender score] miscalculation, which appeared in Mr. Schubert's plea statement as well as in the judgment and sentence, rendered the plea involuntary." Appendix B at 2.

a. Due process requires a defendant to be properly advised of the direct consequences of a guilty plea.

Due Process requires that a defendant's plea of guilty be knowing, voluntary, and intelligent. U.S. Const. amend. 14;

Const. art. I, sec. 3, 21, 22; Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); see also In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences."). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

"Where a plea agreement is based on misinformation … generally the defendant may choose … withdrawal of the guilty plea." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). A plea is not voluntary or valid if it is made without an accurate understanding of the consequences. Walsh, 143 Wn.2d at 8.

Because of the constitutional rights waived by a guilty plea, the State must show a plea was knowingly and voluntarily entered. Boykin, 395 U.S. at 242. "The record of the plea hearing must affirmatively disclose a guilty plea was made

intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

b. This Court found the miscalculation in Mr. Schubert's offender score rendered his plea involuntary; this remains the law of the case.

This Court's Deputy Commissioner acknowledged in a 2019 ruling that Mr. Schubert's guilty plea was involuntary. Appendix B at 2. Applying Mendoza and Buckman to Mr. Schubert's PRP, the Court stated, "I agree that the miscalculation, which appeared in Mr. Schubert's plea statement as well as in the judgment and sentence, rendered the plea involuntary." Appendix B at 2.

This is because, as this Court held in Mendoza, "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591. Even where a defendant's ultimate sentence resulted in less time than they believed they

would receive, a defendant is entitled to withdraw their plea. Id. at 584.

The only remaining issue for the Deputy Commissioner was the prejudice prong, which Mr. Schubert's *pro se* pleadings failed to meet under the higher prejudice standard governing PRPs. Id. at 2 (citing Buckman, 190 Wn.2d at 59-60) (requiring actual and substantial prejudice).

When Mr. Schubert's case was then remanded for resentencing following this Court's determination that the guilty plea was involuntary, this was the law of the case. Appendix B at 2. The trial court was wrong when it denied Mr. Schubert's motion to withdraw his guilty plea as involuntary, finding the issue was "previously raised" in the Court of Appeals. 2/3/20 RP 9.

Mr. Schubert argued his plea was involuntary in a *pro se* PRP, before he was appointed counsel on his direct appeal. He requested the assistance of counsel with his PRP, and the Court of Appeals denied this request, even though the Court agreed his

PRP had merit. Schubert, 7 Wn. App. 2d at *2. As a *pro se* litigant, he successfully argued his offender score was miscalculated and should have been appointed counsel. Id. at *1; see RCW 10.73.150(4) (counsel shall be provided to an indigent person on collateral attack when the issues raised in the petition are not frivolous).

In this Court on discretionary review, Mr. Schubert argued before the Deputy Commissioner that because he had relied upon a sentencing miscalculation, his plea was involuntary. This Court agreed, as it must under Mendoza and Buckman, finding the plea involuntary. Appendix B at 2. Mr. Schubert was entitled to return to the trial court with this finding and to pursue his motion to vacate his guilty plea in the trial court, using the lower prejudice standard appropriate on direct appeal.[5]

[5] At the trial court, Mr. Schubert argued, both by motion and in oral argument, that he would not have pleaded guilty had he been advised of the correct sentencing calculation. CP 64-70;

Instead, the trial court erroneously rejected Mr. Schubert's motion to vacate, and the Court of Appeals made the identical error. 2/3/20 RP 9.

The Court of Appeals improperly found Mr. Schubert was attempting to "expand the scope of the remanded PRP to include a previously rejected argument regarding withdrawal of his plea. Appendix A at 4. For this proposition, the Court of Appeals relied on State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017), a case that does not support the Court's reasoning. Appendix A at 4. In Johnson, this Court reaffirmed its "long standing 'law of the case' doctrine." Id. at 756 (internal citations omitted). Johnson stands for the general proposition that "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." Id. at 755.

2/3/20 RP 7-8. He also emphasized the different prejudice standard for direct appeals and PRPs. 2/3/20 RP 7.

Indeed, under Johnson, the law of the case established by this Court's 2019 ruling was that Mr. Schubert's plea was involuntary. Appendix B at 2. But the State did not move to modify that finding of involuntariness, so it remains. The Deputy Commissioner found Mr. Schubert had not established actual and substantial prejudice as required for relief in a PRP, in that he did not show the outcome "more likely than not" would have been different without the error. Appendix B at 2; Buckman, 190 Wn.2d at 60. This only limited Mr. Schubert from prevailing in his PRP.

The Court of Appeals misapplied Johnson when it then determined the "law of the case" prevented the Court from reviewing Mr. Schubert's motion to vacate his plea.

The Court also misapplied the law when it failed to apply the correct standard for prejudice in this direct appeal. The Court held that even if Mr. Schubert could argue prejudice, he "fails to show actual and substantial prejudice, that is, that more likely than not he would have chosen not to plead guilty." Appendix A

at 4-5. As this Court held in Buckman, this is exactly the wrong standard on direct appeal; instead, it is precisely the standard that must be shown in a collateral attack. 190 Wn.2d at 60.[6]

The Court of Appeals erroneously stated Mr. Schubert was procedurally barred from arguing his guilty plea was involuntary, even though this Court had already stated it was. The Court also misunderstood the standard of prejudice that must be shown on direct appeal. Appendix A at 4-5.

c. This Court should accept review because the Court of Appeals opinion is in conflict with Mendoza and Buckman.

Where a defendant is misinformed of the consequences of a guilty plea, they need not show on direct appeal they would

[6] If Mr. Schubert had not filed a *pro se* PRP before his appeal, he would have faced the lower/no prejudice standard on direct appeal first: "Buckman probably would have been entitled to automatic relief if he had sought to withdraw his guilty plea in a direct appeal because he claims he did not discover the error until after sentencing." Buckman, 190 Wn.2d at 88 (Gordon-McCloud, dissenting) (citing Mendoza, 157 Wn.2d at 591-92) (holding no prejudice finding is necessary if claim brought on direct appeal and error not found until after sentencing).

not have pled guilty, but for the misinformation. Mendoza, 157 Wn.2d at 591-92; State v. Rhodes, 8 Wn. App. 2d 1052 n.1 (2019); GR 14.1. On direct appeal, the "actual and substantial prejudice" requirement in collateral attacks does not apply. Buckman, 190 Wn.2d at 59-60.

Further, the Court of Appeals erroneously found Mr. Schubert was barred from raising the voluntariness of his guilty plea on direct appeal. Appendix A at 4. This Court should grant review. RAP 13.4(b)(1).

2. This Court should grant review of and consider each of Mr. Schubert's *pro se* statement of additional grounds for review raised in the Court of Appeals.

This Court should grant review of each of the several additional grounds raised in the *pro se* Statement of Additional Grounds. Mr. Schubert contends the Court of Appeals erred when it failed to consider and denied his arguments that: 1) his trial attorney provided ineffective assistance of counsel; 2) there was not a factual basis for the guilty plea; and 3) the court misapplied

the felony firearm registration requirement. This Court should grant review because the Court's decision is in conflict with decisions of this Court, and with decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

F. CONCLUSION

The Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

This brief complies with RAP 18.17, as it was prepared using Microsoft Word 2016 and contains approximately 2615 words.

DATED this 10th day of March, 2022.

Respectfully submitted,

s/ Jan Trasen

_____

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ISAIAH JACOB SCHUBERT, Appellant.	No. 54597-7-II UNPUBLISHED OPINION

VELJACIC, J. — Isaiah Schubert pleaded guilty to seven charges. During sentencing, Schubert and the State miscalculated his offender score. He did not file a direct appeal, but later filed a personal restraint petition (PRP), arguing that his sentence was invalid due to the miscalculated offender score and that his guilty plea was involuntary as a result of the offender score error. This court considered his PRP and concluded that his offender score had been miscalculated on count 1, but that such errors did not render his guilty plea involuntary. On remand to the superior court, Schubert moved to withdraw his guilty plea. The superior court denied Schubert's motion because this court had already considered the issue. Schubert also requested that the superior court resentence him on counts 2-7 in addition to count 1, but the superior court determined that this court's mandate only addressed count 1.

Schubert appeals, arguing that the superior court erred in denying his motion to withdraw his guilty plea, in refusing to resentence him on counts 2-7, and in imposing discretionary legal financial obligations (LFOs). The State argues that the superior court was barred from granting

Schubert's motion to withdraw his guilty plea, that Schubert must separately move for resentencing of counts 2-7, and that the issue of LFOs is not properly before this court.

We affirm the trial court's ruling on Schubert's motion to withdraw his guilty plea, vacate Schubert's sentence on counts 2-7, and remand for resentencing consistent with this opinion.

FACTS

The State charged Schubert with seven charges, stemming from his violation of his spouse's no-contact order. Schubert pleaded guilty to burglary in the first degree while armed with a deadly firearm—domestic violence, violation of pretrial no-contact order—domestic violence, residential burglary—domestic violence, assault in violation of a pretrial no-contact order—domestic violence, unlawful imprisonment—domestic violence, unlawful possession of a firearm in the second degree, and criminal trespass in the first degree—domestic violence. The superior court convicted him on his plea. Schubert was sentenced on May 30, 2017. Schubert and the State miscalculated his offender score on his count 1 burglary charge, resulting in a score of 9. The trial court determined Schubert was indigent. The court imposed LFOs, some of which were discretionary. The judgment and sentence form included a criminal filing fee of $200 and interest provisions that were later prohibited (as of June 7, 2018). RCW 36.18.020(2)(h); RCW 10.82.090(1).

Schubert filed a PRP attacking his judgment and sentence due to the offender score error. *See In re Pers. Restraint of Schubert*, No. 51900-3-II (Wash. Ct. App. Jan 8, 2019) (unpublished), https://www.courts.wa.gov/opinions/ (*Schubert* I). Schubert argued that the sentence on his other counts was incorrect and that as a result his guilty plea was invalid. *Id*. at slip op. 2. This court accepted review and concluded that the offender score on count 1 was incorrect. *Id*. However, this court disagreed that his sentences on counts 2-7 were incorrect because he pleaded guilty and

stipulated that such charges were not part of the same criminal conduct and were not subject to merger. *Id.* at slip op. 3. This court also rejected Schubert's argument that his guilty plea was involuntary, stating "an error in a judgment and sentence does not render a plea involuntary." *Id*. This court remanded his case to the superior court "for resentencing with a correct offender score of 8 for the first degree burglary," count 1. *Id*. at slip op. 4. Schubert petitioned for review to our Supreme Court, which denied review. Ruling Den. Review, *In re Pers. Restraint of Schubert*, No. 96934-5, at 2 (Wash. July 26, 2019). The court reasoned that when a defendant is misinformed of their sentencing consequences, as Schubert was here, the resulting guilty plea is involuntary. *Id*. But it held that Schubert had not shown actual and substantial prejudice and therefore failed to satisfy the PRP standard necessary to prevail. *Id*.

On remand, Schubert moved under CrR 7.8 to withdraw his guilty plea. During the resentencing hearing for count 1 pursuant to this court's mandate in *Schubert* I, the superior court denied Schubert's motion to withdraw his plea. During the hearing, Schubert requested the court resentence counts 2-7 in addition to count 1. The State agreed that there were errors in counts 2-7, but also argued that this court's mandate only addressed count 1. The trial court determined that per this court's mandate, it was only authorized to resentence on count 1, stating that count 1 was "the limited issue that is here before [the court] today." Report of Proceedings (RP) (Feb. 3, 2020) at 19. The trial court resentenced count 1 and issued a new judgment and sentence. Schubert appeals.

ANALYSIS

I. EFFECT OF APPELLATE MANDATE ON REMAND

We review a superior court's compliance with an appellate mandate for further proceedings for an abuse of discretion. *Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 414, 393 P.3d 844

(2017). Schubert argues that the superior court should have granted his motion to withdraw his guilty plea because the errors in his sentence make his plea involuntary. We disagree.

A petitioner who collaterally attacks their conviction by asserting that their guilty plea was involuntary must show "'actual and substantial prejudice'" to prevail. *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018) (quoting *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 598-99, 316 P.3d 1007 (2014)). To show actual and substantial prejudice here, "the petitioner must show that the outcome of the guilty plea proceedings would more likely than not have been different had the error not occurred." *Buckman*, 190 Wn.2d at 60.

Schubert argues that his guilty plea is invalid because he was not accurately advised of the direct consequences of his plea and that the superior court had no factual basis to accept such a plea. But the procedural posture of this case precludes our consideration of this issue.

Schubert's PRP included the same argument. *Schubert* I, slip op. at 2. This court rejected the argument, and the Washington Supreme Court denied review, ultimately concluding that Schubert failed to even attempt to show prejudice, i.e. that more likely than not he would have chosen not to plead guilty if he knew of the actual offender score. *Id*. This court reasoned that Schubert, did not show prejudice, and was not entitled to relief. *Id*. slip op. at 2-3. That same reasoning applies here because this appeal arises from the remand of Schubert's PRP.

While Schubert prevailed in his PRP on inaccuracy of his offender score, he cannot now expand the scope of the remanded PRP to include a previously rejected argument regarding withdrawal of his plea. *See State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (once an appellate court rules on an issue of law, that holding follows the case in later stages). He cannot argue that prejudice resulted from a misunderstanding of his sentencing consequences, as that was addressed and found lacking at a prior stage of the proceedings arising from his PRP. *See id*.

Even if he could argue the prejudice issue for the first time at this procedural juncture, Schubert fails to show actual and substantial prejudice, that is, that more likely than not he would have chosen not to plead guilty. Accordingly, we affirm the superior court's ruling denying his motion to withdraw his guilty plea.

II. RESENTENCING OF COUNTS 2-7

Schubert argues that the trial court abused its discretion by failing to resentence counts 2-7 based on the same offender score error that had occurred for count 1. The State argues that Schubert must move to address the deficiencies with counts 2-7 because his PRP did not address such counts. We agree with Schubert.

A sentence based on an inaccurate offender score is invalid on its face. *In re Pers. Restraint of La Chappelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004). A defendant cannot waive an erroneous sentence by pleading guilty to the charges. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). When a trial court imposes an erroneous sentence, it has "the [p]ower and the duty to correct" it. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

CrR 7.8(a)-(b) allows a court to provide post-judgment relief, including resentencing, due to mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, and any other reason justifying relief. CrR 7.8 empowers a superior court to modify an erroneous sentence. *State v. Waller*, 197 Wn.2d 218, 226, 481 P.3d 515 (2021).

The trial court abused its discretion by failing to resentence counts 2-7. It is true that this court's mandate from *Schubert* I unequivocally instructs the superior court to resentence count 1, stating "We grant Schubert's petition in part and remand his judgment and sentence for resentencing with a correct offender score of 8 for the first degree burglary." *Schubert* I, slip op. at 4.

But the trial court had independent authority to correct an erroneous sentence. *Carle*, 93 Wn.2d at 33. Schubert and the State agree that the offender scores for counts 2-7 are inaccurate and require modification. This court's mandate does not preclude the superior court from resentencing on counts 2-7 for reasons that had not been previously addressed via Schubert's PRP because a trial court may correct an erroneous sentence. *Carle*, 93 Wn.2d at 33; *Waller*, 197 Wn.2d at 226. Because Schubert's sentence was based on an incorrect offender score, the sentence on counts 2-7 is invalid and must be vacated. *See La Chappelle*, 153 Wn.2d at 6.

III. Discretionary LFOs

Schubert argues that the superior court erred when it imposed discretionary LFOs prior to conducting an analysis under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). We agree.

A superior court may impose costs and fees after conducting an individualized inquiry into a defendant's ability to pay. *See* RCW 10.01.160(3); *Ramirez*, 191 Wn.2d at 745-46. Former RCW 36.18.020 (2017) authorized the court to impose a criminal filing fee of $200, but in 2018 that provision was amended to disallow such fee for indigent defendants. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396, 429 P.3d 1116 (2018). It now states

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

RCW 36.18.020(2)(h). RCW 10.82.090(1) was also amended such that after June 7, 2018, no interest shall accrue on "nonrestitution legal financial obligations."

When the trial court resentenced Schubert, it entered a new judgment and sentence order. The judgment and sentence order required Schubert to pay a $200 filing fee and interest that accrues on unpaid fees. The trial court determined Schubert was indigent. Therefore, the court

was barred from imposing the $200 filing fee and interest on unpaid fees. *See* RCW 36.18.020; RCW 10.82.090. Upon resentencing, the trial court should not impose the filing fee or interest provision.

CONCLUSION

We affirm the trial court's ruling on Schubert's motion to withdraw his guilty plea, vacate Schubert's sentence on counts 2-7, and remand for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Worswick, J.

Glasgow, A.C.J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

ISAIAH JACOB SCHUBERT,

Petitioner.

No. 96934-5

Court of Appeals No. 51900-3-II

RULING DENYING REVIEW

In 2017 Isaiah Schubert pleaded guilty in Thurston County Superior Court to first degree burglary while armed with a firearm, residential burglary, violation of a no contact order, assault, unlawful imprisonment, second degree unlawful possession of a firearm, and first degree criminal trespass. Based on an offender score of 9 for the first degree burglary, the superior court imposed a high-end standard range sentence of 176 months (including a firearm enhancement), running that sentence concurrently with shorter sentences for the other crimes.

Mr. Schubert timely filed a personal restraint petition in Division Two of the Court of Appeals, arguing in part that the superior court miscalculated his offender score in several respects. In an unpublished opinion, the Court of Appeals agreed with the State's concession that the superior court miscalculated the score for the first degree burglary (the correct score was 8), but it disagreed with Mr. Schubert's other claims of miscalculation. The court also rejected claims of ineffective assistance of counsel. The court thus granted the petition in part and remanded for resentencing on the burglary

conviction with a correct offender score, denying the petition in all other respects. Mr. Schubert now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Mr. Schubert must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). He does not make this showing. He now argues only that the Court of Appeals erred in holding that he was not entitled to withdraw his guilty plea on the basis he was misinformed of sentencing consequences as a result of the miscalculated offender score. I agree that the miscalculation, which appeared in Mr. Schubert's plea statement as well as in the judgment and sentence, rendered the plea involuntary. *See State v. Buckman*, 190 Wn.2d 51, 59-60, 409 P.3d 193 (2018) (misinformation as to sentencing consequences renders a plea involuntary).[1] But in this collateral challenge Mr. Schubert must also show that he was actually and substantially prejudiced by the misinformation, meaning, specifically, that in absence of the error he more likely than not would have declined to plead guilty and would have insisted on going to trial. *Id.* at 65. This is an objective inquiry, asking whether a rational person in Mr. Schubert's position more likely than not would have rejected the plea offer. *Id.* at 69.

Mr. Schubert does not even assert he was actually prejudiced, much less show that he was. Instead, he relies on principles of entitlement to withdraw that do not apply

[1] On this point the Court of Appeals stated that an offender score error in the judgment and sentence does not render a plea involuntary. But offender score error that results in the defendant being misinformed of sentencing consequences *does* make a plea involuntary. *Buckman*, 190 Wn.2d at 59-60. The Court of Appeals cited *In re Personal Restraint of Coats*, 173 Wn.2d 123, 141, 267 P.3d 324 (2011), but on the cited page this court said only that an involuntary plea does not render a judgment and sentence facially invalid for purposes of exempting an otherwise untimely personal restraint petition from the time limit on collateral review. That principle has no application to Mr. Schubert's timely petition. Nonetheless, for reasons discussed in this ruling, the result of the Court of Appeals decision is correct.

to collateral challenges. *See, e.g., State v. Mendoza*, 157 Wn.2d 582, 589, 141 P.3d 49 (2006). Mr. Schubert does cite personal restraint petition decisions, but in *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004), this court relieved the petitioner of meeting the heightened standard of prejudice generally applicable to personal restraint petitions due to the unique circumstances of that case, which are not present here. *Id.* at 298-300. Mr. Schubert also cites *In re Personal Restraint of Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009), where this court, without inquiring into actual and substantial prejudice, held that the petitioner was permitted to withdraw his plea on the basis of misinformation as to consequences. But this court, recognizing possible "confusion" stemming from *Isadore* and *Bradley*, subsequently clarified that a personal restraint petitioner seeking to withdraw a guilty plea on the basis of misinformation as to consequences must demonstrate actual and substantial prejudice. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 602-03, 316 P.3d 1007 (2014). As indicated, Mr. Schubert demonstrates no prejudice.

Thus, the Court of Appeals sustainably denied the relief of withdrawal of the guilty plea and instead granted the relief appropriate in this circumstance: resentencing under the correct offender score. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877-78, 50 P.3d 618 (2002).

The motion for discretionary review is denied.

Walton Bunton
DEPUTY COMMISSIONER

July 26th, 2019

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. 54597-7-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 10, 2022
Washington Appellate Project

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