Supreme Court No. 100872-4
COA No. 37828-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID WEIMER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

The Honorable Charnelle Belkengren

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. David Weimer was the appellant in COA No. 37828-4-III.

B. COURT OF APPEALS DECISION

Mr. Weimer seeks review by this Court of the decision No. 37828-4-III, issued March 24, 2022. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

1. When he pleaded guilty, Mr. Weimer's attorney and the court told him he would be eligible to receive as much as 40 months of his 120 month sentence. In fact, he could not legally receive more than 12 months off. It was undisputed that Mr. Weimer materially relied on the mistaken information given to him that the offense was therefore capable of earning one-third "good time," under RCW 9.94.728 and .729. Here, Mr. Weimer argued that the court abused its discretion by denying relief in the form of reduction of Mr. Weimer's sentence on count 1 from 120 months to 100 months, which

would allow him to secure something close to the July, 2025 earned release date that his counsel stated at sentencing, under the 10 percent earned release rate for serious violent offenses.

Is review warranted where the Court of Appeals stated that no case law authority empowers a trial court to grant relief in the form of a modified judgment and sentence following a guilty plea?

2. Mr. Weimer also argued that relief was also warranted irrespective of the degree to which the State's counsel initially denied sharing in the mistake of the legal error that was affirmatively inserted into the plea agreement. CrR 7.8(b)(1) allows relief to be granted for a non-exclusive list of reasons, which can include, *inter alia*, mistake, and ineffective assistance of counsel, and relief can be granted on any terms that are just.

Did the Court of Appeals err in affirming the trial court's order denying relief, warranting review by the Supreme Court?

3. Is review warranted under RAP 13.5(b)(4), because the

present case involves an issue of the resolution of criminal cases by plea and the responsibility of officers of the court acting in good faith, which is an important public interest?

D. STATEMENT OF THE CASE

1. Plea and sentencing.

David Weimer entered a guilty plea to multiple counts: attempted first degree assault pursuant to RCW 9A.36.011(1)(c), first degree arson, and harassment, on October 16, 2019. CP 7-19; 10/16/19RP at 3-10. In the plea statement is a handwritten notation that attempted first degree assault (count 1) is a "violent" offense.

6. **In Considering the Consequences of My Guilty Plea, I Understand That:**

(a) My right to appeal is limited.

(b) Each crime with which I am charged carries a maximum sentence, a fine, and a ***Standard Sentence Range*** as follows:

	COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
CLASS B VIOLENT	1	3	80-120	ϕ	ϕ	$20K/10 yrs
CLASS A VIOLENT	2	3	36-48	ϕ	18 mo	$50K/Life
	3	2	4-12	ϕ	ϕ	$10K/5 yrs

CP 8 . Deputy Prosecuting Attorney (DPA) Mark Cipolla, and defense counsel Brooke Foley affixed their signatures to this Statement of Defendant on Plea of Guilty. CP 7-19. The defendant signed the plea agreement and the trial court signed the agreement when accepting Mr. Weimer's written plea. CP 8; 10/16/19RP at 4, 9.

At sentencing, as noted in the agreed sentencing recommendation which sought a sentence of 120 months (the top of the standard range of count 1), "the State did have some evidentiary hurdles if this case were to proceed to trial [but] Mr. Weimer's plea to Attempted First Degree Assault is a strike offense[.]" CP 25.

On October 30, 2019, the court sentenced Mr. Weimer to 120 months on count 1, the attempted first degree assault, and sentenced him on the other counts including the 18 months community custody, exercising its discretion to accept the agreed recommendation. 10/30/19RP at 28-29; CP 30-43.

During sentencing, defense counsel referred to the defendant's potential earned early release date (ERD) of July 2025 on the attempted first degree assault. The court asked counsel when Mr. Weimer would be able to begin making payments on his legal financial obligations, and counsel responded,

> Your Honor, I'd ask for July 2025, I believe that will get as close to Mr. Weimer's potential ERD. I don't believe that he has [the] ability to make payments until that time.

10/30/19RP at 27.

2. <u>Mr. Weimer's post-sentencing CrR 7.8(b) motion</u>.

In 2020, the Department of Corrections communicated to Mr. Weimer's defense counsel that "RCW 9.94A.030[47] provides that an Attempted Assault 1 retains its status as a <u>serious</u> violent offense and therefore is only eligible for 1/10 good time." (Emphasis added.) CP 49. The handwritten notation in Mr. Weimer's judgment stating that count 1 in the

defendant's plea was a "violent" offense was an overt mistake. RCW 9.94A.030(46)(v), (ix).

Defense immediately counsel contacted DPA Mark Cipolla, and asked him to confirm the fact that one significant consideration for Mr. Weimer, discussed by her and Mr. Cipolla during plea negotiations, was the fact that the State's offer of the reduced charge for count 1 was expressly described as a violent offense, subject to one-third good time. However, as Ms. Foley duly reported, Mr. Cipolla declined, and instead "denie[d] negotiations included considerations of good time." CP 51.[1]

Defense counsel filed a CrR 7.8 motion, CP 44-88.

[1] Prosecutor Rich Whaley's statement at oral argument that "the certificate attached the position of the State that Mr. Cipolla has told them time and time again that we do not negotiate good time, and there were no negotiations of good time" was his description of the above parts of Ms. Foley's affidavit. 10/9/20RP at 38; see CP 51. DPA Whaley stated that he could have, but did not, secure an affidavit from DPA Cipolla. See infra.

According to defense counsel's affidavit, based on the plea offer by Mr. Cipolla, Mr. Weimer believed that the charge for count 1 carried a potential to earn one-third good time. CP 49-50. Counsel noted that DPA Rich Whaley, appearing for Mr. Cipolla, did not correct either the interlineation in Mr. Weimer's plea form, or defense counsel's mistaken statement of a legally impossible ERD date, at any time after the plea and through to sentencing. CP 51.

Rather, their mistake stood. As a remedy, defense counsel asked that Mr. Weimer's sentence be modified to a term of 100 months on the assault count to approximate the ERD date that induced Mr. Weimer to accept the plea, and which he could earn based on the available good time at the 10 percent rate for serious violent crimes. CP 46; 10/9/20RP at 53-54; see RCW 9.94A.728 and .729.[2]

[2] The amount of early release time an inmate may potentially earn from DOC is established by the legislature. Under former RCW 9.94.728 ("Release prior to expiration of sentence"), an earned release date could be secured pursuant to certain statutes allowing for 10 percent earned early release:

3. <u>Hearing</u>.

At the CrR 7.8 hearing the trial court directed that the State show cause why the motion should not be granted. 10/9/20RP at 31-32 (citing CrR 7.8(c)(3)). In the State's response the prosecutor had focused almost entirely on arguments why Mr. Weimer should not be allowed to withdraw

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> (1) No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:
> (a) An offender may earn early release time as authorized by RCW 9.94A.729[.]

Former RCW 9.94.728. Under former RCW 9.94A.729(3), for defendants convicted after July 1, 2010, former RCW 9.94A.729 provided for earned release time of either 10 percent, or one-third of the sentence (subsection 4, applicable to offenses committed prior to July 2, 2010, set forth crimes with 50 percent earned release). The statute provided:

> (3) An offender may earn early release time as follows:
> * * *
> (c) In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.
> * * *
> (e) In no other case shall the aggregate earned release time exceed one-third of the total sentence.

Former RCW 9.94.728(3) [Laws 2018 c 166 § 2]. Under these provisions, the crime of attempted first degree assault, because it classifies as a serious violent offense, is only eligible for ten percent earned early release.

his plea under CrR 4.2(f), which was not what was being sought. CP 89-94. DPA Whaley did much the same in argument before the trial court. 10/9/20RP at 36-37, 41-42.

However, DPA Whaley conceded that he could not say that ERD was *not discussed* during plea negotiations between Ms. Foley and Mr. Cipolla. 10/9/20RP at 38. DPA Whaley stated, "I can't say at some point good time wasn't mentioned." (Emphasis added,) 10/9/20RP at 38.

The State argued that the mistake in Mr. Weimer's plea statement was defense counsel's, and not that of both lawyers who signed the plea agreement. 10/9/30RP at 37.

Mr. Weimer made clear he was not seeking to withdraw his plea and the case did not involve CrR 4.2(f), as the State had argued in its briefing and at the hearing. 10/9/20RP at 49-50; CP 91-94. As counsel noted, the defense motion was based on subsection (1) of CrR 7.8(b), and Mr. Weimer was seeking modification of the sentence. 10/9/20RP at 49; CP 95. Unfortunately for Mr. Weimer, attempted first degree

assault is a "serious violent" offense as opposed to a "violent" offense for purposes of ERD, and Mr. Weimer centrally relied on that mistake in pleading guilty, warranting relief under CrR 7.8(b) (1). CP 44-46, 51; 10/9/20RP at 46-56.[3]

4. <u>Trial court's oral ruling on CrR 7.8(b) motion</u>.

The trial court issued an oral ruling and written findings which incorporated its oral decision. CP 122-34; 10/9/20RP at 64-68. In its oral ruling, the court stated that the believed amount of "[e]arned release time was not a part of the deal relayed to the Court, nor was it included anywhere in the Statement of Defendant on Plea of Guilty." 10/9/20RP at 64-65. The court also stated that the only slight reference to the matter was Ms. Foley telling the sentencing court, in answer to a payment plan question regarding LFO's, was "that July 2025, would be close to Mr. Weimer's potential ERD." 10/9/20RP at 67.

[3] Contrary to the trial court's subsequent ruling, Mr. Weimer did <u>not</u> argue that the motion in the present case turned on subsection (5) of CrR 7.8(b). <u>See</u> argument at Part E., <u>infra</u>.

The court also stated that Ms. Foley's affidavit indicated that Mr. Weimer would not have accepted the plea if he knew that his potential early release date was in 2028. 10/9/20RP at 65. However, the court stated that this is a matter set by statute, RCW 9.94A.729, and therefore "Mr. Weimer cannot possibly qualify for one-third good time." (Emphasis added.) 10/9/20RP at 65. Furthermore, the trial court stated,

> [e]ven if the Court found that Mr. Weimer misunderstood the potential collateral consequences and that materially affected his decision . . . the remedy would be for the Court to allow Mr. Weimer to withdraw his plea [and] he's not asking . . . to withdraw his plea.

10/9/20RP at 66 .

CrR 7.8(b) was not satisfied, the court stated, because "[t]here was no mutual mistake" since the court had earlier accepted the plea, finding that Mr. Weimer "knowingly, intelligently, [and] voluntarily" plead guilty to "the agreement that the parties entered into [which] is clearly laid out at page 5 of the statement [and] [g]ood time was never part of that

agreement and it was never presented to the court as being part of that agreement." 10/9/20RP at 66.

F. ARGUMENT

THIS SUPREME COURT SHOULD ACCEPT REVIEW WHERE THE DENIAL OF RELIEF TO MR. WEIMER UNDER CrR 7.8(b)(1) RELIED ON THE WRONG LEGAL STANDARDS, WHERE THE FACTS ESTABLISHED MISTAKE AND OTHER BASES RECOGNIZED BY THE RULE, AND/OR BY RELYING ON UNSUPPORTED FACTS.

1. Review is warranted under RAP 13.4(b)(1), and (2).

The Court of Appeals erroneously held that no authority permits a trial court to modify a sentence following a guilty plea. Is review warranted under RAP 13.4(b)(1) and (2)?

2. CrR 7.8(b) rulings are reviewed for abuse of discretion, which includes employment of an incorrect legal standard, reliance on facts that do not meet the applicable standard, or reliance on unsupported facts.

CrR 7.8(b)(1) allows relief from a judgment or order based on "mistake, inadvertence, excusable neglect, newly discovered evidence or irregularity in obtaining the judgment,"

and on motion "and upon such terms as are just, the court may relieve a party" from the judgment or order.

Trial court rulings under CrR 7.8(b) are reviewed for abuse of discretion. State v. Lamb, 175 Wn.2d 121, 126, 285 P.3d 27, 30 (2012). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Lamb, 175 Wn.2d at 126-27 (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). A court's decision is also manifestly unreasonable if it is outside the range of acceptable choices, or if the factual findings are unsupported by the record. See, e.g., Lamb, at 127 (trial court abused its discretion under CrR 7.8(b) where it failed to rely on the correct legal standard raised under CrR 7.8(b)).

3. <u>The court below made unsupported factual findings, applied incorrect legal standards and failed to apply the law to supported facts.</u>

The mistaken belief that attempted first degree assault was subject to one-third good time played a significant part in the plea process and was expressly stated at sentencing, pursuant to the plea. In its oral ruling, the court stated that the court believed amount of "[e]arned release time was not a part of the deal relayed to the [Sentencing] Court, nor was it included anywhere in the Statement of Defendant on Plea of Guilty." 10/9/20RP at 64-65,67. All of these findings are in error, as they are unsupported by substantial evidence. Mr. Weimer's belief that his ERD date was July 2025 was stated repeatedly at sentencing, with no reaction by the prosecutor.[4]

At the CrR 7.8 hearing, Ms. Foley referred to and provided the court with the full transcript of sentencing. CP 66-88. At sentencing, when defense counsel referred to the

[4] Mr. Weimar notes *infra*, solely for purposes of argument, that even if earned release was not a consideration during the negotiations between Ms. Foley and Mr. Cipolla, relief was still warranted under CrR 7.8(b)(1).

defendant's potential ERD date July 2025, the sentencing court plainly heard what she stated, and acknowledged the date. 10/30/19RP at 27. The court's factual findings dismissing what was said at sentencing, as effectively not having been said or as of no consequence to the motion, were error.

Equally erroneous are the court's statements and findings that there "was no mention, either orally or in writing, of earned release at the time the defendant's plea was accepted;" and that the "slight mention" of an ERD date made by defense counsel at sentencing "was the only reference made about earned release made during the plea and sentencing process." CP 123 (findings 15, 16, and 17). To the contrary, as the defendant's plea statement indicated, counsel for both parties had signed off on the stated classification of the crime as a "violent" offense. CP 8. This undisputed mistake was thus memorialized in writing, and at the October 16, 2019 plea hearing, that plea was accepted by the court, and the court signed the plea. 10/16/RP at 3-10.

As Ms. Foley stated in the affidavit, DPA Cipolla approached defense counsel with a proposal: strike the bond reduction, client pleads to Attempted Assault 1 and First Arson, agreed high end on the Attempted First Assault but with the understanding that he'd presumably receive a 1/3 good time reduction. CP 49-50 (As defense counsel properly noted that after Mr. Weimer was in prison and DOC saw the error, she approached DPA Cipolla, but he declined to agree that earned release was a consideration in the plea negotiations. CP 49-50 (Foley Affidavit, at parts 22, 23).

> Ultimately, this factual issue was concluded on the merits when DPA Whaley - an officer of the court - admitted to Judge Bjelkengren that he could not say that earned release was <u>not</u> mentioned in plea negotiations, an admission which was later in time than DPA Cipolla's now stale denial.

10/9/20RP at 38. But the defense never argued that the matter turned on some claim or argument by Mr. Weimer that the lawyers 'negotiated' for some percentage of ERD to apply to the reduced charge, given that these matters are set by law.

DPA Whaley conceded at this October, 2020 hearing that the statement by Mr. Cipolla reported in Ms. Foley's affidavit was now admittedly being modified or revised. ERD was mentioned. And that mention could not have been regarding any other count than the highest charge - count 1.

DPA Whaley admitted that he could have *but did not* seek an affidavit from DPA Cipolla. Then, turning on his heels yet again, he asked the court, based on defense counsel's original self-report of the earlier denial by DPA Cipolla, to make a finding that ERD was not discussed, contrary to her detailed, sworn affidavit that it was, and contrary to his own admission moments earlier.

4. The trial court abused its discretion by concluding that Mr. Weimer was required to meet the requirements for plea withdrawal, while at the same time its erroneous findings that the plea was not involuntary, and that earned release time was a collateral consequence, supported relief under CR 7.8(b), as does a mistake that was "one-sided."

The trial court also wrongly based its decision on the notion that Mr. Weimer was seeking to withdraw his plea. CP

122-23. The court held that even if there was a mistake about the earned early release percentage for first degree assault - and even if that materially affected his decision - the sole remedy would be plea withdrawal. 10/9/20RP at 66 (relying on State v. Conley, 121 Wn. App. 280, supra.). State v. Conley involved incorrect information regarding a minimum term and earned release and the issue had been raised in a motion to withdraw the plea under CrR 4.2(f). State v. Conley, 121 Wn. App. at 284-85) ("Mr. Conley bears the demanding burden of proving a manifest injustice.").

In contrast, CrR 7.8(b)(1) provides for relief from a judgment on the basis of mistake and other grounds, and such relief may be in the form of modification of the sentence.

> [W]e have held that "[u]nder CrR 7.8(b), a judgment may be modified or vacated." State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996). CrR 7.8 provides the superior court with "jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires." Id. (citing State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)).

State v. Waller, 197 Wn.2d 218, 226, 481 P.3d 515 (2021); see also, State v. Breazeale, 99 Wn. App. 400, 412, 994 P.2d 254, 261 (2000) (court may relieve party from a judgment "for any reason justifying relief, unless the adverse party can show cause why the relief asked for should not be granted"), aff'd in part, rev'd in part on other grounds, 144 Wn.2d 829 (2001).

To the extent the court relied on CrR 4.2(f) it erred. The court should not have accepted the State's insistence that it should be guided by considerations of CrR 4.2(f) and require Mr. Weimer to meet the "heavy burden" of proving a "manifest injustice" akin to that relevant to plea withdrawal. CP 89-95 (State's response); 10/9/20RP at 36-37, 41-42.

5. Mistake is among the reasons why relief may be granted under CrR 7.8(b)(1) and mistake was present here, as was involuntariness as a result of affirmative misinformation as to the consequences of Mr. Weimer's plea.

The Court of Appeals erroneously held that no authority exists under which "a mistaken plea will justify resentencing or

modification of sentence." Decision, at p. 4 and n. 3; see also Decision, at pp. 4-5.

To the contrary, Ms. Foley argued that the mistake in the understanding of the "good time" available to Mr. Weimer - a mistake she set forth in her written sworn statement under penalty of perjury - was a circumstance akin to the case of State v. Smith, 159 Wn. App. 694, 247 P.3d 775 (2011), in the respect that both situations involved the authority the trial court possesses under CrR 7.8(b) to fashion a sentencing remedy in the interests of justice, distinct from any proceedings for plea withdrawal under CrR 4.2. 10/9/20RP at 49-50.

The trial court found that any mistake about earned release was not a mutual mistake. But CrR 7.8(b) does not limit relief to only "mutual mistakes." In fact it does not include the word "mutual" at all, referring only to to "mistake" as part of a non-exclusive list of bases for relief from a judgment.

In addition, the court's finding that the amount of early release that might be earned on count 1 was a collateral

consequence of the plea, and that Mr. Weimer was therefore entitled to no remedy, was error. If a defendant materially relied on affirmative misinformation concerning a consequence of his plea when deciding to plead guilty, he may well be able to make out the high standard of a manifest injustice - a higher standard than necessary here, where Mr. Weimer was not seeking to withdraw his plea. State v. Ward, 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994); see, e.g., State v. A.N.J., 168 Wn.2d 91, 116, 225 P.3d 956 (2010) (defendant was affirmatively misinformed of collateral consequence of plea).

Relief was required here, under CrR 7.8(b)(1). The court never discredited Ms. Foley's affidavit that her communication of the State's offer appealed to Mr. Weimer in great part because the reduced charge for count 1 was eligible for earning one-third good time - which was wrong.

In this case, Mr. Weimer's motion sought a just remedy. Mr. Weimer's motion would leave the plea intact. As the parties' joint recommendation stated,

> Mr. Weimer's plea to Attempted First Degree Assault is a strike offense, is not capable of being vacated, and the plea to Arson 1st Degree will result in Mr. Weimer having 18 months supervision upon release.

CP 25. The remedy of 100 months requested by Mr. Weimer, as noted, was a sentence to a term of months within the standard range that the sentencing court always had unfettered discretion to select. The requested remedy left the State with the benefit of its bargain. It could only be so, unless the prosecutor during plea negotiations had known that Mr. Weimer would arrive at DOC only to find out that first degree assault was a "serious violent" offense which does not earn one-third good time. That is not what occurred and it is was not and is not in any way being alleged by Mr. Weimer - mistake, by definition, is unintentional. But it is also consequential.

Importantly, even a "one-sided" mistake by Mr. Weimer's counsel warranted relief under CrR 7.8(b)(1). If the court meant by its ruling to credit the State's assertion that only defense counsel was incorrect about count 1's classification,

relief was nonetheless still proper. It was undisputed that serious violent offenses earn only a potential 10 percent good time, and as set forth in the trial court's ruling, "Mr. Weimer cannot possibly qualify for one-third good time." 10/9/20RP at 65; see CP 122, 123 (finding of fact 19; conclusion of law 29).

A mistake such as this on the defense side of the case rendered the plea involuntary. See Walsh, 143 Wn.2d at 8-9 (incorrect range in plea form rendered plea involuntary). The amount of the potential for earning good time - or the lack thereof in a minimum term - is a direct consequence of a plea in these circumstances. State v. Conley, 121 Wn. App. at 284 (guilty plea based on misinformation of the sentencing consequences is not voluntary) ("A recognized direct consequence of a guilty plea is the statutory prohibition against earned early release credit during the period of the mandatory minimum sentence." Conley, 121 Wn. App. at 286.

Even if the trial court could properly find that there was not mutual mistake in the plea agreement, the circumstances of

the mistake - whether or not correctly characterized as "one-sided" on Ms. Foley's part as DPA Whaley urged - relief was warranted. A sentence to 100 months was unlike the sentence crafted in Smith. There, the sentences to shortened full incarceration given after the partial confinement program was terminated and the defendants moved for relief, were technically prohibited by RCW 9.94A.728, which provided for release from correctional facilities only in enumerated circumstances. As this Court of Appeals stated, however, "while the net effect of the court's sentencing modification here may have been early release, that was not the intent or basis for the modification." Smith, at 699.

Here, the proprietary and legality of the sentence sought by Mr. Weimer in modification is established by RCW 9.94A.530(1) ("The court may impose any sentence within the range that it deems appropriate"). See RCW 9.94A.585(1); RCW 9.94A.431 (a standard range sentence cannot normally be appealed); 13 Royce and Ferguson, Washington Practice,

Criminal Practice and Procedure § 4818, at 395-96 (3d ed. 2004); State v. Mail, 121 Wn.2d 707, 711 n.2, 714, 854 P.2d 1042 (1993); State v. Jones, 46 Wn. App. 67, 70, 729 P.2d 642, 644 (1986).

CrR 7.8(b)(1) is expansive, and non-exclusive, in its setting forth of circumstances that can warrant partial relief from a judgment. There was no basis to find, and the trial court did not find, that Mr. Weimer did not rely on the mistaken belief that attempted first degree assault was a violent offense entitling him to earn as much as one-third good time. He was affirmatively, and incorrectly informed about this consequence of the plea offer. Per State v. Ward, 123 Wn.2d at 513-14; and State v. A.N.J., 168 Wn.2d at 116, he entered an involuntary plea, entitling him to relief where the Superior Court Criminal Rules allow.

Under CrR 7.8(b)(1), Mr. Weimer sought only that relief which would satisfy the benefit of the bargain for both parties. The trial court, because of misapplication of law to

fact, abused its discretion. This Court should accept review and reverse and remand.

6. <u>Review is warranted under RAP 13.5(b)(4), because the present case involves an issue of the resolution of criminal cases by plea and the responsibility of officers of the court acting in good faith, which is an important public interest</u>.

Ultimately, the trial court had before it the sworn written declaration of defense counsel that the available good time was a material aspect of the plea discussions; her sworn declaration that she approached DPA Cipolla believing he would attest to the same, but did not; and DPA Whaley's statement to the court at the hearing that he could not say that good time was not discussed during plea negotiations between Foley and Cipolla. 10/9/20RP at 63-65. At no point did DPA Whaley explain why he did not simply prepare and have DPA Cipolla, who was ill at times but was in and out of the office, sign a similar declaration under penalty of perjury that the amount of good time available under the reduced charge was not part of the plea negotiations. <u>See</u> 10/9/20RP at 38.

CrR 7.8(b) provides that the trial court may relieve a party from a final judgment or order for mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order, or for any other reason justifying relief. The State argued below that the mistake in Mr. Weimer's plea statement was solely defense counsel's. 10/9/20RP at 37. But the (incorrect) classification of the offense in question as a mere "violent" offense, which DPA Whaley reiterated throughout the hearing was a matter of set statutory law that his office "time and time again" noted to defendants, was set forth in the plea statement which was signed by all concerned. CP 19. The trial court never doubted Ms. Foley's affidavit that the State's plea offer succeeded in avoiding trial when Mr. Weimer was informed that the charge for Count 1 was a "violent" offense eligible for one-third good time - which was wrong. And the requested remedy left the State with a sentencing result - not exactly in the same spot, but so similar to the benefit of the bargain it wrongly believed it

was lawfully agreeing to that the trial court would have granted the motion, had it not failed to recognize its discretion after assessing its authority under the correctly applicable court rules.

As a matter of law, the trial court abused its discretion because it applied the wrong legal standard, in the manners set forth in the assignments of error and the Opening Brief. AOB, at pp. 1, 10-19. Mistake does not preclude the court from finding a basis for relief under CrR 7.8(b), much less any case that eviscerates CrR 7.8(b) and proclaims CrR 4.2 plea withdrawal as the only post-plea motion a defendant may bring.

In stark contrast to Ms. Foley's humble, forthright narrative of events in describing the circumstances to the trial court, the Respondent below repeatedly intimated in its intermediate appellate briefing that the defense's mere making of these arguments was a "breach" of the plea agreement. SRB, at pp. 8, 10, 13, 26, 27, 29, 30. This is not a

good faith description of defense counsel's straightforwardly candid efforts to set forth what occurred during plea negotiations, or her effort to correct the mistake in the interests of justice, under authority of a court rule which allows the Court great leeway to fashion a remedy in the interests of justice. In contrast to Ms. Foley's candor with the court, the State's use of the intimidating language of "breach" throughout its Respondent's Brief is disheartening.

Counsel noted the case of Smith, wherein the trial court (later affirmed by the Court of Appeals) fashioned a remedy under CrR 7.8(b), in the form of new, shorter sentences of prison incarceration. The partial community incarceration originally imposed on the defendants was pursuant to a program subsequently eliminated for budgetary reasons, and upon motion, the court changed the sentences to short terms of incarceration which resulted in immediate release. CP 95-97 (Reply to State's Response) (citing State v. Smith, 159 Wn. App. at 698).

In fact, some of the sentences imposed were in fact prohibited by RCW 9.94A.728, which provides for release from correctional facilities only in enumerated circumstances. As the Court of Appeals stated, however, "while the net effect of the court's sentencing modification here may have been early release, that was not the intent or basis for the modification." Smith, at 698. Rather, the Court affirmed the trial court's employment of CrR 7.8(b) to modify the judgment in the interests of justice. The trial court below possessed the same authority the Smith court did, and the relief sought by Mr. Weimer was simply a standard range sentence, and one not in contravention of the SRA in any aspect.

Remand to the trial court for full consideration of its authority to impose a modified standard range sentence is required in this case. RCW 9.94A.530(1) ("The court may impose any sentence within the range that it deems appropriate").

F. CONCLUSION

Based on the foregoing, Mr. Weimer asks that this Supreme Court reverse and remand to the trial court.

This Brief contains 4,889 words formatted in font Times New Roman size 14.

Respectfully submitted this 25th day of April, 2022.

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

STATE OF WASHINGTON, Respondent, v. DAVID EDGAR WEIMER, Appellant.	)))))))))	No. 37828-4-III UNPUBLISHED OPINION

PENNELL, J. — David Weimer entered a guilty plea pursuant to a favorable plea agreement that substantially reduced his projected sentencing range. After sentencing, Mr. Weimer discovered that, given the nature of his conviction, his maximum potential for early release was lower than he had understood. Mr. Weimer subsequently filed a motion for relief from judgment under CrR 7.8(b), arguing his plea was predicated on a material mistake of law. As a remedy, Mr. Weimer did not seek to withdraw his plea. He instead argued his sentence should be modified downward to account for the lost possibility of earned release time.

We agree with the trial court that Mr. Weimer has not asserted a viable claim for relief under CrR 7.8(b). Mistakes and remedies go hand-in-hand. When a mistake pertains to a guilty plea, the remedy must be specific to the plea. Typically this means withdrawal of the plea, though sometimes the defendant may be eligible for specific performance of a

plea agreement. A mistake in a plea does not entitle a defendant to revisit an otherwise lawful sentence. Because Mr. Weimer has expressly declined the opportunity to revisit his plea, he is not entitled to relief under CrR 7.8(b).

FACTS

In 2019, the State charged David Weimer with one count of attempted first degree murder and one count of first degree arson after he tried to burn down the home of his former fiancé while she was inside sleeping. Following plea negotiations, Mr. Weimer pleaded guilty to the lesser charge of one count of attempted first degree assault, one count of first degree arson, and one count of harassment. The plea agreement specified the prosecutor would recommend a high-end sentence of 120 months. The trial court accepted the plea and subsequently sentenced Mr. Weimer to 120 months' incarceration.[1]

Approximately six months after sentencing, defense counsel realized Mr. Weimer was eligible for only one-tenth earned early release, not one-third as had been counsel's previous understanding. Defense counsel shared this information with Mr. Weimer and he subsequently moved in the trial court under CrR 7.8(b)(1) to modify his sentence to 100 months. Mr. Weimer argued the parties had committed a mutual mistake regarding

[1] At the time of sentencing, the parties jointly recommended a sentence of 120 months.

his eligibility for early release and he had been misinformed of the sentencing consequences of his plea. The court denied his motion, finding earned early release had not been part of the plea negotiations and that the only potential remedy would be a motion to withdraw his guilty plea. The court entered findings of fact and conclusions of law reflecting its oral ruling.

Mr. Weimer timely appeals.

ANALYSIS

CrR 7.8(b)(1) provides superior courts with authority to relieve a party from final judgment based on "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." We review trial court's CrR 7.8(b) decision for abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). Mr. Weimer argues the trial court abused its discretion by committing a series of legal and factual errors. But the core question is whether Mr. Weimer has presented a plausible basis under CrR 7.8(b)(1) for relief from judgment. The answer is no.

Assessing whether a final judgment has been influenced by some sort of mistake requires discerning the type of mistake alleged. This is because the nature of the mistake dictates the scope of possible remedies. If the mistake was made by the defendant in entering a plea, the remedy is plea withdrawal. CrR 4.2(f), CrR 7.8(b)(1). If both

parties have made a mistake in entering a plea agreement, the remedies are either plea withdrawal or specific performance, so long as specific performance would not be prohibited by law. *State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011).[2] If a mistake occurs at sentencing, the remedy is a new sentencing hearing. *See, e.g.*, *State v. Smith*, 159 Wn. App. 694, 701, 247 P.3d 775 (2011).[3]

The mistake alleged by Mr. Weimer pertained to his plea.[4] As a result, his potential remedies are limited. Mr. Weimer has explicitly rejected the possibility of withdrawing his plea. He also does not claim a right to specific performance. Indeed, specific performance is not a potentially available remedy in this case, given neither the court

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[2] *Barber* stated that the only "possible" remedies that have been recognized for an involuntary plea are "withdrawal of the plea or specific performance of the plea agreement." 170 Wn.2d at 855. *Barber* went on to hold that the remedy of specific performance is limited "to the situation in which the State breaches its promise to make a specific charging decision or recommendation to the sentencing court." *Id*. at 874. After *Barber* it is clear that specific performance is not warranted where the parties to a plea agreement have made a mutual mistake that would result in an illegal sentence. *Id*. But it is unclear after *Barber* whether specific performance could be an available remedy for mutual mistake in a plea agreement if the mistake would not render the defendant's sentence illegal. For purposes of this opinion, we assume *Berber* left this possibility open.

[3] Mr. Weimer has pointed to no prior cases indicating that a mistaken plea will justify resentencing or modification of sentence. When a party cites no authority in support of a proposition, we may assume none exists. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

[4] We note that convicted persons are not entitled to rely on a certain percentage of early release time. RCW 9.94A.7281; *In re Pers. Restraint of Pullman*, 167 Wn.2d 205, 214, 218 P.3d 913 (2009).

nor the parties are empowered to modify the statutory standards for early release time. *See* RCW 9.94A.729; s*ee also Barber*, 170 Wn.2d at 873. Without a request for plea withdrawal or the potential for specific performance, Mr. Weimer has not identified an available remedy for his complaints about his plea.

This is not a case where a mistake occurred at sentencing. There is no indication the trial court's sentencing decision was influenced by Mr. Weimer's eligibility for earned release time. This case is unlike *Smith* where assumptions about the availability of a partial confinement program impacted the trial court's sentencing decision. *Smith*, 159 Wn. App. at 701. Eligibility for early release may have been important to Mr. Weimer in negotiating his plea, but there is no indication the trial court shared this concern. Nor is there any indication the trial court chose Mr. Weimer's 120-month sentence based on the assumption he would be eligible for up to a one-third early release reduction.[5] Finally, there is no indication that the State knew that Mr. Weimer based his plea on this assumption.

[5] Given the lack of any statutory guarantees regarding earned release time, speculation about a defendant's potential for early release is generally an inadvisable basis for a trial court's sentencing decision and may be improper. *See State v. Wakefield*, 130 Wn.2d 464, 478, 925 P.2d 183 (1996) ("'The framework of the SRA [Sentencing Reform Act of 1981], [chapter 9.94 RCW] indicates that earned early release time is to be considered only after the offender has begun serving his sentence.'") (*quoting State v. Fisher*, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987) (some alteration in original).

Even if Mr. Weimer had shown a mistake at sentencing, his remedy would be resentencing, not modification of the sentence to a specific term of incarceration. At resentencing, Mr. Weimer's range would have remained 80 to 120 months. Nothing would have required the trial court to sentence Mr. Weimer to 100 months.

Mr. Weimer has a potential remedy for his claim that his guilty plea was based on a mistake of law—withdrawal of the plea. However, withdrawal of the plea would relieve the State of its obligations under the plea agreement and enable it to reinstate the original charge of attempted first degree murder. *See In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 811, 383 P.3d 454 (2016); *State v. Oestreich*, 83 Wn. App. 648, 651, 922 P.2d 1369 (1996). Had Mr. Weimer been convicted of attempted first degree murder, it appears his sentencing range would have more than doubled.[6] Mr. Weimer likely does not want to take the risk of facing this sentencing range. But this is the type of hard decision that must be made when a defendant seeks to remedy an invalid plea. Our case law recognizes no more than two available remedies for an invalid plea, withdrawal and specific performance. *Barber*, 170 Wn.2d at 855. There is no additional option that would allow Mr. Weimer to effectively amend his plea agreement's sentencing recommendation

[6] The State represents that had Mr. Weimer been convicted as originally charged, his sentencing range would be "203.25 months to 270.75 months." Br. of Resp't at 28.

and tie the courts hands in order to meet his subjective expectations of the consequences of his plea.

The trial court appropriately recognized the only remedy available to Mr. Weimer was to withdraw his plea. Because Mr. Weimer insisted he did not want to withdraw his plea, the court appropriately exercised its discretion under CrR 7.8(b) to deny Mr. Weimer's motion.

CONCLUSION

The order denying Mr. Weimer's motion to modify his sentence 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, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 37828-4-III
DAVID WEIMER,	)	
	)	
PETITIONER.	)	

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