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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 91041-3
COA NO. 69048-5-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LOUIS MCGOWEN,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberley Prochnau, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Louis McGowen asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

McGowen requests review of the decision in State v. Louis McGowen, Court of Appeals No. 69048-5-I (slip op. filed October 13, 2014), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether a prior, plea-based conviction could not be counted as a "most serious offense" under the "three strikes" law because that prior conviction was constitutionally invalid on its face, as it included an incomparable foreign offense in the criminal history that rendered the plea involuntary and McGowen did not assume the risk of a legal error by entering into the plea?

D. STATEMENT OF THE CASE

A jury convicted McGowen of three counts of second degree assault and two counts of harassment. CP 136-45. The State sought a sentence of life without the possibility of release under the Persistent Offender Accountability Act (POAA), contending McGowen's prior convictions for second degree robbery under cause number 97-1-01315-8 and second degree robbery under cause number 93-1-04409-3 each

constituted a "strike" and that the current convictions for second degree assault each constituted a third "strike." CP 360-61, 365; 33RP 5. Under the POAA, otherwise known as the "three strikes" law, a defendant who commits a "most serious offense" faces a mandatory life sentence without the possibility of release if he has two prior convictions for "most serious offenses." RCW 9.94A.030(32), (37)(a); RCW 9.94A.570.

Defense counsel argued McGowen's prior 1993 robbery conviction under cause number 93-1-04409-3 did not count as a strike offense under the POAA and therefore McGowen could not be sentenced as persistent offender. CP 281-88; 308-13.

The judgment and sentence for McGowen's 1993 robbery conviction lists a standard range of 13-17 months based on an offender score of "3." CP 306. That offender score is derived from two prior Colorado convictions, a second degree burglary and a robbery. CP 306. The Colorado robbery conviction added two points to the offender score. See Former RCW 9.94A.360(3) (1993) ("Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."); Former RCW 9.94A.360(9) (1993) (if present conviction is for a violent offense, count two points for each prior adult violent felony conviction). McGowen was

sentenced to a standard range sentence of 13 months in connection with the 1993 Washington robbery conviction. CP 307.

When McGowen entered his guilty plea to the 1993 Washington robbery, he did not disclose his criminal history, including the Colorado robbery conviction. Sentencing Exhibit 2. At the time of his plea, McGowen agreed that "if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase." Id. The standard range was listed as 3-9 months in the plea statement. Id.

The defense maintained the judgment and sentence for the 1993 robbery, derived from a guilty plea, was invalid on its face because the offender score and resulting standard range were miscalculated, the court imposed a sentence that was not statutorily authorized, and McGowen was misadvised about a direct sentencing consequence, rendering his guilty plea constitutionally invalid. CP 284-88; 308-13; 33RP 45-52. The offender score and standard range error in the judgment and sentence was the result of improperly including the incomparable Colorado robbery

conviction as a prior offense under the Sentencing Reform Act (SRA). 33RP 46-49.

In an earlier decision, the Court of Appeals held McGowen's prior Colorado robbery conviction was not comparable to a Washington offense and therefore could not be used for sentencing purposes. CP 282-83 (citing State v. McGowen, 95 Wn .App. 1072, 1999 WL 364058 (1999) (unpublished). The defense argued the State was collaterally estopped from challenging the Court of Appeals' determination that the prior Colorado robbery conviction was not comparable. CP 310-11.

The trial court ruled the 1993 robbery conviction was facially valid because "the legal sentencing and proper sentencing is not a direct consequence" of a plea. 33RP 56-61. The plea form for the 1993 robbery listed the standard range as 3-9 months based on an offender score of zero and unknown criminal history. 33RP 57; Sentencing Ex. 2, 3. The trial court asserted "the plea does not incorrectly count the Colorado conviction in the offender score. In fact, it found the score as zero." 33RP 60. The court sentenced McGowen to life without the possibility of parole. CP 333.

On appeal, McGowen argued the conviction for the 1993 robbery was constitutionally invalid on its face and therefore could not be counted as a "most serious offense" for purposes of imposing the life sentence.

Brief of Appellant at 29-40; Reply Brief at 1-6. The Court of Appeals held McGowen could not show the prior robbery conviction was constitutionally invalid on its face because he failed to disclose his criminal history upon entering his plea, thereby assuming the risk that it would be discovered prior to sentencing and used to increase his offender score and standard sentencing range. Slip op. at 9. McGowen seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS DECISION THAT MCGOWEN ASSUMED THE RISK OF A LEGAL MISTAKE IN ENTERING HIS GUILTY PLEA CONFLICTS WITH SUPREME COURT PRECEDENT.

A prior conviction that is "constitutionally invalid on its face may not be considered" in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). Under the SRA, a "conviction" includes "a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9).

The 1993 robbery conviction is constitutionally invalid on its face because the guilty plea that formed the basis for that conviction was not knowing, voluntary and intelligent, in violation of due process. The court used an incomparable out-of-state offense as part of McGowen's criminal history to increase the offender score and standard range sentence,

resulting in a facially invalid plea. The prior robbery conviction cannot be used to presently sentence McGowen to life under the three strikes law.

The Court of Appeals disagreed on the basis that McGowen failed to disclose his prior Colorado robbery conviction when he entered his guilty plea to the 1993 Washington robbery, thereby assuming the risk that the Colorado conviction would be discovered and used to increase his sentence. Slip op. at 9. It cited this Court's decision in In re Pers. Retraint of Codiga for the following proposition: "Where the defendant fails to disclose criminal history to the State, he assumes the risk that it will be discovered prior to sentencing and used to increase his offender score and standard sentencing range." Slip op. at 9 (citing In re Pers. Retraint of Codiga, 162 Wn.2d 912, 929-30, 175 P.3d 1082 (2008)).

The Court of Appeals overlooked the flipside of that proposition. While a defendant generally accepts the contractual risk that additional criminal history will be discovered prior to sentencing, "a defendant should not be charged with knowing the legal impact of his or her criminal history on the offender score. Where a criminal history is correct and complete, but the attorneys miscalculate the resulting offender score, then the defendant should not be burdened with assuming the risk of legal mistake." Codiga, 162 Wn.2d at 929. The Supreme Court again applied the proposition that the defendant is not "burdened with assuming the risk

of legal mistake" in State v. Robinson, 172 Wn.2d 783, 793, 263 P.3d 1233 (2011) (guilty plea violated due process where defendant erroneously believed that his earlier juvenile convictions had washed out and no longer counted toward his offender score).

The Court of Appeals decision in McGowen's case conflicts with Codiga and Robinson on this point. Review is warranted under RAP 13.4(b)(1).

Comparison with Codiga shows why. In Codiga, the prosecutor and the defense agreed upon entry of the plea that (1) Codiga had two prior felonies, (2) one of the prior felonies had washed out, and (3) his offender score was seven. Codiga, 162 Wn.2d at 916. Before sentencing, it was discovered that Codiga had misdemeanor convictions that prevented the felonies from washing out, resulting in an increased offender score and standard sentencing range. Id. In that circumstance, the guilty plea remained valid because "[d]iscovery of additional criminal history, rather than legal error, caused the increased offender score." Id.

In McGowen's case, legal error, not the mere discovery of additional criminal history, caused the increased offender score and rendered the plea to the 1993 robbery constitutionally invalid. The Colorado robbery conviction was not comparable to a Washington offense and therefore could not contribute to the offender score for the 1993

robbery conviction. That was a legal error. The Court of Appeals has already decided the merits of this issue. State v. McGowen, 95 Wn .App. 1072, 1999 WL 364058 (1999) (unpublished). In Codiga, the plea was constitutionally valid because there was no legal error in basing a sentence on additional criminal history that prevented a felony conviction from washing out of the offender score. Codiga, 162 Wn.2d at 916, 929. In McGowen's case, the inclusion of an incomparable prior conviction to boost the offender score and standard range sentence is legal error. McGowen did not bear the risk of that error.

The defense correctly argued the State was collaterally estopped from challenging the non-comparability of the Colorado robbery conviction as part of the life sentence it presently sought against McGowen. CP 310-11. In that earlier decision, the Court of Appeals affirmed the trial court's ruling that the Colorado robbery conviction is not comparable to a Washington offense. McGowen, 1999 WL 364058 at 1, 6-7.[1] The State was given the opportunity to prove that Colorado offense was comparable but was unable to show the offenses were factually the same notwithstanding the different legal elements. Id. at 2, 6-7.

[1] See Martin v. Wilbert, 162 Wn. App. 90, 93 n.1, 253 P.3d 108 (appellate court may consider unpublished opinions in examining issues such as collateral estoppel), review denied, 173 Wn.2d 1002 (2011).

Collateral estoppel "precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment." State v. Harrison, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). Collateral estoppel applies where (1) the issue in the prior adjudication is identical, (2) the prior adjudication is a final judgment on the merits, (3) the party against whom the doctrine is asserted was party to or in privity with a party to the prior adjudication, and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. Harrison, 148 Wn.2d at 561.

The issue here is identical: whether the Colorado robbery conviction is comparable to a Washington offense for sentencing purposes. The prior Court of Appeals decision affirming the trial court's ruling is a final decision on the merits of the comparability issue. The parties were the same. And there is no injustice because the State had a full and fair opportunity to prove the Colorado conviction was comparable. See Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 40, 151 P.3d 1010 (2007) ("Injustice in the collateral estoppel context does not refer to a substantive injustice, but to whether the party was afforded a full and fair hearing."), rev'd on other grounds, 165 Wn.2d 373, 198 P.3d 493 (2008).

The error in McGowen's 1993 robbery conviction is constitutional because it demonstrates the guilty plea was not knowing, voluntary and

intelligent as a result of a miscalculated offender score and standard range. That is a constitutional due process violation. "It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily." State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3; see State v. Webb, __Wn. App.__, 333 P.3d 470, 474-75 (2014) (in three strikes case, holding judgment and sentence for prior second degree assault conviction was constitutionally invalid on its face; the 1992 assault conviction was based on an expired statute and the plea to that charge was not knowing, voluntary, and intelligent).

A defendant's misunderstanding of sentencing consequences such as the standard range when pleading guilty constitutes constitutional error. State v. Mendoza, 157 Wn.2d 582, 589, 590-91, 141 P.3d 49 (2006); State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea. Mendoza, 157 Wn.2d at 590-91. The standard range is a direct consequence of a guilty plea. Id. at 590-91; Walsh, 143 Wn.2d at 8.

The trial court in the present case ruled McGowen's 1993 plea was valid because "the legal sentencing and proper sentencing is not a direct

consequence" of a plea. 33RP 60. That ruling is wrong in light of the foregoing authority.

The trial court also asserted "the plea does not incorrectly count the Colorado conviction in the offender score. In fact, it found the score as zero." 33RP 60. Yet McGowen was not sentenced based on an offender score of zero and a standard range of 3-9 months. Although the plea agreement anticipated additional criminal history might be found and included for sentencing purposes, the sentence that was actually imposed did not comport with an accurate representation of the direct sentencing consequences because the court exceeded its authority in including the incomparable Colorado robbery conviction in the offender score. The 13 month standard range sentence that was imposed on McGowen based on an offender score of "3" was illegal because the incomparable Colorado robbery conviction could not lawfully be included in the offender score.

The facial invalidity in the judgment and sentence demonstrates McGowen was misinformed of the standard range, a direct consequence of his plea. McGowen's plea was involuntary, and thus constitutionally infirm, as a result of the error. A plea, upon acceptance, is a conviction. RCW 9.94A.030(9). The 1993 robbery conviction is invalid on its face. For this reason, the trial court could not treat the 1993 robbery conviction as a conviction that was constitutionally valid on its face.

A prior conviction that is "constitutionally invalid on its face may not be considered" in a sentencing proceeding. Ammons, 105 Wn.2d at 187-88. "Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Id. at 188. Since Ammons, the meaning and scope of "facial invalidity" has primarily been developed in case law involving collateral attacks. In re Pers. Restraint of Coats, 173 Wn.2d 123, 134 n.7, 138-42, 267 P.3d 324 (2011).

The facial invalidity rule "permits consideration of documents that bear on the trial court's authority to impose a valid judgment and sentence," even when such documents are not part of the judgment and sentence itself. In re Pers. Restraint of Carrier, 173 Wn.2d 791, 800, 272 P.3d 209 (2012) ("Carrier's 1985 dismissal order is a court document of unquestionable authenticity that has a direct bearing on the trial court's authority to impose a life sentence. We therefore consider the dismissal order insofar as it reveals that Carrier's judgment and sentence includes the dismissed indecent liberties conviction in his criminal history."). There is no sound reason why the prior Court of Appeals decision holding the Colorado offense to be incomparable should not be accorded the same status. It is of unquestionable authenticity and decisively bears on the trial

court's authority to impose a valid judgment and sentence in relation to the comparability of an out-of-state conviction.

Finally, McGowen's challenge is timely. McGowen's challenge to the use of a prior conviction for sentencing purposes under the POAA is not a collateral attack on that prior conviction, but rather is "directed at the present use of a prior conviction to establish his current status as a persistent offender." State v. Knippling, 166 Wn.2d 93, 103, 206 P.3d 332 (2009) (citing State v. Carpenter, 117 Wn. App. 673, 678, 72 P.3d 784 (2003) (objecting to a prior conviction in a POAA sentencing proceeding is not a collateral attack). McGowen is not lawfully subject to a life sentence under the POAA.

F. CONCLUSION

For the reasons stated above, McGowen requests that this Court grant review.

DATED this 12th day of November 2014.

Respectfully submitted,

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APPENDIX A

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LOUIS MILFORD MCGOWEN, Appellant.	No. 69048-5-I DIVISION ONE UNPUBLISHED OPINION FILED: October 13, 2014

APPELWICK, J. — McGowen appeals his conviction and felony judgment and sentence after being sentenced as a persistent offender. He argues that his due process rights were violated when the trial court found him competent to stand trial without first hearing testimony from his mental health evaluator. He contends that the trial court erred by misinterpreting his motion to substitute counsel as a request to proceed pro se. He claims he should not have been sentenced as a persistent offender, because one of the prior convictions upon which the sentence was based is facially invalid. We affirm.

FACTS

The State charged Louis McGowen with three counts of second degree assault and two counts of felony harassment for his actions against his girlfriend.

On December 2, 2010, defense counsel requested a competency evaluation for McGowen expressing concern about his ability to rationally assist with his own defense. Defense counsel described McGowen's manic and pressured speech, paranoia, lack of eye contact, and his refusal to discuss the case beyond saying, "'I didn't do it.'" Further,

McGowen refused to see a defense psychiatrist. Overall, defense counsel argued that "there are major issues with his inability to work with us." Following the hearing, the trial court entered an order for a pretrial competency evaluation.

On December 22, 2010, Dr. Gregg Gagliardi, a psychologist at Western State Hospital, produced an abbreviated written report finding McGowen competent. On February 14, 2011, the trial court stated that based on the report and counsel's arguments, McGowen's refusal to participate was a result of willfulness, not incompetency. The court found McGowen competent to stand trial.

At this point, defense counsel asked McGowen if he still wanted them to be his lawyers. McGowen said no and maintained that, "God is my lawyer from now on. I don't know no lawyer." The trial court interpreted this as a request to proceed pro se. The court entered a written order denying McGowen's motion indicating that his attempted waiver of counsel was not knowing, intelligent, and voluntary.

During pretrial motions and jury selection, McGowen refused to wear street clothes or acknowledge the court, placed earplugs in his ears, faced the wall, and ignored his attorneys. Further, McGowen burst into a tirade during jury selection. Following this outburst, McGowen's lawyers asked that he be reevaluated for competency. The court ordered a second competency evaluation. Dr. Gagliardi again entered a report indicating that McGowen was competent to stand trial. The trial court considered Dr. Gagliardi's report, jail cell calls in which McGowen sounded lucid, McGowen's behavior, and the arguments. It then determined that McGowen was competent.

The jury found McGowen guilty of three counts of second degree assault, one count of felony harassment, and one count of misdemeanor harassment. At sentencing,

the State alleged McGowen was subject to the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981, ch. 9.94A RCW, due to his two prior robbery convictions. It requested a sentence of life in prison without the possibility of release. McGowen challenged his 1993 King County robbery conviction, arguing that it was constitutionally invalid on its face and could not serve as a predicate conviction for a persistent offender sentence. The trial court found that McGowen was a persistent offender and imposed a sentence of life in prison without the possibility of release. McGowen appeals

DISCUSSION

I. Competency Determination

McGowen argues the trial court erred in finding him competent to stand trial without observing the procedural safeguards mandated by due process and statute. Specifically, he contends the trial court failed to hold a formal evidentiary hearing in which Dr. Gagliardi, the psychologist who submitted a report finding McGowen competent, could be examined.

The trial court's determination that an accused is competent to stand trial will not be reversed absent a manifest abuse of discretion. State v. Crenshaw, 27 Wn. App. 326, 330, 617 P.2d 1041 (1980), aff'd, 98 Wn.2d 789, 659 P.2d 488 (1983). This court normally defers to the trial court's competency determination, because the trial court can personally observe the individual's behavior and demeanor. Id. At competency hearings in Washington, all that due process requires is compliance with the mandates of chapter 10.77 RCW. State v. Coley, 180 Wn.2d 543, 558-59, 326 P.3d 702 (2014).

When there is reason to doubt a defendant's competency, the trial court must appoint experts and order a formal competency hearing. See RCW 10.77.060(1)(a); State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001) abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012). The expert conducting the evaluation must provide his or her report and recommendation to the court in which the criminal proceeding is pending. RCW 10.77.065(1)(a)(i). Experts or professional persons who have reported may be called as witnesses at any proceeding. See RCW 10.77.100 (emphasis added).

Here, the trial court properly followed the statutory procedures for determining competency as outlined in chapter 10.77 RCW. The court ordered that McGowen undergo a psychological evaluation and that the expert provide a written report. After receiving the report by Dr. Gagliardi, the trial court held a hearing on McGowen's competency. The court reviewed two separate competency evaluation reports made by Dr. Gagliardi. The trial court noted that on both occasions Dr. Gagliardi found McGowen competent to stand trial.

Moreover, the trial court considered additional evidence regarding his competency. It listened to telephone calls made by McGowen from jail in which he showed that he had the ability to communicate effectively with a friend. Further, the trial court had the ability to observe McGowen's appearance and conduct in court proceedings. At the competency hearing, the court heard argument from the parties. McGowen did not attempt to call Dr. Gagliardi as a witness. He cites no authority for his claim that his due process rights were violated by the absence of testimony from Dr. Gagliardi, testimony which he had the power to obtain.

The trial court afforded McGowen all of the necessary protections in chapter 10.77 RCW. Therefore, there was no violation of due process and the trial court did not abuse its discretion in finding McGowen competent.

II. McGowen's Motion to Substitute Counsel

McGowen argues that the trial court erred in denying his request to discharge counsel in violation of his Sixth Amendment right to counsel. He claims that the trial court improperly treated this motion—which he characterizes as a motion to substitute new counsel—as a request to proceed pro se and consequently applied the wrong legal standard.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. State v. MacDonald, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). This court reviews both a denial of a motion to discharge counsel and a denial of a request to proceed pro se for abuse of discretion. See State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997); State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

In determining whether to grant a motion to substitute counsel, the trial court must consider the following factors: (1) the extent of the conflict between the attorney and defendant, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). In deciding whether to grant a request to proceed pro se, the court will consider whether the request to waive counsel is knowingly and intelligently made, unequivocal, and timely. Breedlove, 79 Wn. App. at 106. The trial court relied on McGowen's statements in making its determination. While the parties were in court, defense counsel asked McGowen if he still wanted his

current defense counsel to represent him. McGowen responded by saying, "I don't know no lawyer" and "God is my lawyer from now on." Defense counsel then characterized McGowen's motion as a "pro se motion to discharge counsel." McGowen agreed with that characterization. McGowen clarified his position later in the proceeding when he stated, "I don't want these people representing me. God is my representative."

The trial court reasonably interpreted McGowen's statements as a request to proceed pro se. First, McGowen never requested the appointment of a new lawyer or made any indication that he wanted a new lawyer if the trial court were to discharge his counsel at the time. Further, McGowen's statements indicate that he no longer wanted his attorneys to represent him, and preferred God to represent him. God was not a viable option for legal representation. The trial court did not abuse its discretion by characterizing the request as a request to proceed pro se.

The trial court applied the proper legal standard in determining whether McGowen made a knowing and intelligent decision to waive counsel and proceed pro se. During McGowen's conversation with the judge, he said, "I don't know what I'm charged with." Further, in response to the judge's question about whether he understood the maximum penalty for his crimes, he replied, "No, I don't understand that either." In light of McGowen's purported confusion, the trial court did not abuse its discretion by denying his request to proceed pro se.

III. Persistent Offender

McGowen argues that his life sentence without possibility of release must be vacated, because one of the prior convictions upon which his current sentence is based is facially invalid.

McGowen primarily bases his argument on the alleged invalidity of his 1993 King County robbery sentence. Under the POAA, a defendant who commits a "most serious offense" faces a mandatory life sentence without the possibility of parole if he has two prior convictions for "most serious offenses." RCW 9.94A.030(32), (37)(a); RCW 9.94A.570. A defendant's criminal history consists of the defendant's "prior convictions . . . whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11). But, a prior conviction that is constitutionally invalid on its face may not be considered in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). A conviction is constitutionally invalid on its face if without further elaboration it evidences infirmities of a constitutional magnitude. Id. at 188.

McGowen argues that the judgment and sentence for the 1993 robbery is invalid on its face, because it reflects a miscalculation of the offender score and corresponding standard range sentence. He claims this is so, because the trial court miscalculated his 1993 offender score by improperly including a previous Colorado robbery conviction. McGowen contends that the Colorado robbery should not have been included, because it is not comparable to a Washington robbery offense.[1]

But, in defining a persistent offender, it is the validity of the prior conviction that is determinative of that status—not the validity of the sentence. See RCW 9.94A.030(37)(a)(ii). A "persistent offender" is one who has been convicted on at least two prior occasions of a "most serious offense." Id. The act defines "conviction" as, "an

[1] After McGowen was convicted of another robbery in Washington in 1997, this court ruled that the Colorado robbery conviction was not comparable to a Washington robbery for offender score calculation purposes. State v. McGowen, noted at 95 Wn. App. 1072, 1999 WL36405, at *1. McGowen contends that this later ruling is evidence that the Colorado robbery should not have been included in his 1993 offender score.

adjudication of guilt . . . and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). Therefore, even if McGowen were able to demonstrate that his 1993 sentence was invalid because of an improperly calculated offender score, he would still need to show evidence that the underlying robbery conviction on its face evidences infirmities of a constitutional magnitude. See Ammons, 105 Wn.2d at 188.

McGowen does challenge the validity of the conviction itself by claiming that he was misinformed of the standard sentencing range when he pleaded guilty. He contends that this resulted in an involuntary and constitutionally infirm guilty plea. Due process requires that a guilty plea be entered knowingly, intelligently, and voluntarily. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

A plea may be involuntary when it is based on a mutual mistake regarding the offender score or standard sentencing range. In re Pers. Retraint of Codiga, 162 Wn.2d 912, 925, 175 P.3d 1082 (2008). McGowen relies on State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006), to support the proposition that his guilty plea was involuntary and unconstitutional. In Mendoza, the court held that where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Id. at 584. Mendoza's misunderstanding of his sentencing consequences occurred because of an error in calculation out of his control. Id. at 584-85. A prior conviction that was listed and counted as an adult felony conviction should have been counted as a juvenile felony conviction. Id.

Mendoza's offender score was miscalculated based on prior convictions that were brought to the State's attention at the time of the offender score calculation, and Mendoza relied on that error when making his guilty plea. Id. This was not the case here.

When McGowen entered his guilty plea, he failed to disclose his earlier robbery convictions, or any criminal history whatsoever. Where the defendant fails to disclose criminal history to the State, he assumes the risk that it will be discovered prior to sentencing and used to increase his offender score and standard sentencing range. Codiga, 162 Wn.2d at 929-30. Further, at the time of his plea, McGowen agreed that:

> [I]f any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase.

McGowen's plea agreement listed an offender score of "0." McGowen failed to disclose his criminal history and knowingly, intelligently, and voluntarily entered a plea with the understanding that his sentencing range was subject to change should the State discover additional criminal history.

Even assuming the trial court improperly included the Colorado robbery conviction during McGowen's 1993 sentencing, this error would not affect the validity of the plea he entered. McGowen fails to identify a constitutional infirmity in the 1993 conviction. The trial court did not err in considering this conviction when sentencing McGowen in the present case.

The trial court did not abuse its discretion in finding McGowen competent. The court did not err in characterizing McGowen's statements as a motion to proceed pro se

and denying that motion. The court properly sentenced McGowen as a persistent offender. We affirm.

WE CONCUR:

COX, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 69048-5-I
	)	
LEWIS MCGOWEN,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEWIS MCGOWEN
DOC NO. 712677
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky