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No. 96117-4
COA No. 76942-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN JAMES HILL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kevin Hill asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Kevin James Hill*, No. 76942-1-I (June 18, 2018). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

A defendant's guilty pleas must be knowing, voluntary, and intelligent in order to pass constitutional muster. A guilty plea is invalid as involuntary where it is based on a miscalculation of the defendant's offender score or where the plea is based on misinformation. Where a guilty plea is determined to be invalid, the defendant is allowed to withdraw the plea. Mr. Hill pleaded guilty but was never advised prior to his plea that his comparable Arizona prior felony conviction would count in his offender score. Upon learning of this omission, Mr. Hill immediately moved to withdraw the guilty pleas. Is a significant question of law under the United States and Washington Constitutions

involved where the trial court erred in failing to allow Mr. Hill to withdraw his constitutionally invalid guilty pleas?

D. STATEMENT OF THE CASE

As part of an agreement, on April 5, 2017, Kevin Hill pleaded guilty to seven counts of second degree burglary, one count of second degree malicious mischief, and three counts of second degree vehicle prowl. CP 51-105.¹ Shortly thereafter, on April 28, 2017, Mr. Hill moved to withdraw the guilty pleas on several grounds. CP 185-99. Mr. Hill contended that he was unaware that an Arizona prior conviction for forgery counted in his offender score and he was never advised by the prosecutor or the trial court of this fact at the time of his guilty pleas. CP 190-92.

On May 26, 2017, the trial court held a hearing on Mr. Hill's motion and subsequently denied the motion, finding that the pleas were entered knowingly, voluntarily, and intelligently.² 5/26/2017RP 250-51. The court ruled that the failure to account for the Arizona prior

¹ On September 22, 2016, following a lengthy colloquy, Mr. Hill waived his right to counsel and represented himself throughout the proceedings. CP 31-33; 9/22/2016RP 5-31.

² Mr. Hill entered guilty pleas in four cases consolidated for trial, the instant matter being one of those cases. Appeal Nos. 76942-1-I; 76943-0-I; 76944-8-I; and 76945-6-I. The court heard Mr. Hill's motion to withdraw in all four cases in a single hearing and sentenced Mr. Hill in the same proceeding. These cases were not consolidated on appeal.

conviction was not a mistake and was of no import given the fact Mr.

Hill's offender score was well above a "9:"

I'm going to start with the offender score. It is a rare day when a defendant brings forth additional history. What I had asked [the prosecutor] is, are you going to stick with the offender score of 68, and she has affirmatively answered yes, because we still don't believe solicitation of forgery can be pled and proven at sentencing.

With that assurance, the Arizona prior offense, although it may exist on paper, doesn't even amount to a mistake, either legal or factual, because the because [sic] the State is simply not going to ask that your offender score be considered the higher number of 69.

Frankly, you're maxed out at nine. So I think the difference between 68 and 69, I'm not trying to minimize the fact that you might have a one point higher offender score, Mr. Hill, but the State is simply not seeking to prove and plead that additional Arizona history. My understanding is there's an agreed recommendation for sentencing, and I see no reason that even if Judge Amini wanted to find that your offender score was the 69 as opposed to a 68 that it would really change the outcome.

5/26/2017RP 251. Thus the court recognized Mr. Hill's concern over his Arizona prior felony conviction even though it acknowledged his offender score was incorrect. As a result, the trial court denied Mr. Hill's request to withdraw his guilty pleas. 5/26/2017RP 255.

The Court of Appeals affirmed the trial court's denial of Mr. Hill's guilty plea, finding neither misadvisement nor mutual mistake. Decision at 5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Mr. Hill's guilty pleas were not knowing, voluntary, or intelligent in light of the trial court's miscalculation of his offender score.

1. *Due process mandates that a guilty plea be entered voluntarily.*

A defendant may plead guilty if he understands the nature of the charges, there is a factual basis for the plea, and the defendant makes the plea voluntarily. CrR 4.2(a); *State v. Ford*, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). Due process requires that the guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). CrR 4.2(d) requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." Prior to acceptance of a guilty plea, "[a] defendant 'must be informed of all the direct consequences of his plea.'" *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010); quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

A defendant may be allowed to withdraw his guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008). “An involuntary plea can amount to manifest injustice.” *Codiga*, 162 Wn.2d at 923. A miscalculation of an offender score renders the defendant’s plea involuntary and the plea may be withdrawn. *Codiga*, 162 Wn.2d at 925. The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); *State v. Moon*, 108 Wn.App. 59, 63, 29 P.3d 734 (2001). Thus, misinformation about the length of a sentence renders a plea involuntary, even where the correct sentence may be less than the erroneous sentence included in the plea. *Mendoza*, 157 Wn.2d at 591. The Court does not require a defendant to show that the misinformation was material to the plea. *Isadore*, 151 Wn.2d at 302.

2. *The trial court miscalculated Mr. Hill’s offender score, thus he was misadvised of the relevant maximum sentence.*

The standard sentencing range under Washington’s Sentencing Reform Act of 1981 (SRA) for any given offense is a function of the offense’s seriousness level and the defendant’s offender score. RCW 9.94A.525. The offender score is calculated by counting the prior and current felony convictions in accordance with RCW 9.94A.525. “Out-

of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3); *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Mr. Hill was convicted following a guilty plea in Arizona of solicitation of forgery, a Class 6 felony. CP 196. In Arizona, forgery is defined as, with intent to defraud, a person “(1) [f]alsely makes, completes or alters a written instrument; or (2) [k]nowingly possess a forged instrument; or (3) [o]ffers or presents, whether accepted or not, a forged instrument or one that contains false information.” Arizona Revised Statutes § 13-2002(A)(1)-(3). Solicitation requires that “with intent to promote or facilitate the commission of a felony or misdemeanor, such person commands, encourages, requests or solicits another person to engage in specific conduct which would constitute the felony or misdemeanor.” Arizona Revised Statutes § 13-1002(A).

The Washington forgery statute has essentially the same elements. Forgery requires an intent to defraud where the defendant “falsely makes, completes or alters a written instrument,” or “possesses, utters, offers, disposes of, or puts off as true a written instrument.” RCW 9A.60.020(1)(a), (b). Solicitation in Washington has

similar elements as the offense in Arizona; a person is an accomplice to a crime where, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests such other person to commit it. RCW 9A.08.020(3)(a)(i).

The elements of the two statutes are the same and the language used is remarkably similar as well. Both require the false making, completing, or altering of a written instrument with an intent to defraud. Thus, the Arizona offense is comparable to the Washington felony of forgery.

Because Mr. Hill's guilty plea was premised on an incorrect offender score and standard sentence range, his guilty plea was involuntary. *Mendoza*, 157 Wn.2d at 591.

3. *Alternatively, the mutual mistake regarding Mr. Hill's Arizona prior conviction rendered his guilty pleas invalid.*

A defendant's guilty plea is not knowingly made when he bases that plea on misinformation regarding the sentencing consequences. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011).

Generally, a defendant accepts the risk that additional criminal history may be discovered prior to sentencing. *Codiga*, 162 Wn.2d at 928. But, the defendant is not "burdened with assuming the risk of [a] legal mistake." *Id.* at 929.

Mr. Hill was not aware his Arizona prior felony conviction factored into his offender score until after his guilty pleas. He acted immediately in attempting to remedy the error by moving to withdraw his guilty pleas. As in *Robinson*, this was a legal mistake because it turned on his view of the law on determination of offender scores and the comparability of out-of-state convictions.

The improperly calculated offender score rendered Mr. Hill's indivisible plea involuntary. This Court should accept review, find the Arizona prior conviction to be comparable, and find Mr. Hill was either misadvised or there was a mutual mistake as to his offender score.³

F. CONCLUSION

For the reasons, Mr. Hill asks this Court to grant review and remand to the trial court to allow him to withdraw his guilty pleas.

DATED this 16th day of July 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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³ The Court of Appeals also ruled that since Mr. Hill's offender score was "68," any error would have no bearing on his standard range. Decision at 5, fn10. But, a defendant is entitled to a correctly determined standard range. *State v. Parker*, 132 Wn.2d 182, 187-88, 937 P.2d 575 (1997).

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 KEVIN JAMES HILL,)
)
 Appellant.)

No. 76942-1-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: June 18, 2018

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PER CURIAM — Prior to sentencing on his guilty pleas in four separate matters,¹ Kevin Hill moved pro se to withdraw his pleas. He contended his pleas were involuntary because his offender score omitted a prior Arizona conviction and, consequently, he was misinformed regarding a direct consequence of his pleas. Following a hearing during which the State said it did not intend to prove, and could not prove, the Arizona conviction, the court denied Hill's motion. He appeals, arguing that the court abused its discretion in denying his motion to withdraw his pleas. We affirm.

Hill pled guilty with the understanding that his offender score was 68. In moving to withdraw his pleas, he alleged that the State failed to include an Arizona conviction for solicitation of forgery in his offender score. Hill maintained that his offender score was actually 69 and that the misinformation regarding his score rendered his pleas involuntary. In support, he attached a copy of an Arizona judgment and sentence for solicitation of forgery.

¹ The guilty pleas encompassed twenty-two felonies and three misdemeanors. This appeal is taken from Hill's convictions for seven counts of second degree burglary, one count of second degree malicious mischief, and three counts of second degree vehicle prowl.

The State responded that Hill's offender score was correctly calculated and that, in any event, he assumed the risk that his score could increase if additional criminal history was discovered.² In an affidavit, the prosecutor stated:

23. I fully reviewed the Defendant's National Crime Information Center (NCIC) Interstate Criminal History Report to determine if any out-of-state criminal history could be considered as scoreable priors under the SRA, including his history in the State of Arizona. Exhibit C. **There are no prior convictions noted that correspond to the document the Defendant filed as Exhibit B to his motion. While there are similar charges noted in the Defendant's Arizona history, they each are noted with a Disposition of "Court Dismissal."**

24. Because there were no priors to be considered for scoring (or impeachment) purposes from those Arizona records, I did not request any certified documents regarding those cases.

(Emphasis added) CP 112-13. The prosecutor reiterated these points at the hearing on Hill's motion, stating in part:

[PROSECUTOR]: . . . [There is] substantial evidence that that conviction may not be valid even in the state of Arizona. . . . **We do not have here a certified document, do not have here other reliable evidence, and we do have contradictory evidence that indicates that conviction is not comparable.**

THE COURT: Is it fair to say --

...

THE COURT: -- you're not putting that before the sentencing judge?

[PROSECUTOR]: That is correct.

...

² Citing State v. Codiga, 162 Wn.2d 912, 928, 175 P.3d 1082 (2008) (citations omitted), the State argued below:

The Defendant expressly, in writing and on the record in court, assumed the risk that additional criminal history could be found prior to sentencing. The Defendant forfeited his right to argue for withdraw[al] of his plea on this basis. . . . Holding a defendant to such an assumption of risk is necessary to prevent defendants from holding back criminal conviction information to use as an escape hatch to get out of any plea agreement.

CP 120. The Codiga court also held, however, that "the defendant does not assume the risk of miscalculation of the offender score based on a mistake as to the legal effect of a fully disclosed criminal history." Codiga, 162 Wn.2d at 930. Because this issue is not briefed on appeal and we resolve the appeal on other grounds, we do not address it.

[PROSECUTOR]: . . . The State has not seen anything that convinces it that there is a valid comparable felony conviction in the state of Arizona that we have not previously (unintelligible).

[PROSECUTOR]: The State is not asserting that this document . . . the defendant has produced is somehow fraudulent. However, it may not be the final document in the case. The unit in my office works very hard to make sure that we get enough documents so that we know if something happened later. There can be a valid judgment and sentence, or in any case, even in King County, that can later be essentially undone with a different document.

That judgment and sentence still exists. You can still request it and you could still produce it and assert that there is a valid conviction, unless you get that other document. And so it's important and my office works very hard to be careful with what documents it's ordering to determine if these priors are not just comparable but valid in their jurisdiction.

Nothing dependable has been put before this court to establish a comparable, valid, or scorable prior conviction in -- under that specific cause number that the defendant is asserting, and the score should remain the same and the pleas should not be permitted to be withdrawn.

(Emphasis added) RP 248-50. The court then said “[a]nything else?” RP 250.

Neither Hill nor the prosecutor responded.

The court denied Hill's motion to withdraw his pleas, stating in pertinent part:

. . . The court has before it Mr. Hill's motion to withdraw or vacate his guilty pleas. I'm going to deny the request. I think the pleas were entered into . . . knowingly, intelligently, and voluntarily

I'm going to start with the offender score. It is a rare day when a defendant brings forth additional [criminal] history. What I had asked [the prosecutor] is, are you going to stick with the offender score of 68, and she has affirmatively answered yes, because we still don't believe solicitation of forgery can be pled and proven at sentencing.

With that assurance, the Arizona prior offense, although it may exist on paper, doesn't even amount to a mistake, either legal or factual, because the . . . State is simply not going to ask that your offender score be considered the higher number of 69.

Frankly, you're maxed out at nine. So I think the difference between 68 and 69, I'm not trying to minimize the fact that you might have a one point higher offender score, Mr. Hill, but the State is simply not seeking to prove and plead that additional Arizona history.

RP 250-51. Hill appeals.

DECISION

Hill contends the court abused its discretion³ in denying his motion to withdraw his pleas because the parties mistakenly believed, and he was misadvised, that his offender score was 68 when it was actually 69. These mistakes, he argues, rendered the pleas involuntary and entitle him to withdraw the pleas. We disagree.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent.⁴ CrR 4.2(d) codifies this principle and mandates that the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." This rule also allows withdrawal of a plea "to correct a manifest injustice." CrR 4.2(f). A plea may be withdrawn under this standard if it is based on a mistake that bears upon the offender score or sentencing range and renders the plea unknowing and involuntary.⁵ If a defendant has been incorrectly advised of the offender score and accompanying standard range, his plea is involuntary.⁶ If, on the other hand, a defendant is misadvised regarding the offender score but the standard range is the same under either score, the defendant's understanding of the consequences of his plea is unaffected.⁷ "Once an offender score reaches 9, the standard range does not

³ We review the denial of a defendant's motion to withdraw a guilty plea for abuse of discretion. State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966).

⁴ In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004).

⁵ State v. Codiga, 162 Wn.2d 912, 925, 175 P.3d 1082 (2008).

⁶ State v. Mendoza, 157 Wn.2d 582, 589–591, 141 P.3d 49 (2006).

⁷ State v. King, 162 Wn. App. 234, 241, 253 P.3d 120, 124 (2011); see also State v. Wills, 154 Wn. App. 1001, 2010 WL 9085, at *3 ("The offender score is important only to the extent that it impacts the standard sentencing range. . . . Wills's extremely high offender score means that the mistake in the calculation of his score does not effect his standard range. The essential term [of the plea agreement]—the sentencing range—does not change. Therefore, the mutual mistake provision is not triggered. Wills should remain bound by the plea agreement.").

change. RCW 9.94A.510.”⁸

Here, the record establishes that Hill was correctly advised regarding his offender score. The plea documents informed him that his score was 68. Hill claims the score was actually 69 because the State omitted his prior Arizona conviction for solicitation of forgery. But it was *the State's* burden to prove Hill's criminal history,⁹ and the prosecutor told the sentencing court unequivocally that the State could not prove, and Hill's evidence did not prove, the existence of the Arizona conviction. The State points out on appeal, and Hill does not dispute, that the Arizona judgment and sentence Hill submitted below was neither certified nor authenticated. And while a National Crime Information Center Interstate Criminal History Report in the record lists an Arizona forgery committed the same day as the forgery in Hill's judgment and sentence, the report and judgment lack matching case numbers. In any event, the report lists the forgery's disposition as "COURT DISMISSAL." CP 133. Given the evidence presented below, we conclude that there was no mutual mistake or erroneous advice regarding Hill's offender score and that Hill's pleas were knowingly, intelligently, and voluntarily entered.

In addition, we note that even if Hill had been misadvised regarding his score, he would still not be entitled to withdraw his plea because his score is far above 9 and the alleged scoring error would have no effect on his standard range.¹⁰

⁸ State v. King, 162 Wn. App. at 241.

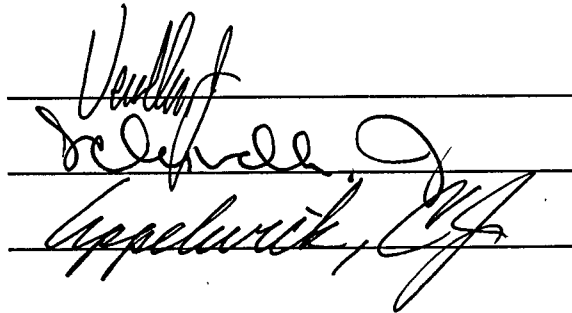
⁹ State v. Arndt, 179 Wn. App. 373, 378, 320 P.3d 104 (2014); State v. Latham, 183 Wn. App. 390, 398, 335 P.3d 960 (2014).

¹⁰ Note 7, supra.

The court did not abuse its discretion in denying Hill's motion to withdraw his pleas.

Affirmed.

FOR THE COURT:

Handwritten signature in cursive script, written over three horizontal lines. The signature appears to be "Vendler" on the first line, "Deborah J." on the second line, and "Appelwick, CJ" on the third line.

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. 76942-1-I**, 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 or residence address as listed on ACORDS:

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Date: July 16, 2018

WASHINGTON APPELLATE PROJECT

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