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Supreme Court No. 98590-1
(COA No. 79735-2-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS MOWER,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
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A. IDENTITY OF PETITIONER

Nicholas Mower, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Mower seeks review of the Court of Appeals decision dated April 20, 2020, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

Whether Mr. Mower is entitled to be sentenced as a non-sex offender for failure to register, where the forms and the colloquy did not establish the offense he was pleading guilty to was a sex offense.

D. STATEMENT OF THE CASE

When Mr. Mower pled guilty to failure to register as a sex offender, he signed a form that set forth the terms of the plea. CP 13. This form unequivocally stated he was pleading guilty to a non-sex offense. *Id.* Each page, including the pages signed by the court and the parties signed, contained a footer

stating Mr. Mower's guilty plea was to a non-sex offense. CP 22-23.

Likewise, when Mr. Mower pled guilty, the court did not advise him that the failure to register offense he was pleading guilty to was a sex offense, only telling Mr. Mower it was a class B felony. RP 6.

The only time anyone mentioned Mr. Mower was pleading guilty to a sex offense was after the colloquy was completed when the prosecutor stated something about a sex offense. RP 7. The record does not establish what the prosecutor said, as the court reporter could not make out the words the prosecutor used. *Id.* It is, however, clear that no one spoke about the aggravated consequences of this guilty plea before it was entered.

The court moved immediately to sentencing. RP 6. The court sentenced Mr. Mower as a third-time offender, which resulted in a higher standard range, designation as an additional sex offense, and with 36 months of community supervision. RP 8, CP 31, 32.

The Court of Appeals denied Mr. Mower relief. The Court of Appeals focused on the words “as a sex offender” to find Mr. Mower had been informed. App. 3. Mr. Mower now asks this Court to accept review, as this language applies to all failures to register, regardless of whether they have the predicate convictions necessary to become an additional distinct sex offense.

E. ARGUMENT

This Court should accept review of whether Mr. Mower’s plea was knowing and voluntary, where the record establishes Mr. Mower believed he was pleading guilty to the non-sex offense version of failure to register as a sex offender.

Mr. Mower asks this Court to accept review of whether he should be resentenced as a non-sex offender where the record at his sentencing hearing does not establish Mr. Mower made a knowing and voluntary plea to a sex offense. This issue involves a significant question of constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

- 1. The Court of Appeals’ decision focuses on the words “as a sex offender,” which is present regardless of*

whether the current offense qualifies as a sex offense.

In its opinion, the Court of Appeals focuses on the words “as a sex offense” to determine that Mr. Mower’s guilty plea was knowing and voluntary. App. 3. This error requires correction by this Court, as the language is present regardless of whether the guilty plea is to the version of failure to register that itself constitutes a sex offense. RCW 9A.44.132(b). Accepting review to issue an opinion correcting this error would aid future courts if this error is again made.

Correction of this opinion is necessary because a guilty plea may only be accepted when the accused understands the nature of the charge and enters the plea knowingly, intelligently, and voluntarily. *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010); U.S. Const. amend. XIV. The evidence does not show Mr. Mower knew his guilty plea was to a sex offense. This Court should accept review to reaffirm that it is an error to accept a plea that is not knowing, intelligent, and voluntarily made. *State v. Buckman*, 190 Wn.2d 51, 58, 409 P.3d 193 (2018).

This Court should also accept review because the Court of Appeals applied the wrong standard for when a trial court's error must be corrected. In its opinion, the Court of Appeals held that Mr. Mower could not establish the error was manifest. App. 4. But, because of the constitutional rights waived by a guilty plea, the government bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). "The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." *Wood v. Morris*, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

Also, Mr. Mower was not required to show the misinformation was material to his decision to plead guilty. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006); *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 939, 205 P.3d

123 (2009). The burden of establishing manifest error should not have been placed on Mr. Mower.

2. The trial record establishes Mr. Mower was misinformed about his guilty plea.

The Court of Appeals appears to misinterpret RCW 9A.44.132, offenses for which can be either sex or non-sex offenses, depending on whether a person has a predicate conviction. App. 3. Focusing on the words “as a sex offender” does not establish Mr. Mower knew his current guilty plea was to a sex offense. Instead, the record establishes Mr. Mower was not pleading guilty to a sex offense, as every page of the form, including the signature pages stated his current offense was not a sex offense. CP 13. Likewise, the plea colloquy does not establish anyone informed Mr. Mower of the consequences of his guilty plea before it was entered. RP 6.

Mr. Mower’s guilty plea forms state he was pleading guilty to a non-sex offense. This Court relies on the guilty plea form as prima facie evidence that a plea is knowing, intelligent and voluntary. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); *State v. Codiga*, 162

Wn.2d 912, 923, 175 P.3d 1082 (2008). This Court should not be confident Mr. Mower understood what he was pleading guilty to when the guilty plea forms misstate the consequences of Mr. Mower’s guilty plea.

First, the captioned title stated Mr. Mower was pleading guilty to a non-sex offense.

Superior Court of Washington for	
<u>State of Washington</u>	No. 18-1-00829-29
Plaintiff	Statement of Defendant on Plea of Guilty to Non-Sex Offense (Felony) (STDFG)
v.	
<u>Nicholas H. Mower</u>	
Defendant	

CP 13.

Every page of the guilty plea statement confirmed this for Mr. Mower, as they had a footer with the same language, saying “Statement on Plea of Guilty (Non-sex offense).”

Statement on Plea of Guilty (Non-Sex Offense) (STDFG) - Page 1 of 11
CrR 4.2(g) (03/2018)


Id.

Nor was this mistake corrected in the plea colloquy. The court did not inform Mr. Mower the offense was a sex

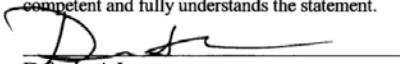
offense, instead only asking Mr. Mower whether he was pleading guilty to “Count Number I, failure to register as a sex offender, which is a Class B Felony.” RP 6.

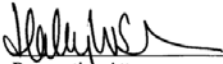
Likewise, the statement of guilty, submitted to the court, signed by Mr. Mower, his attorney, and the prosecutor all plainly stated otherwise. CP 22.

APPROVED. I understand that Mr. Mower has been given a copy of this Statement of Plea and a copy of the Plea of Guilty. I have no further questions to ask the judge.


Defendant

I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the statement.


Defendant's Lawyer


Prosecuting Attorney

Haley Sebens 43320
Print Name WSBA No.

Devin Hennessey 53095
Print Name WSBA No.

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:


(a) The defendant had previously read the entire statement above and that the defendant understood it in full;

Statement on Plea of Guilty (Non-Sex Offense) (STTDFG) - Page 10 of 11
CrR 4.2(g) (03/2018)

CP 22.

The trial court also signed this document, also on a page designating Mr. Mower’s guilty plea to a non-sex offense.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: March 14, 2019 
Judge

CP 23.

Statement on Plea of Guilty (Non-Sex Offense) (STDFG) - Page 11 of 11
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Id.

Pleading guilty to failure to register as a third offense had serious consequences to Mr. Mower. RCW 9A.44.132(1)(b). Rather than sentencing Mr. Mower to a felony with no additional registration requirements or community supervision, Mr. Mower's plea subjected him to a new sex offense, with an additional 36 months of community supervision. *Id.* These are direct consequences, as they have a direct effect on Mr. Mower's punishment. *Bradley*, 165 Wn.2d at 939.

Mr. Mower's guilty plea statement also does not make out a factual basis for a conviction for failure to register as a

sex offense. RCW 9A.44.132. In the statement, Mr. Mower agrees he has been convicted previously of failure to register offenses, but not under RCW 9A.44.130. Because convictions stemmed from a different statutory scheme, the existence of these prior convictions does not automatically render his present conviction a sex offense. This statement does not demonstrate Mr. Mower knew he was pleading guilty to the aggravated failure to register offense. *State v. Wilcox*, 196 Wn. App. 206, 208, 383 P.3d 549 (2016). Thus, Mr. Mower's previous convictions should not act as aggravators, further demonstrating his plea was not knowing, intelligent, and voluntarily made.

3. This Court should accept review to correct the Court of Appeals' error and to order resentencing for Mr. Mower.

A guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). Mr. Mower asks this Court to accept review of this matter, to hold that his plea was not knowing and voluntary

and to correct the error in allowing his guilty plea to stand without resentencing.

F. CONCLUSION

Based on the preceding, Mr. Mower respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 19th day of May 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

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Court of Appeals Opinion APP 1

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

STATE OF WASHINGTON,)	No. 79735-2-I
)	
Respondent,)	
)	
v.)	
)	
NICHOLAS HAYES MOWER,)	UNPUBLISHED OPINION
)	
Appellant.)	
<hr/>		

VERELLEN, J. — Nicholas Mower contends his plea was not knowing and voluntary because the title and footer of the statement on plea of guilty incorrectly identified failure to register as a sex offender as a non-sex offense. The statement otherwise correctly identified the crime. Mower does not assert that these misstatements materially influenced his decision to plead guilty. He does not assert that he was unaware of the direct consequences of his plea. Rather than seeking to withdraw his plea, Mower seeks resentencing for a non-sex offense. These misstatements do not constitute manifest constitutional error and do not warrant the requested relief.

Mower also argues the court erred at sentencing when it found he had two prior qualifying convictions for failure to register. Under the law in effect at the time of the current offense, Mower had two prior qualifying convictions. Mower does not establish any error.

Therefore, we affirm.

FACTS

The State charged Mower with one count of failure to register as a sex offender and one count of escape. Mower pleaded guilty. The court sentenced Mower to the agreed recommendation of 43 months' incarceration and 36 months' community custody.

Mower appeals.

ANALYSIS

I. Guilty Plea

Mower contends his plea was not knowing and voluntary because the title and footer of the statement on plea of guilty incorrectly identified failure to register as a sex offender as a non-sex offense.

Mower raises this issue for the first time on appeal.¹ Because “[d]ue process requires that a guilty plea be knowing, intelligent, and voluntary,”² Mower’s claimed error implicates a constitutional right. But to obtain review, Mower must still establish the error is manifest. To establish an error is

¹ See RAP 2.5(a)(3) (“The appellate court may refuse to review any claim of error which was not raised in the trial court,” but a party may raise a “manifest error affecting a constitutional right” for the first time on appeal.).

² In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001) (citing U.S. Const. amend. XIV; Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)).

manifest, the defendant must show “the asserted error had practical and identifiable consequences in the trial of the case.”³

Here, the State charged Mower with failure to register as a sex offender. But the statement on plea of guilty contained a footer on each page that read “Statement on Plea of Guilty (Non-Sex Offense).”⁴ And the form was titled “Statement of Defendant on Plea of Guilty to Non-Sex Offense.”⁵

But within the form, Mower stated, “I am charged with: ct 1 Failure to Register as a Sex Offender – 3rd Offense.”⁶ And the statement identified the correct elements of failure to register as a sex offender. Mower stated, “I plead guilty to: count 1 Failure to Register as a Sex Offender – Third Offense.”⁷ Additionally, Mower stated, “ON or about and between July 9, 2018 and October 7, 2018, in Skagit County, Washington, I had a duty to register with the Sheriff’s department as a sex offender . . . and I failed to do so . . . and have been convicted of failure to register on at least two prior occasions.”⁸ Mower signed the statement, indicating he read and understood the form.

Mower does not assert that the misstatements in the footer and title of the form materially influenced his decision to plead guilty. He does not assert that he

³ State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

⁴ Clerk’s Papers (CP) at 13-23.

⁵ CP at 13.

⁶ Id. (emphasis added).

⁷ CP at 21 (emphasis added).

⁸ CP at 22 (emphasis added).

was unaware of the direct consequences of his plea. Mower does not seek withdrawal of his plea. Rather, Mower asks this court to remand for resentencing under the statutory scheme for non-sex offenses. But even if considered a form of specific performance, resentencing as a non-sex offense is not an available remedy because there was no mutual mistake or breach of the plea agreement.⁹

We conclude this misinformation did not render Mower's plea involuntary, does not constitute manifest constitutional error, and does not warrant the relief he requests on appeal.

II. Sentencing

Mower argues the court erred at sentencing when it found Mower had two prior qualifying convictions for failure to register.

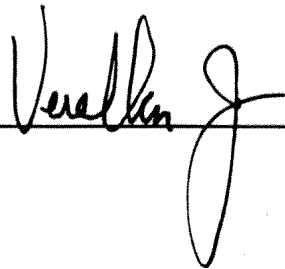
“For purposes of sentencing, we look to the law in effect at the time the defendant committed the current offense.”¹⁰ Mower committed the current offense, the crime of failure to register as a sex offender, between July 9, 2018 and October 7, 2018. At that time, under RCW 9.94A.030(48)(a)(v), a “sex offense” included, in part, “[a] felony violation of RCW 9A.44.132(1) (failure to register as a sex offender) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130 prior to June 10, 2010, on at least one prior occasion.”

⁹ See State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011) (“Specific performance of a plea agreement arises in two main contexts: breach of the plea agreement by the prosecutor and mutual mistake by both parties (and the court) as to the consequences of the plea.”) (emphasis added).

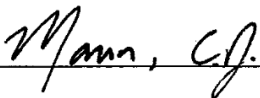
¹⁰ In re Pers. Restraint of Carrier, 173 Wn.2d 791, 808-09, 272 P.3d 209 (2012) (emphasis added) (citing RCW 9.94A.345).

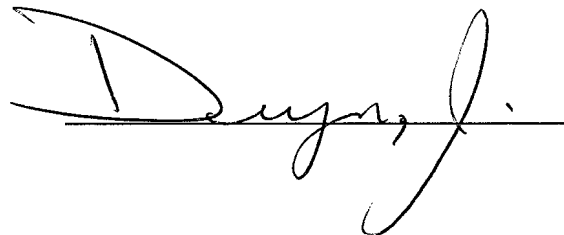
Mower relies on State v. Wilcox¹¹ to argue the court should not have counted his prior convictions. Before 2015, the definition of “sex offense” under (v) included only “felony violation of RCW 9A.44.132(1).”¹² In 2015, the legislature amended the statute to add convictions under RCW 9A.44.130.¹³ In Wilcox, Division Two of this court found the 2015 amendment did not apply retroactively.¹⁴ But in Wilcox, the defendant committed his current offense prior to the 2015 amendment. Here, Mower committed his current offense long after the 2015 amendment. Wilcox does not apply. At the time of the current offense, Mower had numerous prior failure to register offenses, including one in 2015 and one in 2010. Mower fails to establish the trial court incorrectly counted his prior failure to register offenses when it sentenced him as a third-time offender.

Therefore, we affirm.



WE CONCUR:





¹¹ 196 Wn. App. 206, 383 P.3d 549 (2016).

¹² Former RCW 9.94A.030(46)(a)(v) (2012).

¹³ LAWS OF 2015, ch. 261, § 12.

¹⁴ Wilcox, 196 Wn. App. at 212-13.

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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. 79735-2-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: May 19, 2020

WASHINGTON APPELLATE PROJECT

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