

No. 60720-1-I

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

IN RE PERSONAL RESTRAINT OF

HUBBA DeWAYNE TEAL,

v.

STATE OF WASHINGTON, Respondent.

**SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT PETITION RE: APPLICABILITY
OF In Re McKiernan**

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A. AUTHORITY OF RESTRAINT OF PETITIONER

Petitioner Hubba Teal is restrained pursuant to Judgment and Sentence entered in Whatcom County Superior Court cause number 05-1-895-2 to the extent *this* conviction serves as predicate strike offense for Teal's persistent offender sentence arising out of Snohomish County cause number 98-1-473-2. See, State's Response Brief to petition, App. A, B, incorporated herein by reference. Teal filed this personal restraint petition nine years after pleading guilty pursuant to a plea agreement with the State, asserting for the first time that his judgment and sentence is invalid on its face and requesting he be permitted to withdraw his 1996 guilty plea on the basis that it was entered into involuntarily.

Contrary to the State's previous concession, a close examination of Teal's guilty plea, criminal history and agreed modified sentence reveal Teal's 14-month sentence is within the standard range of 11-15 months Teal properly faced.¹ Although Teal's judgment and sentence is technically defective because it lists an erroneous offender score and corresponding sentence range, Teal should nonetheless be precluded from

¹ Previously, the state conceded Teal's standard range was miscalculated; that he had an offender score of 3.5 and faced a standard range of 9.75-12.75 months. The state overlooked the fact that Teal was, as a matter of law, on community placement at the time he plead guilty in Whatcom County and Teal therefore had an offender score of 4 and properly faced a range of 11-15 months incarceration as explained by the prosecutor at Teal's plea and sentencing hearing in 1996. The state's concession that Teal was sentenced outside the standard range was therefore made in error.

withdrawing his guilty plea pursuant to In re McKiernan, 165 Wn.2d 777, 203 P.3d 375 (2009), because the record reflects he voluntarily pled guilty knowing there was a dispute over these calculations and therefore assumed the risk the offender score and sentence range were not accurate.

At the time of Teal's guilty plea, Teal knew the prosecutor was asserting Teal had an offender score of 4 and range of 11 to 15 months. See RP 5-6. Teal also knew his attorney determined that his offender score was a 3.5 and was arguing for a lower standard range. When questioned by the judge, Teal agreed the sentence range of 10-15 months was "basically correct" but given his cooperation Teal hoped for the low end of the standard range sentence. RP 5-6. This record demonstrates Teal's guilty plea was not predicated on misinformation, was involuntary or resulted in a manifest injustice. Teal's untimely personal restraint petition should be dismissed.

B. ISSUES PRESENTED

Whether Teal's 1996 judgment and sentence is facially invalid and guilty plea involuntary pursuant to In re McKiernan where the judgment lists an erroneous offender score and sentence range but the record otherwise establishes Teal pled guilty knowing these calculations were disputed, Teal agreed to a standard range sentence and the technical misstatements therefore had no actual effect on Teal.

C. ARGUMENT

1. In re McKiernan requires more than technical misstatements that had no actual effect on Teal's rights to render Teal's judgment and sentence invalid on its face.

Teal asserts his judgment and sentence reveals he agreed to a sentence outside the standard range and his judgment is therefore facially invalid and that In re McKiernan, 165 Wn.2d 777, 203 P.3d 375 (2009), has no impact on his petition. Teal is wrong.

As a matter of law contrary to the State's previous concession, Teal's judgment and sentence reveal Teal was not sentenced outside the correct standard range Teal faced predicated on his agreed criminal history. Teal listed three offenses as his criminal history and was, as a matter of law, on statutorily mandated community placement for his most recent felony assault conviction as evidenced by the date of conviction and statutorily mandated provisions of former RCW 9.94A.380. Teal therefore had an offender score of 4 and properly faced a standard range of 11-15 months (75% of 15-20 month range) incarceration as explained by the prosecutor at Teal's plea and sentencing hearing. RP 5. Because Teal's judgment reveals he agreed to a modified sentence that was within the appropriate standard range, the State withdraws its previous concession that Teal was improperly sentenced outside the standard range. *See, In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002); State v.

Knigheten, 109 Wn.2d 896, 748 P.2d 1118 (1988) (Courts are not bound by an erroneous concession of error).

The issue in this case is, consequently, whether the technical errors on the face of Teal's judgment and sentence pertaining to his offender score and sentence range render his judgment and sentence facially invalid pursuant to In re McKiernan, 165 Wn.2d 777 and whether even if facially defective, Teal can nonetheless demonstrate his guilty plea was entered into involuntarily where he entered into his guilty plea knowing the parties were disputing his offender score and specific sentence range.

In In re McKiernan, the petitioner argued that a mistaken statement regarding the maximum sentence on the judgment and sentence and in his guilty plea statement rendered his judgment and sentence facially invalid and his guilty plea involuntary. Consequently, McKiernan argued he was entitled to withdraw his 20 year old guilty plea because his judgment reflected an erroneous statement regarding the maximum sentence and because his guilty plea demonstrated he was misinformed as to this sentence consequence at the time of his plea.

A judgment is facially invalid when a judgment and sentence evidences invalidity without further elaboration. In re Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002). A reviewing court may use the documents signed as part of the plea agreement to determine facial

invalidity only if those documents are relevant in assessing the validity of the judgment and sentence. In re Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). The McKiernan Court clarified that the plea agreement is only relevant to determine if the judgment and sentence standing alone is facially invalid. *Citing, In re Hemenway*, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). An alleged defective plea statement does not automatically render a judgment and sentence invalid on its face. The Court determined consequently, that to be facially invalid, a “judgment and sentence requires a more substantial defect than a technical misstatement as to the maximum sentence that had no actual effect on the petitioner.”

McKiernan, at 779.

The Court reasoned that because McKiernan’s judgment and sentence revealed he was convicted of a valid crime by a court of competent jurisdiction, was sentenced within the standard range, was aware of the standard range he faced and the maximum sentence he potentially could face regardless of the misstatement, his judgment and sentence was facially valid and his petition was therefore time barred.

As distinguished from McKiernan, Teal’s judgment and sentence evidences technical misstatement as to the offender score and standard range listed, not the maximum sentence range. Nonetheless, Teal was convicted of a valid crime by a court of competent jurisdiction, he was

sentenced within the standard range he properly faced, was informed of the maximum sentence he could face and was aware at the time he plead guilty that there was a dispute as to what his offender score and specific sentence range was. Teal was aware and agreed he “basically” faced a 10-15 month sentence range, that he had either an offender score of 3.5 or 4 and subsequently agreed to a 14 month sentence that is within the standard range Teal properly faced. Therefore, the misstatements in his judgment and sentence had no actual effect on Teal. Pursuant to In re McKiernan, the technical defects on the face of Teal’s judgment and sentence are therefore not substantive and do not render Teal’s judgment and sentence substantively facially defective.

- 2. Even if Teal’s judgment and sentence is construed as facially invalid, Teal may not withdraw his guilty plea pursuant to In re McKiernan because his plea was not predicated on misinformation as to the sentencing consequences.**

Regardless of the facial invalidity of Teal’s judgment and sentence, Teal cannot demonstrate his guilty plea was predicated on misinformation because he was aware there was a dispute over his offender score and specific sentence range when he plead guilty. Teal therefore assumed the risk of this uncertainty when he knowingly and voluntarily pled guilty.

Due process requires a defendant’s guilty plea be knowing, voluntary and intelligent. In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A

defendant may withdraw a guilty plea if withdrawal is necessary to correct a manifest injustice. CrR 4.2. A defendant seeking to withdraw his plea has the burden of demonstrating a manifest injustice exists. State v. Ross, 129 Wn.2d 279, 283-4, 916 P.2d 405 (1996). “Manifest injustice” is defined as “obvious, directly observable, overt, not obscure.” State v. Ross, 129 Wn.2d at 283-4 (1996), *citing*, State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). Manifest injustice occurs if the plea was involuntary or if trial counsel was ineffective. State v. Taylor, 83 Wn.2d 594, 596-97, 521 P.2d 699 (2000).

A plea is involuntary if a defendant does not understand the direct consequences of pleading guilty. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). Direct consequences have a definite, immediate and largely automatic effect on the defendant’s punishment. Id. A defendant may challenge the voluntariness of his plea when the record demonstrates the defendant was misinformed about the offender score and corresponding sentencing range regardless of whether the error results in a higher or lower sentence range. State v. Mendoza, 157 W.2d 582, 584, 141 P.3d 49 (2006).

Teal asserts that In re Bradley, ___ Wn.2d ___, 205 P.3d 123 (2009) is dispositive to his request to withdraw his guilty plea. In In re Bradley, the court permitted the petitioner to withdraw his guilty plea because his

offender score was miscalculated at the time of his plea and sentencing for one of two crimes for which he plead guilty to. The court determined that although the miscalculation had no “actual effect” on his sentence because the offender score was correct on the more serious offense that ran concurrent to second offense that carried a less onerous sentence range, the court determined the error on the face of the judgment and sentence rendered his judgment facially invalid and his guilty plea involuntary. In Teal’s case however, contrary to In re Bradley, the record demonstrates Teal was not misinformed as to the offender score or sentence range (because this was disputed at the time of the plea) and In re Bradley is therefore not dispositive to this petition.

When a defendant pleads guilty knowing there is a dispute regarding the offender score calculation and sentence range calculations the defendant assumes the risk the offender score and standard range established at sentencing will be different than the sentencing calculations set forth in the guilty plea statement. State v. Paul, 103 Wn.App. 487, 12 P.3d 1036 (2000), State v. Moore, 75 Wn.App. 166, 876 P.2d 959 (1994). In these cases the discrepancy between the guilty plea and judgment and sentence calculations do not render the guilty plea involuntary because the defendant was not misinformed of a sentencing consequence at the time of

the guilty plea but instead, assumed the risk that the offender score and standard range could be, as a matter of law, different than hoped.

Paul and Moore are dispositive to the voluntariness of Teal's guilty plea and consistent with the court's reasoning in Mendoza wherein the court held that when a defendant is informed at sentencing his guilty plea was predicated on a miscalculation of the sentence range and the defendant does not object or move to withdraw the plea on that basis at that time, the defendant waives his right to thereafter challenge the voluntariness of the plea. Mendoza at 584.

Teal pled guilty agreeing he was "basically" facing a 10-15 month sentence regardless of whether the trial court agreed with the prosecutor that his offender score was a 4 and that he faced a 11-15 month standard range sentence or with his attorney, who asserted he had an offender score of 3.5 and faced a lower standard range. Teal chose to plead guilty despite this uncertainty to take advantage of a plea offer from the State to plead to an amended charge. Teal therefore assumed the risk of this uncertainty and cannot now claim his plea was involuntarily made because it was not predicated on misinformation.

Moreover, when Teal was subsequently informed the offender score and standard range listed in his judgment and sentence was incorrect at a re-sentencing hearing, Teal again did not move to withdraw his plea but

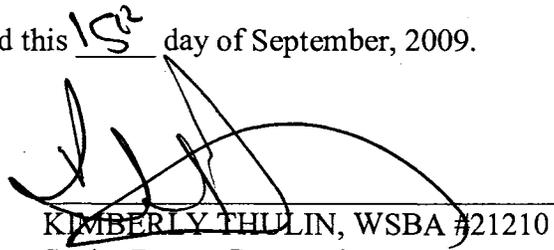
instead agreed to a modified 14 month sentence. Teal's failure to object at this time further evinces his guilty plea was not predicated on a specific expectation of what his sentence range was at the time he chose to plead guilty.

Because the record reveals Teal's guilty plea was not predicated on misinformation and he was never substantively misinformed as to the sentencing consequences of his plea, his choice to plead guilty to an amended charge in 1996 was made knowingly and voluntarily and did not result in a manifest injustice. Under these circumstances it would be unconscionable to require the trial court to try to re-try Teal for his crime after so much time has past, assuming the State could even find witnesses from 1995. *See, State v. Miller*, 110 Wn.2d 528, 141 P.3d 49 (2006).

D. CONCLUSION

Teal's request to withdraw his guilty plea should be denied and his personal restraint petition dismissed.

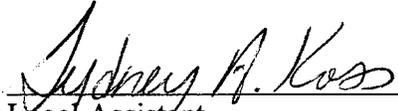
Respectfully submitted this 15th day of September, 2009.


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CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court and to Petitioner's counsel, Jeffrey Ellis, addressed as follows:

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Date