

COA No.67356-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SCHREIB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT  
OF SKAGIT COUNTY

The Honorable Michael Rickert  
The Honorable David Needy

REPLY BRIEF

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**TABLE OF CONTENTS**

A. REPLY ARGUMENT ..... 1

    1. THE TRIAL COURT IMPLICITLY FOUND THAT THE MOTION TO WITHDRAW PLEA WAS A CRITICAL STAGE OF THE LITIGATION AND MR. SCHREIB DID NOT VALIDLY WAIVE COUNSEL ..... 1

    2. THE TRIAL COURT ERRED IN FINDING MR. SCHREIB’S MOTION TO WITHDRAW HIS PLEA OF GUILTY WAS TIME-BARRED, AND IN ANY EVENT MR. SCHREIB IS ENTITLED TO WITHDRAW HIS PLEA ON APPEAL ..... 3

        a. The trial court did not comply with CrR 7.2(b), the document recently filed in the trial court by the Respondent on February 24, 2012 was not a part of the trial court record, and in any event it fails to establish compliance with the Rule ..... 3

        b. Mr. Schreib’s motion to withdraw his guilty plea was also timely because the trial court entered an Order Denying Defendant’s Motion to Withdraw Guilty Plea on June 22, 2011, following the court’s June 15, 2011, Order Modifying Judgment and Sentence and imposing an illegal term of community custody, and the defendant’s final, June 15, 2011 handwritten motion to withdraw his plea. .... 6

        c. Mr. Schreib’s motion to withdraw his guilty plea was timely filed because the judgment, as modified to impose an illegal term of community custody, was invalid on its face. ..... 8

        d. On these bases, Mr. Schreib is entitled to withdraw his plea on appeal. ..... 9

E. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). . . . . 9

State v. Calhoun, 134 Wn. App. 84, 138 P.3d 659 (2006) . . . . . 6

In re Carter, 154 Wn. App. 907, 230 P.3d 181 (2010) . . . . . 5,6

In re Coats, --- P.3d ----, 2011 WL 5593063 (2011) . . . . . 8,9

Garrison v. Rhay, 75 Wn.2d 98, 449 P.2d 92 (1968) . . . . . 1

State v. Harell, 80 Wn. App. 802, 911 P.2d 1034 (1996) . . . . . 1,2

In re Pers. Restraint of McKiernan, 165 Wn.2d 777, 203 P.3d 375 (2009). . . . . 8

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006). . . . . 11

State v. Robinson, 104 Wn. App. 657, 17 P.3d 653 (2001) . . . . . 1

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996). . . . . 11

State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009, review denied, 168 Wn.2d 1027 (2010) . . . . . 8

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) . . . . . 10

**STATUTES AND COURT RULES**

RCW 10.73.090 . . . . . 4

RCW 10.73.110 . . . . . 5

CrR 7.2(b)(6). . . . . 3,4,5

CrR 4.2 . . . . . 11

CONSTITUTIONAL PROVISIONS

Wash. Const. art. I, § 3 ..... 11

Wash. Const. art. I, § 22 ..... 1

U.S. Const. amend. 6. .... 1

U.S. Const. amend. 14. .... 11

UNITED STATES SUPREME COURT CASES

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274  
(1969). .... 11

Mempa v. Rhay, 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254  
(1967). .... 1

## A. REPLY ARGUMENT

### 1. THE TRIAL COURT IMPLICITLY FOUND THAT THE MOTION TO WITHDRAW PLEA WAS A CRITICAL STAGE OF THE LITIGATION AND MR. SCHREIB DID NOT VALIDLY WAIVE COUNSEL.

A criminal defendant has a right to the assistance of counsel at every "critical stage" of a criminal proceeding. U.S. Const. amend. 6; Wash Const. art. I, § 22; Mempa v. Rhay, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); see Appellant's Opening Brief, at p. 22 (citing Mempa).

A stage of criminal litigation is critical if it presents a possibility of prejudice to the defendant. State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996) (citing Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968)).

Mr. Schreib recognizes the Washington decisions holding that a defendant, on a motion to withdraw a plea of guilty made after judgment, is not entitled to counsel. See Brief of Respondent, at pp. 15-16. However, the trial court, given that it determined that Mr. Schreib should have counsel, advised him against waiving counsel, and pursued procedures intending to satisfy the

requirements of waiving the right, necessarily held that Mr. Schreib's motion to withdraw his plea was a "critical stage" of the criminal litigation.

The court could only have been operating under a first determination that this was a "critical stage." For example, in State v. Harrell, this Court, operating under a standard requiring the defendant to make an adequate showing of ineffective assistance of counsel in connection with the entry of his plea before being entitled to counsel and a hearing on plea withdrawal, concluded that where the trial court held the hearing, it had necessarily determined that the defendant was entitled to counsel:

The State asserted during oral argument that a hearing was unnecessary because Harell did not make a preliminary showing warranting a hearing on his motion to withdraw his pleas. But the State did not assign error to the trial court's decision to have a hearing. Nor did the State allege that the trial court abused its discretion by holding the hearing. Implicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing. Therefore, we need not determine the degree of specificity required to be shown by a defendant who seeks to withdraw his plea based upon alleged ineffectiveness of counsel, before the right to counsel attaches and a hearing is required.

State v. Harell, 80 Wn. App. at 804-05. Here, the trial court was entitled to conclude that the motion to withdraw plea was a critical

stage of the litigation, given the unique circumstances below. The defendant's motion to withdraw his guilty plea, was being heard in the same time frame and frequently in the same day's court proceedings as the State's motion to revoke his SSOSA. Notably, OPD (the Office of Public Defense) appointed counsel specifically for the motion to withdraw plea. 5/25/11RP at 4-5; CP 81-82; Supp. CP \_\_\_\_, Sub # 124.

Mr. Schreib argues that he had a right to counsel on his motion to withdraw his plea, and that he did not validly waive that right. Appellant's Opening Brief, at pp. 23-27.

**2. THE TRIAL COURT ERRED IN FINDING MR. SCHREIB'S MOTION TO WITHDRAW HIS PLEA OF GUILTY WAS TIME-BARRED, AND IN ANY EVENT MR. SCHREIB IS ENTITLED TO WITHDRAW HIS GUILTY PLEA ON APPEAL.**

**a. The trial court did not comply with CrR 7.2(b), the document recently filed in the trial court by the Respondent on February 24, 2012 was not a part of the trial court record, and in any event it fails to establish compliance with the Rule.** The record of Rodney Schreib's sentencing does not indicate that he was ever advised of the time limits that apply to collateral attack. There is no indication in the record that Mr. Schreib ever received a

copy of the judgment and sentence at the time of sentencing.

5/14/09RP at 1-5.

The Department of Corrections document filed February 24, 2012 by the appellate prosecutor, which appears to indicate that the defendant was given a copy of his judgment by DOC, was not a part of the trial court record,<sup>1</sup> and must not be considered by this Court, as argued in the Motion to Strike. Even if this document were to be considered, it in any event fails to satisfy Criminal Rule 7.2(b), requiring the trial court to inform the defendant, at sentencing, on the record, of the time limit on collateral attack.

CrR 7.2(b)(6) clearly requires that notice of the time limits on the right to collateral attack imposed by RCW 10.73.090 shall (a) be pronounced to the defendant at the sentencing proceeding, and (b) provides that such advisement shall be made a part of the record of sentencing. Neither requirement was satisfied here, a point the Respondent does not dispute. Respondent also does not dispute that no document entitled "Notice of Rights on Appeal and Certificate of Compliance with CrR 7.2(b)" was ever filed in the court docket of sentencing.

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<sup>1</sup> Appellant is concurrently filing a Motion to Strike the Respondent's reference to a document that was not a part of the trial court record.

The newly-filed DOC document, dated the day after sentencing, appears to inform Mr. Schreib of the conditions of community custody, seemingly for purposes of his SSOSA sentence, and indicates Mr. Schreib acknowledges receiving a copy of his judgment. This extraneous document does not satisfy the Rule. It fails to demonstrate that Mr. Schreib was informed of the time limits for collateral attack by the trial court after pronouncing sentence, and it fails of course to erase the fact that no such advisement was placed into the record of the sentencing hearing. The Rule, along with the similar requirements of RCW 10.73.110, plainly requires trial courts to advise the defendant at that time.

The case of State v. Carter, 154 Wn. App. 907, 914, 230 P.3d 181 (2010), as amended (Aug. 24, 2010), reversed and remanded on other grounds, 172 Wn.2d 917, 263 P.3d 1241 (2011), provides no support for the Respondent's contention that this new document carries significance. There, "[t]he superior court [found] that Carter received a copy of his judgment and sentence at sentencing and from his habeas attorney in 2002." Carter, 154 Wn. App. at 913-14. Carter *acknowledged* that he had received the document, and specifically challenged the adequacy of the

language of the document for purposes of informing him of the collateral attack time limits. The Court of Appeals therefore excused the fact that the trial court had not orally advised the defendant of these time restrictions. Carter, 154 Wn. App. at 913-14.

Here, Mr. Schreib did not receive a copy of the judgment at sentencing. Although the Carter case notes that the defendant there also received a copy of the judgment at a later date, it includes facts that satisfy this critical aspect of the Rule – advisement at the time of sentencing. The Rule was complied with, except for an oral advisement by the Court. Here, there is no such showing. State v. Calhoun, 134 Wn. App. 84, 87-88, 138 P.3d 659 (2006) (finding time bar inapplicable where defendant “was not told of the time limit for review when his judgment and sentence was pronounced”).

**b. Mr. Schreib’s motion to withdraw his guilty plea was also timely because the trial court entered an Order Denying Defendant’s Motion to Withdraw Guilty Plea on June 22, 2011, following the court’s June 15, 2011, Order Modifying Judgment and Sentence and imposing an illegal term of community custody, and the defendant’s final, June 15, 2011 handwritten**

**motion to withdraw his plea. CP 92, 94.** The Respondent has failed in its Brief to respond to this argument. Mr. Schreib represented himself for purposes of his motion to withdraw his plea. His final (of many) handwritten motion to this effect was filed, apparently after the trial court on June 15, 2011 ordered his SSOSA revoked. Thereafter the court issued an order on June 22, 2011, denying the defendant's repeated motions to withdraw his plea.

The final motion – if not the prior motions to the same affect – must be deemed timely collateral attacks, as filed within 1 year of judgment. The court's June 15, 2011 Order Modifying Judgment imposed an illegal term of community custody for "life", a point conceded by the Respondent. The trial court on that date did not simply impose a previously handed-down sentence, which was suspended on the basis that Mr. Schreib was given a SSOSA alternative. Rather, this was a new sentencing hearing.

Notably, the prior "sentence" listing Mr. Schreib's standard range prison term (suspended under the sentencing alternative) had stated no period of community custody. The trial court's June 15, 2011 order, imposing the previously listed prison terms, and community custody for "life," was not only in excess of its statutory

authority, it was the first time the court had ever imposed a full criminal sentence, including community custody. This was Mr. Schreib's sentencing hearing, at which the trial court exercised discretion to decide sanction. It was not a ministerial imposition of a sentence that had previously been imposed. See State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009), review denied, 168 Wn.2d 1027 (2010) (ministerial correction of sentencing error as directed by appellate court is not new sentencing hearing). Mr. Schreib's motion to withdraw his plea was timely filed within 1 year of judgment.

**c. Mr. Schreib's motion to withdraw his guilty plea was timely filed because the judgment, as modified to impose an illegal term of community custody, was invalid on its face.** The time limits applicable to collateral attack, such as a motion to withdraw a guilty plea, do not apply if the judgment and sentence is invalid on its face. In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).

The Respondent has provided no citation to authority which supports the argument that Mr. Schreib's sentence was not invalid on its face for purposes of the time limit on collateral attack. The State's citation to In re Pers. Restraint of Coats, 173 Wn.2d 123,

267 P.3d 324, 335 (2011), and cases cited therein, stand for the proposition that a judgment misstating the standard sentencing range is not invalid on its face, but rather, invalidity requires a judgment in which the court has exceeded its statutory sentencing authority. See Brief of Respondent, at pp. 13-15.

Here, the trial court's judgment and sentence was invalid on its face. The judgment and sentence, as modified by the order of June 15, 2011, imposed a community custody term of "life," vastly exceeding the sentencing court's statutory authority. This order of modification renders the original judgment and sentence invalid on its face. State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719, 718 P.2d 796 (1986).

**d. On these bases, Mr. Schreib is entitled to withdraw his plea on appeal.** In conceding that the trial court's order of community custody for "life" issued June 15, 2011 was illegal, the Respondent states that Mr. Schreib's proper term of community custody was 36 to 48 months. Brief of Respondent, at pp. 11-12. However, Mr. Schreib's March, 2009 plea statement indicates he was advised in one instance that the community custody range was 18-36 months, and in another that it was 36-48 months. CP 5, 7

(plea statement). Specifically, the second page of the plea statement indicates as follows:

IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

\* \* \*

COMMUNITY CUSTODY RANGE: 18 – 36 months.

CP 5. Yet paragraph (f)(ii) of the plea statement states that the community custody range is 36-48 months. CP 7.

Mr. Schreib is entitled to withdraw his plea on appeal, based on the date of sentencing of June 15, 2011. A defendant may withdraw his plea on appeal. State v. Walsh, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001) (challenge to voluntariness of plea can be raised for the first time on appeal where basis was clear and undisputed from the record). In the present case, all of the facts necessary to demonstrate grounds for plea withdrawal are present in the record.

A post-sentencing motion to withdraw a plea of guilty must be made within one year of judgment. Here, the defendant was finally sentenced when the trial court, for the first time, on June 15, 2011, imposed a sentence consisting of both incarceration, and community custody.

The misstatement of the community custody range constitutes a manifest injustice. A guilty plea must be knowing, intelligent, and voluntary to satisfy federal and state constitutional due process requirements. See U.S. Const. amends. 5, 14; Wash. Const. art. I, § 3; Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). CrR 4.2 provides further safeguards by requiring the trial court to determine that (1) the defendant's plea is voluntary and competently made, with an understanding of the nature of the charge and the consequences of the plea, and (2) there is a factual basis for the plea. CrR 4.2(d); State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

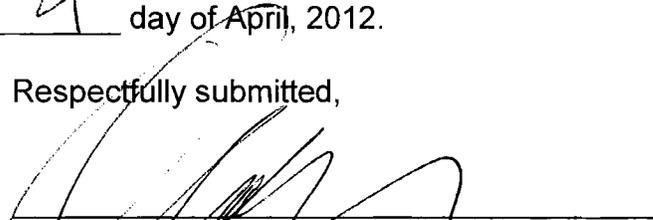
The withdrawal of a plea is governed by CrR 4.2(f), which permits a guilty plea to be withdrawn when "it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). The plea statement in Mr. Schreib's case establishes a showing of a "manifest injustice" because it failed to properly apprise Mr. Schreib of the proper community custody range. See Ross, 129 Wn.2d at 287-88 (use of outdated plea form lacking community custody provisions works a manifest injustice, allowing withdrawal of guilty plea on appeal).

**E. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, Mr. Schreib respectfully requests that this Court reverse the judgment of the trial court and order that Mr. Schreib is entitled to withdraw his plea.

DATED this 4 day of April, 2012.

Respectfully submitted,



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Washington Appellate Project – 90152  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 67356-4-I
	)	
RODNEY SCHREIB, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |   |
|--|---|
| <input checked="" type="checkbox"/> ERIK PEDERSEN, DPA<br>ROSEMARY KAHOLOKULA, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |
|--|---|

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF APRIL, 2012.

X \_\_\_\_\_ 

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