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COURT APPEALS

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No. 34540-4-II

STATE OF WASHINGTON

BY *KRS*

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

STATE OF WASHINGTON,

Respondent,

v.

BRENTON D. THOMPSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Sergio Armijo, Judge

APPELLANT'S OPENING BRIEF

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pm 9-11-06

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Procedural Facts 2

 2. Relevant facts 3

D. ARGUMENT 7

 THE SENTENCING COURT VIOLATED THE LAW OF THE
 CASE AND RAP 12.2 AND EXCEEDED ITS AUTHORITY IN
 REFUSING TO CONSIDER APPELLANT’S ARGUMENTS AND
 THE RESULTING SENTENCE MUST BE REVERSED AS IT
 RELIED ON PRIOR CONVICTIONS WHICH WERE
 CONSTITUTIONALLY INVALID ON THEIR FACE 7

E. CONCLUSION 16

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966) 7

In re Hews, 108 Wn.2d 579, 741 P.2d 983 (1987) 11

In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). 14

In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) 11

Music v. United Ins. Co., 59 Wn.2d 765, 370 P.2d 603 (1962) 15

Personal Restraint of Hopkins, 137 Wn.2d 897, 976 P.2d 616
(1999) 4, 5, 7, 12, 13

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, cert. denied, 479 U.S. 930
(1986). 10, 11, 14

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 10

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 10

State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003) 7, 8

State v. Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002) 11

State v. Mendoza, __ Wn.2d __, __ P.3d __ (August 17, 2006) (2006
Wash. LEXIS 613) 2, 14

State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976) 13

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

State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992). 8

State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003) 12

State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993) 12

State v. Vensel, 88 Wn.2d 552, 564 P.2d 326 (1977) 11

State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) 11

State v. Worl, 129 Wn.2d 416, 918 P.2d 906 (1996) 7

WASHINGTON COURT OF APPEALS

State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995). 14

State v. Dennis, 45 Wn. App. 893, 728 P.2d 1075 (1986), review denied,
108 Wn.2d 1007 (1987) 11

State v. Paul, 103 Wn. App. 487, 12 P.3d 1036 (2000) 11

State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993). 15

FEDERAL AND OTHER CASELAW

Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364 (4th Cir.), cert. denied,
414 U.S. 1005 (1973) 11

Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108
(1976) 11

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162
(1970) 13-15

United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592
(1972) 10

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Former RCW 9.41.010 (1997) 2

Former RCW 9.94A.310 (1998) 2

Former RCW 9.94A.370 (1996) 2

Former RCW 9A.20.021 (1982) 12

Former RCW 9A.28.020(3)(c) (1994) 12

Former RCW 9A.32.030(1)(c) (1990) 2

Former RCW 9A.36.011(1)(a) (1997) 2

Former RCW 69.50.401(a)(1)(i) 12

Former RCW 69.50.408 (1989) 12, 13

| | |
|----------------------------|-------------|
| RAP 12.2 | 1, 7, 8, 10 |
| RAP 12.5 | 8 |
| RAP 16.15(e) | 8 |
| RCW 10.73.090(1) | 4 |
| RCW 9.94A.030(36)(b) | 9 |
| RCW 9.94A.589(1)(b) | 9 |
| RCW 9A.28.020 | 12 |
| RCW 9A.28.030 | 12 |

OTHER AUTHORITIES

| | |
|---|---|
| 5 Am. Jur. 2d Appellate Review § 605 (2d ed. 1995). | 8 |
|---|---|

A. ASSIGNMENTS OF ERROR

1. The resentencing court exceeded its authority and violated the law of the case doctrine and RAP 12.2.

2. Appellant's due process rights were violated when he was resentenced based upon an offender score which included points for two prior convictions which were constitutionally invalid on their face.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the "law of the case" doctrine, a trial court is not bound by decisions of the court of appeals and lacks the authority to either ignore or modify the higher court's decision. In this Court's decision on appellant's personal restraint petition, it specifically ordered that, at resentencing, appellant was to be allowed to present argument and evidence regarding his position that two prior convictions were constitutionally invalid on their face.

Did the resentencing court violate the law of the case and is reversal required where the court refused to even consider the arguments?

Further, was this refusal to comply with this Court's decision a violation of RAP 12.2?

2. A prior conviction may not be included as part of the offender score calculation or relied on at sentencing if it is constitutionally invalid on its face. A prior conviction based upon a plea agreement is constitutionally invalid on its face when a court examining only the judgment and sentence and the documents signed as part of the plea agreement reveal infirmities of a constitutional magnitude. Due process mandates that a plea must be made with knowledge of all of its direct

consequences, and it is well-settled that the maximum term is a direct consequence of any plea. In State v. Mendoza, __ Wn.2d __, __ P.3d __ (August 17, 2006) (2006 Wash. LEXIS 613), the Supreme Court recently made it clear that a guilty plea is involuntary when entered with misinformation about the direct consequences of the plea, regardless whether that misinformation indicated the sentence or range was higher or lower.

In this case, the plea agreement and judgment and sentence for two 1995 convictions showed that the defendant was affirmatively misinformed that the statutory maximum was 10 years when in fact it was only 5 years. Is reversal required where the resentencing court included those two prior convictions in the offender score calculation even though they were constitutionally invalid on their faces?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Brenton D. Thompson was charged by information filed April 13, 1999, with first-degree felony murder and a firearm enhancement, and first-degree assault with a firearm enhancement. CP1-3; former RCW 9.41.010 (1997); former RCW 9.94A.310 (1998), former RCW 9.94A.370 (1996), former RCW 9A.32.030(1)(c) (1990), former RCW 9A.36.011(1)(a) (1997).

On March 10, 2000, he was sentenced to serve 416 months on the murder and 123 months on the assault, to be served consecutively, and 60 months each for the firearm enhancements, also to be served consecutively, for a total time in custody of 659 months. CP 4-15, 20-42.

Mr. Thompson appealed. CP 16-19. On July 29, 2003, this Court affirmed the murder conviction and remanded for retrial on the assault. CP 20-42. After retrial, he was convicted of the first-degree assault. CP 43-65, 69-80. His appeal was still pending in this Court when, on July 11, 2005, this Court granted, in part, a personal restraint petition Mr. Thompson had filed, remanding for resentencing. CP 81-87.

The resentencing hearings were held before the Honorable Sergio Armijo on January 27 and February 3, 2006, after which the court imposed sentences based upon the standard range as calculated by the prosecution as 371-261 months for the murder, plus a 60-month enhancement, and 93-123 months for the assault, plus a 60-month enhancement. CP 93-105.¹ The total time in custody ordered was 604 months. CP 92-105.

Mr. Thompson appealed, and this pleading follows. See CP 106-108.

2. Relevant facts

In his personal restraint petition, Mr. Thompson argued, *inter alia*, that the offender score used to calculate the sentences was incorrect and should have been three rather than six. See CP 81-86. The prosecution conceded the error and the court ordered remand for resentencing. CP 81-86.

In addition, in his petition, Mr. Thompson raised the issue that his criminal history was erroneously calculated, because it included two constitutionally invalid guilty pleas as part of the criminal history. See CP

¹The verbatim report of proceedings consists of two volumes, which will be referred to as follows: January 27, 2006, as "1RP;" February 3, 2006, as "2RP."

81-86. More specifically, he argued that he had pled guilty to two offenses, solicitation to deliver a controlled substance and solicitation to possess with intent to deliver a controlled substance, believing those offenses were class B felonies with a maximum sentence of ten years, when, in fact, they were class C felonies with a maximum sentence of five. See CP 83-84. It appeared that the trial court had improperly imposed a “doubling” provision which did not apply. See CP 83-84.

This Court held that the issue of the propriety of those pleas could not be addressed in the personal restraint petition proceeding, because of the time bar of RCW 10.73.090(1) and because he did not show the judgments and sentences were invalid on their faces for the purposes of that statute. CP 83-84. However, the Court held:

[Mr. Thompson] may, however, present whatever documents and arguments he claims support his position at the resentencing hearing that we order below. *See Personal Restraint of Hopkins*, 137 Wn. 2d 897, 976 P.2d 616 (1999) (doubling provision in RCW 69.50.408 does not apply to solicitation; solicitation is a class C felony subject to a 60-month maximum sentence).

CP 84.²

Prior to the first resentencing hearing, Mr. Thompson filed a “Motion and Memorandum” arguing that the court should exclude his prior 1995 solicitation convictions from the offender score calculation. CP 88-92. He stated that the convictions was constitutionally invalid on their face, because the judgment and sentence indicated that the court used multiple “scoring” in calculating the sentence, and Hopkins held that the plain

²A copy of this Court’s opinion on the Personal Restraint Petition is attached as Appendix I.

language of the statute did not provide for such scoring for solicitation offenses. CP 90-91. As a result, he argued, the convictions were facially invalid as he was misinformed of the direct consequences of plea for the crimes, because he was told the maximum penalty was 10 years when, in fact, it was 5 years because the doubling provision did not apply. CP 90-92. Thus, he stated, it would violate his state and federal due process rights for the court to rely on those pleas in calculating his offender score. CP 90-92.

At the first hearing on resentencing, on January 27, 2006, the case was continued, over Mr. Thompson's objection, so that the victim's family could be present for the resentencing hearing. 1RP 9-11.

At the next hearing, on February 3, 2006, Mr. Thompson, proceeding pro se at his request, agreed to have the court handle resentencing on both the assault and the murder, although the assault was still on appeal. 2RP 1-6. The prosecutor then told the court that the standard range for the murder with an offender score of three was 271-361 months plus an additional 60 months for the enhancement, and for the assault it was 93-123 months plus a 60 month enhancement. 2RP 6. He argued that the court should impose sentences at the high end of the standard range for each offense and run the terms consecutive, noting that each offense involved a different victim. 2RP 7.

Mr. Thompson argued that the court should not include the 1995 convictions in calculating the offender score, because they were facially invalid as argued in his motion. 2RP 8-9. He cited Hopkins and noted that case had held that multiple scoring was not applicable to those offenses,

and also that his plea statement indicated a maximum sentence of 10 years when in fact the maximum was only 5 years. 2RP 9-10.

The court then asked if the prosecution had provided an “answer” for those arguments. 2RP 10. The prosecutor argued that the Court of Appeals had addressed the issues, “denied those arguments,” and had remanded only for the purposes of resentencing based upon the corrected offender score of three. 2RP 10. Mr. Thompson then pointed out that the Court of Appeals specifically had declared that he could present the arguments at resentencing, which he noted meant that he had the “opportunity to raise this issue to give the trial court an opportunity to correct the situation.” 2RP 11. The court stated:

Well, I’m not going to change the offender score at this point. If it’s already come back from the Court of Appeals and they have indicated to use what your correct score is, I’m not going to start playing around with it at this point, sir.

2RP 11. Mr. Thompson objected that the Court of Appeals had specifically told him to reraise the issue. 2RP 11-12. The prosecutor then declared that the Court of Appeals had said the “defendant is invited to file things that would have something to do with the one-year collateral attack time limit,” but that had “nothing whatsoever to do with his offender score.” 2RP 12. He also said that absent a filing by the defendant, “the correct offender score was three,” and that Mr. Thompson was actually arguing still about the three-strikes law. 2RP 12.

Mr. Thompson again cited the language of the Court of Appeals ruling and the specific language saying he could present the arguments regarding the doubling provision and the 60 month term, then pointed to the

Statement of Defendant on Plea of Guilty from 1995 and again cited the Hopkins case. 2RP 13-14. He again noted the reasons why his judgment and sentence was invalid on its face and said that the Court of Appeals specifically “says for me to present my evidence, which this is what I’m presenting to this court, to make a ruling on that issue.” 2RP 15. The court then ruled:

Sir, I don’t read or understand the court ruling that way, that you’re going to be provided a complete hearing on those issue that you’re bringing up. The Court of Appeals has already made a decision as to what your offender score is. And it’s stated there. I’m not going to start changing it from three to something less than three. It’s three, sir. I’m not going to change it.

2RP 15. The court then sentenced Mr. Thompson based upon an offender score which included the two 1995 convictions. 2RP 15; CP 93-105.

D. ARGUMENT

THE SENTENCING COURT VIOLATED THE LAW OF THE CASE AND RAP 12.2 AND EXCEEDED ITS AUTHORITY IN REFUSING TO CONSIDER APPELLANT’S ARGUMENTS AND THE RESULTING SENTENCE MUST BE REVERSED AS IT RELIED ON PRIOR CONVICTIONS WHICH WERE CONSTITUTIONALLY INVALID ON THEIR FACE

The “law of the case” doctrine limits the authority of a trial court on remand. State v. Worl, 129 Wn.2d 416, 424-26, 918 P.2d 906 (1996); Greene v. Rothschild, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966). Often applied in the appellate context, the doctrine also binds the parties and the trial court “by the holdings of the court on a prior appeal until such time as they are ‘authoritatively overruled’” by an appellate court. Greene, 68 Wn.2d at 10. The doctrine not only promotes judicial economy but also avoids improper relitigation of issues by parties who do not prevail. State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). Further, it ensures

fairness and consistency of results by binding lower courts to the ruling of higher courts by assuring “the obedience of lower courts to the decisions of appellate courts.” Harrison, 148 Wn.2d at 562, quoting, 5 Am. Jur. 2d Appellate Review § 605 (2d ed. 1995). Further, when this Court issues a Mandate to the trial court, the Court of Appeals decision becomes “effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court.” RAP 12.2.

Both the law of the case and RAP 12.2 embody a fundamental concept at the heart of the structure of our justice system: that a lower court lacks the authority to refuse to follow an order issued by a higher one. Put another way, “[a]n individual trial court is not free to determine which appellate court orders, if any, it chooses to follow.” State v. Strauss, 119 Wn.2d 401, 413, 832 P.2d 78 (1992). Indeed, as the Supreme Court noted in Strauss, “[i]f a trial court were free to ignore such orders, total chaos would result in the court system.” Id.

In this case, this Court ordered, in its decision on the personal restraint petition, that while Mr. Thompson was not entitled to relief in the personal restraint petition on that basis, “[h]e may, however, present whatever documents and arguments he claims support his position at the resentencing hearing that we order below.” CP 84 (see Appendix 1, attached hereto). The Certificate of Finality for that decision was issued in December of 2005. CP 87.³ Under both the law of the case and RAP 12.2,

³A Certificate is the form of the Mandate used in personal restraint petition cases. RAP 16.15(e); see RAP 12.5 (defining Mandates and including discussion of Certificates); RAP 12.2 (requiring trial court compliance with all Mandates as defined in RAP 12.5).

the superior court was bound to comply with this Court's decision in the personal restraint petition case.

Put simply, it did not. On remand, the resentencing court refused to even consider Mr. Thompson's arguments, based on the mistaken belief, advanced by the prosecution, that this Court's decision that the other current offense should not have been included in the offender score somehow amounted to a conclusion by this Court as to what the "correct offender score is," and that it was, permanently, a three. 2RP 11, 15. But the decision did not so indicate. Instead, it provided:

[P]etitioner argues that the sentencing court calculated and imposed a standard range sentence based on an incorrect offender score. The State concedes this error and acknowledges that petition's offender score should have been three, not six, because his other current offense should not have been included in his offender score. See RCW 9.94A.589(1)(b) (multiple offenses) and RCW 9.94A.030(36)(b) ("serious violent offenses"). Remand for resentencing is necessary.

CP 85-86 (attached hereto as Appendix 1).

Thus, this Court did not hold that Mr. Thompson's correct offender score was a three. It accepted the prosecution's concession that the offender score as calculated at the time of the original sentencing was erroneous because the other current offense should not have been included in the offender score, and that resentencing was required. It was *the prosecution* which said the offender score was a three on appeal, and that was based solely upon the erroneous inclusion of the other current offense - not this Court. CP 85-86. This Court's decision did not amount to a calculation that the correct offender score was a three.

The court's refusal to even consider Mr. Thompson's arguments

was in clear violation of this Court's opinion. When this Court specifically orders that a defendant is entitled to present arguments on an issue to the trial court, as it did here on page 4 of its opinion, it means what it says. See Appendix 1. Further, such an order necessarily includes an order to the trial court not only to permit such argument to be made but also to actually *consider* it. Otherwise, the order permitting the argument would be completely meaningless. The resentencing court's summary refusal to consider Mr. Thompson's arguments was a violation of both the law of the case and RAP 12.2. See, e.g., State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (categorical refusal to consider particular sentence reversible error).

Had the court considered the issue as indicated by this Court's opinion, Mr. Thompson would have been resentenced based on an offender score calculated without including the two 1995 solicitation convictions, because it is clear those convictions were facially constitutionally invalid. At sentencing, the prosecution bears the burden of proving all prior convictions before those convictions can be used to increase an offender score. See State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). While the state usually need not prove the constitutionality of prior convictions before those convictions can be included in an offender score at sentencing, there are two exceptions to that rule. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, cert. denied, 479 U.S. 930 (1986). Those exceptions are 1) if a court has previously declared a prior conviction unconstitutional, or 2) if the prior conviction is "constitutionally invalid on its face." Id; see United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30

L. Ed. 2d 592 (1972). A conviction is constitutionally invalid on its face if it “without further elaboration evidences infirmities of a constitutional magnitude.” Ammons, 105 Wn.2d at 188. Where the prior conviction was entered as part of a plea, the phrase “on its face” means “those documents signed as part of a plea agreement,” as well as the judgment and sentence. In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

Here, the documents considered as part of the plea agreement and the judgment and sentence for the 1995 convictions demonstrate that they are facially constitutionally invalid. Under the state and federal due process clauses, a guilty plea must be knowing, voluntary and intelligent. In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). A plea does not meet that standard unless the defendant was informed of all “direct” consequences of a plea. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A consequence is direct and not collateral if it “represents a definite, immediate and largely automatic effect” on the defendant’s punishment. State v. Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002), quoting, State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir.), cert. denied, 414 U.S. 1005 (1973). It is well-settled that both the standard sentencing range and the statutory maximum are direct consequences of a plea. See State v. Vensel, 88 Wn.2d 552, 555, 564 P.2d 326 (1977); State v. Paul, 103 Wn. App. 487, 494-95, 12 P.3d 1036 (2000); State v. Dennis, 45 Wn. App. 893, 899, 728 P.2d 1075 (1986), review denied, 108 Wn.2d 1007 (1987).

In this case, the Statement of Defendant on Plea of Guilty for the two 1995 solicitation convictions reveal that the pleas were not knowingly, voluntary and intelligent. Under RCW 9A.28.030, criminal solicitation is punished “in the same manner as criminal attempt under RCW 9A.28.020.” Former RCW 9A.28.020(3)(c) (1994) provided that an attempt to commit a crime is punished a class below the attempted crime, so that an attempt to commit a Class B felony was a Class C felony.⁴ Both delivery of cocaine and possession with intent to deliver a narcotic were punishable at the time of the pleas with a maximum term of 10 years imprisonment and, thus, were class B felonies. Former RCW 69.50.401(a)(1)(i)⁵; see State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (cocaine as a narcotic). A Class C felony carried with it a maximum term of five years, so that solicitation to commit a Class B felony would have a maximum term of five years. See State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003); former RCW 9A.20.021 (1982).⁶

Under former RCW 69.50.408 (1989), however, a person “convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized.” This provision, called a “doubler,” doubles the statutory maximum, so that a maximum range for a Class C drug offense would go from being 5 years to

⁴Subsequent changes to the statute are not relevant to the issues in this case. See RCW 9A.28.020.

⁵The statutory scheme has been amended and renumbered but not in ways relevant to this case. See RCW 69.50.401.

⁶Statutory amendments from 2003 are not relevant to the issues in this case. See RCW 9A.20.021 (1982).

10. See, Hopkins, 137 Wn.2d at 900.

In the Statement of Defendant entered in the 1995 cases, Mr. Thompson entered Alford⁷ pleas to two solicitation offenses: solicitation to deliver cocaine and solicitation to possess with intent to deliver a narcotic. Supp. CP ___ (Memorandum in Support of Motion to Modify Judgment and Sentence, filed 11/02/04, at Appendix B), at 1-4.⁸ The relevant statutory maximum penalty, which would have been 5 years, was listed as 10, because the court applied the statutory “doubler” of former RCW 69.50.408 (1989). Appendix 2 at 2-3.

In Hopkins, however, the Supreme Court held that the “doubler” of former RCW 69.50.408 did *not* apply to solicitation of a drug crime. 137 Wn.2d at 901. More specifically, the Court held, “solicitation” is not an “offense ‘under’ RCW 69.50,” so that the doubling provision does not apply. Id. Thus, the sentencing doubling provisions of former RCW 69.50.408 (1989) did not apply to this case “to convert the statutory maximum” for the two solicitation offenses under Hopkins. As a result, the Statement of Defendant on Plea of Guilty for the two 1995 solicitation convictions, showing the maximum as 10 years, was wrong.

Until recently, there was a question about whether an error in a plea rendered a plea invalid under due process if the error involved an

⁷North Carolina v. Alford, 400 U.S. 25, 36, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); see State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

⁸A supplemental designation of clerk’s papers has been filed for this document, and a copy of the relevant Appendix is attached hereto as Appendix 2. Although the document was filed in the court file in this case it does not appear the defendant submitted them to the resentencing court below. Argument regarding this issue is contained *infra*.

overstatement of the correct sentence, range or maximum, rather than an understatement. Mendoza, supra, has settled that question. In Mendoza, the Supreme Court reversed this Court's holding that a defendant's plea was invalid only when based upon a defendant's belief that the sentencing consequences will be *lower* than they are in fact. Mendoza, ___ Wn. 2d at ___ (slip Op. at 5). The Court declined to "engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain," and adhered to its precedent that a plea bargain is involuntary when based on misinformation about the direct consequences, "regardless of whether the actual sentencing range is lower or higher than anticipated." Mendoza, ___ Wn.2d at ___ (slip Op. at 13-14).

Thus, here, the Statement of Defendant on Plea of Guilty for the 1995 crimes shows the convictions for those crimes are constitutionally invalid on their faces. Under Ammons, the 1995 offenses could not be counted as part of the offender score. Ammons, 105 Wn.2d at 187-88. And it is especially significant that the pleas at issue were Alford pleas because such pleas are "inherently equivocal," amounting to not an admission of guilt but a weighing of the alternatives and a decision to accept a deal in light of the options available. In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). A defendant entering such a plea has engaged in a cost-benefit analysis of which option is best for them, so that a court accepting such a plea must exercise special care in ensuring it satisfies constitutional requirements. State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995). And learning that the plea will have "additional

consequences of an unquestionably serious nature” is likely to “rapidly” change the “calculations about the costs and benefits of standing trial.” State v. Stowe, 71 Wn. App. 182, 188, 858 P.2d 267 (1993). Thus, “[m]isinformation with respect to the outcome of an Alford plea is especially problematic.” Id.

Because the resentencing court erred in refusing to consider Mr. Thompson’s argument, and because the sentence that court imposed was based on an offender score which included in its calculations two convictions which were constitutionally invalid on their faces, reversal and remand for resentencing is required.

In response, the prosecution may urge this Court to deny Mr. Thompson the relief to which he is so clearly entitled yet again, based upon the fact that Mr. Thompson submitted the evidence to support his arguments in the record below but appears not to have specifically done so at resentencing. But is clear from the record of the resentencing that the court was completely unwilling to even consider Mr. Thompson’s arguments. Any resubmission of the documents, already in the record due to previous filings, would have been a futile act. See, e.g., Music v. United Ins. Co., 59 Wn.2d 765, 370 P.2d 603 (1962) (law does not generally require engaging in such acts).

The sentencing court categorically refused to even consider Mr. Thompson’s argument, despite the clear language of this Court’s decision. Reversal is required on that basis alone. In addition, because it is clear from the record that the sentence imposed by the resentencing court was based upon including in the offender score two convictions which were

constitutionally invalid on their face, this Court should order resentencing based upon a corrected offender score which does not include those offenses in its calculation. Reversal and remand is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing based upon an offender score which does not include the constitutionally invalid 1995 convictions. In the alternative, this Court should reverse and remand with specific instructions for the trial court to comply with this Court's previous order and consider Mr. Thompson's arguments regarding the constitutional invalidity of those convictions below.

DATED this 11th day of September, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Brenton Thompson, DOC 725911, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 11th day of September, 2006.



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APPENDIX 1



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APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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A.M. JUL 14 2005 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk
DEPUTY

In re the
Personal Restraint Petition of

BRENTON D. THOMPSON,

Petitioner.

No. 32935-2-II

ORDER GRANTING PETITION
IN PART AND DENYING
PETITION IN PART

99-1-01611-6

Brenton D. Thompson seeks relief from personal restraint imposed following his 2000 first-degree murder conviction and his 2004 first-degree assault conviction.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner first claims that he was denied his right to effective assistance of counsel when his attorney failed to file and argue for dismissal based on inconsistent jury verdicts. The State tried Thompson for murder, assault, and unlawful possession of a firearm. As the State's theory at trial was that Thompson was the principal and murdered

32935-2-II/2

Julie Maroni, he claims that the State's failure to prove the firearm charge was also a failure to prove an element of the murder charge.

But this court rejected this identical argument in Thompson's first appeal, ruling:

Where, as here, the evidence is sufficient to support the jury's verdict beyond a reasonable doubt, an inconsistency between that verdict and an acquittal on another count is not a basis for reversal. [*State v.*] *Ng*, 110 Wn.2d [32,] 48, [750 P.2d 632 (1988)]. Thus, this contention is not a basis for relief.

State v. Thompson, No. 25768-8-II at 15 (filed July 29, 2003). Counsel's failure to bring the motion did not prejudice Thompson and thus did not deny him effective assistance of counsel.

FIREARM ENHANCEMENT

Petitioner next argues that his five-year sentencing enhancement for using a firearm in the commission of the murder was improper because the court did not instruct the jury that it needed to find a nexus between the weapon, the defendant, and the murder, and therefore, the court's imposition of the sentencing enhancement amounted to judicial fact finding in violation of his constitutional rights. *See Blakely v Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004).

He cites this court's decision in *State v. Holt*, 119 Wn. App. 712, 728, 82 P.3d 688 (2004), in which this court held that "as an element of the firearm enhancement, the nexus requirement must be set forth in the jury instructions." And it held that the failure to so instruct the jury "essentially relieves the State of the burden of proving the nexus beyond a reasonable doubt." *Holt*, 119 Wn. App. at 728.

But our Supreme Court recently came to a different conclusion in *State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005), holding that "[e]xpress 'nexus' language is not

32935-2-II/3

required" in the jury instructions. *Willis*, 153 Wn.2d at 372-73; *see also State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005) (companion case concluding that failure to include express nexus language is not reversible error). *Willis* held that the instructions are sufficient if they "inform[] the jury that it must find a relationship between the defendant, the crime, and the deadly weapon." *Willis*, 153 Wn.2d at 374.

Thompson has not presented the court's instruction to the jury and thus he has failed to show that they did not sufficiently inform the jury to find a relationship between the defendant, the weapon, and the crime. *See also State v. O'Neal*, 126 Wn. App. 395, 109 P.3d 429 (2005) (discussing *Holt* and *Willis*). We assume then that the instructions were proper and that the court imposed the firearm enhancement based on the jury's, not the judge's, finding of fact.

CRIMINAL HISTORY

Next, petitioner argues that the sentencing court erred in including two constitutionally invalid guilty pleas in his criminal history and thus increasing his range of punishment. Specifically, petitioner argues that he pleaded guilty believing that these offenses, solicitation to deliver a controlled substance and solicitation to possess with intent to deliver a controlled substance, were class B felonies when, in fact, they were class C felonies. Had he known, he insists, he would not have pleaded guilty and thus his pleas were not knowing and voluntary.

But petitioner had one year to collaterally attack these prior convictions and he did not do so. RCW 10.73.090(1) provides that "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year

32935-2-II/4

after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."

The one-year period in which to challenge a conviction by collateral attack runs from when the conviction becomes final, and not when the conviction is used in subsequent proceedings. See *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 450-51, 853 P.2d 424 (1993).

In re Detention of Turay, 139 Wn.2d 379, 395, 986 P.2d 790 (1999). Additionally, petitioner fails to show that the judgment and sentence evidencing these convictions is invalid on its face. His claim simply fails. He may, however, present whatever documents and arguments he claims support his position at the resentencing hearing that we order below. See *Personal Restraint of Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999) (doubling provision in RCW 69.50.408 does not apply to solicitation; solicitation is a class C felony subject to a 60-month maximum sentence).

MANDATORY MINIMUM TERMS

Next, petitioner argues that RCW 9.94A.120 violates article II, sec. 19 of the Washington Constitution and therefore restricting him from earning early release time until he has served at least twenty-years in prison is unlawful. He relies on *State v. Cloud*, 95 Wn. App. 606, 976 P.2d 649 (1999), in which Division One of this court declared RCW 9.94A.120(4), as amended by Initiative 593, unconstitutional because it violated article II, §19 of the Washington Constitution. That section provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Because the title of Initiative 593 referred only to persistent offenders, Division One struck those provisions of the initiative that increased punishment for first-time offenders. *Cloud*, 95 Wn. App. at 618.

32935-2-II/5

But Initiative 593 is not the basis for withholding petitioner's earned early release time. Rather, the basis is the Laws of 1997, chapter 69, § 1, subsection 4, which amended former RCW 9.94A.120(4)¹ to impose a 20-year minimum term for the crime of murder in the first degree, and made offenders ineligible for earned early release during those twenty years. See *State v. Musgrave*, 124 Wn. App. 733, 103 P.3d 214 (2004) (*Cloud* does not apply to mandatory minimum term for first-degree murder). Petitioner's claim fails.²

HEARSAY

In a supplemental brief, petitioner argues that the trial court erred in not allowing Joshua Hines to testify that Robert Pleasant had confessed to the killing. We disagreed with this same claim in petitioner's direct appeal. *State v. Thompson, supra* at 19-25. But petitioner argues that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), compels a different result. We disagree. Here the trial court found that the proffered evidence was unreliable and excluded it on that basis. *Crawford* broadened the scope of excluded evidence to that of an unavailable testimonial witness not subject to cross-examination. *Crawford* is simply irrelevant to petitioner's claim.

OFFENDER SCORE CALCULATION

Lastly, petitioner argues that the sentencing court calculated and imposed a standard range sentence based on an incorrect offender score. The State concedes this error and acknowledges that petitioner's offender score should have been three, not six, because his other current offense should not have been included in his offender score.

¹ Currently codified as RCW 9.94A.505.

² In a statement of additional authorities, petitioner cites *Personal Restraint of Tran*, __ Wn.2d ___, 111 P.3d 1168 (2005), but this case does not support his claim that RCW 9.94A.120(4) is unconstitutional. As such, we disregard it.

32935-2-II/6

See RCW 9.94A.589(1)(b) (multiple offenses) and RCW 9.94A.030(36)(b) ("serious violent offenses"). Remand for resentencing is necessary. Accordingly, it is hereby

ORDERED that this petition is granted in part for resentencing and denied as to all other claims.

DATED this 11 day of July, 2005.

Doughton, D. J.
Christy, J.
17

cc: Brenton D. Thompson
Pierce County Clerk
County Cause No(s). 99-1-01611-6
Michelle Luna-Green

APPENDIX 2

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

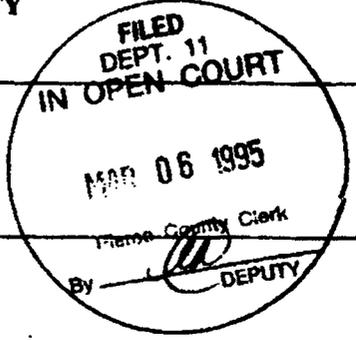
vs.

NO. 94-1-05056-9

MAR 6 1995

STATEMENT OF DEFENDANT ON
PLEA OF GUILTY

PN _____



Brenton Thompson
Defendant.

- 1. My true name is Brenton Thompson
- 2. My age is 20
- 3. I went through the 12 grade.
- 4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
I have the right to be represented by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is J. P. Debraers

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

- The right to a speedy trial and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- The right to remain silent before and during trial, and the right to refuse to testify against myself;
- The right at trial to hear and question the witnesses who testify against me;
- The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
- I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty.
- The right to appeal a determination of guilt after a trial.

6. I am charged with the following: Solicitation to deliver a controlled substance to wit: cocaine
 Count I Solicitation to deliver a controlled substance to wit: cocaine
 Elements: While in Pierce County to solicitated, aided, or incouraged.
Re delivery of a controlled substance to wit: cocaine

Maximum Penalty 10 yrs / 20K Standard Range 30.5 - 10.5

Count II Solicitation to possess with intent to deliver a controlled substance:

Elements: While in Pierce County I knowingly advised
encouraged, or solicited another, to possess ~~with the~~
substance with the intent to deliver

Maximum Penalty 10 yrs 20M Standard Range 30.5 - 40.5

Count III

Elements: _____

Maximum Penalty _____ Standard Range _____

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

- (a) The standard sentencing range is based on the crime I am pleading guilty to and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes juvenile court convictions as follows: convictions for sex offenses, any class A juvenile felony only if I was 15 or older at the time the juvenile offense was committed, any class B and C juvenile felony convictions only if I was 15 or older at the time the juvenile offense was committed and I was less than 23 years old when I committed the crime to which I am now pleading guilty.
- (b) The prosecuting attorney's statement of my criminal history for sentencing is as follows:

UPLS 94

Unless I attach a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced I am obligated to tell the sentencing judge about those convictions.

- (c) If I am convicted of any new crimes before sentencing, or 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 crime is binding on me. I cannot change my mind even if additional criminal history is discovered and even though the standard sentencing range and the prosecuting attorney's recommendation increase.

(d) In addition to sentencing me to confinement within the standard range, the judge will order me to pay \$100 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration up to \$50 per day. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(e) The prosecuting attorney will make the following recommendations to the judge:

36 months DOC ^{each count to run concurrent} will argue for work camp.
12 months of community placement
No contact with persons who use/sell/pose/negotiate
\$100 CVA
NARC under.

[] The prosecuting attorney will make the recommendations set forth in the plea agreement which is incorporated herein by reference.

(f) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard sentencing range unless the judge finds substantial and compelling reasons not to do so. If the judge goes above or below the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

(g) I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

8. IF ANY OF THE FOLLOWING BOXED PARAGRAPHS DO NOT APPLY THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.

| | |
|--|--|
| <p>(a) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(20). This sentence could include as much as 90 days' confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training, and to maintain law abiding behavior.</p> | |
| <p>(b) I am being sentenced for two or more violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.</p> | |
| <p>(c) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence.</p> | |

| | |
|---|--|
| <p>(d) This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge.</p> | |
| <p>(e) In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities.</p> | |
| <p>(f) Because this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis.</p> | |
| <p>(g) Because this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.</p> | |
| <p>(h) Because this crime involves a sex offense, I will be required to register with the sheriff of the county of the state of Washington where I reside. I must register immediately upon being sentenced unless I am in custody, in which case I must register within 24 hours of my release. If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 10 days of establishing my new residence. If I change my residence to a new county within this state, I must register with the sheriff of the new county and notify the sheriff of the county where I last registered, both within 10 days of establishing my new residence.</p> | |

9. I plead guilty to the crime(s) of Solicit to deliver a controlled substance & Solicit to possess a controlled substance with the intent to deliver as charged in the Amended information. I have received a copy of the information.

10. I make this plea freely and voluntarily.

11. No one has threatened any harm to me or to any other person to cause me to enter this plea.

12. No person has made any promises of any kind to cause me to enter this plea except as set forth in this statement.

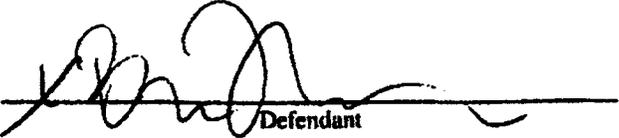
13. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement. Dec 12, 94

as to the events of Sept 15, 94 not Aug 1, 94
 I admit no facts but understand that if I go to trial there is a strong likelihood of a guilty finding. Therefore, I wish to accept the reduction in the charge and plead guilty.

[Signature]

Auton

- 14. Pursuant to RCW 10.73.090 and 10.73.100, I understand that my right to file any kind of post sentence challenge to the conviction or the sentence may be limited to one year.
- 15. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the judge.


 Defendant

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


 Attorney for Defendant


 Deputy Prosecuting Attorney

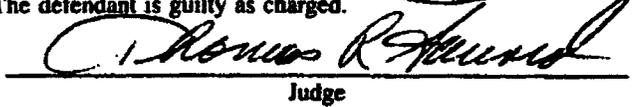
The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that:

- (a) The defendant had previously read; or
- (b) The defendant's lawyer had previously read to him or her; or
- (c) An interpreter had previously read the entire statement above and that the defendant understood it in full.

FILED
 DEPT 11
 IN OPEN COURT
 MAR 06 1995
 Pierce County Clerk
 By  DEPUTY

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 6, 1995


 Judge

*I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19____.

 Interpreter

STATE OF WASHINGTON, County of Pierce
 ss: I, Kevin Stock, Clerk of the above
 entitled Court, do hereby certify that this
 foregoing instrument is a true and correct
 copy of the original now on file in my office.
 IN WITNESS WHEREOF, I hereunto set my
 hand and the Seal of said Court this
 day of JULY 08 2004, 20____
 By  Deputy