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41777-4-II
No. 84735-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JD JONES BARTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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ORIGINAL

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A. SUMMARY OF ARGUMENT

JD Barton pled guilty to two counts of second degree assault, both with firearm enhancements, and one count of first degree unlawful possession of a firearm. At the time of the plea, Mr. Barton was incorrectly informed that the court could impose a total sentence of 180 months confinement for the assault charges, which exceeded the statutory maximum of 120 months. At sentencing, the court in fact imposed an illegal sentence of 180 months. Because Mr. Barton was therefore misadvised of a direct sentencing consequence of the plea, the plea is involuntary in violation of due process. In addition, although Mr. Barton filed his motion to withdraw the guilty plea more than one year after the judgment became final, the motion is timely because (1) the judgment and sentence is invalid on its face, and (2) the sentence he received exceeded the trial court's jurisdiction. Mr. Barton is therefore entitled to withdraw the plea.

B. ASSIGNMENTS OF ERROR

1. Mr. Barton's guilty plea is involuntary in violation of due process.
2. Mr. Barton's motion to withdraw the guilty plea is timely.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Constitutional due process requires a person pleading guilty to a crime be correctly informed about the sentencing consequences of the plea. Is Mr. Barton's guilty plea involuntary in violation of due process where at the time of the plea he was incorrectly informed that the trial court could impose a sentence beyond the statutory maximum, and the court in fact imposed such an illegal sentence?

2. A motion to withdraw a guilty plea is timely, even if filed more than one year after the judgment became final, if the judgment and sentence is invalid on its face. Is Mr. Barton's judgment and sentence invalid on its face where it plainly shows that he received a sentence in excess of the statutory maximum?

3. One exception to the one-year time bar for collateral attacks applies where the trial court imposed a sentence in excess of its jurisdiction. A trial court imposes a sentence in excess of its jurisdiction if the length of the sentence exceeds the amount of time authorized by statute. Does the exception to the one-year time bar apply to Mr. Barton's collateral attack, where the trial court imposed a sentence that was in excess of the statutory maximum?

D. STATEMENT OF THE CASE

On October 31, 2008, JD Barton was charged with two counts of second degree assault, RCW 9A.36.021(1)(c), each with a firearm enhancement, and one count of unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a). Sub #40.¹

That same date, Mr. Barton pled guilty to the charges. Sub #44.² In the guilty plea statement and at the guilty plea hearing, Mr. Barton was advised his offender score for each of the assault charges was "9+," the standard sentence range was 63 to 84 months, and the statutory maximum sentence was 10 years. 10/31/08RP 7; Sub #44 at 2. He was also advised the firearm enhancements would add 36 months to his sentence for each assault charge, to run consecutively to each other and to the base sentence. 10/31/08RP 7; Sub #44 at 2.

Mr. Barton also stated he understood the parties had agreed to an exceptional sentence of 108 months for each of the assault charges, which, when added to the two 36-month firearm enhancements, would result in a total sentence of 180 months. 10/31/08RP 7-8; Sub #44 at 3.

¹ A supplemental designation of clerk's papers has been filed for this document.

² A supplemental designation of clerk's papers has been filed for this document.

The court accepted Mr. Barton's plea as knowing, intelligent and voluntary. 10/31/08RP 13. The court also agreed an exceptional sentence was appropriate and accepted the parties' agreement as to the length of the sentence. 10/31/08RP 16; Sub #39 at 3.³ The court found Mr. Barton's offender score for each assault charge was "11," the standard sentence range was 63 to 84 months, and the maximum term was 10 years. Sub #39 at 3. The court imposed an exceptional sentence of 108 months for the assault charges and two consecutive 36-month firearm enhancements, for a total sentence of 180 months. *Id.* at 5.

On April 22, 2010, Mr. Barton, *pro se*, filed "Amended Motion to Modify and Correct Judgment and Sentence" in the trial court. CP 241-47. He argued, among other things, that his sentence was invalid because it exceeded the statutory 10-year maximum, and that he was entitled to withdraw his guilty plea. CP 242, 247.

On June 17, 2010, the trial court entered an order transferring the motion to the Court of Appeals as a personal restraint petition. Sub #167. On June 24, 2010, Mr. Barton, *pro se*, filed a notice of appeal, seeking direct review by the Washington Supreme Court. CP 317. Counsel was appointed to represent Mr.

³ A supplemental designation of clerk's papers has been filed for this document.

Barton. On January 6, 2011, this Court granted Mr. Barton's motion to transfer the case to the Court of Appeals, Division Two, for determination.⁴

E. ARGUMENT

MR. BARTON'S GUILTY PLEA IS CONSTITUTIONALLY INVALID AND HE IS ENTITLED TO WITHDRAW THE PLEA

1. The trial court imposed an illegal sentence that exceeded its statutory authority. As reflected on the face of the judgment and sentence, the trial court imposed a sentence of 108 months for the two assault charges, plus two consecutive 36-month firearm enhancements, for a total sentence of 180 months. Sub #39 at 5. That sentence is illegal and in excess of the court's statutory authority, because it exceeds the 10-year statutory maximum sentence for the crimes.

It is axiomatic that a trial court has authority to impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). A trial court may not impose a sentence that exceeds the statutory maximum for the crime. RCW 9.94A.599 provides:

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum

⁴ Mr. Barton has a separate appeal stemming from this conviction currently pending in Division Two, No. 40507-5-II.

sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

Thus, the total sentence, including firearm enhancements, is limited by the statutory maximum sentence for the underlying offense unless the offender is a persistent offender. State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003); State v. McCollum, 88 Wn. App. 977, 990, 947 P.2d 1235 (1997). If the court imposes a firearm enhancement and the total sentence exceeds the statutory maximum for the underlying offense, the underlying sentence, not the firearm enhancement, must be reduced. DeSantiago, 149 Wn.2d at 416; RCW 9.94A.599; RCW 9.94A.533(3)(g).

The statutory maximum sentence for the crime of second degree assault is 10 years. RCW 9A.20.021(b); RCW 9A.36.021(2)(a).

Thus, the total term of confinement the trial court imposed for the assault charges in this case—180 months—was erroneous and in excess of the court's authority because it exceeded the statutory maximum of 120 months.

2. Mr. Barton's guilty plea is constitutionally invalid because he was misadvised about the sentencing consequences of the plea. When a defendant pleads guilty, constitutional due process requires that he do so knowingly, voluntarily, and intelligently. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. amend. 14; Const. art. 1, § 3. Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), overruled on other grounds by State v. Barber, ___ Wn.2d ___, No. 83640-0, 2011 WL 172088 (Jan. 20, 2011).

A defendant must be properly informed of all direct sentencing consequences of his guilty plea. Ross, 129 Wn.2d at 285; State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) ("Defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea."). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (citing Miller, 110 Wn.2d at 531).

When a defendant is misinformed about a direct sentencing consequence of a guilty plea, he need not demonstrate that the

misinformation materially affected his decision to plead guilty. State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006); Isadore, 151 Wn.2d 294. A guilty plea based on misinformation about a direct consequence of the plea is involuntary "regardless of whether the actual sentencing range is lower or higher than anticipated." Mendoza, 157 Wn.2d at 591. Thus, "[a]bsent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id.

Here, when Mr. Barton pled guilty, he was misadvised of the sentencing consequences of his plea. He was wrongly informed that the trial court could impose a sentence of 180 months, which exceeded the statutory maximum of 120 months. And, in fact, the court imposed an erroneous sentence of 180 months. Thus, because Mr. Barton was misinformed about a direct consequence of his plea, the plea was not knowing and voluntary and he may move to withdraw the plea.

3. Mr. Barton's motion to withdraw the guilty plea is timely. Mr. Barton filed his motion to withdraw his guilty plea in the trial court on April 22, 2010. CP 241-47. That was more than one year after his judgment became final, which occurred on October 31,

2008. Sub #39; RCW 10.73.090(3)(a) (where no appeal is filed, judgment becomes final for purposes of this section on the date it is filed with the clerk of the trial court). Generally, a person may not file a motion for collateral attack on a judgment and sentence in a criminal case more than one year after the judgment becomes final. RCW 10.73.090. But the one-year time deadline does not apply in Mr. Barton's case, because his judgment and sentence is invalid on its face, and, alternatively, because the sentence he received exceeded the trial court's jurisdiction.

a. The one-year time bar does not apply, because the judgment and sentence is invalid on its face.⁵ The one-year time limit for collateral attack established by RCW 10.73.090 does not apply to a judgment invalid on its face. RCW 10.73.090(1); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). A judgment and sentence is invalid on its face if "the judgment and sentence evidences the invalidity without further elaboration." Goodwin, 146 Wn.2d at 866 (citing In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000)).

⁵ A similar issue is currently pending in the Washington Supreme Court in In re Pers. Restraint of Coats, No. 83544-6. Oral argument was heard in Coats on January 20, 2011.

The Court may look to "related documents, i.e., charging instruments, statements of guilty pleas, [and] jury instructions," to determine whether a judgment and sentence is facially invalid. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 858, 100 P.3d 801 (2004) (citing In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002)); Thompson, 141 Wn.2d at 719. The question is whether the purported infirmity is *affirmatively* shown on the face of the documents. State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719 (1986). If the "court would have to go behind the verdict and sentence and judgment to make" a determination on validity, the conviction is not facially invalid. Id.

"A reviewing court may use the documents signed as part of a plea agreement to determine facial invalidity if those documents are relevant in assessing the validity of the judgment and sentence." In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 781-82, 203 P.3d 375 (2009); see also In re Pers. Restraint of Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009). Invalid plea documents cannot on their own overcome the one-year time bar or render an otherwise valid judgment and sentence invalid, but they may be relevant in determining whether the judgment and sentence itself is facially invalid. McKiearnan, 165 Wn.2d at 781-82.

In Bradley, the petitioner's collateral attack challenging the validity of his guilty pleas was filed more than one year after the judgment became final. Bradley, 165 Wn.2d at 938-39. The State conceded—and the Supreme Court accepted the concession—that the judgment, which contained an incorrect standard range, was facially invalid. Id. Therefore, the time bar did not apply and the court reached the question of whether Bradley was entitled to withdraw his pleas based on the misinformation he received about sentencing consequences. Id.

In contrast, where the judgment and sentence contains no facial infirmity, a petitioner may not attack the validity of his guilty plea more than one year after finality. McKiernan, 165 Wn.2d at 781 ("In order to consider whether the plea agreement was invalid we must first find that the judgment and sentence itself is facially invalid. Otherwise, review of the plea agreement is barred by RCW 10.73.090."). In McKiernan, the judgment and sentence and guilty plea form stated the maximum sentence for the crime was 20 years to life when in fact the maximum term was simply life imprisonment. Id. at 780. McKiernan was aware at the time of the plea of the standard range sentence he would receive and that he could be sentenced up to a maximum term of life imprisonment. Id. at 782.

He was correctly sentenced within the standard range. Id. The court held McKiearnan therefore failed to establish his judgment and sentence was facially invalid, because even though the maximum term was misstated, McKiearnan was nonetheless aware of the maximum amount of time he could serve in confinement. Id. at 783. The court explained, "[t]o be facially invalid, a judgment and sentence requires a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner." Id. Because McKiearnan was not "substantively misinformed as to the maximum sentence," his collateral attack was time-barred. Id.

Here, unlike in McKiearnan, the judgment and sentence contains a "substantial defect" that had an actual effect on Mr. Barton's rights. That is, the trial court imposed an illegal sentence that was 60 months longer than what was authorized by statute. In addition, the judgment and sentence and guilty plea form affirmatively demonstrate, on their face, that Mr. Barton was "substantively misinformed" as to the sentence he could receive. He was informed he could receive a 180-month sentence when in fact the court could not impose a sentence longer than 120 months. The error on the judgment reveals a fundamental defect in the

conviction—an invalid guilty plea. Thus, the judgment and sentence is invalid on its face and the one-year time bar does not apply. Mr. Barton may attack the validity of his plea.

b. The one-year time bar does not apply, because the sentence imposed was in excess of the court's jurisdiction. The one-year time limit for collateral attacks specified in RCW 10.73.090 does not apply if "[t]he sentence imposed was in excess of the court's jurisdiction." RCW 10.73.100(5).

In determining whether a sentence imposed was in excess of the court's jurisdiction, the question is whether the sentence was longer or more onerous than what was authorized by statute. In re Pers. Restraint of Fleming, 129 Wn.2d 529, 534, 919 P.2d 66 (1996) (citing In re Pers. Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980)); In re Pers. Restraint of Vehlewald, 92 Wn. App. 197, 202, 963 P.2d 903 (1998). Thus, in Moore, the sentence was in excess of the court's jurisdiction where the court imposed a sentence of life without the possibility of parole after the defendant pled guilty, but state law permitted the sentence of life without the possibility of parole only following a jury trial. Fleming, 129 Wn.2d at 534 (citing Moore, 116 Wn.2d at 33). And in Carle, the sentence

was in excess of the court's jurisdiction where the court gave Carle an enhanced sentence not authorized for his first degree robbery convictions. Fleming, 129 Wn.2d at 534 (citing Carle, 93 Wn.2d at 22).⁶

Here, the sentence Mr. Barton received was plainly beyond the court's statutory authority. As stated, the court was authorized to impose a sentence no longer than 120 months for the assault charges. RCW 9.94A.599; RCW 9A.20.021(b); RCW 9A.36.021(2)(a). But the court in fact imposed a sentence of 180 months. Therefore, the sentence was "in excess of the court's jurisdiction" and the one-year time limit does not apply. RCW 10.73.100(5).

4. Mr. Barton is entitled to withdraw the guilty plea. Where a defendant agrees to an illegal sentence and is misinformed about the sentencing consequences, the plea is involuntary and the defendant is entitled to withdraw the plea. Isadore, 151 Wn.2d at

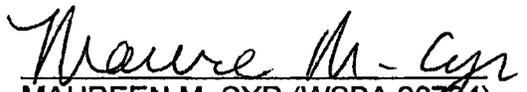
⁶ In contrast, "a sentence is not jurisdictionally defective merely because it is in violation of a statute or is based on a misinterpretation of a statute." In re Pers. Restraint of Richey, 162 Wn.2d 865, 872, 175 P.3d 585 (2008). Thus, in Richey, the exceptional sentence imposed was not in excess of the court's jurisdiction even if based on invalid reasons, because the court was authorized to impose an exceptional sentence, Richey stipulated that an exceptional sentence was justified, and the court adopted the reasons for the sentence that were set forth in the stipulation. Id. Similarly, in Fleming, the sentence was not in excess of the court's jurisdiction, where the court had statutory authority to order restitution but did so in an untimely manner. Fleming, 129 Wn.2d at 534.

298; Ross, 129 Wn.2d at 284; CrR 4.2(f). Because he was misinformed of the sentencing consequences of his guilty plea, Mr. Barton is entitled to withdraw the plea.

E. CONCLUSION

Mr. Barton's guilty plea is constitutionally invalid because he was misadvised of the sentencing consequences of the plea. His motion to withdraw the plea is timely because the judgment and sentence is facially invalid and the sentence he received exceeded the trial court's jurisdiction. Mr. Barton is entitled to withdraw the plea.

Respectfully submitted this 26th day of January 2011.


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BY RICHARD H. CARPENTER

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JD BARTON,)
)
 Appellant.)

NO. 84735-5

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