

FILED
Court of Appeals
Division II
State of Washington
12/10/2018 8:00 AM
No. 52195-4-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Juan Ortiz,

Appellant.

Amended Brief of Appellant

Kevin Hochhalter
WSBA # 43124
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Introduction.....	1
2. Assignments of Error.....	2
3. Statement of the Case.....	3
3.1 Juan Ortiz was a developmentally disabled boy subject to the influence and control of older, gang- affiliated teens.	3
3.2 Juan’s intellectual disabilities left him with limited intelligence and a lack of social and practical skills to adapt to the challenges of life.	4
3.3 Juan and Naitaalii Toleafoa were sent by gang members to confront the gang leader, Juan Zuniga in May 2010. That night, Zuniga was killed and a second gang member was paralyzed.....	5
3.4 Juan was charged with murder and assault, but the gang sent him away to Mexico, where he hid for six years.	6
3.5 Juan accepted a plea deal on the advice of counsel. When he moved to withdraw the plea, the trial court denied his motion.....	7
3.6 The trial court considered the standard range and sentenced Ortiz to 380 months in prison.	9

4. Argument..... 10

4.1 This Court should review the issues in this appeal because it involves manifest constitutional error and ineffective assistance of counsel..... 11

4.2 The trial court erred in allowing its discretion under *Houston-Sconiers* to be limited by the plea agreement..... 12

4.2.1 Constitutional issues are reviewed de novo. 12

4.2.2 The constitution requires that a sentencing court have discretion to consider the offender’s youth. 12

4.2.3 Plea agreements cannot limit the discretion of the sentencing court. 15

4.3 The trial court erred in finding that Ortiz’s plea was knowing and voluntary without inquiring into Ortiz’s understanding of his purported waiver of *Houston-Sconiers*. 16

4.3.1 Constitutional issues are reviewed de novo. 17

4.3.2 Trial courts are required to inquire into a defendant’s understanding of any waiver of constitutional rights before accepting a guilty plea. 17

4.3.3 The trial court’s acceptance of Ortiz’s guilty plea was invalid because the trial court failed to inquire into Ortiz’s understanding of his purported waiver of *Houston-Sconiers*. 18

4.4	The trial court abused its discretion in refusing to hear Ortiz’s motion to withdraw his guilty plea.....	19
4.4.1	Where the grounds for withdrawal of a guilty plea are constitutional in nature, this Court should review de novo, rather than the ordinary abuse of discretion standard.	19
4.4.2	Withdrawal of Ortiz’s guilty plea was necessary to correct the manifest injustice of the purported waiver of <i>Houston-Sconiers</i>	19
4.4.3	Withdrawal of Ortiz’s guilty plea was necessary to correct the manifest injustice of a plea agreement that the trial court failed to invalidate.....	20
4.4.4	The trial court abused its discretion in refusing to hear Ortiz’s motion prior to sentencing.....	21
5.	Conclusion	21

Table of Authorities

Cases

<i>In re Det. of Brock</i> , 183 Wn. App. 319, 333 P.3d 494 (2014)	16, 17
<i>Matter of Det. of Monroe</i> , 198 Wn. App. 196, 392 P.3d 1088 (2017)	11
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011)	16
<i>State v. Bassett</i> , ___ Wn.2d ___, 428 P.3d 343 (2018)	12, 13
<i>State v. Buckman</i> , 190 Wn.2d 51, 409 P.3d 193 (2018)..	17, 19, 21
<i>State v. Gregory</i> , ___ Wn.2d ___, 427 P.3d 621 (2018)	12, 17
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017)	1, 7, 10, 12, 13, 14
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015)	12
<i>State v. Mendoza</i> , 157 Wn.2d 582, 141 P.3d 49 (2006).....	20
<i>State v. Perez</i> , 33 Wn. App. 258, 654 P.2d 708 (1982).....	20
<i>State v. Quy Dinh Nguyen</i> , 179 Wn. App. 271, 319 P.3d 53 (2013)	19
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	12

Statutes

RCW 9.94A.431.....	15, 20
--------------------	--------

Rules

CrR 4.2.....	17, 19, 20
RAP 2.5(a).....	11

1. Introduction

“Children are different,” and that difference “has constitutional ramifications.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). Under *Houston-Sconiers*, a sentencing court must have “absolute discretion” to consider the mitigating qualities of youth and depart “as far as they want” below the standard range sentence. *Id.* at 9.

Juan Ortiz was 17 years old and suffered from intellectual disabilities when he was sent by older gang members to confront the gang’s leader. The gang leader was murdered, and Juan was charged with the crime. Juan was convinced by counsel to enter into a plea agreement that required him to waive his right under *Houston-Sconiers* to seek an exceptional sentence downward on the basis of his youth.

The trial court accepted the guilty plea even though it purported to limit the court’s own discretion. The trial court failed to inquire whether Juan understood the consequence of the purported waiver. Prior to sentencing, the trial court refused to hear Juan’s motion to withdraw his plea. At sentencing, the trial court went along with the improper limitation on its discretion and only considered sentences within the standard range. This Court should reverse these errors, allow Juan to withdraw his guilty plea, and remand for further proceedings.

2. Assignments of Error

Assignments of Error

1. The trial court erred in failing to question Ortiz about the consequences of waiving his rights under *Houston-Sconiers*.
2. The trial court erred in finding Ortiz's guilty plea was a knowing, voluntary plea.
3. The trial court erred in accepting a guilty plea that purported to waive Ortiz's rights under *Houston-Sconiers*.
4. The trial court abused its discretion in denying Ortiz's motion for a continuance of the sentencing hearing for purposes of briefing a motion to withdraw his plea.
5. The trial court abused its discretion in refusing to hear Ortiz's motion to withdraw his plea.
6. The trial court erred in failing to exercise discretion under *Houston-Sconiers*.

Issues Pertaining to Assignments of Error

1. Under *Houston-Sconiers* a sentencing court must have discretion to consider the defendant's youth and adjust the sentence accordingly. Ortiz's plea agreement purported to limit the court's discretion. Did the trial court err in allowing its discretion to be limited? (assignments of error 3 and 6)
2. Waiver of a constitutional right must be knowing and voluntary. The trial court failed to question Ortiz about the consequences of waiving his rights under *Houston-Sconiers*. Did the trial court err in finding Ortiz's guilty plea was knowing and voluntary? (assignments of error 1 and 2)

3. A motion to withdraw a guilty plea prior to sentencing should be granted if the withdrawal is necessary to correct a manifest injustice. The trial court did not allow Ortiz an opportunity to demonstrate grounds for withdrawal. Did the trial court abuse its discretion in refusing to hear Ortiz's motion? (assignments of error 4 and 5)

3. Statement of the Case

3.1 Juan Ortiz was a developmentally disabled boy subject to the influence and control of older, gang-affiliated teens.

Juan Ortiz was born in February 1993, the youngest of six children. CP 34. He was diagnosed at a young age with developmental cognitive disorder. CP 34. He completed elementary and middle school in special education programs. CP 34.

Juan was small in stature and wore glasses. CP 26, 34. In sixth grade, he was bullied constantly by other students. CP 34. When the bullies became violent, Juan sought protection from older Mexican teens with gang affiliations, including his older brother. CP 26, 34. By age 13, Juan was smoking marijuana and consuming beer and hard liquor. CP 34. Under the direction of the older gang members, Juan started committing crimes at age 15, including malicious mischief, residential burglary, and unlawful possession of a firearm. CP 26, 34.

3.2 Juan’s intellectual disabilities left him with limited intelligence and a lack of social and practical skills to adapt to the challenges of life.

Juan has been diagnosed with intellectual disability, chronic post-traumatic stress disorder, and depression. CP 38-39. “An *Intellectual disability* is a disability characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many everyday social and practical skills. ... *Intellectual functioning*—also called intelligence—refers to general mental capacity, such as learning, reasoning, problem solving, judgment etc. *Adaptive behavior* is the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives.” CP 38 (emphasis in original).

“Factors such as impaired cognitive abilities and judgment, physical disabilities, insufficient adaptive behaviors, constant interactions with ‘protectors’ who exploit them, lack of knowledge on how to protect themselves and living and working in high-risk environments increase the vulnerability to victimization. Almost all people with intellectual disability ... are susceptible to becoming involved in the criminal justice system as suspects and/or victims. As suspects, individuals with this disability are frequently used by other criminals to assist in law-breaking activities without understanding their

involvement in a crime or the consequences of their involvement. They may also have a strong need to be accepted and may agree to help with criminal activities in order to gain friendship.” CP 38.

3.3 Juan and Naitaalii Toleafoa were sent by gang members to confront the gang leader, Juan Zuniga in May 2010. That night, Zuniga was killed and a second gang member was paralyzed.

At age 17, in May 2010, Juan was sent by older gang members to accompany Naitaalii Toleafoa to confront the gang leader, Juan Zuniga. CP 27. The State’s theory was that the two were sent to execute Zuniga. CP 22. Ortiz asserts that he did not shoot anyone that night, but he eventually entered an *Alford* plea, believing that a jury would find him guilty. CP 16, 27. The factual basis for the plea was the affidavit of probable cause filed with the original information. CP 16; RP, Feb. 14, 2018, at 7.

At about midnight, Ortiz and Toleafoa arrived at the house where Zuniga was staying. CP 65. They claimed they were there to pay Zuniga some money that was owed to him. CP 65. Zuniga and a second gang member, Dean Salavea, received Ortiz and Toleafoa in the attached garage. CP 65. Within seconds, a witness in the house heard four or five gunshots from the garage. CP 65. Toleafoa ran from the house with his hands in his pockets. CP 65. Ortiz walked out behind him carrying a handgun. CP 65.

Zuniga was found on the floor of the garage, already dead, with multiple gunshot wounds, including a wound to the back of the head. CP 65. Salavea was found just outside the back door of the garage with a gunshot wound to the back. CP 65-66. Salavea survived but was left paralyzed. CP 65.

3.4 Juan was charged with murder and assault, but the gang sent him away to Mexico, where he hid for six years.

Ortiz and Toleafoa were identified by the witness through photomontages. CP 66. Juan was immediately charged with first degree murder, first degree assault, and unlawful possession of a firearm. CP 1-2. However, both Juan and Toleafoa remained at large. CP 66. An amended information filed in February 2011 added gang aggravators to the charges. *See* CP 20.

The gang members took Juan to Mexico to hide him from the authorities and told him never to return to the United States. RP, June 25, 2018, at 16. Juan lived in Mexico City with his uncle until 2016, working as a dishwasher and then a waiter. CP 34; RP, June 25, 2018, at 16. In 2016, Juan was arrested by Mexican officials on a Pierce County warrant. CP 34; RP, June 25, 2018, at 16. He spent eight months in a Mexican prison before being extradited to the United States. CP 34.

3.5 Juan accepted a plea deal on the advice of counsel. When he moved to withdraw the plea, the trial court denied his motion.

Juan was arraigned in April 2017. CP 20. In early 2018, the State offered a plea agreement. *See* CP 5. In exchange for Juan's guilty plea, the State would reduce the charges by removing the gang aggravators, dropping the unlawful possession charge, and reducing the assault charge to the second degree. *See* CP 3-5. As part of the agreement, Juan would have to waive his right under *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), to seek an exceptional sentence downward on the basis of his youth at the time of the crime. CP 22, 28.

Juan discussed the offer at length with his trial counsel. *See* RP, Feb. 14, 2018, at 4-7, 11. Juan asserted his innocence, but he eventually entered an *Alford* plea, stating that a jury would probably find him guilty. CP 16, 27.¹

The trial court questioned Juan about his understanding of the plea and the rights he would be giving up by entering a guilty plea. RP, Feb. 14, at 8-15. The trial court did not ask Juan if he understood the ramifications of waiving his rights under *Houston-Sconiers*. *See* RP, Feb. 14, at 8-15. Rather, the trial court held the following colloquy with Juan about sentencing:

¹ While the record on direct appeal only implies that Juan accepted the deal on advice from counsel, Ortiz intends to file a Personal Restraint Petition in which he will testify to the conversations he had with his attorney while the plea deal was being negotiated.

THE COURT: You come before the Court in this case with an offender score of 3. However, given that Count I is charging you with Murder in the First Degree, the standard range of penalty is 271 to 361 months with an additional 60 months added because there was a firearm involved in this crime. And you will have 36 months of community custody following your release, irrespective of how long the sentence is.

The Court has the authority to sentence you to life imprisonment, Mr. Ortiz, and fine you \$50,000.

Do you understand that the second count of Assault in the Second Degree carries a lesser range? And because these cases will be run concurrently, that really is not particularly relevant to what the sentence is going to be?

Does that make sense to you?

MR. ORTIZ: Yes, it does.

THE COURT: So there may be a recommendation or maybe not about what your sentence should be. But in the end, Mr. Ortiz, you have to understand I'm not obliged to follow anybody's recommendation. I can do, and I'm going to do, what I think the law requires.

Do you understand that?

MR. ORTIZ: Yes.

RP, Feb. 14, at 13-14. The trial court accepted Juan's plea as a knowing, voluntary plea. RP, Feb. 14, at 15.

As sentencing approached, Juan noted a motion to withdraw his guilty plea, setting a hearing for June 18. CP 54-

55. Before the date arrived, the hearing was stricken. CP 55.² At the sentencing hearing on June 25, Juan renewed his motion to withdraw his plea. RP, June 25, 2018, at 4.

Juan's counsel requested the trial court continue the sentencing hearing to allow him to develop and brief the court on the grounds of withdrawing the plea. RP, June 25, at 4-5. The State supported the request to give counsel time to brief the motion. RP, June 25, at 5-6. The trial court asked if there was any reason to suspect that Juan lacked the intellectual capacity to understand the consequences of a guilty plea. RP, June 25, at 7. Juan's counsel replied that he had no such concern. RP, June 25, at 8. The trial court decided to proceed with sentencing without hearing Juan's motion to withdraw his plea. RP, June 25, at 8.

3.6 The trial court considered the standard range and sentenced Ortiz to 380 months in prison.

Defense counsel argued for a sentence at the low end of the standard range, due to the waiver of *Houston-Sconiers* in the plea agreement. CP 28. The prosecutor also emphasized that the

² Although Juan's trial counsel asserted this was done at Juan's request, RP, June 25, 2018, at 4, Juan asserts that he did not ask for the hearing to be stricken. Juan intends to testify to this fact as part of his PRP.

agreement incorporated consideration of the *Houston-Sconiers* factors as part of reducing the charges. RP, June 25, at 8-9.

The trial court considered the standard sentence range and determined that an appropriate sentence within that range would be 320 months on the murder charge, plus the 60-month firearm enhancement, for a total of 380 months. RP, June 25, at 20. The standard range was 331 to 421 months (including the enhancement), placing the trial court's sentence near the middle of the range. CP 43.

4. Argument

“Children are different,” and that difference “has constitutional ramifications.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). Under *Houston-Sconiers*, a sentencing court must have “absolute discretion” to consider the mitigating qualities of youth and depart “as far as they want” below the standard range sentence. *Id.* at 9.

The trial court erred by allowing its discretion under *Houston-Sconiers* to be limited by the plea agreement entered by the parties. Even if were permissible for the parties to limit the trial court's discretion, the trial court erred in accepting the guilty plea without inquiring whether Ortiz understood and voluntarily waived his rights under *Houston-Sconiers*. Finally,

the trial court abused its discretion when it refused to hear Ortiz's motion to withdraw the improper plea.

4.1 This Court should review the issues in this appeal because it involves manifest constitutional error and ineffective assistance of counsel.

The issues in this appeal are of constitutional magnitude. Manifest error affecting a constitutional right may be argued for the first time on appeal. RAP 2.5(a). An error is manifest if it is plausible that the error had practical and identifiable consequences to the trial. *Matter of Det. of Monroe*, 198 Wn. App. 196, 201, 392 P.3d 1088 (2017). Here, the plea agreement, which limited the trial court's sentencing discretion, was invalid and should not have been accepted. A new agreement or a trial was required. Additionally, the trial court's acquiescence in the limitation of its discretion changed the range of options that would otherwise have been available. The outcome would have been different without these manifest constitutional errors.

Additionally, any failure to object was due to the ineffectiveness of Ortiz's trial counsel in failing to recognize that the trial court's discretion under *Houston-Sconiers* could not be limited by agreement of the parties. This failure fell below the minimum standard of reasonable attorney conduct. Trial counsel's advice to Ortiz related to the plea agreement and counsel's subsequent conduct at sentencing in following the

improper agreement were deficient. There is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance. *See State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

4.2 The trial court erred in allowing its discretion under *Houston-Sconiers* to be limited by the plea agreement.

4.2.1 Constitutional issues are reviewed de novo.

Claims of constitutional error in criminal cases are reviewed de novo. *State v. Gregory*, ___ Wn.2d ___, 427 P.3d 621, 631 (2018).

4.2.2 The constitution requires that a sentencing court have discretion to consider the offender's youth.

"The Eighth Amendment to the United States Constitution compels us to recognize that children are different." *Houston-Sconiers*, 188 Wn.2d at 18. Article 1, Section 14 of the Washington Constitution provides greater protection to juveniles than the Eighth Amendment. *State v. Bassett*, ___ Wn.2d ___, 428 P.3d 343, 350 (2018).

Sentencing courts "must" address those differences "with discretion to consider the mitigating qualities of youth." *Houston-Sconiers*, 188 Wn.2d at 19. These mitigating qualities

include the “hallmark features” of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; factors like the juvenile’s surrounding environment, family circumstances, and peer pressure; and factors suggesting the child might be successfully rehabilitated. *Houston-Sconiers*, 188 Wn.2d at 23. These qualities may mitigate the youthful offender’s culpability and call for a more lenient sentence. *Bassett*, 428 P.3d at 349 (2018).

The language of our Supreme Court in *Houston-Sconiers* regarding this discretion in sentencing is mandatory. It does not leave room for sentencing courts to relinquish their discretion.

The Eighth Amendment **requires trial courts to exercise this discretion** whether the youth is sentenced in juvenile or adult court and whether the transfer to adult court is discretionary or mandatory

Houston-Sconiers, 188 Wn.2d at 19 (emphasis added).

Critically, the Eighth Amendment **requires trial courts to exercise this discretion** at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line.

Houston-Sconiers, 188 Wn.2d at 20 (emphasis added).

Sentencing courts **must** have **complete discretion** to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not.”

Houston-Sconiers, 188 Wn.2d at 20 (emphasis added).

Trial courts **must consider** mitigating qualities of youth at sentencing and **must have discretion** to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Houston-Sconiers, 188 Wn.2d at 20 (emphasis added).

In exercising full discretion in juvenile sentencing, **the court must consider** mitigating circumstances related to the defendant's youth—including age and its “hallmark features,” such as the juvenile’s “immaturity, impetuosity, and failure to appreciate risks and consequences.” **It must also consider** factors like the nature of the juvenile’s surrounding environment and family circumstances, the extent of the juvenile’s participation in the crime, and “the way familial and peer pressures may have affected him [or her].” **And it must consider** how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Houston-Sconiers, 188 Wn.2d at 23 (emphasis added).

The constitutionally-required exercise of discretion to consider the mitigating effects of youth resides with the sentencing court. It is a mandatory duty of the sentencing court that cannot be set aside.

Here, the trial court erred first in accepting the guilty plea that was conditioned on an agreement that purported to limit the trial court’s discretion to consider an exceptional sentence downward based on Ortiz’s youth at the time of the

crime. Because the discretion under *Houston-Sconiers* is a mandatory duty of the trial court, it cannot be waived or limited by the parties. The parties' attempt to do so under the plea agreement was invalid. The trial court could not validly accept Ortiz's plea.

The trial court erred again when it gave effect to the plea agreement by limiting its own discretion in violation of the constitutional requirement set forth in *Houston-Sconiers*. The trial court erred in considering only the standard range and failing to give full consideration to the *Houston-Sconiers* factors.

This Court should reverse the sentence and finding of guilt, allow Ortiz to withdraw the improper plea, and remand for further proceedings.

4.2.3 Plea agreements cannot limit the discretion of the sentencing court.

In addition to the constitutional requirement that the sentencing court exercise discretion under *Houston-Sconiers*, Washington's criminal statutes and case law prohibit the parties from limiting the discretion of the sentencing court. "The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea." RCW 9.94A.431(2). "A plea agreement cannot alter the sentencing court's authority." *State*

v. Barber, 170 Wn.2d 854, 870, 248 P.3d 494 (2011). “A plea agreement cannot bind a court to impose a sentence that is contrary to law.” *In re Det. of Brock*, 183 Wn. App. 319, 324, 333 P.3d 494 (2014).

Allowing the parties to limit the sentencing court’s discretion would create a separation of powers problem. The prosecutor, as a member of the executive branch, simply does not have the power to limit the sentencing authority or discretion of the judiciary by way of a plea agreement. *Barber*, 170 Wn.2d at 872.

The trial court erred in accepting the plea agreement, which purported to limit the court’s discretion. The trial court erred in acquiescing to that limitation. This Court should reverse the sentence and finding of guilt, allow Ortiz to withdraw the improper plea, and remand for further proceedings.

4.3 The trial court erred in finding that Ortiz’s plea was knowing and voluntary without inquiring into Ortiz’s understanding of his purported waiver of *Houston-Sconiers*.

Even if the trial court could have properly accepted the plea agreement despite the requirements of *Houston-Sconiers*, the court was at least required to inquire of Ortiz and determine that Ortiz’s waiver of *Houston-Sconiers* was knowing and

voluntary. The trial court failed to do so, in violation of Ortiz's rights of due process.

4.3.1 Constitutional issues are reviewed de novo.

This is another claim of constitutional error, which should be reviewed de novo. *See Gregory*, 427 P.3d at 631.

4.3.2 Trial courts are required to inquire into a defendant's understanding of any waiver of constitutional rights before accepting a guilty plea.

A criminal defendant can, generally, waive any right that exists for his or her benefit if he or she so chooses. *Brock*, 183 Wn. App. at 324. However, "due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily." *State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018).

"The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). The court does so by having a detailed colloquy with the defendant regarding each of the rights that the defendant waives as part of the guilty plea.

4.3.3 The trial court's acceptance of Ortiz's guilty plea was invalid because the trial court failed to inquire into Ortiz's understanding of his purported waiver of *Houston-Sconiers*.

Here, the trial court's colloquy with Ortiz failed to address the waiver of the protections of *Houston-Sconiers*. RP, June 25, at 8-15. Thus, the trial court failed to determine that the waiver was made knowingly and voluntarily. The waiver of *Houston-Sconiers* was central to the plea agreement. If Ortiz did not knowingly, intelligently, and voluntarily waive the protections of *Houston-Sconiers*, he could not knowingly and voluntarily enter into the plea agreement.

Because the trial court failed to inquire into Ortiz's understanding of his purported waiver of *Houston-Sconiers*, the trial court's acceptance of the guilty plea was invalid. This Court should reverse the sentence and finding of guilt, allow Ortiz to withdraw the improper plea, and remand for further proceedings.

4.4 The trial court abused its discretion in refusing to hear Ortiz’s motion to withdraw his guilty plea.

4.4.1 Where the grounds for withdrawal of a guilty plea are constitutional in nature, this Court should review de novo, rather than the ordinary abuse of discretion standard.

Normally, appellate courts review motions to withdraw a guilty plea for abuse of discretion. However, where the request for withdrawal is based on a claimed constitutional error, review should be de novo. *State v. Buckman*, 190 Wn.2d 51, 57, 409 P.3d 193 (2018).

4.4.2 Withdrawal of Ortiz’s guilty plea was necessary to correct the manifest injustice of the purported waiver of *Houston-Sconiers*.

“The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). A manifest injustice exists where the defendant establishes that he or she received ineffective assistance of counsel or that the plea was involuntary. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282, 319 P.3d 53 (2013).

A guilty plea is involuntary when it is based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or

higher than anticipated. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

Ortiz was misinformed that the parties could limit the trial court's discretion under *Houston-Sconiers* by way of the plea agreement. The parties do not have that power. Regardless of the actual impact on the eventual sentence, this error renders the plea involuntary. The trial court should have allowed Ortiz to withdraw the plea.

4.4.3 Withdrawal of Ortiz's guilty plea was necessary to correct the manifest injustice of a plea agreement that the trial court failed to invalidate.

Failure to comply with CrR 4.2(e), standing alone, is grounds for withdrawal of a plea. *State v. Perez*, 33 Wn. App. 258, 263, 654 P.2d 708 (1982). The rule requires, "The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.431 may be determined at the same hearing at which the plea is accepted." CrR 4.2(e). The statute requires the court to determine "if the agreement is consistent with the interests of justice." RCW 9.94A.431.

The agreement was not consistent with the interests of justice. Justice requires that the sentencing court be able to exercise the discretion mandated by *Houston-Sconiers*. The trial

court failed to invalidate the agreement. Ortiz should have been entitled to withdraw his plea.

4.4.4 The trial court abused its discretion in refusing to hear Ortiz’s motion prior to sentencing.

Pre-sentencing guilty pleas are preferred over a post-sentence collateral attack. *See State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018). The trial court’s refusal to hear Ortiz’s grounds for withdrawing his plea was patently unreasonable.

5. Conclusion

The trial court erred by allowing its discretion under *Houston-Sconiers* to be limited by the plea agreement entered by the parties. Even if were permissible for the parties to limit the trial court’s discretion, the trial court erred in accepting the guilty plea without inquiring whether Ortiz understood and voluntarily waived his rights under *Houston-Sconiers*. Finally, the trial court abused its discretion when it refused to hear Ortiz’s motion to withdraw the improper plea.

This Court should reverse the sentence and finding of guilt, allow Ortiz to withdraw the improper plea, and remand for further proceedings.

Respectfully submitted this 7th day of December, 2018.

/s/ *Kevin Hochhalter*
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 7, 2018 (after 5:00pm), I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S, Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

I further certify that on December 7, 2018, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Juan Ortiz, by depositing a copy in the U.S. mail, postage paid, to the following address:

Juan Ortiz, DOC#408941
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

DATED this 7th day of December, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

December 07, 2018 - 5:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52195-4
Appellate Court Case Title: State of Washington, Respondent v. Juan Ortiz, Appellant
Superior Court Case Number: 10-1-02057-0

The following documents have been uploaded:

- 521954_Briefs_20181207171433D2424932_0634.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was Brief - Appellant 2018-12-07 amended.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

This amended brief includes a complete table of authorities and certificate of service on the appellant, which will be complete no later than tomorrow, Saturday, December 8.

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE STE C-217
LACEY, WA, 98503-5608
Phone: 360-763-8008

Note: The Filing Id is 20181207171433D2424932