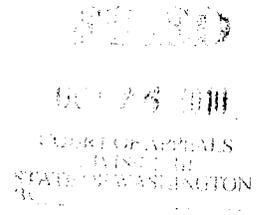


COA No. 29017-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON



STATE OF WASHINGTON, Respondent,

v.

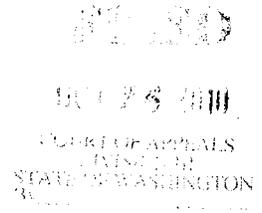
RICARDO LEE AGUILAR, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

COA No. 29017-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON



STATE OF WASHINGTON, Respondent,

v.

RICARDO LEE AGUILAR, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR	
Assignment of Error A: The court erred by denying Ricardo Lee Aguilar's second motion to withdraw guilty plea.....	1
Issues Pertaining to Assignment of Error.....	1
1. Did the court err by determining Mr. Aguilar's second motion to withdraw guilty plea was time-barred by RCW 10.73.090? (Assignment of Error A).....	1
2. Did the court err by determining the issue raised by Mr. Aguilar in the second motion to withdraw guilty plea had already been decided in <i>State v. Aguilar</i> , 152 Wn. App. 1006 (2009 Wash. App. LEXIS 2246)? (Assignment of Error A).....	1
3. Did the court abuse its discretion by denying Mr. Aguilar's second motion to withdraw guilty plea? (Assignment of Error A).....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	7
A. The court erred by determining Mr. Aguilar's second motion to withdraw guilty plea was time-barred by RCW 10.73.090.....	7
B. The court erred by determining the issue raised in Mr. Aguilar's second motion to withdraw guilty plea had already been decided in <i>State v. Aguilar</i> , 152 Wn. App. 1006 (2009 Wash. App. LEXIS 2246), his appeal from the trial court's denial of his first motion to withdraw guilty plea.....	8
C. The trial court abused its discretion by denying Mr. Aguilar's second motion to withdraw guilty plea.....	11

IV. CONCLUSION.....	13
---------------------	----

TABLE OF AUTHORITIES

Table of Cases

<i>In re Pers. Restraint of Skylstad</i> , 160 Wn.2d 944, 162 P.3d 413 (2007).....	7
<i>In re Pers. Restraint of Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	8
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).....	3
<i>State v. Aguilar</i> , 152 Wn. App. 1006 (2009 Wash. App. LEXIS 2246).....	1, 6, 7, 9
<i>State v. Branch</i> , 129 Wn.2d 635, 919 P.2d 1228 (1996).....	11
<i>State v. Marshall</i> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	12
<i>State v. Miller</i> , 110 Wn.2d 528, 756 P.2d 122 (1988).....	12
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	12
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	12
<i>State v. Taylor</i> , 83 Wn.2d 594, 521 P.2d 699 (1974).....	12
<i>State v. Turley</i> , 149 Wn.2d 395, 69 P.3d 338 (2003).....	13
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	13

Statutes

RCW 9.94A.533(3).....	5, 8, 10
RCW 10.73.090.....	1, 7, 8

RCW 10.73.090(1).....7
RCW 10.73.090(2).....7
RCW 10.73.140..... 11

Rules

CrR 4.2(f).....4, 11
CrR 7.8..... 5

I. ASSIGNMENT OF ERROR

A. The court erred by denying Ricardo Lee Aguilar's second motion to withdraw guilty plea.

Issues Pertaining to Assignment of Error

1. Did the court err by determining Mr. Aguilar's second motion to withdraw guilty plea was time-barred by RCW 10.73.090? (Assignment of Error A).

2. Did the court err by determining the issue raised by Mr. Aguilar in the second motion to withdraw guilty plea had already been decided in *State v. Aguilar*, 152 Wn. App. 1006 (2009 Wash. App. LEXIS 2246), his appeal from the trial court's denial of his first motion to withdraw guilty plea? (Assignment of Error A).

3. Did the court abuse its discretion by denying Mr. Aguilar's second motion to withdraw guilty plea? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Aguilar was charged by amended information on January 28, 2008, with eight crimes. (Supp. CP 64). On January 31, 2008, Mr. Aguilar pleaded guilty to three of them: count 1: attempting to elude a pursuing police vehicle while armed with a firearm, count 3: violation of the Uniform Controlled Substances Act – possession with intent to deliver cocaine while armed with a

firearm, and count 6: unlawful possession of a firearm in the first degree. (1/31/08 Supp. RP 3).

In his statement of defendant on plea of guilty, Mr. Aguilar stated: "I do not believe I am guilty of these offenses but in order to take the plea bargain, I plead guilty to counts 1, 3, and 6." (Supp. CP 75). The statement further provided that count 1 had a standard range of 22-29 months with no community custody, count 3 had a standard range of 60-120 months with 9-12 months of community custody, and count 6 had a standard range of 87-116 months with no community custody. (Supp. CP 69). Paragraph (g) of the statement provided the prosecuting attorney would make the following recommendations to the judge: "The prosecutor will recommend 120 months total time (the sentences to run concurrent) and will move to dismiss the remaining counts, and will not seek an exceptional sentence of multiple consecutive sentences of 120 months each for the other drug charges. In exchange for prosecutor's recommendation to run the time on this offense concurrent with defendant's other charge which is now a conviction, defendant agrees not to appeal that conviction." (Supp. CP 71).

At the guilty plea hearing of January 31, 2008, the court went over the offender score and the standard range and community custody, if any, for each of the three offenses to which Mr. Aguilar was pleading guilty. As for count 3, the court noted the standard range was 60-120 months, "but we have an enhancer there of 36 months, which brings this total to 96-120 months." (1/31/08 Supp. RP 5). Count 3 also included community custody of 9-12 months. (*Id.*). The court went over the prosecutor's recommendation: 120 months with all sentences to run concurrently, dismissal of 5 other charges, and no exceptional sentence. (1/31/08 Supp. RP 6).

As for the firearm enhancement, the court had colloquy with the prosecutor confirming there was only one such enhancement so it did not have to be run consecutive to any other. (1/31/08 Supp. CP 7-8). The court stated, "Even though we may have a couple of firearms problems, we're not going to stack those firearms three times, we're only going to do it once, right?" (1/31/08 Supp. RP 9). The prosecutor agreed. (*Id.*).

The court understood this was an *Alford* plea [*North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)] to take advantage of the plea bargain so it considered the probable cause statements as the factual basis for the guilty pleas. (1/31/08

Supp. RP 9). The court accepted Mr. Aguilar's guilty pleas to the three offenses, finding they were made knowingly, voluntarily, and intelligently. (1/31/08 Supp. RP 10).

At the February 25, 2008 sentencing hearing, the court sentenced Mr. Aguilar to 29 months for the eluding count, 120 months for the intent to deliver cocaine count, and 116 months for first degree unlawful possession of a firearm count, all sentences to run concurrently. (1/31/08 Supp. RP 17). The court also mentioned community custody of 9-12 months for the intent to deliver cocaine. (1/31/08 Supp. RP 16). That day, the court entered judgment and sentence reflecting the court's oral pronouncement. (Supp. CP 78-83).

Mr. Aguilar moved to withdraw his guilty plea in a motion and affidavit signed on March 29, 2008, and filed on April 2, 2008 :

I was not fully aware of the consequences of my plea of guilty. I was not aware that all of my time wouldn't be run consecutive. Nor that I had a 36 [month] mandatory no good time due to a firearms enhancement or that the feds could pick up those charges dropped by the prosecution. In short, due to ineffective counsel I wasn't fully informed or I would not of pled guilty." (Supp. CP 87-90).

The court held a hearing where Mr. Aguilar was not present and denied the motion to withdraw guilty plea. (4/21/08 Supp. RP 19-20). Finding there was no manifest injustice under CrR 4.2(f) or

CrR 7.8, Mr. Aguilar was aware of the consequences of the plea, and he received effective assistance of counsel, the court filed the order denying motion to withdraw guilty plea on April 21, 2008. (Supp. CP 92-93). Mr. Aguilar appealed the denial of his motion on April 30, 2008. (Supp. CP 98).

While the appeal was pending, the trial court, on the State's motion, entered an order clarifying judgment and sentence. (Supp. CP 99-101). As pertinent to this appeal, the order stated:

. . . [F]inding that the terms of confinement include a mandatory firearms enhancement that requires sentences to be run consecutive thereto, and that clarification of the terms is warranted, . . .

IT IS HEREBY ORDERED that section 4.2 of the judgment and sentence entered herein on February 25, 2008, shall provide as follows:

4.2 CONFINEMENT OVER ONE YEAR: The court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections commencing February 25, 2008:

29 months on Count No. 1;
36 months for the firearms enhancement for Count No. 3,
then 84 months on Count No. 3, for a total of 120 months;
116 months on Count No. 6.

The defendant shall serve the mandatory 36 month term for mandatory firearms enhancement in Count No. 3 in total confinement pursuant to RCW 9.94A.533(3). The sentence for Count No. 1 and Count No. 6, and the remaining 84

months on Count No. 3 shall run concurrent to each other, and shall run consecutive to the 36 months for the firearms enhancement on Count No. 3.

(X) Actual number of months of total confinement ordered is 120 months including community custody. The actual number of months of total confinement including community custody ordered shall not exceed 120 months.

(X) This sentence shall be concurrent with the sentence in Walla Walla County cause no. 07-1-00250-0.

IT IS FURTHER ORDERED that all other terms and conditions of the judgment and sentence entered herein shall remain in effect until further order of the court. (Supp. CP 99-100).

The Court of Appeals subsequently filed its unpublished decision affirming the convictions and the denial of the motion to withdraw guilty plea. *State v. Aguilar*, 152 Wn. App. 1006 (2009 Wash. App. 2246). (CP 26-41). The Supreme Court denied the petition for review on March 31, 2010. (CP 25). The mandate was filed on April 20, 2010. (CP 45).

Mr. Aguilar filed a second motion and affidavit to withdraw guilty plea on March 16, 2010. (CP 5-10). The court held a hearing on April 12, 2010, where Mr. Aguilar was not present. (4/12/10 RP 1-4). The order denying defendant's second motion to withdraw guilty plea was filed the same day. (CP 42-43). Mr. Aguilar timely appealed. (CP 62).

III. ARGUMENT

A. The court erred by determining Mr. Aguilar's second motion to withdraw guilty plea was time-barred by RCW 10.73.090.

The trial court found that Mr. Aguilar's second motion to withdraw guilty plea was time-barred by RCW 10.73.090. The judgment and sentence was filed on February 25, 2008. (Supp. CP 78). Generally, criminal defendants must bring collateral attacks against their judgment and sentence within one year of their judgment being final. *In re Skylstad*, 160 Wn.2d 944, 947, 162 P.3d 413 (2007). A motion to withdraw guilty plea is a collateral attack. RCW 10.73.090(2).

RCW 10.73.090(1) provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Here, the judgment and sentence was invalid on its face so Mr. Aguilar's second motion to withdraw guilty plea was not time-barred by RCW 10.73.090. As recognized in the order clarifying judgment and sentence entered on December 29, 2008, the judgment and sentence was incorrect and not valid on its face in paragraph 4.2, confinement over one year, because "the terms of

confinement include a mandatory firearm enhancement that requires sentences to run consecutive thereto, and that clarification of the terms is warranted.” (Supp. CP 99-101). In relevant part, the order clarifying judgment and sentence stated:

36 months for the firearms enhancement for Count No. 3, then 84 months on Count No. 3, for a total of 120 months; . . .

The defendant shall serve the mandatory 36 month term for mandatory firearms enhancement in Count No. 3 in total confinement pursuant to RCW 9.94A.533(3). The sentence for Count No. 1 and Count No. 6, and the remaining 84 months on Count No. 3, shall run concurrent to each other, and shall run consecutive to the 36 months for the firearms enhancement on Count No. 3. . . (Supp CP 100).

Paragraph 4.2 in the original judgment and sentence referenced no mandatory firearms enhancement requiring total confinement and simply provided the sentences were to run concurrently. (Supp. CP 81). Both the State and the trial court recognized the judgment and sentence was incorrect and invalid on its face. See *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000). Accordingly, Mr. Aguilar’s second motion to withdraw guilty plea was not time-barred by RCW 10.73.090.

B. The court erred by determining the issue raised in Mr. Aguilar’s second motion to withdraw guilty plea had already been

decided in *State v. Aguilar*, 152 Wn. App. 1006 (2009 Wash. App. 2246), his appeal from the trial court's denial of his first motion to withdraw guilty appeal.

The issue raised in the second motion could not have been decided by this Court in the first appeal because the December 29, 2008 order in question was entered while the appeal was pending and was not before the Court. (Supp. CP 99-101). In his affidavit in support of the second motion to withdraw guilty plea, Mr. Aguilar made this specific claim:

On December 29, 2008, this court ordered and granted the plaintiff's motion for an order clarifying the terms of confinement in the judgment and sentence entered on February 25, 2008, violating the defendant's right to due process by not giving proper notice or an opportunity to respond during the modification hearing. The court did not merely correct a clerical error under CrR 7.8(a); its imposition of a 36 month weapon enhancement imposed additional punishment. [cite omitted.] The court should have acted only after an adversarial hearing, with notice to both parties. [cites omitted.]

The defendant was also prejudiced when the trial court amended the defendant's judgment and sentence and added a 36 month weapon enhancement, to run consecutive to the other sentences. In part, the guilty plea statement indicated the prosecutor would recommend "120 months total time (the sentences to run concurrent) . . . The prosecutor made an agreement, which is a legal binding contract between the defendant and the state. The agreement was made in open court with the defendant and the prosecutor both present and was made part of the record during the change of plea. . .

Due process requires that the prosecutor adhere to the plea agreement. [cite omitted.] (CP 8-9).

In the plea bargain, Mr. Aguilar was supposed to have total time of 120 months, with the 120-month sentence on count 3, the 29-month sentence on count 1, and the 116-month sentence on count 6 all running concurrently. (Supp. CP 71). The agreement was a package deal. (1/31/08 RP 6).

When the court clarified the judgment and sentence, it noted that the sentences must run consecutive to the mandatory firearms enhancement. (Supp. CP 99). The court then ordered total confinement of 36 months in count 3 for the mandatory firearms enhancement and “[t]he sentence for Count No. 1 and Count No. 6, and the remaining 84 months on Count No. 3, shall run concurrent to each other, and shall run consecutive to the 36 months for the firearms enhancement on Count No. 3.” (Supp. CP 100).

RCW 9.94A.533(3) states in part that “[i]f the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.” By doing so, the court imposed a sentence for count 6 of 116 months running

consecutively to the 36-month firearms enhancement, for a total of 152 months. That is not only contrary to the terms of the plea bargain and what was understood by Mr. Aguilar, but is beyond the 120-month maximum jail time for count 6, a class B felony. (Supp. CP 65). The recitation in the order clarifying judgment and sentence that the total confinement is, and shall not exceed, 120 months does not comport with the actual sentence, which is clearly invalid on its face.

The issue raised here could not have been before this Court in the appeal from the order denying the initial motion to withdraw guilty plea. The infirmity in the original judgment and sentence was not cured, but was rather exacerbated by the subsequent order clarifying judgment and sentence, of which Mr. Aguilar now complains. His second motion to withdraw guilty plea was not a repetitive petition and is not barred by RCW 10.73.140.

C. The court abused its discretion by denying Mr. Aguilar's second motion to withdraw guilty plea.

CrR 4.2(f) permits a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A "manifest injustice" is obvious, directly observable, overt, not obscure. *State v. Branch*, 129 Wn.2d 635,

641, 919 P.2d 1228 (1996). The defendant bears the burden of showing manifest injustice. *Id.* On the other hand, the State bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). The denial of a motion to withdraw guilty is reviewed for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

A guilty plea is not knowingly made when it is based on misinformation of the sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). Mr. Aguilar has been sentenced beyond the maximum jail time for a class B felony and beyond the 120 months total time he bargained for with the prosecutor. By changing the judgment and sentence on its own motion, the State clearly breached its agreement. Due process demands that the prosecutor abide by it. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). He did not. Mr. Aguilar has demonstrated a manifest injustice. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Moreover, the order clarifying judgment and sentence confined Mr. Aguilar to a term in excess of the maximum jail time for count 6. This fact further shows that a manifest injustice would occur if he is not permitted to withdraw his guilty plea. *Id.* at 598.

Mr. Aguilar should be allowed to withdraw his pleas to all three offenses as he need not make a showing of manifest injustice on each count when the plea agreement, as here, is a package deal. *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

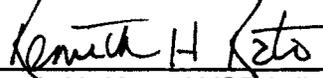
Stating the same issue was decided before and denied by another Walla Walla County Superior Court Judge, the Court of Appeals, and the Supreme Court, the trial court summarily denied Mr. Aguilar's second motion to withdraw guilty plea. (4/12/10 RP 2-3). But the issue is not the same and has not been decided. Indeed, Mr. Aguilar has shown a manifest injustice. By refusing to consider the merits of his motion, the court abused its discretion as the decision was based on untenable grounds and for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). Mr. Aguilar must be allowed to withdraw his guilty plea.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Aguilar respectfully urges this Court to reverse the denial of his second motion to withdraw guilty plea, reverse his convictions, and remand for further proceedings to allow him to withdraw his guilty plea.

DATED this 26th day of October, 2010.

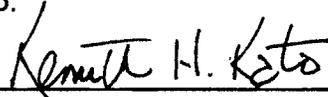
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on October 26, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Teresa J. Chen, Attorney at Law, PO Box 40, Soap Lake, WA 98851-0040; and Ricardo Lee Aguilar, #746222, Coyote Ridge Corr. Ctr., PO Box 769, Connell, WA 99326.



Kenneth H. Kato
Kenneth H. Kato