



29017-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICARDO LEE AGUILAR,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Teresa Chen", is written above the typed name.

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Where CrR 7.8 requires that motions under this authority be filed within one year of the date of the order challenged or an otherwise reasonable time, did the superior court err in finding the Defendant's CrR 7.8 motion untimely when it was filed more than a year from the entry of the challenged order and more than a year after the date of alleged discovery of alleged error?
2. Where the Defendant's claim (that he did not know that the enhancement would run consecutive to the offense enhanced) is identical to one made and adjudicated on direct appeal, did the superior court err in finding the issue decided?
3. Did the court abuse its discretion in denying the motion for a legal challenge not raised before the court and without any actual effect on

the 120 month sentence?

IV. STATEMENT OF THE CASE

The Defendant Ricardo Aguilar was charged with eight counts: attempting to elude police, four counts of possessing controlled substances with intent to deliver while armed with a firearm (methamphetamine, cocaine, hydrocodone, and marijuana), two counts of unlawful possession of a firearm in the first degree, and possessing stolen property in the first degree. CP 64-67.

In another case, the Defendant was convicted by jury of Escape From Community Custody and Bail Jumping. CP 119-20. The next day, January 31, 2008, he pled guilty in the instant case to three counts: attempting to elude police, possessing cocaine with intent to deliver while armed with a firearm, and unlawful possession of a firearm in the first degree. CP 68-77, 119-20. The remaining counts were dismissed in exchange for his guilty plea and his agreement not to challenge the jury verdict in the other case. CP 71, 120. The prosecutor agreed to recommend a total sentence of 120 months, obtained by running the sentences in each count concurrent to each other. CP 71. The Defendant was sentenced the next month. CP 78-86.

The Defendant received 29 months on count one; 120 (84 + 36

(enhancement)) months on count three; and 116 months on count six. CP 78-86, 99-101. The counts ran concurrent to each other for a total of 120 months. CP 78-86, 99-101.

On April 2, 2008, the Defendant filed a Motion to Withdraw Guilty Plea claiming the plea was involuntary and that there was ineffective assistance of counsel, because he was not aware (1) that the time on each count would run concurrent to the others, (2) that he could not earn early release on confinement ordered on the enhancement, and (3) that federal prosecutors could pick up dropped charges. CP 87-88. On April 21, 2008, the motion was denied. CP 92-93.

Before the Defendant filed a notice of appeal on March 2, 2009 (CP 102), the superior court issued an order of clarification explaining that actual months of confinement *including community custody* must not exceed 120 months. CP 99-101.

The Defendant challenged this Order Clarifying. CP 103-07. The prosecutor explained that the motion to clarify, while made by the prosecutor, was actually made “at the suggestion of the defendant’s appellate counsel” and for the purpose of insuring that “total confinement including community custody ordered could not exceed 120 months.” CP 117-18, 20. CP 119-41. The superior court held that the procedure was proper, pursuant to *In re*

Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). CP 111-12.

The Court of Appeals affirmed the convictions in an unpublished opinion issuing on September 3, 2009. CP 46. The court specifically addressed the Defendant's allegation that he was not aware that the enhancement would run consecutive to the underlying offense. CP 51-54. The mandate issued April 15, 2010. CP 45.

Before the mandate issued, the Defendant filed a new Motion to Withdraw Guilty Plea. CP 5-10. In this motion, he complains that he did not anticipate the sentence as a consequence of his plea, specifically that the enhancement would run consecutive to the underlying offense. CP 8-9. The superior court denied the motion, finding no manifest injustice and insufficient evidence to establish that the defendant was not aware of the consequences of his plea. CP 42. The court also found that the motion was time barred and successive. CP 42.

The Defendant appeals from this dismissal.

V. ARGUMENT

A. THE DEFENDANT'S CrR 7.8 MOTION WAS UNTIMELY.

The Defendant argues that his CrR 7.8 motion was timely. Brief of Appellant at 7-8.

A motion made under CrR 7.8 which alleges “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining [the] judgment” or “newly discovered evidence” “shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken.” CrR 7.8(b). A CrR 7.8 motion alleging another appropriate reason “shall be made within a reasonable time.” *Id.*

The Defendant’s motion filed March 16, 2010 (CP 5-10) seeks to withdraw his guilty plea. In other words, it challenges the court’s January 31, 2008 acceptance of the plea (CP 68-77).

Although the motion does not explain which subsection of the CrR 7.8(b) is relevant, one could interpret that this is a claim of newly discovered evidence. The Defendant is claiming that he discovered that his plea was involuntary when the court entered the Order Clarifying the Judgment & Sentence (CP 99-101) filed December 29, 2008. He claims that the order did not clarify the order, but actually changed the order. CP 8. He claims that he believed the 36-month weapon enhancement would run concurrent with the offense it was enhancing. CP 8. He claims that this is a violation of the plea agreement. CP 9. If one interprets the Order Clarifying to be new evidence, then he had one year from the guilty plea to make his challenge -- and the motion was, therefore, untimely.

On appeal, the Defendant argues that the judgment and sentence is void. Brief of Appellant at 7. A claim that the judgment is void is made under CrR 7.8(b)(4) and subject to “reasonable” time limits. Because the Defendant would have discovered his claim on December 2008, his 2010 motion was not filed in a reasonable time.

The motion is untimely per CrR 7.8. *See State v. Gudgel*, No. 83821-6 (Wash. filed Dec. 9, 2010) (finding the direct appeal of the dismissal of a CrR 7.8 motion was untimely when filed more than a year after the filing of the judgment and sentence).

The Defendant asserts that his judgment and sentence is invalid on its face, because the Court entered an Order Clarifying. Brief of Appellant at 7. This is not persuasive. He provides no authority for his assertion (Brief of Appellant at 8) that a desire to clarify is equivalent to an acknowledgment of invalidity. The statement of clarification is only that the court’s order must be understood in the context of RCW 9.94A.505(5) and RCW 9.94A.533(3), which dictate that enhancements are added to a confinement period and a sentence of confinement and community custody cannot exceed the statutory maximum term for the offense. The order does not change the judgment and sentence, but only provides additional information about how sentences function.

If this Court accepts these claims to be timely, the personal restraint petition standards of review apply.

As the lower court indicated, the burden of proof is on the Defendant. CP 42-43. *See also In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990) (ultimate burden of proof requires petitioner establish error by a preponderance of the evidence); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). The petitioner must demonstrate actual and substantial prejudice; the mere possibility of prejudice is insufficient. *In re Mercer*, 108 Wn.2d 714, 718, 741 P.2d 559 (1987). *See also In re Powell*, 117 Wn.2d 175, 184, 814 P.2d 635 (1991) (actual prejudice must be established by a preponderance of the evidence). Although a constitutional error is never considered harmless on direct appeal, such an alleged error is *not* presumed prejudicial for purposes of a personal restraint petition. *In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner fails to make a prima facie showing of prejudice, the petition will be dismissed. *In re Grigsby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

B. THE DEFENDANT MAY NOT RELITIGATE A DECIDED CLAIM.

While the permissive time bar may permit these late collateral attacks,

the law does not permit the relitigation of decided issues.

The lower court ruled that the Defendant “failed to establish that the issue he now raises was not decided” by the Court of Appeals’ hearing of his earlier appeal. CP 42. The Defendant claims that this is error. Brief of Appellant at 8-11. In fact, it is quite clear that Defendant’s very specific claim was litigated in the earlier appeal.

In his March 2010 motion, the Defendant argued that he should be allowed to withdraw his guilty plea, because he received a 120-month sentence. CP 8-9. Specifically, he argues that the 36-month weapon enhancement should have been run concurrent to the time on the offense which it was enhancing. CP 8. It is identical to one of the claims he had already made in his first appeal. CP 50 (“Mr. Aguilar alleged he was not aware that the firearm enhancement had to run consecutively [...] and that he would not have taken the plea bargain had he known of these consequences.”) The Court held that the Defendant fully understood this sentencing consequence. CP 52-54.

The Defendant argues that he could not possibly have challenged the sentence in his original appeal due to the timing of the issuance of the Order Clarifying Judgment and Sentence. Brief of Appellant at 9. Neither the timing of the filing of various documents, nor the actual content of the Court

of Appeals' unpublished decision, support the Defendant's conclusion.

The issue has already been litigated. The doctrine of collateral estoppel prevents the relitigation of decided claims in criminal cases. *State v. Eggleston*, 164 Wn.2d 61, 187 P.3d 233 (2008). The courts will not reconsider such issues absent a showing that the interests of justice so require. *See In re Lord*, 123 Wn.2d 296, 329, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994); RCW 10.73.140.

The superior court correctly held that this claim had already been litigated.

C. THE DEFENDANT'S SENTENCE IS NOT IN EXCESS OF LAW.

As an afterthought, the Defendant argues that the effect of the Order Clarifying is a "term in excess of the maximum jail time." Brief of Appellant at 12. He argues that RCW 9A.04.030(3) requires that an enhancement must be added to the total confinement "for all offenses, regardless of which underlying offense is subject to a firearm enhancement." Brief of Appellant at 10. In other words, the 36 months should have been added to the greatest base punishment, which was the 116-month sentence of count 6, not the 84-month sentence of count 3.

First, this is not a proper subject for this appeal. This appeal is from

the order entered April 12, 2010. CP 62. That order addressed the claims made in the Defendant's March 16, 2010 Motion to Withdraw Guilty Plea (CP 5-10). That order did not address any claim that the sentence was computed contrary to RCW 9.94A.533(3).

Second, whatever computation is proper, the Defendant's sentence as it stands is not 152 months as the Defendant alleges. Brief of Appellant at 11. It is 120 months, which is exactly what the Defendant bargained for. CP 100 ("The actual number of months of total confinement including community custody shall not exceed 120 months"). The Order Clarifying was issued precisely in order to insure that the Defendant serves no more time than what is permitted by law.

As the Supreme Court held, it is proper for the trial court to remand a sentence to state explicitly that the combination of confinement and community custody shall not exceed the statutory maximum. *In re Brooks*, 166 Wn.2d 664, 375, 211 P.3d 1023 (2009). Where the statutory maximum is 10 years (or 120 months) (CP 69), this is precisely what the superior court did. CP 100 ("The actual number of months of total confinement including community custody shall not exceed 120 months").

That being the case, there can be no credible claim of "manifest injustice." A withdrawal of a plea is only permitted to correct a manifest

injustice. CrR 4.2(f). The Defendant received the sentence he bargained for: 120 months. It is the consequence he expected and understood. Accordingly, a withdrawal of the plea is not permitted. Nor has he met the PRP standard of demonstrating actual prejudice. *In re St. Pierre*, 118 Wn.2d at 328; *In re Grigsby*, 121 Wn.2d at 423.

Therefore, if there is to be any action at all, the only proper remedy would be an amendment of the sentence to provide for 84 months on count six, which would still result in a total sentence of 120 months and would be consistent with the parties' intent and the sentencing court's intent.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: December 14, 2010.

Respectfully submitted:



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