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Court of Appeals  
Division III  
State of Washington  
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NO. 35910-7-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**MIGUEL ANGEL MONTENEGRO,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

1. The State used an obsolete Judgment and Sentence form which included a repealed statute pertaining to community custody.
2. Lack of evidence in the record that Miguel Angel Montenegro was a gang member or affiliate undermines defense counsel's performance in stipulating to that allegation at sentencing.
3. Imposition of the \$200.00 filing fee by the trial court after determining that Mr. Montenegro was indigent is in error.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the repeal of RCW 9.94A.545, effective August 1, 2009 preclude the imposition of 12 months community custody on Mr. Montenegro at the time of sentencing?
2. Was defense counsel ineffective when a stipulation was entered at sentencing that Mr. Montenegro was a gang member or affiliate?
3. Should the \$200.00 filing fee be removed from the Judgment and Sentence due to Mr. Montenegro's indigency?

## **STATEMENT OF THE CASE**

Miguel Angel Montenegro was a passenger in a SUV on December 29, 2017. The driver was his significant other, Sara Madrigal. (DeVair RP 46, ll. 18-20; RP 47, ll. 2-5)

While parked in the Conway Apartments parking lot another car pulled up behind the SUV. Ms. Madrigal drove away, but did not turn on her headlights. Law enforcement officers stopped the SUV as it left the parking lot. (DeVair RP 52, l. 24 to RP 53, l. 14; RP 70, ll. 21-25; RP 71, ll. 19-22)

According to Detective Riley of the Kennewick Police Department both Ms. Madrigal and Mr. Montenegro were questioned concerning his identity. They each provided a false name to the officer. (DeVair RP 68, ll. 17-23; RP 73, ll. 11-13; RP 73, l. 18 to RP 74, l. 25)

Mr. Montenegro was then arrested on a bench warrant. (King RP 8, ll. 23-25)

A search incident to arrest located a holster attached to the waistband of his pants. Mr. Montenegro stated: "Hey, it's not illegal to have a holster?" (DeVair RP 75, ll. 1-9; ll. 18-25)

The officers obtained a search warrant based upon their concern that there may be a gun in the SUV. It was located under the driver's side

floormat. The gun fit the holster. It was a 9 mm black and silver Ruger. (DeVair RP 83, ll. 4-18; RP 83, ll. 22 to RP 84, l. 2; RP 86, ll. 5-10)

Ms. Madrigal allegedly told Detective Riley that Mr. Montenegro had the gun. At trial she claimed the gun was hers. (DeVair RP 61, l. 19 to RP 62, l. 6; RP 81, ll. 10-17)

The gun was sent to the Washington State Patrol Crime Lab (WSPCL). Jeremy Phillips, a forensic scientist, was unable to locate any fingerprints on the gun. He test fired the gun and it worked. (DeVair RP 44, ll. 14-18; RP 153, ll. 8-12; RP 159, ll. 8-25)

Mr. Montenegro denied possession of any firearm during an interview at the Kennewick Police Department. (DeVair RP 107, ll. 2-15)

An Information was filed on January 3, 2018 charging Mr. Montenegro with unlawful possession of a firearm first degree and providing false information to a police officer. (CP 1)

Prior to trial Mr. Montenegro stipulated that he had a prior serious felony for purposes of the unlawful possession of a firearm charge. (CP 6)

A jury found Mr. Montenegro guilty of both offenses. (CP 38; CP 39)

Judgment and Sentence was entered on March 8, 2018. Mr. Montenegro stipulated, for purposes of community custody, that he was a gang

member or affiliate. The trial court imposed a \$200.00 filing fee as part of his legal financial obligations (LFOS) (Gianguialano RP 4, ll. 11-13; CP 52)

Mr. Montenegro filed his Notice of Appeal the same date. (CP 55)

### **SUMMARY OF ARGUMENT**

Mr. Montenegro was inadequately represented by counsel during the sentencing proceedings. His attorney did not note that he was being sentenced to community custody under a repealed statute.

The defense attorney had Mr., Montenegro enter into a stipulation without making a record of its voluntary nature.

The trial court failed to engaged in a colloquy with Mr. Montenegro concerning the voluntariness of the stipulation.

Mr. Montenegro was denied due process under the Fourteenth Amendment to the United States Constitution and Const art. I, § 3 based upon the ineffective assistance of his attorney at the sentencing hearing.

The trial court's imposition of the \$200.00 filing fee is contrary to *State v. Ramirez, slip opinion* 95249-3 (September 20, 2018).

## ARGUMENT

To demonstrate ineffective assistance of counsel, a defendant must make two showings:

- (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Montenegro asserts that defense counsel was ineffective in two respects:

1. Allowing him to be sentenced under a repealed statute; and
2. Allowing him to enter into a stipulation concerning gang membership or affiliation.

Mr. Montenegro further asserts that he was prejudiced by defense counsel's performance. The prejudice was the increased punishment of 12 months community custody.

The Judgment and Sentence form used by the State references a repealed statute pertaining to community custody. RCW 9.94A.545 was

repealed by Laws of 2008, ch. 231, § 57 and Laws of 2009, ch. 28, § 42, effective August 1, 2009.

Mr. Montenegro recognizes that the repealed statute was replaced by RCW 9.94A.701 (3)(b) which requires 12 months of community custody when there is:

...an offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate.

The record does not reflect, other than the stipulation, any evidence that Mr. Montenegro is a criminal street gang member or associate.

RCW 9.94A.030 (13) defines a criminal street gang associate or member as meaning “any person who actively participates in any criminal street gang and intentionally promotes, furthers or assists in any criminal act by the criminal street gang.”

Other than the stipulation, there is no evidence of Mr. Montenegro’s association or membership in a criminal street gang.

When a criminal defendant pleads guilty to an offense there are certain requirements involved that are mandated for purposes of making the plea voluntary.

A defendant must be informed of all direct consequences of pleading guilty, including mandatory community custody. *State v. Turley*, 149 Wash.2d 395, 398-99, 69 P.3d 338 (2003). Failure to inform a defendant that he will be subject to mandatory community custody if he pleads guilty renders a plea invalid. *Turley*, 149 Wash.2d at 398-99. Once a plea is invalid, the defendant has the initial choice of specific performance or withdrawing his plea. *Turley*, 149 Wash.2d at 399 (citing *State v. Miller*, 110 Wash.2d 528, 536, 756 P.2d 122 (1988)).

*State v. Barber*, 152 Wn. App. 223, 226, 217 P.3d 346 (2009).

Even though Mr. Montenegro did not plead guilty, the State was still required to establish that he was a criminal street gang member or associate.

The sentencing court checked the box on the Judgment and Sentence which states, as follows:

**The jury returned a special verdict or the court made a special finding with regard to the following:**

Count I is the crime of **Unlawful possession of a firearm**. The defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.545.

The record at the sentencing hearing does not indicate that the court engaged in a colloquy with Mr. Montenegro concerning the stipulation. Defense counsel did not address the stipulation. The prosecuting attorney was the only one who referenced the stipulation. (Gianguialano RP 4, ll. 11-13)

In the absence of that colloquy there is no way to determine whether Mr. Montenegro entered into the stipulation intelligently, knowingly, and voluntarily.

Mr. Montenegro has not found any caselaw directly on point with the arguments being raised. Rather, he draws his conclusion from inferences involving guilty pleas and the right to due process (notice requirement) pursuant to the Fourteenth Amendment to the United States Constitution and Const. art I, § 3.

A defendant's decision to plead guilty must be knowing, intelligent, and voluntary. [Citations omitted.] To qualify as a knowing and intelligent plea, a guilty plea must be made with a correct understanding of the charge, and the consequences of pleading guilty. . [Citation omitted.] A guilty plea is not knowingly made when it is based on misinformation regarding sentencing consequences. . [Citation omitted.]  
...

The imposition of *mandatory* community placement or community custody is a direct consequence of a guilty plea. . [Citation omitted.]

*Personal Restraint of Quinn*, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010).

Moreover, as set out in *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011);

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. [Citations omitted.] A trial court may not accept a guilty plea without first determining that a criminal defendant has entered into the plea "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea."

Last, but not least, the imposition of the \$200.00 filing fee is now contrary to *State v. Ramirez, supra*, which rules that Laws of 2018, Ch. 269, 317 (2)(h) applies prospectively.

At the time of Mr. Montenegro's sentencing, the trial court was authorized to impose a \$200.00 criminal filing fee.

Clerks of superior court shall collect the following fees for their official services ... [u]pon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020 (2)(h) (2017).

However, effective June 7, 2018, House Bill 1783 amended this statutory provision to prohibit the imposition of the \$200.00 criminal filing fee on indigent defendants:

- (2) Clerks of superior courts shall collect the following fees for their official services ...
- (h) Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010 (3) (a) through (c).

Laws of 2018, ch. 269, § 17.

### **CONCLUSION**

Even though a valid statute exists with regard to imposing community custody if an offense is committed by a gang member or affiliate, Mr. Montenegro was sentenced pursuant to a repealed statute. Additionally, since the stipulation concerning gang membership or affiliation was not determined to be voluntary, and defense counsel did not require the State to prove Mr. Montenegro's gang membership or affiliation, the community custody provision of the Judgment and Sentence should be stricken.

Finally, the \$200.00 filing fee should be removed from the Judgment and Sentence pursuant to *State v. Ramirez, supra*.

DATED this 8th day of October, 2018.

Respectfully submitted,

s/ Dennis W. Morgan

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**NO. 35910-7-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	BENTON COUNTY
Plaintiff,	)	NO. 18 1 00012 6
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
MIGUEL ANGEL MONTENEGRO,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 8th day of October, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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**Transmittal Information**

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