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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

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STATE OF WASHINGTON, APPELLANT

v.

EDUARDO IBARRA VALENCIA, RESPONDENT

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ON APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY

Superior Court Cause No. 15-1-00766-4

The Honorable John D. Knodell

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in allowing Eduardo Ibarra Valencia to withdraw his guilty pleas under the pre-sentencing standards of Criminal Rule (CrR) 4.2 instead of applying the post-judgment collateral attack standards of CrR 7.8. (Assignment of Error No. 1).

## **II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Do errors in a judgment and sentence entered following a guilty plea render the judgment and sentence void, such that review of a motion to withdraw guilty pleas is limited to the pre-sentencing standards of CrR 4.2 or must the court apply the more stringent collateral attack standards of CrR 7.8? (Assignment of Error No. 1).

## **III. STATEMENT OF THE CASE<sup>1</sup>**

On November 20, 2017, Eduardo Ibarra Valencia (“Ibarra”) pleaded guilty to murder in the second degree and attempted murder in the second degree, both with firearm enhancements. CP at 210. Ibarra’s original charges were first degree premeditated murder and attempted first degree premeditated murder. CP at 1.

The charges were amended to second degree murder and attempted murder pursuant to a plea agreement, CP at 205, under which the State agreed to recommend 80 months on the murder conviction, plus a 60 month firearm enhancement, and 40 months on the attempted murder

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<sup>1</sup> The record in this case consists only of Clerk’s Papers. The court reporter filed copies of his Verbatim Reports of Proceedings with the Grant County Clerk’s Office. This will not happen again. The State cites to the Clerk’s Papers as CP at \_\_\_\_.

conviction, with another 60 month firearm enhancement, for a total of 240 months. CP at 214.

On January 22, 2018, the Honorable John D. Knodell sentenced Ibarra to a total of 579.5 months. CP at 248.

The judgment and sentence reflected the parties' agreement that Ibarra's offender score was two. CP at 247. His true score was zero. CP at 242–43; 246. An additional error occurred when the court imposed 240 months for the two 60-month firearm enhancements instead of 120 months. CP at 248. The errors were promptly recognized. On February 16, the State filed a motion to amend the judgment and sentence. CP at 276.

On April 5, 2018, Ibarra moved to withdraw his guilty pleas and for relief from judgment pursuant to Criminal Rules (CrR) 4.2 and CrR 7.8(b)(1). CP at 299. He asserted that, having learned an offender score of zero on first degree premeditated murder and attempted murder resulted in a “substantially less standard range sentence than an offender score of two”, he would not have accepted the State's settlement offer had he known his true score. CP at 302. He averred he would have proceeded to trial on the original charges, hoping for an acquittal or for conviction on lesser charges with firearm enhancements. CP at 302, 309.

Although the erroneous judgment and sentence was entered January 22, 2018, Ibarra argued: “Withdrawal of a guilty plea *prior to*

*sentencing* is governed under CrR 4.2(f).” CP at 306 (emphasis added). Ibarra contended because entry of the amended sentence had been set for April 25, he had filed his plea withdrawal motion prior to sentencing. He argued he was still awaiting sentencing because of the two errors in his original January 22 judgment and sentence. CP at 311.

Ibarra also asserted miscalculation of his offender score satisfied the collateral attack standards of CrR 7.8(b), citing two post-sentencing cases in support.<sup>2</sup> CP at 312. He concluded his argument by maintaining his motion was timely because it was made prior to *resentencing*. CP at 313 (emphasis added).

The State responded that because Ibarra raised the issue after sentencing, the collateral attack standards of CrR 7.8 governed. The State relied on *State v. Buckman*, 190 Wn.2d 51, 55, 409 P.3d 193 (2018), a case decided after Ibarra’s plea but before his motion. The State emphasized critical similarities between that case and Ibarra’s in both facts and procedural posture. CP at 322.

The State also addressed the insufficiency of Ibarra’s asserted prejudice, arguing Ibarra accepted the State’s offer believing he faced a

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<sup>2</sup> *State v. Zavala-Reynoso*, 127 Wn. App. 119, 123, 110 P.3d 827 (2005); *State v. Crawford*, 164 Wn. App. 617, 521, 257 P.3d 365 (2011) (citing *State v. Gomez-Florencia*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997), *review denied*, 134 Wn.2d 1026 (1998)).

maximum sentence for first-degree murder of 347 months when he actually faced a 320-month maximum, the 27 month discrepancy too minor to demonstrate actual and substantial prejudice. CP at 323. Relying primarily on *Buckman*, the State pointed out Buckman's sentencing challenge was treated by the Washington Supreme Court as a post-judgment collateral attack. The State urged the trial court to apply the CrR 7.8 review standards applicable to collateral attack instead of the more lenient pre-sentencing standards of CrR 4.2. CP at 323.

In a supplemental memorandum requested by the trial court, CP at 370, Ibarra confirmed his motion was filed "pursuant to CrR 4.2 and/or in the alternative CrR 7.8(b)(1)." CP at 370. Citing *In re Smalls*, 182 Wn. App. 381, 335 P.3d 949 (2014), he conceded a facially invalid judgment and sentence does not affect the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced." CP at 372-73 (other citations omitted). He acknowledged that under *Smalls* and the other cases he cited his "plea appears to be governed by CrR 7.8(b)." CP at 373.

After this concession, Ibarra briefly addressed the merits of his withdrawal motion, contending the errors discussed in *Smalls* were distinguishable from the errors at issue in his own case, arguing the errors in his case were "much more significant problems which resulted in a

legally unacceptable plea.” CP at 373. He did not discuss the showing required under the more current *Buckman* decision, decided February 1, 2018. *Buckman*, 190 Wn.2d at 51. Ibarra concluded by arguing he had made a substantial showing he was entitled to relief under both CrR 7.8 and CrR 4.2(f).

Hearing on the withdrawal motion was held November 28, 2018. CP at 377, 498. The parties and the court agreed the judgment and sentence recited an incorrect offender score and that the court had miscalculated the firearm enhancements. CP at 500.

Despite his written concession that review properly fell under CrR 7.8, Ibarra argued he filed his withdrawal motion under both CrR 4.2 and CrR 7.8 “because, at a minimum, we don’t have at this point a valid sentence”. He then argued his motion was appropriate under CrR 4.2(f) because withdrawal was required in the interests of justice and that it would be a manifest injustice for him not to be able to do so. CP at 500–01. He argued, referring generally to *State v. Mendoza*,<sup>3</sup> he should have been allowed to engage in a risk/benefit analysis of going to trial or giving up that right, and that he needed to be properly informed and correctly advised in order to do so. CP at 501–02. He asserted *any* misinformation

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<sup>3</sup> *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006).

concerning his sentencing range provided sufficient basis to withdraw his plea under both CrR 4.2 and CrR 7.8. CP at 502–03.

The State responded that the matter was before the court on collateral attack and that the true reason for Ibarra’s motion was the court’s sentence far in excess of the parties’ recommendation. CP at 503. Pointing out the court had been very clear at sentencing it was not required to follow the recommendation—a fact Ibarra did not contest—the State pointed out Ibarra would receive a far higher sentence if convicted of first degree murder. CP at 504–05. The court commented: “I don’t think I’ve ever seen a case that’s as black and white as this one”, noting the shooting was on video and with a room full of witnesses. CP 505–06. The court continued: “The evidence is fresh. You’ve got a very strong case against [Ibarra], and you can get twice the time on it.” CP at 506. The State replied it was trying to stand by its plea agreement and did not intend to go back on the deal by sliding through a door that might be opening. CP at 506–07.

Responding to the court’s inquiry about *Mendoza*, the State referred the court back to *Buckman* for the rule that Ibarra needed to demonstrate he would have refused to plead guilty if he had known his range was lower than what he believed it was and that Ibarra could not

make that demonstration. CP at 507–08. The State then paused its argument to allow the court to review *Buckman*. CP at 508.

After the court reviewed *Buckman* on the bench, CP at 508, the State continued that it was Ibarra’s burden to show he was actually and substantially prejudiced by the 27 month discrepancy in his first degree murder scoring error—an error of less than nine percent. CP at 508–07. The State asserted *Buckman* required the defendant to demonstrate a rational person would have rejected the plea offer if initially provided a correct offender score. CP at 509–07. The State further pointed out Ibarra was “getting substantially less” time on the second degree murder plea agreement, notwithstanding the court’s decision not to follow the parties’ recommendation. CP at 509.

The court then recited its understanding of Ibarra’s argument that CrR 4.2 was the appropriate review standard, stating: “we’re in this kind of no man’s land where I sentenced him - - irrespective of the motion to withdraw his plea, the sentence is invalid. It’s going to have to be redone. Does that distinguish *Buckman* from this case?” In answering it did not, the State again referred back to *Buckman*, maintaining an incorrect offender score on a judgment and sentence does not lead to automatic plea withdrawal and highlighting the parallel facts and circumstances in Ibarra’s case and *Buckman*’s. CP at 512.

Ibarra reiterated his motion should be granted to ensure due process and fairness under CrR 4.2. CP at 516. The court stated its understanding that if Ibarra's motion had come before sentencing, withdrawal would automatically be granted. CP at 517. Ibarra agreed that pre-sentencing standards appear "to be a much lower bar under CrR 4.2." CP at 517. He added he also met the criteria under CrR 7.8. CP at 517. The court responded that however it decided, Ibarra would get less time under the corrected judgment and sentence than the time to which he had already agreed. CP at 517. The court stated *Buckman's* "takeaway is, look, you can't receive the sentence and then find out what the judge is thinking and then make the motion to withdraw, because you don't like what the judge thinks, unless you can show specific prejudice." CP at 518. In light of the fact the scoring error benefitted Ibarra, the court found "questionable" Ibarra's assertion he would not have taken the plea offer had he known his true score. CP at 518.

After further discussion concerning the dire consequences Ibarra could expect if the court granted his motion, including the court's promise it would not accept another reduction from first degree murder to second degree, the court recessed briefly to review *Buckman* and *Mendoza* a final time before rendering its decision. CP at 520.

Upon retaking the bench, the court stated *Mendoza* required the automatic granting of any pre-sentencing plea withdrawal motion that was based on a scoring error and that no showing of prejudice was required. CP at 521–22. Differentiating *Buckman* as a post-sentencing motion, the court pointed out the similarities between that case and Ibarra’s circumstances. CP at 522. In both cases, the only evidence was the defendant’s statement he would not have pleaded guilty had he known his score was lower than what he had believed. CP at 522. The court emphasized *Buckman*, being a collateral attack, required a showing of prejudice under *Strickland*.<sup>4</sup> CP at 522. The court said it tended to agree with the State that Ibarra’s case fell under CrR 7.8 because Ibarra moved to withdraw his plea after had was sentenced and discovered what the judge was thinking. The court continued:

The question becomes, however, because that plea was incorrect, it was mistaken because of the mathematical error I made, that raises the question of whether this is a motion under 7.8, which in my view would have to be - - would have to be denied - - yeah, that would have to be denied, or under 4.2, which would have to be granted. And while I understand - - I think as far as we’re talking about the policy or the purposes of the law, I think probably we’re talking about 7.8 for those purposes.

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<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

But I'm unwilling to take the chance. I'm going to grant the motion to withdraw the plea, and I'm going to set a trial date today.

CP at 523.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

Resolution of this appeal hinges on the purely legal question of whether Ibarra's stated grounds for withdrawing his guilty pleas must satisfy only the pre-sentencing review standards of CrR 4.2, or the more stringent post-sentencing collateral attack standards of CrR 7.8. Errors of law are reviewed de novo. *State v. Warner*, 125 Wn.2d 876, 883, 889 P.2d 479, 481 (1995).

##### B. ERRORS IN A JUDGMENT AND SENTENCE ENTERED FOLLOWING A GUILTY PLEA DO NOT RENDER THE JUDGMENT AND SENTENCE VOID, SUCH THAT REVIEW OF A MOTION TO WITHDRAW GUILTY PLEAS IS LIMITED TO THE PRE-SENTENCING STANDARDS OF CrR 4.2. THE COURT MUST APPLY THE MORE STRINGENT COLLATERAL ATTACK STANDARDS OF CrR 7.8

Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea where withdrawal is necessary to correct a manifest injustice. However, if the motion for withdrawal is made after the judgment, it is governed by CrR 7.8(b), which states that a court "may relieve a party from final judgment" for several reasons including mistake,

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newly discovered evidence, fraud, a void judgment, or any other reason justifying relief.

*In re Stockwell*, 179 Wn.2d 588, 595, 316 P.3d 1007 (2014) (emphasis added. The question here is whether Ibarra’s initial judgment and sentence was rendered void by an incorrect offender score and the court’s inadvertent doubling of the two firearm enhancements from 120 months to 240 months.

A trial court has both the power and the duty to correct an erroneous sentence. *Petition of Carle*, 93 Wn.2d 31, 33–34, 604 P.2d 1293, 1294 (1980). Sentencing errors do not affect the finality of those portions of the judgment and sentence that were correct and valid at the time it was pronounced. *Id.* at 34 (citing *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848, 850 (1955)). Sentencing errors absolutely require re-sentencing but they do not render the original judgment and sentence void. *Dill v. Cranor*, 39 Wn.2d 444, 445, 235 P.2d 1006 (1951) (citing, among other cases, *Bass v. Smith*, 26 Wn.2d 872, 876, 176 P.2d 355, 357 (1947) (“A judgment and sentence may be erroneous because it imposes a penalty in excess of that provided by law and still not be void.”))

Ibarra conceded in his supplemental briefing his withdrawal motion “appears to be governed by CrR 7.8(b).” CP at 373. At oral argument, however, he resurrected the claim his sentence was not “valid,”

arguing *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006) required the court automatically grant his withdrawal motion under the “much lower bar” of CrR 4.2, without a showing of prejudice. CP at 500–02.

The State maintained the appropriate standard was confirmed by *State v. Buckman*, 190 Wn.2d 51, 55, 409 P.3d 193 (2018), decided on nearly identical facts. Ibarra had to establish prejudice by demonstrating a rational person would have rejected the plea offer had they known their correct offender score, CP at 509–07.

The trial court correctly determined Ibarra failed to demonstrate prejudice under *Strickland*.<sup>5</sup> CP at 522. The court was also correct when it found Ibarra’s motion would have to be denied if it were a collateral attack brought under CrR 7.8. CP at 523. However, despite acknowledging the similarities between Ibarra’s facts and those in *Buckman*, it ultimately accepted Ibarra’s argument that his sentence was entirely void and that the court had no choice but to grant the plea withdrawal motion. CP at 523.

## V. CONCLUSION

This Court should find the trial court erred when it refused to reject outright that sentencing errors rendered Ibarra’s sentence entirely void and that the pre-sentencing review standards of CrR 4.2 required the court to grant Ibarra’s motion to withdraw his plea. This Court should find the

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<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

sentence was not void and remand for reconsideration of the motion under the collateral attack standards of CrR 7.8.

DATED this 15<sup>th</sup> day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Appellant in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: March 15, 2019.

  
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**GRANT COUNTY PROSECUTOR'S OFFICE**

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