

SUPREME COURT NO. 81045-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Personal Restraint Petition of:

ANTHONY LAMOUNT BRADLEY,

Petitioner.

REC'D

JUN 25 2008

King County Prosecutor
Appellate Unit

SUPPLEMENTAL BRIEF OF PETITIONER

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PETITIONER

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A. ISSUE PRESENTED

Whether petitioner is entitled to withdraw his guilty plea to possessing cocaine, as well as his guilty plea to possessing cocaine with intent to deliver, where: (1) the state concedes the offender score calculation for the simple possession offense wrongly includes one point for juvenile convictions that washed out under this Court's reasoning in State v. Smith;¹ and (2) the pleas were entered on the same day as part of the same package plea deal, and petitioner was misinformed regarding the standard range for the simple possession charge?

B. STATEMENT OF THE CASE

On September 26, 2002, petitioner Anthony Bradley pled guilty to two charges: possessing cocaine on May 14, 2002 (No. 02-C-04718-8 SEA); and possessing cocaine with the intent to deliver on August 16, 2002 (No. 02-1-07413-4 SEA). State's Response to Personal Restraint Petition (Resp.) Appendix (App.) B and D. For the simple possession charge, the state calculated Bradley's offender score as 8 points, which included 1 point for Bradley's juvenile convictions, yielding a standard range of 33-43 months. Pursuant to the plea agreement, the state agreed to recommend "43 concurrent to 02-C-07413-4 SEA." Resp. App. B. For the possession with intent charge, the state calculated Bradley's offender

¹ 144 Wn.2d 665, 30 P.2d 1245 (2001).

score as 9 points, which included 2 points for Bradley's juvenile convictions, yielding a standard range of 87-116 months. Pursuant to the plea agreement, the state agreed to recommend "87 months (low end) concurrent to 02-C-04718-8 SEA." Resp. App. D. The court imposed DOSA sentences of 19 months and 50.75 months, to run concurrently. Resp. App. A and C.

Bradley filed a prior personal restraint petition challenging his offender score calculation on grounds that it wrongly included his juvenile offenses. Division One of the Court of Appeals dismissed the petition in May 2004, based on this Court's then recent decision in State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004):

Here, as in Varga, the petitioners all committed their crimes after June 13, 2002, the 2002 amendments' effective date.^[2] Given the plain language in the 2002 SRA amendments and the unambiguous holding in Varga, petitioners have failed to establish that their offender scores were miscalculated.

Resp. App. E.

In September 2007, Bradley filed the current petition requesting to withdraw his pleas, arguing inter alia that his offender score calculation for simple possession wrongly included washed-out juvenile offenses, which rendered the judgment invalid on its face. He asserted the

² But Bradley's *simple possession* offense was committed before the amendments' effective date, on May 14, 2002.

misinformation resulted “in a complete miscarriage of justice” that “affected the totality of both Judgment and Sentences[.]” Personal Restraint Petition (PRP) pp. 6.

The state conceded Bradley’s offender score for possession wrongly included washed-out juvenile convictions and agreed he should have been sentenced with an offender score of 7, rather than 8. The state further conceded Bradley should have been advised he faced a standard range of 22 to 29 months, rather than 33 to 43 months, for that charge. Resp. at 6-7. The state nevertheless argued Bradley was not entitled to withdraw his pleas because “it was a certainty” he would have received the same sentence for possession with intent:

[I]t was a certainty that Bradley would receive a concurrent sentence of at least 87 months total confinement, or a DOSA consisting of 50.75 months of confinement and 50.75 months of community custody, as to possession of cocaine with intent to deliver. Thus, his much lower standard range on the possession charge was not a consequence with a definite, immediate and automatic effect on Bradley’s total punishment. It was not a direct consequence of the plea.

Resp. at 12. The state therefore concluded Bradley’s petition should be granted in part and remanded for correction of the judgment and sentence to reflect the correct offender score and range for the simple possession charge. Resp. at 14.

Bradley disagreed it was a certainty the state would have offered him the same deal had it realized what it was now conceding – that Bradley’s juvenile drug offenses washed out for purposes of the possession offense. Reply at 6-7. In support, Bradley cited to the recommended standards for plea negotiations, which encourages prosecutors to consider the individual’s criminal history when plea-bargaining. Reply at 6-7; See RCW 9.94A.450(2)(f) (prosecutor may agree to less serious charge in light of “[t]he defendant’s history with respect to criminal activity”). Accordingly, with less criminal history to consider for one charge, the state may have been inclined to offer a different charge, such as conspiracy, for the other.³ Reply, at 7. In any event, Bradley asserted that had he been correctly informed, he would not have pled guilty at all:

The inaccurate “direct consequences” (standard range) led Bradley to make a risk management decision he shouldn’t have had to make. That made both of Bradley’s pleas involuntary and Bradley’s pleas should be set aside.

Reply at 8.

Since this appears to be Bradley’s second petition, the court of appeals transferred it to this Court for consideration under In re Personal

³ Another possibility (not mentioned by Bradley) is the state may have been inclined to drop the possession charge, resulting in a shorter standard range for the more serious offense.

Restraint of Perkins, 143 Wn.2d 261, 19 P.3d 1027 (2001). By order dated April 2, 2008, this Court retained the petition and appointed counsel to file this supplemental brief.

C. ARGUMENT

BECAUSE THE PLEAS WERE ENTERED AS PART OF A PACKAGE DEAL, THE MISINFORMATION AS TO THE STANDARD RANGE FOR ONE OFFENSE RENDERS BOTH PLEAS INVOLUNTARY.

The state concedes the judgment and sentence for Bradley's possession charge reflects an incorrect offender score, rendering the judgment and sentence invalid on its face. Resp. at 4-7. The state also concedes the trial court misadvised Bradley as to the correct standard range for the possession charge. Resp. at 7. From the state's concession, it follows Bradley is entitled to collateral relief. See e.g. In re Personal Restraint of Johnson, 131 Wn.2d 558, 933 P.2d 1019 (1997) (a miscalculated offender score constitutes a fundamental defect that inherently results in a complete miscarriage of justice); In re Personal Restraint of Isadore, 151 Wn.2d 294, 300, 88 P.3d 390 (2004) (constitutional personal restraint requirements met where Isadore was not informed of all the direct consequences of his plea, rendering his plea involuntary); and In re Personal Restraint of Stoudmire, 145 Wn.2d 258,

36 P.3d 1005 (2002) (the one-year time limit for collateral attacks does not apply to convictions that are facially invalid).

Accordingly, the only issue before this Court is the remedy. The state claims Bradley is entitled only to remand for a corrected judgment and sentence. Applying this Court's decision in State v. Turley,⁴ however, Bradley is entitled to withdraw both pleas.

Due process requires that a defendant's plea be knowing, voluntary, and intelligent. In re Isadore, 151 Wn.2d at 297 (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). This standard is reflected in CrR 4.2(d), which mandates that the trial 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." Under this rule, once a guilty plea is accepted, the court must allow withdrawal of the plea only "to correct a manifest injustice." CrR 4.2(f). An involuntary plea produces a manifest injustice. Isadore, 151 Wn.2d at 298.

This Court has repeatedly held a defendant may challenge the voluntariness of a guilty plea when the defendant was misinformed about sentencing consequences resulting in a more onerous sentence. See e.g. State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988) (defendant entitled to

⁴ 149 Wn.2d 395, 69 P.3d 338 (2003).

withdraw his guilty plea because both parties were unaware of a mandatory minimum sentence requirement); State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) (defendant entitled to withdraw plea when he was not informed of mandatory community placement because that term constitutes a “direct consequence” of a guilty plea). A sentence consequence is direct when “the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Ross, 129 Wn.2d at 284.

The length of a sentence is a direct consequence of pleading guilty. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). A guilty plea may be involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence is lower or higher than anticipated. Mendoza, 157 Wn.2d at 591. In so holding, this Court has recognized that risk management decisions bear equally when the misinformation is that the standard range is lower than anticipated in the plea agreement.

— [R]isk management decisions of a defendant inherent in plea bargaining bear equally in situations where, as here, the correct standard range is lower than the mistaken standard range upon which a plea is entered. A defendant may evaluate the risks of trial versus guilty plea far differently if faced with a 12-month plus one day bottom of the standard range, rather than a 120-month bottom of the standard range.

Mendoza, 157 Wn.2d at 590 (quoting State v. Moon, 108 Wn. App. 59, 64, 29 P.3d 734 (2001) (Brown, J., concurring)).

The state concedes Bradley was misinformed the standard range was higher than in actuality for the simple possession offense. Granted, he was not misinformed as to the other offense. Regardless, as this Court held in Turley, the misinformation as to the direct consequences of one of the charges to which Bradley pled guilty as part of a package deal rendered both of his pleas involuntary.

Turley pled guilty to two charges: one count of first degree escape and one count of conspiracy to manufacture methamphetamine. At the plea hearing, the state erroneously represented that there were no mandatory community placement requirements on the drug charge. The sentencing judge accepted the plea and sentenced Turley to concurrent terms with no community placement. Turley, 149 Wn.2d at 396.

Several years later, the state moved to amend the judgment and sentence to include the mandatory minimum term of community placement for the drug offense. Although Turley argued community placement was not part of the plea agreement, the judge signed an order amending the sentence. Turley, 149 Wn.2d at 397.

Turley later moved to withdraw his pleas, arguing that since the agreement covered both charges, he was entitled to withdraw both pleas.

The trial court granted his motion in part, allowing him to withdraw his guilty plea as to the conspiracy count, but not to the escape count. In an unpublished opinion, the court of appeals affirmed. Turley, 149 Wn.2d at 397-98.

This Court reversed, holding Turley was entitled to withdraw both pleas:

We hold that a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding. Absent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. Such a determination, after the fact, would not serve the plea negotiation process. When the defendant can show manifest injustice as to one count or charge in an indivisible agreement, the defendant may move to withdraw the plea agreement or have specific performance of the agreement.

Turley, 149 Wn.2d at 400.

Like Turley, Bradley negotiated and pleaded to two charges contemporaneously and both pleas were entered on the same day. Although the pleas were not described in one document, the plea form for each offense cross-referenced the other and provided for concurrent sentencing. The objective manifestations of intent indicate an indivisible agreement. See e.g. In re Personal Restraint of Shale, 160 Wn.2d 489, 493-94, 158 P.3d 588 (2007) (pleas entered on same day but described in

different documents constituted an indivisible package deal where the documents were all signed on the same day and referred to each other). Because Bradley has shown manifest injustice as to one count, he is entitled to withdraw his pleas to both. Turley, 149 Wn.2d at 400.

In arguing to the contrary, the state likens this case to State v. Oseguera Acevedo, 137 Wn.2d 179, 970 P.2d 299 (1999). Resp. at 11. In Acevedo, the noncitizen defendant was arrested for possession of cocaine with intent to deliver. Before accepting Acevedo's plea, the court informed Acevedo he may be subject to supervision by the Department of Corrections following his sentence. However, the plea form did not contain written notification of the community placement requirement. Acevedo sought to withdraw his plea. The trial court denied his motion, but the court of appeals reversed, ruling the plea was involuntary. Isadore, 151 Wn.2d at 300 (summarizing facts of Acevedo).

In a plurality opinion, this Court reversed. The lead opinion suggested a "materiality" requirement, and held that since there was no indication Acevedo would not have entered a guilty plea had he known of the community placement requirement, he could not establish the "manifest injustice" required for withdrawal. Acevedo, 137 Wn.2d at 194-96; Isadore, 151 Wn.2d at 301. Regardless, because Acevedo was an undocumented alien from Mexico who would likely be deported following

his sentence, the lead opinion concluded the community placement requirement was not a “direct consequence” of his guilty plea. Acevedo, 137 Wn.2d at 196; Isadore, 151 Wn.2d at 300-301.

In contrast, the concurring opinion would have held that community placement was a direct consequence because deportation was not a “certainty,” but that, in any event, Acevedo was adequately informed. Acevedo, 137 Wn.2d at 204 –206 (Johnson, J., concurring). The dissenters agreed with the concurrence that deportation was not a certainty, but disagreed that Acevedo was adequately informed. Acevedo, 137 Wn.2d at 206-208 (Sanders, J., dissenting).

This Court has since narrowed its decision in Acevedo. Isadore, 151 Wn.2d at 302 (“Acevedo should not be expanded to apply to cases with dissimilar facts”). In Isadore, the state argued, based on Acevedo, that a defendant who is not informed of the direct consequences of his plea is not entitled to a remedy unless he establishes the misinformation was material to his decision to plead guilty. Isadore, 151 Wn.2d at 301. This Court disagreed, stating the majority of the Court in Acevedo held community placement was a direct consequence of Acevedo’s guilty plea. Isadore, 151 Wn.2d at 301-302 (“This Court has repeatedly held that a defendant must be informed of all direct consequences of a guilty plea, and that failure to inform the defendant of all direct consequences renders

the plea invalid”). Isadore, 151 Wn.2d at 301. Moreover, this Court specifically repudiated the materiality test suggested by the lead opinion in

Acevedo:

We decline to adopt an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant’s subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision. If the test is limited to an assertion of materiality by the defendant, it is of no consequence as any defendant could make that after-the-fact-claim.

Isadore, 151 Wn.2d at 302. This Court therefore adhered to its prior precedent and held that because Isadore was not informed of a direct consequence of his guilty plea, his plea was involuntary and he was entitled to his remedy of choice, which, in Isadore’s case, was specific performance. Isadore, 151 Wn.2d at 302-303.

The problem with the state’s reliance on Acevedo in this case is the state is essentially asking this Court to concern itself with the unexpressed subjective intent of the parties. In other words, the state is arguing that because Bradley still faced a concurrent sentence of 87-116 months on the possession with intent charge, the standard range for the less serious possession charge could not have been a material factor in his decision to plead guilty.

But as this Court wisely decided, it is not for the appellate court to determine how the defendant arrived at his decision to plead guilty. Isadore, 151 Wn.2d at 302. For instance, as this Court recognized in Turley, a lower standard range than anticipated in the plea documents could affect a defendant's risk management decision. Had Bradley known of the shorter standard range faced on the simple possession offense, he could have decided to take the charge to trial. If acquitted, he would have faced a lower standard range on the on the possession with intent charge. Moreover, based on Bradley's citation to the recommended plea negotiation statute, it is possible the state would have dropped the possession charge had it realized what it is now conceding.

In other words, contrary to what the state is now asserting, it is not a "certainty" Bradley would have faced the same 87-116 standard-range sentence on the possession with intent charge absent the misinformation the state is now conceding. As this Court aptly recognized, "A reviewing court cannot determine with certainty, how a defendant arrived at his personal determination to plead guilty, nor discern what weight a defendant gave to each factor in arriving at his decision." Isadore, 151 Wn.2d at 302. And ironically, the state has argued against challenging only part of a plea agreement under similar circumstances. See State v.

Shale, 160 Wn.2d at 493. If the state's position in Shale is any indication, the state likely would have objected Bradley was entitled to no relief had he moved only to withdraw his plea to possession. Id. The state should not have it both ways. Under this Court's decisions in Turley, Bradley is entitled to withdraw both his pleas.

In response, the state may ask this Court to dismiss this petition on procedural grounds. Any such request should be denied. Granted, this petition appears to be Bradley's second. The prohibition on successive PRPs found in RCW 10.73.140⁵ limits the jurisdiction of the court of appeals but does not limit this Court's jurisdiction. In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2002); In re Personal Restraint of Johnson, 131 Wn.2d 558, 566, 933 P.2d 1019 (1997) (RCW 10.73.140 does not bar this Court's review of a second PRP).

⁵ If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

RCW 10.73.140.

Nevertheless, the state may claim consideration of Bradley's PRP is barred under RAP 16.4(b).⁶ The rule bars consideration of a second petition "for similar relief" without a showing of good cause. Where the claim raised in the second petition has neither been heard nor determined on the merits, however, it is not a "petition for similar relief" barred by RAP 16.4(d). State v. Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984) (adopting approach taken in Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)).

From the court's ruling dismissing Bradley's prior PRP, it is evident the court never decided the issue raised here – which the state now concedes – that Bradley's juvenile offenses were wrongly included in his *simple* possession offense: "Here, as in Varga, the petitioners all committed their crimes after June 13, 2002, the 2002 amendments' effective date." Resp. App. E. Bradley's simple possession offense occurred on May 14, *before* the amendments' effective date. Accordingly, it is clear the court did not hear or determine the merits of the issue the state now concedes.

⁶ The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RAP 16.4(d).

Because RCW 10.73.140 does not apply to this Court, the abuse of the writ doctrine is the only direct bar to raising new issues in successive PRPs in this Court. In re Perkins, 143 Wn.2d at 265 n. 5; In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 352, 5 P.3d 1240 (2000). However, abuse of the writ occurs only “if the petitioner was represented by counsel throughout postconviction proceedings.” Stoudmire, 141 Wn.2d at 352. From the court’s order of dismissal, as well the court’s list of case events for Bradley’s PRP,⁷ it appears Bradley was not represented on his prior PRP. Resp. App. E. Regardless, Bradley was not represented “*throughout postconviction proceedings*,” because he filed the current PRP pro se. Stoudmire, 141 Wn.2d at 352 n.1 (emphasis in original). Procedurally, Bradley’s petition is properly before this Court.

⁷ A copy of the list of case events for COA No. 52353-8-I is attached.

D. CONCLUSION

The state concedes Bradley's judgment and sentence reflects an incorrect offender score. He is therefore entitled to collateral relief. The state disputes only the remedy. Contrary to the state's argument below, the appropriate remedy is withdrawal of both pleas.

DATED this 25th day of June, 2008.

Respectfully submitted,

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CASE EVENTS # 523538

Date	Item	Action	Participant
07/07/2004	Letter	Received by Court	
	<i>Comment: COF mailed to petitioner was returned as "Inactive"</i>		
07/06/2004	Stored in CT	Filed	
	<i>Comment: 4-273</i>		
07/01/2004	Disposed	Status Changed	JOHNSON, RICHARD D
07/01/2004	Certificate of Finality	Filed	JOHNSON, RICHARD D
05/21/2004	Letter	Received by Court	
	<i>Comment: Copy of the Order Lifting Lifting Stay and Dismissing the PRP mailed to petitioner was returned as "Inactive"</i>		
05/18/2004	Decision Filed	Status Changed	
05/18/2004	Decision terminating Review	Filed	ELLINGTON, ANNE
	<i>Comment: ORDERED that the stays previously imposed are lifted. It is further ORDERED that the personal restraint petitions listed above are all dismissed under RAP 16.11(b).</i>		
05/18/2004	Stay Lifted	Status Changed	
06/02/2003	Stayed, pending decision on another case	Status Changed	
06/02/2003	Decision to stay	Filed	COX, RONALD
06/02/2003	Decision to stay	Filed	COX, RONALD
	<i>Comment: ORDERED THAT OLIVER'S PERSONAL RESTRAINT PETITION IS STAYED PENDING FINAL RESOLUTION OF STATE V. VARGA, NO. 51064-9-I, AND STATE V. SMITH, NO. 51323-1-I</i>		
05/27/2003	Submitted	Status Changed	
05/16/2003	Personal Restraint Petition	Filed	