

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

MICHAEL W. MCKIEARNAN,

PETITIONER.

SUPPLEMENTAL BRIEF

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STATE OF WASHINGTON
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A. INTRODUCTION

This is a simple case, both factually and legally speaking.

As his *Judgment* plainly reveals, Michael McKiearnan pleaded guilty on May 14, 1987 in Snohomish County Superior Court to one count of Robbery in the First Degree committed on March 14, 1987. At that time, the maximum sentence for first-degree robbery was life and/or a \$50,000 fine. RCW 9A.20.021. Contrary to the law, McKiearnan's *Judgment* stated that the maximum term was "20 Yrs. to Life."

McKiearnan's guilty plea contains the same, plain error. In section 5 of the *Statement of Defendant on Plea of Guilty*, the form states the maximum sentence is "twenty (20) years to life imprisonment."

Because this error appears on McKiearnan's *Judgment*, that document is facially invalid. As a result, McKiearnan's PRP is timely. Because the error in his guilty plea constitutes misinformation about a direct consequence of his plea, his plea is invalid. As a result, this Court should grant McKiearnan's petition and remand his case to the Superior Court to permit him to withdraw his plea.

B. FACTS

The facts are undisputed.

On May 14, 1987, McKiearnan pleaded guilty to Robbery in the First Degree for a crime that occurred two months earlier—on March 14, 1987. His *Statement of Defendant on Plea of Guilty* states that the

maximum sentence for the crime is “twenty (20) years to life imprisonment.” In fact, the maximum penalty was life.

McKiearnan was sentenced on May 19, 1987. The *Judgment* repeats the error from the plea form, stating in Section 3 that the maximum term is “20 yrs. to life.”

This is McKiearnan’s first collateral attack on this *Judgment*.

C. ARGUMENT

1. INTRODUCTION

McKiearnan’s *Judgment* is facially invalid. His invalid judgment reveals an invalid guilty plea.

2. MCKIEARNAN’S JUDGMENT IS INVALID ON ITS FACE

RCW 10.73.090 establishes a one-year time limit for bringing a collateral attack on a judgment. More than one year has elapsed since this conviction was final. A judgment is “invalid on its face” if that document alone reveals an infirmity. *In re Restraint of LaChapelle*, 153 Wn.2d 1, 100 P.2d 805 (2004) (an improperly calculated sentence is invalid on its face). A judgment and sentence is “invalid on its face” if the alleged defect is evident on the face of the document without further elaboration. *In re Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *In re Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); *In re Restraint of Thompson*, 141 Wn.2d 712, 718-19, 10 P.3d 380 (2000).

As the *Goodwin* court explained:

We have never held, however, that RCW 10.73.090 requires, merely by use of the words ‘valid on its face,’ that the only type of invalidity that will prevent operation of the one-year bar to filing a personal restraint petition is constitutional infirmity. By its plain language, the statute does not state that ‘valid’ means ‘constitutionally valid.’ As we reasoned in *Stoudmire* and *Thompson*, under RCW 10.73.090(1), ‘invalid on its face’ means the judgment and sentence evidences the invalidity without further elaboration.

146 Wn.2d at 866 (footnote removed).

Here, the maximum penalty on the *Judgment* is clearly erroneous. Since 1984, the maximum for first-degree robbery has been “life.” RCW 9A.20.021. In 1987, the maximum for first-degree robbery could not be as little as twenty years. Further, the maximum penalty was not a “range,” starting at 20 years and topping off at life.

The invalidity is apparent from the *Judgment* alone. McKiernan’s *Judgment* lists the date (“3-14-87”) and name (“First Degree Robbery”) of McKiernan’s crime of conviction and then states that the “Maximum Term” is “20 Yrs. to Life.” Although prior to the adoption of the SRA, a sentencing court had the discretion to set the maximum from 20 years to life, at the time of McKiernan’s conviction the maximum could not be as little as 20 years; was not a range; but, was instead “life.” Thus, it is obvious that the maximum sentence on the face of the *Judgment* is erroneous.

The face of McKiearnan's *Judgment* reveals the error without further elaboration. The question then becomes whether this error corresponds to a defect in the guilty plea that merits relief. Here, it does.

3. MCKIEARNAN'S JUDGMENT REVEALS AN INVOLUNTARY PLEA

“Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent.” *In re Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

Misinformation about the statutory maximum for the class of crime constitutes a direct consequence of a guilty plea, as this Court held recently and unanimously in *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008). In that case, Weyrich was misinformed that the statutory maximum for the theft crimes was 5 years, rather than the correct 10 years. This Court held that a “defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea, “adhering “to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence [of] the plea....” *Id.* at 557. *See also In re Vensel*, 88 Wn.2d 552, 555, 564 P.2d 326 (1977)

("We believe it is important at the time a plea of guilty is entered, whether in justice or superior court, that the record show on its face the plea was entered voluntarily and intelligently, and affirmatively show the defendant understands the maximum term which may be imposed."); *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006) (maximum sentence is among the direct consequences of a plea).

Just as in *Weyrich*, the 1987 version of Cr 4.2(g), no. 5, provided that every written guilty plea statement include the maximum sentence for the crime. *Appendix A*. On the issue of the validity of McKiearnan's plea, *Weyrich* controls. McKiearnan's plea is invalid. McKiearnan should be allowed to withdraw his plea.

D. CONCLUSION

Based on the above, this Court should vacate McKiearnan's *Judgment* and remand this case to Snohomish County Superior Court to permit him to withdraw his guilty plea.

DATED this 8th day of August, 2008.

Respectfully Submitted:

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Appendix A ~
Former CrR 4.2

(c) **Waiver of Counsel.** If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming his right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(d) **Name.** Defendant shall be asked his true name. If he alleges that his true name is one other than that by which he is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had against him by that name or other names relevant to the proceedings.

(e) **Reading.** The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

Comment

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

RULE 4.2 PLEAS

(a) **Types.** A defendant may plead not guilty, not guilty by reason of insanity or guilty.

(b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) **Pleading Insanity.** Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) **Voluntariness.** The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) **Agreements.** If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons

for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) **Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court later determines under RCW 9.94A.090 that the agreement is not binding, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered.

(g) **Written Statement.** A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

SUPERIOR COURT OF WASHINGTON FOR
[] COUNTY

THE STATE OF WASHINGTON,
Plaintiff,
v.
_____,
Defendant.

No. _____
Statement of Defendant on Plea
of Guilty

1. My true name is _____
2. My age is _____
3. I went through the _____ grade in school.
4. I have been informed and fully understand that I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is _____

5. I have been informed and fully understand that I am charged with the crime of _____, that the elements of the crime are _____, the maximum sentence(s) for which is (are) _____ years and \$_____ fine. The standard sentence range for the crime is at least _____ and not more than _____, based upon my criminal history which I understand the Prosecuting Attorney says to be: _____

In addition, I may have to pay restitution, costs, assessments, and recoupment of expenses for defense services provided by the court. I have been given a copy of the information.

6. I have been informed and fully understand that:
 - (a) I have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.
 - (b) I have the right to remain silent before and during trial, and I need not testify against myself.

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(c) I have the right at trial to hear and question witnesses who testify against me.

(d) I have the right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty.

(f) I have the right to appeal a determination of guilt after a trial.

(g) If I plead guilty I give up the rights in statements 6(a)-(f).

7. I plead _____ to the crime of _____ as charged in the _____ information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. I have been informed and fully understand the Prosecuting Attorney will make the following recommendation to the court: _____

12. I have been informed and fully understand that the standard sentencing range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions or guilty pleas at juvenile court that are felonies and which were committed when I was 15 years of age or older. Juvenile convictions count only if I was less than 23 years of age at the time I committed this present offense. I fully understand that if criminal history in addition to that listed in paragraph 5 is discovered, both the standard sentence range and the Prosecuting Attorney's recommendation may increase. Even so, I fully understand that my plea of guilty to this charge is binding upon me if accepted by the court, and I cannot change my mind if additional criminal history is discovered and the standard sentence range and Prosecuting Attorney's recommendation increases.

13. I have been informed and fully understand that the court does not have to follow anyone's recommendation as to sentence. I have been fully informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

14. I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is

grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

15. The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime in the information. This is my statement: _____

16. I have read or have had read to me and fully understand all of the numbered paragraphs above (1 through 15) and have received a copy of "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the court.

Defendant

Prosecuting Attorney

Defendant's Lawyer

The foregoing statement was read by or to the defendant and signed by the defendant in the presence of the defendant's attorney, and the undersigned Judge, in open court. The court finds the defendant's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the defendant of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the defendant is guilty as charged.

Dated this _____ day of _____, 19__.

Judge

I am fluent in the _____ language and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19__.

Interpreter

(h) Verification by Interpreter. If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

[Amended effective September 1, 1983; July 1, 1984; September 1, 1986.]

Comment

Section (e) of the rule accommodates the requirements in RCW 9.94A.080, .090, and .100. The rule also makes it clear that it is unnecessary to hold separate hearings for determining the validity of the agreement and for accepting the guilty plea.

In section (f) of the rule, a new sentence is added reflecting a similar provision in RCW 9.94A.090. It is desirable to repeat the statutory provision in the rule to avoid any implication that the "manifest injustice" test in the existing rule applies to the withdrawal of a plea entered pursuant to an agreement that is later found to be not binding under the statute.

The rule requires only that the court "inform" the defendant of the right to withdraw a guilty plea. The Commission concluded that the statutory provision requiring a formal "order" was unnecessary and will recommend that the statute be amended to conform to the rule. It is assumed that if the defendant chooses to exercise the option of withdrawing the plea, the withdrawal will be confirmed by the entry of an order.

Regardless of whether the defendant is permitted to withdraw a guilty plea under the existing "manifest injustice" standard or the new statutory provision, the time for trial is extended under CrR 3.3(d)(7) to 90 days after the entry of the order confirming the withdrawal of the plea if the defendant is released, or 60 days if the defendant is to remain in custody pending trial.

Section (g), concerning the defendant's written statement, has been revised throughout to conform to the requirements of the new act.

Section (h) is the same as the corresponding section in the prior rule.

RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) are of the same or similar character, even if not part of a single scheme or plan; or
- (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be joined in the same charge:

- (1) when each of the defendants is charged with accountability for each offense included;
- (2) when each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

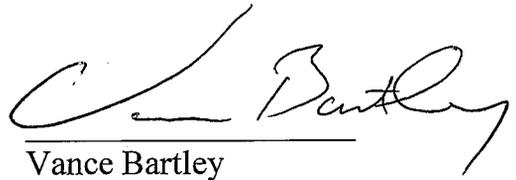
CERTIFICATE OF SERVICE

I, Vance Bartley, certify that on August 8, 2008, I served the party listed below with a copy of the attached *Supplemental Brief* by placing a copy in the mail, postage pre-paid, addressed to:

Seth Fine
Sr. Deputy Prosecuting Attorney
Snohomish County Prosecutor's Office
3000 Rockefeller Ave. MS #504
Everett, WA 98201

8-8-08 Seattle Wa

Date and Place


Vance Bartley