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SUPREME COURT
STATE OF WASHINGTON

2008 DEC -8 P 2:52 NO. 81522-4

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CLERK
SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

STEVEN CLARK,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED FOR REVIEW

1. Whether this petition should be dismissed as time-barred where the judgment and sentence as modified properly imposed no term of community placement and is valid on its face.

2. Whether this petition should be dismissed as time-barred where petitioner's claim that the modification order violated due process cannot be affirmatively established on the face of that order.

3. Whether this petition should be dismissed where Clark's plea was not involuntary because under the facts Clark could not have reasonably relied on the misadvisement regarding community placement in deciding to plead guilty.

4. Whether this petition should be dismissed where Clark waived his challenge by not timely seeking withdrawal of his plea when he discovered that he had been misadvised regarding community placement.

B. STATEMENT OF THE CASE

In 1998, Steven Clark pled guilty to two counts of robbery in the second degree. In exchange for his plea, the State agreed to dismiss a third charge of robbery in the second degree. The plea

form advised Clark that "[i]n addition to confinement, the judge will sentence me to community placement for at least one year."

Appendix C, at 5.¹ The State's recommendation did not include a period of community placement. Appendix C, at 4.

Clark was sentenced on February 27, 1998, to a sentence of 25 months of total confinement. Appendix B. The court imposed a term of community placement. Appendix B. Two weeks later, on March 12, 1998, the court entered an Order Modifying Judgment and Sentence, vacating the term of community placement. Appendix D. Clark did not appeal his convictions or sentence.

Department of Corrections records indicate that Clark was confined in prison from March 3, 1998, to March 23, 1999. Appendix E. On March 23, 1999, he was transferred to the King County Jail because he was charged with a drug crime. Appendix E and F. He pled guilty to delivery of a controlled substance, and was sentenced to 12 months plus one day of confinement to be served concurrently with his robbery convictions. Appendix F. He was released from jail on May 1, 1999. Appendix E.

¹ The appendices A-G referred to herein are attached to the State's Motion for Discretionary Review.

On October 5, 1999, Clark robbed the Wells Fargo Bank in Kirkland, Washington. Appendix G. On October 26, 1999, Clark robbed the Key Bank in Woodinville, Washington. Appendix G. Subsequently, Clark was found guilty by jury trial of two counts of robbery in the second degree and sentenced to life imprisonment without possibility of parole. Appendix G. These convictions and sentence were affirmed by the Court of Appeals in 2003. Appendix G. Clark did not challenge the validity of his 1998 robbery convictions on appeal. Appendix G.

Clark filed this personal restraint petition on May 8, 2007, alleging for the first time that his 1998 robbery convictions were invalid because his plea was not voluntary.

C. ARGUMENT

1. THIS PETITION SHOULD BE DISMISSED AS TIME-BARRED BECAUSE THE JUDGMENT AND SENTENCE IS VALID ON ITS FACE.

Clark's petition was filed more than nine years after his judgment and sentence became final. Nonetheless, the Court of Appeals concluded that this petition is not time-barred because the judgment and sentence was facially invalid. The Court of Appeals reached this conclusion by assuming facts that are not established

on the face of the modified judgment and sentence. The Court of Appeals decision conflicts with this Court's decisions in In re Personal Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002), and State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986), which restrict the facial validity inquiry to infirmities that can be established on the face of judgment and sentence. Clark's petition should have been dismissed as untimely.

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is filed. RCW 10.73.090(3). In the present case, the judgment and sentence became final in 1998. This petition was filed nine years after the judgment and sentence became final.

A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). Facial invalidity has been interpreted to include those documents signed as part of a plea agreement as well as the judgment and

sentence itself. Ammons, 105 Wn.2d at 189.² The documents of the plea can inform the inquiry as to whether the judgment and sentence is invalid on its face. Hemenway, 147 Wn.2d at 532. However, misinformation about the consequences of a plea is not a facial defect exempt from the one-year time limit on collateral attack. Id. at 533.

Clark argues that his 1998 judgment and sentence is invalid on its face because he was misinformed about whether community placement would be imposed. Hemenway is directly on point. When Hemenway pled guilty, the plea form did not advise him of the mandatory two-year period of community placement, but rather stated that "the judge may place me on community supervision." Id. at 530. At sentencing, the court properly imposed a two-year term of community placement. Id. at 531. Hemenway filed a personal restraint petition five years later contending that his guilty plea was involuntary because he was misadvised as to the mandatory period of community placement. Id. This Court held that the petition was time-barred because the judgment and sentence was not invalid on its face where it imposed the correct

² This Court has adopted the facial inquiry analysis from Ammons in addressing facial validity pursuant to RCW 10.73.090. See State v. Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000).

period of community placement. Id. at 532-33. This Court stated, "[t]he question is not, however, whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence. Here they do not." Id. at 533.

This Court reaffirmed this holding in In re Personal Restraint of Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003), stating that in Hemenway "we noted that the relevant question in a criminal case is whether the judgment and sentence is valid on its face, not whether related documents, such as plea agreements, are valid on their face."

In the present case, the fact that the plea form erroneously advised Clark that he would be placed on community placement does not render Clark's judgment and sentence invalid on its face. The judgment and sentence, as modified by the March 12, 1998 order, properly imposed no term of community placement. The judgment and sentence as modified is valid on its face, and thus Clark's collateral attack on the judgment and sentence is time-barred pursuant to RCW 10.73.090 and Hemenway.

The Court of Appeals concluded that the March 12, 1998 order modifying the sentence was itself invalid on its face because it "was entered without due process."³ Appendix A, at 2, n. 2. The court asserts that "neither Clark nor his counsel was notified of the motion" to modify. Appendix A, at 2. The Court of Appeals does not explain how it made this determination.

While the modification order was not signed by defense counsel, it is impossible to determine from the face of the order whether defense counsel or Clark were notified of the motion. There is no reason to think they would have objected to an order that reduced Clark's punishment. It would appear that the Court of Appeals relied on a declaration provided by Clark on August 22, 2007, that states that he was not notified of the hearing. By relying on this declaration, the Court of Appeals erred and disregarded this Court's clear holdings as to the facial validity inquiry. For example, in Ammons, one defendant argued that his plea form was constitutionally invalid because it failed to show that he was advised of his right to remain silent. Ammons, 105 Wn.2d at 189.

³ There can be no due process violation unless the defendant is deprived of a protected liberty interest. In re Personal Restraint of Bush, 164 Wn.2d 697, 193 P.3d 103 (2008). Because the order striking community placement did not deprive Clark of a protected liberty interest, due process would not have been violated by an ex parte order.

This Court held that such a determination could not be made on the face of the guilty plea form because there was no affirmative showing that the defendant was told he did *not* have a right to remain silent. Id. In other words, the plea form's silence as to that right did not result in facial invalidity.

Likewise, in the present case, it is impossible to determine from the face of the March 12, 1998, order what notice defense counsel and Clark received. It cannot be affirmatively established on the face of the document that no notice was given, just as it could not be established on the face of the plea form in Ammons that the defendant was not advised of his right to remain silent. The Court of Appeals went beyond the face of the order in concluding that the order violated due process and was thus facially invalid. The Court of Appeals decision conflicts with Hemenway and Ammons. The judgment and sentence as modified is valid on its face, and this petition, filed nine years after the judgment and sentence became final, is time-barred.

2. CLARK IS NOT ENTITLED TO WITHDRAW HIS PLEA WHERE THE MISADVISEMENT COULD NOT HAVE BEEN MATERIAL TO HIS DECISION TO PLEAD GUILTY.

Even if this petition is not time-barred, Clark is not entitled to relief because under these facts the misadvisement as to community placement could not have been material to his decision to plead guilty. The Court of Appeals erred in relying on In re Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004), and State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006), in concluding that Clark's plea was involuntary, and that withdrawal was necessary to correct a manifest injustice.

Pursuant to CrR 4.2, a court must allow a defendant to withdraw a guilty plea only if necessary to correct a manifest injustice. Isadore, 151 Wn.2d at 298. An involuntary plea is a manifest injustice. Id. Misadvisement as to the direct consequences of a plea may render a plea involuntary. Id. at 300.

In Isadore, the plea documents failed to advise Isadore that a one-year period of community placement would be imposed as part of his sentence. Id. at 297. This Court held that failure to advise Isadore of the mandatory period of community placement constituted a failure to inform the defendant of all the direct

consequences of the plea. Id. at 298. This Court then declined to adopt an analysis that requires the reviewing court to weigh the materiality of such a misadvisement. This Court explained, "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." Id. at 302. Similarly, in Mendoza, the defendant was misadvised as to his standard range. 157 Wn.2d at 584-85. This Court reaffirmed its holding in Isadore that it would not engage in a *subjective* inquiry into the defendant's risk calculation where it was possible that a lower standard range affected his risk management decisions. Id. at 590.

This is certainly a reasonable rule where the misadvisement *could* have been material to the decision to the plead guilty, as was the case in both Isadore and Mendoza. But what if the misadvisement at issue was so unimportant that by any *objective* standard it could not have been material to the defendant's decision to plead guilty? For example, what if a defendant who was pleading guilty to aggravated murder was misadvised as to revocation of his driver's license? RCW 46.20.285(4) mandates revocation of an offender's driver license when the offender is

convicted of any felony "in the commission of which a motor vehicle is used." This revocation provision is applicable when the use of a car directly contributes to commission of the crime. State v. Hearn, 131 Wn. App. 601, 609-11, 128 P.3d 139 (2006). Suppose the murder was committed in the course of a kidnapping in the first degree in which the defendant used a car to accomplish the kidnapping. That would make revocation of the defendant's driver's license a direct consequence of the plea, pursuant to RCW 46.60.285(4). Suppose the plea form properly advised the defendant that his sentence would be life in prison without possibility of parole⁴, but failed to advise him of revocation of his driver's license. Under Clark's interpretation of Isadore and Mendoza, this Court would have to allow such a defendant to withdraw his plea, even though there is no possibility that the misadvisement could have been material to the defendant's decision to plead guilty. Under such circumstances, the plea is voluntary, and thus, withdrawal of the plea is not necessary to correct a manifest injustice.

While it is reasonable to allow a defendant to withdraw his plea where, as in Isadore and Mendoza, it is possible that a

⁴ RCW 9.94A.510.

misadvisement could have been material to the decision to plead guilty, it would be unjust to allow withdrawal of a plea even in those cases where no reasonable person would have relied on a misadvisement in deciding to plead guilty.

That is the case here. Clark was charged with three counts of robbery in the second degree. Pursuant to the plea agreement, the State agreed to dismiss one of the charges. Clark was correctly advised that his standard range was 22 to 29 months. Clark was incorrectly advised that the court would impose one year of community placement. If he had proceeded to trial and been convicted of all three robberies, his offender score would have increased by two and his standard range would have increased to 43 to 57 months. See Former RCW 9.94A.310 and 9.94A.360. Clark cannot credibly contend that if he had known that he would not have to be on community placement for one year he would not have pled guilty and would have risked increased imprisonment of 43 to 57 months. Such a claim is simply not credible. And, notably, Clark has never made such a claim. Clark should not be allowed to withdraw his plea where no reasonable person would have relied on the misadvisement regarding community placement in deciding

to plead guilty. Where, as here, the misadvisement could not possibly have been material to the defendant's decision to plead guilty, the petitioner cannot show that his plea was involuntary. Such a holding is not precluded by this Court's decision in Isadore and Mendoza.⁵

3. CLARK WAIVED HIS CHALLENGE BY NOT TIMELY SEEKING WITHDRAWAL OF HIS PLEA WHEN HE DISCOVERED THAT HE HAD BEEN MISADVISED.

Even if this petition is not time-barred, Clark is not entitled to relief. Clark waived his challenge by not timely seeking withdrawal of his plea once he discovered he had been misadvised.

The Court of Appeals held that it was constrained by this Court's decision in Mendoza to allow Clark to withdraw his plea. The Court of Appeals is mistaken. The court failed to appreciate the crucial distinction between this case and Mendoza.

Unlike the present case, State v. Mendoza was a direct appeal. In that case, the defendant learned at sentencing that his standard range was lower than he had been advised, and he did

⁵ This holding would not require reviewing courts to make a "*subjective* inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain." Mendoza, 157 Wn.2d at 590-91 (emphasis added).

not object to the lower standard range. 157 Wn.2d at 585, 592.

This Court held that under the circumstances it would not inquire into the materiality of the misadvisement in the defendant's subjective decision to plead guilty. Id. at 590. However, this Court clarified that:

[I]f the defendant was clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and the defendant does not object or move to withdraw the plea on that basis before he is sentenced, the defendant waives the right to challenge the voluntariness of the plea.

Id. at 592. In other words, if the defendant does not timely seek withdrawal upon learning that he was misadvised of a consequence, the appellate court concludes that the misadvisement was not material and the plea was voluntary.⁶

In this case, Clark waited eight years after he was released from prison on this conviction to challenge the voluntariness of his plea. His case is directly analogous to a defendant who learns prior to sentencing that community placement is not required and does not seek to withdraw his plea. In both instances, the defendant's

⁶ In contrast, in Isadore, 151 Wn.2d at 297, Isadore filed a personal restraint petition challenging the voluntariness of his plea within *one month* of learning that he had been misadvised as to community placement.

lack of action constitutes a waiver. Clark should have moved to withdraw his plea in 1999 when he was released from prison and discovered that he would not be on community placement. The Court of Appeals erroneously applied the holding of Mendoza.

D. CONCLUSION

This Court should dismiss Clark's personal restraint petition as time-barred. In the alternative, this Court should hold that Clark has failed to establish that his plea was involuntary, or that Clark waived his challenge by not timely seeking withdrawal.

DATED this 5th day of December, 2008.

Respectfully submitted,

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CERTIFICATION OF SERVICE

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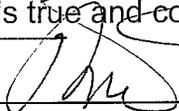
Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Jeffrey Ellis, at the following address:
Ellis, Holmes & Witchley, 705 Second Avenue, Suite 401, Seattle, WA 98104,
attorneys for the petitioner, containing a copy of the Supplemental Brief of Respondent in In re Personal Restraint of Steven Clark, No. 81522-4, in the Supreme Court of the State of Washington.

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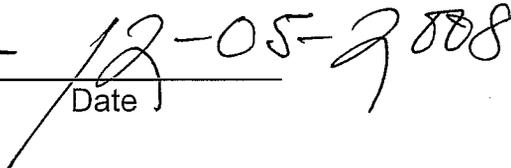
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CLERK

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date