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SUPREME COURT OF THE
STATE OF WASHINGTON

FILED
JUL 30 2009
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

STATE OF WASHINGTON, RESPONDENT

v.

CHUCCO L. ROBINSON, PETITIONER

PETITION FOR REVIEW FROM THE COURT OF APPEALS,
DIVISION III

PETITION FOR REVIEW
July 30, 2009

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A. IDENTITY OF PETITIONER

Chucco L Robinson asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Chucco L. Robinson asks this court to review the decision of the Court of Appeals determining that his guilty plea was knowing, voluntarily and intelligently made, and that any unreported felony convictions are absolutely the responsibility of the defendant for sentencing consequences issued on July 2, 2009. A copy of the decision is in the Appendix at pages A- 1 to 6.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Defendant bears complete responsibility for the sentencing consequences of undisclosed prior felony convictions regardless of the consequences of the failure to disclose ?

D. STATEMENT OF THE CASE

In a 1994, at the age of seventeen, Chucco Robinson was sentenced on a plea to second degree murder in King County, Washington. CP 60, CP 63. At the time of that sentencing he was told that none of his juvenile

convictions counted in his offender score because he was under fifteen years old at the time of those convictions. CP 63. It was his understanding, which was confirmed by his research and discussions when he was incarcerated on that sentence, that those convictions had “washed”, meaning they would never be used against him again. CP 64. That 1994, sentencing was the last time prior to the plea subject of this appeal that Mr. Robinson had appeared in Superior Court. CP 40, RP 17.

On June 22, 2007, Mr. Robinson was arrested on an alleged burglary charge. CP 3. On February 20, 2008, Mr. Robinson entered a guilty plea to a substitute information charging First Degree Burglary and Rape in the Third Degree. RP 3. The standard range sentence discussed in both the Statement of Defendant on Plea of Guilty, CP 12, and the colloquy with the Court, RP 5, was 31 to 41 months. In the Statement of Defendant on Plea of Guilty, as signed by the deputy prosecuting attorney for the State, the recommendation for the sentence was to be 31 months. CP 15, 18. The trial court, relying on this document, told Mr. Robinson that the sentencing recommendation would be 31 months prior to accepting the plea. RP 7. The court found a factual basis for the plea to the First Degree Burglary in the aforementioned Statement of Facts, and Mr. Robinson entered an In Re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), plea to the

Rape in the Third Degree. CP 18, RP 11-12. The allegations in the police Statement of Facts cited by the State as fact were never proven or stipulated in either a hearing or trial. CP 18, RP 11-12.

Apparently, at no time during the prosecution of this case did any juvenile or adult convictions prior to the 1994, sentencing appear on Mr. Robinson's criminal history when checked by either pre-trial services or the State. There is no other criminal history included on either the First Appearance Evaluation undertaken on June 28, 2007, CP 57-58, or the Understanding of Defendant's Criminal History file by the State at the guilty plea on February 20, 2008. CP 60-61. There is no dispute, however, that any convictions at issue were all in Washington State courts, and were apparently subsequently discovered by the community corrections officer (CCO) after resort to the typical sources of criminal history readily available to all law enforcement agencies: NCIC, WASIS, DISCIS and SCOMIS. None of these sources is available to defense counsel except through State and municipal sources. It is unknown at this point how or why additional Washington State felony criminal history eluded the State in its calculation of Mr. Robinson's offender score prior to the plea, but the State appeared at the motion to withdraw the guilty plea / would be sentencing hearing with certified copies of all the juvenile convictions at

issue, and argued unflinchingly to sentence Mr. Robinson to 87 to 116, months on the Burglary and 31 to 41, months on the Third Degree Rape. RP 25. As further discussed elsewhere, this was contrary to all indications and negotiations with respect to standard range that occurred prior to the guilty plea.

Mr. Robinson had no intention of hiding any prior convictions from any court. CP 64. He freely discussed the prior juvenile convictions at issue with the CCO conducting the pre-sentence investigation because, based on his prior instructions on the subject, he truly believed they were not a factor in his sentence. CP 64. This belief was no doubt bolstered by the absence of those juvenile convictions from discussions regarding his first appearance, CP 57, and by the State's not making use of them as part of any Understanding of Defendant's Criminal History. CP 60.

Negotiations in this case revolved completely around the sentencing range. CP 67. Through long discussions, counsel for the State and the Defense came up with the combination of charges, including the Barr, supra, plea on the third degree rape, with the specific intent of getting Mr. Robinson into a sentencing range that was acceptable to all parties involved. CP 67-68. Thirty-one to forty-one months was arrived at in negotiations by adjusting the charges to specifically to require that amount

of time in the sentence. CP 67-68. That intent is readily apparent by the plea to a rape in the third degree where no rape was ever alleged in the facts of the case. CP 68. Mr. Robinson pled guilty to this combination of charges specifically because of the agreed upon sentencing range. CP 68. He would not have entered the guilty plea had the agreed sentencing recommendation not have been specifically thirty-one to forty-one, months in custody. CP 64.

A hearing on Mr. Robinson's motion to withdraw his guilty plea was conducted on May 2, 2008. RP 14-31. After considering all of the evidence and argument submitted by both the State and the defense, the trial court granted the motion to withdraw the guilty plea because, under the facts as presented in this case, Mr. Robinson reasonably believed that the juvenile offences in question were no longer a part of his criminal history, or had washed, and that belief was a mistake as to the applicable law. CP 36, RP 28-29. Significant under these facts in both the court's oral ruling and the Finding of Fact was that the State, itself, submitted a criminal history that did not include convictions at issue. CP 40, RP 28. Because of his mistaken belief as to the law, and the significantly higher sentencing range with the juvenile offences included, Mr. Robinson had not made the plea knowing, voluntarily and intelligently. CP 41. Detailed Findings of

Fact and Conclusions of Law were prepared by the Court. CP 38-41.

E . ARGUMENT .WHY REVIEW SHOULD BE ACCEPTED .

A. Standard of Review.

The trial court's ruling on a motion to withdraw a guilty plea is reviewed on an abuse of discretion standard. State v. Smith, 137 Wn. App. 431, 436, 153 P.3d 898 (2007). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. Id. 437. The Court of Appeals found the Trial Court's decision to allow Chucco Robinson to withdraw his plea to be an abuse of discretion. Given the state of the law prior to this ruling by the Court of Appeals, the trial court's ruling in this case was not manifestly unreasonable.

B. Respondent Reasonably Believed the Juvenile Convictions at Issue Were Not a Part of His Countable Criminal History.

1. Countable Juvenile Criminal History has Changed Radically Since 1994.

At the time of Mr. Robinson's sentencing in 1994, the then

applicable offender score statute, RCW 9.94A.030, was written such that the Washington Supreme Court interpreted it to not allow any juvenile offense committed while under fifteen years old to be counted in calculating an offender score. State v. Smith, 144 Wn.2d 665, 671, 30 P.2d 1245 (2001). As is well known amongst criminal practitioners, the decision in Smith, supra, set off a heated battle between the Supreme Court and the State Legislature that is discussed at length in Personal Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004). Essentially, what happened between Smith in 2001, and LaChapelle in 2004, was that the Legislature amended the offender score statute multiple times in an effort to respond to repeated decisions by the Court that refused to count certain juvenile offences in the offender score. LaChapelle, supra, 6-11. The Supreme Court repeatedly held to principle by declining to “. . . revive previously washed out criminal history to retroactively revive previously washed out convictions”. Id. 11. Finally, by the amendment in 2002, the Legislature closed all avenues of dissent on the issue, and the Court was forced to conclude that “. . . offenders have no vested right in prior wash out provisions, and . . . are subject to the “criminal history” statute in effect at the time of the offense”. Id. 13.

The current criminal history statute, RCW 9.94A.525(2)(f), and

(21), clearly state that all juvenile offences count in offender score, and it makes no difference whether the prior conviction was included in the calculation of a prior offender score. State v. McDougall, 132 Wn. App. 609, 614, 132 P.3d 786 (2006). The legislature's victory was belated, but complete.

The confusion inherent in the juvenile offences and offender score battle of the branches of government is apparent by reviewing LaChapelle, supra. According to the only record in this case, Mr. Robinson was acting on actual knowledge when he believed that the juvenile offences in his past had washed. According to all accounts, this belief was well founded because of the "Herculean" struggle that had took place over years. This issue was complicated by all accounts. It was really a two fold question: 1) whether the juvenile offences washed, and 2) whether juvenile offences that had previously washed could be used in a subsequent sentencing. It was, and is, confusing to practitioners, and Mr. Robinson had spent the entire time he was in custody thinking the juvenile offences had washed pursuant to all indications from the 1994, plea and sentencing. Prior to the battle of offender scores, and a good part of the way into it, he would have been correct. He just never knew the playing field had been completely revised by the Legislature during his incarceration. He acted in this case on that

mistaken knowledge.

This mistake as to the applicable law was compounded by the actions of the various State and county entities in providing incorrect criminal history at all stages of the prosecution right up to the guilty plea hearing. No State actor ever did or provided anything that was contrary to Mr. Robinson's mistaken belief. In fact, everything that was provided to Mr. Robinson regarding his criminal history contributed to his conception that only the 1994, conviction was on his record.

For the State to argue that Mr. Robinson's mistaken belief as to the law is not credible or disingenuous is to blatantly ignore the unique facts in this case. Mr. Robinson was last sentenced in 1994. He was seventeen years old. He was incarcerated from the time he was sixteen years old. His juvenile offences were not counted when he was sentenced in 1994, in King County. His juvenile offences would not have counted as criminal history according to the law as interpreted by the Supreme Court prior to 2002. The most significant aspect of this fact is that previously washed criminal history could not have been revived for use in a subsequent offended score calculation prior to 2002. Mr. Robinson had a completely understandable belief as to the law regarding countable criminal history, and to for the State to infer that he is either lying or manipulating his criminal history to

gain the “benefit of the bargain” is not supported by the law or facts as established in the record of this case.

The facts in this case, as well as the documented changes in the law between 1994, and 2008, more that adequately attest to the reasonableness of the trial court’s ruling and Findings of Fact and Conclusions of Law.

2. A Guilty Plea That Results in a Sentence that is Longer than the Agreed Upon Sentencing Range is not Knowing, Voluntary or Intelligently Entered if it is the Product of a Legal Mistake.

CrR 4.2(d), and (f), govern the acceptance and withdraw of guilty pleas in the trial court.

(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 judgement upon a plea of guilty unless it is satisfied there is a factual basis for the plea.

(f) Withdrawal of Plea. The court **shall** allow a defendant to withdraw the defendant’s plea **whenever** it appears that the

withdrawal is necessary to correct a manifest injustice.

(Emphasis added)

A guilty plea that does not comply with the specific requirements of CrR 4.2, denies the defendant due process. *In Re Pers. Restraint of Isadore*, 151 Wn. 2d 294, 297, 88 P.3d 390 (2004). A defendant entering a guilty plea must fully understand the sentencing consequences of that plea for the plea to be valid. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). More to the point, misinformation provided to a defendant regarding sentencing consequences of a plea is a “manifest error affecting a constitutional right” which may be raised for the first time on appeal, *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996), *Miller*, supra 531, RAP 2.5(a)(3), and a defendant is entitled to withdraw his plea if the correct standard range is higher than that explained in the plea agreement. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

A defendant contending his or her decision to accept a guilty plea was misinformed as to sentencing consequences need not establish the materiality of that misinformation in the decision to plead guilty. *Isadore*, supra, 302. The reason being that a reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, or discern the weight a defendant gave to each factor relating to that decision.

Id. 302. The State's argument that Mr. Robinson's decision to plead guilty was based on some kind of gamble for the benefit of the plea bargain, and / or disingenuous is without merit and devoid of constructive consideration.

The State argues in essence that State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008), made all prior law with respect to withdrawal of a guilty pleas superfluous when concerned with criminal history and offender scores. This is an inaccurate characterization. In *Codiga*, supra, at 929, the Court drew a significant distinction between cases where a defendant simply fails to disclose additional criminal history, and where there is "legal error" that results in a miscalculation of criminal history. Mr. Codiga simply did not disclose the existence of prior misdemeanors that resulted in the failure of his prior felonies to wash. Id. 929. Because Codiga's "... new offender score was based on newly discovered criminal history or new facts, not new or misunderstood law", he was bound by his agreement in the guilty plea statement. Id. 929. Were the plea agreement the result of a legal mistake he would not have been bound by it. Id. 929. As the trial court in this case ultimately found, Mr. Robinson's mistake as to the law remains a valid consideration upon which a guilty plea may be suspect, and, ultimately, withdrawn.

Mr. Robinson was clearly acting on a legal mistake in his belief that

his prior juvenile offences had washed. He would have been correct had this sentencing taken place six years ago. This was not newly discovered unreported criminal history, it was history regarding which Mr. Robinson had a mistaken legal belief was not countable, as witnessed by the failure to count this same criminal history on his 1994, sentencing. No one provided him with any indication to the contrary, including the State, who had easy access to all of Mr. Robinson's criminal history. Particularly as this was all Washington State criminal history. There was no difficulty in ascertaining these felonies existed by the State, it was able to produce certified copies of the Judgements and Sentences for all the juvenile offences at issue in time for the aborted sentencing hearing, RP 25, and the issue is not at all similar to Codiga, where the defining convictions were misdemeanors that often are not included on the State's Understanding of Criminal History, and normally do not enter into felony criminal history calculations. The State has been aware since 2002, that all juvenile offences now count in calculating criminal history. There is no mystic or confusion in this simple equation. The State simply relied solely on the criminal history counted in the 1994 conviction, as did Mr. Robinson, in entering the plea agreement, and thereby miscalculated the standard sentencing range. The only difference is, the State is now asking that Mr. Robinson bear the entire

burden of everyone's legal misunderstanding with respect to the correct sentencing range.

The trial court's ruling that Mr. Robinson be allowed to withdraw his guilty plea under the facts of this case will not deprive the State of the fair opportunity to proceed to trial, or to accommodate the changed playing field now that everyone is aware that the prior juvenile offences count as criminal history. On the contrary, Mr. Robinson would lose the entire benefit of his plea agreement should his mistake as to the law be enforced, and he will pay for that mistake with several years of his life. Under the unique facts as presented in this case that would certainly be a directly observable injustice. In short, the injustice would be "manifest".

In the Court of Appeals ruling the Court appears to establish that a "bright line" rule exists as to a defendant's failure to disclose prior criminal convictions. That rule would be the defendant bears all responsibility for any non-disclosure no matter what the circumstances. This ruling is inconsistent with this Court's decision in Codiga, supra, as well as all previously established law with respect to knowing and voluntary guilty pleas as set forth above.

Given that the nature of a guilty plea is a due process issue involving a significant question of law under both the State and Federal

Constitutions, and that the knowing nature of guilty pleas involves a widespread substantial public interest, RAP 13.4 (b)(3) & (4), Chucco L. Robinson asks that this court accept review of the Court of Appeals ruling.

F. CONCLUSION

Based on the foregoing, Chucco L. Robinson respectfully requests the Court grant review to determine whether to allow him the to withdraw his plea of guilty.

Respectfully Submitted this 29th, day of July, 2009.



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APPENDIX A



FILED

JUL - 2 2009

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | No. 27120-0-III |
| |) | |
| Appellant, |) | |
| |) | Division Three |
| v. |) | |
| |) | |
| CHUCCO L. ROBINSON, |) | PUBLISHED OPINION |
| |) | |
| Respondent. |) | |

BROWN, J. — The State appeals the trial court's decision to grant Chucco Robinson's request to withdraw his guilty plea following the discovery of additional criminal history that increased his offender score and standard sentencing range. Because Mr. Robinson failed to disclose his juvenile offense history, regardless of wash-out rule applications, he is contractually bound by the plea agreement to accept the increased offender score for juvenile offenses that do not wash out under current law. Accordingly, we reverse.

FACTS

The State charged Mr. Robinson with first degree burglary, attempted first degree rape, and first degree kidnapping for an incident involving Mr. Robinson and an acquaintance. During plea negotiations, Mr. Robinson identified a 1994 second degree

murder conviction as his criminal history. Mr. Robinson signed the Understanding of Defendant's Criminal History, which states, "This statement of Prosecutor's Understanding of Defendant's Criminal History is based upon present information known to the Prosecutor and does not limit the use of additional criminal history if later ascertained." Clerk's Papers (CP) at 61. Mr. Robinson agreed in his guilty plea statement that his plea was made "freely and voluntarily." CP at 18.

Mr. Robinson, actually, had four prior juvenile convictions that were not used to calculate Mr. Robinson's offender score for sentencing on the 1994 murder under then existing wash-out rules. Mr. Robinson acknowledges that since 2002, the four juvenile offenses do not wash out when calculating his offender score. RCW 9.94A.525(2)(f), and (21); *State v. McDougall*, 132 Wn. App. 609, 614, 132 P.3d 786 (2006).

Mr. Robinson entered and the court accepted guilty pleas to the reduced charges of first degree burglary and third degree rape. Counting solely the 1994 conviction, the agreed standard range sentence was 31-41 months on the burglary charge and 13-17 months on the rape. A community corrections officer found the four prior juvenile offenses during Mr. Robinson's pre-sentence investigation, raising the sentencing range to 87-116 months on the burglary charge and 41-54 months on the rape charge. Mr. Robinson successfully requested to withdraw his plea. The State appealed.

ANALYSIS

The issue is whether the trial court erred by abusing its discretion in allowing Mr. Robinson to withdraw his guilty plea. The State contends Mr. Robinson assumed the

risk of discovery of additional criminal history when he failed to disclose his other juvenile offenses during plea negotiations and is bound by his plea agreement to accept the higher offender score. The State is correct.

Initially, Mr. Robinson asks this court to not consider portions of the State's brief that refer to the prosecutor's unsworn or uncertified statements. Mr. Robinson does not expressly direct this court to the challenged statements. Nevertheless, to the extent documents are properly included in our record, they are properly before the court on review. See RAP 9.1(a) (regarding appellate record on review).

We review a trial court's ruling on a motion to withdraw a guilty plea for abuse of discretion. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). A trial court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. *Id.* at 119.

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Likewise, CrR 4.2(d) mandates that the trial court 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." See also *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (stating that for a plea to be knowing and voluntary, a criminal defendant must be informed of all direct consequences of his plea). A defendant does not knowingly make a guilty plea

when he bases that plea on misinformation regarding sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

Our focus is whether Mr. Robinson was properly informed of the consequences of his guilty plea at the time he entered into the plea agreement. If he entered into that agreement knowingly and voluntarily, a sentencing error by the trial court does not invalidate his plea. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 362, 759 P.2d 436 (1988). "Knowledge of the direct consequences of the plea can be satisfied by the plea documents." *State v. Codiga*, 162 Wn.2d 912, 923, 175 P.3d 1082 (2008) (citing *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001)). "When [a] judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Notwithstanding this presumption of validity, CrR 4.2(f) provides that "[t]he 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." A manifest injustice is obvious and directly observable, an overt injustice, and not an obscure one. *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Manifest injustice includes instances where (1) effective assistance of counsel was denied, (2) the plea was not voluntary, (3) the plea agreement was not honored by the prosecution, or (4) the plea was not ratified by the defendant. *Id.* at 597. Mr. Robinson's claim of manifest injustice turns on whether the plea was voluntary.

A defendant assumes the risk that new or additional criminal history will be discovered. *Codiga*, 162 Wn.2d at 929 (citing CrR 4.2(g)). In *Codiga*, the plea form's criminal history solely listed a 1997 controlled substance conviction. *Id.* at 917. Mr. Codiga agreed this was correct. *Id.* at 917-18. Prior to sentencing, however, it was discovered Mr. Codiga had another felony conviction and several prior misdemeanor offenses. *Id.* at 921. Mr. Codiga, like Mr. Robinson, explained to the court that he thought the felony offense washed. *Id.* at 929. Our Supreme Court held, "Given that he assumed the risk that additional criminal history would be discovered that would impact his offender score, we conclude that he has not established a manifest injustice sufficient to warrant withdrawal of the plea." *Id.* at 930.

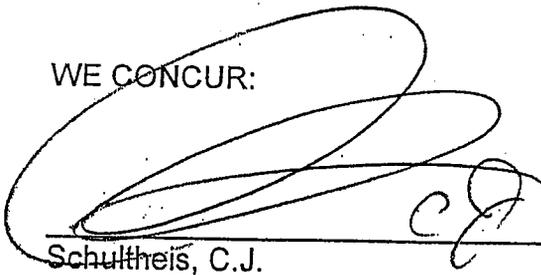
Our facts are strikingly similar to *Codiga*: Here, Mr. Robinson agreed to "the use of additional criminal history if later ascertained." CP at 61. He also agreed his guilty plea was made "freely and voluntarily." CP at 18. Mr. Robinson argues the changes in Washington law regarding the washing out of juvenile offenses led him to believe his prior convictions washed. By comparison, in *Codiga*, Mr. Codiga revealed his two prior felonies to his attorney and they decided not to reveal the second offense, concluding it had washed. The court still held, "the new offender score was based on newly discovered criminal history or new facts, not new or misunderstood law." *Codiga*, 162 Wn.2d at 929. Our courts "have expressed a strong preference for the enforcement of plea agreements, and the burden of showing manifest injustice sufficient to warrant withdrawal of a plea agreement rests with the defendant." *Id.* at 929.

Mr. Robinson has not met his burden. He mistakenly argues he did not need to disclose his juvenile offenses because he thought they had washed out. But it is the court's function to apply the wash-out rules to a defendant's correct criminal history when determining the offender score. Mr. Robinson incorrectly approached the calculation process as though he had never committed the juvenile offenses when choosing non-disclosure. His juvenile offenses are part of his criminal history before any application of wash-out rules. And, Mr. Robinson is presumed to know the relevant law. *State v. Williams*, 158 Wn.2d 904, 906-907, 148 P.3d 993 (2006).

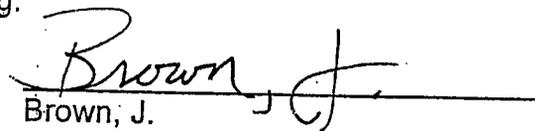
Mr. Robinson assumed the contractual risk fixed in his plea agreement that the discovery of additional criminal history would increase his offender score and standard sentencing range. *Codiga*, 162 Wn.2d at 928. Thus, he has not shown that legal error, rather than the discovery of additional criminal history, caused the increased offender score. Accordingly, the trial court erred by allowing him to withdraw his plea.

Reversed and remanded for sentencing.

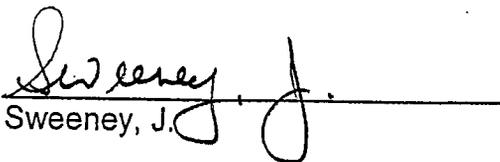
WE CONCUR:



Schultheis, C.J.



Brown, J.



Sweeney, J.