

No. 63345-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

IN RE THE PERSONAL RESTRAINT PETITION OF:

CURTIS GENE THORNTON,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL -7 AM 10:43

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A. INTRODUCTION

On February 18, 1993, Curtis Thornton pleaded guilty to one count of Attempted Robbery in the Second Degree and one count of (completed) Robbery in the Second Degree. Neither crime included a deadly weapon allegation. Nevertheless, in his plea statement, Thornton was told that in addition to confinement, “the judge will sentence me to community placement for at least one year.” Neither charge was a community placement offense at the time.

When Thornton was sentenced on April 23, 1993, the *Judgment* was invalid in at least two respects. First, the sentencing court set the “maximum tem” for the *attempted* robbery at “10 years and/or \$20,000 fine.” The maximum fine for attempted second-degree robbery was 5 years and \$10,000. In addition, the Judgment ordered no contact for “maximum term of 10 years” with the victim of that count “Bree Hansen,” the victim of the attempted robbery count. Instead, 5 years was the maximum term permitted under the law for attempted second-degree robbery.

Thornton now argues that his judgment is facially invalid, revealing an involuntary guilty plea. He seeks to withdraw that plea.

In response, the State argues that “facial invalidity” requires both a showing of an error on the face of the judgment and that error must “affect the validity of the sentence imposed.” *Response*, p. 8.

The State is incorrect, as this reply demonstrates.

B. ARGUMENT

Introduction

The State's *Response* misunderstands and misapplies the Supreme Court's recent ruling in *Personal Restraint Petition of McKiernan*, 165 Wn.2d 777, 203 P.3d 275 (2009). Proceeding from this erroneous starting point, the *Response* then concludes that—even where an error unambiguously appears on the face of a judgment—a post-conviction petition bringing an action more than one year after finality must show that the error has some current negative effect.

Facial Invalidity Properly Understood

Thornton contends that his petition is not time barred because the one-year time limit does not apply to a judgment invalid on its face. RCW 10.73.090; *In re Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). A judgment and sentence is facially invalid if “the judgment and sentence evidences the invalidity without further elaboration.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000)). A reviewing court may, however, look to “related documents, *i.e.*, charging instruments, statements of guilty pleas, [and] jury instructions,” to

determine whether a judgment and sentence is facially invalid. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 858, 100 P.3d 801 (2004) (citing *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002)).

The Supreme Court's recent decision in *Personal Restraint of McKiearnan*, 165 Wn.2d 777, 203 P.3d 275 (2009), did not alter that rule.

McKiearnan held:

In order to consider whether the plea agreement was invalid we must first find that the judgment and sentence itself is facially invalid. Otherwise, review of the plea agreement is barred by RCW 10.73.090. *State v. King*, 130 Wash.2d 517, 530-31, 925 P.2d 606 (1996). A reviewing court may use the documents signed as part of a plea agreement to determine facial invalidity if those documents are relevant in assessing the validity of the judgment and sentence. *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 719, 10 P.3d 380 (2000); *In re Pers. Restraint of Stoudmire*, 141 Wash.2d 342, 354, 5 P.3d 1240 (2000). But an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid. The plea documents are only relevant to help determine if the judgment and sentence itself is facially invalid. *In re Pers. Restraint of Hemenway*, 147 Wash.2d 529, 533, 55 P.3d 615 (2002).

Id. at 781-82. In *McKiearnan*, the Supreme Court found that a judgment which expressed the maximum as "20 to life" (when the maximum was "life") was **not** erroneous. "The maximum was life in prison whether he was informed that the maximum sentence was 1 year to life, 10 years to life, or 20 years to life." *Id.* at 783. Thus, there was no need to look the guilty plea form because there was no possible error on the judgment.

That court faced a similar situation in *In re Hemenway*, 147 Wn.2d 529, 55 P.3d 615 (2002). In that case, the judgment correctly included the

mandatory period of community placement. Nevertheless, Hemenway complained that because he was not given accurate advice when he pled, his judgment was facially invalid. This Court rejected that argument, concluding that the judgment complied with the requirements of the law.

However, this Court noted that:

documents signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgment and sentence. Thus, in *Stoudmire*, the court held the one-year bar did not apply where the plea documents showed that some charges were filed after the statute of limitations had run, and thus showed that the judgment and sentence was invalid. Similarly, in *Thompson*, the plea documents showed that the petitioner had been charged with an offense that did not become a crime until nearly two years after the offense was committed, and thus those documents showed the judgment and sentence was invalid on its face. In this case, the judgment and sentence correctly reflects that Hemenway was sentenced to the mandatory community placement “for the period of time provided by law.” The judgment and sentence is therefore valid on its face.

Hemenway, 147 Wn.2d at 532 (emphasis supplied).

The recent decision, *In re Restraint of Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008), is in accord. Looking only at the judgment, Richey was convicted of murder. A conviction for murder is facially valid. However that is not how this Court framed the issue. “The question remains whether Richey's judgment and sentence is, as Richey asserts, facially invalid in light of the fact that he was charged, alternatively, with attempted first degree felony murder and attempted first degree intentional murder.” In other words, facial invalidity does not depend on whether there is an

obvious, affirmative mistake on the judgment. If that were the case, then *In re Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), would have turned out differently. There is nothing obviously invalid about a conviction for “murder.”

Instead the question is whether the judgment reveals some obvious or possible error, which then allows the reviewing court to review other applicable documents.

The State seeks to impose an additional requirement: the error must have some current, constitutional or “complete miscarriage of justice” negative effect on Thornton. In other words, no error on the face of a judgment regarding the maximum term of confinement can ever constitute a facial invalidity.

This reasoning radically distorts the concept of “facial invalidity.” The facial invalidity “gateway” inquiry simply asks whether the judgment is erroneous in any respect. If it is, then the Court can examine the underlying infirmity—which may be an infirmity in the conviction or sentence, and which may or may not justify relief.

The Supreme Court’s recent decision reversing a facially invalid judgment of conviction, *In re Restraint of Bradley*, ___ Wn.2d ___, 205 P.3d 123 (2009), provides compelling proof for Marlowe’s position. In that case, Bradley’s offender score was miscalculated (at the time of the plea

and sentencing) for one of his two crimes of conviction. The miscalculation had no “actual effect” on his sentence because his offender score was correct on the more serious offense and Bradley’s lesser sentence (on the offense with the miscalculated offender score) ran concurrently with the greater sentence. Nevertheless, this Court concluded that the judgment was facially invalid because it contained an error obvious from the “face” of the document. If *McKiearnan* had changed the law in the manner argued by the State herein, *Bradley* would have been time barred.

The State’s *Response* fails to discuss, much less distinguish, *Bradley*.

Properly applying the facial invalidity test set forth by this Court, Thornton’s judgment reveals an obvious error which justifies reviewing the guilty plea form.

However, even under the State’s proposed test, Thornton prevails. The judgment prohibited no contact with the victim of a crime with a five year maximum term for ten years. Although the State tries to justify the duration of the no contact order by arguing that it was imposed as a condition of the completed robbery count, that count did not involve Ms. Hansen. Thus, imposing a no contact order involving Ms. Hansen for a crime that had nothing to do with her was not directly related to the circumstances of the crime—the relevant test.

Instead, given the Court's imposition of a ten year maximum for both the crime and the no contact order leads to one conclusion: the trial court erred and that error is obvious on the face of the judgment.

Because the judgment is facially invalid, this Court can review Thornton's guilty plea.

Thornton Has Not Waived His Opportunity to Withdraw his Plea

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) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); *State v. Moon*, 108 Wash.App. 59, 63, 29 P.3d 734 (2001). Therefore, misinformation about the length of a sentence renders a plea involuntary, *even where the correct sentence may be less than the erroneous sentence included in the plea.* *Mendoza*, 157 Wn.2d at 591.

In this case, Thornton was misadvised about community placement when he pled guilty. The State argues that because community placement was not imposed at sentencing, Thornton waived his right to challenge the validity of his plea by failing to move to withdraw the plea. The so-called *Mendoza* exception is not so broad. Instead, it requires the trial court to affirmatively present a misadvised defendant with the opportunity to withdraw his plea once the error is revealed. Only when a defendant is informed at sentencing that the plea agreement states a harsher than appropriate sentencing consequence of the plea, and the defendant has the opportunity to withdraw the plea, “the defendant may waive the right to challenge the validity of the plea.” *Mendoza*, 157 Wn.2d at 591. However, as in *Mendoza*, any confusion caused by misinformation in the plea forms must be expressly clarified by either the State and/or the court. 157 Wn.2d at 592.

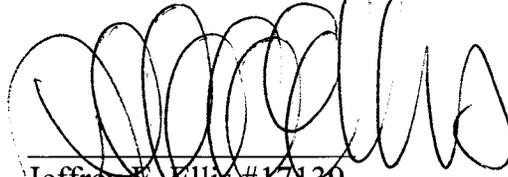
The State has produced no evidence that either the State or the Court informed Thornton of his option to withdraw his plea at the time of sentencing. Thus, the State has not proven that the *Mendoza* exception applies.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should vacate Thornton's robbery convictions and remand this case to King County Superior Court to permit him to withdraw his guilty pleas.

DATED this 4th day of July, 2009.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Jeffrey E. Ellis', written over a horizontal line.

Jeffrey E. Ellis #17139
Attorney for Mr. Thornton

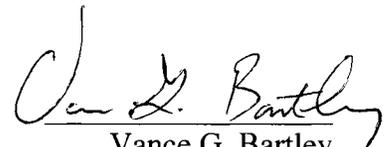
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 4, 2009 I served the parties listed below with a copy of *Petitioner's Reply in Support of Personal Restraint Petition* as listed below:

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7-4-09 Sea, WA
Date and Place


Vance G. Bartley

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