

63570-1

63570-1

NO. 63570-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

STEVEN MILLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE GEORGE MATTSON

2009 DEC -8 PM 4:37
COURT OF APPEALS
STATE OF WASHINGTON
FILED

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. MILLER'S COLLATERAL ATTACK IS TIME- BARRED PURSUANT TO RCW 10.73.090.....	4
2. MILLER WAS NOT MISADVISED AS TO A DIRECT CONSEQUENCE OF HIS PLEA IN THE PLEA FORMS	8
3. MILLER WAIVED ANY CHALLENGE TO THE VOLUNTARINESS OF HIS PLEA AT SENTENCING	11
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>In re Pers. Restraint of Hemenway</u> , 147 Wn.2d 529, 55 P.3d 615 (2002).....	6
<u>In re Pers. Restraint of Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	9
<u>In re Pers. Restraint of McKiearnan</u> , 165 Wn.2d 777, 203 P.3d 375 (2009).....	7
<u>In re Pers. Restraint of Runyan</u> , 121 Wn.2d 432, 853 P.2d 424 (1993).....	5
<u>In re Pers. Restraint of Thompson</u> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	6
<u>In re Pers. Restraint of Turay</u> , 150 Wn.2d 71, 74 P.3d 1194 (2003).....	7
<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	9
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006).....	11, 12
<u>State v. Robinson</u> , 104 Wn. App. 657, 17 P.3d 653 (2001).....	5
<u>State v. Smith</u> , 144 Wn. App. 860, 184 P.3d 666 (2008).....	7, 8
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	9

Statutes

Washington State:

RCW 9.94A.670 3, 10
RCW 10.73.090..... 4, 5, 6, 7
RCW 10.73.100..... 5
RCW 10.73.130..... 5
RCW 10.73.140..... 5

Rules and Regulations

Washington State:

CrR 4.2..... 9
CrR 7.8..... 4, 5, 7, 8

A. ISSUES PRESENTED.

1. A defendant may not collaterally attack a facially valid judgment and sentence more than one year after the judgment becomes final. Defendant Steven Miller's judgment and sentence is valid on its face, and his collateral attack was filed more than one year after the judgment became final. Should the collateral attack be dismissed as untimely?

2. A plea of guilty is valid if the defendant was advised of the direct consequences of his plea. The record reflects that the defendant was advised that he was not statutorily eligible for a Special Sexual Offender Sentencing Alternative (SSOSA), but requested one anyway. Did the trial court properly deny the motion to withdraw the guilty plea, since the defendant was properly advised of the applicable law?

3. A defendant waives his challenge to the voluntariness of his plea if he was misadvised as to the consequence of his plea but was properly advised prior to sentencing and does not move to withdraw his plea. The record reflects that the defendant was clearly advised by the State and the court that he was not eligible for a SSOSA before the court pronounced the sentence. The

defendant did not move to withdraw his plea. Did he waive his challenge to the voluntariness of his plea?

B. STATEMENT OF THE CASE.

Steven Miller was charged by information with two counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 1-2. The Certification for Determination of Probable Cause reflects that Miller forced the ten-year-old victim to perform oral sex on him approximately ten times. CP 3. Miller confessed on videotape to having sexual contact with the victim on at least five occasions. CP 3. Miller pled guilty to the three crimes charged. CP 16-39. In the Statement of Defendant on Plea of Guilty, the paragraphs regarding the Special Sex Offender Sentencing Alternative (SSOSA) were crossed out. CP 24-25. The plea form advised the defendant that the State would be seeking an indeterminate sentence of 216 months to life. CP 22, 38. The defense requested an exceptional sentence below the standard range of a "36 month SSOSA." CP 54.

Both the plea and sentencing occurred before the Honorable George Mattson on February 17, 2006. RP 3. The court conducted an extended colloquy with Miller to insure that his plea

was being entered voluntarily with an understanding of the consequences. RP 21-30.

When making the State's sentencing recommendation, the State explained that Miller was not eligible for a SSOSA pursuant to RCW 9.94A.670 because of the length of his standard range. RP 33-34. Defense counsel represented that the State had refused to reduce the charges to an offense that would make Miller eligible for a SSOSA. RP 42. Defense counsel nonetheless argued that the court could impose a SSOSA if it imposed an exceptional sentence downward. RP 42. In the alternative, defense counsel requested a sentence consisting entirely of electronic home detention. RP 43. Prior to imposing the sentence, court advised Miller that he was not eligible for a SSOSA, and that the court had no authority to place a defendant on electronic home detention for thirteen years. RP 54. The court imposed an indeterminate sentence of 189 months to life total confinement. CP 10.

The judgment and sentence was filed with the clerk of the trial court on February 17, 2006. CP 6. Miller did not appeal. In March of 2009, the superior court received a pro se "Motion for

Withdrawal of Guilty Plea." CP 43-46.¹ On March 19, 2009, the court entered an order denying the motion. CP 42. Miller submitted a notice of appeal to the superior court dated April 15, 2009. CP 49-50. On May 5, 2009, the court entered an order transferring the case to this Court pursuant to CrR 7.8(c)(2). CP 47. On June 4, 2009, Commissioner James Verellen ruled that this matter should be treated as a direct appeal of the trial court's order denying Miller's motion to withdraw his guilty plea.

C. ARGUMENT.

1. MILLER'S COLLATERAL ATTACK IS TIME-BARRED PURSUANT TO RCW 10.73.090.

More than one year after his judgment and sentence became final, Miller filed his collateral attack with the superior court challenging the voluntariness of his plea. Regardless of whether Miller was misadvised as to a consequence of his plea, the judgment and sentence in this case is valid on its face. Thus, Miller's collateral attack on the judgment and sentence is untimely. Miller's untimely collateral attack should have been transferred to

¹ The motion appears to have been originally received by the Washington Supreme Court on December 11, 2008. CP 43. The affidavit of Miller in support of the motion is dated December 6, 2008. CP 46.

this Court for consideration as a personal restraint petition. In the interests of judicial economy, this Court should convert this appeal to a personal restraint petition and dismiss the petition.

No motion 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); see In re Pers. Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). 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). RCW 10.73.090 applies to all collateral attacks, whether they are filed in the trial court or in the appellate courts. State v. Robinson, 104 Wn. App. 657, 662, 17 P.3d 653 (2001). CrR 7.8(b) explicitly provides that a motion for relief from judgment must be made within a reasonable time "and is further subject to RCW 10.73.090, .100, .130 and .140."

The judgment in this case became final on February 17, 2006, the date it was filed with the clerk of the trial court. CP 6. Miller's motion to withdraw his plea was not filed with the King County Superior Court until March of 2009. CP 43. It appears that Miller may have attempted to file the motion with the Washington

Supreme Court in December of 2008. CP 43. No matter what date is used, the motion, signed and dated by Miller on December 6, 2008, was filed more than one year after the judgment and sentence became final.

The one-year time limit applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). The documents of the plea can inform the inquiry as to whether the judgment and sentence is invalid on its face. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002). However, the state supreme court has repeatedly held that a misadvisement about a consequence of the plea is not a facial defect exempt from the one-year time limit on collateral attack. Id. at 533.

In Hemenway, the court was called upon to determine whether Hemenway's judgment and sentence was facially invalid where he was misadvised about the term of community placement that would be imposed as a consequence of his conviction. The court held that misinformation about the consequences of a plea in the plea form does not render a judgment and sentence invalid on

its face if the judgment and sentence imposed the correct period of community placement. Id. at 532. The court reiterated this holding in In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 782, 203 P.3d 375 (2009), stating "an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid. See also, In re Pers. Restraint of Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003).

Miller has never contended that his judgment and sentence is invalid on its face. He has never asserted that there is an error on the face of the judgment and sentence. Miller's judgment and sentence is valid on its face. Miller's claim that his plea is involuntary because he was misadvised about the availability of a SSOSA is untimely pursuant to RCW 10.73.090. Likewise, his claim that he received ineffective assistance of counsel is also untimely pursuant to RCW 10.73.090. Neither of these claims falls within any exceptions to the time bar provided in RCW 10.73.100.

CrR 7.8(c)(2) provides that the superior court shall transfer an untimely collateral attack to the Court of Appeals for consideration as a personal restraint petition. The superior court erred by denying Miller's collateral attack on March 19, 2009, rather than transferring it to this Court. CP 42. In State v. Smith,

144 Wn. App. 860, 184 P.3d 666 (2008), the superior court also erroneously denied the defendant's untimely CrR 7.8 motion. On appeal, the Court of Appeals declined to convert the matter to a personal restraint petition but remanded to the superior court to permit the defendant an opportunity to withdraw his motion before it was transferred to the Court of Appeals. Id. at 863-64. In the present case, Miller has explicitly sought review in this Court, and has not requested that his motion be withdrawn. As such, it would be waste of judicial resources to remand this matter back to the superior court simply for the purpose of having the superior court transfer the motion back to this Court. This Court should convert this appeal to a personal restraint petition, and dismiss it as untimely.

2. MILLER WAS NOT MISADVISED AS TO A DIRECT CONSEQUENCE OF HIS PLEA IN THE PLEA FORMS.

Even if this collateral attack was not time-barred, Miller is not entitled to withdraw his plea. Miller's plea was knowing, voluntary and intelligent, and made after being advised of the direct consequences of his plea, in particular, after being advised that his

standard range was too high for him to be eligible to receive a SSOSA. There was no manifest injustice in this case.

Due process requires that a guilty plea be knowing, voluntary and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). This standard is reflected in CrR 4.2(d), which mandates that the defendant be advised of all direct consequences of the plea. Once a guilty plea is accepted, the trial court may allow withdrawal of the plea only to correct a "manifest injustice." CrR 4.2(f). There is a strong public interest in enforcing plea agreements that are voluntarily and intelligently made. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). An appellate court reviews a trial court's decision on a motion to withdraw guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

Miller contends that his plea was not voluntary because he was not advised that he was ineligible for a SSOSA. However, the record reflects that Miller and his counsel knew that he was not statutorily eligible for a SSOSA but decided to request one anyway. Having been properly advised by the State that he could not receive a SSOSA, Miller should not be allowed to withdraw his plea as involuntary.

RCW 9.94A.670 governs the imposition of SSOSA sentences. Pursuant to that statute, an offender is eligible for a SSOSA only if "the offender's standard range includes the possibility of confinement for less than eleven years." RCW 9.94A.670(2)(c). In the present case, Miller was indisputably advised that the standard range for the minimum term for Counts I and II was 162 to 216 months. CP 17. Eleven years equals 132 months. Thus, Miller was not eligible for a SSOSA because his standard range did not include the possibility of confinement for less than eleven years.

The plea documents in the present case contain two lengthy paragraphs that pertain to imposition of a SSOSA. CP 24-25. These paragraphs were stricken out on Miller's plea form, clearly indicating that the SSOSA provisions were not applicable to him. CP 24-25. During sentencing, defense counsel admitted that the parties were aware that a SSOSA was not statutorily authorized because of the length of Miller's standard range, stating "the State declined to agree to reduce the charge to allow a SSOSA sentence." RP 42.

Nonetheless, despite the fact that Miller was clearly advised during the plea process and in the plea forms that he was not

eligible for a SSOSA because of the length of his standard range, Miller and his counsel chose to advocate that the court could somehow ignore the statute and impose a SSOSA.

Miller cannot establish that withdrawal of his plea is necessary to correct a manifest injustice, since he was properly advised of the applicable law. Miller's unreasonable request that the sentencing court ignore the applicable statute does not constitute a manifest injustice. Miller's decision to plead guilty to the three charged crimes in order to avoid additional charges--for crimes that he confessed he committed--was knowing, voluntary and intelligent. The trial court did not abuse its discretion in denying Miller's motion to withdraw his plea.

3. MILLER WAIVED ANY CHALLENGE TO THE VOLUNTARINESS OF HIS PLEA AT SENTENCING.

Even if this collateral attack were not time-barred, Miller is not entitled to withdraw his plea. Miller waived his challenge by not timely seeking withdrawal of his plea when he was advised at sentencing that he was not eligible for a SSOSA.

In State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006), the defendant learned at sentencing that the standard

range calculation that the plea was based upon was incorrect. Id. at 585. However, he did not move to withdraw his plea on that basis at sentencing. Id. Although the supreme court held that Mendoza had been misadvised about a direct consequence of his plea, the court held that Mendoza had waived his challenge. The court explained:

[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 seek withdrawal upon learning at sentencing that he was misadvised of a consequence of his plea, the defendant waives his challenge to the voluntariness of the plea. In this case, the record demonstrates that prior to the court pronouncing sentence, both the prosecutor and the court advised Miller that he was not statutorily eligible for a SSOSA. RP 33-34, 52. Miller did not move to withdraw his plea. Pursuant to Mendoza, Miller waived any challenge to the voluntariness of his plea by not moving to withdraw his plea at sentencing.

D. CONCLUSION.

This appeal, based on an untimely collateral attack, should be converted to a personal restraint petition and dismissed.

DATED this 8th day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. STEVEN MILLER, Cause No. 63570-1-I, in the Court of Appeals, Division I, for the State of Washington.

2009 DEC -8 PM 4:37
STATE OF WASHINGTON

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

W Brame
Name
Done in Seattle, Washington

12/8/09
Date 12/8/09