Supreme Court No. 100418-4
(COA No. 54122-0-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK PERRY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAMANIA COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mark Perry asks this Court to review the opinion of the Court of Appeals in *State v. Perry*, No. 54122-0-II (issued on October 26, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals incorrectly found Mr. Perry's CrR 7.8(b) motion was untimely.

2. Whether the trial court erred by denying Mr. Perry's motion to withdraw his guilty plea where Mr. Perry was misinformed about his eligibility for a drug offender sentencing alternative (DOSA), and where the court relied on the wrong legal standard in denying the motion.

C. STATEMENT OF THE CASE

Mark Perry pled guilty to various offenses in 2015 pursuant to a plea agreement in which the prosecutor promised to recommend a Drug Offender Sentencing Alternative ("DOSA") sentence. RP 4-17; CP 11-22. Neither the court nor

the parties recognized Mr. Perry could not receive a DOSA due to a disqualifying out-of-state robbery conviction, which was noted on Mr. Perry's plea paperwork and judgment and sentence. RP 4-17; CP 21, 25.

In 2019, Mr. Perry filed a pro se motion under CrR 7.8 to withdraw his plea. CP 38-41. After determining the motion was not time barred under RCW 10.73.090 or CrR 7.8 because the judgment was facially invalid, the trial court denied the motion. RP 18-19, 26-29. Applying the standard reserved for personal restraint petitions, the court ruled:

> As for the motion to withdraw the guilty plea, the court denies the request because defendant has failed to show that there's been a complete miscarriage of justice. **When non-constitutional grounds are asserted for relief from personal restraint, the petitioner must establish he or she is being unlawfully restrained due to a fundamental defect, which inherently result [sic] in a complete miscarriage of justice.** In this case, the court cannot find that that has occurred and the court will go ahead and resentence Mr. Perry on the four counts."

RP 29 (emphasis added).

The court only considered the motion under CrR 7.8 (b)(4), even though Mr. Perry raised CrR 7.8(b)(5) in his pro se motion. RP 18-19, 26-29; CP 38-41. The court failed to consider whether Mr. Perry's plea was knowing, voluntary, and intelligent. After finding the judgment and sentence facially invalid, the court resentenced Mr. Perry to a total of 43 months of confinement, requiring Mr. Perry to return to custody. CP 50; RP 39.

On review, the Court of Appeals found Mr. Perry's CrR 7.8(b) motion was untimely, even though the trial court specifically found Mr. Perry's motion was not time-barred. Slip Op. at 4. The Court of Appeals reinstated Mr. Perry's original sentence.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals incorrectly determined Mr. Perry's CrR 7.8(b) motion was untimely, requiring review under RAP 13.4(b).

A post-judgment challenge to a plea is governed by CrR 7.8. CrR 4.2, 7.8. The rule provides that a court may relieve a

defendant from a final judgment where "the judgment is void," or for "any other reason justifying relief from the operation of the judgment." CrR 7.8(b)(4), (5). The motion must be made within a reasonable time. CrR 7.8.

Here, the Court of Appeals found Mr. Perry's CrR 7.8 motion was untimely because it was made four years after his plea and after he had presumably completed his sentence. Slip Op. at 4. The court acknowledged that neither the rule nor existing cases provide a definition of "reasonable time," yet it nevertheless concluded Mr. Perry's motion was untimely. This is incorrect.

State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005), in instructive. There, the defendant pled guilty in February 2001 and was sentenced to a term of confinement and community custody exceeding the statutory maximum. *Id*. at 121-22, 123-24. He did not challenge the excessive sentence under CrR 7.8 until October 2003, nearly three years after he entered his plea. *Id*. at 121. Despite this lengthy delay, the

Court of Appeals found the motion timely because the judgment and sentence was invalid on its face. *Id.* at 123-24.

Here, Mr. Perry brought his CrR 7.8 motion four years after he entered his plea. The trial court specifically found the motion was not time-barred and considered it on its merits. RP 18-19. The Court of Appeals cited no authority for its reasoning that Mr. Perry's motion was untimely, and did not find Mr. Perry could have brought the motion sooner. Indeed, Mr. Perry told the trial court that he did not know he was ineligible for a DOSA. RP 36. It appears he brought his CrR 7.8 motion upon discovering the error himself.

Because Mr. Perry raised his CrR 7.8 motion in a timely manner, and because the Court of Appeals' determination otherwise is contrary to *Zavala-Reynoso*, this Court should accept review. RAP 13.4(b)(2), (4).

2. Mr. Perry must be allowed to withdraw his plea because the judgment is void and because his plea was not knowing, voluntary, and intelligent.

a. Post-judgment challenges to the validity of a plea are governed by CrR 7.8.

Under CrR 7.8(b)(4), a party may be relieved of a final judgment if the judgment is void. *Zavala-Reynoso*, 127 Wn. App. at 122. A void judgment is one entered by a court "which lacks the inherent power to make or enter the particular order involved." *Id*. (citing *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)).

CrR 7.8 motions to withdraw a plea are reviewed for abuse of discretion. *Id*. (citing *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons, or the decision is manifestly unreasonable. *Id*. (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A court's decision is based on untenable reasons if it is based on an incorrect standard. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (internal quotations omitted). A court's decision

is manifestly unreasonable if it is outside the range of acceptable choices.

b. Mr. Perry's judgment is void because the trial court did not have authority to sentence him to a DOSA.

The Sentencing Reform Act ("SRA") prescribes the trial court's authority to sentencing in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). If a sentencing court exceeds its statutory authority, its action is void. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006) (citing *State v. Phelps*, 133 Wn. App. 347, 355, 57 P.3d 624 (2002)). Whether a court has exceeded its sentencing authority is a question of law reviewed *de novo*. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1186 (2003). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to a punishment in excess of that which the Legislature has

established." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, Mr. Perry agreed to plead guilty in exchange for a joint DOSA recommendation for which he did not actually qualify. CP 11-22. Neither the court nor the parties recognized Mr. Perry was barred by statute from receiving a DOSA due to a disqualifying out-of-state conviction for robbery. RCW 9.94A.660(1)(c) (2009) ("An offender is eligible for the special drug offender sentencing alternative if . . . the offender has no current or prior convictions for a . . . violent offense within ten years before conviction of the current offense, in this state, another state, or the United States."). This is despite the fact the conviction was listed both in his plea paperwork and in the court's judgment and sentence. CP 21, 25.

Because the court lacked the statutory authority to sentence Mr. Perry to a DOSA, the judgment is void. *Paulson*, 131 Wn. App. at 588.

c. Mr. Perry's plea was not knowing, voluntary, and intelligent because the judgment is void, and he must be allowed to withdraw it.

Due process requires an affirmative showing that a defendant entered a guilty plea knowingly, voluntarily, and intelligently. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 594, 316 P.3d 1007 (2014) (citing *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). A guilty plea is involuntary when it is based on misinformation regarding the direct consequences of a plea, such as the potential sentence. *Id*. A direct consequence of sentencing is "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 822, 855 P.2d 1191 (1993) (internal quotations omitted).

A guilty plea is also involuntary if it is based on misinformation about eligibility for a sentencing alternative. *See In re Pers. Restraint of Fonseca*, 132 Wn. App. 464, 132 P.3d 154 (2006); *State v. Adams*, 119 Wn. App. 373, 82 P.3d 1195 (2003). In *Fonseca*, the defendant pleaded guilty in order

to take advantage of a DOSA. 132 Wn. App. at 466. However, the defendant was ineligible for a DOSA because he had been convicted of a violent crime and was subject to deportation. *Id*. In *Adams*, the defendant pleaded guilty to obtain a special sex offender sentencing alternative ("SSOSA"), but he was ineligible for the program under statute. 119 Wn. App. at 376-77 (ineligible because statute required midpoint of standard range sentences to be eight years or less). In each of these cases, the reviewing court held the guilty pleas should be withdrawn because the defendants were misinformed of the direct consequences of their pleas. *Fonseca*, 132 Wn. App. at 465; *Adams*, 119 Wn. App. at 380.

Fonseca and *Adams* are directly on point. Here, Mr. Perry pleaded guilty on the day of trial under the misconception he qualified for a DOSA which the parties would jointly recommend, and which the court ordered. For reasons unclear from the record, neither the court nor the parties were aware

Mr. Perry was ineligible for a DOSA as a result of a known out-of-state robbery conviction.

In hearing Mr. Perry's motion to withdraw his plea, the court did not consider whether the plea was knowing, voluntary, or intelligent where Mr. Perry was misinformed he qualified for a DOSA. Instead, the court utilized the standard applicable for personal restraint petitions and found:

> As for the motion to withdraw the guilty plea, the court denies the request because defendant has failed to show that there's been a complete miscarriage of justice. **When non-constitutional grounds are asserted for relief from personal restraint, the petitioner must establish he or she is being unlawfully restrained due to a fundamental defect, which inherently result [sic] in a complete miscarriage of justice.** In this case, the court cannot find that that has occurred and the court will go ahead and resentence Mr. Perry on the four counts."

RP 29 (emphasis added).

The trial court abused its discretion when it denied Mr. Perry's motion to withdraw his plea because it applied the wrong standard and failed to consider whether Mr. Perry's plea

was knowing, voluntary, and intelligent. Compounding the error, the trial court resentenced Mr. Perry to 43 months of confinement, forcing him to return to custody for an additional 18 months.

In this case, Mr. Perry's judgment is void and he is entitled to relief under CrR 7.8. As in *Fonseca* and *Adams*, Mr. Perry's plea was not knowing, voluntary, or intelligent because he was misinformed about his eligibility for a DOSA. He was clear that he would not have pled guilty had he known he was ineligible for a DOSA: "They wouldn't give me DOSA because I wasn't eligible . . . They knew it wasn't legal. They knew this. I didn't. It's not my job to know this, I didn't know, I just wanted treatment." RP 36. Mr. Perry told the trial court he would have gone to trial but for the DOSA offer. RP 36-37. Because Mr. Perry's plea was not knowing, voluntary, or intelligent, this Court should accept review. RAP 13.4(b)(3), (4).

E. CONCLUSION

Based on the foregoing, Mr. Perry respectfully requests that review be granted. RAP 13.4(b)(2), (3), (4).

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 2044 words (word count by Microsoft Word)

DATED this 29th day of November, 2021.

Respectfully submitted,

/s Tiffinie B. Ma

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APPENDIX A

Filed
Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK VIRGIL PERRY, JR. II, Appellant.	No. 54122-0-II UNPUBLISHED OPINION

MAXA, J. – Mark Perry, Jr. appeals an order denying his CrR 7.8(b) motion to withdraw his guilty plea to two counts of attempted theft of a motor vehicle, second degree unlawful possession of a firearm, and obstructing a law enforcement officer.

Perry pled guilty to these offenses in 2015 in exchange for the State's recommendation of a drug offender sentencing alternative (DOSA), and the trial court imposed a DOSA. In 2019, after he had served his DOSA sentence, Perry filed a motion under CrR 7.8(b) to withdraw his guilty plea, arguing that he actually was not eligible for a DOSA because he had a prior Oregon conviction for second degree robbery. The trial court denied his request to withdraw his plea, but agreed that Perry's judgment and sentence was facially invalid because he was not eligible for a DOSA. The court then resentenced Perry to a standard range sentence.

Perry argues that (1) the trial court erred in denying his motion to withdraw his guilty plea because his plea was not knowing, voluntary and intelligent; and (2) he received ineffective assistance of counsel in 2015 when defense counsel failed to advise him that he was ineligible

for a DOSA. However, we conclude that Perry's motion to withdraw his guilty plea was time barred because it was not filed within a "reasonable time" as required under CrR 7.8(b). We also agree with the State that the trial court had no authority to resentence Perry. Accordingly, we affirm the trial court's denial of Perry's motion to withdraw his guilty plea, but remand for the trial court to vacate the 2019 judgment and sentence and reinstate the original judgment and sentence.

FACTS

In April 2015, pursuant to a plea agreement, Perry pled guilty to several charges. As part of the plea agreement, the State agreed to recommend that Perry receive a DOSA. Perry's criminal history included a 2009 second degree robbery conviction in Oregon. The trial court agreed with the State's sentence recommendation and imposed a DOSA with 25 months of total confinement and 25 months of community custody.

In November 2019, after he had completed his sentence, Perry filed a motion for relief from judgment under CrR 7.8(b)(5) to withdraw his guilty plea. Perry argued that his DOSA was unlawful because of his prior Oregon robbery conviction.[1]

The trial court found that Perry's judgment and sentence was facially invalid because he was ineligible for a DOSA based on the prior Oregon second degree robbery conviction, which occurred within 10 years of the current offense. The court also concluded, without doing a comparability analysis, that the Oregon offense was equivalent to a second degree robbery in Washington. Ultimately, the court ruled under CrR 7.8(c)(2) that Perry's collateral attack was

[1] Under former RCW 9.94A.660(1)(c) (2009), a person is not eligible for a DOSA if they have been convicted of a felony that is a violent offense within 10 years of the current offense. In Washington, second degree robbery is a violent offense. Former RCW 9.94A.030(54)(a)(xi) (2012).

timely and appropriate for the court to decide rather than transfer to this court as a personal restraint petition (PRP).

After a show cause hearing, the trial court denied Perry's request to withdraw his guilty plea. The court applied the PRP standard for nonconstitutional error and concluded that Perry had failed to show a complete miscarriage of justice.

The trial court then decided that it would resentence Perry on the four counts, even though neither Perry nor the State requested resentencing. The court resentenced Perry to a standard range sentence of 43 months of total confinement.

Perry appeals the trial court's denial of his motion to withdraw his guilty plea.

ANALYSIS

A. CrR 7.8(b) LEGAL PRINCIPLES

A motion to withdraw a guilty plea made after judgment is a collateral attack governed by CrR 7.8(b). *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018). CrR 7.8(b) provides five grounds for relieving a party from a final judgment. On appeal, Perry relies on two grounds: "[t]he judgment is void," CrR 7.8(b)(4); and "[a]ny other reason justifying relief from the operation of the judgment," CrR 7.8(b)(5).

Under CrR 7.8(c)(2), the trial court is required to transfer a CrR 7.8(b) motion to the Court of Appeals for consideration as a PRP unless "the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing." RCW 10.73.090(1) states, "No petition or motion for collateral attack on a judgment and sentence in a criminal case 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."

However, a CrR 7.8(b) motion must be filed "within a reasonable time." This requirement is independent of any time limits set forth in chapter 10.73 RCW. CrR 7.8(b).

We review a trial court's decision on a CrR 7.8(b) motion for abuse of discretion. *State v. Crawford*, 164 Wn. App. 617, 621, 267 P.3d 365 (2011).

B. MOTION TIME BARRED UNDER CRR 7.8(b)

Perry argues that the trial court erred in denying his motion to withdraw his guilty plea and that he received ineffective assistance of counsel during his 2015 sentencing. We do not address the merits of Perry's claims because we conclude that Perry's CrR 7.8(b) motion was not filed within a reasonable time and therefore was untimely.

As noted above, CrR 7.8(b) specifically states that a motion must be filed "within a reasonable time." Here, Perry filed his CrR 7.8(b) motion based on the alleged invalidity of his DOSA sentence (1) over four years after his guilty plea and (2) *after he had completed his sentence*. The court rules do not define what a "reasonable time" means under CrR 7.8(b), and no Washington court has provided a definition. But we conclude under the facts of this case that Perry's motion was not filed within a reasonable time.

The trial court did not base its denial of Perry's motion on the reasonable time requirement of CrR 7.8(b), but we can affirm under any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). We hold that the trial court did not err in denying Perry's motion to withdraw his guilty plea because the motion was untimely.

C. UNAUTHORIZED RESENTENCING

The State argues that the trial court had no authority to resentence Perry after finding his 2015 judgment and sentence facially invalid because no party requested resentencing. We agree.

After final judgment and sentencing, authority over a defendant's sentence transfers from the trial court to the Department of Corrections. *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). Only in "certain specific and carefully delineated circumstances" may the trial court amend a final judgment and sentence. *Id.* At a minimum, a party would need to motion for resentencing and set forth the basis. Here, neither party requested resentencing. Accordingly, we hold that the trial court erred in imposing a new sentence on Perry.

CONCLUSION

We affirm the trial court's denial of Perry's motion to withdraw his guilty plea and remand for the trial court to vacate the 2019 judgment and sentence and reinstate the original judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.

MAXA, J.

We concur:

, C.J.

LEE, C.J.

Veljacic, J.

VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54122-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 29, 2021
Washington Appellate Project

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