SUPREME COURT NO. 102325-1
NO. 56569-2-II (linked w/ NO. 56579-0-II)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLE WILLYARD,

Petitioner.

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

The Honorable John Skinder, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

Page

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Nicole Willyard seeks review of the Court of Appeals' decision in State v. Willyard, No. 56569-2-II (Op.), filed August 1, 2023, which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Was Unlawful Possession of a Controlled Substance [UPCS or simple possession] a "nonexistent crime" in Washington, prior to this Court's decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021)? Or, as Division Two has held, was it a "valid crime . . . later invalidated?"

2. When a person pleaded guilty to simple possession prior to the Blake decision, is she now entitled to withdraw that plea, in a collateral attack? Or, as the Court of Appeals determined, is she limited to the remedy of "vacating" the simple possession conviction?

3. When, in exchange for the defendant's guilty pleas under two separate cause numbers, the State agrees to recommend concurrent prison terms, does this evidence an

"indivisible" plea agreement linking the cause numbers? Or, as the Court of Appeals determined, is the agreement to facilitate concurrent sentences irrelevant to the question of divisibility?

C. STATEMENT OF THE CASE

In April of 2003, the State charged Ms. Willyard with one count of UPCS in violation of former RCW 69.50.401(d) (2002). CP 2. In September of that year, the State amended the charges to add one count of bail jumping, alleging that Ms. Willyard failed to appear for a court date in the UPCS case. CP 3.

In October of 2003, Ms. Willyard pleaded guilty to the bail jumping count, in cause no. 03-1-00645-2. CP 4-12, 13-19. The plea was part of a global agreement whereby the State agreed to dismiss the UPCS count; Ms. Willyard agreed to plead guilty under a separate cause number (cause no. 03-1-01829-9) to one count of UPCS and one count of obstructing a public servant (obstruction); and the State agreed to a single sentencing hearing, where it would recommend total terms of 14 months in each case,

to run concurrent with one another. CP 15, 51-52; see Op. at 3, 13.

In the bail jumping case, 14 months was the middle of a standard range sentence based on an offender score of four. CP 5; former RCW 9.94A.515 (2003); former RCW 9.94A.510, .525(7) (2002). Two convictions for UPCS were included in Ms. Willyard's offender score: a 2002 conviction and the other current conviction in cause no. 03-1-01829-9. CP 5. Had these convictions not been included in the score, Ms. Willyard's mid-standard range term for the bail jumping count would have been five months. Former RCW 9.94A.515 (2003); former RCW 9.94A.510, .525(7) (2002).

The sentencing court followed the State's recommendation and imposed a total of 14 months of confinement. CP 4-12.

In February 2021, the Washington Supreme Court decided Blake, which held that Washington's strict liability simple drug possession statute is unconstitutional because it criminalizes

innocent conduct, which is beyond the legislature's power to do. 197 Wn.2d at 195. The Blake Court declared, "the portion of the simple drug possession statute creating this crime . . . violates the due process clauses of the state and federal constitutions and is void." Id.

In July of 2021, Ms. Willyard filed a pro se Motion for Relief from Judgment, seeking to vacate her bail jumping conviction on the ground that it arose from an underlying prosecution for simple drug possession - - now invalid under Blake. CP 20-49. In October of 2021, the Thurston County Public Defender was appointed to represent Ms. Willyard and filed a motion on her behalf, under CrR 7.8(b)(4), seeking to withdraw all three guilty pleas entered under the October 2003 agreement. CP 51-58.

The Thurston County Superior Court held a hearing on that motion on December 20, 2021. RP 4.

Defense counsel explained that, under Blake, simple drug possession under former RCW 69.50.401(d) has always been a

"nonexistent crime" and a "legal nullity," and that a "package [plea] deal" is therefore entirely invalid when it is predicated in part on a plea to that non-offense. RP 7-12, 13-15.

The State agreed that Ms. Willyard was "entitled to some relief," but it argued this relief was limited to an order vacating the conviction for UPCS and leaving all the other convictions undisturbed. RP 16. The prosecutor contended Ms. Willyard's pleas were all voluntary because, "[a]t the time of her plea, the UPCS was a valid, legal charge," and that the remedy of withdrawal would be unjust because it would require the State to retry two 18-year-old cases. RP 16. As support for that argument, the prosecutor explained, "We're not talking about a homicide. We're talking really very minor incidents here in this case." RP 16-17.

The State also argued that Ms. Willyard had not shown the "actual and substantial prejudice" necessary for relief on collateral review, because the guilty plea had garnered her the

"significant benefit" of concurrent sentences under the two cause numbers:

> The State asserts that Ms. [Willyard][1] was not prejudiced. Ms. [Willyard] pled guilty in two separate cases, had a felony dismissed, was sentenced at the mid-range, and *received the benefit of concurrent time on both cases*. Ms. [Willyard] received a *significant benefit in lieu of trial* because Ms. [Willyard] would face the possibility of being sentenced separately on the two cause numbers after two successive trials under former RCW 9.94A.400(3) and current RCW 9.94A.589(3).

CP 89-90 (emphases added).

Finally, the State also contended Ms. Willyard's claims were "moot" because she had already served her entire sentence on all the counts. RP 18-19. The prosecutor explained, "I'm not sure what effective relief we are looking for here other than the charges simply go away and her record gets cleared." RP 18-19. Ms. Willyard assured the court it could afford effective relief by

[1] At the time of the trial court proceedings, Ms. Willyard's last name was "Trichler." See Op. at 1. For consistency with the case caption, and per her current preference, this petition refers to her as Ms. Willyard.

clearing her record: "[Y]ou know, I have consequences for this. I mean, it affects me getting a job. You know, you have no idea. It looks like it's old, but . . . it greatly affects me." RP 23-24. On rebuttal, defense counsel argued there is no such thing as a "voluntary plea to a nonexistent crime." RP 21.

The court denied Ms. Willyard's motion, finding she had not "satisfied that test for when withdrawal of plea is appropriate." RP 21-23; CP 70. The court did not explain what test that was. RP 21-23. It appeared to conclude it would be unfair to make the State retry the bail jumping and obstruction cases after so much time had passed. RP 13.

Court of Appeals Decision

Ms. Willyard appealed. CP 73-76. She argued that she was entitled to withdraw her guilty plea to simple possession because it was a plea to a non-existent offense, and that withdrawing the plea to simple possession would also invalidate the plea to bail jumping, since they were part of an indivisible agreement. BOA at 15-20; RBOA at 7-8.

In the alternative, Ms. Willyard argued that if the Court found her plea agreements were divisible, the bail jumping plea was involuntary because it was tainted by the due process violation later recognized in Blake. BOA at 20-24. Specifically, it was tainted by the parties' erroneous belief that the State could both prosecute and punish her for passive non-conduct: that it could use her current[2] and prior UPCS convictions to elevate her standard range for the bail jumping count. BOA at 22.

With respect to the time bar, Ms. Willyard argued that her collateral attack was exempt because her indivisible plea agreement was invalid on its face and involved a guilty plea to a statute that "was unconstitutional on its face." BOA at 13-14 (quoting RCW 10.73.100(2); citing PRP of Coats, 173 Wn.2d 123, 134-36, 138-39, 267 P.3d 324 (2011); PRP of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004)). And she argued that, if the Court found her plea was divisible, Blake nevertheless

[2] Under the other cause number, 03-1-01829-9.

constituted a significant, retroactive change in the law, which was material to her conviction and sentence in the bail jumping case, and therefore met the time bar exemption in RCW 10.73.100(6). BOA at 13-14; State v. Willyard, No. 56569-2-II (March 13, 2023), at 5 min. 8 sec., audiovisual recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-2-court-of-appeals-2023031076/?eventID=2023031076).

The Court of Appeals held Ms. Willyard's motion to withdraw her guilty plea to bail jumping was time barred and meritless. Op. at 7. Its analysis contains four holdings that this Court should review and correct.

First, Division Two held that, assuming the pleas were indivisible, "the proper remedy for a constitutionally invalid [UPCS] conviction is vacating the conviction, not withdrawing the plea." Op. at 11-12. For this principle, the Court of Appeals relied on its recent published decision in State v. Olsen, __ Wn. App. 2d __, 530 P.3d 249, 257 (2023). Op. at 12.

Second, Division Two held that, "assuming without deciding that Blake is a significant retroactive change in the law," it can never—under any circumstances—be material to a bail jumping conviction. Op. at 9. The Court explained that this was because the Blake decision did not mention bail jumping. Op. at 9.

Third, the Court acknowledged that "Willyard's offender score and resulting standard range on the bail jumping conviction decreases [massively] with the vacation of [UPCS] convictions pursuant to Blake." Op. at 9. But it held that this evidenced only "*sentencing error*," for which the remedy on collateral review can only ever be "resentencing with a corrected offender score." Op. at 9-10 n.6.

Finally, on the question of divisibility, the Court held that an agreement to facilitate concurrent sentencing is meaningless, under this Court's decision in State v. Bradley, 165 Wn.2d 934, 943, 205 P.3d 123 (2009). Op. at 13.

D. REASONS REVIEW SHOULD BE ACCEPTED

Division Two's first holding—that, under Olsen, 530 P.3d at 257, a defendant who pleaded guilty to simple possession may never withdraw the underlying plea—conflicts with this Court's longstanding precedent on pleas to non-existent crimes, including PRP of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) and In re Thompson, 141 Wn.2d 712, 720-23, 10 P.3d 380 (2000), and with published precedent from the Court of Appeals addressing such pleas. E.g., In re Knight, 4 Wn. App. 2d 248, 253, 421 P.3d 514 (2018). The decision therefore merits review under RAP 13.4(b)(1) & (2).

Division Two's second and third holdings—that even if Blake announced a significant retroactive change in the law, this change can never be material to a conviction for something other than simple possession, and can never trigger any remedy besides resentencing—conflict with this Court's holding in In re Yung-Cheng Tsai, 183 Wn.2d 91, 105-07, 351 P.3d 138 (2015), and with well-reasoned unpublished decisions from the Court of

Appeals applying State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). The decision therefore merits review under RAP 13.4(b)(1).

All three of these holdings reflect fundamental misunderstandings of the Blake decision. Blake is indisputably a retroactive holding voiding all convictions under Washington's former simple possession statute. State v. Paniagua, __ Wn. App. 2d __, 511 P.3d 113, 116 (2022) (citing PRP of Ali, 196 Wn.2d 220, 236, 474 P.3d 507 (2020). Yet Division Two reasoned that, even *if* Blake were retroactive—something it purported not to "decide"—Blake error can never invalidate a plea, no matter how egregiously it tainted the bargain. The decision thus merits review under RAP 13.4(b)(4), because it raises questions of substantial public interest that should be decided by this Court.

Finally, Division Two's fourth holding, that an agreement to facilitate concurrent sentencing can never render two pleas indivisible, warrants review because it illustrates an ambiguity in

Bradley, 165 Wn.2d 934, which bears clarification. The decision therefore merits review under RAP 13.4(b)(4).

1. The Court of Appeals decision conflicts with longstanding published precedent on pleas to nonexistent offenses.

As noted, Ms. Willyard argued that a pre-Blake plea to simple possession is a plea to a non-existent offense, and that the defendant is entitled to withdraw such a plea, even on collateral attack. BOA at 15-20; RBOA at 7-8. Thompson, 141 Wn.2d 712, illustrates this rule.

In Thompson, the defendant pleaded guilty to one count of first-degree rape of a child, in exchange for the State's agreement to dismiss two other counts. 141 Wn.2d at 716. The plea agreement stated the offense occurred between 1985 and 1986, but the statute creating the offense to which the defendant pleaded guilty was not enacted until 1988. Id. Four years later, the defendant filed a personal restraint petition arguing the agreement violated ex post facto and due process clause protections. Id. at 719.

This Court granted the petition and vacated the defendant's plea, holding that the proper remedy was to "return the parties to the status quo ante, . . . the position they were in before they entered into the agreement." Id. at 715-16, 730. It explained that, while a defendant may waive constitutional protections in a plea agreement, the waiver must be clear from the record. Id. at 719-20. Absent clear evidence that the defendant had deliberately bargained away the protections, "the incarceration of Petitioner for an offense which was not criminal at the time he committed it is unlawful and a miscarriage of justice." Id. at 719, 720-25.

This Court reached the same conclusion in Hinton, 152 Wn.2d at 857-61, holding that second-degree felony murder, predicated on assault, had been a statutorily non-existent crime when the petitioners pleaded guilty to it, and that their plea agreements were therefore invalid.[3] And Division Two followed

[3] Of particular significance to Ms. Willyard's case, the Hinton Court denied two petitioners' requests for the more limited remedy of resentencing. 152 Wn.2d at 861 n.3.

suit in Knight, 4 Wn. App. 2d at 251-54 & n.5, vacating a conviction of the nonexistent crime of "attempted manslaughter," and remanding for possible reinstatement of the original, greater charges.

Like the petitioners in Thompson, Hinton, and Knight, Ms. Willyard pleaded guilty to an offense the State had no authority to charge her with—in Ms. Willyard's case, the nonexistent crime of simple drug possession under former RCW 69.50.401 (d) (2002). Even if Ms. Willyard could waive her fundamental due process right not to be punished for innocent conduct, her plea agreement did not do so. CP 13-19. Like the petitioners in Thompson, Hinton, and Knight, Ms. Willyard is therefore entitled to withdraw her plea to the nonexistent crime.

The Court of Appeals rejected this argument under Olsen, 530 P.3d at 253-55, which held that simple possession was a *valid crime* prior to Blake. See Op. at 11-12.

The Olsen decision draws an illogical distinction between pleas to non-*codified* offenses—as in Hinton, 152 Wn.2d at 857;

Thompson, 141 Wn.2d at 720-23; and Knight, 4 Wn. App. 2d at 253—and pleas to constitutionally non-*criminalizable* offenses—as in Blake, 197 Wn.2d 170. It holds that a defendant is entitled to withdraw the former, even in an untimely collateral attack, because such a plea "is not knowing, voluntary, and intelligent." 530 P.3d at 253. But a defendant may never withdraw the latter (although she is entitled to have the resulting conviction vacated) because: "[UPCS] was not a nonexistent crime [prior to Blake]; instead, it was a valid crime that was later invalidated." Id.

This is wrong for two reasons.

First, simple possession under the former statute was never a valid conviction, so Ms. Willyard's guilty plea was predicated on false information when she entered it. She was told that the State could punish her for "entirely passive and innocent nonconduct." Blake, 197 Wn.2d at 183-85. This was never true—that punishment has always exceeded the State's constitutional police power, even prior to the Blake decision,

when the State was inflicting it on Ms. Willyard. Paniagua, 22 Wn. App. 2d at 354 (citing Blake, 197 Wn.2d 170).

Indeed, Division Two has *recognized this*, in numerous published and unpublished decisions calling pre-Blake simple possession a "nonexistent crime." State v. A.L.R.H., 20 Wn. App. 2d 384, 386, 500 P.3d 188 (2021) (quoting Hinton, 152 Wn.2d at 857); State v. Lindberg, noted at 19 Wn. App. 2d 1037, 2021 WL 4860740, at *2 (citing Hinton, 152 Wn.2d at 857); State v. Landry, noted at 18 Wn. App. 2d 1037, 2021 WL 3163092, at *2 (citing Hinton, 152 Wn.2d at 857); State v. Spadoni, noted at 17 Wn. App. 2d 1046, 2021 WL 1886205, at *1 (citing Hinton, 152 Wn.2d at 857-58).

Second, the Olsen decision is indefensible from a policy standpoint. Under its logic, a defendant can engage in manifestly culpable conduct, such as firing a gun at another person (as in Knight, 4 Wn. App. 2d at 250) or having sex with a child incapable of consent (as in Thompson, 141 Wn.2d at 728), bargain for a plea less serious than the original charge, and then

withdraw that plea years later if it did not fit within an authorized statutory codification, but a defendant who bargains to be punished for innocent conduct is held to that bargain for life. See Olsen, 530 P.3d at 253-55. This is not rational.

A plea to a nonexistent offense violates due process. This is true whether only the prosecutor (the executive branch) and the trial court (the judiciary) are implicated in the violation—as in Thompson and Hinton—or whether, as in any pre-Blake simple possession conviction—all three branches are implicated.

2. The Court of Appeals decision conflicts with published and unpublished authority holding that a retroactive change in the law may render a prior plea involuntary.

Under RCW 10.73.100(6), the one-year time limit on collateral attacks does not apply when the attack is based on a significant change in the law, which is material to the conviction or sentence, and sufficient reasons exist to require retroactive application of the changed legal standard.

Even though Ms. Willyard's standard range sentence for bail jumping violated due process when she entered her plea, in 2003, our Supreme Court did not recognize that violation for another 18 years. See, e.g., State v. Schmeling, 191 Wn. App. 795, 801-02, 365 P.3d 202 (2015) (holding that strict liability simple possession law does not violate due process). Ms. Willyard could not, therefore, have argued for a lower offender score in 2003. Id.

The Blake decision made such an argument possible; it was therefore a significant change in the law, for purposes of RCW 10.73.100(6). State v. Miller, 185 Wn.2d 111, 114-15, 371 P.3d 528 (2016) (intervening appellate decision is "significant change in the law," under RCW 10.73.100(6), if it overturns prior dispositive decision).

The Blake decision is also material to Ms. Willyard's conviction and sentence, under RCW 10.73.100(6), because it affects the trial court's sentencing discretion. Ali, 196 Wn.2d at 234-35. Had Ms. Willyard had the benefit of Blake's rule when

she entered her guilty plea to bail jumping, the sentencing court could not have imposed 14 months. See BOA at 5-6. Instead, the equivalent mid-range term would have been only five months. See BOA at 5-6; Op. at 9 n.6.

Citing the drastic effect the UPCS convictions had on her standard range for the bail jumping count, Ms. Willyard argued that her guilty plea was involuntary:

> Ms. Willyard's plea to the bail jumping count was induced by the "misinformation" that the State could prosecute and punish her for simple drug possession, including by using her current and prior UPCS convictions to elevate her offender score on the bail jumping count. It was therefore involuntary.

BOA at 22.

Division Two acknowledged this argument,[4] but it held the remedy on collateral review was resentencing, not withdrawal of

[4] Op. at 1 ("Willyard argues . . . that her bail jumping plea was involuntary because it was induced by misinformation about the sentencing consequences"); op. at 9 n.6 ("The record shows that Willyard's offender score and resulting standard sentencing range on the bail jumping conviction decreases with the vacation of [UPCS] convictions pursuant to Blake.").

the plea. Op. at 9-10 n.6, 11 n.8. This conflicts with Tsai, 183 Wn.2d at 105-07, which applied the United States Supreme Court's holding in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and with well-reasoned unpublished decisions applying the retroactive holding of Houston-Sconiers, 188 Wn.2d 1.

Tsai held that Padilla constituted a material, significant change in Washington law, recognizing counsel's duty to advise his client of a guilty plea's immigration consequences, and therefore exempted from the one-year time bar in RCW 10.73.090(1) the petitioner's claim that his unadvised plea was involuntary. Id.; see, e.g., Matter of Al-Bedairy, noted at 22 Wn. App. 2d 1047, 2022 WL 2679227, at *1-*2 (Tsai constituted significant, material, and retroactive change in the law, exempting from one-year time bar petitioner's 2020 claim that, but for counsel's ineffective assistance, he would not have pleaded guilty in 1998).

Contrary to Division Two's decision in Ms. Willyard's case, Tsai holds that a significant, retroactive change in the law can render a plea involuntary and therefore subject to withdrawal.

In State v. Holt, noted at 18 Wn. App. 2d 1028, 2021 WL 3057083, at *1, the 17-year-old defendant pleaded guilty to one count of second-degree murder, bargained down from two counts with firearm enhancements. The parties agreed to jointly recommend a sentence in the middle of the standard range. Id. After the Supreme Court decided Houston-Sconiers, Holt moved for resentencing, under CrR 7.8, and the trial court denied his motion. 2022 WL 3057083, at *3. On appeal, Division Two held that Houston-Sconiers was material to Holt's sentence because he "was sentenced to an adult standard range sentence for crimes he committed as a child." Holt, 2022 WL 3057083, at *5. But it also held he was not entitled to the remedy of resentencing. Id. Instead, Division Two held that his remedy "would be to withdraw his plea upon a showing that he would

not have pleaded guilty if he had been properly informed of his rights." Id. Accord Matter of McDaniel, noted at 20 Wn. App. 2d 1066, 2022 WL 291259, at *3.

These cases show that, contrary to Division Two's decision in Ms. Willyard's appeal, a significant retroactive change in the law may render a plea involuntary, triggering the remedy of withdrawal. Blake is such a holding, and Ms. Willyard's plea was involuntary because it was coerced by an unconstitutional exercise of punitive authority.

3. The Court of Appeals held that Ms. Willyard's concurrent sentences were both a benefit of interdependent plea agreements and irrelevant to the question of divisibility.

In both Ms. Willyard's case and in Olsen, the State advances two logically incompatible arguments at the same time.

First, the State argues the defendant / petitioner cannot show actual and substantial prejudice because the plea agreement garnered her a significant benefit: concurrent sentences. E.g., CP 89-90 (State's trial brief in Willyard); Corr. BOA at 3 ("In

exchange for the plea, the State agreed to recommend a sentence of 14 months, concurrent with charges in cause number 03-1-01829-9"); see Olsen, No. 102131-3, Ans. to Pet. for Rev. and Cross Pet. for Rev. at 3 ("Both guilty pleas refer to the other cause number . . . calling for the sentences to be served concurrently.").

In the next breath, the State argues this was no benefit of the bargain at all, but just something that would have happened, in any event, "by operation of law." Corr. BOR at 2; Olsen, No. 102131-3, Ans. to Pet., at 24-25.[5] Hence, the State argued, the agreement to facilitate concurrent sentences was *not* a term

[5] In its Answer to the Petition for Review in Olsen, the State encapsulates the contradiction:

> Olsen received favorable plea deals. . . . The sentence [for forgery] was run concurrent to the sentence [for simple possession], which would have happened by operation of law even if the trial court had not specified in the judgment and sentence that the cases were to run concurrently. RCW 9.94A.589(1) (2002).

crucial to any global deal and did *not* render the pleas indivisible. Id.; Corr. BOR at 30-31.

In Ms. Willyard's case, Division Two credited the State's argument on divisibility, citing Bradley, 165 Wn.2d at 943. Op. at 13. This illustrates an ambiguity in Bradley, which this Court should clarify.

Like Ms. Willyard, the defendant in Bradley signed separate plea agreements under two separate cause numbers. Id. at 942-43. Just like Ms. Willyard's pleas, Bradley's agreements resolved charges brought months apart, for offenses allegedly committed at different times. Id. And, just like Ms. Willyard's plea agreements, Bradley's agreements referenced each other, noting the State's agreement to concurrent sentencing. Id.

The Bradley decision describes the concurrent sentencing provisions in contradictory terms. First, it calls these provisions "mandatory references" under RCW 9.94A.589(1)(a). Bradley, 165 Wn.2d at 943. Then, a few sentences later, the Bradley decision notes that the "minute entries" from the superior court

show that, on the day of sentencing, the State dismissed a charge. Id. The decision (inexplicably) goes on: "The timing confirms that in return for a plea to two charges, the State agreed to reduce one of the charges . . . and recommend concurrent sentencing." Id. The Bradley Court therefore found the pleas indivisible. Id. at 943-44.

This analysis does not make sense. The statute cited in Bradley, RCW 9.94A.589(1)(a), "mandates" only one thing: that sentences entered the same day be served concurrently. See State v. Montgomery, 2023 WL 3477923, at *2 (unpublished) (citing PRP of Finstad, 177 Wn.2d 501, 507, 301 P.3d 450 (2013)) (sentences imposed the same day presumptively concurrent under RCW 9.94A.589(1)(a)). But no statute mandates that any plea agreement facilitate same-day sentencing under two separate cause numbers.

When plea agreements cross-reference one another, and promise concurrent sentences, they evidence a bargain for same-day sentencing (or some other means of guaranteeing concurrent

terms of confinement). Yes, RCW 9.94A.589(1)(a) makes sentences imposed on the same day presumptively concurrent, but the parties still have to facilitate same-day sentencing, in order to trigger the statute. That is what happened in Bradley, and that is what happened in Ms. Willyard's case. Willyard, TVW audiovisual recording at 0 min. 25 sec.; 18 min. 4 sec. In both cases, it was a benefit of the bargain, memorialized in the plea agreements and linking those agreements, indivisibly.

In the trial court, the State argued Ms. Willyard should be grateful for the deals she got on her bail jumping and simple possession cases because, had she gone to trial on either, she would have risked consecutive sentences. CP 89-90. On appeal, the State turned around and said the concurrent terms were meaningless, mandatory outcomes, under RCW 9.94A.589(1)(a); Willyard, TVW audiovisual recording at 0 min. 25 sec.

The State got away with this, because of the problematic reasoning in Bradley. Op. at 13. This is not right.

E. CONCLUSION

The Court of Appeals' decision in this case conflicts with multiple lines of precedent addressing pleas to nonexistent offenses and retroactive changes in the law. For those reasons, it merits this Court's review.

The Court of Appeals' decision also merits review because it perpetuates the unconstitutional and racially disproportionate harms that stem from the criminalization of "passive non-conduct." Blake, 197 Wn.2d at 182-85 & n.10; id. at 208 (Stevens, J., concurring).

This Court should grant Ms. Willyard's petition for review, correct Division Two's numerous legal errors, and allow her to withdraw her tainted guilty plea to bail jumping.

I certify that this document was prepared using word processing software, in 14-point font, and contains 4,602 words excluding the parts exempted by RAP 18.17.

DATED this 31st day of August, 2023.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

August 1, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICOLE MARIE WILLYARD, Appellant.	No. 56569-2-II UNPUBLISHED OPINION

LEE, J. — Nicole M. Willyard[1] appeals the trial court's order denying her motion to withdraw her guilty plea to bail jumping. Willyard argues that she should be allowed to withdraw her guilty plea to bail jumping because it is indivisible from her guilty plea to unlawful possession of a controlled substance in another case and that her bail jumping plea was involuntary because it was induced by misinformation about the sentencing consequences. Willyard also argues in the alternative that her bail jumping conviction must be vacated because the trial court lacked jurisdiction to order her to appear in court for the pending unlawful possession of a controlled substance charge because the *State v. Blake*[2] decision declaring the statute that criminalized possession of a controlled substance unconstitutional is retroactive.

Willyard's argument that her bail jumping conviction must be vacated because the trial court lacked jurisdiction to order Willyard appear in court for the pending unlawful possession of

[1] Much of the record in this case refers to Willyard as Trichler. This opinion refers to the appellant as Willyard for consistency with the case caption.

[2] 197 Wn.2d 170, 481 P.3d 521 (2021).

a controlled substance charge from which the bail jumping charge arose is beyond the scope of this appeal; therefore, we do not address the argument. We hold that Willyard's motion to withdraw her guilty plea is time barred, and the trial court should have transferred the motion to this court to consider as a personal restraint petition (PRP). Therefore, we vacate the trial court's order denying Willyard's motion to withdraw her guilty plea on the merits and remand to the trial court to address the motion under the procedures set forth in CrR 7.8.

FACTS

In April 2003, the State charged Willyard with one count of unlawful possession of a controlled substance. The State amended the charges on September 26, 2003, to add one count of bail jumping for Willyard's failure to appear in court on the unlawful possession of a controlled substance charge on September 23, 2003.

On October 21, 2003, Willyard pleaded guilty to bail jumping, and the unlawful possession of a controlled substance charge was dismissed. Also on October 21, 2003, Willyard pleaded guilty in a separate case[3] to charges of unlawful possession of a controlled substance and obstructing a public servant (obstruction) for conduct that occurred on September 24, 2003.[4] The statement of defendant on plea of guilty for the bail jumping charge was a separate document and had a different case number than the statement of defendant on plea of guilty for the unlawful possession of a controlled substance and obstruction case. The statement of defendant on plea of

[3] Thurston County Superior Court case no. 03-1-01829-9, Court of Appeals case no. 56579-0-II.

[4] The record shows that the trial considered two separate cases on the same day; the record does not show that the plea to the bail jumping case was considered by the trial court at the same time as the pleas to the unlawful possession of a controlled substance and obstruction charges in the other case.

guilty in the bail jumping case stated that the prosecutor would dismiss the unlawful possession of a controlled substance charge in the same case and recommend to the court that Willyard serve 14 months of total confinement concurrent to the sentences in the other separately filed case for unlawful possession of a controlled substance and obstruction.

The trial court accepted Willyard's plea to bail jumping. The trial court entered the conviction for bail jumping and dismissed the underlying unlawful possession of a controlled substance charge. The bail jumping judgment and sentence listed the unlawful possession of a controlled substance conviction from the other case as an "[o]ther current conviction listed under different cause numbers used in calculating the offender score." Clerk's Papers (CP) at 5. The trial court also included a different 2002 unlawful possession of a controlled substance conviction in Willyard's criminal history used for calculating her offender score.

The trial court sentenced Willyard in the bail jumping case based on an offender score of four, making her total standard sentencing range 12-16 months. The court sentenced Willyard on the bail jumping conviction to 14 months of total confinement and ran that sentence concurrently with the sentence for the unlawful possession of a controlled substance and obstruction convictions in the other case. Because Willyard did not file an appeal, Willyard's judgment in the bail jumping case became final on October 21, 2003, the day it was filed with the superior court clerk.[5]

[5] RCW 10.73.090(3) provides that

> a judgment becomes final on the last of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

In February 2021, our Supreme Court issued its opinion in *Blake*, holding that Washington's former unlawful possession of a controlled substance statute was unconstitutional and void. 197 Wn.2d at 195.

In July 2021, Willyard filed a pro se motion for relief from judgment pursuant to CrR 7.8. Willyard's motion listed the bail jumping case number, as well as the unlawful possession of a controlled substance/obstruction case number in the caption. Willyard argued, in relevant part, that her bail jumping conviction should be vacated because it was predicated on an unlawful possession of a controlled substance charge and that the unlawful possession of a controlled substance charge was for a nonexistent crime under *Blake*. Willyard argued that because unlawful possession of a controlled substance was the predicate offense for bail jumping, the original trial court lacked jurisdiction to hear the case.

After counsel was appointed for Willyard, counsel filed a motion to withdraw Willyard's guilty plea to the bail jumping charge. Willyard argued that her guilty plea to the bail jumping charge was indivisible from the unlawful possession of a controlled substance and obstruction guilty pleas in the other case. Willyard alleged that the pleas were made and accepted on the same day in the same proceeding. Based on this alleged indivisibility with the unlawful possession of a controlled substance and obstruction pleas in the other case, Willyard argued that she was entitled to withdraw her guilty plea to the bail jumping charge. Willyard also argued that her motion was

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> (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

not time barred and that the trial court should not transfer the motion to the court of appeals for consideration as a PRP. Willyard also filed a separate motion to vacate her unlawful possession of a controlled substance conviction and withdraw her guilty plea to obstruction in the other case.

The State opposed Willyard's motion to withdraw her guilty plea to the bail jumping charge. The State argued that Willyard had not shown her plea was involuntary, Willyard's motion was moot because she had already served her sentence, and Willyard had not shown any prejudice resulting from her guilty plea. However, the State conceded that "*State v. Blake* renders the judgment and sentence facially invalid; therefore, the time bar does not apply." CP at 84.

The trial court heard all of Willyard's motions to withdraw her pleas during the same show cause hearing. The court concluded that the unlawful possession of a controlled substance conviction in the other case should be vacated and dismissed. However, the court denied Willyard's motions to withdraw her pleas to obstruction and bail jumping. The court ruled that there was not a sufficient basis for Willyard to withdraw her pleas to obstruction and bail jumping. The trial court did not address the time bar issue.

At the end of the hearing, Willyard argued that she did not "see how you can bail jump on a nonexistent claim" and that the State did not have "a right to arrest, therefore, they didn't have a right to impose a bail." Verbatim Rep. of Proc. (VRP) at 23. The trial court responded, "That argument about bail jumping, that wasn't put to the Court today." VRP at 24.

Willyard appeals.

ANALYSIS

A. LACK OF JURISDICTION: ARGUMENT OUTSIDE THE SCOPE OF THIS APPEAL

Willyard argues that her bail jumping conviction must be vacated because the trial court lacked jurisdiction over the underlying unlawful possession of a controlled substance charge in 2003. Willyard notes in her appellate briefing that this claim was brought in her pro se motion for relief from judgment. We do not address the issue because it is outside the scope of this appeal.

An appellate court's review is necessarily limited by the scope of a given appeal, which is determined by the notice of appeal, the assignments of error, and the substantive arguments of the parties. *Clark County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013). The notice of appeal must designate the decision or part of decision that the party wants this court to review. RAP 5.3(a); *Clark County*, 177 Wn.2d at 144-45. "After a decision or part of a decision has been identified in the notice of appeal, the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review." *Clark County*, 177 Wn.2d at 145.

Here, Willyard filed two separate motions at the superior court approximately three months apart: one motion for relief from judgment and one motion to withdraw her guilty plea. Willyard only made jurisdictional arguments regarding the underlying unlawful possession of a controlled substance charge in her motion for relief from judgment, in which she sought to vacate the bail jumping conviction. Willyard's notice of appeal to this court only designates the trial court's denial of her motion to withdraw her plea.

When Willyard attempted to make arguments from her motion for relief from judgment at the hearing below, the trial court stated that the argument was not before the court that day. There

is no indication in our record that the trial court ruled on Willyard's motion for relief from judgment, and any decision on that motion is not properly before us in this appeal. Therefore, we do not address Willyard's argument that her bail jumping conviction must be vacated based on a lack of jurisdiction.

B. MOTION TO WITHDRAW PLEA: TIME BARRED

Willyard also argues that the trial court erred by denying her motion to withdraw her guilty plea to bail jumping. As a threshold matter, we must determine whether Willyard's motion to withdraw her plea is time barred. Although Willyard brought her motion more than one year after her judgment became final, Willyard argues that her motion meets several exceptions to the time bar. The State conceded below that her motion was not time barred but argues on appeal that its concession did not apply to anything beyond the inclusion of an unlawful possession of a controlled substance conviction in the offender score. The trial court did not address the time bar issue. We hold that Willyard's motion to withdraw her plea to bail jumping is time barred.

"A motion to withdraw a plea after judgment has been entered is a collateral attack." *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018). RCW 10.73.090(1) provides that "[n]o 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." RCW 10.73.100 provides six exceptions to the one year time bar, including:

> (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct; [or]
>
> . . . .

> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

The person collaterally attacking the judgment and sentence has the burden of showing that a time bar exception applies. *In re Pers. Restraint of Fuamaila*, 131 Wn. App. 908, 918, 131 P.3d 318 (2006). "[R]aising a claim under one of the exceptions in RCW 10.73.090 does not open the door to other time-barred claims." *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 424-25, 309 P.3d 451 (2013). Once the one-year time limit has run, a collateral attack "may seek relief only for the defect that renders the judgment not valid on its face (or one of the exceptions listed in RCW 10.73.100)." *Id.* at 424.

1. Constitutionally Invalid Statute

Willyard argues that her motion meets the time bar exception for a constitutionally invalid statute. To meet this time bar exception, a defendant must show that the statute *they were convicted of violating* was unconstitutional on its face or as applied to the defendant's conduct. RCW 10.73.100(2).

Here, the only conviction on the judgment and sentence is for bail jumping. Willyard makes no argument and cites no authority regarding the bail jumping statute's constitutionality. When a party cites no authority in support of a proposition, we may assume counsel has found none. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978). Therefore, we hold that the time bar exception for a constitutionally invalid statute does not apply to Willyard's motion.

2. Significant Retroactive Change in Law

Willyard argues that her motion meets the time bar exception for a significant retroactive change in law based on *Blake*. For this exception to apply, the change in law must be material to the conviction or sentence. RCW 10.73.100(6). Assuming without deciding that *Blake* is a significant retroactive change in law, we hold that *Blake* is not material to bail jumping convictions. *Blake* did not mention bail jumping or make any change in the law regarding bail jumping. And bail jumping convictions predicated on unlawful possession of a controlled substance charges are not invalidated by *Blake*. *See State v. Paniagua*, 22 Wn. App. 2d 350, 356, 511 P.3d 113 (bail jumping conviction predicated on unlawful possession of a controlled substance charge is not facially invalid), *review denied*, 200 Wn.2d 1018 (2022).

Blake only invalidated convictions under the former unlawful possession of a controlled substance statute. 197 Wn.2d at 195. Willyard makes no argument and cites to no authority regarding the inclusion of unlawful possession of a controlled substance convictions in her offender score with respect to the time bar.[6] Therefore, we hold that the time bar exception for a significant retroactive change in law does not apply to Willyard's motion.

[6] Even if we construe Willyard's mere mention of her offender score as an argument with respect to the time bar, *Blake*'s effect on Willyard's offender score does not provide Willyard the relief she seeks, which is to withdraw her plea on the bail jumping charge.

The record shows that Willyard's offender score and resulting standard sentencing range on the bail jumping conviction decreases with the vacation of unlawful possession of a controlled substance convictions pursuant to *Blake*. There is also a question of whether the trial court included a point for committing the current offense while being on community custody for a former unlawful possession of a controlled substance conviction. Regardless, a person collaterally attacking a judgment after the one-year time limit has run "may seek relief *only* for the defect that renders the judgment not valid on its face (or one of the exceptions listed in RCW 10.73.100)." *Adams*, 178 Wn.2d at 424 (emphasis added). If a sentencing error claim meets a time bar

3. Facial Invalidity of Judgment and Sentence

Willyard argues that her motion meets the time bar exception for a facially invalid judgment and sentence. For the one year time bar to apply, the judgment and sentence must be facially valid. RCW 10.73.090(1). To determine whether the judgment and sentence is facially valid, we can consider related documents, including charging instruments and statements of guilty pleas. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 858, 100 P.3d 801 (2004).

Here, the judgment and sentence includes one conviction for bail jumping. The first amended information shows that the bail jumping charge was predicated on an unlawful possession of a controlled substance charge. But the judgment and sentence shows that this unlawful possession of a controlled substance charge was ultimately dismissed, and Willyard was never convicted of unlawful possession of a controlled substance in this case. Further, Willyard makes

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exception, that exception does not waive the time bar for other claims related to the underlying conviction. *See id.* at 425 (holding that facially invalid offender score did not waive time bar for ineffectiveness of counsel claim).

Here, the potential defect on the judgment and sentence is an incorrect offender score. The remedy for an incorrect offender score is resentencing with a corrected offender score, not withdrawal of the underlying plea. *See In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014) (offender may not rely on the existence of a facial sentencing error to assert other time barred claims; remedy is limited to correction of facially invalid sentence); *In re Pers. Restraint of Sylvester*, 24 Wn. App. 2d 769, 777-78, 520 P.3d 1123 (2022) (remedy for miscalculated offender score is resentencing with corrected offender score).

Willyard seeks to withdraw her guilty plea but does not explain how *Blake* is material to her bail jumping conviction for the purposes of withdrawing her bail jumping plea. Therefore, Willyard's motion to withdraw her bail jumping guilty plea does not overcome the time bar. *See Adams*, 178 Wn.2d at 424-25 ("[R]aising a claim under one of the exceptions in RCW 10.73.090 does not open the door to other time-barred claims.").

no argument about how the underlying unlawful possession of a controlled substance charge makes the judgment and sentence invalid on its face.[7]

As discussed above, Willyard's offender score included a former unlawful possession of a controlled substance conviction and the current unlawful possession of a controlled substance conviction from another separate case, but Willyard does not make an argument about the inclusion of these unlawful possession of a controlled substance convictions in her offender score with respect to the time bar.[8] Therefore, we hold that the facial invalidity exception to the time bar does not apply to Willyard's motion.

4. Indivisibility

Part of Willyard's substantive argument is premised on her bail jumping guilty plea being indivisible from her unlawful possession of a controlled substance guilty plea in her other case. It is unclear whether Willyard intends for her arguments regarding indivisibility to also apply to her time bar arguments. Regardless, an offender is only entitled to withdraw their pleas in an indivisible plea agreement if they can show they are entitled to withdraw at least one plea in the agreement. *State v. Olsen*, ___ Wn. App. 2d ___, 530 P.3d 249, 255 (2023); *see State v. Turley*,

[7] Willyard states that the bail jumping conviction must be vacated because it was based on the underlying unlawful possession of a controlled substance charge, but she does not make this argument with respect to the time bar. Regardless, bail jumping is a separate offense, and an underlying unlawful possession of a controlled substance charge does not render a bail jumping conviction invalid. *See Paniagua*, 22 Wn. App. 2d at 356, 359 (holding that "a predicate crime does not constitute an element of bail jumping" because defendants must submit "to the authority of the law, until held unconstitutional, rather than taking the law into one's own hand").

[8] Even if we construe Willyard's mere mention of her offender score as an argument with respect to the time bar, for the same reason as addressed in footnote 6, the offender score does not provide Willyard the relief she seeks, which is to withdraw her plea on the bail jumping charge.

149 Wn.2d 395, 400, 69 P.3d 338 (2003). Willyard argues that she is entitled to withdraw the unlawful possession of a controlled substance plea pursuant to *Blake*, but the proper remedy for a constitutionally invalid unlawful possession of a controlled substance conviction is vacating the conviction, not withdrawing the plea. *See Olsen*, 530 P.3d at 257 (holding that constitutional invalidity of unlawful possession of a controlled substance conviction entitled offender to vacating the conviction but not withdrawing the plea). Thus, Willyard fails to show that she is entitled to withdraw any plea in the purportedly indivisible agreement.

Even if Willyard had shown she was entitled to withdraw her unlawful possession of a controlled substance plea, our record does not show that the unlawful possession of a controlled substance plea is indivisible from her bail jumping plea.

We look "to the objective manifestations of the parties to determine whether a plea is indivisible." *State v. Chambers*, 176 Wn.2d 573, 581, 293 P.3d 1185 (2013). "[A] trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding." *Turley*, 149 Wn.2d at 400. However, pleas entered on the same day are not necessarily indivisible. *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 943, 205 P.3d 123 (2009). If the plea documents cross reference each other, that may indicate that the pleas are part of a package deal, but a cross reference about concurrent sentencing "provides little evidence of intent to create a package plea deal." *Id.*

Here, the State charged Willyard with unlawful possession of a controlled substance and bail jumping in one information and charged Willyard in a separate information with unlawful

possession of a controlled substance and obstruction. The crimes in the two informations took place on different days.

The statement of defendant on plea of guilty in the current appeal shows that Willyard agreed to plead guilty to bail jumping in exchange for the State dismissing the underlying unlawful possession of a controlled substance charge, recommending certain legal financial obligations, and recommending a 14-month sentence to be served concurrently to the sentence in case number 03-1-01829-9. A separate statement of defendant on plea of guilty in the other case, case number 03-1-01829-9, shows that Willyard agreed to plead guilty as charged to unlawful possession of a controlled substance and obstruction. The record in the current case on appeal does not show that the State's agreed recommendation was in exchange for Willyard's guilty plea in the separate case, case number 03-1-01829-9. The concurrent sentencing with case number 03-1-01829-9 is the only cross reference between the cases in the statement of defendant on plea of guilty. But former RCW 9.94A.589(1)(a) (2002) made concurrent sentences presumptively mandatory, so the cross reference does not evidence an intent to create a global plea deal. *See* former RCW 9.94A.589(1)(a) (sentences for current offenses shall be served concurrently); *Bradley*, 165 Wn.2d at 943.

Willyard's two separate cases were ultimately resolved in separate judgment and sentences. While all the pleas were entered on the same day and the sentencing for all convictions took place on the same day the pleas were entered, there is no information in our record on appeal about the substance of those proceedings. Willyard contends that the pleas were entered as part of a global

plea agreement but has provided no documentation to support that contention.[9] In sum, our record does not show that Willyard's bail jumping plea in this case is indivisible from Willyard's unlawful possession of a controlled substance plea in her other separate case under case number 03-1-01829-9.

Therefore, we hold that Willyard's bail jumping plea is not indivisible from her unlawful possession of a controlled substance plea in case number 03-1-01829-9. *See* RAP 9.2(b) (it is the appellant's responsibility to designate portions of the transcript necessary for us to address the issues raised on review). Thus, even if Willyard had shown that she was entitled to withdraw her unlawful possession of a controlled substance plea in her other case, Willyard's motion to withdraw her plea in this case still does not meet any exception to the time bar because she fails to show that her bail jumping plea is indivisible from her unlawful possession of a controlled substance plea in the other separate case.

5. Conclusion

"A motion to withdraw a plea after judgment has been entered is a collateral attack." *Buckman*, 190 Wn.2d at 60. Untimely collateral attacks "must be transferred to the Court of Appeals for consideration as personal restraint petitions." *State v. Basra*, 10 Wn. App. 2d 279,

[9] Willyard contends that the State conceded indivisibility in its brief to the superior court opposing Willyard's motion to withdraw her plea. The State's brief to the trial court, filed more than 18 years after Willyard's guilty plea, does not show a concession, nor does it show that a package plea deal was entered. The State's brief says that "[Willyard] pled guilty in two separate cases, had a felony dismissed, was sentenced at the mid-range, and received the benefit of concurrent time on both cases." CP at 89. The brief does not state that the pleas were negotiated or entered into as part of a global plea agreement. As discussed above, nothing in our record shows that the pleas were entered as part of a global plea agreement.

287, 448 P.3d 107 (2019), *review denied*, 194 Wn.2d 1020, *cert. denied*, 141 S. Ct. 322 (2020); *see* CrR 7.8(c)(2).

Here, the trial court did not consider the time bar and did not make any ruling with regard to the timeliness of Willyard's motion. As discussed above, Willyard's motion to withdraw her bail jumping plea was time barred. Thus, the trial court should have transferred Willyard's motion to this court to consider as a PRP. *See Smith v. Miller*, 25 Wn. App. 2d 561, 564, 524 P.3d 1054 (2023) ("It is mandatory for a superior court to transfer an untimely collateral attack to this court without reaching the merits."); *Basra*, 10 Wn. App. 2d at 287. Instead, the trial court improperly denied Willyard's motion to withdraw her plea on the merits. Therefore, we vacate the trial court's order denying Willyard's motion to withdraw her plea on the merits and remand to the trial court to address Willyard's motion under the procedures set forth in CrR 7.8. *See Smith*, 25 Wn. App. 2d at 565-66 ("We vacate the order dismissing [the collateral attack], and remand to the superior court with instructions to construe [the collateral attack] as a PRP and transfer it to the Court of Appeals pursuant to CrR 7.8(c)(2)."); *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008) ("The superior court did not have authority to deny an untimely motion and, thus, we vacate the order and remand for the superior court to enter an order complying with [CrR 7.8] consistent with this opinion.").

No. 56569-2-II

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.

Lee, J.

We concur:

Maxa, P.J.

Che, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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