SUPREME COURT NO. 102326-0
NO. 56579-0-II (linked w/ NO. 56569-2-II)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLE WILLYARD,

Appellant.

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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STATUTES, RULES, AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Nicole Willyard seeks review of the Court of Appeals' decision in State v. Willyard, No. 56579-0-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 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?

C. STATEMENT OF THE CASE

In September of 2003, the State charged Ms. Willyard with one count of UPCS in violation of former RCW 69.50.401(d) (2002). CP 2, 51. One month later, the State amended the

charges to add one misdemeanor count of obstructing a public servant, alleging Ms. Willyard gave a false name to an officer who asked her to identify herself on the day she was arrested for UPCS. CP 3.

The State and Ms. Willyard negotiated a global agreement whereby she would plead guilty to the UPCS and obstruction counts, under cause number 03-1-01829-9, and one count of bail jumping under a different cause number (03-1-00645-2). CP 77. In exchange for her guilty pleas, the State agreed to drop a second UPCS charge under cause number 03-1-00645-2 and recommend 14-month terms of confinement in both cases, to run concurrently. CP 15, 78-79. Ms. Willyard's single plea statement, regarding cause number 03-1-01829-9, says: "On 9/24/03 in Thurston County I possessed methamphetamine. During the crime investigation I walked away from the police officer after being told to stop." CP 18.

In February 2021, the Washington Supreme Court decided Blake, which held that Washington's strict liability 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 conviction for bail jumping on the ground that it was invalidated by Blake, 197 Wn.2d 170 (2021). 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 both her guilty pleas under both cause numbers covered by the October 2003 agreement. CP 50-59, 80; RP 12.

The Thurston County Superior Court held a hearing on those motions 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. 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 the latter 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.

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 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 vacated the conviction for UPCS, but it denied Ms. Willyard's motion to withdraw the pleas to bail jumping and obstruction, finding she had not "satisfied that test for when withdrawal of plea is appropriate." RP 21-23; CP 60-68. 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 obstruction, since they were part of an indivisible agreement. BOA at 13-17; RBOA at 7-11.

With respect to the time bar, Ms. Willyard argued that her collateral attack was exempt because her indivisible plea agreement involved a guilty plea under a statute that "was

unconstitutional on its face." BOA at 12 (citing RCW10.73.100(2)). She also argued that Blake was a significant, retroactive change in the law that was material to her conviction and sentence. BOA at 12 (citing RCW 10.73.100(6)). And she argued that her judgment and sentence was invalid on its face. BOA at 12-13 (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); RCW 10.73.090(1)).

The Court of Appeals held Ms. Willyard was entitled only to vacation of her UPCS conviction, and (paradoxically) that the underlying plea agreement must remain intact. Op. at 5. Division Two reasoned that her challenge to the plea agreement, as distinct from the conviction it facilitated, was "time barred." Op. at 5.

Division Two agreed that "[a] defendant is entitled to withdraw all pleas in an indivisible plea agreement if they demonstrate they are entitled to withdraw at least one guilty plea in the indivisible agreement." Op. at 6 (citing State v. Olsen, __ Wn. App. 2d __, 530 P.3d 249, 255 (2023)). And it agreed that Willyard's pleas to obstruction and simple possession were

indivisible. Op. at 7-8. But, citing its recent published decision in Olsen, 530 P.3d at 253-55, 257, Division Two held that Ms. Willyard could not withdraw either of her pleas, and that she was instead limited to the remedy of vacating the simple possession conviction. Op. at 8.

Division Two also held that, even if Ms. Willyard could challenge her obstruction plea, the challenge would fail because she had not shown "actual and substantial prejudice." Op. at 8-9. According to Division Two, Ms. Willyard could satisfy that standard only by showing that she "more likely than not . . . would have refused to plead guilty and would have gone to trial." Op. at 9 (citing State v. Buckman, 190 Wn.2d 51, 59-60, 409 P.3d 193 (2018)).

D. REASONS REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision in this case, and the recent published decision on which it relies, Olsen, 530 P.3d 249, conflict with longstanding precedent on pleas to non-existent crimes. See, e.g., Hinton, 152 Wn.2d at 857; In re Thompson, 141 Wn.2d 712, 720-23, 10 P.3d 380 (2000); and 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).

1. A pre-Blake guilty plea to simple possession was a plea to a nonexistent crime.

Blake's holding is retroactive, meaning that a conviction under Washington's simple drug possession statute "is and has always been a legal nullity." 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); Evans v. Brotherhood of Friends, 41 Wn.2d 133, 143, 247 P.2d 787 (1952)).

Accordingly, Division Two has repeatedly recognized that a conviction for simple drug possession, entered at any time under the statute invalidated in Blake, is a conviction for 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).[1]

2. Contrary to Division Two's decision in this case, "actual and substantial prejudice" inheres in a plea to a nonexistent crime; on collateral review, the defendant is entitled to withdraw such a plea with no additional showing of prejudice.

A defendant who pleads guilty to a nonexistent crime "establishes actual and substantial prejudice resulting from constitutional error." E.g., Hinton, 152 Wn.2d at 858-61. Such a defendant is therefore entitled to withdraw the plea, even on collateral attack. Thompson, 141 Wn.2d at 720-23; Knight, 4 Wn. App. 2d at 253 (quoting Hinton, 152 Wn.2d at 860); State v. De Rosia, 124 Wn. App. 138, 149, 100 P.3d 331 (2004) (quoting State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002), overruled on other grounds by State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006)) ("'If the plea was not valid when entered, the trial court must set it aside regardless of "manifest injustice."'").

Thompson, 141 Wn.2d 712, illustrates this rule.

[1] Unpublished authority, cited pursuant to GR 14.1.

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, Mr. Thompson 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 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.[2] And Division Two followed 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. Therefore, like the petitioners in Thompson, Hinton, and Knight, Ms.

[2] 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.

Willyard is therefore entitled to withdraw her plea to the nonexistent crime.

Division Two rejected this argument, concluding that Ms. Willyard must demonstrate she "more likely than not . . . would have refused to plead guilty and would have gone to trial." Op. at 9 (citing Buckman, 190 Wn.2d 51, 59-60. This is incorrect. The Buckman standard does not apply where the defendant has pleaded guilty to a nonexistent crime.

3. Division Two rejected Ms. Willyard's appeal under its recent published decision in Olsen, but Olsen conflicts with decades of precedent.

Division Two also rejected Ms. Willyard's appeal under Olsen, 530 P.3d at 253-55. See Op. at 6-8. Olsen is a deeply flawed opinion, irreconcilable with decades of precedent, which this Court should repudiate as soon as possible.

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 acknowledges 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 it holds a defendant may never withdraw the latter (although she is entitled to have the resulting conviction vacated) because, according to the Olsen Court: "[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, as noted, 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).

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.

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 obstruction.

I certify that this document was prepared using word processing software, in 14-point font, and contains 2,651 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. 56579-0-II UNPUBLISHED OPINION

LEE, J. — Nicole M. Willyard[1] appeals the trial court's order affording relief from judgment pursuant to *State v. Blake*,[2] which vacated Willyard's conviction for unlawful possession of a controlled substance but left in place Willyard's conviction for obstructing a public servant (obstruction). Willyard argues that she should be allowed to withdraw her guilty pleas to both the unlawful possession of a controlled substance and obstruction convictions because the guilty pleas to unlawful possession of a controlled substance and obstruction are part of an indivisible plea.

We hold that while Willyard is entitled to have her unlawful possession of a controlled substance conviction vacated, Willyard is not entitled to withdraw her plea to obstruction. Accordingly, we affirm the trial court's order.

[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).

FACTS

Willyard was a passenger in a vehicle that was pulled over on September 24, 2003. Willyard gave law enforcement officers a false name when they asked for her information. When the officers searched the car, they found a pipe filled with methamphetamine where Willyard was sitting.

On September 26, 2003, the State charged Willyard with one count of unlawful possession of a controlled substance committed on September 24. The State later amended the information to add a charge for obstructing a public servant (obstruction) committed on that same day.

Willyard pleaded guilty to both charges on October 21, 2003. On that same day, Willyard also pleaded guilty to a separate charge in a different case for bail jumping. The statement of defendant on plea of guilty for the unlawful possession of a controlled substance and obstruction case was a different document than the statement of defendant on plea of guilty for the bail jumping case. The unlawful possession of a controlled substance/obstruction case and the bail jumping case were assigned different case numbers and the trial court entered separate judgment and sentences for the two cases.[3] Because Willyard did not file an appeal, Willyard's judgment in this case became final on October 21, 2003, the day it was filed with the superior court clerk.[4]

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[3] The case number for bail jumping conviction is Thurston County Superior Court case no. 03-1-00645-2, and the case number for unlawful possession of a controlled substance and obstruction convictions is Thurston County Superior Court case no. 03-1-01829-9.

[4] 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;

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, and hand wrote in case number 03-1-01829-9, which is the case number for the current case on appeal involving the unlawful possession of a controlled substance and obstruction convictions. In the motion, Willyard made arguments regarding bail jumping but did not discuss the obstruction conviction.

After counsel was appointed for Willyard, Willyard's counsel filed a motion under CrR 7.8, seeking to withdraw Willyard's guilty plea based on our Supreme Court's decision in *Blake.* Willyard argued that her motion was not time barred because her judgment and sentences were facially invalid due to the *Blake* decision. Willyard contended that she was entitled to withdraw her plea to the unlawful possession of a controlled substance charge because that conviction was void and should be vacated. Willyard also contended that her pleas to the unlawful possession of a controlled substance charge and the obstruction charge constituted an indivisible plea agreement; therefore, the entire plea must be withdrawn.

> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
>
> (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.

The State opposed Willyard's motion to withdraw her guilty plea. 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 Willyard's motion relating to the unlawful possession of a controlled substance conviction was not time barred because *Blake* was a substantial change in the law that rendered the judgment and sentence facially invalid.

At the show cause hearing on Willyard's CrR 7.8 motion, Willyard argued that she was entitled to a vacation of her unlawful possession of a controlled substance conviction because it is a nonexistent crime, rendering the conviction invalid. Willyard also argued that the plea to unlawful possession of a controlled substance was part of an indivisible plea agreement that included another charge, so she was entitled to withdraw her guilty pleas to all charges that were part of the indivisible plea.

The State conceded that Willyard was entitled to a vacation of the unlawful possession of a controlled substance conviction. But the State argued that Willyard was not entitled to withdraw her guilty plea to the obstruction charge and the obstruction conviction should remain.

The trial court ruled that withdrawal of the entire plea agreement was not the appropriate legal remedy. Instead, the appropriate remedy was vacating and dismissing the unlawful possession of a controlled substance conviction. Accordingly, the trial court vacated Willyard's unlawful possession of a controlled substance conviction but denied Willyard's motion to withdraw her guilty pleas. The trial court entered a written order vacating and dismissing Willyard's unlawful possession of a controlled substance conviction and ordering that the obstruction conviction remain.

Willyard appeals.

ANALYSIS

Willyard argues that *Blake* rendered unlawful possession of a controlled substance a nonexistent crime, and therefore, she is entitled to withdraw her guilty pleas to both unlawful possession of a controlled substance and obstruction. Willyard contends that because her convictions resulted from an indivisible plea agreement, she must be entitled to withdraw both guilty pleas.

A. TIME BAR

Although Willyard filed her motion to withdraw her pleas more than one year after her judgment became final, Willyard argues that her motion to withdraw her guilty pleas to both unlawful possession of a controlled substance and obstruction meets certain exceptions to the time bar. The State conceded below that the motion was not time barred. However, on appeal the State argues that its concession does not apply beyond vacation of Willyard's unlawful possession of a controlled substance conviction. We hold that while Willyard is entitled to a vacation of the unlawful possession of a controlled substance conviction, Willyard's motion to withdraw her plea to the obstruction charge is time barred.

1. Legal Principles

"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 lists six exceptions to the one-year time bar.

The relevant RCW 10.73.100 exceptions argued are:

> (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).

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)." *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 424, 309 P.3d 451 (2013). Claims that fall within the exceptions to the time bar in RCW 10.73.100 will be considered, but all other claims that do not fall into one of the exceptions will not be considered. *Id.* at 425.

A defendant is entitled to withdraw all pleas in an indivisible plea agreement if they demonstrate they are entitled to withdraw at least one guilty plea in the indivisible plea agreement. *State v. Olsen*, ___ Wn. App. 2d ___, 530 P.3d 249, 255 (2023); *see State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). A plea agreement is indivisible if "'pleas to multiple counts or

charges were made at the same time, described in one document, and accepted in a single proceeding.'" *State v. Coombes*, 191 Wn. App. 241, 256, 361 P.3d 270 (2015) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Bradley*, 165 Wn.2d 934, 941-42, 205 P.3d 123 (2009)), *review denied*, 185 Wn.2d 1020 (2016). In the absence of a showing that the pleas are indivisible, the proper remedy for an invalid unlawful possession of a controlled substance conviction on a judgment and sentence as a result of a guilty plea is vacation of the invalid unlawful possession of a controlled substance conviction, not withdrawal of the guilty 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).

2. Motion to Withdraw Pleas is Time Barred

Here, Willyard identified one error on her judgment and sentence: a constitutionally invalid conviction for unlawful possession of a controlled substance. Willyard argues that this error is a facial invalidity that entitles her to withdraw her guilty pleas to both unlawful possession of a controlled substance and obstruction because the pleas were part of an indivisible agreement.

Here, the parties do not dispute that Willyard's challenge to the unlawful possession of a controlled substance conviction is not time barred. However, the parties dispute whether Willyard's challenge to the obstruction conviction is time barred. Unless Willyard's plea to the obstruction charge is part of an indivisible plea agreement and Willyard is allowed to withdraw her guilty plea to the unlawful possession of a controlled substance charge, Willyard's challenge to the obstruction charge is time barred. *See id.* at 255, 257.

We agree that the guilty pleas were part of an indivisible plea agreement because the unlawful possession of a controlled substance and obstruction charges were committed on the same

day, charged in the same information, pleaded guilty to on the same day and in the same document, and resolved in the same judgment and sentence. *See Coombes*, 191 Wn. App. at 256. However, Willyard has not shown that she is entitled to withdraw her guilty plea to the unlawful possession of a controlled substance conviction. *See Olsen*, 530 P.3d at 255. Without a showing that Willyard can withdraw at least one plea within the agreement, Willyard cannot show that she is entitled to withdraw all her pleas in the agreement. *See id.* at 253-55, 257 (a defendant who is unable to show they are entitled to withdraw their guilty plea to unlawful possession of a controlled substance is only entitled to a vacation of the invalid unlawful possession of a controlled substance conviction, not withdrawal of their guilty plea to all charges in the plea agreement).

Because more than one year has passed since Willyard's judgment became final, Willyard may only seek relief for the defect that renders her judgment and sentence invalid on its face—vacation of the unlawful possession of a controlled substance conviction. *See Adams*, 178 Wn.2d at 424. Willyard has failed to show any facial invalidity or defect that entitles her to seek the relief requested—withdrawal of her guilty plea to the obstruction charge.[5] Therefore, Willyard's motion to withdraw her guilty plea to the obstruction charge is time barred.

B. ACTUAL AND SUBSTANTIAL PREJUDICE

Even if Willyard's motion to withdraw her plea to the obstruction charge is not time barred, her motion fails because she fails to show actual and substantial prejudice. To obtain relief in a

[5] Willyard also argues other exceptions to the time bar under RCW 10.73.100. Regardless of which exceptions Willyard argues, her arguments fail because she has not shown any defect entitling her to withdrawal of both her guilty pleas. *See Adams*, 178 Wn.2d at 424 (when challenging a judgment and sentence more than a year after its finality, an offender "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).").

collateral attack, the person bringing the motion must show both error and that they were actually and substantially prejudiced. *Buckman*, 190 Wn.2d at 60. For a motion to withdraw a plea, the person bringing the motion must show that it is more likely than not that they would have refused to plead guilty and would have gone to trial. *Id.* at 65. A bare allegation is not sufficient. *Id.* at 67. To show actual and substantial prejudice, Willyard must show that more likely than not she would have refused to plead guilty and would have insisted on going to trial. *Id.* at 65.

Here, Willyard makes no argument attempting to show actual and substantial prejudice. Willyard does not even make a bare assertion she would have not pleaded guilty or entered the plea agreement in this case. Therefore, we hold that the trial court did not abuse its discretion in denying Willyard's motion to withdraw her guilty plea to the obstruction charge.

Willyard is entitled to have her unlawful possession of a controlled substance conviction vacated. However, Willyard is not entitled to withdraw her guilty plea to the obstruction charge. Therefore, Willyard's motion to withdraw her guilty plea to the obstruction charge is time barred. Accordingly, we affirm the trial court's order.

No. 56579-0-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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Transmittal Information

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