69309-3

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No. 69309-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARRIDAN NELSON,

Appellant.

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

The Honorable Eric Z. Lucas

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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TABLE OF CONTENTS

A. ARGUMENT 1

1. THE TIME BAR DOES NOT APPLY TO FACIALLY INVALID JUDGMENTS 1

2. AN INVOLUNTARY PLEA BASED UPON A MUTUAL MISTAKE IS A VALID BASIS TO WITHDRAW A GUILTY PLEA 3

B. CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) 1

In re Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005) 2

In re Scott, 173 Wn.2d 911, 271 P.3d 218 (2012) 1

In re the Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 3

State v. Cloud, 95 Wn.App. 606, 976 P.2d 649 (1999) 4

State v. Lamb, 175 Wn.2d 121, 285 P.3d 27 (2012) 4

State v. Lusby, 105 Wn.App. 257, 18 P.3d 625, *review denied,* 144 Wn.2d 1005 (2001) 5

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988), *overruled on other grounds*, *State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011) 3

State v. Speed, 96 Wn.2d 838, 640 P.2d 13 (1982) 4

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 3

STATUTES

RCW 10.73.090 1

RCW 10.73.100 1

RULES

CrR 4.2 3

CrR 7.8 ..... 1, 3

A. ARGUMENT

1. THE TIME BAR DOES NOT APPLY TO FACIALLY INVALID JUDGMENTS

The State contends that Mr. Nelson's attempt to withdraw his guilty plea for the first time on appeal is time-barred. Brief of Respondent at 5-7. This argument should be rejected.

It's important to reemphasize that the State's position on appeal is directly opposite its position before the trial court. In response to Mr. Nelson's CrR 7.8 motion, the State *conceded* that the one-year time bar did not apply because the motion was not time-barred under RCW 10.73.090 or RCW 10.73.100. CP 4-5. The State also conceded the judgment and sentence was invalid on its face and/or the sentence imposed was in excess of the trial court's jurisdiction. As the State so eloquently argued before the trial court, the one-year time bar does not apply to judgment and sentence that is invalid on its face. RCW 10.73.090; *In re Personal Restraint of Goodwin,* 146 Wn.2d 861, 866, 50 P.3d 618 (2002).

"Generally speaking, a judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority to impose the judgment or sentence." *In re Scott*, 173 Wn.2d 911, 916, 271 P.3d 218 (2012). The Supreme Court has

found invalidity when an offender agreed to serve a 10 year exceptional sentence on a lesser crime, with no reduction for earned early release time, in exchange for the prosecution reducing the charge from a third strike offense, and the trial judge memorialized the agreement on the judgment and sentence. *In re Personal Restraint of West,* 154 Wn.2d 204, 206-07, 110 P.3d 1122 (2005). Thus, however reasonable the bargain was, the Supreme Court ruled trial judge lacked the statutory authority to direct whether an offender would or would not earn early release. *Id.* The Supreme Court ruled that the judgment and sentence was invalid, and remanded for deletion of the offending clause. *Id.* at 215–16.

Here, the State conceded Mr. Nelson's collateral attack on his judgment and conviction was not time-barred. CP 4-5. The argument was well-taken before the trial court and applies equally here.

2. AN INVOLUNTARY PLEA BASED UPON A MUTUAL MISTAKE IS A VALID BASIS TO WITHDRAW A GUILTY PLEA

The State further contends that Mr. Nelson failed to meet the requirements of CrR 7.8 and CrR 4.2 for withdrawing a guilty plea. Brief of Respondent at 8-20.

A plea is involuntary if the plea is entered without knowledge of the direct sentencing consequences, which constitutes a manifest injustice. CrR 4.2(f); *In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004), citing *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (mutual mistake regarding sentencing consequences renders guilty plea invalid).

The State's attempts to circumvent *Walsh* are unavailing. The defendant may raise the voluntariness of his plea and move to withdraw the guilty plea for the first time on appeal where it is based upon a misadvisement of the sentencing consequences. *Walsh,* 143 Wn.2d at 8, *quoting State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *overruled on other grounds*, *State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011).

To the extent the State contends that the hearing below was not a sentencing hearing but merely a ministerial act of amending the

judgment and sentence, that runs afoul of the decision in *State v. Cloud,* 95 Wn.App. 606, 618, 976 P.2d 649 (1999). In *Cloud*, this Court remanded for "imposition of a sentence which permits Cloud early release, and direct the trial court to credit Cloud with good time credit he has already earned." *Cloud*, 95 Wn.App. at 618. Thus, this Court was required by *Cloud* to remand the matter for imposition of a sentence which allows early release, thus constituting a new sentencing hearing.

State v. Lamb, 175 Wn.2d 121, 285 P.3d 27 (2012), cited by the State is inapposite. Brief of Respondent at 10-12. *Lamb* involved a scenario where the Legislature acted *after* the defendant had pleaded guilty, thus the failure to advise the defendant of the consequence did not exist. *Lamb,* 175 Wn.2d at 129-30. Here, the offending statutory provision was in effect at the time Mr. Nelson entered his plea but was invalidated after his plea. The fact the statute was subsequently ruled unconstitutional rendered the statute a nullity. An unconstitutional statute is a nullity, and leaves the law as it stood before the enactment of the invalid statute. *State v. Speed,* 96 Wn.2d 838, 843, 640 P.2d 13 (1982).

Finally, the remedy for an involuntary plea is clear: the appellate court must reverse and remand to the superior court to allow the defendant an opportunity to withdraw his guilty plea. *State v. Lusby,* 105 Wn.App. 257, 263, 18 P.3d 625, *review denied,* 144 Wn.2d 1005 (2001). Mr. Nelson submits this Court must reverse and remand to the superior court to allow Mr. Nelson to move to withdraw his guilty pleas.

B. CONCLUSION

For the reasons stated, Mr. Nelson requests this Court remand this matter to the trial court to allow him to withdraw his guilty plea.

DATED this 10th day of July 2013.

Respectfully submitted,

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DIVISION I

STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 69309-3-I
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GARRIDAN NELSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MARY WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF JULY, 2013.

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