90395-6

COA NO. 31401-4-III

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JUAN ALEJANDRO MENDOZA,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

Juan A. Mendoza 343534

Washington State Penitentiary

1313 N. 13th Avenue

Walla Walla, WA 98362

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A. IDENTITY OF PETITIONER

Petitioner Juan A. Mendoza, defendant and appellate below, asks this Court to accept review of the decision in this case issued Feb. 26, 2014, by Division III of the Court of Appeals.

B. DECISION

On January 19, 2012, the Court of Appeals ruled that defendant's Judgment and Sentence contained a fundamental defect that required remand back to the superior court to correct the errors. Defendant moved to withdraw plea of guilty, because those "defects" were a direct consequence. Making the plea not knowingly nor voluntarily entered. The trial court denied defendant the relief and simply corrected the misstated offenses to reflect Class B felonies and not Class A felonies offenses defendant was not charged with, nor plead guilty for and sentenced to. Defendant filed his notice of appeal to the amended Judgment and Sentence. The court of appeals ruled that defendant was not entitled to relief (withdrawal of guilty plea), because he was time barred, failed to show the judgment was facially invalid and that defendant was sentenced within the standard range.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court lacked the authority to amend the Judgment and Sentence to conform, and/or designate Class B Felony convictions on Counts 2, 3 and 4, when petitioner was charged,

entered a Plea of Guilty and sentenced for class A felonies. Petitioner believed were valid on its face to avoid an exceptional sentence?

2. Is a Plea of Guilty deemed knowingly, voluntarily, and intelligently made, when the defendant is misinformed about the charged offenses (class A felonies) later determined incorrect and not applicable by law as ruled by the Court of Appeals.

D. STATEMENT OF PROCEDURAL FACTS

On January 4, 2010, the Chelan County Prosecutor charged petitioner with three (3) Counts of Unlawful Delivery of a Controlled Substance-Cocaine, two (2) Counts of Unlawful Possession of a Controlled Substance-Cocaine, and Possession of a Controlled Substance, Marijuana-forty grams or less. CP 1-4. Petitioner was appointed Jeremy Ford as Defense Counsel on the charged offenses.

On January 12, 2010, the state prosecutor amended the original charges and charged petitioner with the following: Three (3) Counts of Unlawful Delivery of a Controlled Substance, Cocaine, within 1000 feet of a school zone, Count 4 and 5, Unlawful Possession of a Controlled Substance, Cocaine, with Intent to Deliver, within 1000 feet of a school zone. Count 5, included while armed with a firearm; Count 6, Unlawful Possession of a Controlled Substance, Marijuana

Forty grams or less. CP 5-8. This amended information added five (5) total enhancements (4) school zones and (1) firearm enhancement. Defense Counsel advised petitioner that he was facing several class A felonies with a minimum of 20 years in prison, school zone enhancements, and a firearm enhancement, which must be served consecutive to each other. Defense Counsel stated he would talk to the prosecutor and see what type of offer was on the table. Counsel later informed petitioner that the prosecutor was offering a plea deal of 256-months.

After believing that court appointed counsel Ford was not adequately representing petitioner in the plea negotiation, petitioner retained Attorney Travis Brandt to represent petitioner in plea negotiations and the sentencing phase of the case. Newly appointed defense counsel Brandt re-affirmed that petitioner was facing several class A felonies, but that he would try and get the firearm enhancement dismissed because it was unlawfully seized and there existed no proof that petitioner possessed or controlled the firearm during the deliveries. Defense counsel Brandt specifically advised petitioner that he was facing class A felonies due to multiple deliveries committed on different dates and would be considered "other current offenses" for purposes of determining criminal history. Defense counsel Brandt also informed petitioner that since they would be considered "Prior Criminal History," the charges would elevate to Class A felonies pursuant to a doubling rule. RP 4-7.

During a 3.6 Suppression Hearing held September 2, 2010, the Trial Court held that the Wenatchee Police did not have probable cause to search petitioner's vehicle and suppressed the Cocaine, Marijuana, and firearm found in the vehicle. Because the court determined illegal search and seizure. The state filed a "Second Amended Information." CP 9-11; dropping Counts V and VI, Possession of Cocaine, Marijuana, and the firearm enhancement. (RP 2). Defense counsel informed petitioner that the state was offering a "one-time, non-negotiable" plea offer of 92-108 months. Defense counsel also informed petitioner that if he opted out and chose to go to trial, he would be facing an exceptional sentence of up to 256-months. (RP 4). For the amount of cocaine seized. Defense counsel explicitly advised that "it was in my best interest to take the deal." After further consultation with defense counsel petitioner accepted the plea deal of 92-108 months. (RP 4, 7-8).

On September 13, 2010, Petitioner entered a Plea of Guilty on the Second Amended Charges. (RP 11-12). Petitioner was led to believe that the charges were Class A felonies because of the multiple delivery dates, deemed "other current offenses," for purposes of criminal history, and because they would be considered "Prior Drug Offenses," elevating the charges to class A felonies. The Honorable Judge Bridges accepted petitioner's guilty pleas and Statement of Defendant's Plea of Guilty. (CP 12-19)(RP 14).

Did the trial court violate petitioner's State and Federal Due

Process Rights when it accepted petitioner's guilty plea on three (3) Class A felonies to avoid an exceptional sentence, then sentenced petitioner to a term of 92-108 months; and thereafter realizing a charging error Sua Sponte did amend petitioner's judgment and sentence to conform and/or reflect guilty pleas for Class B felonies, that mandated no possibility of an exceptional sentence and refused to allow petitioner to withdraw his guilty plea? CP 172.

On September 13, 2010, petitioner plead guilty to three class A felonies to avoid an exceptional sentence and benefit from a fixed standard range of 92-108 months. Had petitioner gone to trial and lost, petitioner was facing an exceptional sentence above-and-beyond the 92-108 months.

E. ARGUMENT

FACIALLY INVALID OR INVALID PLEA? THE ANSWER THAT BOTH TRIAL COURT AND COURT OF APPEALS HAS NOT AWARDED AND AVOIDS. A CLEAR SIGN OR PREJUDICE AND COMPLETE MISCARRIAGE OF JUSTICE.

First and foremost, this Court should keep a broad view for full picture of how petitioner's plea was acquired. To determine the validity or voluntariness of the guilty plea.

Thus, petitioner asks this Court "(1) [W]as the defendant incompletely or inaccurately advised about one or more consequences of the plea? (2) [C]ould the defective advice have materially affected the defendant's decision to plead guilty? (3) [D]id the

defective advice materially affect the defendant's decision to plea guilty? McDermond, 112 Wash.App. at 248, 47 P.3d 600.

There is no question that petitioner was inaccurately advised; in fact, the record reflects that petitioner's counsel (advised to except plea offer), the prosecutor (amending information to reflect charges as class A felonies), and trial court (excepting statement of defendant's plea of guilty), all mistook petitioner's invalid charges. And there is also little room for debate as to whether the misinformation could have and did affect petitioner's decision. Without the plea, petitioner was facing up to 20 years in prison. Given this potentially lengthy term, this Court is constrained to acknowledge that petitioner may not have pleaded guilty if petitioner had known he was not facing 20 years, choosing instead the uncertainties of a full jury trial.

Acknowledging these three points, the State and Court of Appeals/ Commissioner maintains that the mistake was not prejudicial. The Logic is that, because the trial court imposed a standard range sentence while under the belief that petitioner was facing 20 years.

Absent of the potential 20 years. The possibility of the same plea offer would have been immune, if petitioner would have been properly advised of the true length of time. A direct consequence rendering the plea invalid and void, because of the incorrect charges.

First, it is inconsequential what the outcome of petitioner's sentencing hearing would have been had the trial court known the true

status of petitioner's eligibility to (the class A felonies) charges. Rather, the critical point is that petitioner may not have had a (plea offer) sentencing hearing, if he had known of his ineligibility, because he may have elected to go to trial rather than plead guilty. It is only because of this incorrect advice and coerced, that petitioner was even at the sentencing phase.

Second, requiring petitioner to prove the the trial court's decision was affected by the misinformation would improperly compound his burden of proof. As is evident in McDermond's third factor, which asks whether the misinformation actually and materially affected the decision to plead, prejudice is already required. If the misinformation did affect the decision, then it was prejudicial, because it prevented a course of action--i.e., proceeding to trial--that the defendant may otherwise have taken if not for the mistake.

Petitioner's judgment is invalid, because it contained an obvious error. the "face" of petitioner's judgment reveals that the sentencing court set a maximum penalty of "20" years as charged and sentenced to for a crime with a maximum penalty of 10 years. Thus, petitioner is not time-barred.

Petitioner contends that the plea was not obtained in good faith nor knowingly or voluntarily, because they incorrectly charged and misadvised him of a direct consequence of the plea (the statutory maximum), because the error on the judgment reveals the existence of essentially the same error in petitioner's guilty plea and charging

information, petitioner can attack the validity of his guilty plea. Moreover, because petitioner plea was based on misinformation and misadvised about a direct consequence, it was neither knowingly nor voluntarily entered, which triggered due process violation, rendering this guilty plea "VOID." McCarthy, v. U.S., 394 U.S. at 466 (1989). The trial court must show that petitioner would have not made a different choice if he had been correctly advised that the maximum penalty was 10 years and not 20 years. Instead, petitioner's plea of guilty should be "VOID" or at the least entitled to withdrawal of plea, unless the state can make a sufficient showing of prejudice in which this case should be remanded for a hearing on petitioner's choice of remedy.

RCW 10.73.090 establishes a one-year time limit for collateral attack on a judgment. More than a year has elapsed since this conviction was final. However, the one-year limit does not apply to a judgment that is invalid. In re Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002).

A judgment is invalid on its face if it is evident the validity "without further elaboration." Goodwin, 146 Wn.2d at 866. The phrase "on its face" includes the documents signed as part of a plea agreement. Id. at 866 n.2 (citing In re Restraint of Stoudmire, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000) In re Restraint of Thompson, 141 Wn.2d 712, 719, 10 P.3d 380 (2000)).

As this Court has explained: "[T]he relevant question in a criminal case is whether the judgment and sentence is valid on its face. Such, documents may be relevant to the question whether a judgment is valid on its face, but only if they disclose facial invalidity in the judgment and sentence itself." In re Restraint of Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003).

In this case at bar, the maximum penalty (for Counts 2, 3 and 4) on the judgment is clearly erroneous. Thus, the maximum of imprisonment is 10 years, not 20 years. From this information alone, it is obvious that the maximum sentence is erroneous. Petitioner has no prior convictions or drug related offenses to have allowed the trial court the discretion to elevate the maximum penalty from 10 years to 20 years, i.e., from Class B to Class A felonies as stated on the judgment and sentence without further elaboration.

Thus, the question then becomes whether this error in the judgment identifies a defect in the guilty plea that merits relief or voids this plea. Here, it does.

When a judgment reveals an infirmity "on its face," the reviewing court can then look to other documents to determine whether there is "fundamental defect which inherently resulted in a complete miscarriage of justice." See In re Pers. Restraint of Thompson, 141 Wn.2d 712, 719, 10 P.3d 380 (2000)(quoting In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996)).

When a defendant pleads guilty, he must do so knowingly, voluntarily and intelligently. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); McCarthy v. U.S., 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). See also CrR 4.2(d); In re Fonseca, 132 Wn.App. 464, 132 P.3d 154 (2006)(plea withdrawn where a defendant did not know he was ineligible for DOSA at time he pled guilty).

A defendant must be properly informed of all direct consequences of his guilty plea. See State v. Ross, 129 Wn.2d 279, 285, 916 P.2d 405 (1996). In re Restraint of Hoisington, 99 Wn.App. 423, 993 P.2d 296 (1999), the court stated that "a guilty plea entered on a plea bargain that is based upon misinformation about sentencing consequences is not knowingly made." 99 Wn.App. at 428.

The maximum possible sentence is a "direct" consequence of a guilty plea. State v. Vensel, 88 Wn.2d 552, 555, 564 P.2d 326 (1977) ("We believe it is important at the time a plea of guilty is entered, whether in justice or superior court, that the record show on its face the plea was entered voluntarily and intelligently and affirmatively show the defendant understands the maximum term which may be imposed"). Here, its clear the trial court obtained a plea on misinformation making petitioner's plea of guilty not knowingly and voluntarily made, rendering it "VOID." According to Isadore, a

defendant "need not make a special showing of materiality" in order for misinformation concerned "a direct consequence of [the] guilty plea." 151 Wn.2d at 296 (emphasis added).

Withdrawal of a guilty plea is appropriate even where correction of the mistake works to a defendant's benefit. For example, in State v. Mendoza, 157 Wn.2d 582, 141 P.3d 149 (2006), the Washington Supreme Court held that a guilty plea is involuntary when it is based on a miscalculated sentence range, even where the correct sentence range results in a lower sentence. 157 Wn.2d at 584. In this case, the sentencing range benefited only as part of a one-time non-negotiable plea deal. "Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary, when based on a direct consequence of the plea, regardless of whether the actual sentence range is lower or higher than anticipated. Absent a showing that the defendant was correctly advised/informed of all the direct consequences of his guilty plea. The defendant may move to withdraw the plea." Id. at 591.

The Mendoza decision is on point to this case, a brief exposition is warranted. The Mendoza opinion begins its reasoning with the settled law that when a defendant pleads guilty, due process requires that he must do so knowingly, voluntarily and intelligently. Id. at 587; In re Isadore, supra (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 93 L.Ed.2d 274 (1969)("consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has

been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.")). This standard is reflected in CrR 4.2(d), which mandates that the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." In the light, petitioner was informed that the charges (class A felonies) filed in the Second Amended Information were what he was facing, trial or no trial. Clearly incorrect, determined the Appellate Court. The trial court admitted to the incorrect charges. This alone warrants relief from an invalid judgment.

The Mendoza court then relies on the "clarification" in Isadore that a defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty in order to seek withdrawal of the plea. ("In determining whether the plea constitutionally valid, we decline to engage in a subjective inquiry into the defendant's subjective risk calculation and the reasons underlying his or her decision to accept the plea bargain.") Mendoza, 157 Wn.2d at 590-91. In this case petitioner merely accepted the plea to avoid an exceptional sentence or possibility of 20 years. Which clearly he was facing if the charges were correct. But in this case they were not correct

therefore, there was no benefit in this plea bargain, making it not knowingly and voluntarily entered therefore its void.

Mendoza created one exception to the rule above. When a defendant is "clearly informed before sentencing" of the correct direct consequences of the plea, "and the defendant does not object or move to withdraw the plea on that basis before he is sentenced, the defendant waives the right to challenge the voluntariness of the plea." 157 Wn.2d at 592.

That exception does not apply in this case. Here, there was an obvious and uncorrected (both at the time of plea and at sentencing) mutual mistake about the incorrect charges and maximum penalty petitioner was unlawfully pled guilty and sentenced to.

When petitioner plead guilty he was informed the maximum for Counts 2, 3 and 4 was 20 years. That information was both incorrect and concerned a direct consequence.

Accuracy regarding a direct consequence of a guilty plea is not too much to expect. In fact, it is required.

Petitioner is entitled to exercise choice of remedy. He chooses to withdraw his plea or deemed void due to the fact that it was not acquired knowingly and voluntarily. Also, because the misinformation as to petitioner's eligibility to the charges actually and materially affected his decision to plead guilty. This Court is respectfully asked to revisit the merits to this case and Court of Appeals ruling which resulted in a complete miscarriage and manifest injustice.

F. CONCLUSION

Because the misinformation as to petitioner's eligibility to incorrect charges actually and materially affected his decision to plead guilty and violated his State and Federal Due Process rights.

Petitioner prays this Court accepts this Motion for Discretionary Review for the reasons stated in Part E and grants petitioner relief to withdraw his guilty plea and/or deem the plea void.

CERTIFICATE OF MAILING / SERVICE

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief pursuant to **28 U.S.C. § 1746.** I deposited U.S. Postal Mailbox, First Class Postage and properly addressed.

Executed this 3rd day of June, 2014.

Respectfully Submitted,

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 31401-4-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION TO MODIFY**
	)	**COMMISSIONER'S RULING**
JUAN ALEJANDRO MENDOZA,	)	
	)	
Appellant.	)	

Having considered appellant's pro se motion to modify the commissioner's ruling of February 26, 2014, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: May 6, 2014

PANEL: Judges Lawrence-Berrey, Brown, and Siddoway

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

The Court of Appeals
of the
State of Washington
Division III

FEB 26 2014

COURT OF APPEALS
DIV

STATE OF WASHINGTON, Respondent, v. JUAN ALEJANDRO MENDOZA, Appellant.	)	COMMISSIONER'S RULING NO. 31401-4-III

Juan Mendoza appeals a Chelan County Superior Court order denying his motion to withdraw his plea of guilty to three counts of delivery of a controlled substance – cocaine, and one count of possession of a controlled substance with intent to deliver – cocaine. He contends he is entitled to withdraw his guilty plea where the plea was not voluntary because he was informed incorrectly that the statutory maximum for the charged crimes was 20 years, rather than 10 years. In his Statement of Additional Grounds for Review Mr. Mendoza contends that "the trial court lacked authority to amend the judgment and sentence to designate class B felony convictions for counts 2,

3 and 4, where I was actually charged with, adjudicated guilty of, and sentenced for class A felonies, and where I specifically pleaded guilty to the charges I believed were valid to avoid an exceptional sentence that only class A felonies would have permitted." The State of Washington's motion on the merits is granted.

In 2010, Mr. Mendoza entered a plea of guilty to three counts of cocaine delivery and one count of possession of cocaine with intent to deliver. The sentence imposed included consecutive 24-month enhancements because the crimes occurred within 1000 feet of a school bus route stop. Mr. Mendoza did not file a direct appeal from this judgment and sentence which became final on September 13, 2010. On January 7, 2011, Mr. Mendoza filed a personal restraint petition, but it was dismissed as frivolous.

On September 27, 2011, more than a year after the judgment and sentence was entered, Mr. Mendoza filed with the trial court a CrR 7.8 motion for leave to withdraw his guilty plea. The superior court transferred the matter to this Court to be treated as a personal restraint petition. In the petition Mr. Mendoza raised several issues, including that he was misinformed about the length of his sentence and therefore his guilty pleas were involuntary and resulted in a manifest injustice warranting withdrawal of the pleas, and that the judgment and sentence was facially invalid because three of the crimes were erroneously classified as class A felonies. This Court determined that the personal restraint petition was time barred and the Court lacked jurisdiction to consider the petition because it was a successive petition. However, the Court also concluded that the judgment and sentence was incorrect as it designated the crimes as class A felonies

instead of class B felonies, but because Mr. Mendoza's term of confinement and community custody combined did not exceed the 120-month statutory maximum such defect did not render his plea involuntary or otherwise make Mr. Mendoza's argument on this point exempt from the one-year time bar. Nonetheless, this Court remanded the matter to the superior court for the limited purpose of correcting the judgment and sentence to reflect that the three crimes were class B, not class A, felonies.

Mr. Mendoza, unhappy with this Court's decision, sought review at the Washington State Supreme Court, Cause No. 87022-5. The Supreme Court denied review on the grounds the petition was time-barred, and then stated that even though "the judgment and sentence misstated the maximum sentences for three of Mr. Mendoza's crimes, the superior court otherwise imposed correct standard-range sentences. In this circumstance, the misstatement in the maximum sentences is not a facial defect allowing Mr. Mendoza to challenge his plea beyond the one-year time limit."

On December 3, 2012, before the trial court had corrected the judgment and sentence, Mr. Mendoza filed, in the trial court, another motion to withdraw his 2010 guilty plea. The trial court transferred the motion to this Court to be treated as a personal restraint petition. Thereafter, Mr. Mendoza informed this Court he wished to voluntarily withdraw the petition. This Court granted his requested on February 8, 2013.

On December 17, 2012, the Chelan County Superior Court entered an order correcting the judgment and sentence to reflect that counts 2, 3, and 4 are class B

felonies with a maximum sentence of 10 years. On January 22, 2013, Mr. Mendoza filed this current appeal.

Mr. Mendoza now contends that because of the misinformation in the judgment and sentence designating the crimes as class A instead of class B felonies he decided to enter a plea of guilty because he thought he potentially faced a 20 year sentence, and therefore he should be allowed to withdraw his decision to enter a plea of guilty because it was not voluntary.

Mr. Mendoza's contention will not be considered by this Court for several reasons. First, this petition is time barred under RCW 10.73.090(1), and Mr. Mendoza has failed to show that the judgment is facially invalid or entered without competent jurisdiction, or that one of the exceptions listed in RCW 10.73.100 (1)-(6) to the time bar applies. Further, the defect in the judgment and sentence does not render the plea involuntary or otherwise make it exempt from the one-year time bar. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 141, 144, 267 P.3d 324 (2011). This Court and the Washington State Supreme Court have already determined that the judgment is not facially invalid.

Second, because the "facially valid" precondition is an exception to the one-year time bar to personal restraint petitions, once the defect is cured the entry of a corrected judgment does not trigger a new one-year window for challenging other judgment provisions that are valid on their face. *In re Pers. Restraint of Adams*, 178 Wn. 2d 417, 427, 309 P.3d 451 (2013).

Third, under RCW 10.73.140, this Court lacks jurisdiction to consider a successive petition unless the petitioner certifies that he or she has not filed a previous petition on similar grounds and shows good cause why he did not raise the new grounds in the previous petitions. Here, Mr. Mendoza has not only filed previous petitions, but also raised similar grounds and issues now as were presented in those previous petitions. Further, he has failed to file a certification stating why he did not make this argument earlier as required by RCW 10.73.140.

Finally, this Court and the Washington Supreme Court addressed this same or a very similar issue in Mr. Mendoza's prior personal restraint petition and directed the trial court to make the necessary corrections. On remand, the trial court properly did as it was ordered by this Court and the Washington State Supreme Court.

In light of the above, the decision of the trial court is affirmed and this appeal is hereby dismissed.

February 26, 2014.

Joyce J. McCown
COMMISSIONER