69048-5

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COA NO. 69048-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LOUIS MCGOWEN,

Appellant.

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

The Honorable Ronald Kessler, Judge
The Honorable Kimberley Prochnau, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. MCGOWEN'S LIFE SENTENCE MUST BE VACATED BECAUSE ONE OF THE PRIOR CONVICTIONS IS FACIALLY INVALID.

The State contends there is no facial invalidity in McGowen's 1993 judgment and sentence, theorizing nothing on its face shows the Colorado conviction included in the offender score was incomparable to a Washington offense. Brief of Respondent (BOR) at 43-44. The State objects to consideration of the Court of Appeals decision in State v. McGowen, 95 Wn .App. 1072, 1999 WL 364058 (1999), in which this Court held the State failed to prove McGowen's Colorado conviction was legally or factually comparable and therefore could not be included in the offender score. BOR at 44 n.12.

The State advanced a similar argument in In re Pers. Restraint of Carrier, 173 Wn.2d 791, 272 P.3d 209 (2012). It lost.

In Carrier, the Supreme Court addressed the question of whether a court order dismissing Carrier's prior indecent liberties conviction could be considered in deciding if an error exists on the "face" of a later judgment and sentence. Carrier, 173 Wn.2d at 798-99. The judgment and sentence did not itself reveal that a court dismissed Carrier's prior indecent liberties conviction. Id. at 799. Evidence of dismissal came from a separate dismissal order issued in 1985. Id. The Court concluded the

dismissal order could be considered in determining whether the judgment and sentence was facially invalid because it "is a court document of unquestionable authenticity that has a direct bearing on the trial court's authority to impose a life sentence." Id. at 800.

The Court of Appeals decision at issue here is also of unquestionable authenticity. Consideration of that decision reveals the previous trial court erred in including the Colorado conviction as criminal history in computing the standard range for the 1993 robbery conviction to which McGowen pled guilty. The Court of Appeals decision bears on the present trial court's authority to impose a life sentence on McGowen because, as set forth in the opening brief, the sentencing error invalidates the guilty plea to the 1993 robbery conviction. The face of the 1993 judgment and sentence shows the Colorado offense was included as criminal history for purposes of computing the offender score. CP 306. The 1993 conviction cannot be considered a "third strike" because there is a facial invalidity of constitutional dimension on the face of the judgment and sentence for the 1993 robbery.

The State attempts to draw a distinction between failing to prove the Colorado offense was factually comparable versus whether the Colorado offense was in actuality factually comparable. BOR at 41. That is a distinction without a difference. The State failed to prove it despite

being given the opportunity to do so. That failure of proof makes the Colorado offense incomparable as a matter of law.

The State further claims the error is only statutory, not constitutional. BOR at 44 n.13. The error is constitutional because it demonstrates the guilty plea — the judgment —was not knowing, voluntary and intelligent. That is a constitutional due process violation. "It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily." State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A defendant's misunderstanding of sentencing consequences such as the standard range when pleading guilty constitutes constitutional error. State v. Mendoza, 157 Wn.2d 582, 589, 590-91, 141 P.3d 49 (2006); State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

In this regard, it is important to keep in mind that McGowen is not advancing an untimely collateral attack against the 1993 judgment and sentence. If he were, he would get nowhere. In the context of untimely collateral attacks, a facially invalid judgment and sentence does not create a broad exception permitting a personal restraint petitioner to assert a claim that is otherwise not exempt from the one-year limit on collateral

review under RCW 10.73.100. In re Pers. Restraint of Snively, __Wn.2d__, __P.3d__, 2014 WL 1119928 at *1 (2014); In re Personal Restraint of Adams, 178 Wn.2d 417, 424-25, 309 P.3d 451 (2013). A claim that a plea was involuntary due to misinformation as to sentencing is not by itself an exempt ground for relief under RCW 10.73.100. Snively, 2014 WL 1119928 at *2. The sole remedy for a sentencing error is correction of the sentence. Id.

McGowen's argument, in contrast, is "directed at the present use of a prior conviction to establish his current status as a persistent offender." State v. Knippling, 166 Wn.2d 93, 103, 206 P.3d 332 (2009). A challenge to the use of a prior conviction for sentencing purposes under the POAA is not a collateral attack on that prior conviction. Knippling, 166 Wn.2d at 103 (citing State v. Carpenter, 117 Wn. App. 673, 678, 72 P.3d 784 (2003)). Whatever remedy is available to a personal restraint petitioner who advances an untimely collateral attack on his judgment and sentence therefore has no bearing on McGowen's case. McGowen does not seek to overturn the 1993 robbery conviction or sentence. He only objects to the use of that conviction as a basis to establish his current status as a persistent offender. That is a time-honored distinction.

McGowen agrees with the State's contention that, in the context of a challenge to a persistent offender sentence, the validity of a prior

conviction is the pertinent question. BOR at 45. The two sides draw different conclusions on whether the face of the 1993 robbery judgment and sentence shows the judgment — the robbery conviction — is invalid. A "conviction" includes "acceptance of a plea of guilty." RCW 9.94A.030(9). As argued, the robbery conviction is invalid because the plea is constitutionally infirm and that infirmity is facially evident. A prior conviction that is "constitutionally invalid on its face may not be considered" in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986).

The State asserts the plea is not constitutionally infirm because McGowen entered his plea knowing that his sentencing range could be increased if further criminal history was discovered. BOR at 47-48. The State's contention is misplaced. The constitutional infirmity identified by McGowen has nothing to do with his offender score being increased upon discovery of the Colorado conviction. The constitutional infirmity stems from the incomparability of the Colorado conviction, which renders his plea involuntary.

The State also argues it is not collaterally estopped from showing the Colorado conviction is comparable because a 2008 amendment to the Sentencing Reform Act provides "The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous

sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense." BOR at 42 (quoting RCW 9.94A.525(22)).

That statutory provision is inapplicable to the situation here. The issue is not whether the prior Colorado conviction should be included in the criminal history or offender score for McGowen's current offenses. That question is irrelevant. The issue is whether the prior 1993 judgment and sentence that did include the prior Colorado conviction as criminal history to compute the offender score shows the 1993 judgment and sentence was facially invalid. The 2008 amendment does not speak to that issue.[1]

B. CONCLUSION

For the reasons set forth above and in the opening brief, McGowen requests that this Court reverse the convictions and hold the prior 1993 robbery offense does not qualify as a "most serious offense" under the Persistent Offender Accountability Act.

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[1] Even so, the State made no attempt in the current proceeding to establish the factual comparability of the Colorado offense.

DATED this 10th day of April 2014

Respectfully Submitted,

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEWIS MCGOWEN
DOC NO. 712677
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF APRIL 2014.

X Patrick Mayovsky