

62234-0

62234-0

NO. 62234-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANNY WILLS,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUZANNE BARNETT
THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	6
1. THE MISCALCULATION OF WILLS'S OFFENDER SCORE DID NOT RENDER HIS PLEA INVOLUNTARY	6
a. The Offender Score Is Not A Direct Consequence Of Pleading Guilty	9
b. Wills Fails To Establish That The Miscalculation Is Material To The Agreement	13
c. Wills Ratified The Plea Agreements.....	17
2. THIS MATTER MUST BE REMANDED FOR THE SENTENCING COURT TO RESOLVE THE DISPUTE CONCERNING WILLS'S OFFENDER SCORE	20
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Berg v. Hudesman, 115 Wn.2d 657,
801 P.2d 222 (1990)..... 13

Go2Net v. CI Host, Inc., 115 Wn. App. 73,
60 P.3d 1245 (2003)..... 13, 14

In re Personal Restraint of Breedlove,
138 Wn.2d 298, 979 P.2d 417 (1999)..... 7

In re Personal Restraint of Isadore,
151 Wn.2d 294, 88 P.3d 390 (2004)..... 8, 9

Paopao v. Dept. of Social Servs.,
145 Wn. App. 40, 185 P.3d 640 (2008)..... 15

Scott Galvanizing, Inc. v. N.W. Enviroservices, Inc.,
120 Wn.2d 573, 844 P.2d 428 (1993)..... 14

Simonson v. Fendell, 101 Wn.2d 88,
675 P.2d 1218 (1984)..... 16

Snohomish County v. Hawkins,
121 Wn. App. 505, 89 P.3d 713,
as amended on denial of recons. (2004),
review denied, 153 Wn.2d 1009 (2005)..... 17, 18

State v. Barton, 93 Wn.2d 301,
609 P.2d 1353 (1980)..... 8

State v. Codiga, 162 Wn.2d 912,
175 P.3d 1082 (2008)..... 11, 12, 13, 19, 20

State v. Conley, 121 Wn. App. 280,
87 P.3d 1221 (2004)..... 9, 13

<i>State v. Giebler</i> , 22 Wn. App. 640, 591 P.2d 465, <i>review denied</i> , 92 Wn.2d 1013 (1979).....	19
<i>State v. Lillard</i> , 122 Wn .App. 422, 93 P.3d 969 (2004), <i>review denied</i> , 154 Wn.2d 1002 (2005).....	21
<i>State v. Mendoza</i> , 157 Wn.2d 582, 141 P.3d 49 (2006).....	7, 8, 10, 11, 12, 18, 20
<i>State v. Miller</i> , 110 Wn.2d 528, 756 P.2d 122 (1988).....	8
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	21
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	7, 8
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	13
<i>State v. Wakefield</i> , 130 Wn.2d 464, 925 P.2d 183 (1996).....	7
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	7, 8, 10, 12
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	9
<i>State v. Weyrich</i> , 163 Wn.2d 554, 182 P.3d 965 (2008).....	9
<i>Ward v. Richards & Rossano, Inc., P.S.</i> , 51 Wn. App. 423, 754 P.2d 120 (1988).....	18

Statutes

Washington State:

RCW 9.94A.411 2
RCW 9.94A.441 20, 21
RCW 9.94A.510 12
RCW 9.94A.525 10
RCW 9.94A.535 3

Rules and Regulations

Washington State:

CrR 4.2..... 7
CrR 7.8..... 7

Other Authorities

RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981)..... 15

A. ISSUES PRESENTED

1. A defendant's plea is involuntary if the defendant was misinformed about a direct sentencing consequence, i.e., a fact that has a definite, immediate, and largely automatic effect on the defendant's sentencing range. Here, Wills was misinformed that his offender score was 29, when, in fact, it was 22. This misinformation, however, had no effect whatsoever on his standard range and did not result in any prejudice to him. Has Wills failed to establish that his plea was involuntary?

2. A defendant can withdraw his guilty plea based on a mutual mistake of a material term in the plea agreement. Here, Wills entered into a plea agreement where the parties made a mutual mistake about his offender score, calculating it as 29 when it should have been 22. This mistake, however, was not material because his standard range did not change and because the error was not to a basic assumption of the agreement. Is Wills precluded from withdrawing his guilty pleas?

3. A party ratifies an agreement where, after discovery of the facts that would warrant rescission, he remains silent or continues to accept the contract's benefits. Here, immediately after the court imposed Wills's sentence, Wills's counsel advised the

court of a 1986 change in the manner in which felony convictions scored that resulted in Wills having an offender score lower than what had been represented to the court. Wills objected "for the record," but did not move to withdraw his guilty pleas or ask the court to take any further action. Has Wills ratified the plea agreement?

4. RCW 9.94A.411 requires judges at sentencing to resolve any dispute in the offender score, especially if the offender score is the basis for an exceptional sentence. Here, the sentencing court left unresolved a dispute in Wills's offender score and imposed an exceptional sentence based on the multiple offender policy. Must this matter be remanded for the sentencing court to resolve the dispute in Wills's offender score?

B. STATEMENT OF THE CASE

Under King County cause number 08-1-03634-7 ("34-7") and by amended information, the State charged defendant Danny Wills with possession of stolen property in the second degree and

malicious mischief in the second degree.¹ CP 5-6. Under King County cause number 08-1-04149-9 ("49-9"), the State charged Wills with theft in the second degree and malicious mischief in the second degree. CP 1-2.

On July 7, 2008, Wills pled guilty as charged under both cause numbers. CP 7-76 (34-7); CP 7-28 (49-9); 1RP 9, 11.² During the plea colloquy, Wills acknowledged that he understood his standard range sentence for all four charges was 22-29 months. 1RP 6. Wills further acknowledged that, as part of the plea agreement, the State would recommend an exceptional sentence of 30 months on each count to be served consecutively. 1RP 6-7; CP 70 (34-7); CP 22 (49-9). Although Wills did not agree to an exceptional sentence (Wills agreed to not ask for a sentence of less than 25 months concurrent on each charge), he agreed that there were facts sufficient pursuant to RCW 9.94A.535(2)(c),³ for the

¹ Initially, the malicious mischief charge was charged as a burglary in the second degree under a separate cause number. As part of the plea negotiations, the State reduced the charge to malicious mischief in the second degree and, for simplicity, added the charge as count two under cause number 34-7. See 7/7/08RP at 3-4; CP 1, 77-78.

² The two volumes of proceedings will be referred to as 1RP (July 7, 2008-plea hearing); 2RP (August 1, 2008-sentencing hearing).

³ RCW 9.94A.535(2)(c) provides: "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

court to impose a sentence outside of his standard range. 1RP 7; 2RP 3; CP 70, 80-83 (34-7); CP 22, 30-33 (49-9).

In exchange for Wills's guilty pleas as charged, the State agreed to not file possession of stolen vehicle or robbery charges arising from Seattle Police Department incident number 2008-034134, and to not file additional charges arising out of four additional Seattle Police Department incident numbers. CP 70 (34-7); CP 22 (49-9).

The State calculated Wills's offender score as 29. CP 71-75 (34-7); CP 23-27 (49-9). However, on the Statements of Defendant on Pleas of Guilty, Wills's offender score is calculated as "9+." CP 8 (each cause number). The defense did not include Wills's offender score in its sentencing memorandum, but noted that Wills's standard range for all four charges was 22-29 months. CP 80 (34-7); CP 30 (49-9).

At sentencing, the deputy prosecutor argued, as expected, for an exceptional sentence. 2RP 3-18. The prosecutor emphasized that over Wills's long criminal career, he had amassed 29 prior felony convictions. 2RP 7. Unless the court imposed an exceptional sentence based on the multiple offender policy, the State noted that Wills would not incur a punishment for three of the

four felony convictions for which he was before the sentencing court. 2RP 17-18.

Defense counsel asked for a drug offender sentencing alternative or a standard range sentence of 25 months concurrent. 2RP 20-21; CP 80-83 (34-7); CP 30-33 (49-9).

The sentencing court imposed 25 months on each count to be served consecutively, finding that an exceptional sentence was warranted because otherwise, based on Wills's criminal history, some of the current offenses would go unpunished. 2RP 31; CP 87, 92 (34-7); CP 37, 42 (49-9).

Immediately after the court imposed Wills's sentence and the deputy prosecutor completed the proposed findings of fact and conclusions of law, Wills's counsel stated:

One of the proposed findings of fact is that Mr. Wills has an offender score of 29. . . . I disagree with the specific calculations of his offender score. Specifically, I think all of the sentences that were imposed on the same day prior to 1986 would count as one point. He would still have an offender score well in excess of 9. *But for the record, I would object to that finding.*

2RP 35-36.

Wills did not move to withdraw his plea.

The sentencing court did not resolve the dispute in Wills's offender score. Rather, the court indicated in its findings of fact and conclusions of law in support of the exceptional sentence that Wills's offender score is "at least 21 or maybe as much as 29." CP 91 (34-7); CP 54 (49-9). Irrespective of whether Wills's offender score was 21 or 29 the court unequivocally stated that it would impose the same sentence on each count. 2RP 37-38. The court said, "[A]t some point it really doesn't matter if [Wills's offender score] is 21 or 29. It is off the chart." 2RP 38.

Wills timely appeals his sentences. CP 95 (34-7); CP 45 (49-9).

C. ARGUMENT

1. THE MISCALCULATION OF WILLS'S OFFENDER SCORE DID NOT RENDER HIS PLEA INVOLUNTARY.

Wills contends that his pleas were involuntary because of the mutual mistake concerning his offender score and that he is therefore entitled to withdraw the pleas. This Court should reject Wills's claim for three reasons. First, the offender score is not a direct consequence of the pleas. Thus, misinformation about the offender score is not a manifest injustice for which Wills may

withdraw his pleas. Second, Wills cannot establish that the misinformation informed his decision to plead guilty. Finally, Wills ratified the plea agreement. For each of these reasons, Wills's claim fails.

Due process requires that a defendant's guilty plea must be knowing, intelligent and voluntary. *State v. Mendoza*, 157 Wn.2d 582, 587, 591, 141 P.3d 49 (2006). There is a strong public interest in the enforcement of plea agreements that are voluntarily and intelligently made. *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). Between the parties, plea agreements are considered and interpreted as contracts, and the parties are bound by the terms of a valid plea agreement. *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999).

Under CrR 4.2(f), a defendant must be allowed to withdraw a guilty plea if it appears that the withdrawal is necessary to correct a manifest injustice.⁴ Wills bears the burden of proving a manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). A manifest injustice exists if the plea was involuntary. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

⁴ If the motion for withdrawal is made after judgment has been entered (as technically occurred here), it shall be governed by CrR 7.8. CrR 4.2(f). CrR 7.8(b) allows for relief from judgment for, among other reasons, mistake.

A guilty plea is involuntary when a defendant is misinformed about a direct consequence of pleading guilty. *Mendoza*, 157 Wn.2d at 587-88. A direct consequence of pleading guilty is one having a definite, immediate, and largely automatic effect on the sentence. *Ross*, 129 Wn.2d at 284. If a defendant was misinformed about a direct sentencing consequence, the defendant can withdraw his guilty plea without having to show this information was material to his decision to plead guilty. *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

Misinformation concerning myriad circumstances has rendered a plea involuntary and, as a consequence, the defendant has been permitted to withdraw his guilty plea. See, e.g., *Walsh*, 143 Wn.2d at 7-8 (defendant could withdraw his guilty plea because standard range higher than stated in the plea); *Mendoza*, 157 Wn.2d at 590 (defendant could withdraw his guilty plea because standard range lower than stated in the plea); *State v. Miller*, 110 Wn.2d 528, 536-37, 756 P.2d 122 (1988) (defendant could withdraw his guilty plea because parties unaware of mandatory minimum sentence); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) (defendant could withdraw guilty plea because parties misinformed that community custody was

required); *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008) (defendant could withdraw guilty plea because parties misinformed about defendant's maximum potential sentence).

On the other hand, consequences that are not "automatically imposed" by the sentencing court, that do not "automatically enhance" the sentence, or that do "not alter the standard of punishment" are collateral. *State v. Ward*, 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994). A defendant need not be informed of all possible collateral consequences. *In re Isadore*, 151 Wn.2d at 298. However, affirmative misinformation about a collateral consequence may create a manifest injustice if the defendant materially relied on that misinformation when deciding to plead guilty, in which case, the plea should be set aside. *State v. Conley*, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004).

a. The Offender Score Is Not A Direct
Consequence Of Pleading Guilty.

Here, the State concedes that Wills's offender score was miscalculated — the State erroneously believed that it was 29,

when, in fact, it was 22.⁵ This miscalculation, however, was not a direct sentencing consequence because it had *no effect* on Wills's range of punishment. Indeed, this misinformation did not change his standard range, his maximum sentence, whether community custody would be imposed, or his legal and financial obligations. Since this did not affect his range of punishment, this was not a direct sentencing consequence. See, e.g., *Walsh*, 143 Wn.2d at 7-8; *Mendoza*, 157 Wn.2d at 590.

Relying on *Walsh* and *Mendoza*, Wills contends that the miscalculation of his offender score renders his plea involuntary, irrespective of the fact that the correct score would not have altered his standard range. See Br. of Appellant at 7-10. Wills's reliance is misplaced; *Walsh* and *Mendoza* are distinguishable.

In *Walsh* and *Mendoza*, the miscalculated offender score resulted in an incorrect standard range (whether higher or lower). *Walsh*, 143 Wn.2d at 4; *Mendoza*, 157 Wn.2d at 584-85. The court in *Mendoza* stated, "[A] guilty plea may be deemed involuntary

⁵ In 1986, the law regarding felony scoring changed. See RCW 9.94A.525(5)(a)(ii) (multiple prior convictions committed before July 1, 1986, score as one point if served concurrently). Wills has eight convictions for offenses committed before July 1, 1986. CP 71-72 (34-7); CP 25-26 (49-9). Thus, his proper offender score is 22.

when based on misinformation regarding a direct consequence on the plea, regardless of whether the *actual sentencing range* is lower or higher than anticipated." *Mendoza*, at 591 (emphasis supplied). And, "the length of the sentence is a direct consequence of pleading guilty." *Id.* at 590. Thus, the guilty pleas in *Walsh* and *Mendoza* were involuntary.

Here, however, Wills has not shown how the mere miscalculation of his offender score, without any resulting impact on the standard range of his sentence, constituted misinformation regarding a direct consequence of pleading guilty. Therefore, Wills fails to establish that his plea was involuntary.

Wills also relies on *State v. Codiga* as support for his claim that the miscalculation of his offender score rendered his plea involuntary, but the case is inapposite. See *State v. Codiga*, 162 Wn.2d 912, 175 P.3d 1082 (2008).

In *Codiga*, the parties miscalculated the defendant's offender score and concomitant standard range sentence based on the erroneous belief that two prior felonies had washed out. 162 Wn.2d at 916. The issue in the case was which party had assumed the risk that additional criminal history would be discovered that increased Codiga's standard range. *Id.* at 925. The resolution

turned on whether the mistake was factual or legal. *Id.* at 916-17, 926, 928. The supreme court stated that because it was a factual error, Codiga had assumed the risk. *Id.* at 928. The court clarified, however, that a defendant does not assume the risk of a miscalculated offender score based on a mistake as to the "legal effect" of a fully disclosed criminal history. *Id.* at 929-30.

Here, unlike in *Codiga*, the miscalculation of the offender score had no legal effect because Wills's standard range did not change. The only function of the offender score is to establish one of the two intersecting coordinates on the sentencing grid. See RCW 9.94A.510 (the offender score appears on the x-axis and the seriousness level of the crime that is being scored constitutes the y-axis). Once the offender scores 9 or more, the sentencing range remains static. Thus, whereas in *Walsh*, *Mendoza*, and *Codiga*, the corrected offender score impacted the defendant's standard range, here, it impacted nothing. As the sentencing court stated, "[A]t some point it really doesn't matter if it is 21 or 29." 2RP 38.

In sum, Wills has failed to show that his guilty pleas were involuntary and he should not be permitted to withdraw them.

b. Wills Fails To Establish That The
Miscalculation Is Material To The Agreement.

Wills next argues that this Court should allow him to withdraw his guilty plea because in the felony plea agreement, the parties agreed that

[a]n essential term of this agreement is the parties' understanding of the standard sentencing range(s) and if the parties are mistaken as to the offender score of any count, neither party is bound by any term of this agreement.

See Br. of Appellant at 6-7, citing CP 70 (34-7) and CP 22 (49-9).

This argument fails because, in order to get relief from a collateral consequence to his guilty pleas, Wills must establish that he materially relied on the miscalculated offender score when he decided to plead guilty — something Wills cannot do. See *Conley*, 121 Wn. App. at 285.

Plea agreements are contracts, and the courts will use contract principles to enter these agreements. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). A primary purpose of contract interpretation is to ascertain and give effect to the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). When interpreting a contract, Washington courts apply the context rule. *Go2Net v. CI Host, Inc.*, 115 Wn. App. 73, 83-84,

60 P.3d 1245 (2003). The context rule states that courts, when deciding the parties' intent, will "review the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective positions interpretations advocated by the parties." *Id.* at 84 (quoting *Scott Galvanizing, Inc. v. N.W. Enviroservices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993)).

Based on the entire context of the plea agreement, it is clear that it was based on an understanding of the *standard range*, and if the parties were mistaken about the standard range, either party could opt out of the agreement. The section of the plea agreement at issue starts by noting that the essential term of the agreement is — not the offender score — but the "parties' understanding of the standard sentencing range." CP 70 (34-7) and CP 22 (49-9). The following clause then focuses on the offender score as it relates to the sentencing range. CP 70 (34-7) and CP 22 (49-9). This phrase mentions the offender score only because the offender score — in almost all cases — determines the standard sentencing range. Put simply, the parties intended that the plea agreement was based on parties having the *correct sentencing range*, and they never

intended that either party could opt out of the contract if the offender score changed, but not the standard range.

Essentially, Wills seeks to withdraw his plea based on a claimed "mutual" factual mistake. See Br. of Appellant at 8. But to rescind a contract based on mutual mistake, a party needs to show that the mistake was "to a basic assumption on which the contract was made" and "has a material effect on the agreed exchange of performances." *Paopao v. Dept. of Social Servs.*, 145 Wn. App. 40, 50, 185 P.3d 640 (2008) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981)). Here, the mistake was not "to a basic assumption" of the agreement and had no material effect – or, for that matter, any effect – on the agreed exchange of performance.

The quid pro quo in this case was the State's agreement to not file myriad charges arising out of several different police incident numbers in exchange for Wills's guilty pleas to four felonies and a stipulation to the existence of a valid basis upon which the State would seek an exceptional sentence and a commitment by Wills to not ask for a sentence of less than 25 months concurrent on each charge. CP 70 (34-7) and CP 22 (49-9). Clearly, Wills's offender score was not a basic assumption on which these agreements were made.

Moreover, it is clear from the Statements of Defendant on Pleas of Guilty, the plea colloquy and the sentencing hearing that the standard ranges — not the offender score — was the material term. See CP 8 (lists the offender score as 9+ for each crime in both cause numbers). During the plea colloquy on each cause number, the judge did not even mention Wills's offender score; rather, the court inquired of Wills if he understood that the standard range for the crimes to which he was entering guilty pleas was 22 to 29 months. 1RP 6. At sentencing, Wills did not discuss his offender score; rather, he acknowledged that he was "looking at ten years," and asked for "a standard range sentence with inpatient treatment." 2RP 28.

The only argument that Wills makes regarding the materiality of the identified mistake in his offender score is that, had he known his score was a 22, "(and hence [at] a reduced risk of receiving an exceptional sentence)," he "*may have* evaluated the risks associated with taking his cases to trial very differently." Br. of Appellant at 9 (emphasis added). But this speculation was not material to the agreement at the time that the parties entered into it. See *Simonson v. Fendell*, 101 Wn.2d 88, 92, 675 P.2d 1218 (1984) (test of materiality is whether the contract would have been entered

into had the parties been aware of the mistake). Further, Wills has not explained how a score of 22 — 13 points above the sentencing grid maximum — would reduce his risk of a possible exceptional sentence. The basis for the State's recommendation was that, under the multiple offender policy, three of Wills's four current convictions would go unpunished. That rationale is just as valid whether Wills's offender score is 22 or 29. And, irrespective of the 1986 scoring changes, Wills still accumulated 29 prior felony convictions — a point made by the deputy prosecutor at sentencing. 2RP 7.

In any event, even if Wills has established that the miscalculated offender score was material to the agreement, Wills ratified the plea agreements at sentencing. Therefore, he is not entitled to withdraw his guilty pleas.

c. Wills Ratified The Plea Agreements.

A party ratifies an otherwise voidable contract if, after discovery of the facts that would warrant rescission, he remains silent or continues to accept the contract's benefits. *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510-11, 89 P.3d 713, as amended on denial of recons. (2004), review denied, 153 Wn.2d

1009 (2005). To ratify an agreement, a party must have acted voluntarily, with full knowledge of the facts. *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 433, 754 P.2d 120 (1988).

In *Mendoza*, the defendant was notified of the offender score error before sentence was imposed and he neither objected to the State's lower sentencing recommendation, nor moved to withdraw his plea as involuntary on the basis of the initial erroneous calculation. *Mendoza*, 157 Wn.2d at 585, 592. The supreme court concluded that Mendoza had waived his right to challenge the voluntariness of his plea, i.e., Mendoza ratified his plea agreement. See *id.* at 592.

Similarly, Wills has waived the right to challenge the voluntariness of his plea. Although his counsel *objected "for the record,"* Wills did not move to withdraw his plea. Moreover, it is disingenuous for Wills to suggest that he did not know that his offender score was miscalculated before the court imposed the exceptional sentence.

Immediately after imposition of the sentence, Wills's counsel brought the matter to the court's attention. 2RP 35-36. Counsel specified his objection was based on a 1986 change in the law. 2RP 36. It is therefore very unlikely that this error just came to

counsel's attention when the State presented its proposed findings of fact and conclusions of law in support of the exceptional sentence. Rather, it is more probable that counsel waited to see what sentence the court would impose and then, to demonstrate that Wills's offender score was not as high as the court believed when it imposed sentence, counsel advised the court of the error.⁶

In any event, Wills's failure to move for a withdrawal of his plea at the time that he became aware of the "mutual" mistake, constituted an election for specific performance and Wills should be estopped from withdrawing his guilty pleas. *See State v. Giebler*, 22 Wn. App. 640, 642-43, 591 P.2d 465 (when defendant became aware that State was changing its sentencing recommendation in violation of the parties' plea agreement, defendant had a duty to move to withdraw his plea or have the agreement specifically enforced; defendant's failure to object precluded him from raising the issue on appeal), *review denied*, 92 Wn.2d 1013 (1979).

Wills contends that he has preserved the right to challenge his offender score (as did the defendant in *Codiga*) because his counsel objected to the court's finding that Wills's score was 29.

⁶ Wills's offender score is not listed in defense counsel's presentence memorandum to the court. CP 80 (34-7); CP 30 (49-9).

Wills is mistaken. In *Codiga*, the defendant's counsel objected to the "*unexpectedly* high offender score and sentencing range." *Codiga*, 162 Wn.2d at 930 n.5 (emphasis supplied). In this case, as noted above, there was nothing unexpected about the sentencing discrepancy. But more significantly, Wills's failure to do anything more than object for the record is the equivalent of Mendoza's silence because Wills did not ask the court to resolve the dispute or take any action based on his objection. Thus, he has waived his right to challenge the voluntariness of his plea on appeal. See *Mendoza*, 157 Wn.2d at 592.

2. THIS MATTER MUST BE REMANDED FOR THE SENTENCING COURT TO RESOLVE THE DISPUTE CONCERNING WILLS'S OFFENDER SCORE.

Wills contends that the sentencing court erred by failing to resolve the dispute in his offender score. Br. of Appellant at 4-6.

Wills is correct.

Under RCW 9.94A.441:

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed

issues as to criminal history *shall* be decided at the sentencing hearing.

RCW 9.94A.441 (emphasis added).

Although generally a sentencing court may stop counting a defendant's prior convictions at nine, where, as here, the basis for the exceptional sentence was Wills's offender score, remand is required for a proper calculation. *State v. Lillard*, 122 Wn .App. 422, 433, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005).

In this case, the deputy prosecutor at sentencing was unaware that the law regarding felony scoring changed in 1986. 2RP 36-37. As noted in footnote 5, *supra*, Wills's proper offender score is 22. Thus, remand is necessary solely for the proper calculation of Wills's offender score.

As Wills correctly concedes, he is not entitled to resentencing because the sentencing court made clear that it would impose the same sentence irrespective of Wills's actual score. 2RP 37-38; see *also* Br. of Appellant at 5-6 (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

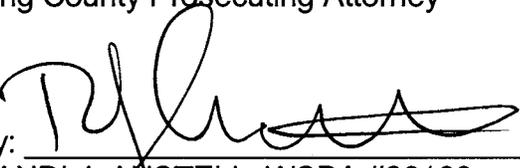
D. **CONCLUSION**

For the reasons stated above, Wills should not be permitted to challenge the voluntariness of his pleas or be allowed to move to withdraw them. However, the matter should be remanded for a resolution of the dispute in Wills's offender score.

DATED this 2 day of June, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

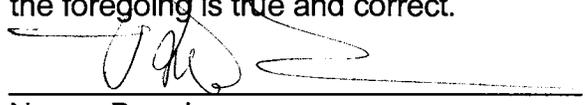
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of the Respondent, in STATE V. DANNY WILLS, Cause No. 62234-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name: Bora Ly
Done in Seattle, Washington

06/02/2009
Date