

NO. 67356-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RODNEY ALBERT SCHREIB, JR.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge
The Honorable David R. Needy, Judge

**STATE’S SUPPLEMENTAL RESPONSE TO
SUPPLEMENTAL ASSIGNMENT OF ERROR**

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ANSWER.....	1
II. ISSUES.....	3
III. STATEMENT OF FACTS REGARDING MOTION.....	3
IV. ARGUMENT	7
1. PERIOD OF COMMUNITY CUSTODY ADVISED AND ORDERED.....	7
2. STATUTORY COMMUNITY CUSTODY TERM.....	8
3. TIMELINESS OF CLAIM OF MIS-ADVICE.	9
4. BASIS FOR WITHDRAWAL OF GUILTY PLEA.....	11
V. CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON SUPREME COURT</u>	
<u>Holt v. Morris</u> , 84 Wn.2d 841, 529 P.2d 1081 (1974)	10
<u>In re Pers. Restraint of Coats</u> , 173 Wn. 2d 123, 267 P.3d 324 (2011).....	11
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	10
<u>In Re Pers. Restraint of LaChapelle</u> , 153 Wn.2d 1, 100 P.3d 805 (2004)....	10
<u>State v. Bao Sheng Zhao</u> , 157 Wn.2d 188, 137 P.3d 835 (2006)	11
<u>State v. Barton</u> , 93 Wn.2d 301, 609 P.2d 1353 (1980)	12
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006)	12
<u>State v. Miller</u> , 110 Wn.2d 528, 756 P.2d 122 (1988)	12
<u>State v. Ross</u> , 129 Wn. 2d 279, 916 P.2d 405 (1996)	12
<u>State v. Taylor</u> , 83 Wn.2d 594, 521 P.2d 699 (1974).....	12
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994)	12
<u>WASHINGTON COURT OF APPEALS</u>	
<u>In re Pers. Restraint of Matthews</u> , 128 Wn. App. 267, 115 P.3d 1043 (2005)	12
<u>In re Pers. Restraint of Quinn</u> , 154 Wn. App. 816, 226 P.3d 208 (2010).....	12
<u>In re Pers. Restraint of Stockwell</u> , 161 Wn. App. 329, 254 P.3d 899 (2011)13	13
<u>WASHINGTON STATUTES</u>	
Former RCW 9.94A.712	6
RCW 10.73.090	11, 12
RCW 9.94.850	8
RCW 9.94A.501	8
RCW 9.94A.507	6
RCW 9.94A.701	8
RCW 9.94A.712	8, 10
RCW 9.94A.850	8
<u>WASHINGTON COURT RULES</u>	
CrR 4.2	11
<u>WASHINGTON REGULATIONS</u>	
WAC 437-50.....	8

I. SUMMARY OF ANSWER

Rodney Schreib who was revoked from a SSOSA two years after sentencing filed a supplemental brief contending he was mis-advised of the community custody range in the guilty plea statement and is entitled to withdraw his guilty plea. The guilty plea statement contains information indicating both a range of 18 to 36 months and a range of 36 to 48 months. Legislation which applied retroactively subsequently set Schreib's community custody term at 36 months.

The State contends Schreib's challenge to the judgment and sentence which was valid on its face is time-barred. The error which occurred in the order modifying judgment must be corrected but does not create a facially invalid judgment and sentence.

In addition, since the guilty plea statement contained information about both ranges and because sentencing laws have changed such that Schreib's community custody now is 36 months, the advisement does not merit withdrawal of the guilty plea. As a collateral attack Schreib has also failed to establish he was prejudiced by the claimed error.

II. ISSUES

Is a judgment and sentence which is valid on its face subject to collateral attack based upon a subsequent error in an order modifying the judgment and sentence to revoke the SSOSA sentence?

After sentencing and revocation of his Special Sex Offender Sentencing Alternative, is a defendant entitled to withdrawal of his guilty plea on a basis raised for the first time on appeal where he was advised of conflicting information of the community custody range?

Where Schreib's actual community custody term would be 36 months which with both ranges of which he was advised, has he established a manifest injustice permitting the motion to withdraw the guilty plea?

In a collateral attack in a motion to withdraw a guilty plea, must a defendant establish that he was prejudiced by the claimed error?

III. STATEMENT OF FACTS REGARDING MOTION

On October 15, 2008, Rodney Schreib was charged with four counts of Child Molestation in the First Degree alleged to have occurred between May 1, 2007, and August 31, 2007. CP 1-2. Schreib was alleged to have a date of birth of October 10, 1990, and thus the offenses were alleged to have occurred when Schreib was sixteen years old. CP 1.

On March 26, 2009, Schreib pled guilty to three counts of Child Molestation in the First Degree. CP 4-12. The State agreed to dismiss count four in exchange to the pleas to the first three counts. CP 7. The State agreed to recommend a Special Sexual Offender Sentencing Alternative (SSOSA) sentence if approved by the Department of Corrections. CP 7. The guilty plea form advised Schreib in two different locations as to a period of community custody. At one location his community custody range was said to be 36 to 48 months. CP 7, section 6(f)(ii).¹ In Schreib's case a determinate-plus sentence with confinement and community custody for up to life was not available since he was under age 18 when the offenses were committed. CP 7, section 6(f)(ii). That provision reads in pertinent part:

If the period of confinement is over one year, the judge will sentence me to community custody for a period of 36 to 48 months or up to the period of earned early release, whichever is longer.

CP 7, Statement of Defendant on plea of Guilty, page 4, section 6(f)(ii). The Statement of Defendant on Plea of Guilty also had language indicating community custody was 18 to 36 months. CP 5, Statement of Defendant on Plea of Guilty at section 6(a). CP 5

On May 14, 2009, Schreib was sentenced to 98 months, but he was granted a SSOSA and the sentence was suspended. CP 17. The terms of the

¹ In Schreib's case a determinate-plus sentence with confinement and community custody for up to life was not available since he was under age 18 when the offenses were

suspended sentence required him to comply with the terms of his sex offender treatment plan. CP 18. Community custody was set for the period of the suspended sentence. CP 17-8. The State pursued a number of revocations of the SSOSA which were denied.

On May 25, 2011, Schreib filed a pro se motion to withdraw his guilty plea in the trial court citing numerous cases and court rules. CP 84-9. Schreib did not raise any issue that he was mis-advised of the community custody range. On June 1, 2011, the trial court found there was both insufficient basis for an evidentiary hearing and the motion to withdraw guilty plea was untimely. 6/1/11 RP 16-7.

After denying the motion to withdraw guilty plea, the trial court proceeded to consider the revocation of the SSOSA. 6/1/11 RP 18-68. The State called Schreib's treatment provider, the person who saw Schreib stay at a house where minor children were present, and Schreib's community corrections officer. 6/1/11 RP 19-25, 25-34, 35-46 (respectively). Schreib testified on his own behalf. 6/1/11 RP 46.53. The trial court found Schreib had unapproved contact with minors, remained overnight at a residence where minors resided and failed to disclose the contact with minors to his treatment provider or the Department of Corrections. 6/1/11 RP 63-4. The trial court also found Schreib failed to make adequate progress in treatment.

committed. CP 7, section 6(f)(ii).

6/1/11 RP 65. As a result the trial court revoked the SSOSA. 6/1/11 RP 66. Schreib contended he had been sentenced based upon the wrong guidelines, so the case was continued to address those claims. 6/1/11 RP 67.

On June 15, 2011, the case was back before the court and Schreib's counsel indicated it appeared that Schreib had been sentenced on the proper guidelines. 6/15/11 RP 3-4. The trial court entered an order modifying the judgment and sentence to revoke the SSOSA. 6/15/11 RP 5.

The order modifying the SSOSA provided Schreib's term of community custody was "for life pursuant to RCW 9.94A.507 (former RCW 9.94A.712)." CP 92.

On July 5, 2011, Schreib timely filed a notice of appeal from the revocation of the SSOSA, and filed notices of appeals from the denial of his motion to withdraw his guilty plea, denial of his motion to dismiss and denials of his motion for pro se legal access. CP 95.

Schreib's Appellant's Opening Brief contended the trial court erred in finding his motion to withdraw the guilty plea was time barred, imposed a judgment exceeding trial court's authority and he did not adequately waive his right to appointed counsel on post-judgment motions. The brief did not seek any independent basis of withdrawal of the guilty plea. The State's Respondent's Brief noted the community custody range was incorrect in the order modifying the judgment and sentence, but contended the remedy was

for correction of the range not reversal of the revocation or withdrawal of the guilty plea.

On April 4, 2012, Schreib filed a supplemental assignment of error contending he should be permitted to pursue a motion to withdraw his guilty plea based upon the mis-advisement of the correct community custody range.

IV. ARGUMENT

1. Period of community custody advised and ordered.

Schreib's supplemental assignment of error is based upon the contention he was mis-advised of the community custody range of 18 to 36 months. However, the Statement of Defendant on Plea of Guilty actually indicated both that community custody was 18 to 36 months and that it was 36 to 48 months. The State contends the more precise pre-printed language of section 6(f)(ii) details why the 36 to 48 month range applied. CP 7. As it turns out, both parties were agreeing to recommend a SSOSA if approved by the Department of Corrections with the extended resulting community custody. CP 17-8. So when the SSOSA sentence was granted, Schreib was ordered to be supervised for the period of the SSOSA. The term of community custody on the standard range sentence if Schreib was revoked from the SSOSA was not addressed in the Judgment and Sentence. CP 17-8.

Only after revocation of the SSOSA, was the term of community custody addressed in the trial court. The State acknowledged in the Respondent's Brief that given that Schreib was under 18 at the time of the offenses, the determinate plus sentence with lifetime supervision was not applicable. Respondent's Brief at pages 11-5. This correction is required.

2. Statutory community custody term.

On March 26, 2009, at the time of the guilty plea the 36 to 48 month range had been established by the sentencing guidelines committed pursuant to RCW 9.94.850, and WAC 437-50. Effective 2009, the setting of the ranges was removed from the authority of the sentencing guidelines commission. RCW 9.94A.501, RCW 9.94A.850 (Laws of 2009, ch. 28 § 17). Instead, a straight term of 36 months of community custody was set for sex offenses not subject to RCW 9.94A.712. RCW 9.94A.701(1)(a), Laws of 2009, ch. 375, § 10. This 36 month term applied retroactively to all individuals previously sentenced. Laws of 2009, ch. 375, § 9, § 10 & § 20. The effective date of this legislation was July 26, 2009. Thus, by the time of revocation of Schreib's SSOSA, he was no longer facing a community custody range but instead a straight period of 36 months of community custody. This term is within both of the terms of which Schreib was advised at the time of his guilty plea.

3. Timeliness of claim of mis-advice.

Schreib did not make any claim of inappropriate community custody range at the time of the order modifying judgment and sentence. Schreib also did not raise that the claimed mis-advice as to range should permit withdrawal of the guilty plea until the reply brief was filed.

More than a year passed from the entry of the judgment and sentence. Schreib did nothing to challenge the validity of his guilty plea. Schreib does not contend that the judgment and sentence here was invalid on its face. Instead, Schreib contends the order amending the judgment and sentence was modified by revocation of his SSOSA sentence. He contends the motion to withdraw guilty plea was within one year of that motion. Reply Brief at pages 7-8. As he indicates:

The trial court's June 15, 2011 order, imposing the previously listed prison terms, and community custody for "life," was not only in excess of its statutory authority, it was the first time the court had ever imposed a full criminal sentence, including community custody.

However there was full judgment and sentence with community custody.

The document entered on May 14, 2009, was titled "Felony Judgment and Sentence." CP 15. It finds a sentencing hearing was held and provides a sentence and order. CP 13, 15. In addition, the judgment and sentence under suspension of sentence addressed the period of community custody.

(d) SUSPENSION OF SENTENCE. The execution of this sentence is suspended; and the defendant is placed on community custody under the charge of DOC for the length of the suspended sentence, the length of the maximum term under RCW 9.94A.712, or three years, whichever is greater, and shall comply with all rules, regulations and requirements of DOC and shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. Community custody for offenses not sentenced under RCW 9.94A.712 may be extended up to the statutory maximum of the sentence....

CP 17. A previous period of community custody was set in the original judgment and sentence.

Schreib does not contend the initial judgment and sentence was not valid on its face. Schreib cites to no authority supporting the contention the subsequent order modifying a judgment and sentence to revoke a SOSSA allows challenge to the initial judgment and sentence which was valid on its face. By this contention every SSOSA revocation operates to permit a defendant to an extended period to challenge the provisions of a prior judgment and sentence and guilty plea.

“On its face” modifies “valid.” Put another way, for the petitioner to avoid the one-year time bar, he or she must show that the judgment and sentence is “facially invalid.” *E.g.*, LaChapelle, 153 Wn.2d at 6, 100 P.3d 805 (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 865–67, 50 P.3d 618 (2002)). Since at least 1947, we have not limited our review to the four corners of the judgment and sentence. *See generally* Holt, 84 Wn.2d at 843–45, 529 P.2d 1081. But we have only considered documents that reveal some fact that shows the judgment and sentence is invalid on its face

because of legal error. *See, e.g., Goodwin*, 146 Wn.2d at 866 n. 2, 872, 50 P.3d 618.

In re Pers. Restraint of Coats, 173 Wn. 2d 123, 138-39, 267 P.3d 324 (2011).

Further, the “not valid on its face” limitation of RCW 10.73.090 is not a device to make an end run around the one-year time bar for most errors, including errors at trial that affect a fair trial. We will examine limited documents to determine if an error in a judgment and sentence is “on its face” but those documents must reflect an error on the judgment and sentence

In re Pers. Restraint of Coats, 173 Wn. 2d at 144.

Here the judgment and sentence but not the order modifying the judgment and sentence was flawed. As a result, the motion to withdraw guilty plea is untimely and the remedy provided should be to fix the flaw on the order modifying judgment and sentence.

4. Basis for withdrawal of guilty plea.

The motion for withdrawal of the guilty plea in this case needs to be evaluated in the particular facts of this case. A defendant may withdraw his or her plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice,” but this is a demanding standard. CrR 4.2(f); State v. Bao Sheng Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). “Manifest injustice” requires an injustice that is “obvious, directly observable, overt, [and] not obscure.” State v. Mendoza, 157 Wn.2d 582,

586, 141 P.3d 49 (2006) (*quoting In re Pers. Restraint of Matthews*, 128 Wn. App. 267, 274, 115 P.3d 1043 (2005)). The defendant has the burden of showing that a manifest injustice has occurred. *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

A guilty plea is not knowingly made when it is based on misinformation regarding sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). A defendant need not, however, be advised of all collateral consequences of pleading guilty. *State v. Ward*, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). The distinction between collateral and direct consequences depends upon whether the consequence “ ‘represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.’ ” *Ward*, 123 Wn.2d at 512, 869 P.2d 1062 (*quoting State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). The imposition of mandatory community custody has been held to be a direct consequence of a guilty plea. *State v. Ross*, 129 Wn. 2d 279, 287, 916 P.2d 405 (1996). In *Ross*, the defendant was not advised at all of the requirement for imposition of a 12 month period of community custody. Here there was a correct statement of the period of community custody. CP 7. There was also an incorrect statement of community custody. It appeared it did not matter to Schreib since he agreed to the guilty plea.

Schreib's challenge here is a collateral attack to his guilty plea. RCW 10.73.090 (2) (specifically including motion to withdraw guilty plea

in collateral attacks). Not only must Schreib establish that he was misadvised of the period of community custody but also that he was prejudiced thereby. In re Pers. Restraint of Stockwell, 161 Wn. App. 329, 339, 254 P.3d 899 (2011) (misinformation by an incorrect statement of the statutory maximum did not establish prejudice to the defendant and there motion to withdraw guilty plea denied).

Here, Schreib will receive a 36 month period of community custody which is not a greater period of community custody of which he was advised. The State contends Schreib has established an incorrect statement of the period of community custody or that he was prejudiced thereby such that he is entitled to withdrawal of his guilty plea.

V. CONCLUSION

For the foregoing reasons, this Court should find the judgment and sentence was valid on its face, the error in the order modifying the judgment and sentence does not cause facial invalidity in the judgment and sentence causing the motion to be untimely, and that Schreib was not prejudiced. However, the court should order the case remanded to the trial court to correct the error in the order modifying judgment and sentence.

DATED this 1st day of June, 2012.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Oliver Davis, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 1st day of June, 2012


Vickie Maurer, DECLARANT