

FILED
COURT OF APPEALS
DIVISION II

No. 38025-1-II

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STATE OF WASHINGTON
BY *[Signature]*

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

GERALD WHITE III,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeff Ellis #17139
Attorney for Mr. White

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A. INTRODUCTION

In this PRP, Gerald White III (hereinafter “White”) challenges his 1989 Thurston County conviction for Robbery in the Second Degree. In its response, the State argues that White is not under any “disability” from this judgment. The State is wrong. White has outstanding legal financial obligations on this case totaling over \$13,000. Just as importantly, this conviction served as a necessary predicate for White’s current life sentence as a result of a subsequent conviction and persistent offender finding (Thurston County Case Number 96-1-00633-9)—a fact that the State concedes, but argues is legally irrelevant. Caselaw provides otherwise.

Although the State argues that White’s judgment is facially invalid, it concedes that White was not informed of the statutory limits on post-conviction relief. Thus, it is clear that White’s petition is not time barred.

White argues that he is entitled to withdraw his guilty plea because he was misinformed about his offender score and the resulting standard range. In response, the State argues that White waived any challenge to the score by stipulating to certain prior convictions. However, while a defendant can stipulate to prior convictions and thereby waive subsequent challenges to those convictions, a defendant cannot agree to certain criminal history and then enter a guilty plea based on the legally erroneous scoring of that history. In short, a guilty plea based on an erroneous calculation of criminal history is invalid.

The State has not claimed any prejudice resulting from White's choice of remedy—withdrawal of his guilty plea. Therefore, the State has not carried its initial burden. This Court should grant White's PRP and remand this case to the superior court to permit him to withdraw his plea.

B. ADDITIONAL FACTS

White has over \$13,000 in legal financial obligations outstanding on this case. *See Thurston County Clerk's LFO Summary* attached as Appendix A.

C. ARGUMENT

1. WHITE IS UNDER A RESTRAINT

RAP 16.4 (b) requires a post-conviction petitioner to be under "some" "disability" as a result of the challenged judgment. That "disability" is not limited to confinement. Here, White has a substantial outstanding financial obligation. As a result, he remains under a disability.¹

Thus, this Court does not need to reach the issue of whether the undisputed fact that this conviction was necessarily used to increase White's current sentence constitutes a separate type of restraint. However, the law fully supports that conclusion. *See In re Personal Restraint of Richardson*, 100 Wash.2d 669, 670, 675 P.2d 209 (1983) (restraint may include "a serious blot" on a person's record resulting from a conviction

even if the person has completed his or her sentence). Thus, White easily satisfies the restraint or disability requirement.

2. THE STATE DOES NOT CONTEST THE FACT THAT WHITE WAS NEVER INFORMED OF THE STATUTORY LIMITS ON POST-CONVICTION RELIEF.

White's was never informed of the time bar, a fact conceded by the State. As a result of this fact, White's PRP is not time barred, a legal result begrudgingly conceded by the State.²

Because the failure to provide notice makes this petition timely, White does not need to establish the facial invalidity of his judgment, although the judgment is clearly erroneous on its face in at least in some manner because either both the burglary and robbery convictions washed out or they both counted. In either event, the judgment contains an incorrect offender score and sentence range. *See In re Restraint of Goodwin*, 146 Wash.2d 861, 50 P.3d 618 (2002) (incorrectly calculated offender score rendered judgment facially invalid).

Once again, White need only show one exception to the time bar. This Court should accept the State's concession on the first grounds.

¹ Because White's conviction has not been vacated, he remains under additional disabilities, such as the loss of civil rights.

² The State argues that this Court should impose some arbitrary time limit—presumably less than the time elapsed between final conviction and the filing of this PRP—but does not suggest the legal basis for this new rule. The State's argument is better suited for the Legislature. Further, if the State had corrected its mistake and given White notice of the one-year limit at some point after sentencing, then White would have only had one year from the date of that notice. However, the State failed to do so.

3. WHITE'S INVALID AND INVOLUNTARY PLEA

Once again, without abandoning his additional arguments, White narrows his focus to his strongest, factually-uncontested, claim.

The parties in a criminal case cannot factually agree that certain criminal convictions exist and then either agree to or unwittingly *mis-*calculate the offender score and resulting sentence range. As the Supreme Court explained in *Goodwin*:

Accordingly, we hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

146 Wn.2d at 874 (emphasis in original). Here, the miscalculation is a legal error. Second, it is also consistent with legislative intent that criminal history be correctly determined and the corresponding sentence be imposed. For example, RCW 9.94A.421 (formerly RCW 9.94A.080) provides that the prosecution cannot agree *not* to allege prior convictions. Thus, the State cannot by a plea agreement agree to less criminal history than exists, and cannot agree to a reduced offender score in this way.

Focusing only on the information presented at the time of the plea and sentencing, it is obvious that there was a mutual legal mistake about the offender score/standard range. To explain: at the time of White's guilty plea the plea form listed his standard range as 12 months (*sic*) to 14

months, consistent with an offender score of two. During the plea colloquy, the prosecutor indicated that White was convicted in 1976 of a second-degree robbery. RP 3. He then added that White was also convicted in 1974 of burglary. *Id.* The defense attorney then added “also a weapons violation.” *Id.* Focusing only on the two fully-named felony convictions, those convictions legally add up to three points (two points for the prior robbery and one point for the burglary). Further, because both the robbery and the burglary have the same ten year “wash” periods, it is impossible for one to wash and not the other.³

The State argues that this error inured to White’s benefit—that his sentence range was lower than what was legally mandated. This distinction makes no legal difference.

A guilty plea containing a miscalculated (up or down) offender score is invalid. In *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006), the Court stated:

In determining whether the plea is constitutionally valid, we decline to engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain. Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea.

³ The State later incorrectly referred to the robbery as a first-degree offense and as a “serious violent offense.” However, on the judgment (entered only moments after the plea) the conviction was again described as a second-degree robbery.

Because it is clear (based only on the information presented at the time of White's plea) that his sentence range was legally incorrect, *Mendoza* controls. As the trial court explained: "We have to know what the points are, what counts, what doesn't count..." RP 4.

That did not happen, here—based either on the limited record at the time of the plea and sentencing or based on White's true offender score. White will note that if reconvicted he faces a longer sentence for these crimes as a result of both his true offender score and the fact that his subsequent convictions will now count as "prior criminal history."

4. WITHDRAWAL OF PLEA

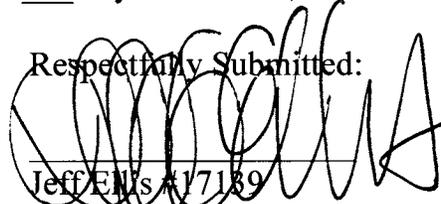
In his PRP, White indicated his intent to withdraw his guilty plea. Because the State has not met its threshold burden, this Court should remand with instructions that the trial court permit White to do so. *See State v. Turley*, 149 Wn.2d 395, 401, 69 P.3d 338 (2003) (State must make "a showing of compelling reasons" that defendant's chosen remedy is unjust in order to remand for a hearing. Otherwise, the appellate court should remand for defendant's chosen remedy).

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should vacate White's robbery conviction and remand this case to Thurston County Superior Court to permit him to withdraw his guilty plea.

DATED this 9th day of October, 2008.

Respectfully Submitted:



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Attorney for Mr. White

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Seattle, WA 98104
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Appendix A ~
Remaining Legal Financial Obligations owed to
Thurston County Clerk's Office

10/08/08 16:06:10

DG1310MI Case Financial History (CFHS) THURSTON SUPERIOR S34
Case: 891004953 S1 Csh: Pty: DEF 1
Name: WHITE, GERALD JOSEPH NmCd:

A C C O U N T I N G		S U M M A R Y	
TOTAL TRUST		TOTAL AR	
Current Bail:		AR ORDERED: Fine/Fee:	170.00
Bail Payable:		Restitution:	5,000.00
Undisbursed Fnds:	21.00	TOTAL AR ORDERED:	5,170.00
Other Trust:		ADJUSTMENTS: Fine/Fee:	
Trust Balance:	21.00	Restitution:	
Other Rev Rec:		AR ADJUSTMENTS:	
Current Bond:		INTEREST: Int Accrued:	7,902.00
Bond Payable:		Int Received:	
Disbur to Payees:		INTEREST BALANCE:	7,902.00
Bail Forfeit Rec:		RECEIVED: Fine/Fee:	
Disp Code:		Restitution:	21.00
Last Receipt Date: 11/28/2005		TOTAL AR RECEIVED:	21.00
Cln Sts: Time Pay: N		BAIL/OTHER APPLIED:	
Joint and Several Case: N		BALANCE: Fine/Fee:	430.02
Case Fund Investments: N		Restitution:	12,620.98
Obligor AR Rec: 21.00		TOTAL AR BALANCE:	13,051.00
PF Keys: AR=2 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11			
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BETTY J. GOULD
Thurston County Clerk
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

AND FOR THE COUNTY OF THURSTON

FILED

SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff, THURSTON COUNTY, WASH. NO. 89-1-495-3

vs.

Defendant

1990 SEP 24 AM 8:35

GERALD J. WHITE

THE MAJ THOMAS, CLERK

ORDER SETTING RESTITUTION AND TO DISBURSE FUNDS

This matter having come on before the undersigned judge of the above-entitled Court, and the Court being fully advised, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that restitution in the above-entitled matter is to be paid to the Clerk of the Superior Court, in the sum of \$5,000.00; it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the above-entitled Court is hereby directed to disburse said funds as they are received in the manner following

Roy E. Wallace
8552 Rocky Land SE
Olympia, WA 98503

() Joint and several liability with

DATED this 21st day of Sept, 1990

[Signature]
J U D G E

PRESENTED BY:
PATRICK D. SUTHERLAND
Prosecuting Attorney

APPROVED FOR ENTRY:

[Signature]
GARY TABOR
Deputy Prosecuting Attorney
WSBA no. 8225

[Signature]
DAN GRAF
Attorney for Defendant

MICROFILMED

PATRICK D. SUTHERLAND
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2000 LAKERIDGE DR SW
OLYMPIA, WASHINGTON 98502
(206) 796-5340

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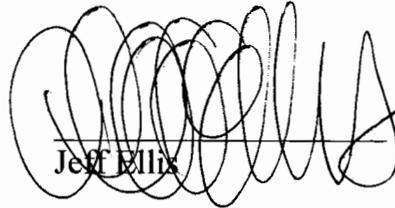
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CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on October 9, 2008, I served the party listed below with a copy of the attached *Reply in Support of PRP* by placing a copy in the mail, postage pre-paid, addressed to:

Carol LaVerne
Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney
2000 Lakeridge Dr. SW, Bld. 2
Olympia, WA 98502

10/9/08 Seattle, WA
Date and Place


Jeff Ellis

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BY  DEPUTY