

NO. 42223-9-II

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

STATE OF WASHINGTON, Respondent

v.

TERRELL EDWARD JONES, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-01093-9

RESPONSE TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

A.	RESPONSE TO CLAIM OF ERROR.....	1
I.	PETITIONER SEEKS WITHDRAWAL OF HIS PLEA, BUT HE IS NOT ENTITLED TO WITHDRAWAL OF HIS PLEA BECAUSE THE TRIAL COURT DID NOT FAIL TO ADVISE HIM OF A DIRECT CONSEQUENCE OF HIS PLEA.....	1
B.	STATEMENT OF THE CASE	1
C.	ARGUMENT.....	1
I.	THE PETITIONER IS NOT ENTITLED TO WITHDRAW HIS PLEA BECAUSE HE WAS NOT MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.....	1

TABLE OF AUTHORITIES

Cases

<i>In re Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	2, 3, 7, 8
<i>In re Pers. Restraint of Cashaw</i> , 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994).....	7, 8
<i>In re Pers. Restraint of Cook</i> , 114 Wn.2d 802, 813, 792 P.2d 506 (1990) ..	2
<i>In re Pers. Restraint of Garcia</i> , 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001)	8
<i>In re Pers. Restraint of Hagler</i> , 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).....	1
<i>In re Pers. Restraint of Hews</i> , 99 Wn.2d 80, 88, 660 P.2d 263 (1983).....	2
<i>In re Pers. Restraint of Stockwell</i> , ___ Wn.App. __, No 37238-0-II (February 17, 2011)	2
<i>In re Pers. Restraint of Williams</i> , 111 Wn.2d 353, 365, 759 P.2d 436 (1988).....	2
<i>In re PRP of Brooks</i> , 166 Wn.2d 664, 211 P.3d 1023 (2009).....	5, 6
<i>State v. Franklin</i> , No. 84545-0 (Oct. 13, 2011).....	5, 6
<i>State v. Turley</i> , 149 Wn.2d 395, 399, 69 P.3d 338 (2003)	3

Rules

RAP 16.4 (b).....	3
RAP 16.4 (c).....	3
RAP 16.7(a)(2)(i).....	2

A. RESPONSE TO CLAIM OF ERROR

- I. PETITIONER SEEKS WITHDRAWAL OF HIS PLEA, BUT HE IS NOT ENTITLED TO WITHDRAWAL OF HIS PLEA BECAUSE THE TRIAL COURT DID NOT FAIL TO ADVISE HIM OF A DIRECT CONSEQUENCE OF HIS PLEA.

B. STATEMENT OF THE CASE

Petitioner pled guilty to several felonies. In this petition, he claims that the plea to one of those crimes (felony violation of a no contact order) was involuntary. See Statement of Defendant on Plea of Guilty, attached. He claims the plea was involuntary because he was not told, prior to entering his plea, that the time he served in custody, combined with the time would spend on community custody, could not exceed the statutory maximum penalty for the offense which is 60 months. He claims that this advisement is a direct consequence of his plea. It is not.

C. ARGUMENT

- I. THE PETITIONER IS NOT ENTITLED TO WITHDRAW HIS PLEA BECAUSE HE WAS NOT MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional

error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In this case, petitioner argues that he is not required to demonstrate prejudice. He relies on *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). In *Isadore*, the Supreme Court held that where a defendant can demonstrate that he was not advised of a direct consequence of his plea he

need not show the materiality of that consequence to his decision to plead guilty in order to demonstrate that his plea was involuntary. *Isadore* at 296. The Court also held that when the voluntariness of a plea is challenged for the first time in personal restraint petition a petitioner need not meet the usual “threshold” requirements of demonstrating either constitutional error that has resulted in actual or substantial prejudice or nonconstitutional error that has resulted in a fundamental defect which inherently results in a complete miscarriage of justice when the petitioner has not had a prior opportunity for judicial review. *Isadore* at 298. In such a situation, the petitioner need only demonstrate that he is restrained under RAP 16.4 (b) and that the restraint is unlawful under RAP 16.4 (c). *Id.*

In order to avail himself of the seemingly sweeping rule of *Isadore*, Mr. Jones must first demonstrate that he was misadvised about a direct consequence of his plea.

It is well settled that the requirement to serve time on community placement or community custody is a direct consequence of a guilty plea. *Isadore* at 298; *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). “[F]ailure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty will render the plea invalid.” *Isadore* at 298, citing *Turley* at 399. Petitioner was advised that he would be placed on community custody either for a period of twelve months or

the period of earned early release, whichever is longer. This is a correct statement of the law. He was also advised that the maximum penalty for his offense is 60 months. This is also a correct statement of the law. In attempting to demonstrate that he was provided with an incorrect statement of the law, Mr. Jones misrepresents the language of the statement of defendant on plea of guilty. He claims the statement of defendant on plea of guilty told him that he would be required to remain on community custody for a term of 12 months or the period of earned early release (whichever is longer) “*even if* he was sentenced to 60 months in prison.” See Brief of Petitioner at p. 6, emphasis added. Petitioner implies that he was specifically told that he would have to serve time on community custody even if he also served the full 60 months in prison. The plea form says no such thing. See Statement of Defendant on Plea of Guilty (SDPG) at p. 5. Moreover, such a statement would make no sense. If a defendant serves 60 months in prison it would be because *there was no earned early release*. Here is what the plea form actually says:

“OFFENSE TYPE”

Crimes against persons
as defined by
RCW 9A.44.020 (2).

“COMMUNITY CUSTODY RANGE”

12 months or up to the period of earned
release, whichever is longer.

SDPG at p. 5. Mr. Jones was advised of all of the direct consequences of the plea.

Petitioner assumes that the failure to advise a defendant, prior to entering his plea, that he will be placed on community placement or custody is the legal equivalent of the failure to advise a defendant that the time he serves in custody combined with the time he spends on community custody can in no event exceed the statutory maximum for the offense. He makes this leap without argument or citation to authority; he simply assumes it to be so. Petitioner is incorrect.

There is no published authority holding that a defendant must be advised, prior to entering his plea, that the time he spends incarcerated combined with the time he spends on community custody cannot exceed the statutory maximum. In contrast, there is published authority which holds that a judgment and sentence must advise the Department of Corrections that in no event can the period of incarceration, combined with the time spent on community custody, exceed the statutory maximum penalty for the offense. See e.g., *In re PRP of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009); *State v. Franklin*, No. 84545-0 (Oct. 13, 2011). The purpose of the *Brooks* notation is to place the Department of Corrections on notice that a defendant cannot remain on community custody beyond the statutory maximum period for the offense. (“Here, Brooks’s sentence

can exceed the statutory maximum only if we add the community custody range to the term of confinement and presume both that Brooks will earn something less than 18 months of earned early release credits *and that the DOC will ignore the mandates of the SRA.*" *Brooks* at 672. emphasis added.) For example, a defendant who is sentenced to 60 months' incarceration on an offense carrying a maximum penalty of 60 months cannot be required to serve any time on community custody if he failed to earn any early release credits and actually served the full 60 months in prison. Where defendant complains that his judgment and sentence lacks a Brooks notation, the remedy is to amend the judgment and sentence to include a Brooks notation. *Brooks* at 673; *Franklin* at page 12.¹

The cases providing for a Brooks notation on a judgment and sentence to place DOC on notice that it must follow the plain language of the SRA do not hold that a defendant also must be advised, prior to entering his plea, that the DOC will be required to follow the plain language of the SRA. There is no case which holds that knowledge of the DOC's obligation to follow the law is somehow a direct consequence of a defendant's plea. Indeed, a consequence is defined by Merriam-Webster as "3.a. something produced by a cause or necessarily following from a set of conditions; 4. as a result." *Merriam-Webster OnLine*. The defendant

¹ In this case Mr. Jones does not complain about the lack of a Brooks notation on his judgment and sentence and that issue is not before this Court.

was advised that as a result of his plea, he would be placed on community custody. This is a direct consequence of his plea. That DOC must follow the law is not a direct consequence of his plea. Mr. Jones' plea did not trigger DOC's obligation to follow the law. The judge also must follow the law. So must the State and defense counsel. Mr. Jones does not need to be advised, prior to his plea, that all parties playing a role in his case must follow the law. It is axiomatic. Mr. Jones has failed to demonstrate that he was misadvised about a direct consequence of his plea.

Even if Mr. Jones had been misadvised about a direct consequence of his plea, he must also demonstrate that he has not had a prior opportunity for judicial review in order to avail himself of *Isadore's* largesse (namely, excusing him from threshold the requirement that he demonstrate either constitutional error that has resulted in actual or substantial prejudice or nonconstitutional error that has resulted in a fundamental defect which inherently results in a complete miscarriage of justice.) Mr. Jones has made no attempt to demonstrate a lack of prior opportunity for judicial review. In *Isadore*, supra, the term of community custody was added to the defendant's sentence after the time period to file a direct appeal had passed. *Isadore* at 299. He could not have discovered the error earlier than he did. Likewise, in both *In re Pers Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) and *In re Pers*,

Restraint of Garcia, 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001), the defendants challenged actions taken by the Indeterminate Sentence Review Board and the Department of Corrections, respectively, that could not have been raised in a direct appeal and therefore met that standard of not having had a prior opportunity for judicial review.

Here, Mr. Jones has changed his mind about the plea bargain he struck and wants to undo it. Nothing was changed or added to his sentence after it was imposed, unlike the petitioners in *Isadore*, *Cashaw* and *Garcia*, supra. He hasn't demonstrated that he did not have a prior opportunity for judicial review of this imagined defect in his plea, nor has he even acknowledged that he bears such a burden under *Isadore* in order to avoid the ordinary threshold requirements of gaining relief through personal restraint. Stated another way, Mr. Jones must demonstrate prejudice.

Mr. Jones has not attempted to demonstrate prejudice in this personal restraint petition. Indeed, how could he? How is he prejudiced by this "consequence," namely that the DOC must follow the law, and must not require him to serve any time on community custody once the statutory maximum has been reached, either through incarceration alone or through a combination of incarceration and community custody? Note that this is not an argument about materiality--it is about prejudice. Mr. Jones

is not worried that DOC will require him to serve time on community custody past the 60 month cut-off. He is not worried that he will actually be prejudiced by any action of the DOC. If he was, he would be arguing in this petition that it was error for the trial court not to include a Brooks notation on his J&S and asking for remand so that a Brooks notation can be added to his J&S. He is not concerned at all with prejudice. Instead, he is arguing that the lack of a Brooks advisement to DOC, *in his plea form*, rendered his plea involuntary. As argued above, this argument is specious and wholly unsupported by any citation to authority.

Mr. Jones' personal restraint petition should be dismissed.

DATED this 27 day of November, 2011.

Respectfully submitted:

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Transmittal Letter

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Case Name: In re Personal Restraint of Jones

Court of Appeals Case Number: 42223-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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