

No. 46773-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Schmitt,

Appellant.

Pierce County Superior Court Cause No. 13-1-04668-9

The Honorable Judge John Hickman

Appellant's Reply Brief

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ARGUMENT

I. MR. SCHMITT MUST BE ALLOWED TO WITHDRAW HIS GUILTY PLEAS BECAUSE THEY WERE ENTERED IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

Mr. Schmitt pled guilty based on two errors. The parties mistakenly believed that he faced life without parole on his original charge. CP 3, 15, 30. In addition, the parties miscalculated his offender scores and standard ranges for the offenses to which he pled guilty. RP 3-4, 10, 16, 26-27; CP 3, 21, 30-31.

Both errors stemmed from a misunderstanding of the law regarding the wash-out period described in RCW 9.94A.525(2)(b) and (c).¹ The parties' misunderstanding resulted in the erroneous inclusion of Mr. Schmitt's 1996 robbery and two class C felonies in his offender scores.²

Mr. Schmitt must be permitted to withdraw his guilty pleas. He was induced to plead guilty based on misinformation³ and thus should be granted relief under *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001).

¹ Specifically, the record does not show that anyone realized Mr. Schmitt was "in the community" even while confined. See *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010). Following release on the robbery, he spent time in confinement, but not "pursuant to a felony" conviction. *Id.*, at 822, 826.

² These offenses washed out because Mr. Schmitt was "in the community" for a period longer than ten years "without committing any crime that subsequently result[ed] in a conviction." RCW 9.94A.525(2)(b) and (c). This is so even though he was confined for much of the time, since he was not confined "pursuant to a felony conviction." RCW 9.94A.525(2)(b) and (c); see *Ervin*, 169 Wn.2d 815.

³ The erroneous belief that he faced a persistent offender sentence on the original charge.

In addition, the record does not affirmatively demonstrate that he understood the direct consequences of his pleas, because the parties and the court miscalculated his offender scores and standard ranges. *See In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004).

Respondent's arguments reflect a misunderstanding of the applicable standards. Without citation to authority,⁴ the state argues that Mr. Schmitt's argument "would carry more weight if he had been sentenced to a standard range sentence." Brief of Respondent, p. 11.

Respondent appears to be making a materiality argument. But a defendant need not show that any misinformation was material to the plea. *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009); *Isadore*, 151 Wn.2d at 296. Furthermore, Respondent's unsupported argument does not address Mr. Schmitt's claim that his guilty pleas and stipulation to the 30-year exceptional sentence were induced by a misunderstanding regarding the original charge. *See* Appellant's Opening Brief, pp. 5-9.

Respondent also misconstrues Mr. Schmitt's argument relating to *Ervin*.⁵ In his direct appeal, Mr. Schmitt does not claim that his federal

⁴ Where no authority is cited, this court should assume that counsel has found none after diligent search. *Burke v. Hill*, No. 71500-3-I, 2015 WL 6679548, at *10 (Wash. Ct. App. Nov. 2, 2015).

⁵ Respondent's error may stem from its unclear attempts to respond to both the PRP and the Opening Brief with a single response brief. Mr. Schmitt does not cite to *Ervin* in his PRP; thus appellate counsel assumes Respondent is attempting to address the arguments raised on direct appeal.

bank robbery conviction has no effect on the washout of his 1996 robbery and the two prior class C felonies. *See* Brief of Respondent, pp. 15-16.

Even if the federal bank robbery conviction resets the washout period (as Respondent suggests), Mr. Schmitt spent more than ten years “in the community” following that conviction. Under *Ervin*, the time he spent in prison on the federal charge was not time spent in confinement “pursuant to a felony” conviction. *Ervin*, 169 Wn.2d at 822, 826.

Respondent’s argument that federal bank robbery qualifies as a “crime” is irrelevant to Mr. Schmitt’s argument regarding *Ervin*. *See* Brief of Respondent, pp. 15-16.⁶

Respondent does not argue that Mr. Schmitt’s confinement for the federal bank robbery qualifies as confinement “pursuant to a felony conviction” under RCW 9.94A.525(2)(b) or (c). This failure can be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Finally, Respondent misrepresents the record on direct appeal. According to Respondent, Mr. Schmitt “was aware of the offender score argument that he makes here.” Brief of Respondent, p. 4. This is incorrect. The trial court record shows that the parties had identified a

⁶ The argument may be relevant to Mr. Schmitt’s PRP. However, as noted, Mr. Schmitt does not rely on *Ervin* in his PRP.

different dispute regarding the offender score. This other dispute related solely to the inclusion of Mr. Schmitt's federal bank robbery conviction; it did not relate to the washout of the 1996 robbery or the two class C felonies. RP 6-25. Nothing in the record suggests that defense counsel contemplated the possibility that these offenses might wash out if the court ruled in favor of the defense on the federal bank robbery charge.

Respondent asks the court to "accept as true that the defendant knew about the washout argument before he elected to plead guilty." Brief of Respondent, p. 6. This apparently stems from the declarations Mr. Schmitt filed in connection with his PRP. However, on direct appeal, an appellate court "cannot consider matters outside the record." *State v. Curtiss*, 161 Wn. App. 673, 703, 250 P.3d 496 (2011). Mr. Schmitt's declarations have no bearing on his direct appeal. *Id.*

Mr. Schmitt was induced to plead guilty and stipulate to a 30-year sentence based on the mistaken belief that he faced a persistent offender sentence if convicted on his original charges. Furthermore, the record of the plea hearing does not affirmatively show that he had a correct understanding of his offender scores and standard ranges. The offender score dispute identified for the trial judge did not take into account the fact that his 1996 robbery and two class C felonies washed out of his offender

score while he was serving time on a federal offense that did not qualify as a felony under Washington law.

Accordingly, Mr. Schmitt must be allowed to withdraw his guilty pleas. *Walsh*, 143 Wn.2d at 8-9; *Isadore*, 151 Wn.2d at 296.

II. MR. SCHMITT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS.

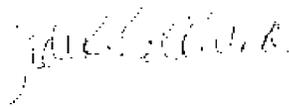
Mr. Schmitt rests on the argument set forth in his Opening Brief.

CONCLUSION

For the foregoing reasons, Mr. Schmitt must be allowed to withdraw his guilty pleas.

Respectfully submitted on November 13, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

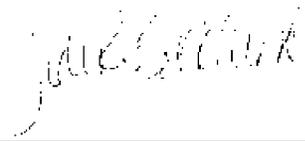
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 13, 2015.



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