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COURT OF APPEALS
DIVISION ONE

AUG 28 2007

No. 59970-4

81522-4

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

STEVEN J. CLARK,

PETITIONER.

REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2007 AUG 28 PM 3:29

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TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	FACTS	3
C.	ARGUMENT	3
D.	CONCLUSION	10

A. INTRODUCTION

Steven Clark argues that his *Judgment* is facially invalid because it includes community placement for a second-degree robbery conviction when, at the time of the conviction and sentence, community placement was not statutorily authorized. This facial invalidity reveals an underlying constitutional infirmity: Clark's plea was involuntary because he was misinformed about one of the direct consequences of that plea.

In response, the State argues that the facial invalidity no longer exists because it was cured by a later order. However, what the State fails to acknowledge is that the order amending the sentence was signed at an *ex parte* hearing without notice to Clark or his former counsel—an order not even served on Clark after the hearing. That order, which fails to comply with the most rudimentary concept of due process, is void.

The State then argues that the misinformation in the plea form, which is repeated in the *Judgment*, is not “material.” According to the supposition of the State, even if properly informed, Clark still would have pled guilty. Not only does this argument find no factual support, the State's invitation to now determine Clark's state-of-mind at the time of the plea is completely contrary to *In re Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004), and *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 149 (2006),

which expressly reject any post-hoc factual inquiry into the subjective state of mind of the defendant.

The State then attempts to distinguish these cases by arguing that Clark's failure to speedily file a *pro se* motion to vacate is legally equivalent to the *Mendoza* exception, where the court held that a defendant waives his right to later challenge a material mistake in his guilty plea when *prior to sentencing* he and counsel are informed of the options of specific performance or withdrawal and where the defendant then expressly rejects withdrawal as a remedy. *Mendoza* further holds that no waiver exists where a defendant "was not advised of the [material misinformation in the plea] or the available remedies until *after he was sentenced*." 157 Wn.2d at 591; *citing State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001) (emphasis added).

Here, it is undisputed that Clark was not informed of the misinformation in the plea form and offered the opportunity to withdraw his plea prior to his sentencing. Thus, Clark has conclusively established that the misinformation in his plea was material.

Because the *ex parte* order is void, the *Judgment* in this case remains facially invalid and Clark's plea involuntary.

B. FACTS

In response to the factual claims raised by the State in its *Response*, Mr. Clark's declaration, which describes his lack of notice, is attached as Appendix A to this *Reply*. In addition, counsel has further located a letter (contained in Clark's central file, but never served on Clark), written to the sentencing judge by a Department of Corrections "Records Manager" explaining that community placement was not authorized in Clark's case. This letter precedes the court order by several days. *See* Appendix B.

C. ARGUMENT

The State does not appear to contest that Clark's original *Judgment* is facially invalid. Instead, the State argues that the March 12, 1998 *Order Modifying Judgment and Sentence* removes that invalidity. What the State fails to acknowledge is that the March 12th order is void.

The March 12th Order is Void Because It Fails to Comply with Due Process

The State completely fails to note that the March 12th order was obtained at an *ex parte* hearing without notice to defendant or his former counsel. *Response*, p. 2 (stating that the order was entered two weeks after sentencing and then noting that Clark did not appeal, but failing to make any mention of the State's utter disregard for due process in obtaining the order).

It is a long-standing and universal rule that motions must be made on notice, and orders should not be issued on an *ex parte* basis. The only instances where a party should attempt to move *ex parte* are where the other party has explicitly agreed to an order or when a statute or rule explicitly authorizes such a motion. Somehow, the State (and its attorney) overlooked these basic requirements when it modified Clark's sentence.

Caselaw supporting Clark's position that the order in this case is void is well founded. Notice and an opportunity to be heard are the cornerstones of due process. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571(2006). In *State v. O'Neal*, 147 Wash. 169, 171-72, 265 P. 175 (1928), *reversed on other grounds in Mempa v. Rhay*, 68 Wn.2d 882, 890, 416 P.2d 104 (1966), the Washington Supreme Court reversed the entry of an *ex parte* order revoking a suspended sentence stating: "Instinctively one feels that he is entitled to be heard whenever the court takes testimony intended to establish an order or judgment detrimental to a substantial right of his, and that to enter such an order without notice is to disregard a principle as old as the law itself."

In *State v. Edelman*, 97 Wn. App. 161, 984 P.2d 421(1999), the issue was whether a restitution obligation could be modified to reflect payment to a victim's estate after his death. However, this Court's opinion starts with the simple and apparently unquestioned proposition, set forth initially by

the trial court, that an *ex parte* order amending the *Judgment* was void (“The trial court dismissed the State's motion for sanctions, ruling that the *ex parte* order was invalid because Edelman was not present when it was entered and had received no notice of the hearing, in violation of her right to due process.”).

However, the State’s utter disregard for due process is not the March 12th order’s only constitutional infirmity. In addition to not being given notice or an opportunity to appear, it axiomatically follows that Clark was also not provided with counsel in order to assist in responding to this motion. Thus, the order amending the *Judgment* does not bear the signature, nor does it reflect that Clark had counsel—an omission which constitutes a separate facial invalidity. *See Custis v. United States*, 511 U.S. 485, 496-97, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994); *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986).

It should be unquestionable that Clark was entitled to notice, an opportunity to be heard, and counsel at the hearing on the motion to modify the judgment. As the State implicitly acknowledges in its *Response*, the State’s suggested (and obtained) remedy was not the only option--Clark could have sought to withdraw his plea. However, the prosecutor, DOC, and the Court all failed to provide Clark with notice, inform him of his options, or give him with an opportunity to be heard.

Thus, the order modifying the *Judgment* is void.

This Court Cannot Now Speculate What Clark Would Have Done If Properly Informed of the Consequences of His Plea

The State next argues that Clark would not have sought to withdraw his plea, even if he had been afforded due process and provided with counsel. The State argues: “It is clear that the advisement regarding community placement was not material to Clark’s decision to plead guilty.” *Response*, p. 7. Thus, the State invites this Court to inquire into Clark’s subjective state of mind and dismiss his petition.

This approach was explicitly rejected by the Washington Supreme Court in *In re Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004), where the Court held:

We decline to adopt an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant’s subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision. If the test is limited to an assertion of materiality by the defendant, it is of no consequence as any defendant could make that after-the-fact claim.

Rather, we adhere to the analytical framework applied in *Ross and Walsh*. In this case, it is undisputed that when the trial court asked about community placement, the prosecutor responded that community placement did not apply. It is undisputed that community placement was not indicated on the plea form. Defendant Isadore was not informed of this direct consequence of his plea. Therefore, under *Ross and Walsh*, Isadore’s plea was not intelligent or voluntary. Isadore’s plea is invalid and his restraint unlawful.

This analysis was recently reaffirmed in *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006), where the Court reaffirmed its earlier

decision not to adopt an analysis that focuses on the materiality of the sentencing consequence to the defendant's subjective decision to plead guilty. The Court continued:

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.

Id. at 590-91.

Thus, while the State is free to characterize Clark's claim as "patently absurd" (*Response*, p. 9), it is the State's argument that is clearly contrary to the law.

In addition, the State argues that a plea is not involuntary where a defendant is advised of "all of the punishment that was statutorily authorized." *Response*, p. 8. However, Clark was not simply advised of the statutorily authorized punishment. He was misadvised that certain punishment was mandatory when, in fact, it was not statutorily authorized.

A knowing, voluntary, and intelligent guilty plea requires a meeting of the minds. Misinformation regarding a direct consequence of a plea renders the plea involuntary. *Mendoza*, 157 Wn.2d at 590. Community placement is a direct consequence of a plea. It is irrelevant whether a

defendant is given too much or too little information or whether the actual sentencing consequences or more or less onerous than stated in the plea.

Id. “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.” *Id.* at 591.

A Defendant Waives His Right to Withdraw a Plea Based on a Material Consequence Only When Offered an Opportunity to Withdraw His Plea Prior to Sentencing.

The State’s last ditch effort is to argue that this case fits within the narrow and precisely defined exception in *Mendoza*. The State argues that Clark’s failure to move to withdraw his plea *after* he was sentenced and *after* he must have necessarily learned that he was not on community placement demonstrates the lack of materiality of the mistake. *Response*, p. 8-9.

The State’s argument is completely and definitively rebutted in *Mendoza*, which holds that “when the defendant is informed of the less onerous standard range *before* he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea.” 157 Wn.2d at 591 (emphasis added). The Court continued:

Here, the State informed the sentencing court and *Mendoza* that his offender score was erroneously calculated in the plea agreement. The prosecutor explained that in researching *Mendoza*'s prior convictions for the presentence report, the State realized that one of *Mendoza*'s convictions should have counted in his offender score as

a juvenile felony offense. After being advised of the mistake, Mendoza did not object to the State's lower sentence recommendation. And, although Mendoza sought to withdraw his plea for other reasons, he did not mention the corrected standard range as one of his concerns. Because Mendoza did not object to sentencing or move to withdraw his plea as involuntary and because his lower sentence is statutorily authorized, we conclude that Mendoza waived his right to challenge the voluntariness of his guilty plea.

Id. at 592. *Mendoza* then distinguishes *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), “where the defendant was not informed of the mistake before sentencing.” *Id.* Thus, a defendant does not waive his challenge to the plea “where he was not advised of the miscalculated offender score or the available remedies until *after* he was sentenced.” *Mendoza*, 157 Wn.2d at 591; *Walsh*, 143 Wn.2d at 7.

Here, it is not contested that Clark was not advised of error or the available remedies before sentencing. Thus, Clark does not fall into the *Mendoza* exception. However, it is important to further note that Clark was not given an opportunity to withdraw his plea when the State sought to modify the *Judgment*. In addition, Clark was not given counsel to explain his options, although it would have been easy to notify his counsel at the time of the plea and sentencing and to set a hearing.

The *Mendoza* exception does not apply in this case. Here, there was an obvious and uncorrected (at the time of sentencing) mutual mistake about community placement which renders Clark’s plea involuntary.

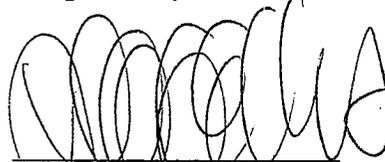
D. CONCLUSION

Based on the above, this Court should vacate Clark's robbery convictions and remand this case to King County Superior Court to permit him to withdraw his guilty pleas.

If this Court determines that material and disputed facts exist, this Court should remand this case to the Superior Court for an evidentiary hearing. RAP 16.11(b).

DATED this 28th day of August, 2007.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Jeff Ellis", written over a horizontal line.

Jeff Ellis #17139

Attorney for Mr. Clark

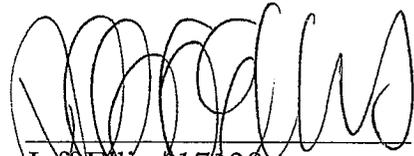
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CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on August 28, 2007, I mailed a copy of the attached *Reply Brief* to counsel for Respondent by placing it in the mail addressed to:

Ann Summers
Senior Deputy Prosecuting Attorney
W554 King County Courthouse
516 Third Ave.
Seattle, WA 98104

8/28/07 Seattle, WA
Date and Place


Jeff Ellis #17139

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APPENDIX A

DECLARATION OF STEVEN CLARK

I, Steven Clark, declare:

S.C. (1)

I am over 18 years old and competent to make this declaration.

S.C. (2)

I am the Petitioner in this PRP which attacks my *Judgment* in King County Case No. 97-1-09348-8 SEA.

S.C. (3)

When I pled guilty in that case I was told, after I finished my sentence, I would have to do at least one year of community placement. I was told this by my attorney and then again by the judge who took my guilty plea.

S.C. (4)

When I was sentenced, the judge ordered me to serve a term of community placement.

S.C. (5)

I was not present and had no knowledge of the hearing on March 12, 1998, when the court entered an order modifying my *Judgment*. I did not receive notice prior to that date that any legal proceedings were taking place. I was not given an opportunity to consult with counsel.

S.C. (6)

In addition, I ~~do not remember receiving~~ ^{did not receive} a copy of the order modifying my *Judgment* until just prior to the time that I filed this PRP. ~~To the best of my knowledge,~~ ^{S.C.} my current attorney was the first person to discuss that order with me and provide me with a copy of it.

S.C. (7)

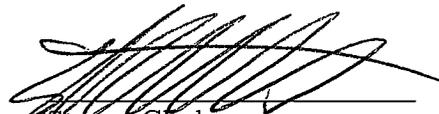
I never sought or agreed to modify my *Judgment*.

S.C. (8)

I do not seek specific performance of my plea agreement. Instead, I wish to withdraw my plea.

I declare under the penalty of perjury that the above is true and correct.

8-22-'07
Date and Place


Steven Clark

APPENDIX B



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

WASHINGTON CORRECTIONS CENTER
P.O. Box 900 • Shelton, Washington 98584

March 6, 1998

Honorable Anthony Wartnik
King County Superior Court
516 Third Ave.
Seattle, WA 98104

RE: CLARK, Steven J.
DOC#927696
CSE#97-1-09348-8

Dear Judge Wartnik:

RCW 9.94A.120(9)(a)(b) states, "Community Placement is to be ordered for offenses categorized as a sex offense, a serious violent offense, assault in the second degree, assault of a child in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under Chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988. The above named inmate does not appear to meet that criteria.

We would appreciate clarification on this matter. Thank you very much for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Wendy Stigall".

Wendy Stigall
Correctional Records Manager 2

Enclosures

cc: Prosecuting Attorney
Central File