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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

83444-0

No. 27120-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

CHUCCO ROBINSON, RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY
HONORABLE ELLEN K. CLARK

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

- A. Respondent acknowledges each of Appellant's assignments of error to the trial court's Findings of Fact 4,11, 12,13,14, and Conclusions of Law 1, 3 and 4, but respectfully disagrees they were entered in error.

II. ISSUES

- D. Whether the trial court committed reversible error by granting Respondent's motion to withdraw his guilty plea under the facts as presented in the record of this case?

III. STATEMENT OF THE CASE

In a 1994, at the age of seventeen, Chucco Robinson was sentenced on a plea to second degree murder in King County, Washington. CP 60, CP 63. At the time of that sentencing he was told that none of his juvenile convictions counted in his offender score because he was under fifteen years old at the time of those convictions. CP 63. It was his understanding, which was confirmed by his research and discussions when he was incarcerated on that sentence, that those convictions had "washed", meaning they would never be used against him again. CP 64. That 1994,

sentencing was the last time prior to the plea subject of this appeal that Mr. Robinson had appeared in Superior Court. CP 40, RP 17.

On June 22, 2007, Mr. Robinson was arrested on an alleged burglary charge. CP 3. On February 20, 2008, Mr. Robinson entered a guilty plea to a substitute information charging First Degree Burglary and Rape in the Third Degree. RP 3. The standard range sentence discussed in both the Statement of Defendant on Plea of Guilty, CP 12, and the colloquy with the Court, RP 5, was 31 to 41 months. In the Statement of Defendant on Plea of Guilty, as signed by the deputy prosecuting attorney for the State, the recommendation for the sentence was to be 31 months. CP 15, 18. The trial court, relying on this document, told Mr. Robinson that the sentencing recommendation would be 31 months prior to accepting the plea. RP 7. The court found a factual basis for the plea to the First Degree Burglary in the aforementioned Statement of Facts, and Mr. Robinson entered an In Re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), plea to the Rape in the Third Degree. CP 18, RP 11-12. The allegations in the police Statement of Facts cited by the State as fact were never proven or stipulated in either a hearing or trial. CP 18, RP 11-12.

Apparently, at no time during the prosecution of this case did any juvenile or adult convictions prior to the 1994, sentencing appear on Mr.

Robinson's criminal history when checked by either pre-trial services or the State. There is no other criminal history included on either the First Appearance Evaluation undertaken on June 28, 2007, CP 57-58, or the Understanding of Defendant's Criminal History file by the State at the guilty plea on February 20, 2008. CP 60-61. There is no dispute, however, that any convictions at issue were all in Washington State courts, and were apparently subsequently discovered by the community corrections officer (CCO) after resort to the typical sources of criminal history readily available to all law enforcement agencies: NCIC, WASIS, DISCIS and SCOMIS. None of these sources is available to defense counsel except through State and municipal sources. It is unknown at this point how or why additional Washington State felony criminal history eluded the State in its calculation of Mr. Robinson's offender score prior to the plea, but the State appeared at the motion to withdraw the guilty plea / would be sentencing hearing with certified copies of all the juvenile convictions at issue, and argued unflinchingly to sentence Mr. Robinson to 87 to 116, months on the Burglary and 31 to 41, months on the Third Degree Rape. RP 25. As further discussed elsewhere, this was contrary to all indications and negotiations with respect to standard range that occurred prior to the guilty plea.

Mr. Robinson had no intention of hiding any prior convictions from any court. CP 64. He freely discussed the prior juvenile convictions at issue with the CCO conducting the pre-sentence investigation because, based on his prior instructions on the subject, he truly believed they were not a factor in his sentence. CP 64. This belief was no doubt bolstered by the absence of those juvenile convictions from discussions regarding his first appearance, CP 57, and by the State's not making use of them as part of any Understanding of Defendant's Criminal History. CP 60.

Negotiations in this case revolved completely around the sentencing range. CP 67. Through long discussions, counsel for the State and the Defense came up with the combination of charges, including the Barr, supra, plea on the third degree rape, with the specific intent of getting Mr. Robinson into a sentencing range that was acceptable to all parties involved. CP 67-68. Thirty-one to forty-one months was arrived at in negotiations by adjusting the charges to specifically to require that amount of time in the sentence. CP 67-68. That intent is readily apparent by the plea to a rape in the third degree where no rape was ever alleged in the facts of the case. CP 68. Mr. Robinson pled guilty to this combination of charges specifically because of the agreed upon sentencing range. CP 68. He would not have entered the guilty plea had the agreed sentencing

recommendation not have been specifically thirty-one to forty-one, months in custody. CP 64.

A hearing on Mr. Robinson's motion to withdraw his guilty plea was conducted on May 2, 2008. RP 14-31. After considering all of the evidence and argument submitted by both the State and the defense, the trial court granted the motion to withdraw the guilty plea because, under the facts as presented in this case, Mr. Robinson reasonably believed that the juvenile offences in question were no longer a part of his criminal history, or had washed, and that belief was a mistake as to the applicable law. CP 36, RP 28-29. Significant under these facts in both the court's oral ruling and the Finding of Fact was that the State, itself, submitted a criminal history that did not include convictions at issue. CP 40, RP 28. Because of his mistaken belief as to the law, and the significantly higher sentencing range with the juvenile offences included, Mr. Robinson had not made the plea knowing, voluntarily and intelligently. CP 41. Detailed Findings of Fact and Conclusions of Law were prepared by the Court. CP 38-41.

IV. ARGUMENT

A. Standard of Review.

The trial court's ruling on a motion to withdraw a guilty plea is reviewed on an abuse of discretion standard. State v. Smith, 137 Wn. App. 431, 436, 153 P.3d 898 (2007). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. Id. 437. The trial court's ruling in this case was manifestly reasonable given the facts of this case.

B. State's Referral to Facts as Set Forth in the State's Trial Court Brief and Sentencing Memorandums as Clerk's Papers is Improper.

On pages 5 and 6, of the Brief of Appellant the State refers to several unsworn and uncertified statements of the deputy prosecuting attorney assigned to this case in the trial court as fact. Those statements were contained in the State's briefing and memorandum statement of facts. Those facts are not stipulated to or acknowledged as accurate by the Respondent, and the information conveyed should be stricken from consideration.

C. Respondent Reasonably Believed the Juvenile Convictions at Issue Were Not a Part of His Countable Criminal History.

The State has argued throughout this case that Mr. Robinson knew about the juvenile convictions at issue and the simple fact that he did not disclose them is dispositive. It alleges that Mr. Robinson obviously would have known, pursuant to his own research and discussion with inmates at some point while he was in prison, about the “Herculean” struggle between the Supreme Court and the Legislature that, ultimately, decided the law with respect to what juvenile offences count as criminal history for subsequent sentencing purposes. The State would have this Court find that it is unreasonable to believe that Mr. Robinson was unaware that his previously “washed” juvenile offences had been revived to count in a sentencing taking place fourteen years later. In spite of the multiple changes in the law in the intervening years. Finally, the State goes so far as to call Mr. Robinson’s claim that he did not know the prior washed offences were part of his countable criminal history disingenuous. These arguments by the State are without basis in the record of this case.

1. Countable Juvenile Criminal History has Changed Radically Since 1994.

At the time of Mr. Robinson's sentencing in 1994, the then applicable offender score statute, RCW 9.94A.030, was written such that the Washington Supreme Court interpreted it to not allow any juvenile offense committed while under fifteen years old to be counted in calculating an offender score. State v. Smith, 144 Wn.2d 665, 671, 30 P.2d 1245 (2001). As is well known amongst criminal practitioners, the decision in Smith, supra, set off a heated battle between the Supreme Court and the State Legislature that is discussed at length in Personal Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004). Essentially, what happened between Smith in 2001, and LaChapelle in 2004, was that the Legislature amended the offender score statute multiple times in an effort to respond to repeated decisions by the Court that refused to count certain juvenile offences in the offender score. LaChapelle, supra, 6-11. The Supreme Court repeatedly held to principle by declining to "... revive previously washed out criminal history to retroactively revive previously washed out convictions". Id. 11. Finally, by the amendment in 2002, the Legislature closed all avenues of dissent on the issue, and the Court was forced to conclude that "... offenders have no vested right in prior wash

out provisions, and . . . are subject to the “criminal history” statute in effect at the time of the offense”. Id. 13.

The current criminal history statute, RCW 9.94A.525(2)(f), and (21), clearly state that all juvenile offences count in offender score, and it makes no difference whether the prior conviction was included in the calculation of a prior offender score. State v. McDougall, 132 Wn. App. 609, 614, 132 P.3d 786 (2006). The legislature’s victory was belated, but complete.

The confusion inherent in the juvenile offences and offender score battle of the branches of government is apparent by reviewing LaChapelle, supra. According to the only record in this case, Mr. Robinson was acting on actual knowledge when he believed that the juvenile offences in his past had washed. According to all accounts, this belief was well founded because of the “Herculean” struggle that had took place over years. This issue was complicated by all accounts. It was really a two fold question: 1) whether the juvenile offences washed, and 2) whether juvenile offences that had previously washed could be used in a subsequent sentencing. It was, and is, confusing to practitioners, and Mr. Robinson had spent the entire time he was in custody thinking the juvenile offences had washed pursuant to all indications from the 1994, plea and sentencing. Prior to the

battle of offender scores, and a good part of the way into it, he would have been correct. He just never knew the playing field had been completely revised by the Legislature during his incarceration. He acted in this case on that mistaken knowledge.

This mistake as to the applicable law was compounded by the actions of the various State and county entities in providing incorrect criminal history at all stages of the prosecution right up to the guilty plea hearing. No State actor ever did or provided anything that was contrary to Mr. Robinson's mistaken belief. In fact, everything that was provided to Mr. Robinson regarding his criminal history contributed to his conception that only the 1994, conviction was on his record.

For the State to argue that Mr. Robinson's mistaken belief as to the law is not credible or disingenuous is to blatantly ignore the unique facts in this case. Mr. Robinson was last sentenced in 1994. He was seventeen years old. He was incarcerated from the time he was sixteen years old. His juvenile offences were not counted when he was sentenced in 1994, in King County. His juvenile offences would not have counted as criminal history according to the law as interpreted by the Supreme Court prior to 2002. The most significant aspect of this fact is that previously washed criminal history could not have been revived for use in a subsequent

offended score calculation prior to 2002. Mr. Robinson had a completely understandable belief as to the law regarding countable criminal history, and to for the State to infer that he is either lying or manipulating his criminal history to gain the “benefit of the bargain” is not supported by the law or facts as established in the record of this case.

The facts in this case, as well as the documented changes in the law between 1994, and 2008, more that adequately attest to the reasonableness of the trial court’s ruling and Findings of Fact and Conclusions of Law.

2. A Guilty Plea That Results in a Sentence that is Longer than the Agreed Upon Sentencing Range is not Knowing, Voluntary or Intelligently Entered if it is the Product of a Legal Mistake.

CrR 4.2(d), and (f), govern the acceptance and withdraw of guilty pleas in the trial court.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the **consequences of the plea**. The Court shall not enter a judgement upon a plea of guilty unless it is satisfied there is a factual basis for

the plea.

(f) Withdrawal of Plea. The court **shall** allow a defendant to withdraw the defendant's plea **whenever** it appears that the withdrawal is necessary to correct a manifest injustice.

(Emphasis added)

A guilty plea that does not comply with the specific requirements of CrR 4.2, denies the defendant due process. In Re Pers. Restraint of Isadore, 151 Wn. 2d 294, 297, 88 P.3d 390 (2004). A defendant entering a guilty plea must fully understand the sentencing consequences of that plea for the plea to be valid. State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). More to the point, misinformation provided to a defendant regarding sentencing consequences of a plea is a "manifest error affecting a constitutional right" which may be raised for the first time on appeal, State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996), Miller, supra 531, RAP 2.5(a)(3), and a defendant is entitled to withdraw his plea if the correct standard range is higher than that explained in the plea agreement. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

A defendant contending his or her decision to accept a guilty plea was misinformed as to sentencing consequences need not establish the materiality of that misinformation in the decision to plead guilty. Isadore,

supra, 302. The reason being that a reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, or discern the weight a defendant gave to each factor relating to that decision. Id. 302. The State's argument that Mr. Robinson's decision to plead guilty was based on some kind of gamble for the benefit of the plea bargain, and / or disingenuous is without merit and devoid of constructive consideration.

The State argues in essence that State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008), made all prior law with respect to withdrawal of a guilty pleas superfluous when concerned with criminal history and offender scores. This is an inaccurate characterization. In Codiga, supra, at 929, the Court drew a significant distinction between cases where a defendant simply fails to disclose additional criminal history, and where there is "legal error" that results in a miscalculation of criminal history. Mr. Codiga simply did not disclose the existence of prior misdemeanors that resulted in the failure of his prior felonies to wash. Id. 929. Because Codiga's "... new offender score was based on newly discovered criminal history or new facts, not new or misunderstood law", he was bound by his agreement in the guilty plea statement. Id. 929. Were the plea agreement the result of a legal mistake he would not have been bound by it. Id. 929.

As the trial court in this case ultimately found, Mr. Robinson's mistake as to the law remains a valid consideration upon which a guilty plea may be suspect, and, ultimately, withdrawn.

Mr. Robinson was clearly acting on a legal mistake in his belief that his prior juvenile offences had washed. He would have been correct had this sentencing taken place six years ago. This was not newly discovered unreported criminal history, it was history regarding which Mr. Robinson had a mistaken legal belief was not countable, as witnessed by the failure to count this same criminal history on his 1994, sentencing. No one provided him with any indication to the contrary, including the State, who had easy access to all of Mr. Robinson's criminal history. Particularly as this was all Washington State criminal history. There was no difficulty in ascertaining these felonies existed by the State, it was able to produce certified copies of the Judgements and Sentences for all the juvenile offences at issue in time for the aborted sentencing hearing, RP 25, and the issue is not at all similar to Codiga, where the defining convictions were misdemeanors that often are not included on the State's Understanding of Criminal History, and normally do not enter into felony criminal history calculations. The State has been aware since 2002, that all juvenile offences now count in calculating criminal history. There is no mystic or

confusion in this simple equation. The State simply relied solely on the criminal history counted in the 1994 conviction, as did Mr. Robinson, in entering the plea agreement, and thereby miscalculated the standard sentencing range. The only difference is, the State is now asking that Mr. Robinson bear the entire burden of everyone's legal misunderstanding with respect to the correct sentencing range.

The trial court's ruling that Mr. Robinson be allowed to withdraw his guilty plea under the facts of this case will not deprive the State of the fair opportunity to proceed to trial, or to accommodate the changed playing field now that everyone is aware that the prior juvenile offences count as criminal history. On the contrary, Mr. Robinson would lose the entire benefit of his plea agreement should his mistake as to the law be enforced, and he will pay for that mistake with several years of his life. Under the unique facts as presented in this case that would certainly be a directly observable injustice. In short, the injustice would be "manifest".

IV. CONCLUSION

Based on the foregoing, Chucco Robinson respectfully requests this Court affirm the ruling of the trial court allowing withdrawal of his guilty plea.

Respectfully Submitted this 12th, day of January, 2009.



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