

No. 93545-9

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN BUCKMAN,

Petitioner.

Review from Court of Appeals, Division Two, Case No. 46967-7-II

Respondent's Supplemental Brief

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I. ISSUE

- A. Did Buckman establish that he suffered substantial and actual prejudice from being erroneously informed he was facing a maximum term of an indeterminate life sentence, which would entitle him to withdraw his guilty plea?

II. STATEMENT OF THE CASE

Brian Buckman was charged by information on November 1, 2011 with Rape of a Child in the Second Degree. CP 1-3. The information alleged the rape took place on or about and between May 1, 2010 and September 30, 2010. CP 1. The State received a report from the Winlock Police Department that on October 25, 2011 Chief Williams and Social Worker Roni Jensen met with KBS¹ at Winlock High School to discuss KBS's relationship with Buckman. CP 15. KBS was fourteen years old, with a date of birth of November 8, 1996. *Id.* KBS disclosed that she was the current girlfriend of Buckman. *Id.* Buckman's date of birth is November 19, 1992, making him three years and 11 months older than KBS. CP 3, 15. KBS disclosed she and Buckman had a sexual relationship and the first time KBS and Buckman had intercourse was in June 2010 when she was 13 years old. CP 15.

On January 26, 2012 Buckman pleaded guilty as charged to one count of Rape of a Child in the Second Degree. CP 4-14.

¹ The State will refer to the victim by her initials, KBS, to protect her identity.

Buckman's attorney submitted a motion for Special Sex Offender Sentencing Alternative (SSOSA) examination. RP (1/26/12) 6. On March 7, 2012 Buckman was granted a SSOSA. CP 24-37. The SSOSA was revoked due to Buckman contacting KBS, failing to report to DOC, failing to report as a sex offender, and selling heroin to a confidential informant. CP 63-64. Buckman was resentenced to an indeterminate sentence of a minimum sentence of 114 months and a maximum sentence of Life, pursuant to RCW 9.94A.507. CP 69. Buckman appealed his SSOSA revocation and filed a personal restraint petition which were consolidated and not final until February 2015. See COA No. 44147-1-II.

Buckman filed a Motion to Modify or Correct Judgment and Sentence in the Superior Court of Lewis County on February 7, 2014. CP 83. The motion was set over due to the still pending direct appeal of the SSOSA revocation. RP (6/19/14) 2-5.²

On September 4, 2014 Buckman filed a motion to withdraw his guilty plea pursuant to CrR 4.2(f) and CrR 7.8. CP 85. Buckman filed a memorandum of law in support of the motion. CP 93-123. Buckman also filed a supplemental argument on October 3, 2014. CP 87-92. Buckman's argument was based upon being improperly

² This verbatim report of proceedings contains three hearings, 6/19/14; 10/31/14; 11/15/14. The State will cite to this volume by the first hearing date, 6/19/14 for clarity.

informed he was facing an indeterminate sentence pursuant to RCW 9.94A.507, which was impossible because Buckman was 17 years old at the time of the offense. CP 87-123. Buckman also argued he was improperly sentenced to an indeterminate sentence. *Id.*

The motion was heard by trial court on October 31, 2014, with an opportunity to present additional briefing on November 18, 2014. RP (6/19/14) 6-18. The trial court, *sua sponte*, determined the correct interpretation of RCW 9.94A.507 using the phrase “seventeen years of age or younger” should be interpreted as anyone under the age of 17 up to their seventeenth birthday, but not beyond their seventeenth birthday. RP 6-13. The court reasoned if the Legislature had intended to have the statute read under the age of 18, they would have phrased it as such:

MR. GROBERG: Well, I think it means up until the day you turn 18.

THE COURT: Well, if that’s the case, why didn’t the Legislature say under the age of 18, as they have done over and over and over again in the statute? As a matter of fact, even in this exact statute, they use that phrase.

RP 7. The trial court denied Mr. Buckman’s motion to withdraw his guilty plea, and Mr. Buckman timely appealed the trial court’s ruling. CP, 136-37.

The Court of Appeals in a published opinion affirmed the trial court's order denying Buckman's motion to withdraw his guilty plea and reversed the trial court's sentence. *State v. Buckman*, 195 Wn. App. 224, 381 P.3d 79 (2016). The Court of Appeals concluded that the trial court erroneously interpreted RCW 9.94A.507, and the indeterminate sentence did not apply to defendant's who committed their crime after their seventeenth birthday but prior to their eighteenth birthday. The Court of Appeals found that Buckman had been properly informed of the actual maximum sentence he was facing and therefore his plea was knowing, intelligent, and voluntary. The Court of Appeals held that the trial court did not abuse its discretion when it denied Buckman's motion to withdraw his guilty plea. The Court of Appeals remanded the case for resentencing to a determinate sentence. Buckman petitioned for review, which was granted.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE PROPER ANALYSIS IS WHETHER BUCKMAN ESTABLISHED HE SUFFERED ACTUAL AND SUBSTANTIAL PREJUDICE FROM BEING ERRONEOUSLY INFORMED OF THE MAXIMUM PUNISHMENT HE WAS FACING IF HE PLEADED GUILTY TO RAPE OF A CHILD IN THE SECOND DEGREE.

The proper analysis in a CrR 7.8(b) motion to withdraw a guilty plea where a defendant is arguing he was improperly informed of a direct consequence of his plea is for the trial court to determine if the defendant has made the requisite showing he has suffered actual and substantial prejudice. Buckman argued to the trial court and to the Court of Appeals that a showing of prejudice was not required. Buckman maintains that argument to this Court. Buckman was, and still is, required to show he suffered actual and substantial prejudice from receiving the erroneous information to be entitled to withdraw his guilty plea.

Buckman did not meet his burden. The Court of Appeals' decision to affirm the trial court's order denying the motion should be affirmed on this basis. In the alternative this Court should remand the case back to the trial court to for a determination of Buckman's motion to withdraw his guilty plea.

1. A CrR 7.8(b) Hearing To Withdraw A Guilty Plea Is A Collateral Attack On A Judgment And Sentence.

After a defendant enters a guilty plea in the trial court, he or she may motion the court to be allowed to withdraw the guilty plea or correct an erroneous sentence. See CrR 4.2(f), CrR 7.8(b). Pursuant to CrR 7.8 a defendant may seek relief from final judgment when a defendant provides sufficient proof of:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Motions brought under CrR 7.8(b) are also subject to RCW 10.73.090, RCW 10.73.100, RCW 10.73.130, and RCW 10.73.140, all which govern collateral attacks.

A motion to withdraw a guilty plea after the defendant has been sentenced is governed by CrR 7.8(b), not the manifest injustice standard of CrR 4.2(f). *In re Pers. Restraint of Stockwell*,

179 Wn.2d 588, 601, 316 P.3d 1007 (2014); *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). Therefore, a motion to withdraw a guilty plea, post-sentencing, is a collateral attack on a judgment and sentence pursuant to CrR 7.8(b).

2. A Defendant Must Establish Actual And Substantial Prejudice To Be Entitled To Relief From Their Judgment And Sentence In A CrR 7.8(b) Motion.

Reviews of alleged errors on collateral attacks are distinct from review on direct appeal. *In re Stockwell*, 179 Wn.2d at 597. “[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes costs society the right to punish admitted offenders.” *Id.* (internal quotations and citations omitted).

In *Stockwell* the Court analogized the burden a petitioner must meet in a personal restraint petition showing prejudice resulting from misinformation regarding sentencing consequences with the burden required of a defendant in a CrR 7.8 motion. *Id.* at 601-02. *Stockwell* argued to the Court the prejudice standard found under CrR 4.2, the manifest error requirement, mirrored prejudice standard required in a personal restraint petition. *Id.* at 601. The Court rejected *Stockwell*'s argument, noting post-sentence motions

to withdraw a guilty plea are not governed by CrR 4.2, but by CrR

7.8(b). *Id.* The Court stated:

CrR 7.8 represents a potentially higher standard than CrR 4.2(f) for withdrawing a plea. Just as a petitioner may need to meet a higher burden when withdrawing a plea postjudgment versus prejudgment, so should a petitioner in the context of a PRP.

Id. at 602. The Court concluded a petitioner, who was seeking to withdraw his guilty plea after being misinformed about the statutory maximum sentence, was required to show the complained error caused actual and substantial prejudice. *Id.* at 602-03.

Therefore, prejudice is not presumed in a collateral attack in the trial court pursuant to CrR 7.8 just as prejudice is not presumed for a claim of being misinformed of a direct consequence of a plea in a personal restraint petition. A defendant seeking to withdraw his plea of guilty in a post-sentencing CrR 7.8(b) collateral attack motion for being misinformed of the statutory maximum sentence, must establish the error caused actual and substantial prejudice.

3. Standard Of Review.

A defendant has a right to appeal the denial of their CrR 7.8 motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Yet, on appeal, the only order before the appellate court is the denial of the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509.

“The original sentence would not be under consideration.” *Id.* Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8 motion. *Id.*

4. Buckman Did Not Establish Actual And Substantial Prejudice From His Claimed Error.

Buckman argued to the courts below, and to this Court, that he is not required to establish prejudice, it is presumed. Buckman relies on a number of cases which are inapplicable to his situation, a CrR 7.8(b) motion to withdraw a guilty plea based on being allegedly misinformed about the maximum punishment, and then being incorrectly sentenced to an indeterminate sentence.

Buckman relies on two direct appeal cases in which defendants attempted to withdraw their guilty pleas prior to sentencing. *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006). Buckman argues his guilty plea is automatically rendered involuntary due to being misadvised of a direct consequence of pleading guilty, the length of his sentence, citing *Mendoza*. Buckman also relies exclusively on the manifest injustice standard found in CrR 4.2(f). Buckman’s reliance on all of these authorities is misplaced because none of the sources set forth the correct legal standard for which

Buckman's motion should have been determined under by the trial court.

The review of Buckman's motion to withdraw his guilty plea is solely a review of the trial court's determination of the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509. The appellate court's only question on review can be: did the trial court abuse its discretion when it denied Buckman's motion, finding he was not prejudiced? *Id.*; CP 127-28; RP (6/19/14) 13, 15.

In this matter Buckman submitted a written motion to the trial court on February 7, 2014 pursuant to CrR 7.8 requesting his judgment and sentence be corrected because it was invalid on its face, as he was sentenced to an indeterminate sentence pursuant to RCW 9.94A.507 and he was only 17 years old at the time of the offense. CP 80-82. There was also a declaration filed in support of the motion. CP 83-84.

Then on September 4, 2014, with the assistance of court appointed counsel, Buckman filed a motion to withdraw his guilty plea pursuant to CrR 4.2(f) and CrR 7.8. CP 85. The factual basis stated for the motion was that Buckman was "informed, pled and was sentenced to an indeterminate sentence, which is unlawful pursuant to 9.94A.507." CP 85. Buckman's attorney filed a

memorandum of law in support of the motion. CP 93-123. There is a short “FACTUAL HISTORY” but there is no declaration or affidavit attached regarding the facts. *Id.*

Buckman filed a pro se supplemental argument, which also contained facts, on October 3, 2014. CP 87-92. There is a certification to attempt to make the factual statements meet the standards for certification, but it is lacking the place the document was signed. CP 92; RCW 9A.72.085. In the additional facts, Buckman asserts the misinformation about the possibility of facing an indeterminate life sentence forced his decision to plead guilty to a lighter sentence under SSOSA. CP 90.

While the hearing for the motion to withdraw the guilty plea was set for two hours with the anticipation that testimony may be taken, Buckman offered none. RP (10/30/14) 4; RP (6/19/14) 6-17. There were no exhibits, affidavits, or declarations submitted at the hearing. RP (6/19/14) 6-17.

The State did not deny to the trial court the improper indeterminate sentence Buckman received or that Buckman was 17 years of age when the offense was committed. RP (6/19/14) 6, 16; CP 124. It was Buckman’s burden to show under CrR 7.8(b) he suffered actual and substantial prejudice from allegedly being

informed that he was facing an indeterminate sentence. Buckman simply did not meet that burden.

Buckman did not testify under oath regarding what Mr. Brown, his original counsel, informed Buckman. See RP (6/19/14) 6-17. Mr. Brown was not called to testify regarding the circumstances involved in Buckman entering the plea of guilty and seeking a SSOSA sentence. *Id.* Buckman did not even present a declaration or affidavit from Mr. Brown. *Id.*

As the Court of Appeals noted in its decision, during the plea colloquy that the trial court correctly informed Buckman the correct maximum penalty for Rape in the Second Degree and Buckman's standard range sentence. RP (1/26/12) 5. Buckman was also advised by the trial court it did not have to agree to grant a SSOSA sentence and if it declined to grant it, Buckman would be sentenced with the standard range of 86 to 114 months in prison. *Id.* Further, the plea form correctly set forth the law regarding indeterminate sentences, which stated they only applied if the defendant was 18 at the time of the offense. CP 6. Buckman signed the plea form. CP 11.

The trial court determined that any error on the judgment and sentence regarding the indeterminate sentence was really just

a “scrivener’s error” or could be compared to a scrivener’s error. RP (6/19/14) 13.

Buckman presented nothing to the trial court which would meet the heightened standard of prejudice required in a post-sentence collateral attack pursuant to CrR 7.8. Buckman’s argument, in his unsworn statements, is that he only pleaded guilty for a lighter SSOSA sentence because he believed he was facing an indeterminate life sentence.³ But when Buckman pleaded guilty, the SSOSA sentence was something he could request, but was not guaranteed, or even an agreed recommendation with the State. RP (1/26/12) 4; CP 7. The State was actually opposing the SSOSA sentence and withholding its recommendation until after the SSOSA evaluation was complete. *Id.* Therefore, if Buckman had been told by Mr. Brown that he was facing an indeterminate sentence Buckman had to realize that there was a very real possibility he would be facing such a sentence after his guilty plea.

³ There were facts contained within Buckman’s petition for review to this Court that were not cited to the record nor could the State find anywhere in the record after a thorough search of the record. The State acknowledges the best practice would have been to respond to the petition for review and file a motion to strike all extraneous facts which were not contained within the record. Regardless, this Court should not consider extraneous fact not found within the record. See generally *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252, 850 P.2d 1298 (1993) (“Cases on appeal are decided only on evidence in the record.”); *Wells v. Whatcom County Water Dist.*, 105 Wn. App. 143, 154, 19 P.3d 453 (2001) (a party on appeal may not cite to evidence not in the appellate record and may be sanctioned for doing so).

But all of this matters for naught, because asserting he would not have taken the deal does not establish prejudice. *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 41, 321 P.3d 1195 (2014). The Court explained, “we do not attempt to look into the mind and motivations of a defendant when determining whether an error resulted in prejudice. Instead we evaluate the practical effects that result from the error.” *Id.* (citations omitted).

The practical effects in Buckman’s case are that instead of having a minimum term of 114 months and a maximum term of life, Buckman will now have a determinate sentence within the standard range. See CP 67-69. Buckman’s standard range for Rape of a Child in the Second Degree is 86 to 114 months in prison. CP 67; RCW 9A.44.076; RCW 9.94A.510; RCW 9.94A.515. Therefore, Buckman’s sentence will now be 114 months in prison. Buckman will also no longer face a lifetime on community placement but will have 36 months of community custody. CP 69; RCW 9.94A.507; RCW 9.94A.701(1)(a). There is no prejudice in the practical effects resulting in the sentencing error. The correct remedy would be the one already ordered by the Court of Appeals, to remand to the trial court for Buckman to be correctly sentenced to a determinate sentence.

5. This Case May Require Remand To Have The Trial Court Fully Consider And Rule On Whether Buckman Met His Burden Pursuant To CrR 7.8.

Buckman's briefing in the trial court argued he was not required to show prejudice. CP 87-96. The State countered, noting Buckman's motion fell within CrR 7.8, not CrR 4.2(f). CP 124-26. The State argued Buckman was required to show substantial and actual prejudice before the trial court could grant him relief. *Id.*

When the parties showed up to argue whether Buckman was entitled to withdraw his guilty plea, the disputed issue, the trial court decided *sua sponte* it would make its ruling regarding Buckman's motion on a statutory interpretation of RCW 9.94A.507. RP (6/19/14) 6-13. Ruling the indeterminate sentence actually applied to Buckman because it applied to individuals who had not yet turned 18 years old.

After the trial court completed its analysis of RCW 9.94A.507, Buckman's attorney asked, "I just was going to ask is there anything else the court needs additional briefing on other than that particular issue?" *Id.* at 13. The trial court responded, "No. It does seem to me that this is a scrivener's error, or it can be compared to a scrivener's error, in that there's no prejudice here,

but I'm not reaching that. That's what the argument would be about, I think - -." *Id.*

The fact that the trial court did not actually determine the motion to withdraw guilty plea is further evidenced by the trial court's statements when the order denying the motion was drafted. *Id.* at 14. The Prosecutor stated the trial court had said a simple order, not findings of fact and conclusions of law, would be sufficient. *Id.* The trial court replied, "Right. And the reason for that is this is a matter of statutory interpretation, which the Court of Appeals will do de novo in any event." *Id.*

Therefore, based upon a careful review of the record below, it would appear the proper course for this matter would be remand to the trial court for a full determination of the motion to withdraw the guilty plea pursuant to CrR 7.8(b).⁴ Buckman would be required to meet the heightened standards of CrR 7.8(b) and the trial court would then enter the necessary findings of facts and conclusions of law.

⁴ The State acknowledges it did not argue this in its briefing to the Court of Appeals. The current deputy did not do the briefing below, and when reviewing the record noticed this issue. The State believes it has no choice but to acknowledge that the trial court's wording of its decision could easily be perceived as having not reached a decision on the motion to withdraw, regardless of the written order that was entered. The State's obligation for candor to the tribunal requires the State to acknowledge this fact. RPC 3.3.

IV. CONCLUSION

The question on review is did the Court of Appeals err when it determined the trial court did not abuse its discretion when it denied Buckman's motion to withdraw his guilty plea. To analyze the trial court's decision, the question should be: did Buckman meet his heightened burden under CrR 7.8(b) to show the trial court he suffered actual and substantial prejudice from being erroneously informed he was facing an indeterminate sentence? Buckman did not meet his burden, and the trial court did not abuse its discretion by denying the motion. In the alternative, the Court should remand the case back for a full determination of Buckman's CrR 7.8(b) motion to withdraw his guilty plea.

RESPECTFULLY submitted this 10th day of March, 2017.

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by: _____
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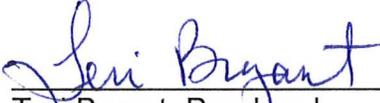
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 93545-9
Respondent,)	
vs.)	DECLARATION OF
)	MAILING
BRIAN BUCKMAN,)	
Petitioner.)	
)	
)	
_____)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: March 13, 2017, the petitioner was served with a copy of the **Respondent's Supplement Brief** by depositing same in the United States Mail, postage pre-paid, to the petitioner at the name and address indicated below:

Brian Buckman, DOC #355481
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

DATED this 10th day of March, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office