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NO. 94591-8

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

In re Personal Restraint of

WILLIAM CRAIG SCHORR,

Petitioner.

BRIEF OF WACDL AS AMICUS CURIAE

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Petitioner William Craig Schorr. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

Additionally, on March 21, 2018, Commissioner Johnston reached out to WACDL and requested amicus briefing on this case.

B. ISSUES OF CONCERN TO AMICUS

1. Is a Petition for Review challenging a judgment and sentence on double jeopardy grounds timely, even though filed more than one year after it became final, where such challenges are statutorily exempt from the one-year limitation on collateral attacks?

2. Is a challenge to a legal sentencing error -- a double jeopardy violation -- leading to an excessive sentence not subject to waiver in a plea agreement?

3. Is the remedy for a double jeopardy challenge to a judgment and sentence, even though entered pursuant to a plea bargain, vacation of the offending convictions?

C. STATEMENT OF THE CASE

As set out by Commissioner Michael E. Johnson in his letter inviting amicus briefing:

The Washington Supreme Court granted review of the above- referenced matter, in which a pro se restraint petitioner claims that his plea-based convictions for first degree murder and first degree robbery violated double jeopardy principles. At issue is whether the petitioner has a valid double jeopardy claim exempt from the one-year limitation on collateral review, and if so, whether the petitioner's waiver of his right to collaterally challenge his convictions, made as part of this plea agreement, applies to his double jeopardy claim.

Commissioner's Letter of March 21, 2018, p. 1.

D. ARGUMENT AND AUTHORITY

1. THE PETITION WAS TIMELY.

Schorr's Personal Restraint Petition, challenging his judgment and sentence on double jeopardy grounds, is timely. A sentence imposed in violation of double jeopardy prohibitions constitutes an exception to the one-year limitation on challenges to final judgment and sentences and is in excess of the court's jurisdiction. RCW 10.73.100(3). For these reasons, Schorr's meritorious double jeopardy claim should be deemed timely

although filed more than one year after sentencing.¹

The one-year limitation on collateral attacks on judgments and sentences set forth in RCW 10.73.090 expressly does not apply to convictions “barred by double jeopardy under Amendment V of the United States Constitution or Article 1, section 9 of the state Constitution,” or where “a sentence was imposed in excess of the court’s jurisdiction.” RCW 10.73.100 (3) and (5).

A petition is timely where it is clear from the record that the error which constitutes an exception under RCW 10.73.100 has been made. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004); State v. Knight, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). The double jeopardy error in Schorr’s case is clear from the record; and, accordingly, his petition is timely.

2. THE DOUBLE JEOPARDY ISSUE WAS NOT WAIVED BY THE PLEA AGREEMENT.

Schorr did not waive the double jeopardy issue by the plea agreement because a defendant cannot agree to a punishment in excess of the punishment which the Legislature has established. State v. Knight,

¹ In the Court of Appeals, the State did not challenge Schorr’s assertion in his PRP that his sentences violated double jeopardy, and argued only that the claim was either waived or constituted invited error. Response to the Petition, Court of Appeals, No. 49853-7-II (filed 3/31/17). Amicus found no other briefing by the State on the Court’s website.

162 Wn.2d 806, 174 P.3d 1167 (2008); In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002); In re Personal Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991); In re Personal Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980).

“[W]aiver does not apply where the alleged sentence error is legal error leading to an excessive sentence.” Goodwin, at 874. (emphasis added). As specifically set out in Goodwin, this “rule [against waiver of legal error] has been applied in cases involving negotiated plea agreements, and this Court has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence. “ Id., at 870; Gardner, 94 Wn.2d at 507 (improper to include restitution for victims of dismissed charges even though agreed to by plea bargain); Moore, 116 Wn.2d at 38 (improper to sentence to life without parole for crime which carried a punishment of life with parole even though agreed to by plea bargain).

In Knight, supra, this Court held that like the illegal sentences in Goodwin, Gardner, and Moore, a guilty plea to multiple charges that facially violate double jeopardy is an illegal plea and the remedy is vacation of the offending charge:

[C]laims which go to ‘the very power of the State to bring the defendant into court to answer the charges brought against him’ are not waived by guilty pleas. Blackledge v. Perry, 417 U.S. 21, 30,

94 S. Ct. 2098, 40 L.Ed.2d 628 (1974). . . [W]here a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea.

State v. Knight, at 811-812. In Knight, the defendant pleaded guilty to two counts of conspiracy in violation of her double jeopardy rights. This Court unanimously held that the terms of the plea agreement did not require her to waive her right to double jeopardy.

This Court has since consistently reaffirmed its unanimous holding in Knight that multiple punishments that violate double jeopardy constitute an illegal sentence and the remedy is vacation of the improper conviction. State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009) (footnote 5); In re Personal Restraint of Francis, 170 Wn.2d 517, 531-32, 242 P.3d 866 (2010); State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009).²

² In Knight, the double jeopardy claim arose from a “unit of prosecution” violation. Knight, 162 Wn.2d at 810. Subsequently, the Court of Appeals, in State v. Amos, 147 Wn. App. 217, 227, 198 P.3d 564 (2008), held that Knight was limited to such unit of prosecution cases, which it characterized as going to the power of the state to charge multiple counts, and did not control cases where charges – such as the second degree assault and first degree robbery charged in Amos – could be properly charged and violated double jeopardy only when the trial court imposed sentences for both. Amos, however, was effectively overruled in State v. Hughes, 166 Wn.2d 675, 681-684, 212 P.3d 558 (2009), which held that under the same evidence test, convictions for second degree rape and second degree rape of a child, based on guilty pleas pursuant to a plea

Washington law differentiates between a plea that is legally defective, as in Goodwin and Knight, and one that is factually defective. Parties may agree to a plea based upon fictional facts, but they may not agree to fictional offenses or fictional sentences. See State v. Zhao, 157 Wn.2d 188, 137 P.3d 835 (2006), and In re Personal Restraint of Barr, 102 Wn.2d 265, 684 P.2d 712 (1984) (both holding that a defendant may plead guilty to lesser offenses for which there are no factual basis, if there was a factual basis for the original charges and the defendant understands that he is waiving a challenge to the factual basis for the plea). See, also, In re Personal Restraint of Swagerty, 186 Wn.2d 801, 383 P.3d 454 (2016) (violation of the statute of limitations, a legislative creation not of constitutional magnitude, to enter pleas to lesser charges was waived by a plea agreement when the greater charge was filed within statute of limitations).

Barr, Zhao, and Swagerty provide important flexibility to plea bargaining without running afoul of Legislature's sole authority to determine the punishments for crimes. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 800 (2009) (authority to define crimes and set

bargain, violated double jeopardy The Hughes court remanded for dismissal of one of the convictions. For whatever interest it may have to this Court, this sub silentio abrogation of Amos by Hughes, was noted in the unpublished decision in State v. Marcum, 192 Wn. App. 1037 (2016).

punishment rests with the Legislature); Brower v. State, 137 Wn.2d 44, 45, 969 P.2d 42 (1998) (the Legislature cannot abdicate or transfer the responsibility to define crimes and set punishment). In contrast, where the issue is legal error, accused persons should have little incentive to bargain for double punishment, and it should not be too onerous for the State and the trial court to avoid agreeing to and imposing sentences which violate the prohibition against double jeopardy.

Washington courts have not always held that parties could not bargain for illegal sentences, at least to the extent that the illegal sentence was a result of a mutual mistake about the law during the plea bargaining process. See State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988) (defendant may specifically enforce an illegal sentence). In 2011, however, this Court overruled Miller and held that specific performance of an illegal sentence is both harmful and incorrect. State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011). The Barber Court held that taking Miller “to its logical conclusion, specific performance in the context of a mutual mistake may require enforcement of a sentence that is contrary to law.” Barber at 860.

Schorr did not waive his double jeopardy claim. His sentence is constitutional error which cannot be waived by plea bargain.

3. THE REMEDY SHOULD BE VACATION OF THE OFFENDING CONVICTION TO CORRECT THE DOUBLE JEOPARDY VIOLATION.

This Court in Knight and Goodwin held that the issue was not the voluntariness of the plea agreement or the state's reliance on it or even balancing the harm to the state and petitioner, but rather "we are considering a fundamental defect." Goodwin, at 876-877. The appropriate remedy in both cases was held to be correcting the portion of the sentence which was imposed in excess of the court's authority. Id.

The Court, in Knight, rejected the state's argument that the plea was indivisible and therefore must be withdrawn. The Court held instead that correcting the double jeopardy error did not require withdrawal of the plea, and that the plea need not be disturbed to correct the error. Knight, at 812-813. In Goodwin, the Court cited In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 35, 604 P.2d 1293 (1980), noting that the ruling to correct the legal error did not affect the portion of the sentence what was correct and valid when entered.

Like the defendant in Knight, Schorr did not specifically waive his double jeopardy rights and the plea facially violates double jeopardy. He does not he seek to withdraw his plea. To the degree that his sentence is illegal, the remedy, as in Knight and the double jeopardy cases following Knight, is vacation of the illegal convictions.

C. CONCLUSION

Amicus urges the Court to grant Schorr's Petition and remand his case for resentencing to correct the double jeopardy violation.

Respectfully submitted,

DATED this 10th day of April, 2018

/s/ Rita Griffith

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