Supreme Court No. ____
(COA No. 84531-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS WALKER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

United States Constitution

Washington Constitution

Court Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Curtis Walker, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated April 22, 2024, for which reconsideration was denied on May 21, 2024. RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies are attached.

B. ISSUES PRESENTED FOR REVIEW

1. A court may not substantively alter a person's sentence without affording the person the opportunity to be present and have the assistance of counsel. Without any notice to Mr. Walker or counsel, the court amended his sentence based on an ex parte motion of the prosecution. This Court should grant review of the denial of Mr. Walker's rights to appear, to have assistance of counsel, and to participate in substantive hearings in a criminal case.

2. A manifest injustice arises when a person's guilty plea was based on misinformation of the plea's direct consequences and the punishment at stake. Mr. Walker plead guilty as part of

a package plea agreement. But without notice to Mr. Walker, the court removed a conviction that was part of the indivisible plea agreement. This Court should review the trial court's failure to afford Mr. Walker the opportunity to seek a different remedy, such as withdrawing his plea, before altering a critical part of the plea agreement.

C. STATEMENT OF THE CASE

In 2006, Curtis Walker resolved several charges pending against him by entering a plea agreement. CP 18-22, 44, 47. Under this agreement, he plead guilty to unlawful possession of a firearm in the first degree; possession of a controlled substance; possession of marijuana with the intent to deliver; and fourth degree assault. CP 18, 26, 45. The prosecution promised to recommend he serve 66 months in prison and agreed not to pursue further charges. CP 21, 32.

Mr. Walker had been originally charged with simple possession of cocaine, possession of cocaine with the intent to manufacture, second degree assault, felony harassment, and

unlawful possession of a firearm in the second degree. CP 1-3. The prosecution then altered the original charges to unlawful possession of a firearm in the first degree, two counts of simple possession of cocaine, possession of marijuana with intent to deliver, felony harassment, and fourth degree assault. CP 10-13. Mr. Walker's guilty plea resolved these various charges under a final amended information. CP 14-17.

In 2021, the Supreme Court invalidated the simple drug possession statute underlying Mr. Walker's conviction for possession of cocaine. *See State v. Blake*, 197 Wn.2d 170, 186, 481 P.3d 521 (2021).

Although Mr. Walker had served the sentence imposed in 2006, he was in prison serving a sentence on a different offense. CP 144. Under the offender score calculations mandated by the Sentencing Reform Act, his current sentence necessarily rested on an offender score that included the prior possession conviction as well as the other offenses that were part of this previously entered plea agreement. RCW 9.94A.525.

On March 18, 2021, Mr. Walker filed a pro se motion asking the court to strike the drug possession conviction. CP 104-07. Judge Steven Rosen responded by letter and told Mr. Walker the court would consider his motion on May 7, 2021. CP 122. The court sent Mr. Walker a number of follow-up letters stating the motion would be considered a specific later date. CP 142 (April 29, 2021 letter resetting consideration of motion to September 27, 2021); CP 144 (September 27, 2021 letter resetting consideration of motion for March 28, 2022); CP 147 (March 28, 2022 letter postponing consideration of motion until March 27, 2023).

But on May 20, 2022, Mr. Walker told the court he did not want to pursue this motion. CP 153-55. He filed a motion to withdraw his request to strike the possession conviction. *Id*. Although Mr. Walker did not explain his reasons for withdrawing his request, it appears he wished to pursue a different remedy. Judge Rosen granted Mr. Walker's request to

withdraw the motion and sent Mr. Walker a copy of the order. CP 156-58.

However, on May 6, 2022, the prosecution presented an ex parte motion to Judge Karen Donohue without mentioning the proceedings pending before Judge Rosen. CP 75-76. This motion asked the court to remove Mr. Walker's conviction for possession of a controlled substance from the judgment and sentence. CP 75. Judge Donohue signed the order on the same day. CP 77. The court did not tell Mr. Walker or send him any copy of the order. No defense attorney appeared on Mr. Walker's behalf or signed the order. CP 76.

Mr. Walker did not learn of the court's order amending his judgment and sentence until July 6, 2022, when he received a "kiosk" notification in the law library at Stafford Creek Correction Center that an order had been entered in his case dismissing counts from his judgment and sentence. CP 88. Mr. Walker had not received a copy of the State's motion and did not know of its existence. CP 79, 88-89.

Mr. Walker contacted the Department of Public Defense seeking more information. CP 79. A paralegal located a copy of the court's order and mailed it to Mr. Walker. CP 86. Mr. Walker received the order on August 13, 2022, more than five months after the court entered it. CP 89. When Mr. Walker learned the court had stricken the conviction in an ex parte order, without holding a hearing and without any attorney appearing on his behalf, Mr. Walker filed a late notice of appeal. CP 79-80. He explained he was not timely informed of the court's order striking the conviction. CP 79. The Court of Appeals granted his request to extend the time to file a notice of appeal under these circumstances.

However, the Court of Appeals ruled Mr. Walker was not entitled to relief and was not prejudiced by the court order changing his judgment and sentence.

D. ARGUMENT

1. The Court of Appeals incorrectly ruled Mr. Walker was not entitled to his constitutional rights to be present or have counsel when the trial court amended his judgment and sentence, contrary to long-standing precedent.

a. Substantively amending a judgment and sentence to remove a conviction is a critical stage of a criminal proceeding.

A person convicted of a crime has a constitutional right to be present at a sentencing proceeding because it is a critical stage of the proceeding. *State v. Ramos*, 171 Wn.2d 46, 48-49, 246 P.3d 811 (2011); Const. art. I, § 22; U.S. Const. amend. XIV; CrR 3.4(a) ("The defendant shall be present at . . . the imposition of sentence.").

A person also has a "constitutionally guaranteed" right to counsel "at all critical stages of a criminal proceeding, including sentencing." *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021), *rev. denied*, 199 Wn.2d 1004 (2022); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005);

U.S. Const. amend. VI; Const. art I, § 22. The right to counsel includes the right to confer privately with that counsel. *State v. Peña Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014).

When the prosecution collaterally attacks a conviction, the defendant has the right to counsel. RCW 10.73.150(5).

Article I, section 10 of the Washington Constitution further provides that "[j]ustice in all cases shall be administered openly," which sets a "strong presumption" for public access to court hearings. *In re Det. of Morgan*, 180 Wn.2d 312, 325, 330 P.3d 744 (2014). And the right to due process of law includes the right to notice and the opportunity to be heard when a person's substantive rights are at stake. *See Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

When a court alters the terms of a judgment and sentence, the court must afford the person the opportunity to meaningfully appear in court, with counsel, unless the court's role is solely ministerial, such as fixing a scrivener's error for

which the court has no further options other than correcting the mistake. *Ramos*, 171 Wn.2d at 48-49.

The change in Mr. Walker's sentence was not a mere scrivener's error, contrary to the Court of Appeals opinion. Slip op. at 3. He was entitled to be present, with counsel, when the court substantively altered his judgment and sentence. *Ramos,* 171 Wn.2d at 48-49.

b. The Court of Appeals failed to recognize the role of counsel and the right to be present when a trial court changes a judgment and sentence.

Mr. Walker did not instigate or even know about the prosecution's ex parte request to remove a conviction from his judgment and sentence. The Court of Appeal opinion improperly blames Mr. Walker for not objecting before he filed his appeal, even though Mr. Walker was incarcerated, had limited access to case information, and he did not even know about the court hearing or its ruling for months. Slip op. at 5; *see* CP 79, 86, 89 (showing Mr. Walker's efforts to obtain copy of trial court order long after it was issued).

By setting up a process in which he was forbidden from playing any role or having any advocate, it is manifestly unjust to refuse him any further court hearings because he failed to make a make a record in the trial court of the relief he sought.

Mr. Walker tried to participate in the court proceedings involving his prior controlled substance conviction. Judge Rosen repeatedly communicated with Mr. Walker, led him to believe his request would be considered on a certain date, and then informed him the request to strike his prior drug possession conviction had been withdrawn. CP 142, 144, 147, 156-58. But without regard to Judge Rosen's rulings, the prosecution obtained an ex parte order from a different judge nullifying Judge Rosen's ruling.

Mr. Walker is entitled to participate in a court proceeding that alters a substance of his judgment and sentence. He was not afforded this opportunity.

The court's order granting the State's motion to strike a conviction that was part of a plea agreement altered the terms of

the agreement. A plea agreement is a contract. *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). The court changed the essential terms of this contract on the State's motion, without notifying Mr. Walker.

The court lacked authority to make this significant change to the agreement without affording Mr. Walker the opportunity to be heard and without providing him with counsel. The court's secretive manner of striking the conviction denied Mr. Walker his right to participate in the proceeding, in open court, and have the assistance of counsel. This Court should grant review and allow Mr. Walker to participate in the proceedings.

2. Mr. Walker's guilty plea rested on a void conviction and he is entitled to the opportunity to withdraw his plea.

Under CrR 4.2, a defendant must be allowed to withdraw a guilty plea if it appears that withdrawal is necessary to correct a manifest injustice. A manifest injustice is obvious

and overt. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996).

A plea based on misinformation of the sentence consequences is not knowing and voluntary and constitutes a manifest injustice. *See e.g., In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568-69, 933 P.2d 1019 (1997) (a miscalculated offender score constitutes a fundamental defect that inherently results in a complete miscarriage of justice); *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 300, 88 P.3d 390 (2004) (constitutional personal restraint requirements met where Isadore was not informed of all the direct consequences of his plea, rendering his plea involuntary).

"Plea agreements covering multiple counts are indivisible." *State v. King*, 162 Wn. App. 234, 241, 253 P.3d 120 (2011) (citing *State v. Bisson*, 156 Wn.2d 507, 518-520, 130 P.3d 820 (2006); *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003)). "Thus, if there is error on one count of a multicount agreement, the entire plea agreement must be set

aside upon request." *Id.* (citing *Turley*, 149 Wn.2d at 400-401). Where "pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding," the pleas are indivisible. *Turley*, 149 Wn.2d at 400.

Mr. Walker pleaded guilty to several offenses on the same day as part of a single plea bargain. CP 21-22, 26, 46-47. The sentencing recommendation and agreement to dismiss other charges was contingent upon entering this plea. CP 21-22, 45. The plea agreement is indivisible.

Mr. Walker's plea rests on misinformation. It included a conviction for drug possession, but Washington's simple drug possession statute "is and has always been a legal nullity." *State v. Paniagua*, 22 Wn. App. 2d 350, 354, 511 P.3d 113 (2022). A conviction for simple drug possession, entered at any time under the statute invalidated in *Blake,* is a conviction for a "nonexistent crime." *State v. A.L.R.H.*, 20 Wn. App. 2d 384, 386, 500 P.3d 188 (2021).

When a guilty plea is based on misinformation, the defendant is entitled to the opportunity to withdraw his plea. *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006); *Isadore*, 151 Wn.2d at 301-02. Mr. Walker's plea was based on incorrect information about the criminal nature of his conduct and its sentencing consequences, and thus it was "not intelligent or voluntary." *Isadore*, 151 Wn.2d at 302. He was not afforded the opportunity to withdraw his plea when the court struck the possession conviction without regard to the rest of the plea agreement, because the entire proceeding took place outside his presence and without his knowledge.

This Court should grant review and remand the case for further proceedings.

E. CONCLUSION

Based on the foregoing, Petitioner Curtis Walker respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 2293 words and complies with RAP 18.17(b).

DATED this 20th day of June 2024.

Respectfully submitted,

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APPENDIX A

FILED
4/22/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CURTIS JOHN WALKER, Appellant.	No. 84531-4-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Curtis Walker pled guilty to, among other things, a drug-related charge in 2006. In 2023, per State v. Blake, the trial court vacated that conviction without holding a hearing, which Walker believes violated his rights. We disagree and affirm the trial court.

I. BACKGROUND

In 2006, Walker pled guilty to, inter alia, possession of cocaine. On February 25, 2021, our Supreme Court decided State v. Blake, which mandated vacatur of convictions for simple drug possession. 197 Wn.2d 170, 195, 481 P.3d 521 (2021). In March 2021, Walker moved the court, pro se, per CrR 7.8 to "correct [his] judgment and sentence" by "dismiss[ing]" his conviction for cocaine possession (First Motion). Walker re-filed the same motion in April 2021. Both motions indicated he did not desire oral argument.

In May 2022, the State moved the court to vacate and dismiss with prejudice the conviction for cocaine possession from Walker's judgment and sentence. A trial court signed the order granting the State's motion (Order) the same day without holding a hearing. Then, on June 9, 2022, Walker filed a motion to withdraw his First Motion. On July 14, 2022, the trial court granted Walker's motion to withdraw. Walker appeals.

II. ANALYSIS

Walker primarily argues that the trial court violated his Sixth Amendment right to be present for his re-sentencing, when it signed the Order without holding a hearing.

"A defendant has a constitutional right to be present at sentencing, including resentencing." State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). "However, when a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present." Id. In other words, "because the relationship between the defendant's presence and his 'opportunity to defend' must be 'reasonably substantial,' a defendant does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" State v. Irby, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds by Duncan v. State of La., 391 U.S. 145, 155, 88 S. Ct. 1444, 1450-51, 20 L. Ed. 2d 491 (1968)).

Further, a violation of the right to be present may be determined to be constitutionally harmless. State v. Anderson, 19 Wn. App. 2d 556, 564, 497 P.3d

880 (2021). "Under this test, prejudice is presumed and the State bears the burden of proving harmlessness beyond a reasonable doubt." Id.

Here, Walker at no point objected to the State's motion or the court's Order on any grounds, let alone on the basis of his right to be present, at any time prior to appeal, even though the court issued the Order nearly two months after his First Motion. Nonetheless, RAP 2.5(a)(3) allows an appellant to raise an issue for the first time on appeal "for a 'manifest error affecting a constitutional right.'" State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) (quoting RAP 2.5(a)(3)). "A 'manifest' error is an error that is 'unmistakable, evident or indisputable.'" Id. (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). "An error is manifest if it results in actual prejudice to the defendant or the defendant makes a 'plausible showing' 'that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (quoting State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999)).[1]

To resolve this matter, we assume arguendo and without deciding that Walker was entitled to be present at the resentencing, even though it may be a "ministerial correction" under Ramos. 171 Wn.2d at 48. However, we hold, even if an error thereby occurred, it was constitutionally harmless because the court gave him the precise relief he requested, not once but twice; namely, dismissing

[1] For the reasons provided below, we hold there were no practical or identifiable consequences of vacating the conviction without Walker present. Therefore, any error by the trial court would not be manifest or compliant with RAP 2.5(a)(3). Nguyen, 165 Wn.2d at 433 (quoting WWJ Corp., 138 Wn.2d at 602-03). Nonetheless, in our discretion, we choose to review the assignment of error as presented.

the conviction at issue. Anderson, 19 Wn. App. 2d at 564 (finding any error of said right harmless because Anderson received the relief requested).

Our decision in State v. Frohs, 22 Wn. App. 2d 88, 91, 511 P.3d 1288 (2022), is instructive. Frohs pled guilty to several charges, and approximately eight years later filed a motion to amend his judgment and sentence because, inter alia, one of his convictions exceeded the statutory maximum for that type of felony. Id. The State conceded error and provided Frohs notice of a CrR 7.8 hearing "without oral argument." Id. The court entered an order granting his motion as to that error without holding a hearing. Id. Despite the fact that Frohs did request a hearing prior to the court deciding his motion, id. at 91, we held that "the plain terms of CrR 7.8(c) do not require oral argument for a show cause hearing, only that the court consider the motion after hearing from both parties." Id. at 93. As in this case, the "State contended oral argument was not required to consider the motion's merits, and Frohs neither disagreed nor requested oral argument." Id. at 94. Thus, we concluded "under the circumstances, the superior court's decision to decide the motion on the pleadings was reasonable." Id.

Further, as to his conviction for simple drug possession, Frohs "request[ed] very limited relief, asking only that his . . . conviction be vacated" under Blake. Id. at 97. As here, Frohs did not at that time "request resentencing due to this correction." Id. For these reasons, and because "the change to his offender scores [would] not affect the standard ranges for his convictions," we concluded "the trial court ha[d] the discretion to determine whether a hearing or further proceedings [were] required after correcting Frohs' judgment and sentence." Id. at 97-98.

Here, Walker requested and received nothing more or less than what he specifically requested; namely, that his "conviction under RCW 69.50.4013(1) [sic.] . . . be dismissed and/or removed from the defendant's record." And there is nothing in the record suggesting his offender score or standard range would have changed. Thus, as in Frohs, it was reasonable and within the court's discretion to decide the motions on the pleadings. Walker does not explain how a court's procedural decision can be reasonable, within its discretion, and yet constitutionally harmful.

Instead, in reply, Walker argues he in fact did not receive his desired relief. But nowhere does he identify *in the record* before this court what that additional unrequited relief was, and when or where he requested that relief, *prior to the Order*. The court is not required to search the record to locate the portions relevant to a litigant's arguments. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). More substantively, as in Anderson, "[e]ven if [Walker] had asked his attorney to try to expand the scope of the hearing, there is no reasonable basis for believing the result could have been different." 19 Wn. App. 2d at 564.

That is, on this record, where the court had two of Walker's motions (each expressly waiving oral argument) and the State's motion all requesting the same relief, we have no reason to believe that the court would have granted relief greater or less than simply vacating Walker's cocaine possession conviction had Walker been present. Therefore, we conclude any constitutional error which may have occurred was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 887.

Based on the above analysis, we need not reach whether Walker would have had a right to counsel had his presence at the hearing been required or any other remaining assignment of error.[2]

III. CONCLUSION

We affirm.

Díaz, J.

WE CONCUR:

Bjelkeman, J.

Smith, C.J.

[2] Walker also argues that his plea agreement was "indivisible" and "should be set aside *upon request*." This argument is persuasive only if you ignore the fact that he made no such request prior to the court's ruling. That is, even if he had such a right, there was no "request" triggering any further process. See State v. King, 162 Wn. App. 234, 241, 253 P.3d 120 (2011) (citing State v. Turley, 149 Wn.2d 395, 400-01, 69 P.3d 338 (2003)).

APPENDIX B

FILED
5/21/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CURTIS JOHN WALKER, Appellant.	No. 84531-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Curtis John Walker, filed a motion for reconsideration of the opinion filed on April 22, 2024 in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84531-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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