Supreme Court No. _____

Court of Appeals No. 57546-9-II

IN THE SUPREME COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOSEPH ALLEN CAMPBELL,
Petitioner.

PETITIONER'S MOTION FOR DISCRETIONARY REVIEW ON REVIEW FROM CLARK COUNTY SUPERIOR COURT

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A. IDENTITY OF THE PETITIONER

Joseph Campbell, Petitioner, by and through attorney Sean M. Downs, asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner is seeking review of the court of appeals decision denying Mr. Campbell's direct appeal of his invalid judgment and sentence. A copy of the court of appeals decision and subsequent denial of motion for reconsideration is attached as "Appendix A".

C. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Campbell's involuntary entry of a guilty plea based on a legal error of an incorrect offender score affords him the remedy of withdrawal of his guilty plea on direct appeal.
2. Whether Mr. Campbell received ineffective assistance of counsel in entering a guilty plea with a clearly incorrect offender score.

D. SUMMARY OF FACTS

Mr. Campbell entered a guilty plea to one count of rape of child second degree. CP 2-19.[1] There was no criminal history attachment listed and no signature on any document listing criminal history. *Id*. There was no statement indicating that the criminal history was correct and complete. *Id*. The prosecuting attorney's offer listed an offender score of '0' and the plea paperwork indicated an offender score of '0'.

Sentencing was set over and a criminal history was subsequently attached to the judgment and sentence which listed three prior juvenile offenses for residential burglary (case 12301), residential burglary (case 03264), and burglary second degree (case 10210). CP 21-41. Each of these prior offenses was counted as half a point each. CP 41. Mr. Campbell was under eighteen years of age at the time of each of these prior offenses, as his birthdate is April 6, 1985. CP 21, 41. The

[1] Court recordings for these proceedings do not exist anymore, so the briefing in this matter relies on the court file.

criminal history also had the box checked indicating that "[t]he defendant committed a current offense while on community placement (adds one point to score) RCW 9.94A.360." *Id*. The total points were calculated at 2.5 points. *Id*. Mr. Campbell was then sentenced at an offender score of 2 with standard sentencing range of 95 to 125 months. CP 23.

Mr. Campbell subsequently appealed this judgment and sentence and the court of appeals accepted the appeal via a motion for extension of time to file notice of appeal. The appellant argued one issue (that the offender score calculated at sentencing was incorrect) and argued for a chosen remedy of withdrawal of the guilty plea.

The court of appeals ultimately denied Mr. Campbell's appeal and indicated that "Campbell assumed the risk of his additional criminal history that was discovered, which resulted in a higher offender score than anticipated by the plea agreement". 57546-9-II Opinion, p. 6. The court of appeals then

defined this as a "factual error" because Campbell supposedly did not disclose criminal history. 57546-9-II Opinion, pp. 6-7.

Mr. Campbell filed a motion for reconsideration, which was denied. This motion for discretionary review follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Mr. Campbell's entry of a guilty plea was not knowing, intelligent, and voluntary as it was based on an incorrect offender score.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); *State v. Weyrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008); *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); *Boykin v. Alabama*, 395 U.S. 238, 243- 44, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); U.S. Const. Amend XIV; Const. Art. I, § 3. CrR 4.2(d) requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." Prior to acceptance of a guilty plea, "[a] defendant 'must be informed of all the direct consequences

of his plea.'" *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). A defendant need not establish a causal link between deficient information regarding direct sentencing consequences and his decision to plead guilty. *Weyrich*, 163 Wn.2d at 557 (citing *lsadore*, 151 Wn.2d at 302). A sentencing court acts without statutory authority under the sentencing reform act when it imposes a sentence based upon a miscalculated offender score. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 332, 28 P.3d 709, 718 (2001). The incorrect calculation of an offender score constitutes a fundamental defect in sentencing resulting in a miscarriage of justice which requires relief. *Id*.

Where the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the

initial choice of a remedy to specifically enforce the agreement or withdraw the plea." *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). An involuntary plea constitutes a manifest injustice, and a defendant may raise this claim of error for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001). A defendant may be allowed to withdraw his guilty plea "'whenever it appears that withdrawal is necessary to correct a manifest injustice.'" *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008) (citing CrR 4.2(f)). "An involuntary plea can amount to manifest injustice." *Codiga*, 162 Wn.2d at 923. A miscalculation of an offender score renders the defendant's plea involuntary and the plea may be withdrawn. *Codiga*, 162 Wn.2d at 925.

(i) <u>The point added to Mr. Campbell's offender score for being on "community placement" at the time of the offense was erroneous.</u>

A trial court's offender score calculation is reviewed *de novo*. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P. 3d 803 (2011).

The standard sentencing range under Washington's Sentencing Reform Act of 1981 (SRA) for any given offense is a function of the offense's seriousness level and the defendant's offender score. *See* Former RCW 9.94A.525 (2002 c 290 § 3). RCW 9.94A.525 governs the calculation of an offender score. Offender scores are calculated by adding prior non-wash out convictions to current offenses while following any specific rules laid out in RCW 9.94A.525 to determine the sum of the convictions. Prior convictions are defined as convictions which existed before the date of sentencing for the offense for which the offender score is being computed. If the present conviction is for a violent offense, count 1/2 point for each prior juvenile nonviolent felony conviction. RCW 9.94A.525(8) (2002 c 290 § 3). Rape of child second degree is a violent offense; residential burglary and burglary second degree are non-violent offenses. RCW 9.94A.030(29, 45) (2003 c 53 § 55).

If the present conviction is for an offense committed while the offender was under community placement, add one

point. RCW 9.94A.525(17) (2002 c 290 § 3). "Community placement" means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two. Former RCW 9.94A.030(7) (Definitions) (2003 c 53 § 55). "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably. RCW 9.94A.030(30) (2003 c 53 § 55). "Postrelease supervision" is that portion of an offender's

community placement that is not community custody. RCW 9.94A.030(33) (2003 c 53 § 55).

In the instant case, Mr. Campbell's offender score was erroneously inflated by one point because of supposedly being on "community placement" at the time of the current offense for a prior juvenile offense. Community placement is only available for criminal matters resolved in adult court. There is no possibility for community placement to be imposed for juvenile matters. The court and the parties apparently erroneously believed that juvenile probation was the same as community placement for purposes of calculating the offender score. It is not. The Sentencing Reform Act is applied to offenses in adult court, whereas the Juvenile Justice Act is applied to offenses in juvenile court. The three prior burglary offense were resolved in juvenile court and Mr. Campbell was 15 years old or younger at the time of the offenses. Community placement was not an option for those offenses. The date of the offense in the instant case was one month after Mr. Campbell

turned eighteen years old when juvenile court still had jurisdiction over Mr. Campbell for his prior juvenile adjudications.

Given the above, the court erroneously imposed one more point in Mr. Campbell's offender score. His correct offender score should have been 1 with standard range sentence of 86 to 114 months.

(ii) Mr. Campbell is entitled to his chosen relief of withdrawal of his guilty plea.

Although Mr. Campbell stipulated to his offender score, the erroneous score results from a legal error entitling him to relief. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P. 3d 618 (2002). The law is well settled. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Id*. at 867- 68 (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P. 2d 1019 (1997)); *In re Pers. Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P. 2d 1001 (1980) ("a plea bargaining

agreement cannot exceed the statutory authority given to the courts"); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P. 2d 1293 (1980) ("[W] hen a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.") (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P. 2d 848 (1955)); *accord*, *State v. Wilson*, 170 Wn.2d 682, 688- 89, 244 P. 3d 950 (2010).

(iii) Mr. Campbell did not present a criminal history. Both parties relied on the same erroneous offender score at the guilty plea hearing.

In *Codiga*, the defendant erroneously believed that a prior felony had washed from his offender score, but the discovery of additional misdemeanor history that interrupted the washout period resulted in a higher offender score. *State v. Codiga*, 162 Wn.2d 912, 916, 175 P.3d 1082 (2008). The court found that a defendant should *not* be charged with knowing the *legal* impact of his or her criminal history on the offender score.

Id at 928. Three years after *Codiga* was decided, the Supreme Court issued a decision in *Robinson* which modified its holding *State v. Robinson*, 172 Wn.2d 783, 788, 263 P.3d 1233 (2011). Like in Mr. Campbell's case, a guilty plea was entered where both parties believed the defendant had an offender score of '0'. Robinson entered a statement of criminal history that did not list prior juvenile offenses. *Id*. A community corrections officer discovered the prior criminal history, which changed Robinson's sentencing range considerably. *Id*. Robinson was nonetheless allowed to withdraw his guilty plea and the Supreme Court affirmed the withdrawal of a guilty plea where there was a mutual mistake. *Id*.

The instant case is also akin to the mutual mistake case of *State v. Walsh* (cited by *Codiga*). *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001). In *Walsh*, the court concluded that a plea is involuntary and can be withdrawn when the actual standard sentencing range is higher than the range stated in the plea form. *Id*. at 7–8. In *Walsh*, both the prosecutor and defense

counsel calculated Walsh's offender score such that they believed his standard range would be 86 to 114 months. *Id*. at 4. The plea form then provided that the prosecutor would recommend a sentence of 86 months. *Id*. After the plea hearing, a community corrections officer calculated Walsh's offender score differently, resulting in a standard range of 95 to 125 months. *Id*. Nothing in the record showed that Walsh was ever advised or realized before sentencing that the standard range was not the one reflected in the plea agreement. *Id*. at 5, 17 P.3d 591. The court held that because there was a mutual mistake at the time the plea was entered regarding the standard sentence range, Walsh had established that his guilty plea was involuntary. *Id*. at 8.

In the instant case, there was no criminal history presented at the guilty plea hearing. Even though the parties erroneously relied on an incorrect offender score of '0', there is nothing in the record that indicates that Mr. Campbell failed to provide information to the court. Parties can be incorrect in

their interpretation of the very complicated offender score statute and may assume that prior juvenile offenses do not count in an offender score. There is nothing in the record to show that it was Mr. Campbell that failed to disclose information to the court. It is the defense attorney, not the defendant, that is tasked with preparing documents for entry of a guilty plea.

The increase in offender score from '0' to '2' resulted in an erroneous offender score and a different standard sentencing range than what was contemplated between the parties in the plea agreement. There was a mutual mistake and the plea was therefore involuntary. *Walsh*, 143 Wn.2d 8-9. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. *Id*. This court cannot presume that there was a factual mistake in the instant case because there was no criminal history attached to the plea form.

The court of appeals opinion appears to be based on the incorrect assumption that an 18-year-old Mr. Campbell somehow hid his criminal history from the State and the court. To the contrary, there was no criminal history document listed whatsoever and it is not incumbent on a teenage defendant who is represented by counsel to prepare that document for the court. There is nothing in the record to suggest that this was a factual mistake where Mr. Campbell bore the risk of additional criminal history being discovered. Based on the record presented and Mr. Campbell's SAG, it is much more likely that defense counsel failed in his preparation of the plea documents and advisement to his client. Mr. Campbell's case is more akin to *Walsh* or *Robinson, supra*.

(iv) <u>The Court of Appeals decision is in conflict with a decision of the supreme court and court of appeals, pursuant to RAP 13.4(b)(1)-(2).</u>

The Supreme Court will accept review if the lower court's decision conflicts with a Supreme Court decision or a

published Court of Appeals decision. RAP 13.4(b)(1), (2). In the instant case, the court of appeals ignored numerous cases discussing how the incorrect calculation of an offender score is a legal error necessitating correction by either (a) resentencing, or (b) withdrawal of the guilty plea, at the choice of the defendant. *See*, *e.g.*, *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988); *State v. Codiga*, 162 Wn.2d 912, 175 P.3d 1082 (2008); *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001); *State v. King*, 162 Wn. App. 234, 253 P.3d 120, 124 (2011).

The court of appeals opinion is in direct conflict with the above published authority. Accordingly, this court should accept review.

2. Mr. Campbell received ineffective assistance of counsel in entering a guilty plea with an incorrect offender score.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an "objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Sixth Amendment to the United States Constitution protects an individual's fundamental right to a fair trial.[2] The United States Supreme Court has repeatedly emphasized that entitlement to counsel plays a critical role in protecting this fundamental right.[3] In *Strickland*, the United States Supreme Court announced a two-prong test to evaluate whether a convicted defendant was deprived of his Sixth Amendment right to effective assistance

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[2] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.")

[3] *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 467, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932). In an adversarial judicial system, "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). Because an attorney's role is of vital importance, a person accused of a federal or state crime, with limited exceptions, has the right to have counsel appointed if one cannot be obtained. *Argersinger v. Hamlin*, 407 U.S. 25, 30–31, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (rejecting the contention that prosecutions of petty crimes, which may be tried without a jury, could be tried without a lawyer).

of counsel. *Strickland*, 466 U.S. at 687.[4] In order to succeed on a claim of ineffective assistance of counsel, the defendant must show (1) the "counsel's performance was deficient" and (2) that the deficient performance prejudiced the defendant as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687. In evaluating counsel's alleged deficiency, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Strickland*, 466 U.S. at 689. In evaluating the prejudice prong, courts require that "but-for" counsel's deficiency, the result of the trial likely would have been different. *Id*. at 693–94 ("…[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case…The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

[4] The Supreme Court had already "recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

sufficient to undermine confidence in the outcome."). The *Strickland* test applies to claims of ineffective assistance of counsel arising from plea bargains. *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997).

In the instant case, Mr. Campbell entered a plea of guilty with an offender score of '0'. He was subsequently sentenced at an offender score of '2' due to one point being erroneously counted for supposedly being on "community placement" for a juvenile offense at the time of the instant offense. There is no indication in the court file that defense counsel objected to this erroneous scoring. There is no rational basis for proceeding with a plea and sentencing at a higher offender score than was authorized by law and there is no strategic value to having the court erroneously impose more time for one's client. Mr. Campbell should have only been looking at a sentencing range of 86-114 months instead of 95-125 months that he was sentenced to due to counsel's deficiency. Mr. Campbell's revoked SSOSA resulted in a minimum term sentence of 125

months, which is 11 months more time that was possible at the correct sentencing range. Spending considerably more time in prison unnecessarily due to defense counsel's failures is a clear and direct prejudice to Mr. Campbell.[5] Mr. Campbell was specifically prejudiced by this deficiency as his SSOSA sentence was revoked and Mr. Campbell had to spend additional time in prison as a result. Given the above, Mr. Campbell received ineffective assistance of counsel with the entry of the guilty plea.

(i) The Court of Appeals decision is in conflict with a decision of the supreme court and court of appeals, pursuant to RAP 13.4(b)(1)-(2).

[5] There are other potential instances of ineffective assistance of counsel that are present in the record. As noted by Mr. Campbell in his statement of additional grounds, the charging documents and probable cause statement do not align as to who the correct alleged victim is. This also raises the possibility that Mr. Campbell did not enter his guilty plea knowingly and intelligently if there is not clarity as to the identity of the alleged victim. Moreover, there is an absence of information about Mr. Campbell's youthfulness raised for purposes of sentencing. Mr. Campbell was 18 years old at the time of the offense, which raises the possibility that youthful mitigators were present at the time of the offense, especially considering the circumstances of adolescents being in a large group together thereby resulting in peer pressure. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

The Supreme Court will accept review if the lower court's decision conflicts with a Supreme Court decision or a published Court of Appeals decision. RAP 13.4(b)(1), (2). In the instant case, as argued in the previous section, Mr. Campbell received ineffective assistance of counsel by relying on an incorrect offender score and the court of appeals decision did not address this assignment of error. Mr. Campbell relies on the above-named authorities in support of this motion.

F. CONCLUSION

Given the foregoing, Mr. Campbell respectfully requests that the supreme court accept review of this matter.

DATED this November 18, 2024.

This document contains 3,464 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, declare under penalty of perjury under the laws of the State of Washington that on November 18, 2024 I e-mailed the above MOTION FOR DISCRETIONARY REVIEW with the clerk at <supreme@courts.wa.gov> and a copy to the following participant: Lauren Boyd <lauren.boyd@clark.wa.gov>, attorney for Respondent.

s/ Sean M. Downs
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From: OFFICE RECEPTIONIST, CLERK
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Subject: RE: State v. Joseph Campbell (CoA #57546-9-II) - motion for discretionary review
Date: Tuesday, November 19, 2024 11:33:00 AM

Received 11-18-24

Supreme Court Clerk's Office

From: Sean Downs <sean@greccodowns.com>
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Subject: State v. Joseph Campbell (CoA #57546-9-II) - motion for discretionary review

Attached is a motion for discretionary review regarding the above-referenced Division II matter. We are requesting that the attached be filed and that a new case be generated for this motion.

If you require any further information, please feel free to contact me. Thank you for your assistance.

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Filed
Washington State
Court of Appeals
Division Two

September 4, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH ALLEN CAMPBELL, Appellant.	No. 57546-9-II UNPUBLISHED OPINION

CHE, J. — Joseph Allen Campbell seeks to withdraw his guilty plea.

Campbell pleaded guilty to one count of second degree rape of a child. The trial court imposed a sentence based on an offender score of 2, which included one point for committing the current offense while on community placement under RCW 9.94A.360.

Campbell appeals, arguing that his guilty plea was not knowing, intelligent, and voluntary as it was based on an incorrect offender score. In a statement of additional grounds (SAG), Campbell also argues that he received ineffective assistance of counsel.

We hold that (1) the trial court erred by using an incorrect offender score to sentence Campbell, (2) Campbell is not entitled to withdraw his guilty plea, but he is entitled to resentencing using a correct offender score, and (3) Campbell did not receive ineffective assistance of counsel.

Accordingly, we affirm the conviction and remand to the trial court for resentencing using Campbell's correct offender score.

FACTS

In 2003, the State charged Campbell with second degree rape of a child. The information identified minor VKF (DOB 5/18/90) as the victim. But the probable cause certificate appeared to identify a different individual, minor FGK (DOB 7/20/90), as both a witness and the victim. SAG Ex. 1. Campbell pleaded guilty to second degree rape of a child. In Campbell's statement on plea of guilty, he wrote that he "had sexual intercourse with a 12 year old minor DOB (5/18/90)" when "[he] was 18 years old." Clerk's Papers (CP) at 7. He did not name the victim, however.

Both Campbell's statement on plea of guilty and the plea agreement reflected an offender score of 0 and the corresponding standard sentence range. Campbell's statement on plea of guilty acknowledged that "both the standard sentence range and the prosecuting attorney's recommendation may increase" if the State discovered additional criminal history. CP at 3. Campbell acknowledged that his guilty plea would nevertheless be binding.

Campbell signed the guilty plea statement, attesting that his lawyer had explained the plea and that he understood it and had no further questions. Campbell also attested that he made the plea "freely and voluntarily." CP at 7. Campbell's attorney signed the statement, declaring that he had discussed the statement with Campbell and believed Campbell was, "competent and fully understands the statement." CP at 7. The trial court found Campbell's guilty plea "knowingly, intelligently and voluntarily made" and that Campbell understood "the charges and the consequences of the plea." CP at 8.

Before sentencing, the State discovered that Campbell's criminal history contained three prior nonviolent juvenile offenses, totaling 1.5 points. Additionally, Campbell was on juvenile

probation when he committed his offense. Therefore, the trial court added one additional point because it believed that Campbell committed his offense while on community placement. The trial court sentenced Campbell using an offender score of 2. It imposed 125 months to be served through the Special Sexual Offender Sentencing Alternative (SSOSA). The trial court later revoked Campbell's SSOSA and sentenced him to 125 months to life. *In re Pers. Restraint of Campbell*, 27 Wn. App. 2d 251, 253, 533 P.3d 144 (2023).

Campbell appeals.[1]

ANALYSIS

I. WITHDRAWAL OF GUILTY PLEA

Campbell argues that his guilty plea was not knowing, intelligent, and voluntary because the trial court erroneously added one point for community placement, thereby sentencing him using an incorrect offender score. He seeks to withdraw his guilty plea as his chosen remedy. The State concedes that Campbell's offender score is incorrect but argues he is entitled only to resentencing using a correct offender score. We accept the State's concession that the trial court sentenced Campbell using the incorrect offender score. But we conclude Campbell's guilty plea was knowing, intelligent, and voluntary, and that the error here is a factual one, such that he is not entitled to withdraw his guilty plea. Instead, Campbell is entitled to resentencing using a correct offender score.

[1] Campbell filed his notice of appeal on November 4, 2022, nearly 20 years after entry of the judgment and sentence. The commissioner granted Campbell's motion to file a late notice of appeal pursuant to RAP 18.8(b).

A. *Offender Score Calculation*

The sentence imposed by the trial court must be statutorily authorized. *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 322, 422 P.3d 451 (2018). We review offender score calculations de novo. *State v. Griepsma*, 17 Wn. App. 2d 606, 619, 490 P.3d 239 (2021). RCW 9.94A.525 governs the offender score calculation. The trial court must add one point to a defendant's offender score if they are under community placement when they commit their offense. Former RCW 9.94A.525(17) (2002). Community placement is defined as the "period during which the offender is subject to the conditions of community custody and/or postrelease supervision." Former RCW 9.94A.030(7) (2002). Community placement is not available for juvenile offenses. *See* former RCW 9.94A.030(7) (2002).

Here, Campbell's juvenile probation did not qualify as community placement under former RCW 9.94A.030(7). Thus, the trial court erred by adding one point to Campbell's offender score calculation and Campbell is entitled to a remedy.

B. *Campbell's Plea is Knowing, Intelligent, and Voluntary, and Campbell Is Entitled Only to Resentencing Using a Correct Offender Score*

Campbell seeks to withdraw his guilty plea, arguing that the erroneous offender score rendered his plea not knowing, voluntary, and intelligent. The State responds that the remedy for an erroneous offender score is resentencing with a correct offender score, not withdrawal of the plea. Given the facts of this case, we agree with the State.

"Due process requires that a defendant's guilty plea must be knowing, intelligent, and voluntary." *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). When guilty pleas are voluntarily and intelligently made, there is a strong public interest in their enforcement. *Id*.

There is a strong presumption that a plea is voluntary if "'a defendant completes a plea statement and admits to reading, understanding, and signing it.'" *State v. D.G.A.*, 25 Wn. App. 2d 860, 864, 525 P.3d 995, *review denied*, 534 P.3d 802 (2023) (quoting *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998)). We determine whether a plea is knowingly, intelligently, and voluntarily made based on the totality of circumstances. *State v. Snider*, 199 Wn.2d 435, 444, 508 P.3d 1014 (2022). The State bears the burden of proving a guilty plea is valid. *State v. Ross*, 129 Wn.2d 279, 283, 916 P.2d 405 (1996).

Plea agreements are regarded and interpreted as contracts between the parties and the parties are bound by the terms of a valid plea agreement. *Codiga*, 162 Wn.2d at 922. Under CrR 4.2(f), a defendant may withdraw their guilty plea when it appears necessary to correct a manifest injustice. *Id.* at 922-23. Involuntary pleas can amount to a manifest injustice. *Id.* at 923. The defendant carries the burden of proving manifest injustice. *Ross*, 129 Wn.2d at 283.

It is uncontested that Campbell read and signed his guilty plea statement, attesting that he discussed all the paragraphs with his attorney, understood its terms, and entered the plea "freely and voluntarily." CP at 7. Campbell's attorney attested that the attorney discussed the guilty plea with Campbell and believed Campbell was competent and fully understood the guilty plea. The trial court found Campbell's plea was "knowingly, intelligently and voluntarily made" and Campbell "underst[ood] the charges and the consequences of the plea." CP at 8. This creates a strong presumption that Campbell's plea was voluntary.

Campbell, however, argues that the erroneous offender score rendered his plea not knowing, voluntary, and intelligent. He relies on *Codiga* for the proposition that because his

offender score is incorrect, which is a legal error, his choice of remedy—withdrawal of his plea—controls.

In *Codiga*, our Supreme Court discussed cases in which it had held that a mutual mistake made by the parties at the time the plea was entered or negotiated—regarding the standard sentence range or offender score—caused the plea to be involuntary such that it *could* be withdrawn. *Codiga*, 162 Wn.2d at 925. The court recognized "a distinction between instances where the mistake was a factual one involving the defendant's criminal history and instances where the defendant completely and correctly revealed [their] criminal history, but the attorneys made a legal mistake as to the resulting sentencing range for the current crime." *Codiga*, 162 Wn.2d at 926. The defendant should not be burdened with assuming the risk of a legal mistake where their criminal history is correct and complete, but counsel miscalculates the resulting offender score. *Id.* at 929. But where the defendant does not disclose their correct or complete criminal history, as was the case in *Codiga*, they assume the risk of additional criminal history being discovered that would impact their offender score and fail to establish a manifest injustice to allow withdrawal of their guilty plea. *Id.* at 928, 930.

Like Codiga, Campbell failed to disclose his entire criminal history and he has not claimed that he presented his entire criminal history to his attorney or the State prior to the entry of his guilty plea. *Id.* at 930. Thus, Campbell assumed the risk of his additional criminal history that was discovered, which resulted in a higher offender score than anticipated by the plea agreement. Campbell characterizes the miscalculation of his further discovered criminal history as a "legal error," but he disregards that he first failed to disclose his entire and correct criminal history, which is a factual mistake. Because this is an instance of a factual mistake regarding

Campbell's criminal history, he fails to establish manifest injustice sufficient to warrant withdrawal of his guilty plea. *See Id.* at 930.

Campbell does not show that withdrawal of his guilty plea is necessary to correct a manifest injustice, but he is nonetheless entitled to resentencing. *See State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010) ("'[T]he remedy for a miscalculated offender score is resentencing using a correct offender score'" (quoting *Ross*, 152 Wn.2d at 228)).

Additionally, *Codiga* does not stand for the proposition that a guilty plea must be withdrawn under Campbell's circumstance where he failed to disclose his criminal record, the court erroneously included one point for community placement, and it sentenced Campbell using the incorrect offender score. Campbell provides no persuasive authority supporting his chosen remedy. Moreover, our Supreme Court has articulated that the proper remedy for a sentence based on a miscalculated offender score is resentencing using a correct offender score. *Wilson*, 170 Wn.2d at 690. Thus, we hold the remedy for Campbell's miscalculated offender score is to remand for resentencing based on a correct offender score.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In his SAG, Campbell argues that defense counsel was ineffective in several ways. He first asserts that counsel rendered ineffective assistance by failing to inform him that both the certificate of probable cause and the information identified different persons as the victim of the sex offense. Specifically, Campbell claims that had he been informed of the discrepancy of the named victims, he would not have pleaded guilty and would have instead proceeded to trial. We disagree. As explained below, we do not reach Campbell's other SAG arguments.

A. *Legal Principles*

Defendants are entitled to effective assistance of counsel under both the United States and Washington Constitutions. *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). To overcome the "strong presumption" that counsel is effective, a defendant must show that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances" and that counsel's deficient representation prejudiced the defendant. *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Failure to prove either prong of the test ends the inquiry. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

To satisfy the prejudice prong, "a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, [they] would not have pleaded guilty and would have insisted on going to trial." *In re Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836, 845, 479 P.3d 674 (2021) (internal quotation marks omitted) (quoting *State v. Sandoval*, 171 Wn.2d 163, 174-75, 249 P.3d 1015 (2011)). A reasonable probability exists if the defendant "convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances." *In re Pers. Restraint of Amos*, 1 Wn. App. 2d 578, 595, 406 P.3d 707 (2017) (internal quotation marks omitted) (quoting *Sandoval*, 171 Wn.2d at 169).

A defendant's bare allegation that he would not have pleaded guilty but for the error is insufficient to establish prejudice. *Buckman*, 190 Wn.2d at 69; *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 254-55, 172 P.3d 335 (2007).

B. *Campbell Fails to Show That He Was Prejudiced by Defense Counsel's Performance*

Campbell does not satisfy the prejudice prong.

Campbell must demonstrate a reasonable probability that, but for defense counsel's failure to inform him of the discrepancy of the named victims, he would have insisted on going to trial. *Garcia-Mendoza*, 196 Wn.2d at 845. Instead, Campbell only asserts without explanation that he would have proceeded to trial if his attorney informed him of the discrepancy. Merely claiming that he would not have pleaded guilty or taken the plea deal but for the alleged error is insufficient to establish prejudice. *Buckman*, 190 Wn.2d at 69. Moreover, when Campbell was asked to state what he did in his own words that made him guilty of the sex offense, Campbell acknowledged that he "had sexual intercourse with a 12 year old minor DOB (5/18/90)." This statement matched the birth date of the victim identified as VKF in the information. Because Campbell fails to establish prejudice, he does not demonstrate ineffective assistance of counsel as to the victim identity issue.

Campbell also argues that he received ineffective assistance of counsel due to the erroneous offender score. In light of our decision to remand for resentencing, we do not address this argument.

Campbell also argues that defense counsel failed to investigate his mental health and behavioral issues and misadvised him during plea negotiations. We cannot consider these arguments as they are based on evidence outside the record. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (Where "arguments [in a SAG] are not supported by credible evidence in the record, we *cannot* review them.") (emphasis added). Campbell's recourse is to raise these claims in a properly supported personal restraint petition. *Alvarado*, 164 Wn.2d at 569.

Thus, Campbell's ineffective assistance of counsel claim fails and we decline to address the remaining arguments in his SAG.

CONCLUSION

We affirm Campbell's conviction and remand to the trial court for resentencing using Campbell's correct offender score.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, P.J.

Price, J.