

69309-3

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NO. 69309-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

GARRIDAN A. NELSON,

Appellant

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

1. Is the defendant's claim that he is entitled to withdraw his guilty plea because it was involuntary time barred?

2. The defendant brought a motion to correct his judgment and sentence which the court granted. He did not file or argue a motion to withdraw his guilty plea. May he now argue for the first time on appeal that his plea was involuntary and he is therefore entitled to withdraw his guilty plea?

3. Was the defendant's plea involuntary when he was advised of the sentencing consequences of his plea as dictated by statute at the time he pled guilty, even though a later decision of this Court regarding a statute as applied to offenders in the defendant's position rendered one of the provisions of the defendant's sentence invalid?

4. Is the defendant entitled to withdraw his guilty plea under CrR 7.8?

II. STATEMENT OF THE CASE

The defendant, Garridan Nelson was charged with two counts of Aggravated First Degree Murder and one count of Homicide by Abuse on March 3, 1995. 1 CP 69-70. On March 31, 1995 the charges were amended to two counts Aggravated First

Degree Murder and one count of First Degree Felony Murder. 1 CP 67-68. The Court entered three orders extending the time for filing notice of the death penalty. 2 CP __ (sub. 12, 18, 22). On June 27, 1995 the State filed a Second Amended Information charging two counts of First Degree Murder under the theory that the murder was committed intentionally, and one count of First Degree Felony Murder. 1 CP 66.

The defendant pled guilty to the charge on that same date. The defendant signed a statement of defendant on plea of guilty stating the maximum sentence on each charge was life, and a \$50,000 fine, and the standard range for each count was 240 to 320 months in prison. 1 CP 61. The defendant further stated that he understood the counts would run consecutive to each other. Id. The guilty plea form also stated the mandatory minimum term on each count was 20 years which was not subject to good time credit. 1 CP 62.

The court sentenced the defendant on July 17, 1995. The defendant's offender score was calculated as 0, the seriousness level was XIV, and the standard range was calculated as 240-320 months. 1 CP 54. The Court sentenced the defendant to 320 months on each count to run consecutive to each other for a total of

960 months confinement. 1 CP 55. In accordance with former RCW 9.94A.120(4) (recodified as RCW 9.94A.540) the judgment and sentence stated that “RCW 9.94A.120(4) provides that 240 months on each count is a mandatory minimum during which the defendant is not eligible for community custody, earned early release time, furlough, etc.” Id.

On July 27, 2012 the defendant filed a “motion to modify or correct judgment and sentence pursuant to CrR 7.8. 1 CP 29. The relief requested was to strike the portion of the judgment and sentence referencing former RCW 9.94A.120(4) and to “resentence Mr. Nelson to reflect the ability to received good time on his mandatory minimum term of 20 years.” 1 CP 14. The motion was based on this Court’s decision in State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999). 1 CP 15-16. The State agreed that the petitioner was entitled to the relief requested in light of Cloud. 1 CP 5.

The trial court granted the defendant’s request and entered an order amending the judgment and sentence to add a statement that “the defendant is entitled to earned early release on each count.” 1 CP 2. The Court deleted from the judgment and sentence the paragraph that read “RCW 9.94A.040(4) (sic)

provides that 240 months on each count is a mandatory minimum during which the defendant is not eligible for community custody, earned early release time, furlough, etc.” Id.

At the hearing on the defendant’s motion the defendant asked if he was not being “remanded for resentencing”. 3 RP 3.¹ The court explained that all that was necessary for the defendant’s motion was an order amending the judgment and sentence; it was not necessary to resentence the defendant. Id. The defendant then said there were issues that he would have liked to bring up at a sentencing hearing. Id. He did not specify what those issues were, what additional relief he may be seeking, or what the grounds for that relief might be. The court instructed the defendant to file additional motions if he wanted to raise new issues. Id.

Whether the petitioner was entitled to good time credit for his entire sentence was not time barred because it was clear after this Court’s decision in Cloud that the defendant was entitled to it. Since the judgment and sentence clearly stated that he was not, it evidenced invalidity on the face of the document.

¹ The report of proceedings prepared for this appeal consist of three volumes designated as follows: Vol 1: 7-13-95; Vol 2: 3-30-12; Vol. 3: 8-23-12.

III. ARGUMENT

A. THE DEFENDANT'S ARGUMENT THAT HIS PLEA WAS INVOLUNTARY IS A COLLATERAL ATTACK ON HIS JUDGMENT WHICH IS TIME BARRED.

A notice of appeal must be filed in a trial court within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. RAP 5.2(a). A party may appeal a final judgment or an order amending the judgment. RAP 2.2(a)(1), (9). Here the court entered the judgment on July 17, 1995. The defendant did not appeal his conviction or sentence, so it became final on the date it was filed. RCW 10.73.090(3)(a). The court amended the judgment on August 23, 2012. The defendant's notice of appeal was filed on September 10, 2012, within 30 days of the order amending the judgment. It is timely as to the order amending judgment, but untimely as to the underlying conviction.

A collateral attack is any kind of post conviction relief other than a direct appeal. RCW 10.73.090(2). The defendant's appeal does not challenge the order amending the judgment and sentence. Rather he challenges the underlying conviction that entered 17 years earlier. Because that issue relates to the underlying conviction, and it is untimely as a direct appeal, it is a collateral attack on his judgment.

No collateral attack on a judgment may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and it was rendered by a court of competent jurisdiction. RCW 10.73.090(1). The one year time bar does not apply if one of the six enumerated grounds in RCW 10.73.100 exists.

A judgment is invalid if the court in fact exceeded its statutory authority in entering the judgment and sentence. In re Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). A claim that a plea was involuntary however does not render a judgment and sentence invalid on its face. Id. at 141.

Whether a time bar in either statute applies depends on the issue raised. In re Stoudmire, 141 Wn.2d 34, 5 P.3d 1240 (2000). In Stoudmire the Court considered whether the defendant was convicted of charges filed after the statute of limitations had run because the invalidity of the conviction on that basis was apparent on the face of the judgment and sentence. Id. at 354. For that same reason the Court considered whether the sentence imposed exceeded the standard range authorized by statute. Id. at 355-56. The claim that the defendant received ineffective assistance of counsel, that there was insufficient evidence to support one of the

charges, and that the defendant was entitled to withdraw his guilty plea because he was inaccurately informed of the community custody requirement was not considered because they did not fit within the exception to the time bar in RCW 10.73.090. Id. at 350

Here the defendant originally requested the trial court correct his sentence to strike the portion of the judgment and sentence that precluded him from earned early release time on his entire sentence struck. 1 CP 14. He argued he was entitled to relief because this Court's decision in Cloud rendered his judgment invalid on its face. 1 CP 16-17. The State agreed that as to that issue the motion was timely. 1 CP 4-5.

The defendant now asks the Court to remand to the trial court to permit him to withdraw his plea. He alleges that his plea was not voluntary because there was a mutual mistake regarding application of former RCW 9.94A120(4) to his sentence. This is a claim that does not render the judgment and sentence invalid on its face. Further there is no exception in RCW 10.73.100 which would permit consideration of that specific claim. The specific issue raised in this appeal is therefore time barred and therefore should be denied.

B. THE DEFENDANT MAY NOT SEEK TO WITHDRAW HIS GUILTY PLEA FOR THE FIRST TIME ON APPEAL.

1. The Record Does Not Establish A Manifest Constitutional Error.

The defendant argues that he is entitled to withdraw his guilty plea because it was not voluntary. He asserts that imposition of the portion of his sentence that disallowed earned early release for the first 20 years of each sentence was based on a mutual misunderstanding, rendering his plea involuntary. Because the defendant did not raise the issue in the trial court, and he has not shown that a manifest constitutional error has occurred, he is not entitled to the relief he now seeks.

The defendant did not move to withdraw his guilty plea in the trial court. Generally claims of error not raised in the trial court are not considered on appeal. State v. Cleary, 166 Wn. App. 43, 47, 269 P.3d 367 (2012). The rule is based on a policy to “encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) quoting, State v. Scott, 110 Wn.2d 682, 685, 747 P.2d 492 (1988).

The Court may review a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a). To determine whether an alleged error merits review under that rule the Court engages in a four step analysis. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). First the court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Id. Second the court will determine if the error is manifest, i.e. whether the defendant has made a plausible showing that the asserted error had practical and identifiable consequences at trial. Id. Third, if the court finds the error is manifest, it will address the merits of the constitutional issue. Id. Finally, if the court decides that an error of constitutional import was committed, then the court will look to whether that error was harmless. Id.

When analyzing whether a constitutional error has been alleged the court will consider whether the facts asserted by the defendant, if true, result in a constitutional violation. O'Hara, 167 Wn.2d at 98-99. The defendant contends that his plea was involuntary because he was erroneously informed that he would not be eligible for earned early release time during the first 20 years of each sentence.

A plea is voluntary if the defendant was informed of the direct consequences of the plea at the time that the defendant pled guilty. State v. Lamb, 175 Wn.2d 121, 129, 285 P.3d 27 (2012). A direct consequence of the plea is one that is definite, immediate and largely automatic on the range of the defendant's punishment. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). In Lamb the Court found statutory amendments enacted after the defendant pled guilty did not render the plea involuntary, even though those amendments resulted in additional consequences arising from the defendant's conviction. Lamb, 175 Wn.2d at 129.

This case is much like the circumstances presented in Lamb. At the time the defendant pled guilty the law clearly stated persons who are convicted of first degree murder are not eligible for earned early release during the mandatory minimum term. See Laws of Washington 1994, Ch. 1, §2. When the words in a statute are clear and unequivocal the court must apply the statute as written. State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997). Long after the defendant pled guilty this Court construed that portion of the statute to be unconstitutional as applied to those who were not convicted as a persistent offender. Washington Constitution art. 2, §19 prohibited more than one subject in each bill. Since the title of

the bill that included the relevant sentencing provision here related to offenders who had been convicted of serious offenses on three occasions, it could not apply to offenders who had been convicted of a serious offense on only one occasion. Cloud, 95 Wn. App. at 617-18.

Like the defendant in Lamb this Court's later decision did not render the defendant's plea involuntary. He was correctly informed of the direct consequence of his plea that the court was required to impose at the time he pled guilty. Because, under the circumstances, the facts asserted by the defendant do not establish his plea was involuntary, he has not raised a constitutional question.

Similarly the defendant has not demonstrated any alleged error in accepting his guilty plea is manifest. This second factor requires showing actual prejudice. O'Hara, 167 Wn.2d at 99. To show actual prejudice the error alleged must be "so obvious on the record that the error warrants appellate review." Id. at 100.

It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical an identifiable, the appellate court must place itself in the shoes of the

trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. at 100.

The record on appeal consists of the report of proceedings for the sentencing hearing, a motion for defense counsel's file, and the motion to correct the judgment and sentence, as well as the statement of defendant on plea of guilty, the judgment and sentence, the defendant's motion pursuant to CrR 7.8(b) to correct the judgment and sentence to reflect that he is eligible for earned early release credit for his entire sentence, and the order amending the judgment and sentence granting that relief. This record does not show the defendant's plea was based on a misunderstanding about the sentencing consequences that were in force at the time he entered his guilty plea.

Further, given the state of the law at the time the defendant entered his guilty plea, he was properly advised of the sentencing consequences. Neither the prosecutor, defense counsel or the trial judge could have foreseen that the portion of the statute relied on would be found unconstitutional four years after the defendant pled guilty and was sentenced on the charges. Thus, nothing occurred when the defendant pled guilty that could render his plea

involuntary. Cf. In re Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel does not perform deficiently when he does not anticipate a change in the law.)

If the court does reach the substantive issue then pursuant to Cloud an error did occur when the judgment and sentence gave the defendant no good time credit for the first 20 years of each consecutive sentence. That error was corrected when the court amended the judgment and sentence.

The defendant attempts to side-step this analysis by arguing that a defendant may challenge the voluntariness of his plea for the first time on appeal, relying on State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001), and State v. Wakefield, 130 Wn.2d 464, 925 P.2d 183 (1996). Those cases do not support the defendant's argument because in each of those cases the circumstances which caused the plea to be involuntary existed at the time the defendant pled guilty.

In Walsh the parties agreed that the defendant had one prior conviction, but miscalculated his score by failing to take into account the multiplier assigned to that prior offense. Walsh, 143 Wn.2d at 4-5. The mistake was discovered only after the community corrections officer prepared the presentence report,

correctly calculating the offender score. Id. Under these circumstances the defendant had demonstrated a manifest constitutional error justifying review under RAP 2.5(a)(3). Id. at 8.

In Wakefield the defendant pled guilty after the trial judge promised to sentence her within the standard range. Wakefield, 130 Wn.2d at 469. At sentencing the trial judge imposed an exceptional sentence. The defendant appealed arguing she was entitled to remand for resentencing within the standard range. Id. The Court noted the lack of authority dealing with these unique facts. Because it concluded there was reason to doubt whether the plea was voluntary it held the remedy was to remand to allow the defendant the opportunity to withdraw her plea. Id. at 475. The Court did not discuss whether there was any procedural bar to raising this issue for the first time on appeal.

The relief sought in the trial court was to amend the judgment and sentence to reflect the defendant was eligible to earn early release time for his entire sentence. It was not to withdraw his guilty plea. Because the defendant did not raise this issue below, and because the record does not reflect a manifest constitutional error, the appeal should be dismissed.

2. The Defendant Has Not Shown That He Is Entitled To Relief From Judgment of Conviction Under CrR 7.8(b).

The defendant argues that he is entitled to withdraw his guilty plea under CrR 4.2(f) because it was based on a mutual mistake regarding the consequences of the plea, and was therefore involuntary. BOA at 5. Again he relies on Walsh and Wakefield. Both of those cases considered the issues presented under CrR 4.2(f). Walsh, 143 Wn.2d at 6, 8, Wakefield, 130 Wn.2d 5 472. That rule permits a defendant to withdraw his guilty plea to correct a manifest injustice. A manifest injustice is established when a plea that was involuntary. Id. Neither of those cases addressed the portion of that rule that states a motion brought after judgment is governed by CrR 7.8. CrR 4.2(f).

The Supreme Court has recently addressed this situation in Lamb. There the Court held that when a request to withdraw guilty plea is made post-judgment it is not enough to show there has been manifest error under CrR 4.2(f); the defendant who seeks to withdraw his guilty plea after judgment enters must also establish that he is entitled to relief under CrR 7.8(b). Lamb, 175 Wn.2d at 129.

The defendant does not address the requirements for relief under CrR 7.8(b). An offender is entitled to relief under CrR 7.8(b) under the following circumstances:

- (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).

The court ordered a portion of the defendant's sentence was not subject to earned early release pursuant to the statute as it existed at the time of sentence. The order was not the result of a mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.

A new trial based on newly discovered evidence requires showing that the evidence (1) will probably change the result at trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence (4) is

material, and (5) is not merely cumulative or impeaching. State v. Gassman, 160 Wn. App. 600, 609, 248 P.3d 155, review denied, 172 Wn.2d 1002 (2011). The absence of any one of these elements is grounds to deny relief. Id. This Court's decision in Cloud does not constitute evidence that would change the result had the defendant gone to trial. Nor is it material to any fact supporting the conviction.

There are no facts supporting a claim of fraud justifying the defendant's requested relief. The sentence imposed was based on the law as written at the time judgment entered.

A void judgment is one that is entered by a court that "lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved." State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005) quoting, Dike v. Dike, 75 Wn.2d 1,7, 448 P.2d 490 (1968). The court had jurisdiction to sentence the defendant. At the time sentence was imposed the court had no power to grant earned early release time for the first 20 years of each sentence. To the extent that a portion of the statute was later found unconstitutional as applied to persons in the defendant's position, and therefore that

portion became void as to the defendant, the court granted the defendant the relief that he was entitled to.

The last catch-all provision is limited to extraordinary circumstances not covered by any other section of the rule. State v. Smith, 159 Wn. App. 694, 700, 247 P.3d 775 (2011). “Extraordinary circumstances include fundamental and substantial irregularities in the court’s proceedings or irregularities extraneous to the court’s action.” Id. In Smith the trial court’s decision to reduce the sentence imposed when partial confinement alternatives were discontinued was upheld because those alternatives were central to the trial court’s rationale for the length of the original sentence.

Here there was nothing irregular about the court proceeding; the defendant was advised of the law as it was written at the time he pled guilty. While this Court’s decision in Cloud was extraneous to what happened in the trial court, the defendant was given the appropriate relief. The remedy under CrR 7.8(b) is limited to “such terms that are just.” To allow the defendant to withdraw his guilty plea, where he did not request that relief in the trial court and the request is made 18 years after the crime was committed would not satisfy that standard.

Had the defendant filed a motion to withdraw his guilty plea he would have been required to file an affidavit to support that motion. CrR 7.8(c)(1), State v. Forest, 125 Wn. App. 702, 105 P.3d 1045 (2005). The defendant did file an affidavit stating the Department of Corrections failed to recognize his right to earned early release time as a result of the provision in the judgment and sentence which had been held unconstitutional. That affidavit alleges facts that would support correcting his sentence, but it does not allege facts that would support a motion to withdraw guilty plea. 1 CP 13. Thus there is no record justifying the relief he now seeks.

Further, to grant the defendant's request to withdraw his guilty plea would unfairly prejudice the State. Due to the defendant's failure to bring a motion to withdraw the guilty plea in the trial court the State had no opportunity to develop a record demonstrating what evidence may have been lost as a result of the 18 year delay between the plea and his current request to withdraw his guilty plea. It is unknown whether the State's witnesses are still available, and if so to what degree their memories of the events leading to the murders have faded. It is also not known what other

evidence may have been lost in the interim time between the plea and sentence and this appeal.

Even where there has been a mutual mistake regarding sentencing consequences, the defendant's choice of remedy does not control where it would be unfair to other parties. State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988) overruled on other grounds, State v. Barber, 170 Wn.2d 856, 248 P.3d 494 (2011). Miller cited the loss of evidence or witnesses as a basis to deny a defendant's motion to withdraw guilty plea under those circumstances. Id. Here, as contemplated in Miller, it simply would not be fair to permit the defendant to withdraw his guilty plea. It is fair to give the defendant the benefit of this Court's decision in Cloud. The trial court did that when it amended the judgment and sentence.

IV. CONCLUSION

The defendant did not claim his plea was involuntary due to a mutual mistake when he filed his motion to correct the judgment and sentence. Whether he is entitled to withdraw his guilty plea has not been preserved for review. The defendant fails to show that he is entitled to withdraw his guilty plea under CrR 7.8. For those reasons the defendant's appeal should be denied.

Respectfully submitted on May 6, 2013.

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