IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**No. 28036-5-III**
	)	
	)	**Division Three**
	)	
MICHAEL DUKE COOMBES,	)	**UNPUBLISHED OPINION**
	)	
Petitioner.	)	

Kulik, C.J. — A defendant must be informed of all direct consequences of a guilty plea. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Michael Coombes pleaded guilty to first degree murder and was sentenced to 300 months. The mandatory minimum sentence for first degree murder is 240 months, during which time the offender is not eligible for earned early release credit. RCW 9.94A.540(1)(a), (2). We conclude that Mr. Coombes is entitled to withdraw his plea because he was not informed that early release credits were unavailable during the first 240 months of his sentence. We, therefore, grant his personal restraint petition and remand to the trial court to allow Mr. Coombes to withdraw his guilty plea.

FACTS

In September 2007, Mr. Coombes was charged in Spokane County with first degree murder while armed with a firearm and first degree unlawful possession of a firearm. He pleaded guilty to first degree murder, without a weapon enhancement. In the plea statement, the prosecutor made the following recommendation:

> (g) . . . 300 months in prison, credit for time served, dismiss weapon enhancement. Dismiss Intimidation of Witness charge, 08-1-00556-0, plead to Unlawful Possession of a Firearm charge on a different day, $500.00 crime victims compensation assessment, $200.00 court costs, $100.00 [deoxyribonucleic acid] collection fee, restitution, 24-48 months community custody.

Pet'rs Supplemental Br., App. B at 3. The plea statement includes nearly three pages of "Notification[s] Relating to Specific Crimes." Pet'rs Supplemental Br., App. B at 4. The heading to this section states, "If Any of the Following Paragraphs *Do Not Apply*, They Should Be Stricken and Initialed by the Defendant and the Judge." Pet'rs Supplemental Br., App. B at 4. Numerous paragraphs are interlineated, but not initialed, including the paragraph relating to mandatory minimum sentences:

> [z] ~~The crime of ___________ has a mandatory minimum sentence of at least _________ years of total confinement. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[n].~~

Pet'rs Supplemental Br., App. B at 6.

Under RCW 9.94A.540(1)(a), an offender convicted of first degree murder has a mandatory minimum sentence of 20 years' total confinement. During this minimum term, the offender is not eligible for "community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release." RCW 9.94A.540(2). Neither Mr. Coombes's plea statement nor the judgment and sentence informed him that he faced a mandatory minimum sentence without eligibility for earned early release during the first 20 years. In fact, the judgment and sentence imposes 300 months and leaves blank the following statement: "The confinement time on Count(s) ____ contain(s) a mandatory minimum term of _____." Resp't Br., App. C at 8. The judgment and sentence was filed on June 16, 2008.

In April 2009, Mr. Coombes filed a motion for writ of habeas corpus in the Spokane County Superior Court.[1] He claimed that he entered the guilty plea under the mistaken belief that he was eligible for 20 percent earned early release credit for the entire 300 months. After he began serving his sentence, however, he learned that he was ineligible for earned release time for the first 240 months and could earn only 10 percent

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[1] The writ form, which apparently was intended for use in federal collateral review, was treated by the superior court as a CrR 7.8 motion for relief from judgment. *See Toliver v. Olsen*, 109 Wn.2d 607, 609-10, 746 P.2d 809 (1987); RCW 7.36.010.

credit on the remaining 60 months. The superior court transferred the writ to this court for consideration as a personal restraint petition. CrR 7.8(c)(2); *Toliver v. Olsen*, 109 Wn.2d 607, 612-13, 746 P.2d 809 (1987). After determining that Mr. Coombes's request to withdraw his guilty plea had sufficient merit, this court appointed counsel and now considers the matter on the merits.

ANALYSIS

To prevail in this personal restraint petition, Mr. Coombes must show either a constitutional error that results in actual and substantial prejudice, or a nonconstitutional error that inherently causes a complete miscarriage of justice. *Isadore*, 151 Wn.2d at 298. He may not rely on conclusory allegations, but must show by a preponderance of the evidence that the error caused him prejudice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Mr. Coombes contends his guilty plea is constitutionally defective because it was entered without knowledge of his inability to earn early release credits during the mandatory minimum sentence under RCW 9.94A.540(1)(a), (2).

Principles of due process require that a defendant's guilty plea must be knowing, voluntary, and intelligent. *Isadore*, 151 Wn.2d at 297. The defendant must be informed of all direct consequences of his plea, meaning those consequences that have an immediate and largely automatic effect on the defendant's sentencing range. *Id.* at 298;

State v. Conley, 121 Wn. App. 280, 284, 87 P.3d 1221 (2004) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). If the guilty plea is based on misinformation of the sentencing consequences, it is not knowing or voluntary. *Isadore*, 151 Wn.2d at 298; *In re Postsentence Review of Hudgens*, 156 Wn. App. 411, 416, 233 P.3d 566 (2010). An involuntary plea is a manifest injustice. *Isadore*, 151 Wn.2d at 298. "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." *Id.*

A recognized direct consequence of a guilty plea is the statutory prohibition against earned early release credit during the period of the mandatory minimum sentence. *Conley*, 121 Wn. App. at 286. The State admits that the mandatory minimum sentence required under RCW 9.94A.540(1)(a) and the concomitant ineligibility under RCW 9.94A.540(2) to earn early release credits during that mandatory period were not stated in the plea statement, plea hearing, or the judgment and sentence. Moreover, by crossing out the relevant provision, the plea statement misinformed Mr. Coombes that his crime did not require a mandatory minimum sentence. The State argues, however, that the mandatory minimum did not have an immediate, automatic effect on the range of Mr. Coombes's punishment because the mandatory minimum prescribed by

RCW 9.94A.540(1)(a)—240 months—is less than the standard range for the crime—291 to 388 months—and less than Mr. Coombes's actual sentence of 300 months.

The State's argument is not persuasive. Mr. Coombes is not challenging the length of his sentence. He is challenging the failure to inform him that he was not eligible for earned early release credit during the first 20 years. At 10 percent credit for good time (*see* former RCW 9.94A.728(1)(a) (2007)), Mr. Coombes had the potential to earn up to 30 months of early release during the entire 300 months of his sentence. Because he is ineligible during the first 240 months of his sentence, however, he can earn at most 10 percent of the remaining 60 months, or 6 months. The difference is significant and is an automatic result under RCW 9.94A.540(2).

In effect, the State is arguing that the failure to inform Mr. Coombes of the mandatory minimum sentence was not material or prejudicial. As held in *Isadore*, however, the court will not consider the materiality of a direct consequence: "A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." *Isadore*, 151 Wn.2d at 302. If the defendant was not informed of a direct consequence of his plea, the plea is not intelligent or voluntary, the plea is invalid, and the restraint of the defendant is unlawful. *Id.*

When a guilty plea is invalid, the defendant has the initial choice of specific performance or withdrawal of the plea. *Id.* at 303. Once the choice is made, the State carries the burden of showing that there are compelling reasons not to allow the remedy chosen. *Id.* Mr. Coombes chooses to withdraw his plea. The State has not objected to that chosen remedy. Consequently, we grant Mr. Coombes's personal restraint petition and remand to the trial court to permit him to withdraw his plea. *State v. Miller*, 110 Wn.2d 528, 537, 756 P.2d 122 (1988). Because we grant Mr. Coombes's petition, and he chooses to withdraw his plea, his claim of ineffective assistance of counsel is moot.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.