IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**No. 28687-8-III consolidated with No. 28688-6-III**
	)	**Division Three**
TIMOTHY EDGAR KEITH,	)	**UNPUBLISHED OPINION**
Petitioner.	)	

Kulik, C.J. — Timothy Edgar Keith pleaded guilty on June 7, 2000, to one count of third degree child molestation and one count of sexual misconduct with a minor. Mr. Keith was sentenced under the special sex offender sentencing alternative (SSOSA). In 2009, Mr. Keith violated the conditions of his SSOSA sentence. The trial court revoked Mr. Keith's SSOSA and sentenced him to 5 years' confinement. Mr. Keith has filed two personal restraint petitions challenging his guilty pleas to both charges. The State agrees with Mr. Keith that the sexual misconduct with a minor conviction should be dismissed with prejudice but argues that dismissing his guilty plea to third degree child molestation would prejudice the State in recharging and trying him for that offense.

We conclude that Mr. Keith's petitions are timely and that the conviction for sexual misconduct with a minor should be dismissed with prejudice. We remand to the trial court for its determination regarding Mr. Keith's request to withdraw his guilty plea for third degree child molestation pursuant to *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

FACTS

The State charged Timothy Edgar Keith on January 31, 2000, with one count of third degree child molestation under RCW 9A.44.089 (count I). On March 9, 2000, the State amended charges against Mr. Keith to add a charge of one count of sexual exploitation of a minor under RCW 9.68A.040 (count II).

On June 7, 2000, Mr. Keith appeared before the court and pleaded guilty to both counts. Mr. Keith's guilty plea statement addressed the elements to the molestation charge, count I, but did not address the elements of the exploitation charge, count II. On August 11, 2000, the court entered a judgment on counts I and II and sentenced Mr. Keith to 5 years' confinement for count I and 10 years' confinement for count II. The court imposed concurrent sentences but opted for sentencing under the SSOSA. The statement of defendant on plea of guilty and the court's judgment and sentence mistakenly list count II as sexual misconduct with a minor despite the charged offense being sexual

exploitation of a minor. Additionally, the maximum term is listed as 10 years instead of 5 years.

In 2009, Mr. Keith violated his SSOSA, and the court sentenced him to 5 years' confinement. In these consolidated personal restraint petitions, Mr. Keith seeks to withdraw his guilty pleas to both count I and count II. The State concedes that Mr. Keith's guilty pleas to both count I and count II are invalid but argues that the court should not allow Mr. Keith to withdraw his guilty plea to count I because significant evidence has been destroyed.

ANALYSIS

Mr. Keith filed his personal restraint petitions after the one-year limitation under RCW 10.73.090(1). But because the judgment and sentence was facially invalid, we conclude the PRPs are timely.

RCW 10.73.090(1) establishes that, "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." A judgment and sentence is considered invalid on its face when the judgment and sentence exhibits invalidity without further elaboration. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615

(2002) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002)). Evidence of a judgment and sentence's facial validity may be evaluated through the plea agreement used in the judgment and sentencing. *Goodwin*, 146 Wn.2d at 866 n.2.

A valid plea agreement requires that a defendant know and voluntarily admit to information in the agreement without being misinformed of the agreement's consequences. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *rev'd on other grounds by State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011)). A defendant will be considered to be informed of a plea agreement if he or she is informed of the direct consequences of the agreement. *Id.* at 298 (citing *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). A defendant need not be informed of all possible consequences of the plea agreement as long as all direct consequences of the agreement have been understood by the defendant. *Id.*

Here, the judgment and sentence is facially invalid because it mistakenly lists count II as sexual misconduct with a minor despite the charged offense being sexual exploitation of a minor. Additionally, the maximum term is listed as 10 years instead of 5

years. Thus, we conclude that Mr. Keith's personal restraint petitions are timely under RCW 10.73.090(1).

Count II—Dismissal with Prejudice. The State agrees that Mr. Keith's conviction under count II should be dismissed with prejudice because he pleaded guilty to a different crime than was charged, the maximum term was misstated, and the elements and the State's proof of both the charged and pleaded crime were not set forth. Unlike count I in which the speedy trial time was tolled by Mr. Keith's guilty plea to that specific offense, Mr. Keith never pleaded guilty to count II; rather, he pleaded guilty to a crime that had not been charged.

We dismiss Mr. Keith's count II conviction with prejudice.

Withdrawal of Count I Guilty Plea. A defendant's ability to revoke a guilty plea is based on two disparate elements, including whether a factual basis for the defendant's guilty plea was provided during the guilty plea hearing, CrR 4.2(d), and whether allowing a defendant to withdraw his guilty plea would prejudice the government. *Miller*, 110 Wn.2d at 535.

The State concedes that Mr. Keith has a basis under *Turley* to withdraw his guilty plea to count I, as well as count II. But the State argues that Mr. Keith is not entitled to withdraw his guilty plea to count I because of likely prejudice to the State in its ability to

pursue the count I claim. A defendant's right to withdraw a guilty plea is subject to compelling reasons to disallow such a plea withdrawal including unfairness to a prosecutor who has detrimentally relied on the plea bargain and has lost essential witnesses or evidence. *Miller*, 110 Wn.2d at 535. However, the court's decision to grant a motion to withdraw a plea after sentencing is within its discretion and it will be subject to review only upon an abuse of that discretion. *United States v. Vallejo*, 476 F.2d 667, 669 (3d Cir. 1973). Thus, we remand to the trial court for its determination of Mr. Keith's request to withdraw his plea pursuant to *Turley*, 149 Wn.2d at 402.

Finally, the trial court did not err by denying Mr. Keith credit for community custody time served on his SSOSA sentence.

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.

_____
Kulik, C.J.

WE CONCUR:

_____ _____
Korsmo, J. Siddoway, J.