No. 81522-4

SANDERS, J. (dissenting)—Steven Clark's original judgment and sentence is invalid on its face, and the ex parte order modifying the judgment and sentence is also invalid on its face. As a result, Clark's personal restraint petition is timely. Because the majority's analysis to the contrary mischaracterizes the original judgment and sentence and the modification order, I dissent.

Under RCW 10.73.090(1) a prisoner is barred from filing a personal restraint petition to collaterally attack a judgment and sentence more than one year after the judgment becomes final unless it is invalid on its face. Here, Clark's original judgment and sentence is facially invalid because it contains a community placement provision that is not authorized for Clark's offense. *See* former RCW 9.94A.120(9) (1997); *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985) (a judgment and sentence outside the authority of the trial court is invalid).

The majority recognizes the trial court made an explicit finding that Clark's offense qualified for community placement: the trial court incorporated

into the judgment and sentence "Appendix H Community Placement," which states: "The Court having found the defendant guilty of offense(s) qualifying for community placement . . . ." However, the majority then determines this finding can be wholly ignored because the language of the community placement provisions includes a general list of offenses qualifying for community placement and Clark's offense is not included. Majority at 5 n.3. But whether community placement applies is a determination by the trial court, not a post hoc interpretation of the judgment and sentence by the defendant, the Department of Corrections, or any other subsequent reader. The trial court expressly stated that Clark's offense qualified for community placement; that finding was erroneous and renders the judgment and sentence facially invalid.

Yet the majority persists in characterizing this error as no error at all. This mischaracterization ignores that the trial court itself found it necessary to issue a subsequent order correcting this same error in the original judgment and sentence.

Undaunted, the majority then mischaracterizes this modification order as "merely remov[ing] section 4.7 and appendix H to avoid any confusion." Majority at 5 n.3. The order does avoid the confusion caused by the trial court's error, but adding "merely" does not somehow minimize the fact that the trial court's order removed all reference to community placement, including the

court's express finding that Clark's offense qualified for it. That is a substantial change to the judgment and sentence that affects the sentence he served; there is no legal basis to minimize or ignore the modification order simply because it stands in the way of the result the majority desires.

After mischaracterizing the modification order as unnecessary, the majority then incorporates the modification order by applying it to the original judgment and sentence to create a modified judgment and sentence.[1] Majority at 5-6. The majority then announces its new modified judgment and sentence does not violate former RCW 9.94A.120(9) because it makes no mention of community placement. *Id*. With this semantic sleight of hand, the majority denies Clark's personal restraint petition as untimely because the modification order corrects any potential error in the original judgment and sentence that would have rendered it invalid on its face.

However, the majority's modified judgment and sentence is itself invalid on its face, viewing the original judgment and sentence and modification order together. An order made pursuant to CrR 7.8(a) can modify only the judgment and sentence to the extent permitted by the rule. CrR 7.8(a) allows a court to

[1] The "modified judgment and sentence" is not an independent document; the trial court did not issue another judgment and sentence in connection with its modification order. The majority creates the modified judgment and sentence from the language that would result if the modifications in the modification order were made to the original judgment and sentence.

correct clerical mistakes in judgments arising from oversight or omission. A clerical mistake exists when the language of a judgment does not correctly convey the intention of the court. *See State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005) (citing *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (discussing the related inquiry of clerical mistakes under CR 60(a)). CrR 7.8(a) does not permit a court to "rethink the case" or "enter an amended judgment that does not find support in the trial court record." *See Presidential Estates*, 129 Wn.2d at 326.

The modification order here does not correct a clerical error in the original judgment and sentence because the trial court *intended* to sentence Clark to community placement. This is evident in the original judgment and sentence[2] in which the trial court: (1) did not strike out the community placement provision; (2) checked the box incorporating appendix H, which states Clark was guilty of an offense qualifying for community placement; (3)

[2] One could argue the modification order itself is not *facially* invalid because its invalidity is only apparent when one views the original judgment and sentence. However, viewing the original judgment and sentence to analyze the facial validity of the modification order here is synonymous with viewing the plea agreement to determine the facial validity of a judgment and sentence. *See In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002) ("documents signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgment and sentence"). Both circumstances involve reviewing the underlying documentation.

attached appendix H to the judgment and sentence, but did not attach other appendices that were not relevant to Clark or his offense; and (4) signed and dated appendix H. Intent is further demonstrated because the trial court adopted the community placement provision from the plea agreement; the provision was not unintentionally inserted into the judgment and sentence. The modification order, which is part of the majority's modified judgment and sentence, is invalid on its face.

The majority sidesteps the invalidity of the modification order because the CrR 7.8(a) issue was not raised on appeal. Majority at 8 n.4. But since the original judgment and sentence was invalid on its face, there should have been no need to reach the issue of the validity of the modification order. Only because the majority *created* a nonexistent modified judgment and sentence from the modification order is the validity of the modification order at issue. This court has the power to raise an issue sua sponte when it is necessary to properly decide a case. RAP 12.1(b); *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wn.2d 799, 813, 959 P.2d 657 (1998). Once the majority created the modified judgment and sentence, putting the validity of the modification order at issue, it could have invited the parties to submit briefs on the CrR 7.8(a) clerical error issue. *See* RAP 12.1(b). But it didn't.

Because the original judgment and sentence and the modification order

are both facially invalid, Clark's personal restraint petition is not barred by the one-year statute of limitations. *See* RCW 10.73.090(1).[3] Clark's petition should have been reviewed on its merits, and he should be permitted to withdraw his guilty plea.[4]

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[3] Clark argues the modification order is void because the trial court issued it without providing him notice or an opportunity to be heard. *See, e.g., Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985) (judgments and orders issued in violation of due process are void). Although due process would require some sort of equitable tolling under RCW 10.73.090(1) where a failure to provide notice left Clark unaware of the order at the time it was filed, Clark does not demonstrate or even allege that he did not know of the order until one year prior to filing this petition.

[4] CrR 4.2(f) allows a defendant to withdraw his guilty plea whenever it appears that the withdrawal is necessary to correct a manifest injustice. Manifest injustice occurs when a defendant receives misinformation about direct consequences of his or her sentence, resulting in an involuntary plea—even when the corrected judgment and sentence results in a lower sentencing range. *See State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001) (citing *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988)); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006).

The State argues Clark is not entitled to withdraw his guilty plea because community placement could not have been material to his decision to plead guilty. However this court has previously declined to inquire into the materiality of sentencing consequences to a defendant because it would entail an inexact and indeterminate inquiry into a defendant's subjective decision to plead guilty. *See In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

I respectfully dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: