No. 83444-0

J.M. JOHNSON, J. (dissenting)—Chucco Robinson signed a guilty plea agreement that expressly provided "Criminal history includes prior convictions *and* juvenile adjudications or convictions." Clerk's Papers (CP) at 12 (emphasis added). At his plea hearing, Robinson affirmed he carefully reviewed the plea agreement with his attorney before signing it. Verbatim Report of Proceedings (Feb. 20, 2008) at 4. He also stated that he understood its contents completely. *Id.*

Robinson knew of all of his juvenile convictions and told his attorney about them before plea negotiations began. He chose not to disclose them to the State. Robinson now claims he did not know that in addition to his adult conviction for second degree murder, his four (and possibly five) juvenile convictions count as criminal history for purposes of calculating his offender score. Contrary to the majority's conclusion, the trial court's holding that

Robinson's plea was not knowing, voluntary, and intelligent is in direct conflict with our case law, particularly *State v. Codiga*, 162 Wn.2d 912, 175 P.3d 1082 (2008). The trial court's decision, therefore, was an error of law. The trial court abused its discretion by concluding it would be a manifest injustice to allow Robinson's plea to stand and by allowing Robinson to withdraw his plea.

Because the record before us demonstrates Robinson's plea was knowing, voluntary, and intelligent, judgment should be entered and Robinson should be sentenced according to the terms of the plea agreement. I dissent.

Analysis

The issue before us is whether the trial court abused its discretion in concluding it would be a manifest injustice to allow Robinson's plea to stand and in allowing him to withdraw his plea. *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 197 n.5, 137 P.3d 835 (2006) (the defendant "must show the trial court abused its discretion in concluding there was no manifest injustice justifying withdrawal of the plea"). In *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010), we affirmed that courts shall allow a defendant to

withdraw his or her plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. We have held that a manifest injustice exists at least where (1) the plea was not ratified by the defendant, (2) the plea was not voluntary, (3) effective assistance of counsel was denied, or (4) the plea agreement was not kept. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A manifest injustice has also been defined as "an injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (citing *Webster's Third New International Dictionary* (1966)).[1]

Robinson argues that his plea was not knowing, voluntary, and intelligent because he allegedly did not know his juvenile convictions count as criminal history. Based on the record and our precedent in *Codiga*, however, the trial court made an error of law when it determined Robinson's plea was not knowing, voluntary, and intelligent. It abused its discretion when it allowed Robinson to withdraw his plea.

The law was clear at the time of Robinson's plea that all of his juvenile

[1] The phrase "manifest injustice" represents more than a mere dictionary definition. A manifest injustice is a result that profoundly undermines the people's confidence in the justice system.

convictions count as criminal history. *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 12, 100 P.3d 805 (2004); former RCW 9.94A.525 (2008); *see also State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004) (discussing former RCW 9.94A.030 (2002)).

Robinson knew of all of his convictions and chose not to disclose his convictions to the State, although he did tell his attorney about them before plea negotiations began. This resulted in a factual error the court must correct at sentencing, not a legal mistake that renders a plea agreement not knowing, voluntary, and intelligent. *Codiga*, 162 Wn.2d at 928-30. Robinson signed a plea agreement that explained that juvenile convictions counted as part of his criminal history and that the standard sentencing range could be increased if they were discovered. Robinson told the court that he carefully reviewed the plea agreement with his attorney before signing it and stated that he understood its contents completely. Although a defendant is not automatically charged with knowing the legal impact of criminal history, he or she is under a statutory and contractual obligation to provide an accurate statement of criminal history. *Id.* at 928; RCW 9.94A.441. Robinson failed to do so.

An error of law can constitute an abuse of discretion.[2] Here, the trial court abused its discretion when it concluded that allowing Robinson's plea to stand would be a manifest injustice and allowed Robinson to withdraw his plea. The trial court made this decision without considering all of the supported facts (most notably the specific language in the plea agreement itself) and without applying our latest case on the issue, *Codiga*.[3]

A. The Trial Court's Holding Is Inconsistent with *Codiga*

This case is not distinguishable from *Codiga* in a legally meaningful way. In *Codiga*, the defendant agreed to plead guilty in exchange for the dismissal of two charges, which resulted in a particular standard sentencing range. *Codiga*, 162 Wn.2d at 917. The sentencing range was based on the State's understanding of Codiga's criminal history. *Id.* at 917-18. However, similar to Robinson, Codiga disclosed his felony convictions during plea negotiations, but not his misdemeanors. *See id.* at 920. This led the State to

[2] *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); *see also State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[3] *Codiga* was decided on January 31, 2008, just months before the trial court's hearing on Robinson's motion to withdraw. *Codiga*, 162 Wn.2d at 912.

believe one of Codiga's felonies had "washed out," to which the defense agreed. *Id.* at 919.

As here, the plea agreement defined criminal history as "'prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.'" *Id.* at 918 (quoting CP at 9). The form also provided that "'*if any additional criminal history is discovered* [before sentencing], both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding upon me. *I cannot change my mind if additional criminal history is discovered.*'" *Id.* (quoting CP at 9).

Like this case, the judge spoke directly with Codiga at the plea hearing, confirmed that he had read the plea form carefully and discussed it with his attorney. *Id.* After confirming Codiga understood his rights and engaging in the normal colloquy, the judge found the plea was knowing, voluntary, and intelligent and found there was a factual basis for the plea. *Id.* at 919-20.

As here, the Department of Corrections (DOC) completed a routine presentence investigation report and discovered Codiga's additional criminal history. *Id.* at 920. This increased Codiga's offender score from 7 to 8,

therefore increasing the standard range. *Id.* *This discovery was not made known to Codiga at the time.* *See id.* at 921; *cf.* majority at 10.

At the sentencing hearing, the State and the defense agreed that Codiga had an offender score of 7 (not 8) despite the DOC report. *Codiga*, 162 Wn.2d at 921. The prosecutor soon discovered the discrepancy. *Id.* When the court asked Codiga whether he believed his 1996 felony conviction washed out, his defense counsel responded that they had believed it had "washed," just as Robinson claims here. *Id.*

The court imposed sentence required by Codiga's full history. Codiga quickly moved to withdraw his guilty plea, arguing that he was not accurately informed of the consequences of his plea because the standard sentence range increased between his plea and sentencing. *Id.* We upheld the trial court's ruling. *Id.* at 922-31.

B. The Majority's Distinctions from *Codiga* Are Not Legally Meaningful

The majority attempts to distinguish this case from *Codiga* in three ways. First, the majority argues that "a review of the opinion and the briefs filed in *Codiga* reveals that he offered no explanation for why he did not disclose his prior offenses." Majority at 10. This may be technically true but it is not an

accurate statement. The trial court in *Codiga* also sought an explanation and asked Codiga whether he believed his 1996 felony conviction washed out. *Codiga*, 162 Wn.2d at 921. Understandably, his defense counsel responded on his behalf and said that "they originally believed it did wash out." *Id.* Like Robinson, Codiga may have held a subjective belief that his convictions had washed, even though they had not. Furthermore, it is arguable that Codiga's failure to disclose was more reasonable than Robinson's. In both plea agreements, juvenile convictions are expressly included in the definition of "criminal history." In contrast, one must infer that misdemeanors are included in the term "prior convictions." Because the language is straightforward in one case and requires an inference in the other, it was arguably more reasonable for Codiga not to disclose his misdemeanor convictions than it was for Robinson to fail to disclose his juvenile convictions.

Second, the majority makes much of the fact that Codiga did not move to withdraw his plea until the sentencing hearing, while Robinson, like the defendant in *A.N.J.*, moved to withdraw before the sentencing hearing. Majority at 10. This suggests that Robinson's motion to withdraw was

somehow more credible than Codiga's. *See id.* at 9; *A.N.J.*, 168 Wn.2d at 107. However, just like Robinson, Codiga promptly moved to withdraw his guilty plea after being confronted with previously unknown sentencing consequences. Thus, this "distinction" cannot be the basis on which to allow Robinson's motion to withdraw but deny Codiga's motion. *See A.N.J.*, 168 Wn.2d at 107 (standing for the proposition that the timing of a motion to withdraw should be given weight "*only* when it is made promptly after discovery of the previously unknown consequences or the newly discovered information"); *see also id.* at 124-25 (J.M. Johnson, J., concurring) (explaining that *A.N.J.* is a rare exception to the strong presumption that plea agreements are valid and enforceable by the courts).

Finally, the majority attempts to distinguish this case from *Codiga* because the trial court in that case found the plea was knowing, voluntary, and intelligent and did not conclude that allowing the plea to stand would be a manifest injustice. As explained above, the trial court here made an error of law when it found Robinson's plea was not knowing, voluntary, and intelligent without considering the language of the plea agreement itself and without applying *Codiga*. Allowing the plea to stand, therefore, is not a

manifest injustice.

The phrase "manifest injustice" has been defined as "an injustice that is obvious, directly observable, overt, not obscure," *Taylor*, 83 Wn.2d at 596. The phrase "manifest injustice," however, represents more than a mere dictionary definition. A manifest injustice is a result that profoundly undermines the people's confidence in the justice system. Taking a defendant's previous convictions into account to arrive at an appropriate sentencing range for a given crime does not undermine confidence in the justice system.

Conclusion

Robinson's plea was knowing, voluntary, and intelligent. He stated so in open court. Robinson knew of all of his convictions and told his attorney about them before plea negotiations began. He signed a guilty plea agreement that expressly provided, "Criminal history includes prior convictions *and* juvenile adjudications or convictions." CP at 12 (emphasis added). At his plea hearing, Robinson affirmed that he carefully reviewed the plea agreement with his attorney before signing it. The trial court correctly found Robinson guilty of burglary in the first degree and rape in the third

degree.

The trial court abused its discretion on Robinson's later motion to withdraw his guilty plea. The Court of Appeals ruled correctly in accord with this court's jurisprudence. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Chief Justice Barbara A.

Justice Charles W. Johnson

Justice Debra L. Stephens