

Court of Appeals No. 56574-9-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington

v.

Christopher Olsen

Thurston County Superior Court

Cause Nos. 03-1-01537-1, 03-1-1697-1, and 05-1-1887-2

The Honorable Judge James Dixon

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Olsen's motion to withdraw his guilty pleas.
2. The trial court erroneously failed to recognize that Mr. Olsen's 2003 guilty pleas were part of an indivisible agreement.
3. The trial court erred by adopting Finding of Fact/Conclusion of Law No. 3 (all cause numbers).
4. The trial court erred by adopting Finding of Fact/Conclusion of Law No. 4 (all cause numbers).
5. The trial court erred by adopting Finding of Fact/Conclusion of Law No. 5 (Cause Nos. 03-1-1537-1 and 03-1-1697-1 only).

ISSUE 1: A guilty plea is part of an indivisible plea bargain if objective evidence shows that the parties considered it to be indivisible. Were Mr. Olsen's 2003 guilty pleas part of an indivisible plea bargain?

ISSUE 2: Where an invalid conviction was part of an indivisible plea bargain, the defendant must be allowed to withdraw his remaining guilty pleas. Did the trial court err by refusing to allow Mr. Olsen the opportunity to withdraw his guilty pleas after his possession charges were dismissed?

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2003 and 2005, Christopher Olsen pled guilty to separate charges of possession of a controlled substance. In each case, Mr. Olsen also pled guilty to another felony. After the Supreme Court issued its decision invalidating convictions for simple possession,¹ Mr. Olsen asked to withdraw the other guilty pleas that accompanied each possession charge.

The objective evidence shows that each plea agreement was indivisible. Mr. Olsen should have been permitted to withdraw the guilty pleas that accompanied his pleas to the simple possession charges. His cases must be remanded with instructions to allow him to withdraw his guilty pleas to forgery and to unlawful possession of a firearm in the second degree.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Plea agreement for 2003 offenses. On October 28, 2003, Christopher Olsen pled guilty to forgery² and possession

¹ See *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

² Cause No. 03-1-1537-1

of a controlled substance.³ Clerk's Papers A⁴ (CPA) 2, 11, 43, 51; CPB . Although each charge had its own cause number, both pleas were entered at the same hearing. CPA 2, 11, 43, 51; CPB 2, 11.

Each of Mr. Olsen's plea statements referred to the other pending case. CPA 13, 53; CPB 13. Using nearly identical language, each indicated that the prosecutor would "make the following recommendation to the judge: 3 months [incarceration] concurrent..."⁵ CPA 13, 53; CPB 13. Each recommendation also included identical language regarding other terms: "Standard fees, costs, conditions, credit for time served." CPA 13, 53; CPB 13.

The sentencing court followed the prosecutor's recommendation, and Mr. Olsen received a three-month

³ Cause No. 03-1-1697-1.

⁴ The clerk's papers from the three separate cause numbers are not numbered sequentially. They will be referred to as CPA (for documents from Cause No. 03-1-1537-1), CPB (for documents from Cause No. 03-1-1697-1), and CPC (for documents from Cause No. 05-1-1887-2).

⁵ In each plea statement, this part of the recommendation concluded by spelling out the cause number for the companion case. CPA 13, 53; CPB 13.

concurrent term. CPA 6, 47; CPB 5. Financial penalties and other conditions of sentence were identical.⁶ CPA 4, 45; CPB 4.

Plea agreement for 2005 offenses. In 2005, Mr. Olsen was charged with possession of a controlled substance and unlawful possession of a firearm in the second degree (UPF 2). CPC 4. The charges shared an offense date and were charged in the same Information. CPC 1.

On January 17, 2006, Mr. Olsen pled guilty to both charges. CPC 4. He completed a single plea form that included both charges. CPC 4. The prosecutor made a single recommendation, spelling out the terms for a prison-based DOSA. CPC 6. The court accepted the recommendation and sentenced Mr. Olsen to a prison-based DOSA. CPC 16.

Motions to withdraw guilty pleas. In 2021, the Supreme Court invalidated the statute criminalizing simple possession. *Blake, supra*. Following that decision, Mr. Olsen brought motions to withdraw his guilty pleas. CPA 18; CPB 21; CPC 23.

⁶ Apart from a requirement that he pay \$500 to the drug enforcement fund for the possession case. CPA 45; CPB 4.

He argued that his 2003 pleas to possession and forgery were part of a single indivisible plea agreement. CPA 19, 72, 88; CPB 21, 73, 86. He asked the court to allow him to withdraw his pleas to both charges. CPA 19, 72, 88; CPB 21, 73, 86.

Similarly, he argued that his pleas to the 2005 offenses were part of a single indivisible plea agreement. CPC 22, 64, 79. He asked the court to allow him to withdraw his guilty pleas to both the drug possession charge and the firearm charge. CPC 22, 64, 79.

Following a hearing, the court concluded that the 2003 guilty pleas were not part of an indivisible plea agreement. RP (12/7/21) 15-21. CPA 96-97; CPB 90-91. The judge decided that both pleas were knowing and voluntary, but vacated the invalid possession charge pursuant to *Blake*. CPA 96-97; CPB 90-93. The court left intact the forgery conviction. CPA 96-97; CPB 90-91, 92-93.

Regarding the 2005 offenses, the court agreed that the two convictions stemmed from an indivisible plea agreement. RP (12/7/21) 21; CPC 87. Despite this, the court refused to

allow Mr. Olsen to withdraw his plea to the firearm charge. RP (12/7/21) 15-21; CPC 86-87. The court concluded that Mr. Olsen's pleas were valid. CPC 86-87. The court vacated the drug possession charge pursuant to *Blake*, leaving the UPF 2 conviction in place. CPC 86-95.

Mr. Olsen appealed. CPA 95; CPB 89; CPC 85.

ARGUMENT

MR. OLSEN SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS GUILTY PLEAS.

Because the court found that Mr. Olsen's pleas to drug possession and UPF in the 2005 case were part of an indivisible agreement, the court should have allowed Mr. Olsen to withdraw both pleas upon invalidation of the drug possession conviction.

The court should have found that Mr. Olsen's 2003 pleas to possession and forgery were part of an indivisible agreement. The pleas were entered at the same hearing, the sentencing recommendation in each case referenced the companion case, and the prosecutor recommended concurrent time. Because the parties entered into an indivisible agreement, the court should

have allowed Mr. Olsen to withdraw both guilty pleas when it invalidated his conviction for drug possession.

- A. A defendant may withdraw guilty pleas stemming from an indivisible agreement where one conviction is later invalidated.

When a conviction is invalidated, the defendant may withdraw any related guilty pleas that were part of an indivisible plea agreement. *State v. Turley*, 149 Wn.2d 395, 402, 69 P.3d 338 (2003); *In re Bradley*, 165 Wn.2d 934, 941, 205 P.3d 123 (2009). A guilty plea is invalid when it is not knowingly and voluntarily made. *In re Pers. Restraint Petition of Mayer*, 128 Wn.App. 694, 705, 117 P.3d 353 (2005).

A guilty plea to a “nonexistent crime...[is] unknowing and involuntary and is a nullity.” *Id.*, at 705. This is so because a guilty plea is not knowing and voluntary unless the defendant has “an accurate understanding of the relation of the facts to the law.” *Id.* at 704.

In *Mayer*, the defendant pled guilty to felony murder with second-degree assault as the predicate offense. *Id.*, at 704. Subsequently, the Supreme Court invalidated the crime of

felony murder premised on second-degree assault. *Id.*, at 698 (citing *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), *as corrected* (Oct. 29, 2002), *as amended on denial of reconsideration* (Mar. 14, 2003)).

The Court of Appeals found that Mayer’s guilty plea “to the nonexistent crime of second-degree felony murder predicated on assault was unknowing and involuntary.” *Id.*, at 705. Although the court denied the defendant’s personal restraint petition, this was because he had pled guilty to both intentional and felony murder.⁷ *Id.*

Mayer applies to Mr. Olsen’s case.

B. Mr. Olsen’s guilty pleas to drug possession were not made knowingly and voluntarily.

The statute criminalizing simple possession is unconstitutional. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Thus, like the charge at issue in *Mayer*, simple possession of a controlled substance is a “nonexistent crime.” *Mayer*, 128 Wn. App. at 705.

⁷ The court allowed the intentional murder conviction to stand but directed the trial court to remove all references to felony murder from the Judgment and Sentence. *Id.*, at 708.

A statute that is unconstitutional “is void, and is as no law.” *State v. Markovich*, 19 Wn. App. 2d 157, 172, 492 P.3d 206 (2021), *review denied*, 198 Wn.2d 1036, 501 P.3d 141 (2022) (internal quotation marks and citations omitted). Thus, “[i]f a statute is unconstitutional, it is *and has always been* a legal nullity.” *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952) (emphasis added).

In both the 2003 and the 2005 cases, Mr. Olsen pled guilty to a “nonexistent crime,” simple possession of a controlled substance. *Mayer*, 128 Wn.App. at 705. He did not have “an accurate understanding of the relation of the facts to the law.” *Id.* at 704. His pleas to the nonexistent offense were “unknowing and involuntary.” *Id.*, at 705.

The trial court erroneously concluded that Mr. Olsen’s pleas were “voluntary, knowing and competent,” that he “understood the nature of the charge[s]” and that “there was a factual basis for [each] plea.” CPA 96; CPB 90; CPC 86. The court’s conclusion was based on its mistaken belief that “[t]here is a distinction between the Defendant’s invalid conviction for

[possession] and the voluntariness of the Defendant's plea."⁸

CPA 96; CPB 90; CPC 86.

This is incorrect – Mr. Olsen's pleas to "nonexistent crime[s]" were necessarily "unknowing and involuntary." *Id.*, at 705. The trial court's Findings/Conclusions Nos. 3 and 4 must be vacated. *Id.*; CPA 96-97; CPB 90-91; CPC 86-87.

Mr. Olsen's guilty pleas to possession were invalid. As outlined below, each possession conviction was part of an indivisible plea bargain. Accordingly, he must be allowed to withdraw all pleas that were entered pursuant to each indivisible agreement.

C. Mr. Olsen must be allowed to withdraw his guilty plea to the firearm charge because the court found that plea to be part of an indivisible agreement.

The trial court found that Mr. Olsen's guilty pleas to the 2005 offenses were part of an indivisible plea bargain. RP (12/7/21) 21; CPC 87. As part of that plea agreement, he pled

⁸ The court suggested that invalidation of the possession charges would be vacated, but that this "does not, by operation of law, require this Court to allow the Defendant to vacate his guilty plea[s]" to those charges. CPA 96; CPB 90; CPC 86. This is incorrect; Mr. Olsen's guilty pleas to possession were involuntary, and he was entitled to withdraw those pleas. *Id.*

guilty to the “nonexistent crime” of simple possession. CPC 4, 11. That plea was “unknowing and involuntary and is a nullity.” *Id.*, at 705.

Because the court found that the involuntary guilty plea was part of an indivisible plea agreement, Mr. Olsen must also be given the opportunity to withdraw his plea to the other charge that was part of that agreement. *Bradley*, 165 Wn.2d at 941.

This court must vacate the trial court’s Order Denying Defendant’s Motion to Withdraw Plea. CPC 86. Mr. Olsen’s 2005 case⁹ must be remanded to allow him to withdraw his plea to the firearm charge. *Id.*

D. Mr. Olsen must be allowed to withdraw his guilty plea to forgery because it was part of an indivisible plea agreement.

The trial court found that Mr. Olsen’s 2003 guilty pleas were not part of an indivisible plea agreement. CPA 96; CPB 90. This was error.

Plea agreements are akin to contracts. *Turley*, 149 Wn.2d at 400. As in contract law, courts look to “the intent of the

⁹ Cause No. 05-1-1887-2.

parties” to determine if a plea bargain is indivisible. *Id.*; *State v. Chambers*, 176 Wn.2d 573, 580–81, 293 P.3d 1185 (2013).

It is the “objective manifestations of intent, not unexpressed subjective intent” that guides the analysis. *Chambers*, 176 Wn.2d 573, 580–81. Courts “examine the documents produced at [the plea hearing] for objective manifestations of intent.” *Bradley*, 165 Wn.2d at 942.

There are many ways the parties can objectively manifest their intent to enter an indivisible plea agreement.

In *Turley*, for example, the court held “that when a defendant pleads guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document, the plea agreement will be treated as indivisible.” *Turley*, 149 Wn.2d at 402; *see also State v. Bisson*, 156 Wn.2d 507, 519, 130 P.3d 820 (2006).

In *Bradley*, the Supreme Court found a plea agreement indivisible even though (1) the offenses occurred months apart, (2) the crimes were charged in separate charging documents, and (3) the defendant submitted separate plea forms.¹⁰ *Bradley*,

¹⁰ The plea forms included what the court characterized as “mandatory” cross-references necessary to the offender score

165 Wn.2d at 942. Despite these indicators, the *Bradley* court found “an objective manifestation that the pleas were negotiated as part of a package deal” because one charge was reduced on the day of the hearing. *Id.* at 943.

In another case involving separate charging documents, the Supreme Court found objective evidence of an indivisible plea agreement. *In re Shale*, 160 Wn.2d 489, 492, 158 P.3d 588 (2007). In *Shale*, the guilty pleas resolved multiple cases during a single proceeding.¹¹ *Id.* The defendant signed separate plea statements; however, in each form, the prosecutor’s recommendation referenced the other pending cases.¹² *Id.* The recommendation was for “concurrent time to all matters pleaded to on the same day and a standard range sentence.” *Id.*, at 492-493.

calculation for other current offenses. *Bradley*, 165 Wn.2d at 942-943. This, by itself, was insufficient to prove indivisibility. *Id.*

¹¹ Although charged separately, all three cause numbers stemmed from crimes committed on the same day. *Shale*, 160 Wn.2d at 493.

¹² This is different from the “mandatory” cross-references that were insufficient to establish an indivisible agreement in *Bradley*, 165 Wn.2d at 942-943.

These examples show that Mr. Olsen's pleas were part of an indivisible plea agreement.

As in *Turley*, Mr. Olsen pled guilty "to multiple counts or charges at the same time, in the same proceeding[]." *Turley*, 149 Wn.2d at 402. As in *Shale*, the State's sentencing recommendation on each plea statement referred to the other case. *Shale*, 160 Wn.2d at 492. Furthermore, as in *Shale*, the prosecutor's recommendation was for "concurrent time to all matters pleaded to on the same day and a standard range sentence." *Id.*, at 943.

These facts show "an objective manifestation that the pleas were negotiated as part of a package deal." *Bradley*, 165 Wn.2d at 943. As in *Bradley*, this "objective manifestation" is not undermined by the separate offense dates. *Id.*, at 942. Nor is it a problem that each case was charged under a separate cause number. *Id.*; *Shale*, 160 Wn.2d at 492-493.

Mr. Olsen's guilty plea to forgery was part of an indivisible agreement that included his plea to the "nonexistent crime" of simple possession. Because the plea agreement was indivisible, the case must be remanded to allow him to

withdraw his guilty plea to the forgery charge. *Turley*, 149 Wn.2d at 402.

CONCLUSION

Mr. Olsen entered two indivisible plea agreements. In the first, he pled guilty to forgery and drug possession. In the second, he pled guilty to UPF 2 and drug possession.

His guilty pleas to simple possession were invalid. Because each pair of convictions stemmed from an indivisible agreement, Mr. Olsen must also be permitted to withdraw his pleas to all four convictions. The case must be remanded to allow him to do so.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 2621 words, as calculated by our word processing software.

Respectfully submitted on May 23, 2022,

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CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to:

Christopher Olsen, DOC #831898
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON
THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on May 23, 2022.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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