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SUPREME COURT
STATE OF WASHINGTON
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NO. 102642-1

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TANNER DAVID BARBER,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan Chushcoff

No. 18-1-00995-4

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Tanner Barber received a lawful mitigated exceptional indeterminate sentence of 66 months to life pursuant to former RCW 9.94A.712(1)(a)(i)¹ for two counts of rape in the second degree committed prior to Barber’s eighteenth birthday. More than one year after this sentence became final, Barber prevailed on the trial court to convert his indeterminate sentence into a determinate sentence. Barber acknowledges now, that binding authority bars this action.²

¹ Former RCW 9.94A.712 was amended multiple times during the charging periods for counts I and II. *See* Laws of 2006, ch. 124, § 3; Laws of 2006, ch. 124, § 2 (expired July 1, 2006); Laws of 2006, ch. 122, § 5; Laws of 2006, ch. 122, § 4 (expired July 1, 2006); Laws of 2005, ch. 436, § 2; Laws of 2004, ch. 176, § 3; Laws of 2001, 2nd Special Session, ch. 12, § 303. Because the amendments did not substantially alter the subsections that are relevant to this appeal, the State will simply cite to “former RCW 9.94A.712” instead of each of the session laws.

Former RCW 9.94A.712 was recodified as RCW 9.84A.507 by Laws of 2008, ch. 231, § 56. The recodification did not substantially alter the subsections that are relevant to this appeal.

² *See* Brief of Respondent at 15, citing *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 939, 949 (2022) (*Forcha-Williams II*).

The State filed a notice of appeal within 30 days from the entry of the trial court's *sua sponte* CrR 7.8(a) order, and a second notice of appeal within 30 days of the entry of the nunc pro tunc order correcting judgment and sentence. Barber claimed that these notices of appeal were untimely and that the time for filing a notice of appeal expired 30 days after the January 11, 2019, judgment and sentence was filed.

The appellate court assumed, but did not decide, that the State's notice of appeal was due on February 10, 2019—1,329 days *prior* to the entry of the CrR 7.8 Order and 1,367 days *prior* to the entry of the order correcting judgment and sentence. The appellate court held that extraordinary circumstances justified expanding the deadline for filing the notices of appeal. Barber seeks review, claiming that the application of RAP 18.8(b) under these circumstances presents an issue of substantial public interest. Barber is wrong.

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II. STATE'S COUNTERSTATEMENT OF THE ISSUES

- A. Does this case warrant further review as the State timely filed its notices of appeal?
- B. If this court should grant Barber's petition for review, should it decide the State's other assignments of error and issues that the appellate court did not reach? RAP 13.7(b). The undecided issues are:

B. Is a trial court prohibited from entering a nunc pro tunc order to rectify a judicial error?

C. Is a trial court prohibited by making substantive changes to a judgment pursuant to CrR 7.8(a)?

D. Must a trial court transfer an untimely CrR 7.8(b) motion to the court of appeals pursuant to CrR 7.8(c)(2)?

Brief of Appellant at 3.

III. STATEMENT OF THE CASE

The defendant, Tanner Barber, repeatedly raped and molested his younger siblings. CP 1. Barber committed all of these sexual offenses prior to the age of seventeen. CP 24-25, FOFs 6, 7, and 8. Barber, however, was prosecuted in adult court

because the crimes were not reported until after Barber was twenty-five years old. CP 1.

A jury convicted Barber of two counts of rape in the second degree with the aggravating factors of minor victim under age 15 and pattern of sexual abuse. CP 23, 24 FOF 4. Barber's rape in the second degree convictions were subject to former RCW 9.94A.712. *See* Former RCW 9.94A.712(1)(a)(i). This statute requires that the offender receive a maximum term equal to the statutory maximum for the offense and a minimum term that is either within the standard range or outside the standard range pursuant to RCW 9.94A.535. Former RCW 9.94A.712(1)(a)(i) and (3). The remainder of Barber's convictions were subject to determinate sentences under the Sentencing Reform Act (SRA). Former RCW 9.94A.712(2).

The trial court imposed mitigated exceptional sentences based upon the factors identified in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). CP 115-22. *Accord* CP 26, FOFs 5 and 6; CP 27, COLs 1, 3, 4, and 5. The court did not state

that the sentences for the rape convictions were to be determinate rather than the indeterminate sentence mandated by former RCW 9.94A.712(1)(a)(i) and (3). *See* CP 121-22. And the sentencing court signed a judgment and sentence that imposed sentences of “66 months to life” on the former RCW 9.94A.712 crimes and determinate sentences of 66 months on the other offenses. CP 137-38.

Barber appealed from the judgment and sentence. *See State v. Barber*, No. 53131-3-II, 2020 WL 4784640 (Wash. Ct. App. Aug. 18, 2020). The mandate issued in this appeal on January 7, 2021. CP 158. The trial court entered a post mandate order correcting the identified scrivener’s errors and striking the interest on February 26, 2021. CP 154.

More than one year later, on March 28, 2022, Barber filed a CrR 7.8(b) motion for resentencing. CP 33. Barber claimed that his motion was timely due to a material change in the law. CP 35. He requested that the trial court exercise its discretion to

decide whether to reduce the maximum term imposed on the second degree rape counts. CP 36.

The State requested that Barber's motion be transferred to the court of appeals pursuant to CrR 7.8(c)(2) because it was both untimely and, even assuming it was timely, Barber did not make a substantial showing that he was entitled to relief or that a factual hearing was required. CP 38. The State also notified the trial court that the Washington Supreme Court had accepted review of the court of appeal's decision in *In re Pers. Restraint of Forcha-Williams*, 18 Wn. App. 2d 167, 490 P.3d 255 (2021) (*Forcha-Williams I*), *rev'd*, 200 Wn.2d 581, 520 P.3d 939 (2022).

The trial court, without prior notice to the parties, granted partial relief by *sua sponte* applying CrR 7.8(a) to correct a "scrivener's error." CP 160; RP 7. The court directed that the judgment and sentence should be amended to indicate that Barber would not be subject to the Indeterminate Sentencing

Review Board (ISRB). CP 165. The State filed a notice of appeal 24 days after this order was entered. CP 166.

On November 10, 2022, a hearing was held in which the order correcting judgment and sentence was signed. The trial court clarified during the hearing that the CrR 7.8(a) ruling was addressing “both a substantive error . . .and . . . a Scribner’s error.” RP 3-4. The State filed an amended notice of appeal that identified both the October 3, 2022, order and the November 10, 2022, order on November 16, 2022.

The State asserted one substantive and three procedural objections to the trial court’s action. While Barber agreed that the trial court did not have discretion to replace an indeterminate sentence with a determinate sentence,³ he argued that the time for the State’s appeal had run. *State v. Barber*, No. 57514-1-II, slip op. at 6-7 (Nov. 14, 2023) (unpublished).⁴

³ See Brief of Respondent at 15.

⁴ A copy of the slip opinion may be found in the appendix to Barber’s petition for review.

The court of appeals granted the State's appeal and directed that the CrR 7.8(a) order and the November 10, 2022, order both be vacated. In reaching this result the court

Assum[ed], without deciding, that the sentencing court was correcting a clerical error under CrR 7.8(a), and further assuming that this means the State's window for appealing this unauthorized sentence under RAP 2.2 has past, this case clearly presents extraordinary circumstances that require us to extend the time for the State's appeal.

Slip op. at 9.

Barber seeks further review, claiming that the court of appeals abused its discretion by extending the time for the State to appeal. Barber's request must be denied as the State's notices of appeal were timely.

IV. ARGUMENT

An aggrieved party has 30 days from entry of the order that it seeks review of to file a notice of appeal. RAP 5.2(a). That date begins to run on the day the trial court submits the order to the clerk for filing. RAP 5.2(c); CR 5(e); CR 58(b). The State's notices of appeal were filed within 30 days of the entry

of both disputed orders. *Compare* CP 178 with CP 190, and CP 181 with CP 184.

Barber does not dispute that the State's notices of appeal were filed within 30 days of the entry of the CrR 7.8 order or the entry of the order amending his judgment and sentence. Nor does he identify any court rule, statute, or case which holds that RAP 5.2(c) does not apply to nunc pro tunc orders. His failure to do so is fatal to his contention that the appellate court abused its discretion by invoking RAP 18.8(b). *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search); *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit).

The appellate court's reliance on RAP 18.8(b) was dicta because the State's notices of appeal were timely. Dicta does not create an issue of public importance that merits further review by

this court. Barber's petition for review should, therefore, be denied.

But if this court were to grant review of Barber's petition for review, it should resolve the three procedural challenges to the trial court's resolution of Barber's untimely CrR 7.8(b) motion and its improper use of nunc pro tunc order and CrR 7.8(a) to make substantive legal changes to Barber's sentence. *See* RAP 13.7(b).

V. CONCLUSION

The State's notices of appeal were both timely. The appellate court's application of RAP 18.8(b), therefore, was dicta. Barber's petition for review must be denied.

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This document contains 1,684 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of January, 2024.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1/11/2024
Date

s/ Kimberly Hale
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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