

FILED

APR 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 31166-0-III

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

ROCKY RHODES KIMBLE

Appellant

BRIEF OF RESPONDENT

Mathew J. Enzler, WSBA #38105
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

DEFENDANT'S ASSIGNMENTS OF ERROR

1. Did the trial court properly transfer this matter to the Court of Appeals?
2. Is the motion barred by RCW 10.73.090?
3. Is the Judgment entered in this case valid on its face?
4. Did the trial court lack authority to enter a sentence based on an offender score of 3?
5. Did the prior Wisconsin conviction "Wash Out"?
6. Did the offender score improperly include 2 points for the prior Wisconsin robbery conviction?
7. Did the offender score improperly include 1 point for the current burglary offense?
8. Did the sentencing court lack authority to enter an exceptional sentence?
9. Does the defendant's affidavit tend to prove the judgment is invalid on its face?

II.

ISSUES PRESENTED

I. Are each of the assignments of error presented by the defendant Appellant wholly frivolous and without merit, thus making it appropriate to grant the relief requested: Allowing Appellant's attorney to withdraw?

III.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

IV.

ARGUMENT

ISSUE I: Did the trial court properly transfer this matter to the Court of Appeals?

The trial court did properly transfer this matter to the Court of Appeals. Appellant's attorney cites CrR 7.8, the rule regarding proper jurisdiction and transfer of review from a trial court to an appellate court. The State agrees, pursuant to this rule, this matter was properly transferred to the Court of Appeals because the matter is both barred by RCW 10.73.090, and does not require a factual hearing for determination of the merits. Pursuit of relief would be

without merit and wholly frivolous, Appellant's attorney ought be allowed to withdraw.

ISSUE 2: Is a motion for collateral attack barred by RCW 10.73.090?

The State agrees with Appellant's attorney that this motion is barred by RCW 10.73.090, cited in Appellant's Brief at Pg. 4. Here, this motion is brought more than a decade following the judgment becoming final. RCW 10.73.090 requires a motion for any type of collateral attack, including a motion to withdraw a guilty plea, be brought within one year of the judgment becoming final. Pursuit of this issue would be without merit and wholly frivolous, Appellant's attorney ought be allowed to withdraw from this issue.

ISSUE 3: Is the judgment valid on its face?

The State agrees with Appellant's attorney that this judgment appears to be valid on its face. Appellant's attorney cited to *In re Scott*, 173 Wn.2d 911, 917 (2012), for the general proposition that a Judgment is valid on it's face unless a judge exercised discretion it did not have. Worth noting is that Appellant has previously litigated this issue by way of a PRP, in which the Court of Appeals has found the trial court/sentencing court did act within it's discretion when it sentenced Appellant. See CP 59. As this matter has previously been litigated, the State agrees with Appellant's attorney that pursuit of this matter is without

merit and wholly frivolous, and Appellant's attorney ought be allowed to withdraw from this issue.

ISSUE 4: Did the trial court lack authority to enter a sentence based on an offender score of 3?

Here, the issue seems mostly moot, as the sentencing court entered an exceptional sentence, based on the facts and circumstances of the case, not based upon the Appellant's offender score. However, to the extent the Appellant's offender score played a role in the determination of the gravity of the exceptional sentence, the offender score appears correct. First, Appellant states in the Statement of Defendant on Plea of Guilty that he had a prior Robbery conviction out of Wisconsin in 1994. The Robbery statute in Wisconsin in 1994, Statute 943.32, stated as follows:

ROBBERY (1): Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means, is guilty of a Class C felony:

- (a) by using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property, or
- (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property.

(2) Whoever violates sub (1) by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonable to believe that it is a dangerous weapon is guilty of a Class B felony.

(3) In this section "owner" means a person in possession of property whether the person's possession is lawful or unlawful.

History: 1997 c 173; 1979 c 114, 1993 a. 486.

The Washington Statutes for Robbery rely on the definition of Robbery found in RCW 9A.56.190 which provides:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The two degrees of Robbery in Washington are delineated as follows, beginning with First Degree Robbery, defined in RCW 9A.56.200:

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon;
 - or
 - (iii) Inflicts bodily injury; or
 - (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.
- (2) Robbery in the first degree is a class A felony.

Robbery in the Second Degree is defined in RCW 9A.56.210, which provides:

- (1) A person is guilty of robbery in the second degree if he or she commits robbery.
- (2) Robbery in the second degree is a class B felony.

The Statutes of the Wisconsin Robbery and Robbery in Washington are directly comparable on their face. Either offense has a multiplier attached to it for a present conviction of rape. The offender score was properly calculated at 3.

ISSUE 5: Did the prior Wisconsin Robbery conviction wash out?

The comparability analysis above shows that the Wisconsin Robbery conviction is directly comparable to Washington State Robbery. In Washington State Robbery is either a Class A or Class B Felony. Under either of those circumstances, the conviction does not wash out, as the present conviction occurred within ten years. The State agrees with the law provided by Appellant's attorney on this point.

ISSUE 6: Did the offender score improperly include 2 points for the prior Wisconsin Robbery?

Giving the Appellant the benefit of the doubt, and assuming the Wisconsin Robbery is most comparable to Robbery in the Second Degree, 2 points are properly included for the prior conviction of Robbery per RCW 9.94A.525, RCW 9.94A.030 as included in the Appellant's brief.

ISSUE 7: Did the offender score improperly include 1 point for the current Burglary offense?

Appellant's counsel properly cites to RCW 9.94A.525 and RCW 9.94A.589 for the general proposition that other current offenses shall also be counted in the offender

score. Furthermore, the Burglary anti-merger statute, RCW 9A.52.050, provides “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” Due to this statute, the “same criminal conduct rule” does not apply, and these are “separate offenses” as is intended by the statutes of referenced by Appellant’s Attorney. It is clear by statute the burglary was properly counted as a separate offense.

ISSUE 8: Under *Blakely v. Washington*, 542 U.S. 296 (2004), did the sentencing court lack authority to enter an exceptional sentence?

The State agrees with Appellant’s counsel that *Blakely* is not applicable to the present matter due to the rulings in *Kilgore* and *Evans* both cited by Appellant’s attorney.

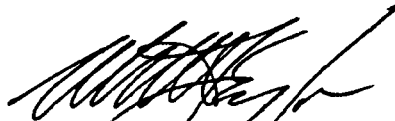
ISSUE 9: Would evidence showing Mr. Kimble was misinformed about various consequences of his guilty plea show the judgment not valid on its face?

In Re Scott, 173 Wn.2d 911 (2012), also cited by appellant’s attorney, is the controlling law on this matter, and sums up years of prior case law in stating that such a petition is now time barred.

CONCLUSION

Based upon the legal arguments and facts above each of the purported issues are clearly without merit, and would be wholly frivolous if pursued further. The State Respectfully requests this court grant the relief requested, that Counsel be allowed to withdraw, and further requests this Court Dismiss this appeal, as without merit, and wholly frivolous.

Dated this 15th day of April, 2013.



Mathew J. Enzler, WSBA#38105
Deputy Prosecuting Attorney
Stevens County Prosecuting Attorney's Office
Attorney for Respondent

Affidavit of Certification


I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Respondent's Brief to the following:

Court of Appeals, Division III,
500 N. Cedar Street,
Spokane, WA 99201,

Mrs. Janet Gemberling
P.O. Box 9166
Spokane, WA 99209

Rocky R. Kimble. #808179,
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001.

Signed in Colville, WA, this 15th day of April, 2013



Michele Lembcke

Legal Assistant
Stevens County Prosecutor's Office

To: Court of Appeals, Division III
ATTN: Ms. Townsley - Clerk of the Court
500 N. Cedar St.
Spokane, WA 99201-1405

June 27, 2013

From: Rocky R. Kimble
AHCC MB60L
PO Box 2049
Airway Heights, WA 99001-2049

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JUL 01 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

RE: Case # 311660-III
STATE v. KIMBLE

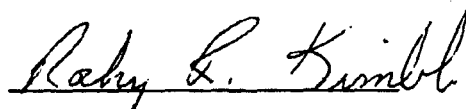
APPELLANTS REPLY BRIEF IN OPPOSITION
TO ANDERS BRIEF
Declaration of Service (General Rule 3.1)

Dear Ms. Townsley,

Please find enclosed my REPLY brief in opposition to my appointed appellate counsel's Anders Brief/Motion to withdraw. Please record my BRIEF as filed on June 27th, 2013 in accordance with General Rule 3.1, mailbox rule.

I'm Gratefully thankful for your valuable time and assistance.

Respectfully,


Rocky R. Kimble

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON _____)
Respondent)

No: 311660-III

v.)

DECLARATION OF SERVICE
BY MAILING

ROCKY R. KIMBLE _____)
Appellant)

[General Rule 3.1]

I, Rocky Kimble, Appellant, in the above entitled cause, do hereby declare that I have served the following documents;

APPELLANTS REPLY BREIF
IN OPPOSITION TO ANDERS BRIEF

Upon: THE COURT OF APPEALS
Division III
N. 500 Cedar
Spokane, WA 99201

I deposited with the M-Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

On this June day of 27, 2013.
I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,
Rocky R. Kimble
Petitioner