98706-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 36514-0-III

STATE OF WASHINGTON, Respondent,

v.

ROCKY RHODES KIMBLE, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Rocky Kimble requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on March 17, 2020, declining to consider his argument that he was deprived of his Sixth Amendment right to assistance of counsel when his attorney volunteered confidential information to the State to oppose Mr. Kimble's pending motion and refused to advocate for it, and holding that Mr. Kimble's motion was barred by collateral estoppel. A copy of the Court of Appeals' unpublished opinion is attached hereto as Appendix A. The Court of Appeals issued an order denying reconsideration and amending the opinion on May 28, 2020, attached hereto as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

The Stevens County Superior Court appointed counsel to represent Rocky Kimble in a motion for resentencing that he filed *pro se* after the State conceded in a collateral proceeding that his offender score was miscalculated. His attorney obtained information about a prior ruling concerning the offender score and volunteered the ruling to the court, after

Mr. Kimble moved for the attorney to be disqualified for a conflict of interest. His attorney did not forward arguments against the application of collateral estoppel and advocated against Mr. Kimble's interests. The trial court declined to rule on Mr. Kimble's motion to disqualify his attorney and denied his motion for resentencing without providing him any opportunity to respond. Was his attorney's conduct deficient and prejudicial to his case? Did his attorney's conduct so undermine the basic responsibilities of an attorney as to constitute a deprivation of counsel?

In affirming the ruling that collateral estoppel barred Mr. Kimble's motion, did the Court of Appeals fail to apply published precedent holding that decisions rendered on procedural grounds should not be given preclusive effect, when the prior ruling concluded Mr. Kimble's petition was time-barred?

IV. STATEMENT OF THE CASE

In 2000, Rocky Kimble pleaded guilty to one count of residential burglary and one count of first degree rape arising from the same incident. CP 11, 13, 19. The parties agreed his offender score was "3" on both counts and the State agreed to recommend a high end standard range sentence of 160 months. CP 15.

The judge used a pre-printed form at sentencing. CP 35-44. She marked by hand the box indicating that the crimes were the same criminal conduct but did not recalculate the offender scores. CP 36, 37. Thereafter, based upon a judicial finding of deliberate cruelty, the judge imposed an exceptional sentence of 360 months. CP 37, 39, 47-53. Kimble challenged the exceptional sentence on appeal based on the judicial finding, but the Court of Appeals affirmed the sentence.[1] CP 54-55.

Thereafter, Mr. Kimble sought to withdraw his guilty plea, arguing that his offender score was miscalculated once the sentencing court determined that the crimes were the same criminal conduct and he was therefore misadvised of the consequences of his guilty plea. CP 339-40. The Court of Appeals concluded his personal restraint petition was time-barred because an involuntary plea is not exempt. CP 340. However, it proceeded to evaluate the merits of his argument that the offender score was miscalculated and found, without an evidentiary hearing and in spite of the box being checked by hand on the otherwise pre-printed form, that the notation was surplusage. CP 340.

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[1] *Blakeley v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), would not be decided for another three years.

Mr. Kimble sought discretionary review of the dismissal of his petition. CP 344. The Supreme Court commissioner agreed that Mr. Kimble's request to withdraw his guilty plea was time-barred. CP 346. And it also concluded that the offender score was not prejudicially miscalculated, although it concluded the checked box was a scrivener's error. CP 345.

Subsequently, Mr. Kimble moved to vacate his judgment and sentence and for resentencing based on a miscalculated offender score. CP 267. To support his motion, he relied upon briefing the State filed in the Court of Appeals in a proceeding concerning the propriety of a transfer order in which the State conceded that the crimes were the same criminal conduct and contended there was no factual dispute concerning the miscalculation. CP 271, CP 292-93, 295. In response to the motion, the State did not dispute the concession but merely argued that the miscalculation was harmless because an exceptional sentence had been imposed. CP 309-10.

The trial court appointed counsel to represent Mr. Kimble on his motion. RP 59. Initially, counsel filed a request to the court to clarify the purpose of his representation, stating that "[t]here is no motion before the court," only a matter previously raised under a different caption. CP 381.

He argued that the correct procedure was for Mr. Kimble to file a personal restraint petition and that he would be unable to meaningfully assess the case. CP 381-82. Mr. Kimble filed a letter with the court expressing concern about inaccuracies in the filing and his perception that his attorney was acting contrary to his interests. CP 301-05. At the next hearing, the trial court agreed with Mr. Kimble, advised counsel that there was a pending motion and set a deadline for responsive briefing. RP 64-67.

Counsel did not file a reply by the deadline, so Mr. Kimble personally responded to the State's brief by letter. CP 317-22. At the motion hearing, in spite of the State's stipulation to the miscalculated offender score, counsel advocated for a continuance to further investigate the trial court's intent, stating that "it was never the parties intent to find there was same course of criminal conduct," stating he did not believe the sentencing court intended to find they were the same criminal conduct, and suggesting the "same criminal conduct" box might have been checked after the judgment and sentence was filed. RP 71-73, 74. The court continued the hearing to allow the parties to obtain a copy of the sentencing transcript. RP 78-79. It allowed Mr. Kimble to briefly address the court personally, and Mr. Kimble expressed that he had been unable to contact or communicate with his attorney and was concerned about the

lack of a reply brief, so he had personally filed a response rather than risk the State's argument going unopposed. RP 80.

Mr. Kimble then moved to discharge his attorney due to a conflict of interest. CP 323. In the motion, Mr. Kimble described his efforts to contact counsel to discuss the motion and the State's response and his inability to receive any substantive communication from his attorney. CP 325-26. He also contended that his attorney took an adversarial position to his interests at the motion hearing by arguing against the State's concession and raising objections to the "same criminal conduct" finding that the State did not advance. CP 326. Mr. Kimble stated that he had already requested counsel to withdraw and did not want his representation at the next court hearing. CP 327. After his attorney abruptly terminated a phone call about the disagreement and his lack of preparedness, Mr. Kimble left a message requesting that he withdraw due to the breakdown in communication, conflict of interest, and lack of communication and trust. CP 328.

A week later, the State moved to strike Mr. Kimble's motion to vacate the judgment and sentence, arguing that it was collaterally estopped by the rulings dismissing his earlier personal restraint petition. CP 334-

336. Appointed counsel did not respond to or controvert Mr. Kimble's motion or the State's motion.

At the next motion hearing, counsel first addressed the court concerning the motion to withdraw. He advised the court that he had found the Washington Supreme Court's order dismissing the personal restraint petition, which Mr. Kimble did not want him to raise, but suggested his duty of candor to the tribunal required it. RP 86-87. Stating that the order showed the issue had been previously litigated, he informed the court there was nothing he could do for Mr. Kimble. RP 87-88. He forwarded no argument concerning whether the order was a judgment on the merits, whether applying collateral estoppel would be unjust under the circumstances, or whether the State's concession concerning the offender score calculation could be revoked. The trial court then denied Mr. Kimble's motion for resentencing on the grounds it was collaterally estopped and declined to address the motion to discharge his attorney. RP 88-89.

On appeal, Mr. Kimble contended that the trial court erred by ruling on the pending motion to vacate without addressing the conflict of interest, which deprived Mr. Kimble of an opportunity to respond to the claim of collateral estoppel. *Appellant's Brief*, at 2, 11-13. He further

argued that the State was judicially estopped from revoking its concession of offender score error after taking that position to advance its interests in the Court of Appeals, and that the prior appellate rulings were not preclusive because they were decided on procedural grounds and without taking evidence on the question of the sentencing court's intent. *Appellant's Brief*, at 2-3, 13-20. These arguments were presented for the first time on appeal, since appointed counsel did not present any argument against the dismissal of Mr. Kimble's motion.

The Court of Appeals considered only the collateral estoppel issue. *Opinion*, at 7. It concluded that Mr. Kimble's petition was not dismissed solely on procedural grounds because the court considered the merits of a second argument. *Opinion*, at 9-10. In reaching this conclusion, it did not disagree that the petition should have been entirely dismissed as a mixed petition. *Opinion*, at 8. And although it acknowledged that *Ullery v. Fulleton*, 162 Wn. App. 596, 256 P.3d 406, *review denied*, 173 Wn.2d 1003 (2011) held that actions that were dismissed on procedural grounds should not be given preclusive effect, it declined to apply that rule to Mr. Kimble's case. *Opinion*, at 8-10. It declined to reconsider its opinion as to appointed counsel's asserted conflict and its effect on the proceedings. *Motion to Reconsider*, filed April 6, 2020; *Order Denying Motion for Reconsideration and Amending Opinion*, filed May 28, 2020.

Mr. Kimble now requests that this Court review (1) whether declining to rule on his motion to discharge his attorney before deciding the merits of his motion for resentencing deprived him of his right to counsel and an opportunity to be heard on the question of collateral estoppel; and (2) whether the Court of Appeals' opinion that Mr. Kimble's motion is collaterally estopped in spite of the State's prior concession of offender score error conflicts with published Court of Appeals' authority concerning the preclusive effect of procedural rulings.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(2) and (3). The actions of appointed counsel in undermining Mr. Kimble's position and refusing to advocate for it raise significant questions concerning Mr. Kimble's constitutional right to counsel. Further, as to collateral estoppel, the Court of Appeals' opinion conflicts with its published opinion in *Ullery* that matters decided on procedural grounds should not be considered preclusive even if the court also addresses the merits of the claim. Review is appropriate to evaluate what actions are necessary to protect the right to counsel when an attorney refuses to advance a client's position in a case and to resolve the conflict concerning whether a ruling on a time-barred claim should collaterally estop future litigation on the merits.

I. The Court should accept review to hold, clearly and unequivocally, that an appointed attorney who will not advocate for his client's position must preserve client confidences and move to withdraw.

> The attorney-client relationship is grounded in the fundamental understanding that an attorney will give complete and undivided loyalty to the client so that the attorney should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost.

State ex rel. S.G., 714 A.2d 612, 616 (N.J. Sup. Ct. 2003) (internal quotation marks omitted). An attorney must abide by the client's decisions concerning the objectives of the representation. *McCoy v. Louisiana*, __ U.S. __, 138 S. Ct. 1500, 1509, 200 L. Ed. 2d 821 (2018). If the defendant timely asserts a conflict of interest and the trial court fails to conduct an adequate inquiry, automatic reversal is required. *State v. Regan,* 143 Wn. App. 419, 426, 177 P.3d 783, *review denied*, 165 Wn.2d 1012 (2008) (*citing Holloway v. Arkansas,* 435 U.S. 475, 488, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). This is because the right to assistance of counsel is so basic to a fair trial that its deprivation can never be treated as harmless error. *Holloway*, 435 U.S. at 489 (*quoting Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

An actual conflict of interest exists "when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Regan,* 143 Wn. App. at 428 (*quoting U.S. v. Levy*, 25 F.3d 145, 155 (2d Cir. 1994)). A defendant is adversely affected by a conflict of interest when the conflict causes a lapse in representation that is contrary to the defendant's interests, or likely affects particular aspects of the attorney's advocacy for the client. *Id.*

It is commonplace for an attorney representing a criminal defendant to come into possession of information that could be damaging to the defendant's case if revealed. Washington's ethical rules establish broad protection for such information. *See* RPC 1.6, n. 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). Here, appointed counsel obtained information adverse to Mr. Kimble's interests and, rather than maintain it in confidence, volunteered it to the court, notwithstanding Mr. Kimble's early raised and repeatedly expressed alarm that his attorney was undermining his position. This disregard for confidentiality undermines the core of the attorney's obligation toward a client and this Court should

hold that such conduct amounts to a deprivation of counsel under the Sixth Amendment.

Further, it is ineffective, and a deprivation of representation, to refuse to assert a criminal defendant's arguments to the trial court as frivolous rather than moving to withdraw. *See, e.g., State v. Chavez*, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011). If trial counsel did not believe he could advocate for Mr. Kimble's position consistent with Mr. Kimble's objectives without running afoul of RPC 3.1, he had a conflict of interest that required him to withdraw. Here, the trial court was on notice of the asserted conflict because (1) Kimble moved to discharge his attorney, citing conflict of interest; and (2) trial counsel advised the court he did not believe he could advocate for Mr. Kimble's position due to his ethical obligations. RP 86-87. At that point, the trial court had a duty to investigate the conflict and either replace trial counsel or discharge him to allow Mr. Kimble to proceed pro se. *Regan*, 143 Wn. App. at 425-26. The failure to do so deprived Kimble of his constitutional right to conflict-free counsel. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003) (*citing Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)).

From the outset of his appointment, counsel expressed reluctance to advance Mr. Kimble's argument, undermined the State's concession that the offender score was miscalculated, and ultimately declined to advance any arguments on Mr. Kimble's behalf, volunteering confidential information obtained from his investigation and his conversations with Mr. Kimble about that information in the process. This conduct is contrary to the vigorous advocacy required of a criminal defense attorney. This Court should accept review and conclude that Mr. Kimble's attorney failed to meet constitutionally required minimum standards.

II. The Court should examine the reasoning of *Ullery* to determine whether a time-barred argument decided without full and fair consideration of disputed facts should be precluded from future consideration on the merits.

Under the doctrine of collateral estoppel, when an ultimate factual issue has been determined by a valid and final judgment, the issue cannot be relitigated in the future. *State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004). A party asserting collateral estoppel must show that (1) the issue decided in the first adjudication is identical to the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the plea of collateral

estoppel is asserted was a party or in privity with a party to the prior litigation ; and (4) application of the doctrine must not work an injustice. *Id.* at 114 (*quoting State v. Bryant*, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002)).

In evaluating whether there is a final judgment on the merits, courts also consider whether the claim was properly resolved on the merits or on procedural grounds. *See Ullery,* 162 Wn. App. 596 (where court dismissed case on standing but also evaluated the merits, the court's determination of the merits should not operate as a bar to a future claim). Under the fourth factor, the "injustice" prong, the primary consideration is whether the parties received a full and fair hearing on the issue in question such that the prior decision was procedurally fair. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).

In *Ullery*, the Court of Appeals rejected the argument that a claim on the merits had preclusive effect even when the prior ruling addressed the merits, when the prior ruling granted relief on the basis of lack of standing. 162 Wn. App. at 603. Ruling that because a plaintiff lacking standing may not assert the rights of others, the trial court should not have proceeded to evaluate the merits after finding the plaintiff lacked standing. *Id.* at 604-05. And it adopted the Restatement position that

> [W]hen a dismissal is based on two or more determinations at least one of which, standing alone, would not render the judgment a bar to another action on the same claim, then in such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar.

Id. at 606 (*citing* Restatement (Second) of Judgments § 20 cmt. e (1982)).

Here, Mr. Kimble's initial motion to withdraw his guilty plea was time-barred. CP 340, 346. Under the mixed petition rule, if any claim is time-barred, the entire petition must be dismissed, even claims that are not time-barred. *In re Hankerson*, 149 Wn.2d 695, 72 P.3d 703 (2003). As in *Ullery*, in which the preliminary question of standing was dispositive and should have ended the inquiry, in Mr. Kimble's case, the issue of timeliness was dispositive and should have ended the inquiry. As in *Ullery*, the fact that the court nevertheless proceeded to consider the merits should not have preclusive effect in a future action that is not time-barred. Thus, the Court of Appeals' opinion is in direct conflict with *Ullery*.

This Court should accept review of the case to resolve the conflict and issue a ruling that the prior ruling dismissing Mr. Kimble's requested relief as time-barred should not operate preclusively to bar him from obtaining relief that is not time-barred.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(2) and (3) and this Court should enter a ruling that (1) Mr. Kimble's right to counsel was violated when his appointed attorney's conflicts were ignored, and (2) Mr. Kimble should be allowed to argue that his offender score was miscalculated after the sentencing court found the crimes to constitute the same criminal conduct, entitling him to resentencing.

RESPECTFULLY SUBMITTED this 29 day of June, 2020.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

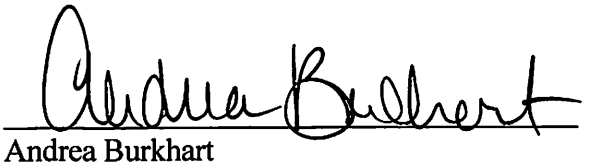
I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Timothy Rasmussen
Stevens County Prosecutor
215 S Oak St
Colville, WA 99114-2862

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

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29 day of June, 2020 at Kennewick, Washington.



Andrea Burkhart

APPENDIX A

FILED
MARCH 17, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ROCKY RHODES KIMBLE, Appellant.	)	No. 36514-0-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Since 2012, Rocky Kimble has filed multiple motions seeking vacation or resentencing of his 2000 pleas of guilty. Either form of relief would result in his 30-year exceptional sentence, imposed without a jury's finding, to be nullified. In 2015, we made a final decision on the merits of the same issue he now raises. He argues collateral estoppel does not apply because we should have dismissed his personal restraint petition (PRP) on procedural grounds instead of deciding it on the merits. We disagree, apply collateral estoppel, and dismiss his latest PRP.

FACTS

In 1999, the State charged Rocky Kimble with one count of rape in the first degree and one count of burglary in the first degree. In 2000, Mr. Kimble pleaded guilty to the

amended charges of one count of rape in the first degree and one count of residential burglary.

In the signed plea agreement, Mr. Kimble's offender score was listed as "3" on both counts, based in part on a prior robbery conviction in Wisconsin. The State agreed to recommend a sentence of 160 months' imprisonment for the rape charge and a concurrent sentence of 17 months' imprisonment for the burglary charge. But judges are not bound by a sentencing recommendation. The sentencing court disagreed with the State's recommendation and entered an exceptional sentence of 360 months for the rape charge. Mr. Kimble appealed the exceptional sentence to this court. Our decision was final before *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and we affirmed.

In April 2012, Mr. Kimble filed a motion to withdraw pleas of guilty in the superior court, arguing his offender score was miscalculated. Mr. Kimble based this argument on the contention his prior conviction for robbery in Wisconsin was not comparable to a Washington crime. The trial court found Mr. Kimble's offender score had been calculated correctly and concluded the motion was not timely filed and, additionally, Mr. Kimble had not made a showing he was entitled to relief. It then

transferred Mr. Kimble's motion to this court as a personal restraint petition. *See* CrR 7.8(c)(2). Mr. Kimble later abandoned his PRP, and we dismissed it.

In April 2015, Mr. Kimble filed a PRP with this court. He argued the PRP overcame the time bar because the judgment was facially invalid due to miscalculated offender scores of "3" for each crime. He claimed (1) he was entitled to withdraw his guilty plea as involuntary because the offender score errors resulted in his being misinformed as to the direct consequences of his plea, and (2) the miscalculated offender score was prejudicial error that required resentencing.

With respect to Mr. Kimble's first argument, we concluded that his claim of plea involuntariness did not fall within any RCW 10.73.100 exception to the one-year time bar. *See In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014) (petitioner's sole remedy in challenging facially invalid sentence is correction of sentence; claim of plea involuntariness due to misinformation about sentence is not an exempt ground for relief under RCW 10.73.100).

With respect to Mr. Kimble's second argument, we concluded his offender score was correctly calculated for his rape conviction. In reaching this conclusion, we determined the original sentencing court had inadvertently checked the "same criminal conduct" box on the sentencing form.

We did agree with Mr. Kimble that his offender score was incorrectly calculated for his burglary conviction. But because the lesser burglary sentence was concurrent with the rape sentence, we concluded Mr. Kimble was not harmed by the offender score error, and the defect did not result in a complete miscarriage of justice. For that reason, he was not entitled to relief. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 508, 301 P.3d 450 (2013). We dismissed Mr. Kimble's PRP because he was not entitled to relief under either of his two arguments.

Mr. Kimble petitioned the Washington Supreme Court for discretionary review of the second part of our order, where we denied his resentencing request because of a purported error in his offender score. A commissioner denied his request for discretionary review by a written ruling. In ruling, the commissioner wrote:

> Mr. Kimble is correct that the trial court apparently checked off the "same criminal conduct" box on the judgment and sentence. But the standard sentencing range specified in the plea agreement, *the plea colloquy*, and the judgment and sentence plainly reflected that the trial court counted the current offenses separately. The checked-off box was clearly a scrivener's error.

Clerk's Papers (CP) at 345 (emphasis added).

In November 2017, Mr. Kimble filed a second motion to withdraw pleas of guilty. In his 2017 motion, Mr. Kimble again argued he should be permitted to withdraw his guilty plea as involuntary because he was misinformed due to the miscalculated

residential burglary offender score. The trial court transferred the CrR 7.8 motion to this court to be considered as a PRP, and Mr. Kimble appealed the transfer.

Despite prior rulings by this court and the Supreme Court commissioner, the State responded in its brief: "[T]he sentencing court determined that both current offenses constituted the 'same criminal conduct,' . . . [so] Kimble's offender score should . . . [be] reduced by one (1) point on both charges, and his standard sentencing ranges recalculated." CP at 293.

After the State filed its response brief, Mr. Kimble asked the court to withdraw his PRP, and this court filed a certificate of finality on November 27, 2018.

In May 2018, Mr. Kimble filed a motion to vacate his pleas of guilty. This motion was based on the "concession that Mr. Kimble's offender score and presumptive standard range sentences were, in fact, miscalculated . . . ." CP at 271. The trial court appointed Mr. Kimble an attorney. The State filed a response, again incorrectly stating Mr. Kimble's scores were miscalculated, but contending he was not prejudiced by the miscalculation. At a hearing on the motion, Mr. Kimble's appointed attorney requested a continuance, stating he had to review the transcript of the guilty pleas because he did not "really believe Judge Baker even found anything to be the same course of criminal conduct." Report of Proceedings at 72.

Following this, Mr. Kimble moved to discharge his appointed counsel, arguing there was a conflict of interest and a breakdown in communication. He claimed the conflict arose from the counsel's admission at the hearing. The State then filed a motion to strike Mr. Kimble's motion to vacate, arguing it was barred by collateral estoppel.

The trial court held a hearing on December 10, 2018, to address all of the issues. At the hearing, Mr. Kimble's attorney was given a chance to address the motion to discharge and he explained his statements were based on his duty of candor to the court. The trial court did not rule on the motion to discharge counsel and, instead, ruled collateral estoppel applied in this case and denied the motion to vacate. Mr. Kimble objected, stating he could prove the offender scores were incorrect, but the trial court ruled this court and the Supreme Court had already ruled on that issue. Mr. Kimble did not object to the trial court's failing to rule on his motion to discharge counsel.

Mr. Kimble timely filed this appeal.

ANALYSIS

Mr. Kimble makes three arguments on appeal: (1) the trial court erred by failing to inquire into the asserted conflict of interest, (2) the State is judicially estopped from challenging its concession that his offender scores were incorrectly calculated, and (3) the

trial court erred by applying collateral estoppel. The third issue, if decided against Mr. Kimble, would be dispositive. We, therefore, begin our analysis with that issue.

COLLATERAL ESTOPPEL

Mr. Kimble contends the trial court erred in determining he was collaterally estopped from rearguing that his offender score was miscalculated. We disagree.

Whether a court is collaterally estopped from deciding an issue is a question of law this court reviews de novo. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). To satisfy the well-settled test for collateral estoppel, a party must show

> "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice."

Id. (internal quotation marks omitted) (quoting *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999)).

Mr. Kimble challenges the first and second factors. Under those factors, the court considers whether the issue was actually litigated and necessarily and finally determined in the prior proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). In evaluating whether there is a final

judgment on the merits, courts must consider whether the claim was properly resolved on the merits as opposed to procedural grounds. *Ullery v. Fulleton*, 162 Wn. App. 596, 604-07, 256 P.3d 406 (2011).

Mr. Kimble contends our prior determination, that his offender score of "3" for rape, was not a final decision on the merits because his entire 2015 PRP "should have been" dismissed on procedural grounds. Appellant's Br. at 20. In support of his argument that his entire 2015 PRP should have been procedurally dismissed, he cites *In re Personal Restraint of Hankerson*, 149 Wn.2d 695, 702, 72 P.3d 703 (2003). We agree, his entire 2015 PRP should have been procedurally dismissed once we determined that his first argument was time barred.

But simply because we should have dismissed Mr. Kimble's entire 2015 PRP on procedural grounds, does not mean collateral estoppel applies. This point is understood by examining *Ullery*.

In *Ullery*, the trial court dismissed an earlier action between the parties, having determined Mr. Fulleton lacked standing and additionally determining that he had failed to perform a reclamation agreement. 162 Wn. App. at 600. Thereafter, the Ullerys filed an ejectment proceeding against the Fulletons. *Id.* The Fulletons defended and counterclaimed on the basis that the reclamation

agreement had been performed. *Id.* The trial court, applying collateral estoppel to the issue of performance, ruled in favor of the Ullerys. *Id.* at 602.

In reversing, we explained the Fulletons' defense and counterclaim were not barred by collateral estoppel because the earlier claim brought by Mr. Fulleton did not result in a judgment on the merits. *See generally, id.* at 603-07. Citing various authorities, we held that when a trial court dismisses a case on procedural grounds such as lack of standing, any additional substantive basis for dismissal does not have preclusive effect. *Id.* at 605-06. In buttressing this holding, we agreed with the comment e of the *Restatement (Second) of Judgments* § 20 (1982). The comment author explained: A gratuitous analysis of a substantive issue might not be as carefully and rigorously analyzed and, of critical importance, the losing party—having failed on a procedural ground—would not have an incentive to appeal the substantive issue. *Ullery*, 162 Wn. App. at 606.

That is not the case here. We did not dismiss Mr. Kimble's 2015 PRP on procedural grounds and then gratuitously analyze the merits. Rather, we dismissed his first argument on procedural timeliness grounds and then addressed the merits of his second and independent argument. Because we did not dismiss his entire 2015 PRP on procedural grounds, we carefully analyzed his second argument.

Had we dismissed Mr. Kimble's entire 2015 PRP on procedural grounds, he would not have had an incentive to petition the Supreme Court for review. But we did not, and Mr. Kimble did petition the Supreme Court to review the merits of his offender score argument. The Supreme Court commissioner then analyzed the merits of his offender score argument and agreed with us, the checked box "was clearly a scrivener's error."[1] CP at 345.

We conclude there was a final judgment on the merits with respect to Mr. Kimble's offender scores. For this reason, collateral estoppel bars relitigation of his current PRP claim, and we dismiss it.

[1] Mr. Kimble argues we erred in 2015 by determining the sentencing judge inadvertently checked the "same criminal conduct" box. He argues we should order a reference hearing so the judge who conducted the plea and sentence 15 years ago could enter findings on that issue. We disagree for two reasons. First, the Supreme Court Commissioner reviewed the recorded colloquy and found no evidence the trial court intended to check the "same criminal conduct" box. Second, we find it inconceivable that the same judge who handed down an exceptional sentence more than twice the maximum standard range would also use its discretion to grant Mr. Kimble a lesser offender score by purposefully checking the "same criminal conduct" box.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.

APPENDIX B

FILED
MAY 28, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 36514-0-III**
	)	
Respondent,	)	**ORDER DENYING**
	)	**MOTION FOR**
v.	)	**RECONSIDERATION AND**
	)	**AMENDING OPINION**
ROCKY RHODES KIMBLE,	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of March 17, 2020, is denied.

IT IS FURTHER ORDERED that the first sentence of the third full paragraph on page 5 that begins "In May 2018 . . . ." shall be amended as follows:

> In May 2018, Mr. Kimble filed a motion requesting his sentence be vacated so he could be resentenced with a correct offender score.

PANEL: Judges Lawrence-Berrey, Siddoway, and Pennell

FOR THE COURT:

REBECCA PENNELL
CHIEF JUDGE

BURKHART & BURKHART, PLLC

June 29, 2020 - 2:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36514-0
Appellate Court Case Title:	State of Washington v. Rocky Rhodes Kimble
Superior Court Case Number:	99-1-00221-5

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