Supreme Court No. 100623-3
Court of Appeals No. 37661-3-III

STATE OF WASHINGTON,

Respondent,

v.

OLAJIDE ADEL FLETCHER,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Olajide Adel Fletcher, Petitioner, seeks the relief designated in Part II.

II. DECISION

The Court of Appeals granted the State's appeal, reversed the superior court's decision granting Mr. Fletcher's CrR 7.8 motion, and directed the superior court to reinstate the original judgment and sentence. *State v. Fletcher*, __ Wn. App. __, 497 P.3d 886, 894 (2021). A motion to reconsider was denied on January 11, 2022. Copies of both the opinion and the denial of reconsideration are attached.

III. ISSUES PRESENTED FOR REVIEW

A. Does RCW 10.73.140, which precludes the court of appeals from considering a second or successive personal restraint petition, likewise apply to a superior court and therefore requires the court of appeal to grant a state's appeal from a successful motion to vacate?

B. Must a defendant show good cause for a successive collateral attack when he was pro se during the prior proceeding? Does the lower court's failure to exempt Mr. Fletcher from the good cause requirement conflict with this Court's decisions?

IV. FACTS

After negotiations, the State and Mr. Fletcher entered into a plea agreement whereby Fletcher pleaded guilty to two crimes, including a count of second-degree assault with a joint recommendation of an exceptional sentence of 120 months. The statement on plea of guilty identified Mr. Fletcher's offender score on that count as "8." CP 10-11, 14.

Mr. Fletcher was sentenced on February 23, 2016. His offender score for the assault was calculated as an "8." The sentencing court followed the recommendation and imposed an exceptional sentence of 120 months. CP 26.

On March 18, 2016, Mr. Fletcher filed a pro se motion to modify the judgment and sentence pursuant to CrR 7.8, seeking a standard range sentence of 106 months in confinement. CP 41. The superior court transferred the motion to the Court of Appeals for consideration as a personal restraint petition. Mr. Fletcher was also pro se in the Court of Appeals, which dismissed the petition as frivolous. CP 49, 52-54.

Three years later Mr. Fletcher filed a second CrR 7.8 motion, arguing that the sentencing court incorrectly calculated his offender

score. Specifically, he asserted that the court incorrectly included his two juvenile convictions that should have washed out making his correct offender score "4," rather than "8." CP 58, 63.

In response, the State argued that the motion was barred as improperly successive under RCW 10.73.140. CP 94, 158-59. Mr. Fletcher replied by filing a declaration certifying that his previous petition did not present similar grounds and arguing that he had good cause for not raising the offender score in his previous petition because he did not have access to his judgment and sentence. Mr. Fletcher argued that the lack of access was "an external objective impediment" that prevented him from raising the issue. According to Mr. Fletcher, he requested a copy of his judgment and sentence from defense counsel, but never received that document so could not check the offender score calculation. CP 135, 139-53.

The superior court held that Mr. Fletcher's judgment was facially invalid, and thus his motion was timely. The court also found that Fletcher had established good cause for not including the issue in his first motion. Finally, the court found prejudice, concluding that if the sentencing court had known the parties relied on an erroneous offender

score and standard range when they negotiated the agreement, the sentencing court likely would have departed from the agreement and imposed a lower sentence. Accordingly, the court held that Mr. Fletcher was entitled to re-sentencing with the proper offender score and proper standard range. CP 564, 578-79. The State did not immediately appeal the order granting the motion to vacate.

Instead, the case proceeded to resentencing where the court ordered a high-end standard range sentence of 77 months.[1]

V. ARGUMENT

A. Introduction

The Court of Appeals erred in two respects. First, the limitation in RCW 10.73.140 applies only to the "court of appeals," not the superior court. Likewise, the statute does not require reversal of a superior court decision granting a motion to vacate. Second, the "good

[1] Mr. Fletcher has now served the entire sentence and has been released from prison. Because he has done so and because the State could have but did not appeal from the order vacating the judgment prior to a resentencing, Mr. Fletcher contends that re-imposing the original sentence would constitute double jeopardy. See *State v. Hardesty*, 129 Wash. 2d 303, 313, 915 P.2d 1080 (1996) (citing various considerations). Obviously, if this Court accepts review and reverses that issue becomes moot.

cause" requirement applies only to prior PRPs where a petitioner was represented by counsel. Because that issue is controlled by clear precedent from this Court and dispositive, Fletcher starts there.

B. A Showing of Good Cause is Not Required Where the Petitioner was Pro Se During the Prior Proceeding.

The Court of Appeals vacated the order granting vacation of the judgment and remanded for reinstatement of the original sentence after concluding that Fletcher had not shown good cause for failing to include the instant issue in his prior motion to vacate. The court held: "Since we find that Mr. Fletcher has failed to show good cause for not including the offender score issue in his first motion, we conclude that his second motion is successive and barred by the requirements of RCW 10.73.140 as applied through CrR 7.8(b)." *Fletcher*, 497 P.3d at 894. The lower court failed to consider one crucial fact: Fletcher was pro se during that prior proceeding. Imposing the good cause limitation where the petitioner was *pro se* during the prior proceeding conflicts with precedent.[2]

[2] The State may respond by noting that Fletcher's prior counsel, both in the trial court and on appeal, accepted that he was required to show good cause. However, since it is the State's burden to show the applicability of the exception and because the undisputed historical

A petition may be improperly successive under either RCW 10.73.140 or RAP 16.4(d). *In re Pers. Restraint of VanDelft*, 158 Wash.2d 731, 737, 147 P.3d 573 (2006). The statute calls for dismissal of a PRP where the petitioner has not established good cause why the issues in the current PRP were not raised in an earlier PRP. RCW 10.73.140. That is because it constitutes an "abuse of the writ" to file a second petition with a new issue that could have been included in the first proceeding. If a petitioner shows good cause for not including that issue previously, then the limitation does not apply.

This Court explained in *In re Adolph*, 170 Wash. 2d 556, 565, 243 P.3d 540 (2010):

> If the [defendant] was represented by counsel throughout postconviction proceedings, it is an abuse of the writ for him or her to raise ... a new issue that was available but not relied upon in a prior petition. I*n re Pers. Restraint of Turay,* 153 Wash.2d 44, 48, 101 P.3d 854 (2004) (quoting *In re Pers. Restraint of Jeffries*, 114 Wash.2d 485, 492, 789 P.2d 731 (1990) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986))). Here, Adolph acted pro se in both his first PRP and the current PRP. Because he was not represented by counsel throughout postconviction proceedings, Adolph's failure to raise

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record definitively shows that the exception does not apply, Fletcher contends he can raise the deficiency in the State's reliance on that exception now. Obviously, Fletcher will file a PRP claiming ineffective assistance of both prior attorneys if needed. However, he respectfully requests that this Court consider the argument at this juncture.

> the current issue in his prior PRP is not an abuse of the writ. We hold Adolph's PRP is not procedurally barred.

(internal quotation marks omitted). See also *In re Greening*, 141 Wash. 2d 687, 700, 9 P.3d 206, 213 (2000). Because only when a petitioner was represented by counsel throughout postconviction proceedings is it an abuse of the writ for him to raise, in a successive petition, a new issue that was available but not relied upon in a prior petition, the good cause requirement simply does not apply in this instance. See also *In re Martinez*, 171 Wash. 2d 354, 363, 256 P.3d 277, 282 (2011) (where petitioner was pro se in prior proceeding, subsequent petition raisign new issue was not an abuse of the writ under RAP 16.4(d) and does not bar Mr. Martinez's collateral attack). Where the petitioner was pro se during a prior collateral attack, the State explicitly "declined to rely on the abuse of the writ doctrine, likely because it did not apply." *In re Adams,* 178 Wash. 2d 417, 432, 309 P.3d 451 (2013) (Gordon-McCloud, J. concurring).

Moreover, the good cause requirement that can arise when a successive petition is filed is an affirmative defense that the State must plead. *Turay,* 153 Wash.2d at 48. An essential element of that defense is that the petitioner was represented by counsel in the prior

proceeding, something that the State has never contended or plead in this case.

Because the lower court's decision applies the good cause requirement notwithstanding the fact that Fletcher was previously pro se, the decision conflicts with controlling precedent from this Court. For that reason, this Court should grant review.

To be clear, Fletcher contends that he demonstrated good cause, although that is not required. Good cause exists for raising a new issue in a successive petition if "an external objective impediment" prevented raising the issue in the prior petition. *In re Pers. Restraint of Vazquez,* 108 Wn. App. 307, 315, 31 P.3d 16 (2001). A mere "self-created hardship" does not suffice. *Id.*

Here, the trial court also did not provide him a copy of his judgment and sentence as the SRA requires. CP 135. The statute requires the trial court to submit copies of "all written findings of facts and conclusions of law as to sentencing" to the Department of Corrections ("DOC"). RCW 9.94A.500(1). In turn, DOC must ensure the judgment and sentence "accompany the offender" in DOC custody. *Id.*

The only document available at the law library at Mr. Fletcher's facility was a copy of his plea agreement sent by trial counsel. CP 135, 139-53. Either the trial court did not submit the judgment and sentence to DOC, or DOC failed to ensure it accompanied Mr. Fletcher. CP 136, see CP 161 (alerting the trial court to RCW 9.94A.500). Either way, Mr. Fletcher did not have access to it.

Had Mr. Fletcher received a copy of the judgment and sentence, he could have noticed the washed-out convictions in his criminal history. CP 24, 136. Instead, he had access only to his plea agreement, which did not list his prior convictions. CP 10-21, 135-36. His inability to review the judgment was an external impediment, as he "had no control over what documents were transferred with him from the county jail." CP 136. The trial court correctly found Mr. Fletcher showed good cause for not raising his miscalculated offender score in his first motion. CP 163. The court of appeals erred both by requiring good cause and by finding that Fletcher had not made such a showing.

C. Even Assuming the Good Cause Requirement Applies, The Limitation on Consideration of a Successive Petition Only Applies to a PRP Filed in the Court of Appeals, Not an Appeal from a Motion to Vacate.

Mr. Fletcher commenced the current proceeding by filing a motion for relief from judgment under CrR 7.8(b) in superior court. His motion was granted and the State appealed following resentencing. In other words, the Court of Appeals reviewed a State's appeal, not Fletcher's PRP.

After incorrectly imposing the good cause requirement on Fletcher, the Court of Appeals vacated the order granting a new sentencing hearing. Although the parties both agreed that since the successive petition bar under RCW 10.73.140 only applies to petitions "filed" in the Court of Appeals, the lower court nevertheless concluded that a motion to vacate constituted a PRP, that an appeal by the State was the same as filing a PRP, and the transfer provisions of RAP 16.5(c) do not apply. *Fletcher*, 497 P.3d at 894.

The jurisdictional limitations of RCW 10.73.140 apply to personal restraint petitions filed as an original action in the court of appeals. Because we review this case in our appellate capacity, not as an original action,

Motions under this rule are considered a form of collateral attack and are subject to the provisions against successive petitions under

RCW 10.73.140. *In re Pers. Restraint of Becker,* 143 Wash.2d 491, 496, 20 P.3d 409 (2001).

This Court has construed RCW 10.73.140 based on the plain language of the statute. For example, because RCW 10.73.140 applies only to the "court of appeals," a PRP that is barred as successive in the Court of Appeals may be "perfectly cognizable before this court." *In re Pers. Restraint of Perkins,* 143 Wash.2d 261, 265, 19 P.3d 1027 (2001) (citing *In re Pers. Restraint of Johnson*, 131 Wash.2d 558, 566, 933 P.2d 1019 (1997)). "We have concluded that where the Court of Appeals is barred from reviewing a PRP under RCW 10.73.140, but this court is not barred, the Court of Appeals should transfer the case to this court." *Id.* at 266.

Despite the plain language of the statute and plain language review by this Court, the lower court construed PRP to mean any collateral attack. Moreover, the lower court did not construe the limitation on consideration ("will not consider the petition") to prevent consideration by the court of appeals. If the court of appeals did not have jurisdiction to consider the case, it should have dismissed the State's appeal. After all, the State could have filed its appeal directly in

this Court in order to avoid the strictures of the court rule. In contrast to its own reading of the rule, the lower court considered the merits of the order granting vacation, found that it was proper, but then vacated that order. There is nothing in RCW 10.73.140 that requires reversal of an order granting relief that is reviewed on appeal. Although the lower court fails to acknowledge this point, it read "court of appeals" to include any "superior court," just as it read "petition" to include any "collateral attack." The acrobatics involved in the lower court's judicial reconstruction of the statute would make any gymnast proud. However, it is contrary to precedent.

Moreover, even if RAP 16.5 prevented transfer to this Court, RAP 4.4 allows the Court of Appeals to seek transfer to the Supreme Court "on its own initiative." Likewise, if this Court accepted review, the lower court's reasoning would automatically become a nullity since this Court has no such restrictions resulting in a colossal waste of judicial resources.

In sum, the lower court decision undertakes a substantial rewrite of what this Court has previously acknowledged must be construed according to its plain and understandable language. An appeal to the

Court of Appeals by the State is not a personal restraint petition filed in that court.

VI. CONCLUSION

This Court should accept review and reverse the Court of Appeals.

CERTIFICATE OF WORD COUNT

This Petition for Review has 2536 words.

DATED this 7th day of February 2022

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FILED
OCTOBER 28, 2021
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 Appellant, v. OLAJIDE ADEL FLETCHER, Respondent.	)	No. 37661-3-III PUBLISHED OPINION

STAAB, J. — This case raises several issues of first impression pertaining to the collateral attack of a sentence. Olajide Fletcher pleaded guilty to a reduced charge of second degree assault with a firearm and one count of unlawful possession of a firearm. Pursuant to the plea agreement, the State recommended an exceptional sentence of 120 months (the statutory maximum). The sentencing judge followed the recommendation. Shortly after sentencing Mr. Fletcher filed a motion to modify the judgment and sentence pursuant to CrR 7.8. Three years later, on July 15, 2019, Mr. Fletcher filed a second CrR 7.8 motion, contending that the court miscalculated his offender score and standard range sentence before imposing the exceptional sentence. Following a series of hearings, the superior court granted Mr. Fletcher's motion, holding that it was timely, good cause was shown for failing to bring the offender score issue in his first motion, and the

miscalculated offender score prejudiced Mr. Fletcher. At the resentencing hearing, the court imposed a high-end standard range sentence of 77 months.

The State filed this direct appeal and we reverse the trial court's decision. We hold that a judgment and sentence is facially invalid when it contains a miscalculated standard range even when the defendant receives the agreed-upon exceptional sentence. While Mr. Fletcher's motion was not untimely, we conclude that it was successive because Mr. Fletcher did not establish good cause for failing to raise the issue in his first motion. Ordinarily, when the court of appeals determines that a collateral attack is timely but successive, we transfer the case to the Supreme Court. In this case, however, since the superior court addressed the motion on the merits, and we are reviewing the case in our appellate capacity and not as original jurisdiction, the transfer provisions of RAP 16.5(c) do not apply and we retain appellate jurisdiction to decide the case. Because Mr. Fletcher's motion was successive without good cause, we reverse the superior court's order granting Mr. Fletcher's motion and reinstate the original sentence.

FACTS

In November 2015, the State charged Olajide Adel Fletcher with one count of first degree assault with a firearm or deadly weapon. The charge alleged that Mr. Fletcher shot Alex Tauveve five times in the legs. According to Mr. Fletcher, Mr. Tauveve took Mr. Fletcher's televisions and when Mr. Fletcher tried to recover the televisions, Mr. Tauveve pulled a gun on him. Mr. Fletcher overpowered Mr. Tauveve, taking the gun

and shooting him. Mr. Fletcher and his girlfriend fled to Montana, where U.S. Marshalls took them into custody.

The State agreed to reduce the first degree assault charge to second degree assault, and refrain from filing charges against Mr. Fletcher's girlfriend if Mr. Fletcher would stipulate to an exceptional sentence of 120 months, the statutory maximum. The statement on plea of guilty identified Mr. Fletcher's offender score as "8" on the second degree assault count, with a standard range of 53-70 months and a firearm enhancement of 36 months, and an offender score of "5" on the unlawful possession count, with a standard range of 41-54 months. The statement did not include Mr. Fletcher's criminal history, although it indicated that it was attached as a separate document. The parties agreed that the prosecutor would recommend "an exceptional sentence/incarceration of 84 months on Count 1 (with a three yr deadly weapon enhancement), 41 months on Count 2 to run concurrent, for a total of 10 years." Clerk's Papers (CP) at 14. Mr. Fletcher "agree[d] there are substantial and compelling reasons for an exceptional sentence in this case." CP at 19.

Mr. Fletcher was sentenced on February 23, 2016. His offender scores for the two charges were calculated as "8" and "5", based on his criminal history of one adult conviction for first degree theft, a juvenile conviction for second degree assault, and juvenile convictions for two counts of attempted second degree assault. The parties also agreed that Mr. Fletcher had a prior third degree assault conviction that washed out.

Based on the offender score, the parties calculated the standard range sentence as 89 to 106 months. The sentencing court followed the recommendation and imposed an exceptional sentence of 120 months.[1]

On March 18, 2016, Mr. Fletcher filed a motion to modify the judgment and sentence pursuant to CrR 7.8, seeking a standard range sentence of 106 months in confinement. The superior court transferred the motion to this court for consideration as a personal restraint petition. This court dismissed the petition as frivolous, noting that Mr. Fletcher stipulated to the exceptional sentence. Therefore he could not challenge the exceptional sentence he agreed to without challenging the entire plea agreement, which he did not do. *See In re Pers. Restraint of Fletcher*, No. 34430-4-III (Wn. Ct. App. Mar. 3, 2017).

Three years later Mr. Fletcher filed a second CrR 7.8 motion, arguing that the sentencing court incorrectly calculated his offender score, thus rendering his sentence unlawful. Specifically, he asserted that the court incorrectly included his two juvenile second degree attempted assaults from May 2006 in his offender score when those crimes should have washed out pursuant to RCW 9.94A.525(4) and *State v. Moeurn*, 170 Wn.2d 169, 240 P.3d 1158 (2010). Mr. Fletcher argues that his correct offender score on the

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[1] Grant County Superior Court Judge David Estudillo accepted Mr. Fletcher's guilty plea and followed the recommended 120-month exceptional sentence. The motion at issue in this appeal, and the subsequent resentencing, were heard by Judge John Antosz.

second degree assault charge was 4, rather than 8, and the score for the unlawful possession of the firearm was 3 rather than 5.

In response, the State argued that the motion was untimely, barred as successive under RCW 10.73.140, and failed to establish prejudice because the State and Mr. Fetcher negotiated the exceptional sentence as part of the plea agreement, with no reference to the offender score or standard range.

Mr. Fletcher then responded by filing a declaration certifying that his previous petition did not present similar grounds and arguing that he had good cause for not raising the offender score in his previous petition because he did not have access to his judgment and sentence. Mr. Fletcher argued that the lack of access was "an external objective impediment" that prevented him from raising the issue. According to Mr. Fletcher, he requested a copy of his judgment and sentence from defense counsel, who told Mr. Fletcher he could not have the judgment in his personal possession when he was transferred to prison but that he would receive a copy when he arrived at the corrections center. Mr. Fletcher did not receive the judgment when he arrived at the corrections center, and when he requested his legal documents from the law librarian, he only received his statement on plea of guilty. Mr. Fletcher claims the plea statement listed his offender scores but did not contain any information regarding his criminal history, such as the dates of the crimes and the sentences. Mr. Fletcher asserted that he did not receive a copy of his judgment and sentence, containing his criminal history, until the State filed

a response to his first personal restraint petition in July 2016. At that time, his motion was already filed and before this court for consideration.

Ultimately, the superior court held that Mr. Fletcher's judgment was facially invalid, and thus his motion was timely. The court also found good cause for not including the issue in his first motion. Finally, the court found prejudice, concluding that if the sentencing court had known the parties relied on an erroneous offender score and standard range when they negotiated the agreement, the sentencing court likely would have departed from the agreement and imposed a lower sentence. Accordingly, the court held that Mr. Fletcher was entitled to re-sentencing with the proper offender score and proper standard range. The court held that Mr. Fletcher's stipulation to the firearm enhancement and the stipulation to the exceptional sentence remained in place and could not be withdrawn, but that Mr. Fletcher could argue for a sentence shorter than 120 months. At resentencing, the court ordered a high-end standard range sentence of 77 months.

The State filed this timely appeal.

ANALYSIS

A. WAS THE CRR 7.8 MOTION TIMELY?

We are asked to decide whether the miscalculation of a petitioner's offender score renders a judgment and sentence facially invalid when the trial court does not impose a standard range sentence but instead imposes the exceptional sentence recommended by

the parties. We hold that when the miscalculation of an offender score and standard range sentence can be determined from the judgment,[2] it renders the judgment facially invalid even when the court imposes the recommended exceptional sentence.

Mr. Fletcher filed his collateral attack in superior court as a motion for relief from judgment under CrR 7.8(b). The procedures for filing such a motion are governed by chapter 10.73 RCW. CrR 7.8(b). Similar to other collateral challenges, a motion under CrR 7.8(b) may not be filed more than one year after the judgment becomes final "if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1).

"Generally, a judgment and sentence is facially invalid 'if it exceeds the duration allowed by statute and the alleged defect is evident on the face of the document without further elaboration.'" *State v. Chambers*, 176 Wn.2d 573, 583-84, 293 P.3d 1185 (2013)

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[2] The State concedes that the offender score was miscalculated and does not argue that calculating the offender score requires us to go beyond the face of the judgment and plea documents. The parties are correct that an incorrectly calculated offender score may render a judgment invalid on its face. *See In re Goodwin*, 146 Wn.2d 861, 867, 50 P.3d 618 (2002) and *In re LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004) ("A sentence, which was improperly calculated using previously washed out juvenile offenses, is invalid on its face."). In both of these cases, however, it appears that the washout could be determined from the information provided in the judgment and plea paperwork. This distinction was noted in *In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 504, 204 P.3d 953 (2009), which held that "[u]nlike in *Goodwin*, here there is nothing on the face of Rowland's judgment and sentence to make it apparent that his offender score should have been two rather than three." *See also*, *In re Pers. Restraint of Banks*, 149 Wn. App. 513, 515, 204 P.3d 260 (2009) (Judgement was not facially invalid where calculation of offender score required court to consider documents beyond the judgment).

(quoting *In re Pers. Restraint of West*, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005)). A judgment is facially "invalid" if the trial court exercised power that it did not have, most typically by exceeding its substantive or statutory authority, as opposed to its procedural authority. *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 110, 385 P.3d 128 (2016); *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011).

Because this is a collateral attack, it is not enough to point out an error that may be obvious on the face of the judgment. In *Coats*, the court rejected the petitioner's argument that any error of law, such as an error concerning the maximum possible sentence renders the judgment and sentence facially invalid. *Id.* at 135. Instead, the court held that a judgment is invalid "only where a court has in fact exceeded its statutory authority in entering the judgment or sentence." *Id.* While the sentencing court misstated the maximum possible sentence for one of the convictions, it nevertheless handed down a sentence within the standard range for that charge. Therefore, while Coats could point to error, the sentencing court did not exceed its statutory authority, and the judgment was facially valid. *Id.* at 143.

Examples of facially invalid judgments include cases where the sentence exceeded the duration allowed by statute. *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 215 n.2, 340 P.3d 223 (2014); *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). A judge's notation on the judgment that the defendant waived early

release was beyond the court's authority and rendered the judgment facially invalid. *West*, 154 Wn.2d at 211-12. A conviction for a then-nonexistent crime is also facially invalid. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004); *In re Pers. Restraint of Knight*, 4 Wn. App. 2d 248, 252-53, 421 P.3d 514 (2018).[3]

On the other hand, errors that do not affect the petitioner's rights or sentence do not render a judgment and sentence facially invalid. In *Toledo-Sotelo*, the trial court miscalculated the petitioner's offender score but ultimately imposed a sentence within the correct standard range. *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 767, 297 P.3d 51 (2013). "For a judgment to exceed the court's statutory authority, we require more than an error that 'invite[s] the court to exceed its authority'; the sentencing court must actually pass down a sentence not authorized under the [Sentencing Reform Act] SRA." *Id.* at 767 (quoting *Coats*, 173 Wn.2d at 136). Because the court reached the correct result required by the SRA, the procedural error of miscalculating the offender score did not render the judgment facially invalid. *Id.* at 768.

More recently, our Supreme Court has clarified the distinction between substantive authority and procedural requirements. In *Flippo*, the court held that failing

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[3] In *Finstad*, the State stipulated that lack of findings to support an exceptional sentence rendered the judgment facially invalid. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 505-06, 301 P.3d 450 (2013). The court accepted the stipulation, noting that the parties were not meaningfully adverse in the issue. *Id.* Given the lack of opposition, it is hard to say that *Finstad* stands for the proposition that the lack of findings renders a judgment invalid.

to conduct an individualized inquiry into a criminal defendant's ability to pay legal financial obligations (LFOs) does not render the imposition of legal fees facially invalid. 187 Wn.2d at 110. "The specific grant of authority to impose discretionary LFOs and the duty to engage in an individualized financial inquiry regarding a defendant's present and future likely ability to pay are distinct components of the discretionary LFO statute, and only the former has any bearing on the question of facial validity." *Id.* at 110.

Collectively, these cases hold that a court exceeds its authority when it miscalculates the standard range, resulting in a sentence outside the correct standard range, or when the sentence exceeds the statutory maximum for a crime. Mr. Fletcher's case falls in the middle. The parties miscalculated his standard range but stipulated to facts sufficient to impose an exceptional sentence. Since the exceptional sentence was not "based on" the miscalculated standard range, we must decide whether the exceptional sentence nevertheless exceeded the court's authority, rendering the judgment facially invalid. In other words, is the miscalculation of a standard range before imposing an exceptional sentence a procedural error or a substantive error?

To answer this question, we turn to the court's authority under the SRA. A court may impose an exceptional sentence above the standard range "if it finds, considering the *purpose* of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (emphasis added). In *State v. Parker*, the Supreme Court held that the SRA's "purpose" included proportionality, which

necessarily requires consideration of the presumptive sentence or standard range. 132 Wn.2d 182, 187 n.6, 937 P.2d 575 (1997). Consequently, a sentencing court must correctly determine the standard range or presumptive sentence before imposing an exceptional sentence. *Id.* at 188. In this case, the superior court relied on the holding in *Parker* to find the judgment in Mr. Fletcher's case facially invalid.

As the State points out, however, *Parker* was a direct appeal and only considered whether the failure to correctly calculate the standard range was legal error. *Parker* did not determine whether a court exceeds its authority by imposing an exceptional sentence after incorrectly calculating the standard range. In *Parker*, the court held that the findings necessary to impose an exceptional sentence must include a correctly calculated standard range. The State argues that *Parker* establishes a procedural rule, not a substantive rule because calculating the standard range is simply a step toward imposing an exceptional sentence that is not based on the standard range. As the State points out, while *Parker* held it was error to miscalculate the standard range before imposing an exceptional sentence, it did not hold that a court exceeds its authority when it fails to take this step.

While the State's characterization of *Parker* is correct, several other Supreme Court decisions strongly suggest that a court does exceed its statutory authority when its findings do not support an exceptional sentence. In *Goodwin*, the court found a judgment to be facially invalid when the sentence imposed was based on an offender score that incorrectly included washed-out juvenile offenses. *In re Pers. Restraint of Goodwin*, 146

Wn.2d 861, 865-67, 50 P.3d 618 (2002). The court reasoned that because Goodwin's offender score was miscalculated, his standard range was miscalculated, and the sentence imposed by the trial court exceeded the standard range.

While *Goodwin* is similar to this case, as the State points out, it is not controlling because the sentencing court in *Goodwin* was attempting to impose a standard range sentence. *Id.* at 864. Significantly, however, the sentence actually imposed in *Goodwin* was above the (correctly calculated) standard range. In other words, it was an exceptional sentence. Implicit in *Goodwin's* holding is the conclusion that a sentence above the (correct) standard range, without the necessary findings, exceeds the court's authority and is facially invalid. *See Toledo-Sotelo*, 176 Wn.2d at 768 (In *Goodwin*, 146 Wn.2d at 877-78, "[t]his court held that the sentence exceeded the court's statutory authority because it was 'based upon a miscalculated offender score (*miscalculated upward*).'").

The Supreme Court has similarly found that a court exceeds its authority when the jury's verdict did not support the sentence enhancement imposed by the court. In *Scott*, the Supreme Court considered whether the petitioner's sentence, based on a firearm enhancement, was facially invalid when the jury's verdict only found a deadly weapon enhancement. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 271 P.3d 218 (2012). In other words, the finding (by the jury) was insufficient to support the sentence enhancement actually imposed. Ultimately, the court found that since the verdict did not

support the application of the enhancement, the judgment was facially invalid. *Id.* at 917-18.

Finally, in *Chambers*, the Supreme Court found a judgment to be facially invalid when the defendant received an exceptional sentence and there were no written findings of fact and conclusions of law setting forth the reasons for the exceptional sentence as required by the SRA. *Chambers*, 176 Wn.2d at 584.

The collective holdings of *Goodwin*, 146 Wn.2d 861, *Parker*, 132 Wn.2d 182, *Scott*, 173 Wn.2d 911, and *Chambers*, 176 Wn.2d 573, suggest that a sentencing court exceeds its authority when it imposes an exceptional sentence that is not supported by necessary findings. The findings necessary to impose an exceptional sentence include a correctly calculated standard range. Since the standard range in this case was incorrectly calculated, the sentencing court exceeded its authority by imposing an exceptional sentence. Because the court exceeded its authority, the judgment is facially invalid and Mr. Fletcher's motion under CrR 7.8(b) is timely.

B. DOES MR. FLETCHER DEMONSTRATE GOOD CAUSE FOR FAILING TO INCLUDE THE OFFENDER SCORE ISSUE IN HIS FIRST MOTION?

Having determined that the one-year time bar does not apply to Mr. Fletcher's collateral attack, we must next decide whether he is exempt from the bar on successive petitions. After he was sentenced, Mr. Fletcher filed a motion to modify the judgment and sentence pursuant to CrR 7.8, seeking a standard range sentence of 106 months. The

Superior court transferred the motion to this court for consideration as a personal restraint petition. This court dismissed the petition as frivolous, noting that Mr. Fletcher stipulated to the exceptional sentence.

Mr. Fletcher filed the current action in superior court as a motion for relief from judgment under CrR 7.8(b).[4] Motions under this rule are considered a form of collateral attack and are subject to the provisions against successive petitions under RCW 10.73.140. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Under RCW 10.73.140, a second or subsequent collateral attack will not be considered unless the petitioner certifies, "that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition." In this second motion, the parties agree that Mr. Fletcher's offender score issue is new and was not raised in his first petition. The parties disagree, however, on whether he has demonstrated good cause for failing to raise this issue in his first motion for relief from judgment.

The term "good cause" is not defined in the statute. Instead, our courts have adopted a definition of "good cause" as that term has been used in other settings. For example, one way to show good cause is to demonstrate that there has been a significant

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[4] CrR 7.8(b): "The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140."

intervening change in the law. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 567, 933 P.2d 1019 (1997).

"Good cause" has also been defined to include an "external objective impediment," as opposed to a "self-created hardship." *State v. Crumpton*, 90 Wn. App. 297, 302, 952 P.2d 1100 (1998) (quoting *State v. Dearbone*, 125 Wn.2d 173, 180-81, 883 P.2d 303 (1994)). In *Crumpton*, the petitioner filed a motion for a new trial alleging newly discovered evidence in the form of hearsay statements from witnesses. After this motion was denied, the petitioner filed another motion for a new trial or relief from judgment, this time submitting first-hand declarations from witnesses and alleging newly discovered evidence. The petitioner alleged he had good cause for not including the first-hand declarations in his first motion in that he was incarcerated, indigent, and could not locate the witnesses. After adopting a definition of "good cause" from RCW 10.95.040, the notice of intention to seek a death penalty statute, the court found that Crumpton's reasons were self-created hardships not otherwise caused by external objective impediments. *Id.* at 302. Thus, Crumpton's second petition was successive and properly dismissed.

Since *Crumpton* was decided in 1998, there have not been any published cases further defining good cause as used in RCW 10.73.140. In this case, Mr. Fletcher does not allege that a material intervening change in the law provided good cause. Instead, he contends that his failure to raise the offender score issue in his first petition was due to an

external objective impediment. Specifically, he contends that he was not given a copy of his judgment at sentencing and did not have a copy when he filed his first petition. The Superior Court accepted Mr. Fletcher's reason as good cause. The court distinguished *Crumpton* by noting that *Crumpton* dealt with a similar issue raised in successive motions, whereas Fletcher was raising a new issue.

We disagree with the Superior Court's analysis of the law and application to the facts. The statute requires a second petition to raise new issues and show good cause for not raising them in the first petition. RCW 10.73.140. The superior court's analysis seems to conflate the two factors. While the successive motions in *Crumpton* addressed a similar issue, the case is relevant for its legal analysis on good cause. The court defined good cause and then applied that definition to the facts of the case. The similarities between the two motions were relevant in the application, not the holding.

Applying the definition of good cause in this case, we find that Mr. Fletcher's reasons for not including his offender score issue in his first petition are not convincing and are self-created. Mr. Fletcher's argument was legally and factually available to him when he filed his first petition. His plea statement identified his offender score as 8 and 5, and also indicated that a copy of his criminal history was attached. Significantly, Mr. Fletcher received a copy of his judgment in July or August 2016 as part of the State's response to his first petition. If access to the judgment was the issue, Mr. Fletcher could have amended his first petition after obtaining a copy. RAP 16.8(e); *In re Pers. Restraint*

of Meredith, 191 Wn.2d 300, 422 P.3d 458 (2018). Instead, he waited almost three years after receiving a copy of the judgment before filing a second motion for relief. While we decline at this time to incorporate a requirement of due diligence into the definition of good cause, we agree that the considerable lapse in time discredits Mr. Fletcher's purported reason.

Since we find that Mr. Fletcher has failed to show good cause for not including the offender score issue in his first motion, we conclude that his second motion is successive and barred by the requirements of RCW 10.73.140 as applied through CrR 7.8(b).

C. REMEDY.

Having decided that Mr. Fletcher's motion is timely but successive, we must decide the remedy. Both the State and Mr. Fletcher suggest that since the successive petition bar under RCW 10.73.140 only applies to the Court of Appeals, we should transfer this case to the Supreme Court. *See* RAP 16.3 (Supreme Court and Court of Appeals have original concurrent jurisdiction over personal restrain petitions not involving the death penalty).

This recommendation misconstrues the status of this case. Mr. Fletcher's motion was filed in superior court and decided on the merits. It comes to us on direct appeal, not as a transfer. The jurisdictional limitations of RCW 10.73.140 apply to personal restraint petitions filed as an original action in the court of appeals. Because we review this case in our appellate capacity, not as an original action, the transfer provisions of RAP 16.5(c)

do not apply. While there are no published cases recognizing this procedural process, in an unpublished decision we followed this course after direction from the Supreme Court. *See State v. Yates*, No. 33703-1-III, slip op. at 1 (Wash. Ct. App. Jul. 11, 2017) (unpublished), http://courts.wa.gov/opinions/pdf/337031_unp.pdf (citing Order, *State v. Yates*, No. 93772-9 (Wash. Jan. 5, 2017)).

We grant the State's appeal, reverse the superior court's decision granting Mr. Fletcher's CrR 7.8 motion, and direct the superior court to reinstate the original judgment and sentence.

Staab, J.

WE CONCUR:

Pennell, C.J.

Siddoway, J.

FILED
JANUARY 11, 2022
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, Appellant, v. OLAJIDE ADEL FLETCHER, Respondent.	)))))))))	No. 37661-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent Olajide Fletcher'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 October 28, 2021 is hereby denied.

PANEL: Staab, Siddoway, Pennell

FOR THE COURT:

REBECCA PENNELL
Chief Judge

ALSEPT & ELLIS

February 07, 2022 - 2:11 PM

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