68168-1

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COA No. 68168-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Respondent,

v.

WILLIAM CARNEY

Appellant

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
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I. INTRODUCTION

William Carney, currently 77 years old, was found not guilty by reason of insanity (NGRI) of the charge of Arson in the First Degree in July 1982. He never appealed his civil commitment and currently remains under the jurisdiction of King County Superior Court.

Now, almost 30 years later, Carney attempts to collaterally attack his civil commitment based on the rule of NGRI procedure announced in State v. Jones,[1] in 1983. The trial court denied his motion deeming it time barred under RCW 10.73. CP 40.

Even if Carney is exempt from the one year time bar under RCW 10.73, the rule of criminal procedure in NGRI cases announced in State v. Jones is not one that applied retroactively to Carney then, or now.

II. STATEMENT OF THE CASE

On March 31, 1982, Carney barricaded himself in his apartment and set it ablaze. CP 2. He was charged with Arson in the First Degree. CP 1. Carney was found competent to stand trial on June 4, 1982. CP 78-79.

Represented by counsel, Carney pleaded not guilty on July 2, 1982. CP84.[2] As allowed at the time under State v. Smith,[3] the State

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[1] State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983).

[2] CP 84-88 are the five pages of the trial court's July 2, 1985 minute order. Defense Motion to Dismiss (CP 26-36) also contains the court's minute order, except that it does

moved the court to enter a plea of "Not Guilty by Reason of Insanity" (NGRI) on behalf of the defendant. CP 85. No objection is noted and the motion was granted. Id. On July 6, 1982, Counsel for the defendant moved to withdraw the insanity plea. That motion was denied. CP 90.

The jury found that Carney committed Arson in the First Degree but was insane at the time of the act. CP 93-94. The Court entered findings of Acquittal by Insanity and civilly committed Carney to the custody of the Department of Social and Health Services, Western State Hospital. CP 96-98. At the time the findings were entered, Carney was advised of his right to appeal within 30 days pursuant to CrR7.1(b). CP 100. Carney did not appeal.

On June 9, 1983, the State Supreme Court published its decision in State v. Jones, holding that a defendant has the right to refuse to enter a not guilty by reason of insanity plea; and, that the decision to either enter into a NGRI plea or waive a NGRI plea must be intelligently and voluntarily made. State v. Jones, 99 Wn.3d 735, 664 P.2d 1216 (1983).

The maximum term of Carney's commitment for Arson in the First Degree, pursuant to RCW 10.77.025, is life and the King County Superior

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not include the first page (CP 84) of the five page document.

[3] State v. Smith, 88 Wn.2d 639, 564 P.2d 1154 (1997), overruled by State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983).

Court has retained jurisdiction of Carney's civil commitment since 1982.[4] CP 37-40, 45-58.

On September 2, 2011, as the State pursued revocation of Carney's Conditional Release Order,[5] Carney filed a Motion to Dismiss, citing State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). The Defendant provided no legal analysis as to whether Jones applied retroactively to Carney. The Court denied Carney's motion (CP 37-40) and this appeal followed.

III. ISSUE

A. SHOULD THIS APPEAL BE DISMISSED BECAUSE THE PROCEDURAL NGRI CHANGE IMPOSED BY STATE v. JONES DOES NOT APPLY RETROACTIVELY REGARDLESS OF RCW 10.73? YES.

IV. ARGUMENT

Almost thirty years since his civil commitment, Carney argues that State v. Jones, decided in 1983, rendered his civil commitment unconstitutional. Carney is incorrect.

The trial court did not err in denying Carney's Motion to Dismiss. CP 40. This court, in reviewing the trial court's Conclusions of Law, de

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[4] See CP 42-58 (State Bench Memorandum re: Revocation Standards) and CP 64-100 (State's Response to Defendant's Motion to Dismiss) for an overview of Mr. Carney's Conditional Release history.

[5] While conditionally released to a residential care facility, Carney had been calling the White House and had threatened to put White House Staff on a "List," resulting in the Secret Service arriving at the facility unannounced to investigate. At the same time, staff found bottles of urine in his room. WSH staff determined Mr. Carney was exhibiting signs of decompensation and required intensive, in-patient treatment. See CP 37-40, 42-58.

novo,[6] has the authority to determine for itself the right and proper conclusions to be drawn from the evidence in the case. Shultes v. Halpin, 33 Wn.2d 294, 306, 205 P.2d 1201 (1949).

Carney's appeal should be dismissed, not remanded for an evidentiary hearing as Carney requests, because regardless of the notice requirements in RCW 10.73.090 and .120,[7] the rule for NGRI procedure articulated in State v. Jones, in 1983, does not apply retroactively to Carney then, or now.

A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is taken, or the date that the appellate court issues its mandate if the conviction is appealed, whichever is later. RCW 10.73.090(3). Carney's NGRI commitment became final on July 9, 1982.

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983), provided a new rule of criminal NGRI procedure. A rule is procedural if it regulates the manner in of determining the defendant's culpability. Schriro v. Summerlin, 542 U.S. 348, 352, 355, 124 S.Ct. 2519 (2004). Jones regulated the manner in which a defendant could enter or refuse to enter into a NGRI defense. Jones, 99 Wn.2d at 746-747.

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6. M H 2 Co. v. Hwang, 104 Wn. App. 680, 16 P.3d 1272 (2001).
7 The State is not conceding or agreeing that Carney did not receive notice under RCW 10.73. RCW 10.73 is irrelevant to the ultimate issue in this case, which is whether State v. Jones can be retroactively applied.

According to Teague v. Lane, 489 U.S. 288, 308, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), the new rule of criminal NGRI procedure articulated in Jones is only applied retroactively to judgments and sentences that were not final on June 9, 1983, the date the Jones decision was published. Carney's NGRI commitment became final on July 9, 1982, the day it was filed. CP 100.

In Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the United States Supreme Court set forth a new formulation for determining the retroactive application of new rules. The Court sought to clarify the standard for retroactivity because, for decades, the Court's cases had dealt with the retroactivity question without a "unifying theme." 489 U.S. at 300. In Teague, a plurality of the Court held that, with few exceptions, a new rule of criminal procedure will not be applied retroactively to cases on collateral review. 489 U.S. at 305. The principals set forth in Teague v. Lane were unanimously applied in Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and have been repeatedly applied by the Court.[8]

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[8] See e.g. Schriro v. Summerlin, 542 U.S. 348, 352, 355, 124 S.Ct. 2519 (2004) (new rule requiring jury to decide aggravating circumstances in capital case not retroactive to convictions already final); Lambrix Singletary, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (new rule regarding the "weighing" of aggravating and mitigating factors in capital case not retroactive to convictions already final); Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993) (new rule requiring jury instruction on mitigating mental states not retroactive to convictions already final); Graham v. Collins,

Washington courts have adopted the retroactivity standard set forth in Teague and its progeny.[9] That is, when a court's decision results in a new rule, that rule applies to all cases pending on direct review. Summerlin, 124 S.Ct. at 2522. As to convictions that were already final when the new rule was announced, new substantive rules, such as interpretations of criminal statutes, generally apply retroactively. Id.

In contrast, new rules of procedure do not apply retroactively unless the new rule constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (citing Teague, 489 U.S. at 311).

In order to fall within this narrow category the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." Id. (emphasis in original) (citing Teague, 489 U.S. at 313). The United States Supreme Court explained that "[t]his class of rules is extremely narrow, and 'it is unlikely that any ... "ha[s] yet to emerge." In re Markel, 154 Wn.2d at 269 (quoting Teague, 489 U.S. at 313). This

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506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (new rule regarding consideration of mitigating circumstances in capital case not retroactive to convictions already final).

[9] See State v. Evans, 154 Wn.2d 438, 447, 114 P.3d 627 (2005) (new rule that jury, not judge, must find aggravating fact that supports an exceptional sentence not retroactive to convictions already final); In re Markle, 154 Wn.2d 262, 273, 111 P.3d 249 (2005) (new rule regarding confrontation clause not retroactive to convictions already final); See State v. Hanson, 151 Wn.2d 783, 91 P.3d 888 (2004); State v. Summers, 120 Wn.2d 801, 815-16, 846 P.2d 490 (1993); In re St. Pierre, 118 Wn.2d 321, 324-27, 823 P.2d 492 (1992) (noting that "we have attempted from the outset to stay in step with the federal retroactivity analysis.")

exception is so narrow that it has not been applied to such game-changing decisions as Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),[10] and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)[11]. Indeed, the only new rule ever specifically determined by the Supreme Court to fall within this narrow category was Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which established the Sixth Amendment right to counsel. See Beard v. Banks, 542 U.S. 406, 418, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2006). The rule announced in Jones is not a watershed rule of criminal procedure on par with Gideon.

The new rule of criminal procedure in NGRI cases announced in State v. Jones does not apply retroactively to cases, like Carney's, that had become final before June 9, 1983. This Court cannot grant Carney relief from civil commitment jurisdiction based on State v. Jones. An evidentiary hearing is not necessary. His appeal should be dismissed.

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[10] See Evans, supra, 154 Wn.2d at 447.

[11] See In re Markle, supra, 154 Wn.2d at 273.

V. CONCLUSION

This appeal should be dismissed because State v. Jones does not retroactively apply to Carney's case regardless of whether or not he is time-barred under RCW 10.73. Remand is not necessary.

DATED this 21st day of November, 2012.

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON, Respondent, v. WILLIAM CARNEY, Appellant,	)))))))))	No. 68168-1-I DECLARATION OF SERVICE

DAN KATZER, being first duly sworn on oath, deposes and says:

On this day, I arranged for service a copy of the *Brief of Respondent*, 68168-1-I, to be delivered by ABC messenger service upon the following:

Casey Grannis
Nielsen, Broman & Koch
1908 E Madison St.
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DATED this 21ST of November, 2012.

DAN KATZER