68633-0

68633-0

NO. 68633-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE FREEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD MCDERMOTT

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. CrR 7.8(c)(2) requires the superior court to transfer an untimely collateral attack to the court of appeals for consideration as a personal restraint petition. Freeman filed a CrR 7.8 motion for relief from judgment after the one-year time limit for collateral attacks had expired. The trial court denied the untimely motion instead of transferring it to this Court. Freeman has previously filed a personal restraint petition in this Court, which was dismissed as frivolous. Should this Court, in the interest of judicial economy, convert this appeal to a personal restraint petition and dismiss it as untimely and successive?

B. STATEMENT OF THE CASE

Nine years ago, Robert Freeman was found guilty by a jury of rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, child molestation in the second degree, rape of a child in the third degree and child molestation in the third degree. CP 148, 154. The charges stemmed from Freeman's long-term sexual abuse of his stepdaughter. The facts of the case were succinctly summarized by this Court in its unpublished opinion dated January 24, 2005:

> Amie Freeman's mother, Virginia, married Robert Freeman when Amie was four years old. Sometimes he would go into Amie's room at night and give her a back rub. When Amie was in fourth grade, these back rubs progressed to rubbing Amie's legs, buttocks and vaginal area under her clothing, and digital penetration of Amie's vagina. Amie told a few friends about the molestation, but did not tell Virginia until 1997, when she was in the ninth grade. When Amie told her, Virginia confronted Robert. He denied touching Amie in an inappropriate way. Neither Amie nor Virginia reported the molestation to the police at this time.
>
> In 1999, Amie confronted Robert about the incidents when she was 17 years old. Amie testified that the next year, Robert admitted what he had done and apologized. She said she did not report anything to the police because she was afraid she would be removed from her home and placed in the foster care system.
>
> Virginia reported the incidents to the police on September 17, 2001, after reporting a domestic violence assault by Robert. Virginia told a detective that she had kept one of Amie's teddy bears that had unusual stains, and that she had noticed stains on the carpet around Amie's bed several times. The detective took the bear and several carpet samples from the home Virginia shared with Robert. The Washington State Crime Lab tested them and found Robert's DNA and semen. They did not find any DNA from Virginia on any of the samples.

CP 162.

Following his trial, Freeman hired different counsel, who filed a motion for a new trial. CP 184-88. Freeman alleged that his prior counsel was ineffective for failing to interview four State's witnesses and for failing to conduct an independent DNA analysis. Id. Freeman's trial counsel submitted a sworn declaration that flatly

contradicted Freeman's claims. CP 203-15. The trial court rejected Freeman's motion for a new trial with extensive written findings. CP 229-35.

On September 13, 2003, Freeman was sentenced to a standard-range sentence of 280 months in prison. CP 151. Freeman appealed, arguing ineffective assistance of trial counsel and prosecutorial misconduct, and arguing that the search of his home was unlawful. This Court rejected Freeman's claims and affirmed his convictions and sentence. CP 161-67. The Washington Supreme court denied Freeman's petition for review, and the mandate issued on January 27, 2006. CP 160.

In September 2006, Freeman filed a timely personal restraint petition in this Court (58785-4-I) alleging that the trial court violated his right to a public trial when it excluded his then-girlfriend from the courtroom during his ex-wife's and stepdaughter's testimony, that his trial counsel was ineffective, that the prosecutor committed misconduct, and that there was insufficient evidence to support the verdicts. CP 170-72. This Court found Freeman's public trial claim was frivolous, and determined that the other issues had previously been litigated on direct appeal. CP 171. The petition was dismissed and the Washington Supreme Court denied Freeman's motion for

discretionary review. CP 168-69. The Certificate of Finality was issued on October 19, 2007. CP 168.

Freeman filed a habeas corpus petition in the United States District Court on November 6, 2007, again arguing ineffective assistance of counsel, prosecutorial misconduct, and that his right to a public trial was violated by the trial court's exclusion of his fiancé from the courtroom during the victim and her mother's testimony. CP 107. The court rejected Freeman's claims on the merits and dismissed the habeas petition. CP 110-22. Both the Ninth Circuit Court of Appeals and the United States Supreme Court refused to hear an appeal of the dismissal of Freeman's habeas petition. CP 129, 131.

During the pendency of his federal habeas petition, Freeman moved to expand the record to include a claim that a public trial violation occurred during jury selection. CP 108, 132-35. In support of his motion, Freeman presented affidavits from family members and transcripts from the trial. CP 133-34. The Magistrate Judge denied Freeman's motion to expand the record, finding that Freeman had failed to diligently develop the factual basis for his claims in state court. CP 134. Specifically, the court determined that at the time of the state court proceedings, Freeman had been aware of the information he presented in support of his motion to expand the record, but that he had failed to diligently pursue it. CP 134. The

District Court, in its order dismissing Freeman's habeas petition, specifically noted that Freeman had failed to raise his denial of a public trial claim with respect to jury selection in state court, and that he did not raise it in the federal court for nearly a year after he had originally filed his habeas petition. CP 108.

On December 16, 2011, almost six years after the mandate issued on his direct appeal, Freeman filed a CrR 7.8 motion for relief from judgment in the King County Superior Court. CP 1. In the motion, Freeman claimed that his right to a public trial was violated during jury selection and also when his fiancé was excluded from the courtroom during certain testimony. CP 2-3. In support of his motion, Freeman attached the affidavits from his family members, as well as excerpted portions of the verbatim report of proceedings for pretrial motions and jury selection. CP 14-76.

In response to Freeman's CrR 7.8 motion, the State asked the trial court to transfer the motion to this Court for consideration as a personal restraint petition. CP 173-75; RP 21-23. The State argued that the motion was untimely and therefore, under CrR 7.8(c)(2), the trial court was required to transfer it. CP 174; RP 23.

The trial court indicated its belief that the timeliness of Freeman's motion was not an issue for it to determine, but rather a

matter for this Court's consideration:

> And I make no ruling, specifically make no ruling as to the time issues . . . And if [the Court of Appeals] feel[s] that the time has already expired and it's too late . . . to make that appeal, that's their decision. I make no ruling on that.

RP 33. The trial court stated its belief that the record did not support Freeman's claim that his family was excluded from the courtroom during jury selection, but admitted that it had no independent memory of events. RP 30-31. The court denied Freeman's motion, concluding that the matter was for the appellate courts to decide. CP 139-41; RP 2-33. Freeman filed this appeal. CP 142-43.

C. ARGUMENT

Freeman filed a CrR 7.8 motion for relief from judgment in the superior court almost six years after his judgment and sentence unquestionably became final. The trial court denied the motion. Freeman had already filed a timely personal restraint petition in this Court, which was dismissed as frivolous and an attempt to relitigate previously decided issues. Because Freeman's CrR 7.8 motion was untimely, the trial court should have simply transferred it to this Court for consideration as a personal restraint petition instead of denying it.

Freeman has failed to establish that his claims fall within any exception to the one-year time limit for collateral attacks. Because untimely claims made in the Superior Court must be transferred to this

Court, it would serve no purpose to remand the matter for the sole purpose of transferring it back to this Court as a personal restraint petition. In the interests of judicial economy, this Court should convert this appeal to a personal restraint petition, and dismiss it as untimely and successive.

1. FREEMAN'S COLLATERAL ATTACK IS TIME-BARRED PURSUANT TO RCW 10.73.090.

Motions made pursuant to CrR 7.8(b) are subject to the statutory provisions for collateral attacks. See CrR 7.8(b) ("The motion shall be made within a reasonable time . . . *and is further subject to RCW 10.73.090, .100, .130 and .140*") (emphasis added). A collateral attack is any request for "postconviction relief other than a direct appeal" and includes motions for new trial. RCW 10.73.090(2). With specific statutory exceptions, a collateral attack must be filed within one year of the final judgment. RCW 10.73.090(1). For purposes of calculating this time-bar, a judgment becomes final on the latest of the following dates: (a) the date it is filed in the trial court if no appeal is taken, (b) the date the appellate court issues its mandate disposing of a timely direct appeal, or (c) the date the United States Supreme Court denies a timely petition for writ of certiorari to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3).

Here, the judgment became final on January 27, 2006, the date the mandate issued affirming Freeman's conviction and sentence.[1] RCW 10.73.090(3)(b); CP 160. Freeman's CrR 7.8 motion for relief from judgment was not filed in the King County Superior Court until December 16, 2011, almost six years after his judgment became final. CP 1. Because Freeman's motion was filed more than one year after the judgment and sentence became final, it is untimely.

CrR 7.8(c)(2) addresses the procedure to be followed when a defendant brings a post-judgment motion for relief in the Superior Court:

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8(c)(2) (emphasis added). In other words, the superior court must transfer a collateral attack to the court of appeals, unless it finds

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[1] In his reply brief in the trial court, Freeman cited to RCW 10.73.090 and argued that his conviction did not become final until the United States Supreme Court denied certiorari in his habeas proceeding. CP 137. He implicitly makes this same argument in his opening brief. See Brf. of Appellant at 7 ("Once the United States Supreme Court rejected Mr. Freeman's Petition for Writ of Certiorari, Mr. Freeman timely filed a motion to the trial court under CrR. 7.8."). However, the plain language of RCW 10.73.090(3) contradicts Freeman's argument. "[A] judgment becomes final on the last of the following dates: (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction *on direct appeal*." (emphasis added). Freeman petitioned the Supreme Court for a writ of certiorari in his habeas corpus proceeding, not his direct appeal. CP 131.

that the motion is (1) timely, and (2) the defendant has made a substantial showing that he is entitled to relief or a hearing on the facts is necessary. CrR 7.8(c)(2).

Pursuant to CrR 7.2(c)(2), the trial court was required to transfer Freeman's untimely motion to this Court for consideration as a personal restraint petition. Instead, the trial court specifically declined to make a finding as to the timeliness of Freeman's CrR 7.8 motion. RP 33. The trial court appeared to believe that timeliness was an issue for this Court to determine. Id. Regardless of the trial court's apparent mistake, because Freeman's motion *is* untimely, this Court should simply convert this direct appeal to a personal restraint petition and dismiss it as time-barred.

State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008) is instructive. There, the superior court erroneously denied the defendant's untimely CrR 7.8 motion instead of properly transferring it pursuant to the court rule. On appeal, the State asked the court to convert the appeal to a personal restraint petition and to dismiss it as untimely. However, because Smith had not previously filed a personal restraint petition, the court declined to automatically convert the appeal, and instead remanded to the superior court to permit Smith an opportunity to withdraw his motion before it was transferred as a personal restraint petition. Id. at 863-64. The court's refusal to

convert the matter was based on the successive petition rule of RCW 10.73.140.

RCW 10.73.140 prohibits the court of appeals from considering a subsequent personal restraint petition raising the same issues as a previous petition, and prohibits consideration of a subsequent personal restraint petition on new grounds without a showing of good cause. A petitioner filing a second or subsequent petition is required to certify that he has not previously filed a petition on similar grounds or to show good cause why he did not raise the new grounds in the previous petition. RCW 10.73.140. If a petition raises the same issues as a prior petition, the court of appeals shall dismiss the petition as successive. Id. If the petitioner fails to show good cause why the claim asserted was not raised earlier, and the petition is also time-barred, this Court must dismiss it. In re Pers. Restraint of Turay, 150 Wn.2d 71, 87, 74 P.3d 1194 (2003). This statutory bar includes all collateral attacks. In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001).

Because Freeman's CrR 7.8 motion is untimely, the superior court should have transferred it to this Court for consideration as a personal restraint petition. However, at this point, a remand to the trial court to simply transfer the matter back to this Court would serve no purpose. Unlike the petitioner in Smith, Freeman has previously filed

a personal restraint petition, and as such, is already subject to the successive petition rule of RCW 10.73.140. CP 170-72. Thus, there is no concern about potential collateral consequences to Freeman should this Court convert this matter to a personal restraint petition. It would be a waste of judicial resources to remand the case to the superior court simply for the purpose of having the superior court transfer the motion back to this Court. This Court should convert this appeal to a personal restraint petition, and dismiss it as untimely and successive.

Although Freeman states repeatedly that his CrR 7.8 motion is timely, he fails to demonstrate how that is so.[2] He has not asserted under RCW 10.73.090(1) that his judgment and sentence is invalid on its face or that the court lacked jurisdiction. Nor does he make any argument that his public trial claims fall within one of the exclusive list of statutory exceptions found in RCW 10.73.100.

Instead, without citation to persuasive authority, Freeman asserts that his motion is "timely" because he pursued federal habeas relief in the time period after his direct appeal was mandated. Brf. of Appellant at 7. Specifically, Freeman claims that he "could not" raise

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[2] Freeman cites State v. Golden, 112 Wn. App. 68, 47 P.2d 587 (2002) for the proposition that an eight and a half-year delay was "not unreasonable." Brf. of Appellant at 11. However, Freeman neglects to mention that the Golden court determined that the defendant's judgment and sentence was facially invalid and thus his claim was excepted from the one-year time limit. 112 Wn. App. at 76. Freeman makes no claim that his judgment and sentence is facially invalid.

his claims in state court because "the transcripts were not available until produced for Habeas review,"[3] and because "the trial court loses jurisdiction during appellate review." Brf. of Appellant at 13-14. Freeman is wrong in both regards.

Freeman argues that his motion was timely because "the transcripts demonstrating the voir dire closure never surfaced until the habeas proceedings." Brf. of Appellant at 19-20. However, Freeman does not even acknowledge that the burden of producing support for his claims falls squarely on him. RAP 9.2(b) requires the party seeking review to "arrange for transcription of all of those portions of the verbatim report of proceedings necessary to present the issues raised on review." Freeman cannot claim that he was unaware of the alleged closure at the time that it occurred, nor does he offer any explanation for why he failed to produce an adequate report of proceedings to timely address his claims.

Similarly, Freeman does not claim that he was unaware of the information contained in his family members' affidavits. Indeed, if his family members were required to leave the courtroom during jury selection, these are facts that Freeman would have been aware of at

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[3] In his direct appeal, Freeman's retained counsel made no arrangement for the transcription of pretrial motions and voir dire. Freeman avoids mentioning this through careful articulation: "[T]he transcripts *never surfaced* until the habeas proceedings." Brf. of Appellant at 19-20 (emphasis added). The transcripts did not "surface" because Freeman never had that portion of the record transcribed.

trial, at the time of his direct appeal, and during the one-year period following issuance of the mandate.[4] It is not the State's burden to produce evidence supporting post-conviction relief. A personal restraint petitioner bears the burden of showing prejudicial error by a preponderance of the evidence. In re Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). More specifically, when claiming a violation of the right to a public trial, it is a personal restraint petitioner's burden to demonstrate that a courtroom closure actually occurred. In re Pers. Restraint of Yates, No. 82101-1, 2013 WL 991900, *8-9 (Mar. 14, 2013).

In sum, any fault for not bringing his claims in a timely fashion lies with Freeman. Freeman's claim that he was handicapped in his ability to present his claims is without merit. Indeed, he *did* present the issue of his fiancé's exclusion during trial testimony in his timely personal restraint petition, where it was rejected on its merits. CP 171.

Additionally, Freeman argues that the lateness of his collateral attack must be excused because the "trial court loses jurisdiction during appellate review." Brf. of Appellant at 13-14. Freeman's only

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[4] Freeman does not argue that his motion falls within the statutory exception for "newly discovered evidence" under RCW 10.73.100(1). Nor could he, since that requires a showing that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996).

authority for this proposition is RAP 7.2(a) and FRAP 41(d),[5] neither of which support an argument that his motion is timely. RAP 7.2(a) states that "after review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule." The rule then dictates that "[t]he trial court has authority to hear and determine . . . postjudgment motions authorized by the . . . criminal rules." RAP 7.2(e). Therefore, even if Freeman's strained interpretation of our state appellate rules dictated that a *federal trial court* proceeding precludes a *state trial court* from acting, Freeman's post-conviction motion for relief is specifically exempted.

Moreover, Freeman's claim is flatly contradicted by the Washington Supreme Court's holding in Scruggs v. Rhay, 70 Wn.2d 755, 761, 425 P.2d 364 (1967), which determined that state courts have concurrent jurisdiction with the federal courts in habeas corpus proceedings. Freeman's argument that his federal habeas proceeding precluded him from timely raising his claims in state court is not supported by any persuasive authority or argument and must be rejected.

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[5] Freeman makes no argument why Federal Rule of Appellate Procedure 41(d) exempts his motion from Washington State's time limit for collateral attacks. The rule merely provides that the federal courts of appeal shall issue a mandate immediately upon denial of a writ of certiorari from the Supreme Court. "Bare assertions and conclusory allegations are not sufficient to command judicial consideration and discussion in a personal restraint proceeding." In re Pers. Restraint of Webster, 74 Wn. App. 832, 833, 875 P.2d 1244 (1994).

2. FREEMAN'S COLLATERAL ATTACK IS SUCCESSIVE.

Additionally, Freeman's petition should be dismissed as successive. As noted above, RCW 10.73.140 bars this Court from considering a collateral attack when the petitioner has previously filed a personal restraint petition asking for similar relief, and also prohibits review of new claims unless the petitioner shows good cause why the new claims were not raised in the prior petition. Id. In the absence of a showing of good cause, an untimely petition must be dismissed. Turay, 150 Wn.2d at 87.

In his first personal restraint petition (65795-0-I), Freeman raised the exact same claim he raises here—that his right to a public trial was violated when the court excluded his fiancé from the courtroom during certain testimony. CP 170-72. Therefore, this claim is barred under RCW 10.73.140 and the petition must be dismissed as successive.

Moreover, Freeman makes no showing of good cause as to why he did not raise his open courts claim relating to jury selection in his previous petition. Indeed, when presented with Freeman's affidavits and the transcripts from jury selection, the federal district court in the habeas proceeding noted:

> although [Freeman] knew of the existence of the above documents and/or information contained in the above documents at the time of his state court proceedings, he did not present it during those proceedings. As a result, [Freeman] "failed to develop the factual basis" for his claims diligently. "Diligence for purposes of the opening clause [of § 2254(e)(2)] depends upon whether [Petitioner] made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[.]"

CP 134 (citations omitted). Freeman fails to acknowledge that the burden to investigate and pursue his potential claims falls on him. If the transcripts "never surfaced" until the habeas proceedings, it is because he never had the record transcribed until that time. Freeman was present at the trial and if the court improperly excluded his family members from jury selection, he was aware of it and should have pursued his claim in a timely fashion. Because Freeman makes no showing of good cause as to why he did not raise this claim in his previous timely petition, the petition must be dismissed under Turay.

3. IF THIS COURT DETERMINES THAT FREEMAN'S PETITION IS NOT TIME-BARRED, A REFERENCE HEARING IS APPROPRIATE.

The State disputes Freeman's claim that the courtroom was closed during jury selection. Even if this Court determines that Freeman's petition is not time-barred, he is not automatically entitled to relief. Rather, this Court should refer the matter to the Superior Court for an evidentiary hearing.

A reference hearing in the Superior Court is appropriate when the merits of the petitioner's contentions cannot be determined solely on the record. RAP 16.11(b); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Both parties may present evidence and subpoena witnesses. RAP 16.12.

Here, the trial court found that the verbatim report of proceedings did not support Freeman's family members' claims that they were made to leave the courtroom during jury selection. RP 31. Because the facts upon which Freeman bases his claims are disputed, a reference hearing would be necessary in the event his untimely and successive petition is not dismissed. Testimony from the trial prosecutor as well as trial defense counsel would be appropriate. The State would also be entitled to cross-examine Freeman's family members regarding the substance of their affidavits. RAP 16.12.

Because Freeman's claims cannot be determined solely on the basis of the record, if this Court declines to dismiss Freeman's untimely and successive petition, it should transfer the matter to the Superior Court for a reference hearing pursuant to RAP 16.11(b).

D. CONCLUSION

For the above-stated reasons, this Court should find that Freeman's CrR 7.8 motion was untimely, convert this appeal to a personal restraint petition, and dismiss it as untimely and successive.

DATED this 8th day of April, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lance Hester and Casey Arbenz, the attorneys for the appellant, at Hester Law Group, Inc., P.S., 1008 S. Yakima Ave, Suite 302, Tacoma, WA 98405, containing a copy of the Brief of Respondent, in STATE V. ROBERT LEE FREEMAN, Cause No. 68633-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

04-08-18

Date

Done in Seattle, Washington