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COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 27 AM 10:29

No. 62978-6-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

JAMES THOMAS BAIRD, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether this Court should convert Baird's appeal of a failed CrR 7.8 motion to a personal restraint petition to be considered herein where the trial court did not have jurisdiction to dismiss Baird's motion as untimely but was required to transfer the motion to this Court for consideration as a personal restraint petition and where Baird, having previously filed two personal restraint petitions, would not be unfairly prejudiced by the conversion.
2. Whether a collateral attack is successive because Baird filed two previous personal restraint petitions and has not shown good cause for failing to include the current claim in the prior petitions.

C. STATEMENT OF FACTS

James Baird was convicted of first degree assault following a jury trial for viciously attacking his wife in 1993 by beating her unconscious with lead-lined gloves and then surgically disfiguring her face by cutting off her nose and slicing off her upper and lower eye lids. See, COA Order of Dismissal #59886-4-I, #59492-3-I, Appendix A, attached and incorporated by reference herein.

On June 3rd, 1994 Baird was given an exceptional sentence of 240 months. Supp CP ___ (sub nom 83, judgment and sentence). Baird

unsuccessfully appealed his exceptional sentence and the mandate affirming his conviction and sentence was issued March 19th, 1997. Supp CP __ (sub nom 112).

Subsequently, Baird filed two personal restraint petitions in this Court challenging the fairness of his trial and his exceptional sentence. See, COA cause nos. 598864-I, 594923-1, Appendix A, incorporated by reference herein. Both petitions were dismissed without merit pursuant to RAP 16.11(b). Id.

On October 7th 2008 James Baird filed yet another collateral attack: a CrR 7.8 motion asserting his exceptional sentence should be vacated because the prosecutor allegedly spoke as the victim's proxy. See, Br. of App. at 5. Following a hearing, Whatcom County denied Baird's motion as both untimely and without merit. CP 11-13.

Baird now appeals asserting the trial court erred denying relief because "CrR 7.8(b)(5) permits a judgment to be vacated for 'any other reason justifying release.'" See, Br. of App. at 5. Baird argues his sentence should therefore be vacated pursuant to State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006), a breach of plea case, because he asserts the prosecutor allegedly improperly spoke on behalf of the victim at sentencing. Br. of App. at 6. Baird's appeal is without merit.

However, because the trial court failed to transfer Baird's untimely motion to this Court pursuant to CrR 7.8 for consideration as a personal restraint petition, this Court must determine whether to remand the matter back to the trial court or, given that Baird has already previously filed two personal restraint petitions, determine whether the more appropriate remedy would be to simply convert his motion for consideration as a personal restraint petition. The State contends this Court should convert Baird's motion and dismiss his petition as untimely, without merit and successive.

D. ARGUMENT

1. Baird's CrR 7.8 motion should be converted for consideration as a personal restraint petition pursuant to CrR 7.8 and RCW 10.73.090.

Baird asserts in his appeal brief that the trial court erred determining his CrR 7.8 motion was untimely pursuant to RCW 10.73.090. Specifically, Baird contends CrR 7.8(b)(5) permits a judgment to be vacated for "any other reason justifying release" and therefore the trial court should have considered the merits of Baird's argument notwithstanding RCW 10.73.090. Br. of App. at 5.

Regardless of the lack of merit inherent in Baird's failed CrR 7.8 motion, the trial court acted without jurisdiction when it denied Baird's

motion as untimely. State v. Smith, 144 Wn.App. 860, 184 P.3d 666

(2008). CrR 7.8 provides:

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 time 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). As a result, trial courts can no longer deny a CrR 7.8 motion as untimely. Instead, trial courts are required to transfer CrR 7.8 motions to the Court of Appeals for consideration as personal restraint petitions. A superior court's authority to address the merits of a CrR 7.8 motion is limited to situations in which the motion is timely filed and the defendant has made a substantial showing he is entitled to relief or that an evidentiary hearing is required to resolve the motion. State v. Smith, 144 Wn.App. at 863. Baird filed his CrR 7.8 motion after September 2007. Therefore, the trial court did not have jurisdiction to deny his untimely collateral attack.

Ordinarily, the remedy when the trial court acts without jurisdiction to deny a CrR 7.8 motion is to remand the case back to the trial court for consideration anew pursuant to the procedure set forth in CrR 7.8. State v. Smith, 144 Wn.App. at 863. This remedy ensures petitioners are on notice that if their motion is transferred to the Court of

Appeals for consideration as a personal restraint petition future pleadings may be subject to the successive petition rule of RCW 10.73.140.

The remedy expressed in Smith does not apply in this case for two reasons. First, CrR 7.8 places defendants on notice that their motion will be transferred to the Court of Appeals for consideration as a personal restraint petition if the motion is determined to be untimely and that such motions are subject to the limitations set forth in RCW 10.73.140. A party who invokes a court's jurisdiction cannot later challenge that court's jurisdiction when it receives an unfavorable result. *See, Hanson v. Shim*, 87 Wn.App. 538, 550, 943 P.2d 322 (1997), *review denied*, 134 Wn.2d 1017 (1998).

Baird was on notice that his CrR 7.8 motion could be converted to a personal restraint petition when he filed and invoked the jurisdiction of the court pursuant to CrR 7.8. Therefore, Baird knew or should have known his motion could be subject to the successive petition rule. Smith relied on Castro v. United States, 540 U.S. 375, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003), to support its conclusion that remand is the appropriate remedy. But in Castro, in contrast to the scenario herein, there was concern the court was re-characterizing post conviction pleadings as collateral attacks where petitioners were not on notice, from either the

court or a court rule, that the pleadings could be converted and re-characterized as collateral attacks or that such conversions could have collateral consequences on any future filings. No such concern is present here however, when a defendant invokes the jurisdiction of the court pursuant to a specific court rule that places them on notice of possible collateral consequences of filing an untimely or meritless CrR 7.8 motion.

Secondly, the Smith remedy is not required in this case because Baird has previously filed two personal restraint petitions collaterally attacking his judgment and is, therefore, already subject to the successive petition rule in RCW 10.73.140. *See, United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (requirement of informing prisoner that their motion would be recharacterized as a §2255 petition does not apply where the petitioner had already filed a previous §2255 petition).

Therefore, in the interests of judicial economy and pursuant to the authority of CrR 7.8 the State respectfully requests Baird's untimely "motion" be considered converted and considered as a personal restraint petition.

2. Baird's petition is untimely and without merit.

A collateral attack on a judgment and sentence 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), (2); In re Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993) (upholding constitutionality of RCW 10.73.090 which imposes a one-year time limit except in six enumerated circumstances set forth in RCW 10.73.100). Motions to vacate judgments and to withdraw guilty pleas are collateral attacks that are subject to these limitations. CrR 7.8(b); RCW 10.73.090(2). A judgment becomes final upon issuance of the mandate if the matter is appealed. RCW 10.73.090(3)(b).

Baird's judgment was final when the mandate issued on March 19th, 1997. Supp CP ____ (sub nom 112). Therefore, Baird's CrR 7.8 motion/personal restraint petition is time-barred under RCW 10.73.090 unless the judgment and sentence is invalid on its face or the court lacked jurisdiction. "Invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration." In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *see also*, State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004) (defendant bears threshold burden of showing existence of error of fact or law within the four corners of the judgment and sentence). If the judgment and sentence reflects that that the sentence imposed was within the trial court's

legal authority, the judgment and sentence is valid on its face. Hemenway, 147 Wn.2d at 532. If no error of fact or law is apparent from the judgment and sentence itself, then the judgment and sentence is valid on its face.

Baird's collateral attack is predicated upon the misguided assertion that State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006) is relevant and requires Baird be re-sentence. It does not. Carreno-Moldenado is a breach of plea bargain case and did not express a significant change in the law that is either material or would be retroactively applied to Baird's sentence. Therefore, Baird's reliance on this case is misplaced and his petition without merit.

Baird's judgment is facially valid. The judgment and sentence does not reflect a sentence that exceeded statutory authority or that was entered without jurisdiction of the court. As his judgment was final over a decade ago, his collateral attack is time-barred and should be dismissed.

3. Baird's collateral attack should also be dismissed as a successive petition.

Baird filed this CrR 7.8 motion/personal restraint petition attacking the validity of his sentence after having previously filed two personal restraint petitions in this Court. His filing of a third collateral attack is a successive petition. As such, he is required to comply with RCW

10.73.140 and to provide “good cause” for filing yet another claim. His failure to do so precludes review by this Court.

Successive collateral attacks via CrR 7.8 motions must comply with the requirements of RCW 10.73.140. CrR 7.8(b); State v. Brand, 120 Wn.2d 365, 370, 842 P.2d 470 (1992). Under RCW 10.73.140 the defendant has an obligation to certify that he has not filed a previous petition on similar grounds and to show good cause as to why he did not raise the grounds in an earlier petition. RCW 10.73.140. Failure to make such a good cause showing subjects a CrR 7.8 motion to summary dismissal. In re Personal Restraint of Holmes, 121 Wn.2d 327, 329-30, 849 P.2d 1221 (1993); *see also*, Brand, 120 Wn.2d at 369-371 (a court may not consider a CrR 7.8(b) motion if the movant has not certified that he has not filed a previous motion on similar grounds).

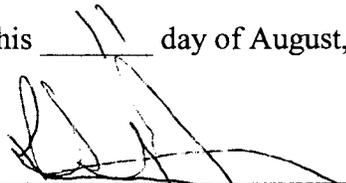
Baird failed to comply with the requirements for filing a successive petition, and thus his motion is procedurally barred from consideration. While this third collateral attack asserts a different basis for vacating his sentence than his previous personal restraint petitions, Baird has failed to show good cause as to why he did not assert this current challenge to his sentence in his prior petitions. His failure to show good cause for not

raising the current "victim proxy" error previously precludes this Court's review.

E. CONCLUSION

The State respectfully requests the appeal of Baird's unsuccessful CrR 7.8 motion be considered and dismissed as an untimely, meritless and successive personal restraint petition pursuant to CrR 7.8, RCW 10.73.090.

Respectfully submitted this 11 day of August, 2009.

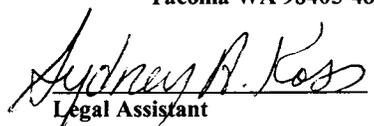

KIMBERLY A. THULIN, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Brett Andrews Purtzer, addressed as follows:

Brett Andrews Purtzer
Attorney at Law
1008 Yakima Ave Ste 302
Tacoma WA 98405-4850

8/12/09


 08/11/2009
Legal Assistant Date

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

February 20, 2007

Brett Andrews Purtzer
Attorney at Law
1008 Yakima Ave Ste 302
Tacoma, WA, 98405-4850

CASE #: 59492-3-I
Personal Restraint Petition of James Thomas Baird

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b) and (c)."

This court's file in the above matter has been closed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

law

enclosure

Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000).

Baird does not dispute that his petition was filed beyond the one-year time limit specified in RCW 10.73.090. To excuse compliance with this statute of limitations, the court in Stoudmire held that a petition must be based solely on exceptions to the limitations period set out in RCW 10.73.090 or RCW 10.73.100. Stoudmire, 141 Wn.2d at 349. That court went on to hold that “the one-year time limit in RCW 10.73.090 does not apply to a petition or motion based on the grounds enumerated in RCW 10.73.100 as long as the petition or motion is based solely on those grounds and not additional ones.” Stoudmire, 141 Wn.2d at 345-46.

Baird does not argue that his claims fit within the limited exceptions of RCW 10.73.090. Nor has Baird established that his claim of sentencing error falls within any statutory exception listed in RCW 10.73.100.² While Baird’s other claim of trial error arguably falls within the exceptions listed in RCW 10.73.100, the “unmixed petition” requirement of RCW 10.73.100 has not been satisfied.

Since the claims raised appear to be mixed, the entire petition should be dismissed. In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 702-03, 72 P.3d 703 (2003); Stoudmire, 141 Wn.2d at 345-46. However, “any claim that is not time barred may be refiled without danger of untimeliness.” Hankerson, 149 Wn.2d at 702.

Now, therefore, it is hereby

² Because Blakely does not apply retroactively, the holding is not a significant change in the law that is material to Baird’s conviction and sentence. See State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005). The claim of sentencing error is, therefore, clearly time-barred.

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 20th day of February, 2007.


Acting Chief Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 FEB 20 AM 10:26

State of Washington,)
County of Whatcom) SS.

I, N.F. Jackson, Jr., County Clerk of Whatcom county and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Whatcom, do hereby certify that the foregoing instrument is a true and correct copy of the original, consisting of five pages, now on file in my office, and that the undersigned has the custody thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at my office at Bellingham this 17th day of August 2009
N.F. Jackson, Jr., County Clerk

By 
Deputy Clerk

SCANNED 4

FILED

JULY 31 12:25

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

WHATCOM COUNTY
WASHINGTON

BY M

IN THE MATTER OF THE
PERSONAL RESTRAINT OF:

No. 59886-4-1

CERTIFICATE OF FINALITY

JAMES THOMAS BAIRD,

Whatcom County

Petitioner.

Superior Court No. 93-1-00095-5

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in
and for Whatcom County.

This is to certify that the order of the Court of Appeals of the State of Washington,
Division I, filed on May 21, 2007, became final on July 20, 2007.

c: Brett Purtzer

IN TESTIMONY WHEREOF, I
have hereunto set my hand
and affixed the seal of
said Court at Seattle, this
20th day of July, 2007.



Richard D. Johnson
Court Administrator/Clerk of the
Court of Appeals, State of
Washington Division I.

g

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RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
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May 21, 2007

Brett Andrews Purtzer
Attorney at Law
1008 Yakima Ave Ste 302
Tacoma, WA, 98405-4850

CASE #: 59886-4-I
Personal Restraint Petition of James Thomas Baird

Counsel:

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This court's file in the above matter has been closed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

law

enclosure

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 21st day of May, 2007.


Acting Chief Judge

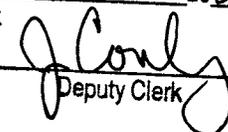
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COURT OF APPEALS FOR THE
STATE OF WASHINGTON
2007 MAY 21 AM 10:09

State of Washington,)
County of Whatcom) SS.

I, N.F. Jackson, Jr., County Clerk of Whatcom county and
ex-officio Clerk of the Superior Court of the State of Wash-
ington, for the County of Whatcom, do hereby certify that
the foregoing instrument is a true and correct copy of the
original, consisting of four pages, now on file in my
office, and that the undersigned has the custody thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and affixed the Seal of said Court at my office at Belling-
ham this 17th day of August 2009

N.F. Jackson, Jr., County Clerk

By 
Deputy Clerk