

67408-1

67408-1

NO. 67408-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUDD DEAVER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES 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. Where Deaver filed a motion to withdraw his guilty plea after the one-year time limit for collateral attacks, should this Court, in the interest of judicial economy, convert this appeal to a personal restraint petition and dismiss it as untimely, where it is also successive and lacking a basis for relief?

B. STATEMENT OF THE CASE

Judd Deaver was originally charged by information with rape in the second degree domestic violence. CP 1. The Certification for Determination of Probable Cause reflects that Deaver repeatedly assaulted and raped his wife, Rachel Deaver,¹ on June 7, 2009. CP 2-3. The attack extended over a period of time and included periods of time where Deaver calmed, followed by renewed violence. CP 2. Deaver told Rachel that he should kill her, and threatened to get his shotgun. Id. Deaver said that he should pour bleach on Rachel's face. Id. Finally Deaver said that

¹ To avoid confusion, references to Rachel Deaver will be by her first name.

he was going to cut Rachel's throat, and left the room to get a knife.

Id.

Before Deaver could return, Rachel escaped by climbing out the window and flagged down a passing car. CP 2. Rachel told the car's occupants, who were strangers, that her husband had beaten and threatened to kill her, and they saw that Rachel had extensive facial injuries. Id. The car's occupants took Rachel to a nearby police officer and Rachel was taken to the hospital for treatment of her injuries. CP 2-3.

Deaver was arrested at the Deaver home, where the assault had occurred. CP 3. He explained that he had been arguing with his wife, but claimed that no physical altercation had occurred. Id. When asked why Rachel would jump out of the window to get away, he responded, "Well, I can be intimidating." Id.

The original charge was filed on June 10, 2009. CP 1. The investigating detective obtained recordings of telephone calls made by Deaver from the King County Jail in the weeks after his arrest. CP 26. In 33 calls to the Deaver home, Deaver tried to get his teenage daughter to help him contact Rachel and threatened to refuse to see his daughter if he went to prison because she disobeyed him. Id. Deaver told his two daughters not to talk to

police and told his older daughter, "Make your mom realize they won't drop the charges unless she recants." Id.

In 11 calls to a family friend, Deaver tried to get the friend to pressure Rachel to recant and not to cooperate with the police or the prosecutor. Id. On one occasion, he used the friend to relay instructions directly to Rachel, who was on another phone, telling her not to talk to the Seattle Police Department victim advocate or to the prosecutor, and instructing Rachel to call Deaver's attorney and recant. Id.

Pursuant to plea agreement, the charge was amended to assault in the second degree domestic violence, felony harassment domestic violence, tampering with a witness, and two counts of misdemeanor violation of a no contact order. CP 5-7. The amended information included a sentencing enhancement as to the assault in the second degree and felony harassment charges: that each crime involved domestic violence and there is evidence of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time or the defendant manifested deliberate cruelty or intimidation of the victim. CP 5-6.

On January 15, 2010, Deaver pled guilty as charged in the amended information, including the aggravating factors. CP 8-20, 29-33, 39-47. Among other terms, the plea agreement included the following stipulations by Deaver:

4. I knowingly, voluntarily, and intelligently waive my right to have the State prove the aggravating factor I am charged with beyond a reasonable doubt at trial and I agree to the following facts supporting a finding of the aggravating factor under RCW 9.94A.535(h)(i): I have assaulted my wife several times over the course of our marriage. In addition, I have been threatening, intimidating, manipulative, and controlling at times. This assault was part of and a serious escalation of this pattern of abuse.

5. I also stipulate and agree that there are substantial and compelling reasons to justify an exceptional sentence outside the standard range, that justice is best served by the imposition of an exceptional sentence outside the range, and that an exceptional sentence above the standard range is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

....

8. I knowingly, voluntarily, and intelligently waive my right to appeal any sentence outside the standard range.

CP 31-32. As part of the plea agreement, Deaver agreed to the attached scoring forms and the offender score reflected in them, which was a score of 2 on each felony count. CP 29, 34-36.

The State recommended an exceptional sentence of 90 months on the assault in the second degree (count 1) and 60 months (the maximum statutory penalty) on the felony harassment (count 2). CP 38. Deaver agreed that an exceptional sentence above the standard range was appropriate and agreed to recommend a sentence of no less than 48 months. CP 31, 38.

At the February 12, 2010 sentencing hearing, the trial court imposed an exceptional sentence of 90 months on the assault in count 1, and 60 months on the harassment in count 2, finding that the sentence was justified based on both the parties' stipulation that an exceptional sentence was warranted, and the aggravating factor of Deaver's history of domestic violence. CP 60-62. The court also imposed a standard range sentence of 12 months on count 3, and imposed misdemeanor sentences on counts 4 and 5. CP 52, 57-59. The judgment and sentences were filed with the clerk of the trial court on February 16, 2010. CP 49, 57. Deaver did not appeal.

In July 2010, Deaver filed a timely personal restraint petition in this court (65795-0-1) alleging that the State breached the negotiated plea agreement, that he was sentenced based on a miscalculated offender score, and that the court improperly

imposed an exceptional sentence above the standard range.

Supp. CP ___ (Sub. No. 86, Certificate of Finality 65795-0-I, filed September 2, 2011). On August 2, 2010, Deaver filed a CrR 7.8 "Motion to Modify" his judgment and sentence in the superior court, making arguments identical to those in his personal restraint petition.² CP 63-75.

On August 26, 2010, the superior court transferred Deaver's CrR 7.8 motion to this Court for consideration as a personal restraint petition (65891-3-I). Supp. CP ___ (Sub. No. 62, Order of Transfer to Appeals Court, filed August 26, 2010). This Court dismissed the petition, as it raised issues identical to those in 65795-0-I. Supp. CP ___ (Sub. No. 64, Certificate of Finality 65891-3-I, filed December 7, 2010).

On March 4, 2011, this Court dismissed 65795-0-I, finding that Deaver had failed to demonstrate that he was entitled to relief. Supp. CP ___ (Sub. No. 86, Certificate of Finality 65795-0-I, filed September 2, 2011). On June 23, 2011, while a motion for discretionary review of 65795-0-I was pending, Deaver filed a CrR 7.8 "Motion to Withdraw Plea of Guilty" in the superior court.

² The motion appears to have been originally received by the superior court on July 27, 2010. CP 63.

CP 109-25. In his motion, Deaver claimed that he received ineffective assistance of counsel when his attorney did not appeal his sentence, and as such he was entitled to withdraw his pleas. CP 114-19. The court denied Deaver's motion, citing lack of jurisdiction because discretionary review of his personal restraint petition was still pending in the Supreme Court. CP 102-03. Deaver filed this notice of appeal. CP 130.

C. ARGUMENT

Deaver filed his CrR 7.8 motion to withdraw his plea in the superior court more than one year after his judgment and sentence became final. As such, it is time-barred. Deaver's untimely collateral attack was required to have been transferred to this Court for consideration as a personal restraint petition. Therefore, in the interests of judicial economy, this Court should convert this appeal to a personal restraint petition, and dismiss the petition as untimely, successive, and lacking a basis for relief.

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

No motion collaterally attacking a judgment and sentence may 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); see In re Pers. Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is filed. RCW 10.73.090(3). RCW 10.73.090 applies to all collateral attacks, whether they are filed in the trial court or in the appellate courts. State v. Robinson, 104 Wn. App. 657, 662, 17 P.3d 653 (2001). CrR 7.8(b) explicitly provides that a motion for relief from judgment must be made within a reasonable time "and is further subject to RCW 10.73.090, .100, .130 and .140."

The one-year time limit applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). The documents of the plea can inform the inquiry as to whether the judgment and sentence is valid on its

face. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002).

This does not mean that every challenge to a guilty plea is exempt from the time bar. The state Supreme Court has repeatedly held that even an affirmative misadvisement about a consequence of the plea is not a facial defect exempt from the one-year time limit on collateral attack. Id. at 533. "An involuntary plea does *not* render a judgment and sentence facially invalid." In re Pers. Restraint of Coats, No. 83544-6, 2011 WL 5617757 at *8 (Wn.2d Nov. 17, 2011) (emphasis included).

In Hemenway, the court was called upon to determine whether Hemenway's judgment and sentence was facially invalid where he was misadvised about the term of community placement that would be imposed as a consequence of his conviction. The court held that misinformation about the consequences of a plea in the plea form does not render a judgment and sentence invalid on its face if the judgment and sentence imposed the correct period of community placement. Id. at 532. The court reiterated this holding in In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 782, 203 P.3d 375 (2009), stating that "an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise

valid judgment and sentence invalid." See also In re Pers. Restraint of Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003).

The judgment in this case became final on February 16, 2010, the date it was filed with the clerk of the trial court. CP 49, 57. Deaver's motion to withdraw his plea was not filed with the King County Superior Court until June of 2011. CP 109. Deaver's motion was filed more than one year after the judgment and sentence became final and it is untimely.

Deaver has made no showing that his judgment and sentence is invalid on its face. Deaver's claim that his plea is involuntary because his attorney failed to file an appeal of his sentence does not render his judgment and sentence facially invalid. His claims do not fall within any exception to the time bar provided in RCW 10.73.100.

CrR 7.8(c)(2) provides that the superior court shall transfer an untimely collateral attack to the Court of Appeals for consideration as a personal restraint petition. The superior court erred when it denied Deaver's collateral attack on June 22, 2011, rather than transferring it to this Court. CP 102-03.

In State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008), the superior court also erroneously denied the defendant's untimely

CrR 7.8 motion. On appeal, the Court of Appeals declined to convert the matter to a personal restraint petition, but remanded to the superior court to permit the defendant an opportunity to withdraw his motion before it was transferred to the Court of Appeals. Id. at 863-64. The court's concern centered around infringement on Smith's right to choose whether to pursue the personal restraint petition, as he would then be subject to the successive petition rule in RCW 10.73.140.

RCW 10.73.140 bars the court of appeals from considering a personal restraint petition raising the same issues as a previous petition. When filing a subsequent petition, the petitioner 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 ground asserted was not raised earlier, and the petition is also time-barred, this Court must dismiss the petition. Turay, 150 Wn.2d at 87. This statutory bar includes all collateral attacks, including habeas corpus petitions. In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001).

Because Deaver's CrR 7.8 motion is time-barred, 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. Here, unlike in Smith, Deaver has previously filed a personal restraint petition in this Court, and as such, is already subject to the successive petition rule of RCW 10.73.140. Thus, there is no concern about potential collateral consequences to Deaver should this Court convert this matter to a personal restraint petition. It would be a waste of judicial resources to remand this matter back 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.

2. DEAVER'S COLLATERAL ATTACK IS SUCCESSIVE.

Additionally, Deaver's petition should be dismissed because it is successive. As noted above, RCW 10.73.140 bars the Court of Appeals from considering a collateral attack when the petitioner has previously filed a personal restraint petition asking for similar relief,

or on new grounds unless the petitioner shows good cause why the ground currently asserted was not raised earlier. Id. In the absence of such 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) Deaver made no claim that his plea was involuntary, or that he received ineffective assistance of counsel. Supp. CP __ (Sub. No. 86, Certificate of Finality 65795-0-I, filed September 2, 2011).³ Rather, he challenged the exceptional sentence that was imposed. Id. After his petition was denied, he filed the instant motion to withdraw his guilty plea, arguing that he received ineffective assistance of counsel because his attorney did not file an appeal on his behalf, or assist him with filing one. CP 109-27. Without supporting legal authority, Deaver claims that such failure on his counsel's part rendered his pleas involuntary. CP 118. Deaver makes no showing of good cause as to why he did not raise this claim in his

³ In his "Motion to Modify" that was transferred to this Court and dismissed as duplicative of Deaver's pending petition, Deaver asked for relief varying from dismissal, to resentencing, to withdrawal of his guilty plea, but he did not elaborate on his proposed remedies, nor did he raise ineffective assistance of counsel. CP 75.

previous petition. As such, it is successive and must be dismissed under Turay.

3. DEAVER HAS FAILED TO ESTABLISH A BASIS FOR RELIEF.

Deaver has also failed to establish a basis for relief. He has failed to establish that he received ineffective assistance of counsel. As part of his plea agreement, Deaver waived the right to appeal his exceptional sentence. He cites to no authority to support his argument that counsel was deficient for failing to file an appeal when Deaver specifically waived that right. Moreover, even assuming for the sake of argument that counsel was ineffective, Deaver has failed to establish that the failure to appeal his sentence rendered his plea involuntary.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice, or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition,

petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. Brune, 45 Wn. App. at 363. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1006 (1992).

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden of establishing ineffective assistance of counsel. Id. at 687. The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. at 689.

An attorney who disregards specific instructions from the defendant to file a notice of appeal acts in a "professionally unreasonable" manner. State v. Wicker, 105 Wn. App. 428, 431,

20 P.3d 1007 (2001). See also Rodriguez v. United States, 395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969); Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). The defendant need not make any additional showing of prejudice. Wicker, 105 Wn. App. at 431-42. However, appointed counsel's performance is presumed to be effective, and the defendant bears the burden of rebutting the strong presumption of effective performance. State v. McFarland, 127 Wn.2d 322, 335-37, 899 P.2d 1251 (1995).

Deaver has not moved to enlarge the time for filing a direct appeal. Rather, he moves to withdraw his plea, arguing that his attorney's inaction in filing an appeal of his sentence rendered his guilty plea involuntary. CP 124. His argument should be rejected.

As part of the plea agreement in this case, Deaver specifically stated, "I knowingly, voluntarily, and intelligently waive my right to appeal any sentence outside the standard range." CP 32. His attorney certified that:

I have carefully reviewed every term and condition of the Plea Agreement and this Addendum with the defendant. I believe that the defendant fully understands and accepts every term and condition. . . . I believe that the defendant is knowingly, intelligently and voluntarily entering into this Agreement.

CP 32-33. The court accepted Deaver's guilty plea, finding that he was making a knowing, intelligent, and voluntary decision, and that he understood the charges and the consequences of the plea.

CP 19, 46. There is nothing in the record that casts doubt on the knowing, intelligent, and voluntary nature of Deaver's plea, or his waiver of his right to appeal. His obvious dissatisfaction with his sentence, and his post-sentencing expression of a desire to appeal, do not render his waiver of the right to appeal involuntary.

Deaver claims that after sentencing, he told his attorney he wanted to appeal, and his attorney told him that he could not.

CP 122. Even if that occurred, counsel's inaction in filing an appeal in the face of a valid, bargained-for waiver was not ineffective.

Indeed, it demonstrates careful avoidance of an action that could seriously jeopardize his client. Deaver agreed to waive his right to appeal in exchange for the State's agreement to dismiss the more serious rape charge. Had counsel filed a notice of appeal, the State could have asked the court to find Deaver in breach of the plea agreement and asked to reinstate the original charges.

Counsel was not ineffective.

Even assuming for the sake of argument that counsel was ineffective, the remedy Deaver asks for, withdrawal of his guilty plea,

is inappropriate. The remedy would be to reinstate Deaver's right to an appeal, not vacation of his conviction. See State v. Frampton, 45 Wn. App. 554, 561, 726 P.2d 486 (1986).

D. CONCLUSION

For all of the above stated reasons, this Court should find that Deaver's motion to withdraw his plea is untimely, convert this appeal to a personal restraint petition, and dismiss it on both procedural and substantive grounds.

DATED this 9 day of December, 2011.

Respectfully submitted,

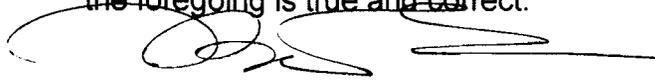
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JUDD DEAVER, Cause No. 67408-1-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
Done in Seattle, Washington

Date 12-09-11

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