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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SYLVESTER J. MAHONE, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper

No. 95-1-01236-3

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly enter a corrected judgment under CrR 7.8(a) to reflect the imposition of 24 months of community placement that was ordered by the court at the original sentencing hearing?
2. Should this court dismiss an untimely subsequent personal restraint petition when there is no showing of a relevant exception to the time bar in RCW 10.73.090 or any compliance with the "good cause" requirement of RCW 10.73.140 or RAP 16.4?

B. STATEMENT OF THE CASE.

This case involves a direct appeal from the entry of an order correcting judgment and sentence and a consolidated personal restraint petition, which originated as a post-judgment collateral attack filed in the superior court, but which was transferred to the Court of Appeals pursuant to CrR 7.8(c)(2). The procedural history of the case includes the following information:

Appellant/petitioner Sylvester James Mahone entered a plea, mid-trial, to murder in the second degree on September 22, 1995. CP 50-62 (transcript of plea hearing); 101-105. On October 24, 1995, the court imposed a high-end, standard range sentence of 178 months. CP 106-116. The verbatim report of proceedings for this hearing shows that the court

also imposed a 24 month term of community placement. CP 33. The judgment entered at that time reflected the court set no contact provisions in addition to the standard conditions that would be in effect during community placement. CP 106-116. However, the court failed to indicate on the written judgment the length of the term of community placement.

Id.

This omission was not noticed for many years. In April 2005, the Pierce County prosecutor's office received a letter from the department of corrections pointing out the deficiency in the judgment. CP 1-14. The State filed a motion to correct the judgment pursuant to CrR 7.8(a). CP 1-14, 15-36. On November 2, 2005, defendant responded by moving to set aside his guilty plea. CP 37-62. The State responded to this motion by arguing that the court should transfer this collateral attack to the Court of Appeals to be treated as a personal restraint petition. CP 63-65.

At a hearing on November 18, 2005, the court granted the State's motion to correct the clerical error in the judgment and sentence and entered an order specifying the term of community placement was twenty-four months. CP 72-73; RP 3-10. As for the motion to set aside his guilty plea, the court noted that petitioner had filed numerous similar prior collateral attacks. RP 11-12. The court indicated that he thought the motion was probably time-barred but decided to transfer the motion to the Court of Appeals. RP 11-12, 16; CP 78-79. Defendant appealed from the order correcting judgment and sentence. CP 83-85. Upon defendant's

request, the court consolidated this appeal with the transferred personal restraint petition.

The motion to set aside guilty plea filed on November 2, 2005, is not the first time defendant has sought to withdraw his plea or otherwise challenge his conviction. Defendant made both a pre- and post-sentencing motions to withdraw his plea; he filed a direct appeal from the denial of these motions. CP 131-142. The court affirmed the trial court's denial of this motions in a ruling issued September 5, 1997. Id. The mandate issued May 18, 1998. CP 143. Defendant filed a personal restraint petition raising the same issues addressed in the direct appeal; the court dismissed the petition. CP 144-145. Defendant filed another personal restraint petition challenging the effectiveness of his appellate attorney which was dismissed. CP 146-147. Defendant obtained discretionary review of an order adding appellate costs to his judgment and of an order denying his motion for remission of costs. State v. Mahone, 98 Wn. App. 342, 989 P.2d 583 (1999). Defendant also filed a personal restraint petition alleging that he should be allowed to withdraw his plea because the State breached it plea agreement by adding appellate costs to the judgment; it was dismissed. CP 148-149. In 2002, Judge Sebring denied a CrR 7.8 motion defendant had brought seeking to withdraw his plea and vacate the judgment. CP 150. In 2003, Judge Orlando denied another CrR 7.8 motion filed by defendant. CP 151-152. Defendant appealed from entry of both of these orders; the matters were consolidated and both

orders were affirmed. CP 153. The Supreme Court denied review. State v. Mahone, 153 Wn.2d 1016, 111 P.3d 856 (2005).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY USED CrR 7.8(a) TO CORRECT A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE.

A court has the authority to correct an erroneous sentence pursuant to CrR 7.8. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997); State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996).

As CrR 7.8(a) explains in part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court *at any time* of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(emphasis added). In deciding whether an error is clerical, a reviewing court must determine whether the amended judgment reflects the trial court's intention as expressed in the original sentencing hearing. State v. Priest, 100 Wn. App. 451, 456, 997 P.2d 452 (2000). If it does, then the original judgment did not correctly convey the court's intention. Priest, 100 Wn. App. at 456. When the amended judgment merely corrects language or an omission to reflect the court's original intention, the error is clerical. Id.

A judgment and sentence that fails to specify the term of community placement is deficient. Broadaway, 133 Wn.2d at 135. Here

defendant's original judgment reflects the court's intention to impose a term of community placement with certain conditions, but does not specify the length of term. CP 106-116. The State sought to have this deficiency corrected under CrR 7.8(a). CP 1-14, 15-36. In support of its motion, the State presented a transcript of the original sentencing hearing to the court. CP 18-36. This transcript clearly indicates that at the original sentencing hearing, the court ordered a term of 24 months of community placement and that this length of term was mandatory. CP 33. However, this term of community placement was not incorporated into the written judgment. CP 106-116. Consequently the order amending the judgment was to correct a clerical error; under CrR 7.8(a), such an order can be entered at any time.

The trial court acted properly in correcting the clerical error in the judgment so that the amended judgment properly reflected its original intent to impose a 24 month term of community placement. The issue raised in defendant's direct appeal is without merit.

2. THIS COURT SHOULD DISMISS THE PERSONAL RESTRAINT PETITION AS IT IS TIME BARRED UNDER RCW 10.73.090 AND 10.73.100 AND IS PROCEDURALLY BARRED BY RCW 10.73.140 AND RAP 16.4.

Personal restraint procedure came from the State's habeas corpus remedy, which is guaranteed by article 4, § 4 of the State Constitution. In re Hagler, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack by

personal restraint petition is not, however, a substitute for direct appeal. Id. at 824. “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” Id. (Citing Engle v. Issac, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. Hagler, 97 Wn.2d at 824.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case 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). In addition to the exceptions listed within that statute, there are other specific exceptions to the one-year time limit for collateral attack:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant’s conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

Pursuant to RCW 10.73.090(3), a judgment is final on the last of the following dates: 1) the date the judgment is filed with the clerk of the trial court; 2) the date the appellate court issues its mandate on the direct appeal; or, 3) the date the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. In this case, the mandate issued on the direct appeal on May 18, 1998. CP 143. Petitioner could have filed a timely first-time personal restraint petition within one year of May 18, 1998. Any first-time petition filed after May 18, 1999, would have to satisfy the

requirements of RCW 10.73.100, or fall under an exception in RCW 10.73.090.

Petitioner filed his post-judgment motion in the trial court on November 2, 2005, which was transferred the motion to the court of appeals to be handled as a personal restraint petition. Petitioner's collateral attack was filed over six years too late.

In neither the petition<sup>1</sup> nor the opening brief, does petitioner articulate any exception to the time bar. He claims that his plea was not knowing and voluntary, but this claim is not listed as an exception to the time bar under RCW 10.73.100; nor does it fall under the facially invalid prong of the exceptions found in RCW 10.73.090.

A similar claim was raised in In Re the Personal Restraint Petition of Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001)(“Stoudmire II”). Stoudmire claimed that his plea was invalid because he had not been informed of the mandatory two-year community placement requirement of his sentence. Stoudmire brought his claim five years after his judgment became final and asserted that his untimely petition fell within the exception provided by RCW 10.73.100(6), which allows a claim to be based on a significant change in the law. Stoudmire claimed that State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996), represented a significant change in the law and provided him with the necessary exception to his

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<sup>1</sup> This refers to the collateral attack filed in the superior court. CP 37-62.

untimely petition. The Supreme Court disagreed. It held that State v. Ross did not represent a significant change in the law and, therefore, the exception found in RCW 10.73.100(6) was inapplicable to Stoudmire's untimely petition. Stoudmire II, 145 Wn.2d at 265.

The court then examined whether Stoudmire could avoid the time bar by claiming his judgment to be facially invalid under RCW 10.73.090. It noted that the plea form signed by Stoudmire advised him "that a mandatory term of 'at least one year' of community placement applied." Stoudmire II at 265-266. The court held that this was sufficient to put him on notice and was distinguishable from the situation in State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1999), where the plea form had stated "the Judge *may* sentence me to community placement for at least one year" Stoudmire II at 266.

Petitioner's plea form contained the same language as Stoudmire's. Petitioner was informed that:

In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities.

CP 101-105. No Washington case has held that this language is insufficient to advise a criminal defendant regarding the two year mandatory term of community placement. The express terms of the plea form inform defendant that *at least* one year will be imposed; it is not

reasonable to interpret this language as creating a legitimate expectation that *only* one year of community placement can be imposed. Moreover, at the sentencing hearing, the length of community placement was discussed and the court articulated that there was a mandatory term of two years. CP 33. Petitioner did not, at that time, articulate any surprise at this condition; nor did he seek to withdraw his plea on this basis. See CP 131-142.

Petitioner's reliance upon In re PRP of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) is misplaced. Isadore pleaded guilty to second degree burglary and third degree assault on March 21, 2000. The community placement and community supervision check-boxes on the plea form were left blank. When the court asked, during the colloquy, whether community placement was part of the sentence, the prosecutor responded that community placement did not apply. In October, 2001, the department of corrections notified the prosecutor's office that Isadore's sentence should have included mandatory one-year community placement; the State moved to amend the sentence. The trial court amended Isadore's sentence on December 13, 2001, adding a one-year community placement to the sentence. On January 2, 2002, Isadore filed a personal restraint petition asking that the amendment to the sentence be stricken and the plea agreement be specifically enforced; he later added that he would not have pleaded guilty had he known about the mandatory community placement. The court granted relief finding Isadore was not properly informed of a direct consequence of his plea and noted that relief by personal restraint

was proper as Isadore had no previous or alternative avenue of judicial review.

Petitioner's reliance on Isadore is misplaced for several reasons. Whereas Isadore could affirmatively show that he not informed in the plea form that his sentence would include mandatory community placement, petitioner in this case was informed that *at least* one year would be imposed. Isadore could point to an express statement made at his plea colloquy that community placement was not applicable to his case; petitioner cannot. Nothing occurred at Isadore's original sentencing that would put him on notice that a term of community placement might be added to his sentence. At petitioner's sentencing there was a discussion that a two year term of community placement must be imposed and a statement by the court that it was imposing such a term. Petitioner's original written judgment reflected that the court was imposing certain conditions to apply during the term of community placement; it just failed to specify the length of that term. Thus, after the original sentencing hearing, petitioner had oral and written notice that the court was imposing a twenty-four month term of community placement. The order correcting the judgment in petitioner's case was to correct a clerical error of omission. The order entered in Isadore's case was to correct a substantive legal error - the erroneous conclusion that Isadore's crimes did not subject him to a term of community placement. Isadore's original written judgment and sentence made no reference to any community placement

conditions as the court did not believe that any community placement term was appropriate. As a result, Isadore had no notice that a term of community placement would ever be applied to his sentence until the court entered the corrected judgment in December, 2001. Less than a month later, Isadore was challenging the one year term of community placement added to his sentence. Isadore acted timely, within one year of the entry of the amended judgment, to challenge the new term added to his sentence. In contrast, petitioner did not seek to challenge this condition of his sentence in a timely fashion. The provisions of RCW 10.73.090 preclude review of the petition before the court.

Neither the Supreme Court nor the Court of Appeals may grant relief on a petition that is time barred. RAP 16.4(d) provides, in part:

The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances *and if such relief may be granted under RCW 10.73.090, .100 and .130.*

(emphasis added). In the instant case, the availability of relief by personal restraint petition is barred by both statute and court rule. In addition to the time bar there are the provisions of RCW 10.73.140 and RAP 16.4.

RCW 10.73.140 states, in part:

If a person has previously filed a petition for personal restraint, the Court of Appeals will not consider the petition unless the person 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. Upon receipt of a personal restraint

petition, the Court of Appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review the Court of Appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the Court of Appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

The courts have defined "ground" for purposes of a PRP:

By 'ground' we mean simply a distinct legal basis for granting relief ... the prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application.

In re Personal Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755

(1986). When the Court of Appeals receives a personal restraint petition it may not consider under the terms of RCW 10.73.140, the proper procedure is either to dismiss it or to transfer it to the Supreme Court if it determines that the petition might comply with the terms of RAP 16.4(d).

In re PRP of Johnson, 131 Wn.2d 558, 566, 933 P.2d 1019(1997). The Court of Appeals has no jurisdiction to consider a second or subsequent petition on grounds which have already been considered on the merits in an earlier petition. Id.

This petition is not petitioner's first petition. Petitioner challenged the voluntariness of his guilty plea in his first direct appeal and his first petition. CP 131-142; 144-145. This court has previously decided the merits of petitioner's claim that his plea was involuntary. Under the terms

of RCW 10.73.140, this court must either dismiss the petition or transfer it to the Supreme Court if the petition complies with the terms of RAP 16.4(d).

RAP 16.4(d) also puts limits on successive petitions, when it's language: "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." The Washington Supreme Court adopted the United States Supreme Court's definition of "similar relief" found in a statute containing language very similar to RAP 16.4(d). In re Personal Restraint of Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984), citing Sanders v. United States, 373 U.S. 1, 15, 17, 10 L. Ed. 2d 148, 83 S. Ct. 1068, 1077, 1078 (1963). The phrase "similar relief" relates to the grounds for the relief, rather than the type of relief sought. In re PRP of Johnson, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997); see also, In re Personal Restraint of Jeffries, 114 Wn.2d 485, 488-89, 789 P.2d 731 (1990). While RCW 10.73.140 precludes the Court of Appeals from ever considering a second petition raising grounds that have previously been considered on the merits, it does not so limit the Supreme Court. The only limit to the Supreme Court's reconsideration of a previously raised issue is the "good cause" requirement of RAP 16.4(d).

Petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously

rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

[I]dential grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects. Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion."

Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. Lord, 123 Wn.2d at 329. The meaning of the "good cause" provision in RCW 10.73.140 was the focus of the court's decision in In re Holmes, 121 Wn.2d 327, 849 P.2d 1221 (1993). The Supreme Court has relied on Holmes when interpreting the "good cause" language of RAP 16.4(d). In re PRP of Johnson, 131 Wn.2d at 567.

In Holmes, the Supreme court was reviewing a Court of Appeals dismissal of a personal restraint petition because Holmes had failed to establish good cause for raising issues in his second petition that were not raised in his first petition as required by RCW 10.73.140. The Supreme Court affirmed the dismissal on discretionary review agreeing that Holmes had not made the required good cause showing as to why the claims were not raised earlier. It held that "good cause" was not satisfied by

addressing the merits of the claims raised. The court specifically held that "regardless of the merits of any constitutional issue, the statutory requirement of showing good cause for not raising the issue earlier must be satisfied." Holmes, 121 Wn.2d at 330. The court also rejected Holmes's claim that the issues were "newly discovered through reading old and new cases" as adopting this liberal standard would clearly be contrary to the purpose of avoiding piecemeal collateral review. Id. The court held that a showing of a material intervening change in the law would satisfy the good cause requirement. While Holmes argued that a recent case represented a material change in the law, the court noted that the case did not establish new or different law from what existed when Holmes filed his first petition. As his allegation of a material change in the law was meritless, the court affirmed the dismissal of his petition because he did not meet the good cause requirement.

Petitioner presents no argument as to why there is good cause for the court to re-examine a claim rejected in his first appeal and first petition. Because the petition is barred under RCW 10.73.140 and RAP 16.4(d) it should be dismissed.

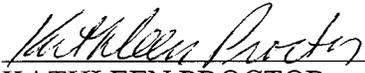
D. CONCLUSION.

For the foregoing reasons the State asks this court to find that there is no merit to the claim raised in the direct appeal portion and to affirm the trial court's entry of the order correcting the judgment. The State asks this

court to dismiss petitioner's untimely second or subsequent petition as time-barred. Petitioner has not addressed the provisions of RCW 10.73.140 or RAP 16.4. This court lacks jurisdiction to decide the petition on the merits. This court only has the authority to dismiss the petition or to transfer it to the Supreme Court. Because petitioner has not satisfied the "good cause" requirement of RAP 16.4, the petition should be dismissed rather than transferred.

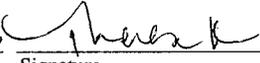
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/6/06   
Date Signature

*Ellner*