

No. 37443-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARVIS J. KNIGHT,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard A. Strophy, Judge
Cause No. 99-1-00929-4

BRIEF OF RESPONDENT

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A. STATE'S ASSIGNMENT OF ERROR.

1. The trial court erred by granting relief in one of appellant's claims and denying another on grounds of the law of the case, while finding two others time-barred and dismissing them.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. APPELLANT'S ISSUE

Whether the trial court had authority to deny two of the four claims raised by Knight in a CrR 7.8 motion on the grounds that they were time-barred rather than transfer them to the Court of Appeals as a personal restraint petition.

2. RESPONDENT'S ISSUE

Whether the trial court had authority to decide any of the four claims raised by Knight in a CrR 7.8 motion, where the motion presented a mixed petition as prohibited by RCW 10.73.100, or whether the court should have transferred all of the claims to the court of appeals as a personal restraint petition.

C. STATEMENT OF THE CASE

The State accepts Knight's statement of the case.

D. ARGUMENT

1. The State concedes that, pursuant to CrR 7.8 as amended September 1, 2007, the trial court was required to transfer Knight's motion to the court of appeals as a personal restraint petition.

Knight was convicted of two counts of second degree assault and two counts of felony harassment [CP 6] He sought to modify or correct his judgment and sentence in Superior Court by

way of a CrR 7.8 motion, filed September 6, 2007. [CP 3] As amended on September 1, 2007, CrR 7.8(2) 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 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.

RCW 10.73.090 provides:

(1) 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.

(2) For purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(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. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

Knight does not claim that his judgment and sentence was invalid on its face or that the trial court lacked jurisdiction, nor does he argue that less than a year elapsed between the time his judgment became final and he filed his motion. His motion to modify judgment is a collateral attack as defined in RCW 10.73.090(2), *supra*. Therefore, his motion is subject to the one year time limit of RCW 10.73.090, and the limits of RCW 10.73.100, which provides:

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 on 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.

In his CrR 7.8 motion, Knight raised several grounds for modification of his judgment and sentence, but only the following four were actually argued to the court: (1) the charging document for the second degree assault charges omitted an essential element; (2) the to-convict jury instruction for the second degree assault charges omitted an essential element; (3) the second degree assault and harassment convictions constituted double jeopardy; and (4) there was insufficient evidence to support a conviction for second degree assault. [CP 4-19] (Although the claim regarding a unanimity instruction was not argued in the trial court nor on appeal, the court did address it in its Order Denying Defendant's Motion to Vacate. [CP 36-38]) The court separated out the charges, finding that the claims of double jeopardy and insufficiency of the evidence were not time barred [RP 43-44]¹ but that the insufficiency argument had been decided by the Court of Appeals and that decision was the law of the case. The court

¹ All references to the report of proceedings are to the February 26, 2008 hearing.

further found that the claims regarding the omission of an element from the charging document and the jury instruction were time-barred and dismissed them. [RP 49-50, CP 36-38] Knight does not appeal the granting of his motion as to double jeopardy or insufficiency of the evidence, but argues that by finding the two other claims time-barred, the court was required to transfer those claims to the Court of Appeals as a PRP.

The State agrees that under the plain wording of CrR 7.8(c)(2) and the decision in State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008), the trial court was required to transfer the motion to the Court of Appeals as a PRP. The State also agrees that this court cannot simply convert this appeal to a PRP, but must remand to the trial court to allow Knight to dismiss his motion should he not want it transferred. The State disagrees, however, that the four claims brought before the trial court should have been separated or that the court should have made a decision even on those that were not time-barred, or barred for other reasons.

2. Because Knight presented a "mixed petition" to the trial court, all of the claims should have been transferred to the Court of Appeals as a PRP and the trial court should not have granted or denied any of them.

CrR 7.8(b) provides that motions must be made within a reasonable time, and imposes a one-year time limit for certain claims, including those that Knight raises. The rule makes these motions subject to RCW 10.73.090 -.140. RCW 10.73.100 provides that the time limit does not apply to “a petition or motion that is based *solely* on one or more of the following grounds,” (emphasis added). Those grounds include double jeopardy and insufficiency of the evidence claims. [RCW 10.73.100(3) and (4)] Because Knight submitted a petition containing two claims that were time-barred and two that were not, he submitted a mixed petition that the trial court should have refused to consider, but rather transferred the entire motion to the Court of Appeals as a PRP.

In State v. Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000), the Supreme Court held that the word “solely” in RCW 10.73.100 “requires that a petition or motion which would make use of this section cannot be based on any grounds other than one or more of the six grounds in RCW 10.73.100.” Id., at 349. The only claims that can be separated out of a mixed petition are those excepted by RCW 10.73.090, *i.e.*, those based on claims that the judgment and sentence is invalid on its face or that the court did not have jurisdiction. Id. As mentioned above, Knight has not claimed, nor

are there any grounds for such a claim, that the judgment and sentence was invalid on its face or that the trial court lacked jurisdiction. The Stroudmire court concluded that a mixed petition must be dismissed, although the petitioner may submit a new PRP which excludes the time-barred claims. Id., at 350. The Supreme Court again applied this rule in In re the Pers. Restraint of Hankerson, 149 Wn.2d 695, 72 P.3d 703 (2003).

[W]e reiterate the holding of Stroudmire I that if a personal restraint petition claiming multiple grounds for relief is filed after the one-year period of RCW 10.73.090 expires, and the court determines that at least one of the claims is time barred, the petition must be dismissed.

Hankerson, *supra*, at 702.

Because RCW 10.73.100 applies to CrR 7.8 motions, and because Knight submitted a mixed petition containing both claims that were time-barred and ones that were not, the court should not have separated out the claims and dealt with them separately. Further, because the trial court did not have the authority under CrR 7.8 to dismiss time-barred motions, it was required to transfer the entire motion to the Court of Appeals as a PRP. Therefore, this Court should vacate both the Order Amending Judgment and Sentence [CP 23] and the Order Denying Defendant's Motion to

Vacate Convictions For Second-Degree Assault [CP 36-38] and remand the matter to the Thurston County Superior Court. There, pursuant to Smith, *supra*, Knight may choose to dismiss his motion or the court may transfer the entire motion to the Court of Appeals as a personal restraint petition.

E. CONCLUSION.

The trial lacked authority to decide the claims brought by Knight in his CrR 7.8 motion. The orders entered by the court should be vacated and the matter remanded to the trial court for further proceedings consistent with State v. Smith and State v. Stoudmire, *supra*.

Respectfully submitted this 23^d day of January, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 37443-9-II,
on all parties or their counsel of record on the date below as follows:

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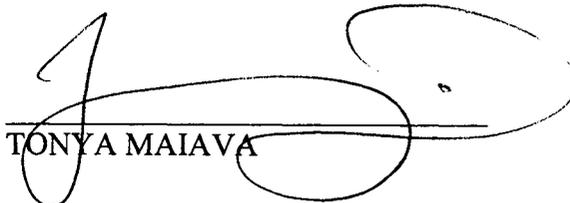
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STATE OF WASHINGTON
BY LA DEPUTY

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

Dated this 26th day of January, 2009, at Olympia, Washington.



TONYA MAIAVA