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COURT OF APPEALS
DIVISION II

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NO. 38224-5-II

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

STATE OF WASHINGTON,

v.

TERRY BUMP,

BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS

ROBERT M. MCKENNA
Attorney General

RONDA D. LARSON, WSBA #31833
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504
360-586-1445

pin 3-10-09

ORIGINAL

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I. BACKGROUND

The Defendant Terry Bump was convicted in Kitsap County of second degree assault with sexual motivation, sexual exploitation of a minor with sexual motivation, and second degree incest, committed in January and August 1994. CR 26. The court imposed prison and community placement. On April 7, 1995, the court signed the judgment and sentence. CR 36. The judgment and sentence requires that before he is released to community placement, Bump must “[o]btain the prior approval of the Department of Corrections (DOC) regarding the living arrangements if Defendant is a sex offender.” CR 33.

In a motion filed on June 13, 2008, in the superior court, Bump stated that the DOC is denying his earned early release from prison to community placement until he finds an approvable residence location in Kitsap County. CR 40.

Bump asked the superior court to clarify the phrase “living arrangements” in his judgment and sentence by explaining that the phrase does not mean “residence location.” CR 42. The court denied the motion, finding that it was without jurisdiction to consider the motion. CR 61. Bump thereafter filed another motion to clarify judgment and sentence on August 15, 2008 (CR 66), but Respondent was never given a copy of that

document and is unaware of its contents. In any case, the court never ruled on it.

A few days later, Bump filed a notice of appeal (CR 73) and was appointed counsel to represent him at the State's expense. He thereby avoided having to meet the stricter burden necessary for appointment of counsel in a personal restraint petition (PRP), even though his motion in the superior court raises issues that are more properly brought as a PRP.¹ This Court subsequently denied Respondent's request to convert the case to a PRP.

II. ARGUMENT

A. **BUMP'S COLLATERAL ATTACK ON THE JUDGMENT AND SENTENCE IS UNTIMELY.**

No 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). The term "collateral attack" includes any motion to arrest judgment. RCW

¹ Instead of denying the motion, the superior court should have transferred it to the Court of Appeals under CrR 7.8(c)(2) to be treated as a personal restraint petition (PRP), given the clear time bar issue in this case, as well as the clearly frivolous nature of Bump's claim. Bump filed his notice of appeal in July 2008. Five months later, the State (i.e., prosecutor) moved to substitute the Attorney General as respondent, which the Court granted. By then, it was too late to file a notice of cross appeal. See RAP 5.1(d). It would have been a better result if the State (i.e., prosecutor) had filed a timely cross appeal, preserving Respondent's argument that the superior court improperly denied Bump's motion and should have instead transferred it to this Court as a PRP.

10.73.090(2). In Bump's case, the judgment became final on the date it was filed with the clerk of the trial court – April 17, 1995. RCW 10.73.090(3)(a).

The one-year time limit is not applicable if the motion 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.

None of these exceptions exists in Bump's case, and he filed his motion well outside the one-year time limit. As such, the trial court should have found that his motion was time-barred.²

B. THE TRIAL COURT DOES NOT HAVE THE AUTHORITY TO CLARIFY THE ALLEGED AMBIGUITY IN BUMP'S JUDGMENT AND SENTENCE.

1. The Trial Court Lacked Subject Matter Jurisdiction.

CrR 7.8 provides that:

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.

CrR 7.8(a). A trial court may correct a clerical error in the judgment and sentence document. State v. Klump, 80 Wn. App. 391, 397, 909 P.2d 317 (1996). Whether a clerical error exists under CrR 7.8 is the same test used to determine a clerical error under CR 60(a), the civil rule governing amendment of judgments. Klump, 80 Wn. App. at 397; Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

To determine whether an error is clerical or judicial, we look to “whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial.” Presidential, 129 Wn.2d at 326. If it

² There was no respondent to the motion in the superior court. Hence, this argument was never made.

does, then the amended judgment should either correct the language to reflect the court's intention or add the language the court inadvertently omitted. Presidential, 129 Wn.2d at 326, 917 P.2d 100. If it does not, then the error is judicial and the court cannot amend the judgment and sentence. Presidential, 129 Wn.2d at 326,917 P.2d 100.

In Bump's case, he points to no clerical error in the judgment. There is also nothing to indicate that the 1995 judgment does not embody the trial court's intentions. As such, the trial court did not have authority to expressly waive the pre-approved address requirement that was and is mandated by statute. "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." Marley v. Department of Labor and Industries of State, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). Because CrR 7.8 does not allow the trial court to make the change to the sentence that Bump requests, the trial court lacks subject matter jurisdiction. The trial court correctly found it had no jurisdiction.

2. The Trial Court Lacked Personal Jurisdiction Over The DOC.

The legislature has not given trial court's personal jurisdiction over the DOC in criminal actions. RCW 9A.04.030 provides a court with criminal jurisdiction over persons who commit crimes. No similar statute

allows jurisdiction over an agency, other than the prosecutor, for purposes of responding to a defendant's motion under the criminal cause.

“A state exercises personal jurisdiction in the following ways: consent, domicile, residence, presence, appearance in an action, and/or doing business in a state.” SCM Group USA, Inc. v. Protek Machinery Co., 136 Wn. App. 569, 574, ¶ 12, 150 P.3d 141 (2007) (citation omitted). The DOC never appeared in the superior court to contest the motion by Bump. And it does not consent to personal jurisdiction, either. As such, the trial court never had personal jurisdiction over DOC.

C. BUMP'S COMPLAINTS REGARDING DOC'S RELEASE DETERMINATIONS ARE NOT WITHIN THE PROVINCE OF THE SUPERIOR COURT.

The superior court determined that it was without jurisdiction to consider Bump's motion. However, it instead should have found that it was authorized to make all merit and time-bar determinations that were necessary for it to transfer the motion to the Court of Appeals to be treated as a personal restraint petition under CrR 7.8(c)(2). Nevertheless, absent a transfer to the Court of Appeals, the superior court was indeed without jurisdiction to grant the relief that Bump requested.

A decision by DOC that, in essence, deprives an inmate of earned early release into community custody is an unlawful restraint, subject to review by the Court of Appeals in a personal restraint petition. In re

Dutcher, 114 Wn. App. 755, 758, 60 P.3d 635 (2002); In re Liptrap, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). The institution in which an offender is actually incarcerated retains complete control over the good time credits granted to offenders within its jurisdiction. RCW 9.94A.728; In re Erickson, 191 P.3d 917, 921 (2008).

An inmate has no alternative other than by means of a personal restraint petition to obtain judicial review of DOC's compliance with the statutory requirements for granting early release. In re Taylor, 122 Wn. App. 880, 884, 95 P.3d 790 (2004); In re Albritton, 143 Wn. App. 584, 591, 180 P.3d 790 (2008).

Nothing in CrR 7.8 authorizes a superior court to grant the relief that Bump requested. Therefore, the court was without jurisdiction to grant such relief. The appropriate forum for Bump's complaints regarding DOC's release determination is a personal restraint petition, filed in the Court of Appeals, naming DOC as the respondent.

D. THERE IS NO MERIT TO BUMP'S CLAIMS.

If the DOC were to release Bump to his community placement term prior to establishing a pre-approved address, it would violate his sentence and the DOC's rules. In re Crowder, 97 Wn. App. 598, 601, 985 P.2d 944 (1999). The statutory right to earned early release credit creates only a limited liberty interest requiring minimal due process. Crowder,

97 Wn. App. at 600 (citing In re Fogle, 128 Wn.2d 56, 65-66, 904 P.2d 722 (1995)). Unlike other offenders sentenced under the Sentencing Reform Act of 1981, drug offenders, sex offenders, and violent offenders are excluded from general release for earned time. Id. Instead, they must serve a period of community custody “in lieu of earned release time.” Id.

The pre-approved address requirement has been mandatory since 1992. And Bump’s judgment and sentence has not waived this requirement, either explicitly or implicitly, contrary to his claim. It is his burden to establish waiver and he has not done that.

Since 1992, trial courts imposing community custody have been required to impose the pre-approved address requirement. See RCW 9.94A.715(2)(a); RCW 9.94A.700(4)(e). Also, since that time, DOC has had the authority to require a pre-approved address. Finally, since 2002, DOC has a statutory mandate to require pre-approval. RCW 9.94A.728(2)(c) states:

The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community placement or community custody terms eligible for release to community custody status in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community.

RCW 9.94A.728(2)(c).

Bump claims that the judgment and sentence does not require a pre-approved “address” because it states only that he must have an approved “living arrangement.” But his argument is nothing more than semantics. A release address is a type of “living arrangement.” The DOC has the authority to deny his proposed living arrangement and it has done so, regardless of whether it has denied it because it is an improper address or because it is any other type of improper arrangement.

Bump’s appointed counsel claims that the superior court, at this late date, is authorized to remove the requirement for an approved release address by virtue of former RCW 9.94A.120(8)(d), which states:

Prior to transfers to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

RCW 9.94A.120(8)(d). However, this section applies only “upon recommendation of the department of corrections.” The DOC’s recommendation is a condition precedent that does not exist in Bump’s case. As such, that section has no application here.

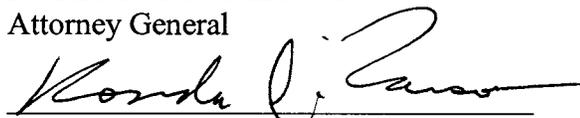
The Court should hold that Bump improperly failed to name the DOC as a party, and as such, the trial court correctly determined that it was without jurisdiction. Alternatively, this Court should hold that the motion is time-barred and frivolous.

III. CONCLUSION

For the reasons stated above, this court should deny Bump's appeal.

RESPECTFULLY SUBMITTED this 10th day of March, 2009.

ROBERT M. MCKENNA
Attorney General



RONDA D. LARSON, WSBA #31833

Assistant Attorney General

Corrections Division

P.O. Box 40116

Olympia, WA 98504

360-586-1445

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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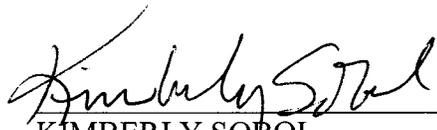
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TO:

Thomas E. Weaver, Jr.
Attorney at Law
P.O. Box 1056
Bremerton, WA 98337-0221
weaver1968@hotmail.com

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

EXECUTED this 10th day of March, 2009 at Olympia, WA.



KIMBERLY SOBOL
Legal Assistant