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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY DWAYNE BLACKWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 04-1-03816-4

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Michelle Hyer
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is defendant improperly attempting to use a direct appeal from a corrected judgment to litigate an untimely challenge to the validity of his plea?
2. Does defendant improperly urge this Court to review an untimely collateral attack of his plea that is as time barred as it is meritless?

B. STATEMENT OF THE CASE

On June 3, 2004, defendant pled guilty to attempting to elude a pursuing police vehicle. CP 2. He was sentenced to 60 days in jail. CP 2. The balance of the sentence was converted to "work crew." CP 2. Defendant signed a notice that work crew is time served in lieu of actual confinement. CP 2. Defendant went into escape status for violating his work crew schedule. CP 2, 36. He was charged with first degree escape. CP 1; RCW 9A.76.110(1). The Information alleged he unlawfully escaped from "a detention facility, to wit: Pierce County Work Crew." CP 1. He pled guilty as charged May 11, 2005:

On June 18, 2004, in Pierce County WA I was serving a jail sentence for Eluding a Police Vehicle. My jail time was converted to work crew. After initially reporting twice, I stopped attending work crew.

CP 3, 6. His plea was found to be knowingly, intelligently, and voluntarily entered as well as supported by a sufficient factual basis. SRP (05/11/05). A standard range sentence was imposed. CP 14. The judgment became final May 11, 2005, as review was not sought. ER 201; RCW 10.73.090(3)(a); RAP 5.2(a). The collateral attack time limit expired one year later on May 11, 2006. *Id.*

More than a decade passed. On September 23, 2016, 11 years after his conviction, defendant filed a *pro se* CrR 7.8 motion asking the court to vacate his guilty plea. CP 23. He argued his CrR 7.8 motion was not time barred under RCW 10.73.090 because the judgment cited a misdemeanor compounding statute (RCW 9A.76.100(1)) instead of the charged crime (RCW 9A.76.110(1)). He also argued his plea was invalid as he allegedly pled to an uncharged means of escape from custody rather than escape from a detention facility. CP 23-32. The State acknowledged the scrivener's error while maintaining that there was no basis to vacate his judgment. CP 35-36. The scrivener's error was corrected. CP 59-60. No discretion was exercised as to defendant's other claims. CP 59-60.¹

¹ Citation to Clerk's Papers above 88 reflect an estimate of supplemental designations.

Defendant filed a notice of appeal. CP 61-66. He then sought reconsideration of the trial court's CrR 7.8 ruling.² CP 67-72. CP 73-74. The court transferred that motion as a personal restraint petition. CP 79. It was returned, accompanied by a letter stating a motion for reconsideration is not a CrR 7.8 motion capable of CrR 7.8(c)(2) transfer. CP 89. The trial court was to vacate the CrR 7.8 order and transfer or rule on reconsideration. *Id.* An order denying reconsideration of the corrected scrivener's error followed:

The court having considered the motion for reconsideration and objection filed by defendant 11-29-2016, and the Division 2 Commissioner rejecting a transfer of the defendant's motion as a PRP and directing this court to enter an order, and this Court having statutory authority to correct a scrivener error in a Judgment and Sentence, having done so, ... It is Ordered that the motion for reconsideration is denied.

CP 75. No discretion was exercised as to defendant's untimely attack upon his plea. This Court reported denial of the motion allowed this appeal to proceed. CP 91.

On appeal, defendant does not challenge the corrected scrivener's error. Instead, in this direct appeal of the limited ministerial ruling actually entered by the trial court, he requests appellate review of an untimely

² Defendant alleged his due process rights were violated as the court did not appoint counsel for him after his CrR 7.8 motion was filed, he did not have to opportunity to reply to the State's response, and the court did not address all the issues raised in his CrR 7.8 motion. CP 67-78.

motion to withdraw his plea that the trial court declined to consider. That claim was not transferred pursuant to CrR 7.8(c)(2). *Id.*

C. ARGUMENT

1. DEFENDANT IMPROPERLY ATTEMPTS TO REVIVE A RIGHT TO APPEAL HIS PLEA IN AN APPEAL FROM CORRECTION OF A SCRIVENER'S ERROR FOUND IN HIS JUDGMENT.

A guilty plea waives the right to appeal from a finding of guilt and a standard-range sentence for the finding. *State v. Gaut*, 111 Wn.App. 875, 880-81, 46 P.3d 832 (2002). A plea does not preclude appeal of collateral questions, *e.g.*, validity of a statute, sufficiency of the charging document, jurisdiction of the court, or circumstances attending a plea. *Id.* Belated motions to vacate a judgment are to be filed pursuant to CrR 7.8(b). *Id.* An appellate court's "scope of review is limited to the trial court's exercise of its discretion in deciding the issues ... raised by the motion." *Id.*

"On review of an order denying a motion to vacate, only the propriety of the denial not the impropriety of the underlying judgment is before the reviewing court." *Id.*; *Bjurstrom v. Campbell*, 27 Wn.App. 449, 450, 618 P.2d 533 (1980)). And where, as here, a trial court declined to exercise discretion to consider the validity of the plea, there is no plea-related ruling to review. *State v. Kilgore*, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009); RAP 2.4. "[A]n unappealed final judgment cannot be restored

to an appellate track by means of moving to vacate and appealing the denial of the motion." *Id.* Likewise, a forfeited right to appeal a conviction based on a guilty plea cannot be revived through a timely appeal from correction of judgment. *See Id.*; *State v. Wheeler*, 183 Wn.2d 71, 79, 349 P.3d 820 (2015) ("untimely [PRP] is... not a vehicle for an untimely motion to withdraw a guilty plea."); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 141-42, 267 P.3d 324 (2011). The remedy for an identified error in a judgment is correction of the error, the error does not revive a defendant's right to challenge his conviction. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 427, 309 P.3d 451 (2013).

Defendant urges this Court to review the validity of an unappealed plea agreement underling a judgment that became final in 2006. The validity of his plea is not properly before this Court. The trial court ruling on review was limited to correcting a scrivener's error found in defendant's judgment. No part of the ruling exercised discretion with respect to the plea. Defendant does not assign error to the trial court's decision to refrain from ruling on the collateral attack of his plea. So that aspect of its decision is beyond the scope of this appeal. *State v. White*, 123 Wn.App. 106, 115, fn1. 97 P.3d 34, 38 (2004); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)); *City of Spokane v. White*, 102 Wn.App. 955, 963, 10 P.3d 1095 (2000); *Dang v. Ehredt*, 95 Wn.App. 670, 678, 977 P.2d

29 (1999); *In re Estate of Tosh*, 83 Wn.App. 158, 164, fn. 6, 920 P.2d 1230, 1234 (1996) (reply brief too late to raise a new issue)).

Defendant cannot revive his forfeited right to timely move for withdraw of his plea or restore his forfeited right to appeal his plea through an appeal from a ruling that fixed a scrivener's error in his judgment. The untimely collateral attack upon his plea was not the subject of a CrR 7.8(c)(2) transfer to this Court, and defendant does not assign error to the trial court's decision not to exercise its discretion. He does not allege the trial court inaccurately redressed the scrivener's error, which is the discretion it exercised. The result is that none of the issues raised in defendant's appeal are properly before this Court and the only issue that could be properly raised, *i.e.*, correction of the scrivener's error, is not challenged. Defendant's misfiled PRP should be summarily rejected, for a notice of appeal will not be converted to a PRP. *State v. Smith*, 144 Wn.App. 860, 863-64, 184 P.3d 666 (2008). The rule enables defendant's to withdraw CrR 7.8 motions to avoid a future PRP from being barred by the subsequent petition rule. *Id.*

2. THE APPEAL WRONGLY URGES THE COURT TO REVIEW AN UNTIMELY COLLATERAL ATTACK OF A PLEA THAT IS AS TIME BARRED AS IT IS MERITLESS.

Collateral relief undermines finality of litigation, degrades the prominence of trial, and can cost society its right to punish admitted offenders. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). These grave costs require collateral relief to be limited in state as well as federal courts. *Id.*

- a. The challenge to the validity of defendant's plea raises a claim that could only be properly brought before this Court in a timely personal restraint petition.

Error is not assigned to the trial court declining to consider defendant's untimely motion to withdraw his plea or the absence of a CrR 7.8(c)(2) transfer, so neither of those nonevents are properly before this Court for review. RAP 10.3. An appeal from a ministerial correction of judgment is not the vehicle for bringing an untimely challenge to an underlying plea before this Court. *See Wheeler*, 183 Wn.2d at 79; *Coats*, 173 Wn.2d at 141-42; *Smith*, 144 Wn.App. at 863-64. Such claims can only arrive to this Court from a trial court by way of a CrR 7.8(c)(2) transfer. *Id.* This Court will not convert appeals to PRPs to review misfiled claims. *Smith*, 144 Wn.App. at 863-64. Yet if the rule were otherwise, defendant's claim would be decided according to PRP standards of review, not the

generous direct appeal standards he invokes. The limitations our Legislature has imposed upon legislatively created collateral relief cannot be circumvented by raising untimely motions to withdraw pleas in appeals from corrected judgments. See *Wheeler*, 183 Wn.2d at 79; *Coats*, 173 Wn.2d at 141-42; *Kilgore*, 167 Wn.2d at 38-39.

- b. If this appeal were capable of being converted to a PRP, it would be a time barred attack on the validity of a plea which our Supreme Court has held is not a review enabling facial invalidity in a judgment that has been final for over a year.

No petition or motion for collateral attack on a judgment in a criminal case may be filed more than one year after the judgment becomes final if the judgment is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). Collateral attacks include motions to vacate a judgment as well as a motion to withdraw a guilty plea. RAP 10.73.090(2). Defendants bear the burden of proving the timeliness of a collateral attack. *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998); *In re Pers. Restraint of Quinn*, 154 Wn.App. 816, 226 P.3d 208 (2010).

In this case, the collateral attack was admittedly filed more than a decade after the one year time limit expired. Defendant did not invoke a RCW 10.73.100 exception to the time bar. He predicates his effort to secure

review of his plea on RCW 10.73.090's exception for redressing facial invalidities in a judgment. He is not the first to mistake an alleged invalidity in an underlying conviction for an invalidity in a judgment. The facial invalidity rule is a narrow exception. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 424, 309 P.3d 451 (2013). It is not a "super exception" that opens the door to all claims, including those unrelated to an invalidity of the judgment. *Id.* at 422-423.

A judgment is only facially invalid if the trial judge exercised authority (statutory or otherwise) it did not have. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 917, 271 P.3d 218 (2012). "Invalid on its face" does not mean the trial court committed some legal error. Legal errors do not deprive trial courts of their authority. Most legal errors must be raised on direct review or a timely personal restraint petition or not at all. *Id.* at 916. Judgments for crimes charged after expiration of the statute of limitation are facially invalid, as are judgments for nonexistent crimes. *Id.* (citing *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 717-19, 10 P.3d 380 (2000). Both involve judgments entered for charges a court "simply did not have the authority to entertain." *Id.* at 916.

RCW 10.73.090 does not enable defendants to avoid the one year time limit for motions to withdraw pleas based on the theory they are

facially invalid. *Id.* at 917; *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). Plea documents are only relevant to the extent they reveal how a judgment was entered in excess of a court's authority. *Id.*; *Scott*, 173 Wn.2d at 917; *Stoudmire*, 141 Wn.2d at 353; *Thompson*, 141 Wn.2d at 717-19. "This principle was bluntly recapitulated in *McKiearnan*: an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment ... invalid." *Coats*, 173 Wn.2d at 141-42 (quoting *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 782, 203 P.3d 375, 376-77 (2009)). "In short, [courts] may examine a plea statement to evaluate a claim that a judgment and sentence is not valid on its face, but not the other way around." *Id.*

Defendant's challenge to his plea urges this Court to review his plea according to that forbidden-inverted approach. App.Br. at 8-12. He seeks relief from his long final judgment based on an alleged legal error in a plea document, making it relief binding precedent has foreclosed. *Coats*, 173 Wn.2d at 141-42; *McKiearnan*, 165 Wn.2d at 782. Like *McKiearnan*, defendant was convicted of a valid crime. The sentence imposed was authorized by that conviction. His judgment is facially valid as a result. So there is no statutorily permissible basis for time-barred review.

The unreviewability of defendant's claim is manifest in his analysis, which reveals an alleged invalidity in the plea agreement by comparing it

against the charging document. He claims this will reveal a plea to an uncharged means of committing first degree escape. His judgment is not at all implicated by the result of that comparison. He pleaded guilty to first degree escape and the judgment imposed a lawful sentence for that crime without regard to the means by which it was committed. According to him, a legal mismatch between the type of confinement from which he was alleged to have escaped (a detention facility, to wit: work crew) and the confinement from which he admitted to escaping (custody, *i.e.*, work crew) proves his guilty plea to escape was not knowingly, intelligently, and voluntarily made. This is precisely the type of untimely motion to withdraw a plea our Supreme Court has forbidden. *Scott*, 173 Wn.2d at 917. In *Clark*, the Court declared it "disposed of this argument in *Hemenway*." *In re Pers. Restraint of Clark*, 168 Wn.2d 581, 586-87, 230 P.3d 156 (2010). Flaws pertaining to a defendant's mental state in entering a plea cannot overcome RCW 10.73.090(1)'s one year time limit for they do not deprive the accepting court authority to enter judgment. *Id.* Defendant's improper attack upon his plea would have to be rejected as time barred if it were reviewable in this direct appeal from ministerial correction of judgment, which it is not.

- c. The challenge to his plea would fail on the merits if it were not procedurally barred because he cannot prove any actual-substantial prejudice resulted from him pleading guilty to a means of committing first degree escape that was different from the means alleged in the charging document.

Uncharged alternative means cases are resolved according to different standards depending on whether they arise on appeal or in a timely PRP. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 538-39, 309 P.3d 498 (2013). On direct appeal, the State must prove a conviction for an uncharged means was harmless error. *Id.*³ In a PRP, the burden shifts. *Id.* Petitioners must prove an error caused actual-substantial prejudice. *Id.* Prejudice arises from pleas that expose defendants to unforeseen direct consequences. *See State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Consequences are direct if they have definite, immediate, and largely automatic effect on punishment. *Id.* Assuming RCW 9A.76.110 creates alternative means of committing first degree escape by disjunctively describing the escaped confinement in terms of "custody or a detention facility," the direct consequences for the offense are the same. RCW

³ This claim would fail even if the direct appeal standard of review was applied. Post-judgment motions to vacate a judgment are governed by CrR 7.8. *See* CrR 4.2(f); *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 601, 316 P.3d 1007 (2014). CrR 4.2(f)'s manifest injustice standard is insufficient when considering a post-judgment motion to withdraw. *State v. Lamb*, 175 Wn.2d 121, 129, 285 P.3d 27 (2012).

9A.76.110(1)-(3) (1982). So no actual-substantial prejudice could result from pleading guilty to a different means of the offense than the one charged.

Beyond this claim defeating absence of prejudicial effect, petitioner has not proved RCW 9A.76.110(1) creates two means of committing first degree escape. The statute lists "custody or a detention facility" disjunctively; however, use of a disjunctive "or" in a list of conduct attending a crime does not necessarily create alternative means of committing the crime. *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Elements of a crime usually consist of the actus reus, mens rea, and causation. *Id.* Statutory analysis employed to discern the existence of alternative means focuses on whether each alleged alternative describes distinct acts that amount to the same crime. *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015). The more varied the described conduct, the more likely alternative means were intended. But when minor nuances inhering in an act are described, it is more likely that they are merely facets of the same criminal conduct. *Id.*

Contrary to defendant's reading, Division III only found two elements in RCW 9A.76.110(1)'s crime of first degree escape: (1) the person must be detained pursuant to a felony conviction, and (2) escape must be from either custody or a detention facility. *State v. Walls*, 106

Wn.App. 792, 795, 25 P.3d 1052 (2001). So "custody or detention facility" are merely facets of the confinement, or restricted freedom, element. *See Id.*; *State v. Eichelberger*, 144 Wn.App. 61, 67, 180 P.3d 880 (2008). The crime is escaping from lawful confinement, manifested as confinement in a detention facility or by a form of legal custody. This interpretation accords with the overlapping connotation of those terms, the meaning of which must be discerned from their plain language, related provisions, and the statutory scheme. *State v. Carlson*, 142 Wn.App. 507, 520, 178 P.3d 371 (2008).

A "detention facility" is "any place used for the confinement of a person . . . in any work release, furlough, or other such . . . program." RCW 9A.76.010(3)(e) (emphasis added). "Work crew" is "a program of partial confinement . . ." RCW 9.94A.030(55) (emphasis added); RCW 9.94A.030(8); *State v. Parker*, 76 Wn.App. 747, 748, 888 P.2d 167 (1995) (home detention is a detention facility); *State v. Gomez*, 152 Wn.App. 751, 754, 217 P.3d 391 (2009); *State v. Peters*, 35 Wn.App. 427, 430, 667 P.2d 135 (1983); *e.g.*, *State v. Sanchez*, 2015 WL 4740640, 189 Wn.App. 1032 (2015)⁴ (work crew is a detention facility under RCW 9A.76.010); *State v. Ammons*, 136 Wn.2d 453, 457, 963 P.2d 812 (1998) ("custody means ...

⁴GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

service on a work crew."); RCW 9A.76.010(2)). The "custody or detention facility" facets of RCW 9A.76.110(1)'s confinement element are comparable to the seven facets of the trafficking statute's participation in theft element and the three facets of the DUI statute's "affected by" element. *See State v. Owens*, 180 Wn.2d 90, 97, 323 P.3d 1030 (2014); *Sandholm*, 184 Wn.2d at 735.

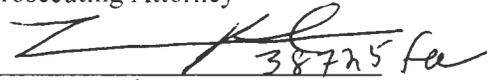
Defendant's time barred challenge to his plea is therefore predicated on a faulty reading of the first degree escape statute. The Information charged him with "knowingly escaping from a detention facility, to-wit: Pierce County Work Crew, contrary to RCW 9A.76.110(1)." CP 1 (emphasis added). His guilty plea acknowledged receipt of that document. CP 3. The plea defined the challenged confinement from which he escaped as "custody (work crew)." *Id.* Paragraph 11 contains an admission his "jail time" for "eluding a police vehicle" was "converted to work crew," and "[a]fter initially reporting twice, [he] stopped attending work crew." *Id.* The charging and plea documents captured both facets of the crime's escape from confinement element. Defendant failed to establish error, much less one capable of resulting in actual-substantial prejudice. The challenge to his plea is as meritless as it is time barred.

D. CONCLUSION

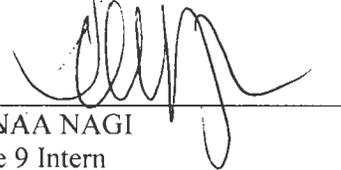
Defendant improperly attempts to use an appeal from an unchallenged correction of a scrivener's error in his judgment to litigate a time-barred challenge to the validity of his plea. The flaw he sees in his plea is not an invalidity in his judgment. If the claim were not procedurally barred, it would readily fail on the merits. The unchallenged correction of judgment should be affirmed. His other claims are not properly before the Court, so review should not be granted.

RESPECTFULLY SUBMITTED: November 29, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE NYER
Deputy Prosecuting Attorney
WSB # 32724



SANAA NAGI
Rule 9 Intern

Certificate of Service:

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.

11.29.17 Therem Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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