

FILED
Court of Appeals
Division II
State of Washington
1/12/2018 1:13 PM
NO. 50122-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DWAIN DAVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 95-1-00160-4

Brief of Respondent

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

1. Does defendant urge this Court to exceed the scope of review in an appeal from a time-barred motion to be resentenced in a 1995 case since review is limited to the issue of whether denial of that motion was a proper exercise of the trial court's discretion and does not extend to the validity of a predicate strike offense he committed in 1986?
2. Is defendant inappropriately using an appeal from a motion to be resentenced for a 1995 rape conviction to relitigate a time-barred collateral attack upon a final judgment and underlying plea entered in 1986?

B. STATEMENT OF THE CASE.

Police responded to an attempted burglary in Tacoma around 12:04 a.m. on January 10, 1994. CP 198. The victim reported an unknown African male's persistent efforts to break into his home. *Id.* Those efforts ceased as the victim threatened to shoot. *Id.* A dry sweater was found on wet grass outside the home. *Id.* Police remained in the area engaged in conversation with a citizen about an unrelated incident. *Id.*

Around 45 minutes later, Officer Hensley watched victim T.M. run from her house waiving her hands while screaming hysterically. *Id.* She was naked from the waist down. *Id.* She yelled, "I've been raped! There's a man in my house!" *Id.* Hensley looked toward her open-front door to see an African American male, later identified to be defendant, exiting wearing sweatpants, but no shirt. *Id.* Hensley ordered him to stop. *Id.* Defendant fled and evaded a police dog only to be captured by Hensley. *Id.*

Defendant admitted the sweater recovered at the attempted burglary scene belonged to him. CP 199. He said if doctors did not find semen in T.M. it would be her word against his. T.M. also spoke with police. *Id.* They learned she and her 3 year-old daughter were asleep in her bed. *Id.* Her other children, ages 5 and 9, were asleep in their room. *Id.* T.M. woke to find defendant—a man she did not know—in her bedroom. *Id.* He said, "Where's the money, bitch?" *Id.* When T.M. tried to call 911, he told her, "You touch that phone, bitch, and I'll kill you." *Id.* He proceeded to orally, then vaginally rape her. *Id.* She caught a glimpse of Officer Hensley's patrol car through a window, so she ran outside for help. *Id.* Defendant pled guilty to raping her in the first degree. CP 200, 479.

Defendant was sentenced to life as a persistent offender in 1995 due to his previous strike-offense convictions, including the 1986 convictions at issue in this 2017 appeal from a denial of his motion for resentencing. CP

479, 515-17. Those predicate convictions consisted of two counts of first degree burglary and individual counts of attempted second degree robbery and second degree theft. CP 479. In 1997, the Supreme Court granted an *Anders*¹ motion and dismissed defendant's appeal based on the absence of any nonfrivolous challenges to his convictions. CP 447-48.

In June, 2010, defendant directed a personal restraint petition at the Supreme Court. CP 479. The PRP was stayed pending the Court's issuance of its decision in *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013). *Id.* A Supreme Court Commissioner determined the PRP was time-barred without an exception. CP 480. There as here, defendant tried to collaterally undermine his 1995 sentence by attacking a misstatement in his 1986 judgment regarding the standard range and maximum penalty for his attempted second degree robbery conviction. *Id.* The denial of that PRP explained the identified error could not open the door to a time-barred motion to withdraw his 1986 plea. CP 480-81. Nor did the error support the requisite finding of actual-substantial prejudice as his concurrent sentence for the joined first degree burglary exceeded the one imposed for the attempted second degree robbery. CP 480-81. His motion to modify was denied by a Supreme Court department. CP 476.

¹ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

The Clerk of the Supreme Court could not locate an order directing defendant to be resentenced. CP 476. This Court's order rejecting transfer of defendant's habeas petition references an order for resentencing, but only in summarizing the claim raised for identification. CP 464. It appears the trial court and Supreme Court Clerk mistook that reference as this Court's misperception that an order to resentence had issued. CP 476. In any event, the Supreme Court clarified one had not. *Id.* This Court rejected transfer of defendant's motion on resentencing as it was interpreted to be a mandamus writ the Court lacked original jurisdiction to decide. CP 464.

The ruling challenged on appeal issued March 10, 2017. Defendant's motion for resentencing was denied because the challenged 1995 rape sentence became final about 20 years ago and the judgment for his predicate 1986 convictions became final roughly 30 years ago. CP 515-16. It was also recognized that defendant's time-barred challenge to both had been decided against him by the Supreme Court. *Id.* So the trial court ruled there was no lawful basis to reconsider his rape sentence. A notice of appeal was timely filed. CP 518, 524.

C. ARGUMENT.

1. DEFENDANT URGES THIS COURT TO DECIDE THE VALIDITY OF HIS 1986 CONVICTION, BUT ONLY DENIAL OF HIS TIME-BARRED MOTION TO BE RESENTENCED FOR HIS 1995 RAPE CONVICTION IS BEFORE THE COURT IN THIS ILL-FRAMED APPEAL.

A plea of guilty waives the right to appeal from a finding of guilt and sentence based on the finding. *State v. Gaut*, 111 Wn.App. 875, 880-81, 46 P.3d 832 (2002). A refusal to vacate sentence based on a plea is only reviewed for an abuse of discretion. *See Id.*; *Bjurstrom v. Campbell*, 27 Wn.App. 449, 450, 618 P.2d 533 (1980). That limited scope of review does not extend to the validity of underlying convictions or predicate offenses on which a challenged sentence depends. *Id.* For unappealed or affirmed final judgments may not be restored to bygone appellate tracks by moving to vacate the sentence imposed and then appealing the motion's denial. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009); RAP 2.4. A forfeited right to appeal a conviction based on a plea is also unreviewable in a timely appeal from correction of judgment or a refusal to correct judgment. *See State v. Wheeler*, 138 Wn.2d 71, 79, 349 P.3d 820 (2015); *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 427, 309 P.3d 451 (2013); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 141, 267 P.3d 324 (2011).

Defendant wrongly urges review of predicate convictions from 1986 underlying the persistent offender sentence imposed in his 1995 rape case. But defendants cannot collaterally attack predicate convictions underlying a sentence imposed in a later case at a hearing on the validity of the sentence. *See State v. Thompson*, 143 Wn.App. 861, 866-67, 181 P.3d 858 (2008). So neither the validity of defendant's 1986 judgment and sentence nor the underlying plea is properly before this Court in an appeal of resentencing denied in his 1995 case. The motion for resentencing did not transform the trial court into an appellate forum to test the validity of a judgement or plea entered 30 years ago in an earlier case. *State v. Bembry*, 46 Wn.App. 288, 289-90, 730 P.2d 115 (1986); *see also State v. Ammons*, 105 Wn.2d 175, 189-90, 713 P.2d 719 (1986).

Denial of defendant's request for unavailable relief was therefore a sound exercise of the trial court's discretion, which is only abused when its rulings are manifestly unreasonable. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). The trial court's decision that there was no authority to reopen his judgment to modify the sentence he received for raping a woman in 1995 accords with binding precedent, for once a judgment is final, a court may only reopen it if authorized by statute or court rule. *Rose ex rel. Estate of Rose v. Fritz*, 104 Wn.App. 116, 120, 15 P.3d 1062 (2001). Defendant's motion was predicated on RCW 10.73.090's facial invalidity exception to

the collateral attack time bar. That exception does not apply as defendant is not really challenging the facial validity of his 1995 judgment. He is actually asking the Court to impermissibly look behind the 1995 judgment to a predicate 1986 judgment, and beneath that predicate judgment to his 1986 plea. But the Supreme Court has explicitly precluded such end runs around the collateral attack time bar duly enacted by our Legislature. *Coats*, 173 Wn.2d 123, 140-41.

Law of the case also precludes review. Although the trial court did not explicitly ground its ruling on that doctrine, lower courts can be affirmed on any legitimate ground. *State v. McNally*, 125 Wn.App. 854, 863, 106 P.3d 794 (2005). The Supreme Court decided defendant's untimely attack upon his 1986 conviction does not entitle him to any sentencing relief in his 1995 rape case. CP 467, 479-81, 516. That disposition is law of this case which only the Supreme Court can countermand. *Matter of Colbert*, 186 Wn.2d 614, 623, 380 P.3d 504 (2016); *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003); *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). The earlier resolution of this claim against defendant's position collaterally estops its relitigation here. See *State v. Johnson*, 46 Wn.App. 302, 305, 730 P.2d 703 (1986). Regardless of the doctrine selected, the trial court's accurate decision not to resentence him should be affirmed.

2. DEFENDANT WRONGLY TRIES TO USE APPEAL FROM AN ACCURATE DENIAL OF RESENTENCING IN A 1995 CASE TO RELITIGATE A TIME-BARRED EFFORT TO UNDERMINE A PLEA HE ENTERED IN A PREDICATE 1986 CASE.

Collateral relief undermines the finality of litigation, degrades the prominence of trial and can cost society its right to punish proven offenders. These grave costs require it to be limited in state as well as federal courts. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack proceedings are creatures of statute, so collateral relief is limited by statute. *Adams*, 178 Wn.2d at 425-27. This is true even if the limitation precludes review of potentially meritorious claims. *Id.*; *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 754-57, 101 P.3d 1 (2004).

As he did in the Supreme Court, defendant claims his 1986 judgment is facially invalid because of an error he perceives to invalidate his underlying plea. But just as the Supreme Court previously explained to him, the identified error in the 1986 judgment is not "facial invalidity" as it did not deprive the court authority to enter that judgment. CP 480 (citing *Coats*, 173 Wn.2d at 135-36; *Adams*, 178 Wn.2d at 424); *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 916-17, 271 P.3d 218 (2012). It is nothing more than a benign legal error that could have only been corrected through a timely direct appeal or timely PRP since issues pertaining to that long ago completed sentence are now moot. *Id.* And even if the error was a facial invalidity susceptible to ministerial

correction, it could not support the relief defendant requests. For when a facial invalidity is discovered, the remedy is its correction. Facial invalidities do not serve as gateways or "super exceptions" enabling defendants to raise claims that are not covered by an exception to the collateral attack time bar. The relief defendant seeks could only be achieved if he were permitted to withdraw his 1986 plea and that relief has been explicitly forbidden by the Supreme Court. CP 480 (citing *Adams*, 178 Wn.2d at 426; *In re Pers. Restraint Petition of Toledo-Sotelo*, 176 Wn.2d 759, 770, 297 P.3d 51 (2013); RCW 10.73.100).

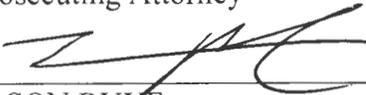
The procedural bar does not work any injustice in defendant's case. As the Supreme Court explained, the only error in his 1986 judgment is its recitation of the range and maximum sentence attending his attempted second degree robbery conviction. CP 480. But that long go completed sentence was run concurrent to a longer sentence imposed for the joined first degree burglary conviction. As the burglary sentence eclipsed the robbery sentence, defendant could not make the requisite showing of actual-substantial prejudice to win relief even if the claim remained reviewable. CP 480-81(citing *Toledo-Sotelo*, 176 Wn.2d at 770). This is one more reason the trial court correctly perceived there were no grounds to grant the resentencing defendant still seeks in his 1995 rape case. So that ruling should be affirmed.

D. CONCLUSION.

The trial court rightly denied defendant's time-barred motion to be resentenced for a 1995 case based on an untimely collateral attack of a 1986 conviction. His meritless claim was already rejected by the Supreme Court. Still, at the hearing below he conveyed a desire to return home to his family. RP (3/10) 6. He described the sentence imposed for the home invasion rape he committed in 1995 to be unfair to him as well as *the public*. *Id.* at 8. There was no mention of remorse for breaking into another family's home where he forcibly raped a mother with her three young children nearby, or the other strike offenses he committed and for which he was removed from society for the public's protection. That self-inflicted outcome is fair, though his rape victim understandably thought it too lenient for what he put her family through. CP 200. The trial court should be affirmed.

RESPECTFULLY SUBMITTED: January 12, 2018.

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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.

1.12.15 Theresa Kar

Date

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PIERCE COUNTY PROSECUTING ATTORNEY

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