

FILED
Court of Appeals
Division II
State of Washington
5/30/2018 10:00 AM

NO. 51517-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

THEODORE RHONE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA #20955
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
a. Jury Instruction Issue.....	2
C. ARGUMENTS.....	7
1. MR. RHONE WAS DENIED HIS DUE PROCESS RIGHT TO BE INFORMED OF THE CHARGES AGAINST HIM WHERE THE TO-CONVICT INSTRUCTION PERMITTED CONVICTION ON AN UNCHARGED ALTERNATE MEANS FOR COMMITTING ROBBERY IN THE FIRST DEGREE	7
2. THE TRIAL COURT ERRED BY DETERMINING THAT THE JURY INSTRUCTION ISSUE IS TIME BARRED	14
a. Exception to time bar under RCW 10.73.100.....	17
D. CONCLUSION.....	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>In re Brockie</i> , 178 Wn.2d 532, 309 P.3d 498 (2013)	8, 9, 10, 11, 12, 13, 14
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 136 P.3d 267 (2011)	18, 19
<i>In re Pers. Restraint of Scott</i> , 173 Wn.2d 911, 271 P.3d 218 (2012)	17
<i>In re Pers. Restraint Petition of Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000)	19, 20
<i>In re the PRP of Hinton</i> , 152 Wn.2d 853 (2004)	18
<i>State Mandanas</i> , 163 Wn. App. 712, 262 P.3d 522 (2011)	14, 15
<i>State v. Barberio</i> , 121 Wn.2d 48, 846 P.2d 519 (1993)	15
<i>State v. Bray</i> , 52 Wn. App. 30, 756 P.2d 1332 (1988)	8, 14
<i>State v. Doogan</i> , 82 Wn. App. 185, 917 P.2d 155 (1966)	10, 11, 12, 14
<i>State v. Fort</i> , 190 Wn. App. 202, 360 P.3d 820 (2015), <i>review denied</i> , 185 Wn.2d 1011 (2016)	14
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991)	8
<i>State v. Landrum</i> , 199 Wn. App. 1037 (2017)	16

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Laramie</i> , 141 Wn. App. 332, 169 P.3d 859 (2007).....	8
<i>State v. Lindsay</i> , 177 Wn.2d. 233, 311 P.3d 61 (2013).....	8
<i>State v. Nicholas</i> , 55 Wn. App. 261, 776 P.2d 1385 (1989).....	9
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	3, 5
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	20
<i>State v. Rhone</i> , 137 Wn. App. 1046 (2007) (Rhone I).....	3
<i>State v. Rhone</i> , 194 Wn. App. 1049 (2016) (Rhone II) (Unpublished).....	3
<i>State v. Rhone</i> , 194 Wn. App. 1049 (2016) (Rhone III).....	4
<i>State v. Severns</i> , 13 Wn.2d 542, 125 P.2d 659 (1942).....	9, 14
<i>State v. Snyder</i> , 196 Wn. App. 1022 (2017).....	13, 14
<i>State v. Suave</i> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	14
<i>State v. Wheeler</i> , 183 Wn.2d 71, 349 P.3d 820 (2015).....	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. Gant,
556 U.S. 332, 129 S.Ct. 1710 (2009)..... 3, 5

RULES, STATUTES, AND OTHERS

CrR 7.5 6

CrR 7.8 6

RAP 2.514, 15, 16, 17

RCW 10.73.090 17, 18, 20

RCW 10.73.100 17, 18

RCW 9.41.010 2

RCW 9A.56.190..... 2

RCW 9A.56.200..... 2, 7, 9

U.S. Const. Amend. VI..... 8

Wash. Const. art. I, § 22 8, 19, 20

A. ASSIGNMENTS OF ERROR

1. Mr. Rhone assigns error to the trial court denying his motion to vacate his robbery conviction because the motion was time barred.
2. Mr. Rhone was unconstitutionally convicted of an alternative means crime he was not charged with in the charging document.
3. Mr. Rhone was prejudiced by being convicted of an alternative means crime he was not charged with in the charging document.

Issues Presented on Appeal

1. Was Mr. Rhone denied his motion to vacate his robbery conviction because the motion was time barred?
2. Was Mr. Rhone unconstitutionally convicted of an alternative means crime he was not charged with in the charging document?
3. Was Mr. Rhone prejudiced by being convicted of an alternative means crime he was not charged with in the charging document?

B. STATEMENT OF THE CASE

a. Jury Instruction Issue

In 2003, Theodore Rhone was charged with and convicted of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver with a firearm enhancement, and first degree unlawful possession of a firearm. CP 48-50, 114-22.

That THEODORE ROOSEVELT RHONE, in the State of Washington, on or about the 30th day of May, 2003, did unlawfully and feloniously take personal property belonging to another with the intent to steal from the person or in the presence of Isaac Miller, the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to Isaac Miller, said force or fear being used to obtain or retain possession of the property...and in the commission thereof, or in the immediate flight therefrom, **defendant was armed with a deadly weapon, to-wit: a handgun**, contrary to RCW 9A.56. 190 and 9A.56.200(1)(a)(i), and in the commission thereof the defendant...was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010... (emphasis added).

CP 48-50. The court's instruction to the jury provided that in order to find Mr. Rhone guilty of first degree robbery, it must be proven beyond a reasonable doubt that Mr. Rhone "displays what appears to be a firearm". Jury instruction 13. CP 65-99.

The to-convict instruction provided that “in the commission of these acts the **defendant displayed what appeared to be a firearm**”. (Emphasis added) Jury instruction 16. CP 65-99.

The trial court found that Rhone was a persistent offender and imposed a sentence of life without the possibility of parole. CP 212-230. Before trial, Rhone unsuccessfully moved to suppress the cocaine and firearm seized during the search of a car in which Rhone was a passenger. CP 4-15. The trial court denied the motion. CP 53.

The Court of Appeals, Div. II, affirmed the ruling on direct appeal. See *State v. Rhone*, 137 Wn. App. 1046 (2007) (Rhone I). In 2014. *State v. Rhone*, 194 Wn. App. 1049 (2016) (Rhone II) (Unpublished). The Washington Supreme Court granted Rhone's Personal Restraint Petition and remanded his case to the Superior Court for reconsideration of the suppression ruling in light of *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009) and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009). On remand, the trial court adopted its original findings of fact and legal reasoning, and again upheld the vehicle search and denied the motion to suppress. CP 325-27.

In an unpublished opinion, the Court of Appeals, Div. II, found that the suppression motion should have been granted and that the cocaine and firearm should have been suppressed. *State v. Rhone*, 194 Wn. App. 1049 (2016) (Rhone III). However, the appeals court nevertheless affirmed Rhone's robbery conviction and its related firearm sentencing enhancement after finding that the error in failing to suppress was harmless. *Rhone III*, 194 Wn. App. 1049.

Specifically, the court stated:

The jury instructions required the jury to find only that Rhone displayed what appeared to be a firearm in order to convict for first degree robbery, not that he possessed an actual firearm. The unchallenged findings of fact include Miller's statement that the front seat passenger pointed a gun at him when the Camaro proceeded through the drive through, Burg's statement that there was a gun in the car and that they had just returned from Jack in the Box, and that Rhone exited from the passenger door of the vehicle. The State meets its burden and establishes that the untainted evidence necessarily supports a finding that Rhone displayed what appeared to be a firearm. Thus, the admission of the weapon is harmless error as it relates to Rhone's conviction for first degree robbery with a firearm enhancement.

Rhone III, 194 Wn. App. 1049.

On March 30, 2017 this Court remanded Mr. Rhone's case

with instructions to vacate counts I and III.

We hold that the trial court erred in denying the motion to suppress the evidence obtained in a search incident to arrest and that the motion to suppress should have been granted under *Gant* and *Patton*. We hold that the error is harmless as to Rhone's conviction for first degree robbery with a firearm enhancement, but we hold that the error is not harmless as to Rhone's convictions for possession of a controlled substance and possession of a firearm. We affirm Rhone's conviction for first degree robbery with a firearm enhancement, vacate his convictions for possession of a controlled substance and possession of a firearm, and remand for further proceedings.

Id.

On November 17, 2017, the superior court vacated counts I and III, and entered a new judgment and sentence. CP 329-330. On that same date, Mr. Rhone requested a new trial on grounds that his robbery conviction was based on erroneous jury instructions. RP 16 (Nov. 17, 2017). The trial court recognized that the Court of Appeals re-imposed the robbery conviction "without knowledge that there was this issue between the charging document and the jury instruction". RP 19 (Nov. 17, 2017).

Defense counsel acknowledged that after speaking with appellate counsel on the 2016 appeal, she too was unaware of this issue as well, but the Court of Appeals rendered a decision based

on the jury instruction issue. RP 20-21 (Nov. 17, 2017).

Defense counsel requested the trial court grant a new trial under CrR 7.5. Id. The trial court provided: "I'm troubled by the fact that we've got a conviction based upon one prong of the robbery statute in the charging document, 'armed with a firearm' or 'armed with a deadly weapon,' and we got the other prong being in the jury instructions. That's never been raised anywhere over the last 14 years or so." RP 27-28 (Nov. 17, 2017). The Court also expressed its concern for this issue. "I think you need to be able to find an avenue to get the issue of the instruction and charging document for the robbery to the appellate court to look at". RP 31. The Court believed the issue was time-barred. RP 35.

The trial court exercised its discretion to deny the motion for a new trial and to forward the motion to this court for its review. RP 28-29 (Nov. 17, 2017). Mr. Rhone filed a notice of Appeal on November 17, 2017. RP 29.

On December 15, 2017, Mr. Rhone filed a motion to reconsider his CrR 7.8 motion for a new trial based on the fact that the trial court never had any authority to sentence Mr. Rhone for a crime not charged. RP 3-4, 15 (December 15, 2017). Superior

Court Judge Edward Murphy indicated this issue “has troubled me for quite a bit”. RP 18 (December 15, 2017). The Court denied the motion and again transferred the matter to the Court of Appeals. RP 18 (December 15, 2017). Mr. Rhone filed a timely notice of appeal. CP 328.

C. ARGUMENTS

1. MR. RHONE WAS DENIED HIS DUE PROCESS RIGHT TO BE INFORMED OF THE CHARGES AGAINST HIM WHERE THE TO-CONVICT INSTRUCTION PERMITTED CONVICTION ON AN UNCHARGED ALTERNATE MEANS FOR COMMITTING ROBBERY IN THE FIRST DEGREE.

The final amended charging document for the robbery charge provided that Mr. Rhone committed the robbery while “armed with a deadly weapon: to-wit, a handgun”. CP 48-50, 114-22. The jury instructions provided Mr. Rhone committed robbery by “displaying what appeared to be a firearm”. CP 65-99. Mr. Rhone was convicted of robbery in the first degree under RCW 9A.56.200(1)(a)(ii) even though the judgment and sentence listed subsection (i)(I). CP 212-230.

The state is required to inform an accused of the criminal

charges to be met at trial, and the state cannot try an accused for an uncharged crime. *In re Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013); *State v. Lindsay*, 177 Wn.2d. 233, 246-67, 311 P.3d 61 (2013). Instructing a jury on an uncharged alternative means violates the defendant's right to be informed of the charges against him. *State v. Laramie*, 141 Wn. App. 332, 343, 169 P.3d 859 (2007) (citing U.S. Const. Amend. VI; Wash. Const. art. I, § 22; *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)).

When the charging information alleges only one alternative means of committing a crime, it is reversible error for the jury to consider other means by which the crime could have been committed. *Brockie*, 178 Wn. 2d at 536; *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

When challenged on direct appeal, a jury instruction that contains uncharged alternative means is presumed prejudicial, and "it is the State's burden to prove that the error was harmless" unless the State can show harmless error. *Brockie*, 178 Wn. 2d at 536, 38-39. An error is harmless only "if 'in subsequent instructions the crime charged was clearly and specifically defined to the jury.'" *Bray*, 52 Wn. App. at 34-35 (quoting *State v. Severns*, 13 Wn.2d

542, 549, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged)); *State v. Nicholas*, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989) (internal citations included).

Robbery in the first degree is an alternative means crime.

RCW 9A.56.200 provides in provides in relevant part:

- (1) A person is guilty of robbery in the first degree if:
In the commission of a robbery or of immediate flight therefrom, he or she:
- (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or
 - (iii) Inflicts bodily injury;

Id.

For first degree robbery, the two alternatives of “displaying what appeared to be a firearm or other deadly weapon” and being “armed with a deadly weapon” are distinct alternative means and are not interchangeable. *Brockie*, 178 Wn. 2d at 538.

In *Brockie*, the court addressed a conviction for first degree robbery where a jury was instructed on the alternative means of being armed with a deadly weapon even though Mr. Brockie was charged only with displaying what appeared to be a deadly weapon. *Brockie*, 178 Wn.2d at 538. Before applying the harmless

error standard, the court held that Mr. Brockie was given notice only on one particular means charged when the state chose to specify that means in the charging document. “Nothing in the charging information put [Mr.] Brockie on notice that he might be charged with the alternative means of first degree robbery while armed with a deadly weapon.” *Brockie*, 178 Wn.2d at 538.

Here as in *Brockie*, Mr. Rhone was only given notice of the alternative means of being armed with a handgun. CP 48-50, 65-99, 114-22. Mr. Rhone was not given notice of displaying what appeared to be a firearm. *Id.* Accordingly, prejudice is presumed. *Brockie*, 178 Wn.2d at 538-39. Distinct from Mr. Rhone’s case, Brockie’s PRP required a higher burden to prove the error was not harmless. Specifically Brockie was required to prove “that more likely than not he was prejudiced by the error.” By contrast, uncharged alternative means cases on direct appeal are presumed to be prejudicial. *Brockie*, 178 Wn. 2d at 539-40. However, even under the standard in *Brockie*, Mr. Rhone establishes that more likely than not he was prejudiced by the error. *Id.*

State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155

(1966) also explains the nature of the error on direct appeal. The Court held that the error in charging an uncharged alternate means of advancing prostitution was prejudicial because:

there is a reasonable possibility that the jury convicted Doogan on the uncharged means of advancing prostitution without ever considering whether, as charged, she profited from prostitution. The uncharged means (advancing) covers a wider range of activity than the charged means, as is shown by the court's instruction that defines the two alternatives:

Doogan, 82. at 189-90, n. 9.

In Mr. Rhone's case, the charging documents charged Mr. Rhone with the alternate means of committing robbery while armed with a hand-gun under (l)(a)(i), but he was not charged under the alternative means he was convicted of in (l)(a)(ii). CP 65-99. The court's instruction to the jury provided that in order to find Mr. Rhone guilty of first degree robbery, it was required to prove beyond a reasonable doubt that Mr. Rhone was armed with "what appeared to be a firearm". CP 65-99.

The trial court committed prejudicial error in instructing the Court under the alternate means because there is a reasonable possibility that the jury convicted Mr. Rhone on the uncharged

means of robbery in the first degree without requiring the jury to determine beyond a reasonable doubt that he was armed with a hand gun. *Brockie*, 178 Wn. 2d at 538-39; *Doogan*, 82. at 189-90, n. 9.

The Court in *Doogan* determined that the defendant was prejudiced in part because the uncharged alternative was broader than the charged alternative. *Doogan*, 82. at 189-90, n. 9. Here too, Mr. Rhone was prejudiced because the uncharged alternative means of displaying what appeared to be a firearm is broader than the charged possession of a hand-gun and covers a wider range of activities. *Id.*

The instruction in Mr. Rhone's case permitted the jury to convict under any range of activities short of being armed with a hand-gun. It is possible to display a toy gun and satisfy the uncharged alternative means of committing robbery in the first degree, but it is not possible to be armed with a handgun for possessing a toy gun. *Brockie*, 178 Wn. 2d at 538. The Washington Supreme Court stated in *Brockie*:

The State asserts that the charging document's phrase "the defendant displayed what appeared to be a firearm or other deadly weapon" could mean either

displaying or being armed with a deadly weapon, since one has to be armed with a weapon in order to display a weapon. But the State's argument fails because one may display what appears to be a deadly weapon without being armed with an actual deadly weapon (such as when a person displays a realistic-looking toy gun)... Similarly, a person may be armed with, but not display, a deadly weapon (such as a gun hidden in a person's pocket). The legislature clearly intended to treat the two alternative means of committing robbery in the first degree as distinct, and the State's reading would improperly collapse the two."

Id.

On this point, Mr. Rhone's case is indistinguishable. The uncharged alternative means relieved the state of proving that Mr. Rhone committed the robbery while armed with a firearm. *Brockie*, 178 Wn.2d at 536.

The unpublished case *State v. Snyder*, 196 Wn. App. 1022 (2017), is also instructive. It provides persuasive authority in support of Mr. Rhone's case. *Snyder* is not cited for precedential value but for persuasive authority this Court may find useful. In *Snyder*, the state conceded error and the Court of Appeals reversed the conviction for robbery in the first degree where the defendant was charged with committing robbery by the alternative means of "unlawfully tak[ing] personal property from a person, against such person's will." Id.

The to-convict instructions provided the following uncharged alternate means for committing robbery in the first degree:

“A person commits the crime of robbery when he or she unlawfully ... takes personal property from the person *or in the presence of another* against that person’s will by the use or threatened use of immediate force.”

Citing *Brockie*, the Court of Appeals presumed the instruction alleging an uncharged alternate means to be prejudicial and reversed and remanded for a new trial. *Snyder*, 196 Wn. App. at 1022.

Here, too, under *Brockie*, *Doogan*, *Bray*, and *Snyder* (*persuasive authority only*) Mr. Rhone was prejudiced by the trial court instructing the jury on the uncharged alternate means where the subsequent instructions did not specifically and clearly define the crime charged to the jury. *Brockie*, 178 Wn.2d at 536; *Severns*, 13 Wn.2d at 549; *Doogan*, 82 Wn. App. at 189; *Bray*, 52 Wn. App. at 34-35.

2. THE TRIAL COURT ERRED BY DETERMINING THAT THE JURY INSTRUCTION ISSUE IS TIME BARRED.

The general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal.” *State v. Fort*, 190 Wn. App. 202, 233-34, 360 P.3d 820 (2015), *review denied*, 185 Wn.2d 1011 (2016) (*citing* RAP 2.5(c); *State v. Suave*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); *State Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011)). This rule applies even when the issue is one of constitutional magnitude. *Mandanas*, 163 Wn. App. 716-17. However, a new issue may be reviewed in a personal restraint petition. *Suave*, 100 Wn.2d at 87.

RAP 2.5(c)(1) also permits review “where the trial court has exercised some discretion.” *Mandanas*, 163 Wn. App. at 716, n. 2.

The rule provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1). The rule “does not revive automatically every issue or decision which was not raised in an earlier appeal.” *State v. Wheeler*, 183 Wn.2d 71, 78, 349 P.3d 820 (2015) (*quoting State v.*

Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)). Since the rule deals with trial court decisions *presently* before the appellate court, it applies “[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue [that] it become[s] an appealable question.” *Id.* Moreover, the rule permits but does not mandate review of unremanded matters, in both the trial court and the appellate court. *Barberio*, 121 Wn.2d at 51.

On November 17, 2017, the trial court reconsidered and denied Mr. Rhone’s motion to vacate his robbery conviction on grounds that he was convicted of an uncharged alternative means of committing that crime. Since the trial court exercised its discretion on this issue, that trial court decision is *presently* before this Court on direct at 50; RAP 2.5(c)(1)(2).

Division Three recently addressed a RAP 2.5(c)(1) issue in the unpublished opinion in *State v. Landrum*, 199 Wn. App. 1037 (2017) (unpublished and presented only for persuasive authority as this Court deems useful). In *Landrum*, the defendant challenged his convictions on direct appeal in addition to sentencing conditions. The Court of Appeals vacated several convictions and

amended the sentence to fit the correct unit of prosecution. Over Landrum's objection the court imposed the same community custody provisions and protection orders. *Landrum*, 199. Wn. App. 1037.

Landrum appealed the sentence and filed a personal restraint petition. The Court of Appeals held that RAP 2.5(c)(1) applied to permit review of Landrum's case because the trial court exercised its discretion when re-imposing the community custody provisions and protection orders.

The Court further held that trial counsel was prejudicially ineffective for failing to challenge the protection orders and community custody provisions that should not have been provided. In Mr. Rhone's case, he unsuccessfully challenged the trial court's re-imposition of imposition of his robbery conviction based on the failure to convict him of a charged crime. This challenge at the trial court level brings this issue before this court under RAP 2.5(c)(1).

Accordingly, Mr. Rhone's challenge to his new judgment and sentence on the robbery charge is properly before this Court.

a. Exception to time bar under RCW 10.73.100

Mr. Rhone's judgment and sentence is invalid on its face.

Facial validity under RCW 10.73.090 depends on whether the court exceeded its substantive authority. The State Supreme Court describes the “valid on its face” language of RCW 10.73.090(1) as “a term of art that, like many terms of art, obscures, rather than illuminates, its meaning.” *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 916, 271 P.3d 218 (2012) (plurality opinion). Courts have “regularly found facial invalidity when the court actually exercised a power it did not have.” *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136 P.3d 267 (2011). However, “the ‘not valid on its face’ limitation of RCW 10.73.090 is not a device to make an end run around the one-year time bar for most errors....” *Coats*, 173 Wn.2d at 144.

In this case, Mr. Rhone’s judgment and sentence is invalid on its face because he was convicted of an uncharged crime. Our court’s permit the reviewing court to look beyond the four corners of the document to determine facial invalidity. *Coats*, 173 Wn.2d at 137. In *Hinton* the Court reviewed Hinton’s charging document and jury instructions to determine that his judgment and sentence was invalid on its face because he was convicted on a non-existent crime. *In re the PRP of Hinton*, 152 Wn.2d 853, 856-57, 561

(2004). In *Coats*, the Court declared that *Hinton* did not stand for the proposition that a defect in a jury instruction could render a judgment invalid on its face. *Coats*, 173 Wn.2d at 140. The Court indicated that the error must fit within RCW 10.73.100. *Coats*, 173 Wn.2d at 140.

Here, Mr. Rhone does not challenge that any specific jury instruction is defective. Rather, he argues that he was convicted of an uncharged crime, specifically provided for in a valid jury instruction that simply did not apply to his case. This is a situation similar to *In re Pers. Restraint Petition of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) where the conviction is in excess of the court's authority because Thompson was not charged with a valid crime. *Thompson*, 141 Wn.2d at 722. In *Thompson*, the defendant pleaded guilty to an offense which occurred before the effective date of the statute creating the offense. *Thompson*, 141 Wn.2d at 725.

In *Thompson*, the prejudice was "so obvious that extensive (or sometimes any) discussion of prejudice was unnecessary." *Coats*, 173 Wn.2d at 142-43. The Court explained that the state may not hold a person responsible for a crime he was

not charged with because that is inconsistent with art. I, § 22 which provides in part: “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him....” Interpreting this proposition we have said.” *Thompson*, 141 Wn.2d at 719. *Accord, Coats*, 173 Wn.2d at 142.

Under this provision, a defendant has the right “to be tried only for offenses charged.” *Thompson*, 141 Wn.2d at 722-23 (quoting *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997)). The Court determined that Thompson was entitled to collateral relief because he was being unlawfully restrained due to “a ‘fundamental defect which inherently results in a complete miscarriage of justice.’” *Thompson*, 141 Wn.2d at 719 (citations omitted). Specifically, the Court found that Thompson’s incarceration for an offense which was not criminal at the time committed, is unlawful and a miscarriage of justice. *Id.*

Here too the Court exceeded its authority by sentencing Mr. Rhone for a crime he was never charged with. Under art. I, § 22, the scrivener setting forth the same subsection in the judgment and sentence after Mr. Rhone was convicted under a different, uncharged alternative means does not cure the defect, *i.e.* that the

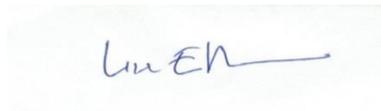
judgment and sentence is invalid on its face under RCW 10.73.090 and therefore not subject to the one-year time limitation. *Thompson*, 141 Wn.2d at 719, 22-23. Mr. Rhone is unlawfully incarcerated for an offense he was not charged with committing. This is unlawful and a miscarriage of justice. *Id.* The remedy here is to reverse and remand for dismissal with prejudice.

D. CONCLUSION

Mr. Rhone respectfully requests this Court reverse and remand for dismissal with prejudice because he was convicted of an uncharged alternative means of committing robbery in the first degree, and the issue is not time-barred because the judgment and sentence is invalid on its face.

DATED this 30th day of May 2018.

Respectfully submitted,

A rectangular box containing a handwritten signature in blue ink that reads "Lise Ellner".

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Theodore Rhone/DOC#708234, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on May 29, 2018. Service was made by electronically to the prosecutor and Theodore Rhone by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

May 30, 2018 - 10:00 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51517-2
Appellate Court Case Title: State of Washington, Respondent v. Theodore Rhone, Appellant
Superior Court Case Number: 03-1-02581-1

The following documents have been uploaded:

- 515172_Briefs_20180530095928D2083266_5453.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Rhone AOB .pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20180530095928D2083266