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No. 53262-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

WARREN M. HELZER,

Appellant.

REPLY BRIEF OF APPELLANT

On Appeal From Pierce County Superior Court
The Hon. Gretchen Leanderson, Presiding
The Hon. Thomas Felnagle, Presiding

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A. ARGUMENT IN REPLY

1. *The State Uses Sarcasm to Mask the Lack of Factual Support for Its Arguments*

The State criticizes Mr. Helzer for filing a 50-page brief with a number of footnotes. *Brief of Respondent* (“BOR”) at 23-24. The State also chooses to spend significant time discussing facts irrelevant to the legal issues at stake, *BOR* at 2-5, and then fills its brief with invective rather than reason. *See, e.g., BOR* at 22 (“If the Defendant had shepardized the case, he would understand that this is not the law.”); *BOR* at 12 (“It is risible to suggest that the Judge Felnagle would have entered an illegal sentence to reduce the penalty for this particular Defendant.”).

While the State’s brief is filled with sarcasm, it then misrepresents critical facts -- facts that are essential to the outcome of the case. In particular, the State claims that in 2010 Judge Felnagle signed a judgment and an order revoking the suspended sentence that “*indicated the minimum term of 130 months*, but failed to mention the maximum term of life which is mandated by RCW 9.94A.507 (formerly RCW 9.94A.712). CP 20, 69.” *BOR* at 6 (emphasis added). The State repeats this language later in its brief:

The error was in the forms. Although the sentencing form used by the court indicates that it is appropriate for use in Special Sexual Offender Sentencing Alternatives, *it failed to provide a section addressing the maximum term*. CP 20. Similarly, the form order which revoked the SSOSA provides *a blank for the court to indicate the minimum term only, not the maximum which is determined by statute*. CP 69.

BOR at 13-14 (emphasis added).

The State appears to be claiming that Judge Felnagle actually imposed a minimum term but that there was some problem with the “forms” that excluded any “blank” for the court to fill in the maximum sentence. In other words, the final judgments and orders included a minimum term of 130 months, but somehow through “oversight resulting from flawed forms” left off the life sentence language. *BOR* at 14. The State’s citations to the record fail to support its creative version of the facts.

For instance, the State cites to “CP 20” to support its position. *BOR* at 6, 13. CP 20 is attached to this brief in Appendix A. A review of that page shows absolutely no mention of the word “minimum term.”

Perhaps the State was referring to CP 25, the operative section of the 2010 judgment that set out the actual term of imprisonment imposed

on Mr. Helzer (attached in App. A). However, this portion of the judgment also fails to support the State's factual assertions:

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(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the county jail or Department of Corrections (DOC):

<u>130</u>	months on Count	<u>II</u>	months on Count
<u>130</u>	months on Count	<u>III</u>	months on Count
<u>130</u>	months on Count	III <u>IV</u>	months on Count
_____	months on Count	_____	months on Count

Actual number of months of total confinement ordered is: 130 Months

Nothing on this page of the judgment says anything about minimum terms, and in fact the operative language clearly describes a determinate sentence -- that the "term of total confinement in the custody of the . . . Department of Corrections" is "130 months" and the "[a]ctual number of months of total confinement" is "130 months." The State fails to explain how this language supports, in any way, the assertion that Judge Felnagle actually imposed a *minimum* term.

The State also cites to CP 69, which the State claims contains "a blank for the court to indicate the minimum term only." *BOR* at 13. Again, a review of the actual document (App. A) fails to support the State's description of the order:

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IT IS HEREBY ORDERED, ADJUDGED and DECREED that the suspended standard range sentence be revoked pursuant to RCW 9.94A.670 and 9.94A.505, and the defendant committed to the Department of Corrections for a period of 130 months.

☐ The Defendant is additionally sentenced to a term of Life year(s) community placement; see Appendix F attached hereto and incorporated by reference.

Nothing about this document which committed Mr. Helzer to DOC for “a period of 130 months” specifically mentions the words “minimum term.” There is no “blank” on the “form” indicating the “minimum term only.” Rather, the order unquestionably committed Mr. Helzer to the Department of Corrections “for a period of 130 months.”

The rest of the State’s arguments flow from its misrepresentations of the record -- that somehow Judge Felnagle actually imposed a minimum term of 130 months but failed to impose the maximum of life because of a clerical error (because of “faulty forms”), such that the “clerical” error could be corrected at any time simply by inserting the maximum term onto the judgment. Yet, Judge Felnagle clearly imposed a 130-month determinate sentence on Mr. Helzer, and, even if this was a legal error, the State waited too long to correct it. Whether this was “intentional” or not has no significance.¹

¹ The State claims: “The Defendant argued that Judge Felnagle had intentionally imposed an illegal, determinate sentence. CP 202.” *BOR* at 6. Again, a review of the actual document, CP 202, fails to support the State’s claims. While Mr. Helzer did state “Judge Felnagle actually imposed *a determinate sentence of 130 months in prison* on Mr. Helzer in 2010,” CP 202 (emphasis in original), Mr. Helzer never argued that Judge Felnagle had “intentionally imposed an illegal, determinate sentence.”

2. *At Most Judge Felnagle Committed a Legal Error, not a Clerical Error*

a. The Correct Standard of Review is *De Novo*

The State chides Mr. Helzer for citing “public records” cases, and argues for an abuse of discretion standard of review because “[t]he trial court is in the best position to recognize its own procedures, routines, and habits in order to interpret its own intent.” *BOR* at 7-8. Of course, the “trial court” here was not Judge Felnagle but another judge almost a decade later and the State opted not to put on any testimonial evidence related to the “procedures, routines, and habits” of Judge Felnagle’s court in 2010. While the prosecutor who argued the case below made reference to Judge Leanderson’s purported experience with special assault cases, RP (4/12/19) 4,² no evidence was actually introduced about anyone’s knowledge or experience with Judge Felnagle’s court in 2010.

Because the State did not call any live witnesses to support its position, this Court is left with the same documentary record that the trial

² The State seems to think a deputy prosecutor’s simple assertion during its legal argument is a substitute for evidence. In any case, it is irrelevant to this case whether Judge Leanderson, who became a judge in November of 2014 (<https://www.atg.wa.gov/news/news-releases/gov-inslee-announces-appointment-gretchen-leanderson-pierce-county-superior-court>), had been “preassigned sometime to SAU cases exclusively.” RP (4/12/19) 4.

court had before it. While there are civil cases that have held that where there is only a documentary record, then “on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo,” *Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969), this principle is not unique to the civil realm. For instance, Mr. Helzer cited in his opening brief to the criminal case, *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014). *BOA* at 12 n.4. The State chooses to ignore this case (presumably so it could attack Mr. Helzer for supposedly only citing civil cases).

Kipp was a child sex case involving review of a trial court’s Privacy Act (RCW 9.73.030) ruling. Our Supreme Court specifically relied on civil cases, including cases cited by Mr. Helzer, to hold that *de novo* review was proper where there were no credibility determinations made by the trial court:

The general rule is that “where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate.” *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003)). In contrast,

“where ... the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and

to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.”

Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (quoting *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969)); see also *State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980) (where the trial court’s findings stem exclusively from the stipulation and attached standards rather than from the testimony of witnesses, this court is not bound by the findings). The rule that undisputed evidence may be decided as a matter of law and reviewed de novo is entirely consistent with this general rule.

State v. Kipp, 179 Wn.2d at 727.³ The State’s brief fails to address these settled principles of law.

Additionally, the lack of any testimony below should lead this Court to ignore any conclusions, not supported by citation to the record, about standard practices -- that Judge Leanderson “would know that defense attorneys prepare the plea papers,” *BOR* at 9, or that “[d]uring that discussion, counsel crosses out inapplicable paragraphs, and the defendant initials the strike marks.” *BOR* at 10. While perhaps the State could have called witnesses as to such standard practices, it did not do so.

³ See also *State v. Dearbone*, 125 Wn.2d 173, 178-79, 883 P.2d 303 (1994); *State v. Wood*, 45 Wn. App. 299, 311, 725 P.2d 435 (1986).

In any case, none of this is particularly pertinent as Mr. Helzer has not moved to withdraw the guilty plea because of a misunderstanding of the consequences of a conviction. Rather, the issue is whether the documentary evidence supports the State's claim of a clerical mistake. It does not.

b. The State Did Not Meet Its Burden of Proving a Clerical, Rather Than a Legal, Error

Because the State misrepresents the facts as to the content of the orders that Judge Felnagle actually signed, the State simply argues that there was a "clerical" error when Judge Felnagle failed to include the maximum sentence of life. Yet, nowhere does the State point out where in the record, at the time of sentencing or at the time of revocation of the suspended sentence, that Judge Felnagle specifically stated he was committing Mr. Helzer to DOC for life with a minimum sentence of 130 months. If this is what actually took place, and that the "faulty forms" failed to reflect the maximum of life and the minimum term that Judge Felnagle specifically imposed, then there would be a clerical error.

Of course, there is nothing in the record to support the State's claims and even the State at one point recognizes the truth: "The court imposed 130 months, suspending all but six months." *BOR* at 5.

Because there is nothing in the record that supports the State's claims that Judge Felnagle said one thing orally, but because of "faulty forms," did another in writing, the State cannot meet its burden of proving a clerical error. Even the cases relied on by the State make it clear that the issue is not a judge's unexpressed subjective intentions or historic experience in other cases. Rather, "[c]lerical errors are those that do not embody the trial court's intention *as expressed in the trial record.*" *BOR* at 8 (quoting *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016)) (emphasis added).

Whether Judge Felnagle simply made a legal error or whether there was a clerical error is determined not by whether a particular judge was "experienced," *BOR* at 13, or whether he possessed a motivation to treat Mr. Helzer harshly (i.e. that he would never have wanted to impose a determinate sentence on Mr. Helzer in particular, *see BOR* at 12).⁴ Rather,

⁴ It also does not matter whether the State (or Judge Leanderson) believes that Mr. Helzer received a "pretty sweet deal." *BOR* at 19. The State too received a "sweet deal" as its case was weakened by its reliance of Mr. Helzer's own statements, and there could
(continued...)

the issue is what was “expressed in the trial record” and here the State failed to show evidence in the record of the sentencing hearing to support its claims.

The fact that the guilty plea statement had an arrow next to a paragraph or that in one report the DOC presentence investigator spoke of an indeterminate sentence is irrelevant to this determination. Of course, Mr. Helzer can point to other roughly contemporaneous documents where the DOC, for instance, believed that Mr. Helzer had a determinate 130 month sentence. CP 293 (noting termination date of sentence (6/5/20)); CP 328 (“He was sentenced to 130 months and community placement of Life but there is no reference to a minimum and maximum term.”). But none of that matters given the unambiguous language on the judgment, and the lack of any indication in the trial record that the judge said something else at the time of the entry of the orders, but that there was simply a scrivener’s error in the recording of the judge’s orders.

⁴(...continued)
have been significant *corpus delicti* issues at trial. Mr. Helzer’s guilty plea allowed the State to obtain convictions without having to bring in children to testify about what they believed may or may not have occurred up to a decade or so earlier.

3. *Double Jeopardy and Due Process Were Violated*

The State's argument regarding double jeopardy is tied to its misrepresentation of the record -- that Judge Felnagle imposed a life sentence with a minimum term of 130 months but that somehow "faulty forms" failed to reflect his ruling. Of course, as noted, nothing of the sort took place.

Thus, there is little significance to the State's discussion about whether Mr. Helzer "knew" the legal consequences of a conviction, such as its repeated reference to the DOC presentence report. *BOR* at 8-9. But Mr. Helzer has not moved to withdraw the guilty plea; whether he "knew" the legal consequences of conviction before he plead guilty is not pertinent.

Rather, the issue is when Judge Felnagle imposed the determinate sentence, did Mr. Helzer have a legitimate expectation of finality once the State failed to file an appeal of the sentence, DOC never filed a motion to correct the sentence, and the February 2010 judgment became final.⁵ Because there was no appeal, the State's citations at pp. 16-17 of its brief

⁵ The State errs when it argues that the February 2010 judgment became final when the mandate from Mr. Helzer's appeal of the revocation of the suspended sentence issued on June 2, 2012. *BOR* at 21. The February 2010 judgment became final when neither side appealed it long before the revocation hearing took place.

to *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011), *State v. Freitag*, 127 Wn.2d 141, 896 P.2d 1254 (1995), *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987), are not on point. In each of those cases, there was no double jeopardy violation because of the pendency of timely filed appeals, either the State's (*Freitag* and *Pascal*), or the defendant's (*Mutch*). The existence of such appeals meant that jeopardy had not been terminated. See *United States v. DeFrancesco*, 449 U.S. 117, 131-38, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); *State v. Ervin*, 158 Wn.2d 746, 757-59, 147 P.3d 567 (2006). In contrast, the State and DOC did not take advantage of mechanisms to seek review of the sentences within 30 days of judgment under RAP 2.2(b) (for the State) or within 90 days of learning of an illegal sentence under RCW 9.94A.585(7) and RAP 16.18(b) (for DOC). For Mr. Helzer, the February 2010 judgment became final and jeopardy terminated almost a decade ago.

United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), cited by the State, is also not on point. This was a case where a judge “inadvertently transposed the sentences he had intended to impose” and corrected the error within a “few hours.” *Id.* at 221. Correcting a sentence shortly after a mistake has been made is very different than waiting until

the person has served most of the sentence and then changing it shortly before the person is about to be released.

In this regard, while the State discusses cases like *State v. Hall*, 162 Wn.2d 901, 177 P.3d 680 (2008), and *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080, *BOR* at 15-16, it does not adequately distinguish them. The fact remains is that when the State took no action to try to change the judgment for almost a decade, Mr. Helzer did have a legitimate expectation of finality. His expectation was no less than that enjoyed by Mr. Hall who was serving prison time for a conviction of a non-existent crime (felony murder based on a second degree assault). And while the State loudly proclaims that only *it* has an expectation of finality in a judgment because it has the burden of proof in the event of a retrial,⁶ noticeably the State gives no citation to authority for its assertion that even defendants in prison serving long sentences for intra-familial sex offenses have not right to repose. Since the State does not cite to authority for this proposition, the Court can assume there is none. *See Lodis v. Corbis*

⁶ Using bold italics and citing to the purported diminution of “the witnesses’ motivation, desire for accountability, and outrage,” *BOR* at 18-19, as if these factors do not exist on the defense side as well.

Holdings, Inc., 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (failure to cite to authority is concession that argument lacks merit).

Here, the State waited almost a decade to bring its motion -- with no explanation for this delay other than attorney error in 2010. It waited until shortly before Mr. Helzer had just about fully served the determinate sentence imposed on him in 2010; it waited until Mr. Helzer gave up various options for post-conviction relief and appeals, a petition for review to the Supreme Court, a petition for a writ of *certiorari* to the U.S. Supreme Court or a petition under 28 U.S.C. § 2554. Whether Mr. Helzer “knew” that he originally faced an indeterminate sentence is not the issue. Rather, the issue was whether once Judge Felnagle unambiguously imposed a determinate sentence, does double jeopardy prevent the State from increasing this sentence (even for a supposed clerical error) a decade later, shortly before the release date?

Again, if Mr. Hall was serving time on a facially invalid judgment (for a crime that did not exist), and the State was precluded from collaterally attacking that judgment shortly before his release from custody, the same principle applies here. Due process and double jeopardy, under the Fifth and Fourteenth Amendments and article I,

sections 3 and 9, prevent changing Mr. Helzer's sentence when he had just about served the prison term previously ordered.

4. *The State's Collateral Attack Petition Was Time-Barred*

In his opening brief, Mr. Helzer noted older authorities which allowed for the correction of sentences at any time. *AOB* at 26 & n.18. He did not, as the State once again misrepresents, "argue[] those authorities should be set aside" or that "this Court should revise the court rule." *BOR* at 17. Mr. Helzer did argue that the older authorities needed to be measured against the Legislature's and the Supreme Court's adoption of very specific time limits for the State or DOC to change sentences after they have been entered.

Prior to 1989, there were no time limits for filing collateral challenges to sentences. When the Legislature adopted time limits for collateral attacks on judgments (both the State's and a defendant's),⁷ it meant to supersede common law allowing challenges to sentencing errors essentially at any time. *See In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 202-03, 963 P.2d 903 (1998). The goal was to "streamline

⁷ In 1989, in the same term, the Legislature adopted both RCW 10.73.090 (Laws of 1989, ch. 395) and RCW 9.94A.585(7) (Laws of 1989, ch.214), which evidences a continuity of purpose between the two statutes, designed promote finality of judgments.

collateral review of judgments and sentences. . . as long as the scope of relief afforded is not constricted beyond the boundaries required by our constitution.” *Id.* at 203. Thus, it is appropriate to view the older cases, cited by the State, in light of subsequent legislative intent, as seen through the adoption in 1989 of RCW 10.73.090 and RCW 9.94A.585(7), to curtail endless litigation decades after a criminal judgment becomes final.⁸

The State argues that the judgment here was “invalid on its face,” and thus the time-bar of RCW 10.73.090 should not apply. *BOR* at 18. This was not an argument that the State raised in its original motion below, CP 136-144, and may have waived it. *See AOB* at 18 n.9. An argument that a judgment is facially invalid because of a judge’s legal error in setting the sentence is not the same as a request for relief under CrR 7.8(a) because of a scrivener’s or clerical error. This argument must be evaluated under the criteria of CrR 7.8(b) and the State fails to note which category of CrR 7.8(b) its motion fits under.

⁸ “Finality advances values ‘essential to the operation of our criminal justice system.’ *Teague v. Lane*, 489 U. S. 288, 309, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion). It promotes the law’s deterrent effect; it provides peace of mind to a wrongdoer’s victims; it promotes public confidence in the justice system; it conserves limited public resources; and it ensures the clarity of legal rights and statuses.” *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 785, 197 L. Ed. 2d 1 (2017) (Thomas, J., dissenting).

In any case, it is not clear that the original judgment was “invalid on its face,” it having been used by the State to lock Mr. Helzer up behind concrete walls and barbed wire for nearly a decade. “[A] judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith.” *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) (internal quotes and citations omitted).⁹

But even where a judge may have imposed an illegal sentence,¹⁰ the State, if proceeding under CrR 7.8(b) rather than CrR 7.8(a), still needed to file its collateral attack petition within a “reasonable time” and within one year for motions under CrR 7.8(b)(1) (mistakes).¹¹ The State offers no explanation how its motion, filed almost a decade after the judgment became final, was filed within a “reasonable” time.

⁹ See also *In re Pers. Restraint of Richey*, 162 Wn.2d 865, 872, 175 P.3d 585 (2008) (“[A] sentence is not jurisdictionally defective merely because it is in violation of a statute or is based on a misinterpretation of a statute.”) (construing RCW 10.73.100(5)).

¹⁰ See *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 135-40, 267 P.3d 324 (2011).

¹¹ CrR 7.8(b) provides in part:

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140.

Pro se prisoners, some who may be illiterate or suffering from mental health concerns, often are time-barred from filing meritorious post-conviction petitions because they waited too long. See, e.g., *In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 445-49, 309 P.3d 459 (2013) (court denies PRP, despite meritorious suppression issue, because ineffectiveness claim was not timely raised by pro se prisoner before the one-year time). When it is the State that waits too long to file for relief, the courts should evenhandedly apply the same rules, particularly where the State's interests do not involve the vindication of constitutional rights.

5. The State Breached the Plea Agreement

The State argues: "The prosecutor's recommendation addressed those aspects of the sentence over which the court had discretion, e.g. the minimum term of confinement. CP 10." BOR at 20. Again, the State is very creative with the facts. CP 10 has no language regarding the "minimum term of confinement," as the State claims:

- (g) The prosecuting attorney will make the following recommendation to the judge:
- The following is an agreed recommendation of the parties: SSOSA, 130 months incarceration with 124 months suspended on following conditions: \$500 CUPA, \$200 Filing Fee, \$100 DNA, Restriction by later order of Court, NCOs with victims, Appendix "G" and "H," and all conditions as imposed by the Court, CCO, SSOSA Treatment Provider (Maureen Saylor).

The State recommended “130 months incarceration with 124 months suspended.” The State did not recommend a minimum term of 130 months.

As noted above, the State received significant benefits when Mr. Helzer’s agreed to give up his constitutional rights and plead guilty. The State cannot reap the benefits of this agreement and then 10 years later change its recommendation and ask the trial court (and this Court) to impose a life sentence with a 130-month minimum term simply because it thinks it made a mistake. The State’s breach of this plea agreement violates Mr. Helzer’s due process rights under the Fourteenth Amendment and article I, section 3. *See State v. MacDonald*, 183 Wn.2d 1, 8-9, 346 P.3d 748 (2015).

6. *Challenges to Illegal Sentencing Conditions Are Appropriately Raised in this Appeal*

Even though the State has openly violated its plea agreement with Mr. Helzer, it asks Mr. Helzer to trust its good intentions: “And it is highly unlikely that the State will enforce conditions which are in conflict with new case law.” *BOR* at 23. The State has demonstrated hostility toward Mr. Helzer, not only by its desire to increase the punishment inflicted on him a decade after the judgment became final, but also by the sarcastic and

vituperative tone of its entire briefing. There is no reason why Mr. Helzer should trust that the State will do the right thing at some future hearing, perhaps decades from now, if Helzer is brought to court in shackles after being arrested for accessing the Internet.

Apart from the fact that many of the sentencing conditions are in fact illegal on their face and thus Mr. Helzer can challenge them at any time (as the State itself has argued), Mr. Helzer can challenge the 2010 sentencing conditions in this direct appeal because the State's collateral attack petition reopened his ability to do so. Despite the State's claim that *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985) ("*Smissaert I*"), somehow was impacted by *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011), the case is actually on point.¹²

In *Smissaert I*, the Supreme Court upheld the modification of a criminal judgment, which changed the maximum term of imprisonment from 20 years to life. The State sought this modification two years after

¹² It is rather shocking that the State would accuse counsel of violating RPC 3.3 by citing and discussing *Smissaert*, when it cites this case itself earlier in its brief, without noting that it had been overruled, even on other grounds. *BOR* at 7. While the State may have a different view of the interplay of *Smissaert* and *Coats*, it is a bit extreme to claim the lawyer for an opposing party is unethical by not agreeing with the State's view of the law. As Justice Alexander once wrote, personalized *ad hominem* on lawyers for the parties are "inappropriate and irrelevant." *State v. Davis*, 175 Wn.2d 287, 338 n. 22, 290 P.3d 43 (2012), *overruled on other grounds State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

the judgment was entered. Even though the defendant had not appealed the original judgment, he appealed the judgment after the modification, raising issues relating back to the original trial. *Smisssaert I*, 103 Wn.2d at 638.

The Supreme Court upheld the modification but also recognized that the defendant's right to appeal, protected under article I, section 22, required restoration of the defendant's appeal of the judgment. *Smisssaert I*, 103 Wn.2d at 642-43. Mr. Smisssaert then raised in the Court of Appeals a series of trial errors from the original jury trial, involving the admission of expert testimony and the scope of impeachment, although he lost on the merits. *State v. Smisssaert*, 41 Wn. App. 813, 706 P.2d 647 (1985) ("*Smisssaert II*").

When one "Shepardizes" *Smisssaert I*, which the State unfairly accuses Mr. Helzer of not doing, the case is not listed as having been overruled. "Shepards" reveals that the case was "distinguished" in *Coats*. In that latter case, a defendant was convicted of murder in 1995 and then filed a PRP 14 years later to try to withdraw his guilty plea, and argued that because the judgment contained the wrong maximum term for one of

Coats' convictions, the judgment was facially invalid and he could withdraw his plea. *Coats*, 173 Wn.2d at 125-28.

The Supreme Court rejected this argument:

Coats notes that “[s]entencing provisions outside the authority of the trial court have historically been described as ‘illegal’ or ‘invalid.’” Suppl. Br. at 3 (quoting *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985)). Citing *Smissaert*, he suggests that an invocation of an invalid or illegal power is enough to render a judgment facially invalid. *Id.* The citation is not well taken. *Smissaert* was convicted of first degree murder. 103 Wn.2d at 638. Under the old indeterminate sentencing schema, the trial judge sentenced Smissaert to a maximum of 20 years in prison. Smissaert did not appeal, and some years later, the Board of Prison Terms and Paroles informed the court that it had erred and Smissaert should have been given a life sentence. *Id.* The trial court corrected the judgment nunc pro tunc, and Smissaert promptly appealed. The Court of Appeals held that Smissaert had waived his right to appeal by not challenging the original judgment and sentence. *Id.* This court reversed, holding that while the trial court had the “power and duty to correct an erroneous sentence,” it should not have corrected the judgment nunc pro tunc, effectively depriving Smissaert of his constitutional right to appeal. *Id.* at 639, 643. But *Smissaert* was not, properly speaking, a collateral review case. *It was a timely challenge to a trial court's judgment and sentence, albeit one that the trial judge had attempted to backdate.* Furthermore, like the cases surveyed above, Smissaert’s judgment and sentence showed the judge exercised an authority he did not have: to actually render a sentence the law did not allow. It does not stand for the proposition that any error on the face of the judgment and sentence opens the door to an otherwise time barred challenge.

Coats, 173 Wn.2d at 136-37 (emphasis added).¹³

This discussion supports Mr. Helzer, not the State. Once the trial court here reached back into history and changed the judgment, *nunc pro tunc*, increasing the sentence to life, Mr. Helzer, like Mr. Smissaert, had a constitutional right to file an appeal of the 2010 judgment under article I, section 22. As noted, Mr. Smissaert raised trial errors in his direct appeal, which had nothing to do with the reason why the trial court changed his judgment. *See Smissaert II, supra*. Similarly, here, if the trial court's *nunc pro tunc* change to the judgment is allowed to stand, Mr. Helzer has a constitutional right to appeal all aspects of that judgment, even those he opted not to challenge in 2010 (because perhaps he did not want to disturb the finality of that judgment).

The State further argues that Commissioner Bearse's May 20, 2019, ruling regarding appealability somehow prevents Mr. Helzer from raising issues connected to 2010 judgment. *BOR* at 21-22. The State argues that Commissioner Bearse's ruling that "[t]his court agrees with the parties" was dispositive, citing to its own argument that it "only agreed that the order at CP 374-75 was appealable, not orders entered in and

¹³ Mr. Smissaert did not raise any issues involving double jeopardy, nor was there a statutory time-bar issue.

undisturbed since 2010.” *BOR* at 22. The State again thinks that it is the only party whose opinion matters. Mr. Helzer had actually argued:

when a court retroactively changes a judgment to correct a purported error, “correction of the sentence should reopen the opportunity to appeal the original judgment.” *State v. Smissaert*, 103 Wn.2d 636, 643, 694 P.2d 654 (1985). This is required by the aforementioned constitutional right to appeal under article I, section 22. *Id.* at 643.

Appellant’s Response Regarding Appealability (5/15/19), at 6. So when the Commissioner “agreed” with the parties, it is just as likely she was agreeing with Mr. Helzer’s argument that allowed him to appeal the original judgment than agreeing with the State’s narrow view of the law.

Accordingly, because the State has not responded substantively to any of the community custody arguments and because it seems to admit that many of the conditions are illegal, the Court should strike the challenged conditions. *But see State v. Wallmuller*, 194 Wn.2d 234, 449 P.3d 619 (2019) (reversing this Court’s decision striking down condition of avoiding “places where children congregate”).

B. CONCLUSION

For the foregoing reasons, and those set out in the opening brief, this Court should reverse the trial court's decision to change Mr. Helzer's sentence or the Court should strike the illegal sentence conditions.

Dated this 20th day of December 2019

Respectfully submitted,

s/ Neil M. Fox

WSBA NO. 15277

Attorney for Appellant

APPENDIX A

which may include electronic monitoring.

For sex offenses committed on or after March 20, 2006:

For the following offenses and special allegations, the minimum term shall be either the maximum of the standard sentence range for the offense or 25 years, whichever is greater:

1) If the offense is rape of a child in the first degree, rape of a child in the second degree or child molestation in the first degree and the offense includes a special allegation that the offense was predatory.

2) If the offense is rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation and the offense includes special allegation that the victim of the offense was under 15 years of age at the time of the offense.

3) If the offense is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation and this offense includes a special allegation that the victim of the offense was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult.

Community Custody Violation:

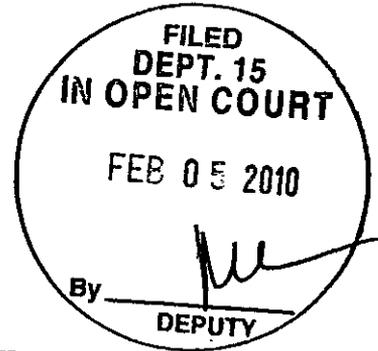
If I am subject to a first or second violation hearing and the Department of Corrections finds that I committed the violation, I may receive as a sanction up to 60 days of confinement per violation. If I have not completed my maximum term of total confinement and I am subject to a third violation hearing and the Department of Corrections finds that I committed the violation, the Department of Corrections may return me to a state correctional facility to serve up to the remaining portion of my sentence.

- (g) The prosecuting attorney will make the following recommendation to the judge:
The following is an agreed recommendation of the parties: SSOSA, 130 months incarceration with 124 months suspended on following conditions: \$500 CUPA, \$200 Filing Fee, \$100 DNA, Restriction by later order of Court, NCOs with victims, Appendix "G" and "H," any, and all conditions as imposed by the Court, CCO, SSOSA Treatment Provider (Maureen Saylor).

The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.

- (h) **The judge does not have to follow anyone's recommendation as to sentence.** The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:
 - (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
 - (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more

09-1-00111-3



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NCO

FEB 08 2010

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 09-1-00111-3

vs.

JUDGMENT AND SENTENCE (FJS)

WARREN HELZER

Defendant.

- Prison RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: UNKNOWN
DOB: 05/29/1962

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 12/14/2009 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
II	CHILD MOLESTATION IN THE FIRST DEGREE (139)	9A.44.083		11/10/01-11/09/03	082470300 PCSD
III	CHILD MOLESTATION IN THE FIRST DEGREE (139)	9A.44.083		11/10/01-11/09/03	082470300 PCSD
IV	CHILD MOLESTATION IN THE FIRST DEGREE (139)	9A.44.083		6/23/03-06/23/05	082470300 PCSD

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page 1 of

10-9-01699-7

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

09-1-00111-3

4.5 SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE. RCW 9.94A.670. The court finds that the defendant is a sex offender who is eligible for the special sentencing alternative and the court has determined that the special sex offender sentencing alternative is appropriate. The defendant is sentenced to a term of confinement as follows:

(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the county jail or Department of Corrections (DOC):

<u>130</u>	months on Court	<u>II</u>	months on Court
<u>130</u>	months on Court	<u>III</u>	months on Court
<u>130</u>	months on Court	III <u>IV</u>	months on Court
_____	months on Court	_____	months on Court

Actual number of months of total confinement ordered is: 130 Months

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently to all felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.

[] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 51 days

(d) SUSPENSION OF SENTENCE. The execution of this sentence is suspended; and the defendant is placed on community custody under the charge of DOC for the length of the suspended sentence or three years, whichever is greater, and shall comply with all rules, regulations and requirements of DOC and shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. Community custody for offenses not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody may result in additional confinement. The defendant shall report as directed to a community corrections officer, pay all legal financial obligations, perform any court ordered community restitution (service) work, submit to electronic monitoring if imposed by DOC, and be subject to the following terms and conditions or other conditions that may be imposed by the court or DOC during community custody:

Undergo and successfully complete an outpatient [] inpatient sex offender treatment program with

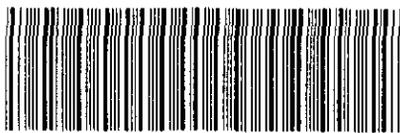
Maureen Saylor
for a period of 3-5 Years

Defendant shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, community corrections officer and the court and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change.

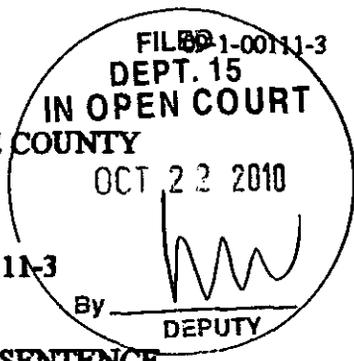
Serve 6 ~~days~~ months of total confinement. Work Crew and

Electronic Home Detention are not authorized. RCW 9.94A.725, 734.

[] Obtain and maintain employment: _____



09-1-00111-3 35263450 ORRSS 10-25-10



JRT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 09-1-00111-3

vs.

WARREN MATTHEW HELZER,

Defendant.

ORDER REVOKING SENTENCE

OCT 25 2010

THIS MATTER coming on regularly for hearing before the above entitled court on the petition of GRANT E. BLINN, Deputy Prosecuting Attorney for Pierce County, Washington, for an order revoking sentence heretofore granted the above named defendant on February 5, 2010, pursuant to defendant's plea of guilty to/trial conviction for the charge(s) of CHILD MOLESTATION IN THE FIRST DEGREE; CHILD MOLESTATION IN THE FIRST DEGREE; CHILD MOLESTATION IN THE FIRST DEGREE, the defendant appearing in person and being represented by Barry Flegenheimer, defendant's attorney, and the State of Washington being represented by Tim Lewis, Deputy Prosecuting Attorney for Pierce County, Washington, the court having examined the files and records herein, having read said petition, and hearing testimony in support thereof/defendant having stipulated to the violation(s), and it appearing therefrom that the defendant has, by various acts and deeds, violated the terms and conditions of said sentence and the court being in all things duly advised, Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the suspended standard range sentence be revoked pursuant to RCW 9.94A.670 and 9.94A.505, and the defendant committed to the Department of Corrections for a period of 130 months.

The Defendant is additionally sentenced to a term of Life year(s) community placement; see Appendix F attached hereto and incorporated by reference.

IT IS FURTHER ORDERED:

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On December 20, 2019, I served a copy of the REPLY BRIEF OF APPELLANT on counsel for the Respondent by filing this brief through the Portal and thus a copy will be delivered electronically.

I am also serving a copy of this brief on the appellant, by having a copy deposited into the U.S. Mail (on 12/20/19) in an envelope with proper first class postage affixed addressed to:

Warren Helzer
224 Ave. E
Snohomish, WA, 98290

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

Dated this 20th day of December 2019, at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

December 20, 2019 - 10:24 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53262-0
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Superior Court Case Number: 09-1-00111-3

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