

**FILED
Court of Appeals
Division II
State of Washington
7/31/2019 10:34 AM**

NO. 53418-5-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LONNIE TENNANT,

Appellant.

RESPONSE TO PERSONAL RESTRAINT PETITION

**THOMAS A. LADOUCEUR
W.S.B.A #19963
Chief Criminal Deputy Prosecutor**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION.....	1
II. AUTHORITY FOR RESTRAINT	1
III. PROCEDURAL HISTORY	2
IV. ASSERTED GROUNDS FOR RELIEF	2
V. CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
<i>In re Pers. Restraint of Colbert</i> , 186 Wash.2d 614, 380 P.3d 504 (2016).....	3
<i>In re Pers. Restraint of Lavery</i> , 154 Wash.2d 249, 111 P.3d 837 (2005).....	4, 5
<i>In re Pers. Restraint of Turay</i> , 150 Wash.2d 71, 74 P.3d 1194 (2003)	3
<i>Matter of Canha</i> , 189 Wash. 2d 359, 402 P.3d 266, 273 (2017).....	5, 6
<i>State v. Garrison</i> , 189 Wash. App. 1053 (2015)	6
<i>State v. Marquette</i> , 431 P.3d 1040, 1043 (Wash. Ct. App. 2018), <u>review denied</u> , 193 Wash. 2d 1007, 438 P.3d 116 (2019).....	5
<i>State v. Miller</i> , 185 Wash.2d 111, 371 P.3d 528 (2016).....	3
<i>State v. Morley</i> , 134 Wash. 2d 588, 952 P.2d 167, 175 (1998)	4, 5, 6
<i>State v. Webb</i> , 183 Wash. App. 242, 333 P.3d 470 (2014).....	2, 6, 7

Statutes

RCW 9.94A.525..... 6
RCW 9.94A.525(3)..... 6
RCW 9.94A.570..... 1
RCW 10.73.100 2, 3

Court Rules

GR 14.1 5

I. INTRODUCTION

Lonnie Tennant has petitioned this Court for release from personal restraint. Petitioner was sentenced to life as a persistent offender. One of his prior strike offenses is a 1982 Missouri conviction for assault. On direct appeal he challenged the finding that this conviction was comparable to the Washington crime of second degree assault. The Court of Appeals affirmed the comparability finding and his sentence in an unpublished opinion in 2003. He now asserts that the law has changed since that decision. The State responds that the law has not changed and his petition is time-barred. The Court should deny this petition.

II. AUTHORITY FOR RESTRAINT

Petitioner was convicted at trial of three counts: rape of a child in the second degree, child molestation in the second degree, and rape in the second degree. Counts I and III are class A felonies punishable by confinement in a state correctional institution for a term of life imprisonment. Count II is a class B felony and punishable by imprisonment in a state correctional institution for ten years. On June 18, 2002 petitioner was sentenced as a persistent offender, under RCW 9.94A.570, to life in prison without the possibility of early release.

III. PROCEDURAL HISTORY

After a three day trial, the jury found the petitioner guilty on April 10, 2002 of all counts. Subsequently, the trial court sentenced him to life in prison without the possibility of early release, pursuant to the Persistent Offender Act. The petitioner filed his direct appeal with the Court of Appeals in December, 2002. A pro se supplemental brief was filed in March, 2003. On December 3, 2003 the Court denied the appeal. *State v. Tennant*, 119 Wn.App. 1038 (2003) (unpublished decision).

The petitioner then petitioned the Supreme Court for review, but was denied on July 7, 2004. *State v. Tennant*, 151 Wn.2d 1038, 95 P.2d 351 (2004) (table). Following denial of the petition for review, this court's mandate became effective on July 7, 2004. He filed a personal restraint petition on June 21, 2005, which was denied. He filed the instant personal restraint petition on April 8, 2019. As this petition was filed more than one year after the judgment becoming final, it is untimely. RCW 10.73.100.

IV. ASSERTED GROUNDS FOR RELIEF

Petitioner argues *State v. Webb*, 183 Wash. App. 242, 333 P.3d 470 (2014) changed the law in a material way and is retroactive. The State replies that *Webb* was not a significant change in the law, it did not

overturn established precedent, and it simply applied settled law to different facts. As such the petition is untimely.

A petitioner can overcome the one-year time bar under RCW 10.73.100(6) if he can identify “(1) a [significant] change in the law (2) that is material and (3) that applies retroactively.” *In re Pers. Restraint of Colbert*, 186 Wash.2d 614, 619, 380 P.3d 504 (2016). A “significant change in the law” occurs “when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue.” *State v. Miller*, 185 Wash.2d 111, 114, 371 P.3d 528 (2016). An “intervening appellate decision that ‘settles a point of law without overturning prior precedent’ or ‘simply applies settled law to new facts’ does not constitute a significant change in the law.” *Id.* at 114-15, 371 P.3d 528 (quoting *In re Pers. Restraint of Turay*, 150 Wash.2d 71, 83, 74 P.3d 1194 (2003)).

In *Webb* defendant was found guilty of second degree assault, domestic violence and was sentenced to life without the possibility of release. One of his prior strikes was a 1982 conviction for second degree assault in Washington. On appeal the court held that the 1982 assault statute is broader than the current second degree assault statute, because grievous bodily harm is broader than substantial bodily harm. The Court

did not address whether the same mens rea was required to violate each version of the statute.

The long-standing rule when comparing an out-of-state conviction to a potential Washington most serious crime is to compare the elements of the out-of-state statute to those of the comparable Washington statute *in effect when the out-of-state crime was committed*. In *State v. Morley*, 134 Wash. 2d 588, 605–06, 952 P.2d 167, 175 (1998), the court wrote, “To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed (internal citations omitted).”

This rule has been applied after the *Webb* case. In *Matter of Canha*, 189 Wash. 2d 359, 372, 402 P.3d 266, 273 (2017), the court specifically compared a California crime to the Washington statute **in effect when the out-of-state crime was committed**. “In 1991, Canha pleaded guilty to voluntary manslaughter in California.... In 1991, there were three possible comparable offenses in Washington.” The court stated, “when we compare statutes, we apply the law existing at the time of the conviction. See *Lavery*, 154 wash.2d at 255, 111 p.3d 837 (stating that

“the elements of the out of state crime must be compared to the elements of a Washington criminal statute *in effect when the foreign crime was committed*” (emphasis added); *Matter of Canha*, at 372. Again, in 2019 in *State v. Marquette*,¹ Division I followed *Morley*, stating, “The test for whether out-of-state crimes are also crimes in Washington—comparable crimes—is addressed in *State v. Morley*, 134 Wash.2d 588, 952 P.2d 167 (1998) and *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 111 P.3d 837 (2005). The court uses a two-part test. *Lavery*, 154 Wash.2d at 255, 111 P.3d 837.”

Both *Morley* and *Webb* were cited in *State v. Garrison*, 189 Wash. App. 1053 (2015).² There, the issue was whether a 1981 Texas felony voluntary manslaughter conviction was comparable to two Washington felony offenses, manslaughter in the first degree and assault in the second degree. In holding that the Texas felony was comparable, Division I of the Court of Appeals, following *Morley*, wrote, “To constitute a strike offense for persistent offender sentencing, a prior conviction must both be

¹ 431 P.3d 1040, 1043 (Wash. Ct. App. 2018), review denied, 193 Wash. 2d 1007, 438 P.3d 116 (2019).

² *State v. Garrison* is an unpublished decision filed in 2015. Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1

included in the defendant's offender score *and* be a “most serious offense.” RCW 9.94A.525 governs the classification of out-of-state convictions for offender score purposes. It provides, in pertinent part: “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). In this context, the relevant comparison is to “Washington criminal statutes **in effect when the foreign crime was committed.**” (Emphasis added).

Despite our Courts adhering to the above-stated rule several years after *Webb*, petitioner nonetheless asserts *Webb* changed this rule. Petitioner writes “Webb argued that the elements differ as to both the mental state required and the type of harm that ensued. The Court of Appeals agreed.” Personal restraint petition, page 6. Petitioner is incorrect. To the contrary, *Webb* only compared the *level of harm* between the 1982 and later version of the Washington crime of second degree assault. *Webb* explicitly stated it was not considering differences in the mental state of the two statutes. “We begin our analysis by comparing the terms “substantial bodily harm,” as used in the current version, and “grievous bodily harm,” as used in the 1982 version... The type of harm required for a conviction under the two statutes is not comparable. Because we reach

this conclusion, we need not decide whether the same mens rea is required to violate each version of the statute.” *Webb*, at 249.

Webb is distinguishable for two reasons. First, *Webb* was comparing the Washington crime of second degree assault with a later version of that same crime, not an out-of-state conviction with a Washington crime. The general rule under *Morley* and its progeny simply did not apply to this different fact pattern. Second, *Webb* did not analyze any differences in the mental state between the two versions of the Washington statute. This is important because the crux of petitioner’s argument is the difference in mental states between his 1982 Missouri assault conviction and a later Washington version of that crime.

Webb did not explicitly or implicitly overturn prior precedent. Several years after *Webb*, our state Supreme Court applied the well-settled rule when comparing out-of-state statutes to Washington statutes in *Matter of Canha*. *Webb* did not change the law by overturning prior precedent, it addressed a different factual scenario. Because *Webb* is not a significant change in the law, petitioner is not exempt from the one year time bar.

Petitioner makes passing reference to other exceptions to the time bar – that the state’s proof that he was a persistent offender was insufficient to support the finding, and that the sentence imposed was in

excess of the court's jurisdiction. He provides no analysis explaining how these exceptions apply in this case.

V. CONCLUSION

For the reasons argued above, Mr. Tennant's Personal Restraint Petition is time-barred and should be denied.

Respectfully submitted this 30th day of July, 2019.

By



Tom Ladouceur, WSBA #19963
Chief Criminal Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Jeffrey E. Ellis
Oregon Capital Resource Center
621 S.W. Morrison Street, Suite 1025
Portland, OR 97205

JeffreyErwinEllis@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 31st, 2019.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

July 31, 2019 - 10:34 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53418-5
Appellate Court Case Title: Personal Restraint Petition of Lonnie Tennant
Superior Court Case Number: 01-1-01175-5

The following documents have been uploaded:

- 534185_Personal_Restraint_Petition_20190731103335D2611882_5157.pdf
This File Contains:
Personal Restraint Petition - Response to PRP/PSP
The Original File Name was 20190731103006655.pdf

A copy of the uploaded files will be sent to:

- ellis_jeff@hotmail.com
- jeffreywinellis@gmail.com

Comments:

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

Filing on Behalf of: Thomas A. Ladouceur - Email: Tom.ladouceur@co.cowlitz.wa.us (Alternate Email: appeals@co.cowlitz.wa.us)

Address:

312 SW 1St Avenue

Kelso, WA, 98626

Phone: (360) 577-3080 EXT 2318

Note: The Filing Id is 20190731103335D2611882