

FILED
Court of Appeals
Division II
State of Washington
11/4/2019 1:53 PM

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN FREDERICK FLYNN, III, Appellant,

v.

PIERCE COUNTY, ET AL, Respondent

OPENING BRIEF OF APPELLANT

MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Flynn
2208 NW Market St., Ste. 414
Seattle, WA 98107
mike@kahrslawfirm.com
206.264.06543

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

A. ASSIGNMENTS OF ERROR 2

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

III. STATEMENT OF THE CASE..... 3

IV. SUMMARY OF THE ARGUMENT 6

V. ARGUMENT 7

A. THE STANDARD OF REVIEW OF A 12(b)(6) MOTION..... 7

B. THE ACCRUAL DATE FOR THE STATUTE OF LIMITATIONS MUST BE THE DATE FLYNN’S SENTENCE WAS CORRECTED 7

C. FLYNN’S NEGLIGENT CAUSE OF ACTION MAY PROCEED BECAUSE HIS AUTHORIZED SENTENCE WAS OUTSIDE THE STANDARD SENTENCING RANGE OF HIS CORRECT OFFENDER SCORE..... 11

D. THE JUDICIAL OFFICER’S RULING IS NOT A SUPERSEDING CAUSE 17

E. IF FLYNN IS THE PREVAILING PARTY HE IS ENTITLED TO STATUTORY FEES AND COSTS 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
<u>Albertson v. Dreis & Krump Mfg. Corp.</u> , 48 Wn. App. 432, 739 P.3d 117 (1987)	18
<u>Albertson v. State</u> , 191 Wn. App. 284, 361 P.3d 808 (2015).....	18
<u>Ang v. Martin</u> , 154 Wn.2d 477, 114 P.3d 637 (2005)	13, 14
<u>Burton v. Lehman</u> , 153 Wn.2d 416, 103 P.3d 1230 (2005)	7
<u>Campbell v. ITE Imperial Corp.</u> , 107 Wn.2d 807, 733 P.2d 969 (1987)	18
<u>Cosia v. McKenna & Cueno</u> , 25 Cal.4th 1194, 108 Cal. Rptr.2d 471, 25 P.3d 670 (2001)	10
<u>Faulkner v. Foshaug</u> , 108 Wn. App. 113, 229 P.3d 771 (2001)	11-14
<u>FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.</u> , 180 Wn.2d 954, 331 P.3d 29 (2014)	7
<u>Heck v. Humphrey</u> , 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).....	8-10
<u>Hizey v. Carpenter</u> , 119 Wn.2d 251, 830 P.2d 646 (1992)	11
<u>In re Pers Restraint of Smalls</u> , 182 Wn. App. 381, 335 P.3d 949 (2014)..	19
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)...	19
<u>Memphis Community School Dist. v. Stachura</u> , 477 U.S. 299, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986).....	8
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	12
<u>Piris v. Kitching</u> , 185 Wn.2d 856, 375 P.3d 627 (2016)	14

<u>Powell v. Associated Counsel for the Accused</u> , 125 Wn. App. 733, 106 P.3d 271 (2005) (<u>Powell I</u>).....	13
<u>Powell v. Associated Counsel for the Accused</u> , 131 Wn. App. 810, 129 P.3d 831 (2006)	13, 14
<u>Preiser v. Rodriguez</u> , 411 U.S. 475, 93 S.Ct. 1927, 36 L.Ed.2d 439 (1973).....	8
<u>Rodriguez v. Loudeye Corp.</u> , 144 Wn. App. 709, 189 P.3d 168 (2008)	7
<u>Tenore v. AT&T Wireless Servs.</u> , 136 Wn.2d 322, 962, 17 P.2d 104 (1998)	7
<u>United State v. McAdory</u> , 935 F.3d 838 (9 th Cir. 2019).....	16
<u>United State v. Valencia</u> , 912 F.3d 1215 (2019).....	15
<u>Wallace v. Kato</u> , 549 U.S. 384, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007).....	9
<u>Wiley v. County of San Diego</u> , 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983 (1998)	12
<u>Yount v. City of Sacramento</u> , 43 Cal. 4th 885, 183 P.3d 471, 76 Cal. Rptr. 3d 787 (2008)	8, 10
Statutes	
8 U.S.C. § 1326(a)	15
18 U.S.C. § 922(g)(1)	16
42 U.S.C. § 1983.....	8-10
RCW 9.94A.360 (former).....	17
RCW 9.94A.535.....	16
RCW 9A.20.021(c)	15

Rules and other authorities

CR 12(b)(6)..... 7

RAP 14.3 19

Restatement (Second) of Torts § 440 (1965) 18

Restatement (second) of Torts § 442 (1965)..... 18, 19

Restatement (second) of Torts § 442A (1965) 19

I. INTRODUCTION

Flynn had no reason to know at the time of sentencing that his offender score and sentence length was wrong and that he had received ineffective assistance by both his trial and appellate attorney or that it take 12 years to correct his sentence. On the date he was released after resentencing, he had been held almost 31 months past his maximum standard range sentence length.

Flynn filed a lawsuit for damages against his attorneys and Pierce County 14 years past his original sentence but less than two years past his resentencing. He alleged three claims: negligence, unlawful imprisonment and a violation of his Eighth Amendment rights.¹ Unfortunately for Flynn, the legal malpractice accrual date based on criminal proceedings is the date of the original sentencing and not the resentencing correcting the criminal conviction. Such a requirement can create a potential conflict because a judgment in the civil case could invalidate the criminal case.

Washington law requires criminal defendant to show their innocence to recover damages for legal malpractice. It is unclear if the criminal defendants who serve more time then their corrected maximum

¹ Flynn had dismissed the other two causes of action in Federal Court.

sentence range for the correct offender score meet the innocence requirement to recover damages.

Finally, Pierce County raised the issue of whether or not a judge's act in sentencing an individual based on an incorrect offender score is a superseding act to the legal malpractice of defendant's attorney. Because sentence length is dependent on an offender score, sentencing is foreseeable and the act of sentencing cannot be a superseding cause.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting Pierce County's motion to dismiss for failure to state a claim as barred by the statute of limitations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To avoid any conflict between civil and criminal law should the accrual date for the statute of limitations for legal malpractice based on an incorrect criminal conviction or sentence be the date the original criminal conviction is final or should it be the date when the criminal defendant was resentenced?

2. Can a criminal defendant established innocence and recover damages for a sentence which exceeds the maximum sentencing

range based upon a particular offender score where no exceptional sentence was imposed?

3. Is a trial court's sentencing decision a superseding cause preventing trial counsel from being liable for ineffective assistance of counsel if it is foreseeable?

4. Is Flynn entitled to statutory fees and costs on appeal?

III. STATEMENT OF THE CASE

Flynn was arrested on October 29, 1993 and subsequently charged with one count of first degree rape and one count of first-degree burglary. CP 007. He was then convicted by a jury. Id.

Prior to sentencing, the Department of Corrections conducted a presentence investigation and believed Flynn to have an offender score of 8 for the rape conviction and 7 for the burglary conviction. CP 007-008. The standard sentencing range for these offender scores is 185 to 245 months for the rape (CP 221) and 67 to 89 months for the burglary. Bonet failed to file a sentencing memorandum on behalf of Flynn. CP 008. The State filed a sentencing memorandum and then argued for an offender score of 13 for the rape conviction and 12 for the burglary conviction. CP 008. The standard sentencing range these offender scores were 210 to 280 months for the rape and 87 to 116 months for the burglary. CP 221. It is unknown what Flynn's trial counsel argued, if anything, but it is believed

he did not argue the lower offender score because Flynn did not challenge it for many years. The trial court then sentenced Flynn to 280 months on the rape charge and 116 months on the burglary charge, to be served concurrently. CP 089-100. He was given credit by the sentencing court on his date of 201 days. CP 096. Flynn's trial counsel filed no post-sentencing motion challenging the offender score. A notice of appeal was timely filed. CP 244-47. In the appeal, appellate counsel did not challenge the offender score. CP 102-106.

After filing several personal restraint petitions, on April 27, 2015, Flynn filed a PRP challenging his sentence length. CP 126-27. In response, the State conceded that the offender score used for sentencing was wrong, arguing instead that Flynn's sentence length would not be changed since he was under DOC's supervision when he committed the crimes. The Supreme Court remanded the case back for resentencing to determine if Flynn was under supervision when he committed his crimes of conviction. Id.

At the resentencing hearing held October 24, 2016, the trial court determined that Flynn's offender score on the rape was 8 and the burglary was 7. CP 133. Based on the sentencing range for these offender scores, the trial court sentenced him to 240 months for the rape to be served

concurrently with the 89 months for the burglary. CP 136. Flynn was released from custody the next day. CP 009.

Calculating from the date Flynn was arrested on October 29, 1993 and adding 245 months, his maximum sentence date for the rape was March 29, 2014. He was released October 25, 2016. He served 942 days past his maximum sentence.

A complaint was timely filed in King County Superior Court on October 22, 2018. CP 004-011. An amended complaint was subsequently filed. CP 028-033.² In the complaint, Flynn alleged that Pierce County and his trial and appellate attorneys were negligent, he suffered false imprisonment and his civil rights under the Eighth Amendment were violated. Pierce County then removed the case to federal court. Pierce County filed a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b). There, Flynn dismissed the false imprisonment and civil rights claims and the case was remanded back to King County. CP 52-53. The parties stipulated to a change of venue to Pierce County. CP 61-62. Pierce County filed the motion to dismiss pursuant to CR 12(b)(6). CP 064-205. Flynn filed a response. CP 206-32. A reply was then filed. CP 233-41. After oral

² No answer was filed to either complaint.

arguments, the trial court dismissed the lawsuit.³ CP 242-43. A timely notice of appeal was filed August 19, 2019. CP 244-47.

IV. SUMMARY OF THE ARGUMENT

Flynn will first show why the accrual date for the statute of limitations should be the date of resentencing, not the original sentencing date. This change in the law will prevent any conflict between civil and criminal cases. Both the United States and California Supreme Courts recognize the sound public policy considerations justifying imposing this restriction on civil lawsuits which may affect a criminal sentence.

Washington law prohibits a criminal defendant from benefitting from his or her conviction unless they are innocent. Because Flynn served more than 30 months past the maximum authorized sentence, he is innocent and can be awarded damages.

Finally, Flynn's trial attorney failed to challenge the state's proposed offender score after his conviction. This failure to advocate for his client made it foreseeable that the trial court would impose a sentence based on the state's proposed offender score. Because it was foreseeable,

³ The order presented to the trial court by Pierce County was modified at the hearing to reflect the actual decision. Some of its language including the caption are incorrect.

the trial court's judgment was not a superseding cause removing any liability from the defendants.

V. ARGUMENT

A. THE STANDARD OF REVIEW OF A 12(b)(6) MOTION.

Under CR 12(b)(6), “[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove ‘any set of facts which would justify recovery.’” FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (quoting Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962, 17 P.2d 104 (1998)); Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). “All facts alleged in the plaintiffs complaint are presumed true.” Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 717, 189 P.3d 168 (2008). However, if the claim is legally insufficient based on the alleged facts, “dismissal pursuant to CR 12(b)(6) is appropriate.” FutureSelect Portfolio Management, Inc., 180 Wn.2d at 963. Review of a dismissal pursuant to CR 12(b)(6) is reviewed de novo. Id. at 962.

B. THE ACCRUAL DATE FOR THE STATUTE OF LIMITATIONS MUST BE THE DATE FLYNN'S SENTENCE WAS CORRECTED.

There is a plain and simple truth – given the current accrual date for legal malpractice, Flynn could not litigate his civil suit for damages based on his wrongful confinement without challenging his sentence.

Other court systems have addressed this very issue by not accepting civil litigation which could affect the criminal conviction or sentence if found in favor of the plaintiff. See Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); Yount v. City of Sacramento, 43 Cal. 4th 885, 183 P.3d 471, 76 Cal. Rptr. 3d 787 (2008).

Heck filed a civil rights claim pursuant to 42 U.S.C. § 1983 which alleged the respondents had destroyed evidence and used illegal procedures. Heck, 512 U.S. at 479. Heck did not ask for release from prison. Id. The district court dismissed the action because it directly implicated Heck's conviction. Id. The United State Supreme Court had previously ruled that the sole mechanism to challenge the fact or duration of a state prisoner is through a writ of habeas corpus. Id. at 481 (citing Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1927, 36 L.Ed.2d 439 (1973)). In examining this conflict, the Supreme Court first stated that it has continually said that "42 U.S.C. § 1983 creates a species of tort liability." Id. at 483 (quoting Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986) (internal quotation marks omitted)). It then resolved the potential conflict.

We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the

unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

Id. at 486. The Supreme Court then clearly stated its ruling:

Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 487 (footnotes excluded).

In practice, this means that “a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.” Id. at 489-90.

[The Heck rule] delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn.

Wallace v. Kato, 549 U.S. 384, 393, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007).

The California Supreme Court then carefully examined this issue and applied the reasoning of Heck to California common tort law. Yount, 183 P.3d at 477-78. The Yount Court acknowledged Heck's limited

application to 42 U.S.C. § 1983 causes of action and then extended it to torts based on good public policy.

Heck, of course, is a rule of federal law that applies only to federal causes of action that challenge the validity of a state conviction. But we cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct and, as stated above, the parties offer none

Id. at 484. In so ruling, the California Supreme Court relied on its previously established sound judicial administrative reasons to support application of the Heck bar. Cosia v. McKenna & Cueno, 25 Cal.4th 1194, 108 Cal. Rptr.2d 471, 25 P.3d 670 (2001).

[T]he requirement of exoneration by postconviction relief protects against inconsistent verdicts — such as a legal malpractice judgment in favor of a plaintiff whose criminal conviction remains intact — that would contravene “a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.”

Cosia, 25 P.3d at 675 (quoting Heck, 512 U.S. at 484)). It also would eliminate duplicative actions based on the same facts, promoting judicial economy.

This requirement also promotes judicial economy. Many issues litigated in the effort to obtain postconviction relief, including ineffective assistance of counsel, would be duplicated in a legal malpractice action; if the defendant is denied postconviction relief on the basis of ineffective assistance of counsel, collateral estoppel principles may operate to eliminate frivolous malpractice claims.

Id. at 675–76.

The delayed accrual mechanism goes directly to the issues in this case. If Flynn has filed and won this lawsuit against his attorneys or Pierce County prior to his being resentenced, it would have invalidated his criminal sentence, requiring resentencing using a civil process. Our courts must change the accrual date of a civil case which would cause the modification or reversal a criminal sentence or conviction to avoid the problems inherent in this conflict. Good public policy requires no less.

C. FLYNN'S NEGLIGENT CAUSE OF ACTION MAY PROCEED BECAUSE HIS AUTHORIZED SENTENCE WAS OUTSIDE THE STANDARD SENTENCING RANGE OF HIS CORRECT OFFENDER SCORE.

To prevail on a claim for legal malpractice, the plaintiff must prove the existence of an attorney-client relationship creating a duty of care, the breach of that duty, damages suffered and proximate cause. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Flynn has alleged in his complaint that the Defendants had a duty to provide competent legal representation and breached that duty, causing him damages. Two more elements were subsequently added for criminal malpractice cases that require “a successful postconviction challenge and proof plaintiff did not commit the underlying crime.” Faulkner v.

Foshaug, 108 Wn. App. 113, 229 P.3d 771 (2001).⁴ Flynn succeeded in his postconviction challenge, leaving the issue of innocence left to be resolved. In Faulkner, the issue was whether or not he was innocent of the underlying crime. Id. 117. Faulkner argued his Alford plea was sufficient to establish his innocence.⁵ Id. The appellate court agreed, establishing that actual innocence and post conviction relief are required to pursue a legal malpractice action whose underlying basis is a criminal conviction. In so ruling, Division I provided the public policy behind these requirements.

Requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefitting from their own bad acts, maintain respect for our criminal justice system's procedural protections, remove the "harmful chilling effect" on the defense bar, prevent suits from criminals who "may be guilty, [but] ... could have gotten a better deal," and prevent a flood of nuisance litigation. These considerations all support our conclusion that postconviction relief is a prerequisite to maintaining the suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action.

⁴Although not directly citing it, the Faulkner court footnoted a California case footnote citing other cases. Id. at 126 fn. 2 (citing) Wiley v. County of San Diego, 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, 985–986 n. 2 (1998).

⁵North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Id. at 123-24.⁶ However, there are two aspects to a criminal trial - the trial itself and the sentencing upon a guilty finding.

Washington courts first addressed wrongful sentencing issues in Powell v. Associated Counsel for the Accused, 125 Wn. App. 733, 106 P.3d 271 (2005) (Powell I). Powell had pled guilty to a gross misdemeanor but had been sentenced to 38.25 months confinement for a Class C felony. Id. at 774. He was held over 20 months in prison, over eight months beyond his maximum sentence. He was granted release because the trial court had an unauthorized sentence. Id. The trial court granted the defendants' summary judgment motion based on the innocence requirement of Faulkner. Because Powell has served more time than authorized, Division I "conclude[d] that blind application of the innocence requirement to the facts of this case would go beyond the public policy to be served by the innocence requirement." Id. at 777.

The defendants then petitioned for review. The Supreme Court granted the petition and then the appeal back to Division I to reconsider its prior decision in light of Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637 (2005). This was because "the trial court imposed a sentence beyond its authority." Powell v. Associated Counsel for the Accused, 131 Wn. App.

⁶ The Supreme Court subsequently concurred with the innocence requirement. Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637 (2005).

810, 812, 129 P.3d 831 (2006) (Powell II). On reconsideration, Division I declined the opportunity to change its original decision, relying on the fact that Powell had served the maximum sentence possible (and then some) for the crime he committed. The Powell II court went on to state that “[t]he harm caused by his unlawful restraint was not the direct consequence of his own bad act.” Id. at 813. It then addressed all the policy issues previously presented in Faulkner and repeated in Ang, finding that public policy favored this holding. Id. at 814-15 (citing Ang, 154 Wn.2d at 484-85 (citing Faulkner, 108 Wn App. At 123-24)).

The most recent case to address innocence in sentencing is Piris v. Kitching, 185 Wn.2d 856, 375 P.3d 627 (2016).⁷ Piris pled guilty to two counts of rape of a child. He was sentenced to the bottom of the standard sentencing range of 159 to 211 months, 159 months. Id., at 629. His appellate counsel argued his offender score was incorrect. The Court of Appeals found for Piris and remanded for resentencing. Id. It took another 12 years before he was resentenced to 146 months. Id. Piris then sued based on being held 13 months longer than his proper sentence. Id.

The Supreme Court applied the reasoning in Powell II but rejected its factual application because “the actual time served was [] within the

⁷ Like Piris, Flynn also named his trial and appellate attorneys besides the County.

court's authority. Id. at 632. It was within its authority because the new sentence imposed was within the standard sentencing range of the prior sentence. Flynn's situation is distinguishable precisely because the new sentence exceeded the standard sentencing range of the prior sentence. The public policy supports this limited exception.

[A] limited exception to the rule requiring proof of actual innocence should not cause a flood of nuisance litigation. The highly unusual facts of this case, whereby an egregious error by defense counsel allowed a defendant to be sentenced to a term substantially longer than the maximum term allowed by statute, and the defendant actually served time in prison beyond the correct maximum term, are not likely to occur with any frequency.

Powell II. at 815.

The federal courts have examined the authority of Washington trial courts to impose sentences based on statutory requirements. See United State v. Valencia, 912 F.3d 1215 (2019). At issue was whether or not Valencia's prior Washington sentence qualified as a felony under federal sentencing which would result in a longer sentence for violating 8 U.S.C. § 1326(a). Valencia, 912 F.3d at 1216. He had been convicted of a class C felony with a maximum term of imprisonment of five years. RCW 9A.20.021(c). However, the Valencia court differentiated between the general and actual maximum sentence. Id. In doing so, the Ninth Circuit relied on Supreme Court cases which established that "the [sentencing]

court must examine both the elements and the sentencing factors that correspond to the crime of conviction.” Id. at 1222 (citing Carachuri-Rosendo v. Holder, 560 U.S. 563, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010) and Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)). The holding was reaffirmed in United State v. McAdory, 935 F.3d 838 (9th Cir. 2019). McAdory was charged with being a felon in possession of a firearm.⁸ His prior Washington convictions resulted in no sentence exceeding one year although the statutory maximums for his three felony convictions far exceeded this range. Id. at 840. The Ninth Circuit examined Washington’s mandatory sentencing guidelines and rejected using the felony class to determine the maximum sentence. Id. at 840-41. In rejecting this approach, the court held that “only if McAdory’s convictions actually exposed him to sentences of that length” could he be found guilty of possession of the weapon. Id. at 844. This ruling focused on the authority of sentencing courts to depart from the standard sentencing range only after “there are substantial and compelling reasons justifying an exceptional sentence.” Id. at 841 (citing RCW 9.94A.535).

⁸ This federal crime requires a sentence length greater than one year. 18 U.S.C. § 922(g)(1).

Flynn did not receive an exceptional sentence in 1994. He was sentenced using the standard sentencing range for the improper offender score. His standard sentencing range based on the correct offender score for the rape conviction was 185 to 245 months. The trial court could not exceed 245 months without finding aggravating circumstances justifying an exceptional sentence. Id. (Former RCW 9.94A.360). Because it did not so find, the authorized sentence it could impose was within this range. At resentencing, Flynn was sentence to 240 months, five months less than the maximum sentence. At the time of Flynn's release in 2016, he had been held 942 days past his maximum authorized standard sentence. Therefore, Flynn is entitled to pursue his legal malpractice claim because he meets the six criteria to sustain this claim.

D. THE JUDICIAL OFFICER'S RULING IS NOT A SUPERSEDING CAUSE.

Flynn's complaint alleged that the actions of his trial and appellate attorneys and Pierce County were the proximate cause of his unlawful period of incarceration. Below, Pierce County argued that the trial court's ruling was a superseding cause and thus it was not liable for that incarceration period. Flynn disagrees because the original sentence was foreseeable.

A superseding cause is an act of a third person or other force which by its intervention prevents the actor from

being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Restatement (Second) of Torts § 440 (1965). However, the lack of foreseeability is the touchstone of whether an action is a superseding cause relieving the party of liability.

Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.

Albertson v. Dreis & Krump Mfg. Corp., 48 Wn. App. 432, 442, 739 P.3d 117 (1987). Courts look at several factors when analyzing whether or not an intervening force is a superseding cause.

We analyze whether an intervening force is a superseding cause according to several factors: (1) whether the intervening force brings about a different kind of harm that would have otherwise resulted from the defendant's negligence, (2) whether the intervening act was extraordinary or its consequences were extraordinary, and (3) whether the intervening act operated independently of a situation created by the defendant's negligence.

Albertson v. State, 191 Wn. App. 284, 297–98, 361 P.3d 808 (2015) (citing Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 812-13, 733 P.2d 969 (1987) (citing Restatement (second) of Torts § 442 (1965))).

Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

Restatement (second) of Torts § 442A. Comment b to section 442A adds clarity to its meaning.

Where the negligence of the actor has created the risk of harm to another because of the likelihood of such intervention, the actor is not relieved of responsibility merely because the risk which he has created has in fact been fulfilled. The same is true where there is already some existing risk or possibility of the intervention, but the negligence of the actor has increased the risk of such intervention or of harm if it occurs.

Id., comment b.

A defendant's negligent failure to argue against the wrong offender score brings about a predictable harm - the wrong sentence. Our jurisprudence is full of examples of wrong sentences besides Flynn's. See e.g. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002); In re Pers Restraint of Smalls, 182 Wn. App. 381, 335 P.3d 949 (2014). The act and consequences of the trial court's imposition of the incorrect sentence based on an incorrect offender score is foreseeable and is anything but extraordinary. The incorrect sentencing was an integral part of the criminal sentencing process. Flynn's incorrect sentence was a foreseeable harm and not a superseding cause.

E. IF FLYNN IS THE PREVAILING PARTY HE IS ENTITLED TO STATUTORY FEES AND COSTS.

If Flynn is a prevailing party on his appeal, he is entitled to statutory attorneys fees and costs pursuant to RAP 14.3.

VI. CONCLUSION

Flynn asks this Court to hold that the accrual date for civil actions that may affect criminal convictions must be the date the criminal sentence is modified or reversed. He further requests being awarded damages because he meets the innocence criteria. He finally asks that a trial court's sentence based on an offender score be deemed a foreseeable act. In conclusion, he asks that the trial court's decision dismissing his lawsuit be reversed and this case remanded back.

DATED this 4th day of November, 2019.

Respectfully submitted,


MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Flynn

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Peter Helmberger, Deputy Prosecuting Attorney for Pierce County, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.


Michael Kahrs

KAHRS LAW FIRM PS

November 04, 2019 - 1:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53703-6
Appellate Court Case Title: John Frederick Flynn, III, Appellant v. Pierce County, Respondent
Superior Court Case Number: 19-2-07630-1

The following documents have been uploaded:

- 537036_Briefs_20191104135308D2281498_6479.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief.pdf

A copy of the uploaded files will be sent to:

- pcpatvecf@piercecountywa.gov
- peter.helmberger@piercecountywa.gov

Comments:

Sender Name: Michael Kahrs - Email: mike@kahrslawfirm.com

Address:

2208 NW MARKET ST STE 414

SEATTLE, WA, 98107-4097

Phone: 206-264-0643

Note: The Filing Id is 20191104135308D2281498