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Court of Appeals  
Division III  
State of Washington

NO. 33523-2-III

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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALVARO MOISES RAMOS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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**I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

- A. *Was Ramos' first CrR 7.8(b)(5) motion time-barred?*
- B. *Did Ramos waive his right to appeal the trial court's ruling and abandon his collateral attack when he voluntarily withdrew his CrR 7.8(b)(5) motion following a ruling on the merits?*
- C. *Was Ramos' second motion, filed over eight months after he withdrew his first motion, time-barred?*
- D. *Was Ramos' second motion, raising the same issues and arguments as he raised in his first motion, a successive petition barred by RCW 10.73.140?*

**II. STATEMENT OF THE CASE**

The State adopts and supplements the procedural facts recited by appellant-petitioner Alvaro Moises Ramos in his Status of the Petitioner and Statement of the Case. RAP 10.3(b).

Ramos learned of immigration consequences to his 2009 guilty plea in this case sometime before January 26, 2012, when he appeared in immigration court with an immigration attorney. CP 44 at ¶ 15. An immigration judge told him he would be deported unless he could “change” this case. *Id.* His immigration attorney then explained to him what he would need to do. *Id.*

Ramos, with the assistance of attorney Brent A. De Young, executed an affidavit detailing his asserted grounds for relief on March 31,

2012. CP 45. He filed this affidavit in Grant County Superior Court 364 days later, on March 29, 2013 (CP 48), along with two supporting declarations from his trial attorney, one executed April 12, 2012 (CP 41), and another executed June 27, 2012. CP 46–47.

A transcript of the May 2009 sentencing hearing was completed February 28, 2012 (CP 39), and filed in Grant County Superior Court ten months later, January 7, 2013. CP 52. After another two weeks, Mr. De Young filed his Notice of Appearance. CP 52. The Notice of Appearance does not identify the purpose for which Mr. De Young appeared. *Id.* On February 5, Ramos, through counsel, filed a Notice of Issue of Law and Note for Motion Docket (Notice). CP 95. The Notice states: “Nature of Motion: Motion to Vacate Guilty Plea; Judgment.” *Id.* Ramos did not file his previously executed affidavit or the declarations of trial counsel until March 29, 2013. Ramos filed the declaration of his immigration attorney on June 25, 2013, 18 months after his immigration hearing. CP 53. He did not file a written motion.

Ramos continued his hearing multiple times before filing a motion on July 22, 2013, to set the hearing out two months to September 27, 2013. CP 96–97.

Ramos filed his first memorandum of authorities<sup>1</sup> on September 4, 2013, over a year and a half after learning of his immigration consequences. CP 98–112. In it, Ramos asserted his judgment and sentence should be vacated under CrR 7.8(b)(5), having concluded subsections (1) through (4) did not apply. CP 107. Ramos argued his guilty plea was not knowing and voluntary because his lawyer did not advise him of the immigration consequences and the sentencing judge did not advise him of his rights to direct and collateral appeal. CP 100 – 106.

Following oral argument on September 27, 2013, the trial court ruled Ramos' motion was not time-barred, that he had not made a substantial showing he was entitled to relief because “[t]he *Padilla*<sup>2</sup> standard does not apply retroactively to his case,” and that a factual hearing was not required because all necessary facts were in the record. CP 137. The same day, October 1, 2013, the court also filed a “Notice of Intended Transfer of Motion to Court of Appeals for Disposition as a Personal Restraint Petition.” CP 113–14. Ramos voluntarily withdrew his motion October 25, 2013. CP 115. The court did not file its order transferring the matter to the Court of Appeals. CP 116.

The case lay quiet for the next eight months. On June 18, 2014,

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<sup>1</sup> Ramos designated his first memorandum “Amended Memorandum of Authorities in Support of Motion to Vacate Guilty Plea.”

<sup>2</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010).

Ramos filed a declaration supplementing his 2102 affidavit, asserting he did not know “until now” about his appeal rights (CP 57), despite the issue having been raised and argued in the memorandum of authorities he filed nine months earlier. He also filed a “Second Amended Memorandum of Authorities” on June 18. CP 117–131. On July 7, 2014, Mr. De Young filed a motion to stay Ramos’ new motion. In his sworn declaration, Mr. De Young stated, “The defendant, after consultation, wishes to proceed with this matter.” CP 132, ¶ 2. At hearing, the court and parties agreed the issues were the same issues considered thirteen months earlier. CP 134. The court noted that nothing in the supplemental declaration or memorandum would change its previous decision. *Id.*

The trial court entered an order transferring the CrR 7.8 motion to this Court on December 1, 2014. CP 135. This Court later consolidated the matter with the direct appeal filed June 5, 2015. CP 59.

### **III. ARGUMENT**

The State concedes trial counsel’s performance was prejudicially deficient for not having advised Ramos of the immigration consequences of his guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). The State further concedes the trial court failed to advise Ramos of his direct and collateral appeal rights immediately following sentencing and that his case is not yet final.

Nevertheless, Ramos' consolidated direct appeal and personal restraint petition should be denied and dismissed as time-barred, as having been waived or abandoned, and precluded as a successive petition under RCW 10.73.140.

*A. Ramos' first CrR 7.8(b)(5) motion was time-barred.*

1. CrR 7.8(b) motions must be brought within a reasonable time.

Reviewing courts attempt to balance the competing interests of preserving a defendant's constitutional rights, including remedying prejudicial error, with the significant costs of collateral review. *State v. Brand*, 120 Wn.2d 365, 368-69, 842 P.2d 470 (1992). "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (quoting *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982)).

Ramos argues his judgment and sentence should be vacated under CrR 7.8(b)(5) because his trial attorney never advised him of the immigration consequences of his guilty plea and because the sentencing court failed to advise him of his direct and collateral appeal rights. CP 107. Motions for relief from judgment under CrR 7.8(b)(5) must be made within one year after entry of judgment. CrR 7.8(b). The motion must state

“the grounds upon which relief is asked, and [be] supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.” CrR 7.8(c)(1). The three declarations Ramos filed March 29, 2013 were the earliest documents identifying facts and errors. In them, Ramos and his trial lawyer asserted he was not advised of the immigration consequences of his plea. Ramos thus constructively filed his first motion to vacate his judgment no earlier than March 29, 2013.

A criminal defendant seeking to vacate a judgment must comply with the time limits set forth in CrR 7.8(b) in conjunction with RCW 10.73.090, .100, and .130. *State v. Dallman*, 112 Wn. App. 578, 582, 50 P.3d 274 (2002), *review denied*, 148 Wn.2d 1022, 66 P.3d 637 (2003). A motion to vacate a judgment based on CrR 7.8(b)(5) must be filed within a reasonable time and also comply with RCW 10.73.090. *State v. Olivera-Avila*, 89 Wn. App. 313, 320, 949 P.2d 824 (1997). “[T]he purpose of RCW 10.73.090 is to encourage convicted prisoners to bring collateral attacks promptly.” *Id.* at 322. A “reasonable time” to challenge a judgment and sentence under CrR 7.8(b) is one year. *State v. Brand*, 65 Wn. App. 166, 170-71, 828 P.2d 1 (1992), *rev’d on other grounds*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992).

RCW 10.73.100 “creates narrow exceptions to the one year time limit and further confines the issues that may be raised to solely those that

the exceptions create.” *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 242, 309 P.3d 451 (2013). Following *Padilla*, defense counsel’s failure to advise of the immigration consequences of a guilty plea falls within the “significant change” exception of RCW 10.73.100(6). *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 103, 351 P.3d 138 (2015) (*Padilla* did not announce a new rule under Washington law and applies retroactively to matters on collateral review).

2. RCW 10.73.090 applies to the timeliness analysis because Ramos’ case is not yet final.

The timeliness analysis regarding Ramos’ first motion properly falls under RCW 10.73.090, in conjunction with CrR 7.8(b), because Ramos’ case in superior court was not yet final. A judgment and sentence are not final until an appeal is mandated. RCW 10.73.090(3)(b). A criminal appeal, regardless of when filed, is deemed timely unless the State can show a defendant, understanding his right to appeal, voluntarily, knowingly, and intelligently waived or abandoned that right. *State v. Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978) (waiver); *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998) (abandonment). At this stage of Ramos’ proceedings, he had not waived or abandoned his right.

The Washington State Constitution guarantees the right to appeal to all criminal defendants, and courts must balance strict application of

filing deadlines against this constitutional right. *State v. Chetty*, 167 Wn. App. 432, 438–39, 272 P.3d 918, 921 (2012) (citing *Kells*, 134 Wn.2d at 314)). Immediately following entry of a guilty plea and sentencing, the trial court must advise a criminal defendant of the limited right to direct appeal and of the collateral attack time limits under RCW 10.73.090 and .100. CrR 7.2(b)(6).

A sentencing court's failure to advise of these rights and time limits can be an extraordinary circumstance justifying extension of filing deadlines under RAP 18.8(b) and RCW 10.73.090. *State v. Lewis*, 42 Wn. App. 789, 794, 715 P.2d 137 (1986); *In the Matter of the Personal Restraint of Vega*, 118 Wn.2d 449, 454, 823 P.2d 1111 (1992). In *Vega*, an incarcerated defendant had been convicted of a felony in Washington before July 23, 1989, and never received notice that the time limit for collateral attack under RCW 10.73.090 had later been limited to one year. *Id.* at 450. RCW 10.73.120 required the Department of Corrections to attempt to advise convicted felons in Vega's circumstances of the one-year limit. *Id.* The Court held the one-year limit could not be applied to Vega because the Department had neither notified him nor attempted to notify him of the new limit. *Id.* However, the Court cautioned that regardless of the Department's failure, Vega's personal restraint petition would have been untimely had Vega received actual notice. *Id.* at 451.

3. Filing deadlines under CrR 7.8(b) and RCW 10.73.090 are equitably extended under RAP 18.8(b) only to the date of actual notice plus the filing period.

A sentencing court's initial failure at sentencing to advise of direct and collateral appeal rights does not extend filing deadlines into an indefinite future. As *Vega* made clear, initial failure to give statutorily required notice is cured by actual notice.

Once the defendant receives actual notice of rights or grounds for appeal, filing deadlines are equitably tolled such that the filing period starts on the date of actual notice. *Lewis*, 42 Wn. App. at 794. In *Lewis*, the district court sentencing judge did not orally advise the defendant of his right to appeal until 14 days after sentencing, the date that would otherwise have been the deadline for filing his notice of RALJ appeal. *Id.* at 791–93. Lewis filed his notice of appeal in district court that same day and the notice was transmitted to superior court three days later. *Id.* at 791–92. Holding that the right of appeal is meaningless unless the defendant is advised of that right, along with the time and method for commencing an appeal, Division Two of the Court of Appeals held the sentencing court's failure to advise was a compelling and extraordinary circumstance justifying extension of the filing deadline to fourteen days from the date Lewis received actual notice. *Id.* at 793.

Similarly, the defendant in *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), did not learn of deportation consequences of his conviction until over two years after sentencing due to a “unique and bizarre series of events.” 112 Wn. App. at 763. Division Two concluded

the one-year time period in RCW 10.73.090 should be equitably tolled from the date of his plea (October 17, 1996) to the date on which he first discovered that deportation was a consequence of his plea (November 2, 1998); *that he filed his motion within one year after November 2, 1998*; and thus that his motion is not time barred.

112 Wn. App. at 763 (emphasis added). In an analogous case addressing a the trial court’s statutory duty to notify accused sex offenders they must register upon conviction with the county sheriff, Division One held the remedy for violation of that duty is to provide actual written notice upon discovery of the oversight, which will trigger the registration requirement. *State v. Clark*, 75 Wn. App. 827, 833, 880 P.2d 562 (1994). *See also State v. Ward*, 123 Wn. 2d 488, 514, 869 P.2d 295 (1994) (requirement to register as sex offender triggered by actual notice of duty).

Ramos had actual notice of the immigration consequences of his guilty plea no later than January 26, 2012. CP 44. Under *Vega*, *Lewis*, and *Littlefair*, the filing deadline for Ramos’ CrR 7.8(b) motion was equitably tolled only to January 25, 2013, one year from the date of his actual notice.

Ramos did not file his own declaration and the two from his trial counsel—the first documents at least partially satisfying the “concise statement” requirements of CrR 7.8(c)—until March 29, 2013, two months after the equitably extended deadline. CP 48–51, 41, 46–47. Ramos filed the declaration of his immigration attorney almost three months after that, on June 25, 2013. Finally, on September 4, 2013, Ramos filed his first memorandum of authorities, stating his motion was brought solely under CrR 7.8(b)(5). CP 107. He argued his guilty plea was not knowing and voluntary because he had not been advised either of his collateral appeal rights or of the immigration consequences of his plea. CP 100–106. The only documents filed before January 25, 2013 were the transcript of Ramos 2009 sentencing hearing and his attorney’s notice of appearance.

Moreover, courts are reluctant to forgive “late filings where the claimant failed to exercise due diligence in preserving his legal rights.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L.Ed.2d 435, 444 (1990) (citing *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 1726, 80 L.Ed.2d 196, 202 (1984) (“One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.”)). Ramos failed to act with diligence once he had actual notice of his immigration consequences. His first motion was time-barred.

*B. Ramos waived his right to appeal the trial court's ruling and abandoned his collateral attack when he voluntarily withdrew his CrR 7.8(b)(5) motion following a ruling on the merits.*

The trial court ruled Ramos' motion was not time-barred, that he had not made a substantial showing he was entitled to relief because "[t]he *Padilla* standard does not apply retroactively to his case," and that resolution of his motion would not require a factual hearing because all necessary facts were in the record. CP 137. The same day the court also filed a "Notice of Intended Transfer of Motion to Court of Appeals for Disposition as a Personal Restraint Petition." CP 113–14. Ramos responded by voluntarily withdrawing his motion on October 25, 2013. CP 115. The court did not transfer the matter to the Court of Appeals. CP 116.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *State v. Riley*, 19 Wn. App. 289, 294, 576 P.2d 1311 (1978) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). The fact that Ramos' right to appeal is of constitutional magnitude does not prevent him from waiving that right. *State v. Rice*, 24 Wn. App. 562, 565, 603 P.2d 835 (1979). Conscious, intelligent, and willing failure to pursue an appeal can constitute waiver when, as here, "a convicted individual is clearly advised of the right to appeal and the procedure necessary to vindicate that right . . .

demonstrates understanding, and is under no unfair restraint preventing vindication . . . .” *State v. Sweet*, 90 Wn.2d at 287.

Mr. De Young, an experienced appellate lawyer specializing in immigration issues, represented Ramos from the inception of his collateral attacks. Ramos’ immigration attorney told him in January 2012 what he needed to do to avoid deportation. Nothing in the record suggests either attorney gave Ramos bad advice or acted without his permission. Ramos chose to withdraw his motion rather than submit it to this Court for resolution.

Ramos abandoned his collateral attack by affirmatively withdrawing his CrR 7.8(b) motion following a decision on the merits but before the superior court could transfer it to this Court as a personal restraint petition. *See State v. Valladares*, 99 Wn.2d 663, 672, 664 P.2d 508, 513 (1983) (defendant waived or abandoned Fourth Amendment objections by affirmatively withdrawing his motion to suppress evidence) (citing *State v. Rice, supra*, at 565; 3 W. LaFave, *Search and Seizure* § 11.1, at 474 (1978)).

The facts in this case are similar to those of the named appellant in *Tsai, supra*. 183 Wn.2d 91. Tsai, assisted by counsel, had filed a motion to withdraw his guilty plea alleging the same failure to advise of immigration consequences Ramos alleged. 183 Wn.2d at 107–08. The trial court denied

Tsai's motion as untimely and not subject to equitable tolling. Regardless of whether the trial court erred, Tsai did not appeal that decision. *Id.* at 108. The Supreme Court held Tsai was not entitled to an evidentiary hearing on the merits of his personal restraint petition because he had not appealed the trial court's decision. *Id.* Like Tsai, Ramos elected not to pursue his first motion following the trial court's ruling that *Padilla* did not apply and its decision to transfer the matter to this Court as a personal restraint petition. Not only did Ramos fail to appeal that ruling or seek reconsideration, he withdrew the issues from further consideration by either this Court or the trial court.

Ramos was aware of his immigration consequences and his rights to direct and collateral appeal when he withdrew his motion on October 25, 2013. By not availing himself of his right of review by this Court, Ramos knowingly, intelligently, and voluntarily abandoned his motion and waived future appeal of those issues. That this was Ramos' own conscious decision is shown by his attorney's sworn statement eight months later: "[t]he defendant, after consultation, wishes to proceed with this matter." CP 132 at ¶ 2. The only reasonable conclusion is that Ramos had not wished to proceed at the time he withdrew his motion. Changing his mind eight months later does not render his abandonment and waiver unknowing, unintelligent, and involuntary.

*C. Ramos' second motion, filed over eight months after he withdrew his first motion, is time-barred.*

“The effect of a withdrawal of a motion is to leave the record as it stood prior to filing as though the motion had never been made.” 56 Am. Jur. 2d Motions, Rules and Orders § 32 (2009). Ramos attempted to resurrect his withdrawn motion on June 18, 2014, by filing a Second Amended Memorandum of Authorities in Support of Motion to Vacate Guilty Plea. CP 117–131. With it, he filed a “2<sup>nd</sup> Declaration of the Defendant – Alvaro Ramos” claiming, among other things, that it had been explained to him “at this time” that his appeal also included the issue of the court’s failure to advise of the time limits for appeal. CP 57 at ¶ 6. He asserted he did not know about the issue “until now.” *Id.* Apparently, he forgot he had briefed and argued the issue in his first CrR 7.8(b) motion. As noted below, Ramos later agreed with the trial court’s conclusion that his second motion raised no new issues. CP 134.

Ramos’ second motion is time-barred for the reasons stated in section A, above.

*D. Ramos' second motion, raising the same issues and arguments he raised in his first motion, is a successive petition barred by RCW 10.73.140.*

At Ramos’ second hearing, the trial court and the parties agreed the issues were identical to those raised a year before. CP 134. RCW

10.73.140's prohibition against successive collateral attacks<sup>3</sup> bars Ramos' second motion. CrR 7.8(b) motions for relief from judgment at the trial court level are "subject to RCW 10.73.140's embodiment of the general rule against subsequent collateral attacks." *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 499, 20 P.3d 409 (2001) (citing *State v. Brand*, 120 Wn.2d at 369). "[A] court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds." *Becker*, 143 Wn.2d at 498 (citing *Brand*, 120 Wn.2d at 370). "Collateral attack" includes all types of postconviction relief except direct appeal. *Becker*, 143 Wn.2d at 496.

In *Becker*, the trial court denied Becker's motion to vacate his guilty plea and Becker filed a RALJ appeal in superior court. *Id.* at 494. The appeal was later dismissed due to abandonment. *Id.* About eight months after dismissal, Becker sought a writ of habeas corpus, alleging the

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<sup>3</sup> RCW 10.73.140 provides: "If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition."

same error he raised in his motion to vacate his guilty plea. *Id.* The writ action, like Ramos' second motion, contained only issues previously raised and adjudicated. *Id.* at 499. The Court noted Becker had abandoned his first collateral attack after losing his argument, characterizing his writ action as an attempt "to take a second bite at the apple." *Id.*

Like Becker, Ramos should not be allowed a second bite at the apple after having chosen to withdraw his CrR 7.8(b) motion following the trial court's 2013 decision. Changing his mind eight months later was not the result of any new issues or facts discovered after he withdrew his motion. As the Supreme Court said fifteen years ago, "A defendant is guaranteed one bite at the apple, not a feast." *Becker*. 143 Wn.2d at 500.

#### **IV. CONCLUSION**

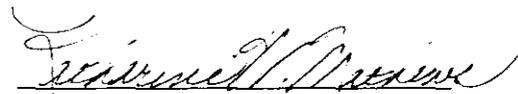
Ramos' motions to vacate his judgment and sentence are time-barred. He waived his right to further appeal when he withdrew his motion following the court's first ruling. His second motion, in addition to being untimely, is a prohibited successive petition.

Ramos' consolidated appeal and personal restraint petition should be denied and dismissed.

DATED this 21<sup>st</sup> day of May, 2016.

Respectfully submitted,

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