

No. 33703-1

FILED

DEC 30, 2015
Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT YATES,
Appellant.

APPELLANT'S OPENING BRIEF

Jeffrey E. Ellis #17139
Attorney for Mr. Yates
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

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I. ASSIGNMENT OF ERROR

Mr. Yates's two determinate sentences for pre-SRA crimes are illegal. Those sentences must be vacated and Mr. Yates must be resentenced to indeterminate terms, regardless of the practical effect on his total cumulative sentence.

II. STATEMENT OF THE CASE

In Spokane County Superior Court, Mr. Yates pleaded guilty to thirteen counts of murder and one count of attempted murder. RP 4-9; CP 1-64. The first two counts of conviction were for murder in the first degree committed on July 13, 1975, prior to the adoption of the Washington Sentencing Reform Act (SRA). Judgment and Sentence, § 2.1. In § 4.5 of the judgment, the court sentenced Yates "to the following term of total confinement in custody of the Department of Corrections (DOC):

240 (months) on Count No. 1
240 (months) on Count No. 2."

Yates' "total confinement" on all of the counts was 4,900 months.

In a previously filed PRP, Mr. Yates unsuccessfully attacked the validity of his guilty pleas. He did not seek resentencing. *In re PRP of Yates*, 180 Wash.2d 33, 39, 321 P.3d 1195 (2014).

After the Washington Supreme Court denied Mr. Yates's request to withdraw his guilty pleas, Mr. Yates returned to Spokane County and sought resentencing. CP 1. A hearing on his motion was held on July

17, 2015. After the court heard argument, Judge Michael Price ruled that Mr. Yates had not shown prejudice, which he defined as a “practical effect” on the total sentence. RP 20; CP 113-114.

This appeal timely follows.

III. SUMMARY OF ARGUMENT

An unlawful sentence—a sentence beyond the statutory authority of the court—can be corrected at any time and must be corrected when requested by a party. The “practical effect” prejudice required to merit withdrawal of a collaterally attacked guilty plea is inapplicable when the only remedy sought is correction of the unlawful sentence.

IV. ARGUMENT

1. Introduction

In a previously-filed PRP attacking the validity of Mr. Yates’s guilty plea, the Washington Supreme Court clearly recognized: “In this case, the judge exceeded his statutory authority in entering the judgment and sentence. He only had authority to impose a 20–year minimum sentence for counts one and two, but instead he imposed a 20–year determinate, or maximum, sentence.” *In re PRP of Yates*, 180 Wash.2d 33, 39, 321 P.3d 1195 (2014). In short, Mr. Yates’ current sentence is unlawful—at least in part.

The issue presented in this appeal—the reason the trial court denied Mr. Yates’ motion for resentencing—is whether Mr. Yates must show

prejudice, which that court defined as a new cumulative sentence less than Mr. Yates' probable lifespan.

This Court should reverse the trial court. The “practical effect” showing required to withdraw a collaterally attacked guilty plea has no application to a request to correct an illegal sentence. That requirement is inapplicable where correction of an unlawful sentence is sought. Instead, courts have not only the power, but also a duty to correct an erroneous sentence upon its discovery. *In re Personal Restraint of Goodwin*, 146 Wash.2d 861, 50 P.3d 618 (2002); *State v. Smissaert*, 103 Wash.2d 636, 694 P.2d 654 (1985).

2. Mr. Yates's Sentences on Counts I and II Are Unlawful.

A sentencing court cannot impose a determinate sentence when the law requires the imposition of an indeterminate sentence. Washington courts have “consistently held that fixing penalties for criminal offenses is a legislative, and not a judicial, function.” *State v. Manussier*, 129 Wash.2d 652, 667, 921 P.2d 473 (1996). A judge exceeds his statutory authority when he imposes a determinate sentence of 20 years when an indeterminate life sentence is the only available legal option.

Because the court sentenced Yates to a determinate term of 20 years, his sentence is unlawful. In fact, it violates the *ex post facto* guarantees of the state and federal constitutions to impose a determinate sentence when an indeterminate one is statutorily required. *See Addleman v. Board of*

Prison Terms & Paroles, 107 Wash.2d 503, 506, 730 P.2d 1327 (1986) (noting that it would violate the *ex post facto* clause to impose a determinate sentence in a case where an indeterminate sentence was required). *See also United States v. Stevens*, 462 F.3d 1169, 1170 (9th Cir. 2006) (The Ex Post Facto Clause of the United States Constitution requires the defendant to be sentenced under the sentencing guidelines in effect at the time of the offense if the guidelines have undergone substantive changes that would disadvantage the defendant).

3. Mr. Yates is Entitled to a Lawful Sentence.

In its decision dismissing Mr. Yates’s attack on the validity of his guilty pleas, the Washington Supreme Court acknowledged the invalidity of his sentence:

In this case, the judge exceeded his statutory authority in entering the judgment and sentence. He only had authority to impose a 20–year minimum sentence for counts one and two, but instead he imposed a 20–year determinate, or maximum, sentence. The authority for determining the maximum sentence rests with the Indeterminate Sentencing Review Board. RCW 9.95.011(1)....The law does not allow the judge to set a maximum or determinate sentence as the judge did on counts one and two. Thus, the sentence was outside of the judge's statutory authority.

In re PRP of Yates, 180 Wash.2d at 39.

Sentences outside the authority of the trial court are “illegal” or “invalid.” *State v. Luke*, 42 Wash.2d 260, 262, 254 P.2d 718 (1953). “In keeping with long-established precedent, we adhere to the principles that a sentence in excess of statutory authority is subject to collateral

attack, that a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and that a defendant cannot agree to punishment in excess of that which the Legislature has established.” *In re Personal Restraint of Goodwin*, 146 Wash.2d 861, 50 P.3d 618 (2002). *Goodwin* remains the law.

Washington courts have always required resentencing to correct an illegal sentence. *See, e.g., Brooks v. Rhay*, 92 Wash.2d 876, 602 P.2d 356 (1979); *State v. Pringle*, 83 Wash.2d 188, 517 P.2d 192 (1973); *Dill v. Cranor*, 39 Wash.2d 444, 235 P.2d 1006 (1951). Washington courts have likewise recognized that a trial court always retains the authority to correct an erroneous sentence. *State v. Loux*, 69 Wash.2d 855, 420 P.2d 693 (1966), *cert. denied*, 386 U.S. 997, [87 S.Ct. 1319,] 18 L.Ed.2d 347 (1967); *State ex rel. Sharf v. Municipal Court*, 56 Wash.2d 589, 354 P.2d 692 (1960); *State v. Williams*, 51 Wash.2d 182, 316 P.2d 913 (1957); *McNutt v. Delmore*, 47 Wash.2d 563, 288 P.2d 848 (1955), *cert. denied*, 350 U.S. 1002, [76 S.Ct. 550,] 100 L.Ed. 866 (1956).

Mr. Yates is entitled to be sentenced according to the law.

4. Mr. Yates is Not Required to Show Prejudice.

In his PRP, Mr. Yates sought withdrawal of his guilty plea. He did not seek resentencing. None of the cases cited in the previous sub-section have ever applied the “practical effect” test to a request for resentencing. The remedy for an illegal sentence is resentencing.

The Washington Supreme Court held that the error in the judgment did not permit Mr. Yates to withdraw his guilty plea because he did not demonstrate that the error prejudiced him. “We see no reason to invalidate his plea. His petition is dismissed.” *Id.* at 42. In other words, a personal restraint petitioner seeking to withdraw a guilty plea based on a misstatement of the statutory maximum is required to satisfy the actual and substantial prejudice standard on collateral attack.

That prejudice requirement does not apply to a motion requesting correction of an unlawful sentence. The concurring opinion makes this clear: “Yates would be entitled to resentencing had he requested it.” *Id.* at 50 (Gordon-McCloud, J. concurring). As the concurring opinion further explains: “Yates’s allegation that the sentence imposed was illegal is a separate claim. A claim that the sentence actually imposed was outside the court’s power is separately cognizable in a PRP and warrants relief.” *Id.* at 50.

The lower court denied resentencing and relied entirely on *In re PRP of Smalls*, 182 Wash.App. 381, 335 P.3d 949 (2014), which it read as requiring a showing of “practical effect” prejudice in order to correct an unlawful sentence. But, *Smalls* misreads *Yates* when *Smalls* stated in dicta: “A petitioner whose judgment and sentence is facially invalid may obtain relief by showing that this facial invalidity had a practical effect on his sentence. A petitioner who makes this showing is entitled only to a

remand to the trial court to correct the invalidity but is not entitled to assert a time-barred challenge to the validity of his plea. If, like Yates, the petitioner cannot show prejudice caused by the sentencing court, he is not entitled to *any* relief and his petition will be dismissed.” *Id.* at 391 (emphasis added).

If “any” includes resentencing to correct an unlawful sentence, *Smalls* conflicts with a solid and unbroken line of precedent, which is cannot overrule. If “any” includes resentencing, *Smalls* misreads *Yates*. *Yates* does not hold that a “practical effect” showing of prejudice is necessary where a petitioner seeks correction of an unlawful sentence for the simple reason that Yates did not seek that remedy. As demonstrated previously, *Yates* does not discuss the prejudice required to correct an illegal sentence and certainly does not overrule the decades-long solid body of law that an illegal sentence can be corrected at any time. The dicta in *Smalls* is not persuasive and certainly does not have any precedential effect.

This is not a case involving judicial sentencing discretion. This is a case where the sentences imposed on Counts I and II are not legislatively authorized. If the sentencing court was not empowered to impose those sentences in the first place, then this Court must direct that court to correct the illegality. The rule remains plain: when a sentence has been imposed for which there is no authority in law, the courts have the power and duty to correct the erroneous sentence, when the error is discovered.

V. CONCLUSION

Based on the above, this Court should reverse and remand for resentencing.

DATED this 30th day of December, 2015.

/s/ Jeffrey Erwin Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Yates
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I efiled the attached opening brief and served a copy on opposing counsel by sending it to:

SCPAappeals@spokanecounty.org

December 30, 2015//Portland, OR

/s/Jeffrey Erwin Ellis