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DEC 29, 2016
Court of Appeals
Division III
State of Washington

34362-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM M. PORTER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUE PRESENTED..... 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 6

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
WHEN IT DENIED MR. PORTER’S CrR 7.8 COLLATERAL
ATTACK ON HIS THIRTEEN-YEAR-OLD JUDGMENT,
WHERE THE CLAIMS RAISED IN THIS ATTACK ARE
THE SAME Y THIS COURT IN 2010 AND 2014, AND
WHERE THE AS THE CLAIMS PREVIOUSLY RAISED
AND DENIED B FILING OF THE CrR 7.8 MOTION WAS
SUCCESSIVE..... 6

1. Standard of Review 6

2. Argument 6

V. CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Pers. Restraint of Bailey, 141 Wn.2d 20,
1 P.3d 1120 (2000)..... 8

In re Pers. Restraint of Becker, 143 Wn.2d 491,
20 P.3d 409 (2001)..... 8

In re Pers. Restraint of Markel, 154 Wn.2d 262,
111 P.3d 249 (2005)..... 10

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)..... 10

State v. Brand, 120 Wn.2d 365, 842 P.2d 470 (1992) 7

State v. Costich, 152 Wn.2d 463, 98 P.3d 795 (2004) 6

State v. Gaut, 111 Wn. App. 875, 46 P.3d 832 (2002) 6

State v. Larranaga, 126 Wn. App. 505, 108 P.3d 833 (2005)..... 6

STATUTES

RCW 10.73.090 7

RCW 10.73.100 8, 11

RCW 10.73.140 7, 9, 10

RCW 10.73.160 11

RULES

CrR 7.8..... 8, 10, 11

OTHER

BLACK’S LAW DICTIONARY (8th ed.2004) 10

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order amending appellant's judgment and sentence nunc pro tunc.
2. The State's motion to amend the judgment and sentence violated promises in the plea agreement.
3. The trial court erred in dismissing appellant's motion for relief on principles of collateral estoppel and res judicata.

II. ISSUE PRESENTED

Did the trial court abuse its discretion when it denied Mr. Porter's CrR 7.8 collateral attack on his thirteen-year-old judgment, where the claim raised in this attack are the same as the ones previously raised and denied by this Court in 2010 and 2014, and where the filing of the CrR 7.8 motion involved claims that were untimely, successive, and repetitive.

III. STATEMENT OF THE CASE

The defendant violently raped the victim, L.W. CP 1-4.¹ She tried to get away, but to force compliance, the defendant punched her in the stomach

¹ The defendant agreed at his guilty plea that the Court should incorporate the affidavit of facts in the plea, and that these facts were correct. Report of Proceedings October 15, 2002 Guilty Plea ("RPGP" hereinafter) 14. The State has filed contemporaneously with this brief a motion to transfer the verbatim report of proceedings filed in defendant's Personal Restraint Petition under No. 28490-5-III

approximately three times and also punched her in the lower portion of her jaw and once on the upper right side of her head. The defendant told her if she told anyone about the rape, he would come back and hurt her and her family. *Id.*

The defendant entered a guilty plea to the charge. CP 7-14. He acknowledged by his signature² that he had read and understood that for his sentencing, under RCW 9.94A.712, the judge would impose the maximum sentence and set a minimum, that thereafter the length of his sentence was subject to review by the Indeterminate Sentence Review Board. CP 9. Additionally, at his sentencing, his attorney explained the ISRB sentence review process the defendant would be subject to at prison:

... But no matter what sentence Mr. Porter receives from the Court, the fact of the matter is, before he is released from custody, from prison, he will have to appear before the Indeterminate Sentencing Board ninety days prior to his scheduled release.

And, at that time, the Board, as I understand it, will review what he has done with his time while he has been in custody, whether he has taken advantage of the treatment that is available at Twin Rivers Corrections Center, the sex offender treatment that is there while someone is in custody, and also what kind of risk he will pose to the community if they were to release him.

It is very possible that, when he appears at that hearing, whether or not he has done the treatment, whether or not he is at the end of his scheduled sentence,

² CP 13.

he may not be released. Mr. Porter realizes that. That is something that we will just have to see down the line.

...

So, I wanted to touch on that; that, no matter what happens here, Mr. Porter may not be released, theoretically, for the rest of his life. As I understand it, they can sentence someone two years at a time to further incarceration, and then every two years that person is entitled to come back before the Indeterminate Sentence Review Board, and at that point the Board can consider whether or not Mr. Porter is safe in the community.

Report of Proceeding January 31, 2003 Sentencing (“RPS” hereinafter) 7-9 (emphasis added).

Pronouncing the defendant’s sentence, the trial court acknowledged that it was important to set a *minimum* term that would allow the defendant enough time to make use of the institutional resources, noting that the actual release of the defendant into community custody would be determined by the Department *after* the minimum term was served. RPS 16-17.

Through some oversight the original judgment and sentence did not contain the required indeterminate life sentence under section 4.5(b). That section was left blank. CP 25. The judgment and sentence was corrected by an order on April 28, 2003. CP 32-33.

On September 30, 2009, the defendant filed his first personal restraint petition (28490-5-III) contending he was entitled to specific performance of the original judgment and sentence - which imposed a determinate term - because the amended judgment and sentence was

contrary to his plea, that he would not have entered a guilty plea if he had been advised of the indeterminate sentence. On May 28, 2010, he filed a second personal restraint petition, contending his plea was involuntary due to ineffective assistance of counsel. This Court consolidated these petitions under 29117-1-III. On November 15, 2010, this Court dismissed both personal restraint petitions, finding the petitions were untimely under RCW 10.73.090, the judgment was valid on its face, and that:

[c]ontrary to Mr. Porter's assertions, however, the plea documents show that he was advised that he faced an indeterminate sentence with a minimum and a maximum term. His signature on the plea statement is presumptive evidence that he entered the agreement voluntarily and with knowledge of its terms. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

CP 41³.

Undaunted by this Court's ruling, the defendant filed his third petition⁴ in the Washington Supreme Court, which transferred it to this Court for consideration. There, he contended his amended judgment and sentence was void because he did not receive personal service of the State's

³ The Order Denying Motion to Modify/Correct Sentence filed March 24, 2016, which attaches this Court's two orders dismissing the defendant's prior petitions, has been designated in the First Supplemental Designation of Clerk's Papers filed December 28, 2016. The State anticipates this document will be designated as CP 34-42.

⁴ Filed sometime in June 2014.

motion to amend, and that he was denied due process. This Court considered his claims, and dismissed the petition:

Mr. Porter's amended judgment and sentence is valid on its face (as determined in the previous personal restraint petition order), the trial court had authority to correct the erroneous original sentence, and his claims based upon an alleged violation of service of notice court rules and constitutional due process do not qualify for any of the exceptions to the one-year rule. RCW 10.73.100. He also fails to certify why he did not raise the grounds in his previous petition. *See* RCW 10.73.140. Consequently, Mr. Porter's petition is dismissed as untimely and successive. RCW 10.73.090(1), .100, .140; RAP 16.11(b).

CP 37-38 (footnote omitted).

On March 24, 2016, the defendant filed his fourth collateral attack, a CrR 7.8 motion to modify/correct his judgment and sentence. CP 43-65.⁵ In this motion, the defendant claimed the prosecutor breached his plea agreement by moving the court for a corrected sentence, the court and the department of corrections failed to notify him of the one-year time limit for collateral attack on the amended judgment, and that the long-expired one-year time limit for filing for collateral relief was equitably tolled. Judge Cozza of the Superior Court for Spokane County denied the motion, noting that this Court had dismissed the prior three personal restraint petitions.

⁵ The defendant's Motion to Modify/Correct Sentence has been designated in the Second Supplemental Designation of Clerk's Papers filed December 29, 2016. The State anticipates this document will be designated as CP 43-65.

Judge Cozza determined that the “new motion seeks to re-litigate the same issues already addressed by the Court of Appeals in 2010 and 2014. Accordingly, his motion before this court is dismissed under the doctrines of collateral estoppel and *res judicata*.” CP 34-35.

IV. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MR. PORTER’S CrR 7.8 COLLATERAL ATTACK ON HIS THIRTEEN-YEAR-OLD JUDGMENT, WHERE THE CLAIMS RAISED IN THIS ATTACK ARE THE SAME AS THE CLAIMS PREVIOUSLY RAISED AND DENIED BY THIS COURT IN 2010 AND 2014, AND WHERE THE FILING OF THE CrR 7.8 MOTION WAS SUCCESSIVE.

1. Standard of Review

Appellate review is limited to determining whether the trial court abused its discretion in denying Porter’s motion. *See State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005); *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Consequently, review on appeal of a CrR 7.8 motion is limited to the issues originally raised. *Id.*

An appellate court may affirm the trial court’s rejection of a defendant’s motion under CrR 7.8(b)(2) on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

2. Argument

Mr. Porter’s instant claims to the superior court were exactly the same as contained in his prior rejected claims to this Court in 2009, 2010

and 2014. In 2009, he claimed he was entitled to specific performance of the original judgment and sentence - which imposed a determinate term - because the amended judgment and sentence was contrary to his plea, and that he would not have entered a guilty plea if he had been advised of the indeterminate sentence. He made that same claim in his 2016 CrR 7.8 motion, CP 46, and in his brief to this Court. Appellant Br. at 6-11. He argued that the corrected judgment and sentence violated his due process rights in his 2014 petition, and makes that same claim here. Appellant Br. at 5-6.

The superior court properly denied defendant's motion because he has previously brought a collateral attack on the same *or substantially similar* grounds. *See State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992); RCW 10.73.090(2) (collateral attack means "any form of postconviction relief other than a direct appeal"). Summary dismissal is appropriate under RCW 10.73.140⁶ where a petitioner previously filed a

⁶ **RCW 10.73.140 COLLATERAL ATTACK —
SUBSEQUENT PETITIONS**

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

personal restraint petition or where the petition is based on frivolous grounds. *In re Pers. Restraint of Bailey*, 141 Wn.2d 20, 22, 1 P.3d 1120 (2000); *and see, In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001).

As relevant herein, CrR 7.8(b) includes the following requirements:

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**. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(Emphasis added.)

This Court has previously determined the defendant's claims are time-barred under RCW 10.73.090, and not exempted from this time bar under .100. That same reasoning applies here. All of the defendant's claims

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.

are time-barred. Additionally, the claims are the same ones previously raised and considered by this Court. Therefore, those considerations were properly considered here by the trial court. *See* RCW 10.73.140 (substituting the Superior Court for the Court of Appeals by operation of CrR 7.8):

If a person has previously filed a petition for personal restraint, the [superior court] 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 [superior court] 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 [superior court] 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 [superior court] 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 [superior court] 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.

RCW 10.73.140 (emphasis added, and substituting “superior court” for “appellate court.”)

The superior court followed the above rule and carefully considered this Court’s prior dismissal orders. Thereafter, the superior court properly determined that the defendant was raising the same claims previously

raised, and that the principles of *res judicata* applied.⁷ That is the analysis required under the rule and the statute. Even at the State Supreme Court, where the bar on successive petitions set forth in RCW 10.73.140 does not apply, where the second petition is similar to the first, “good cause” must be shown as to why the claims should be considered. *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 267, 111 P.3d 249 (2005). No good cause has been shown for the delay or the submission of the previously considered and rejected arguments.

The superior court did not abuse its discretion by dismissing a motion it was allowed or required to dismiss under the joint operation of CrR 7.8 and RCW 10.73.140. Mr. Porter brings no new facts to his arguments. The trial court’s determination that the same issues had been litigated, based upon this Court’s prior decisions, is supported by the record. Indeed, the trial court’s order denying the present motion has this Court’s prior decisional orders attached. CP 34-42. Therefore, there was no abuse

⁷ It can be said that RCW 10.73.140 sets forth the same bars to successive claims as does *res judicata*, or claim preclusion, which prevents the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions that could have been, but was not, raised in the first suit. See BLACK’S LAW DICTIONARY 1336–37 (8th ed.2004), and see *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

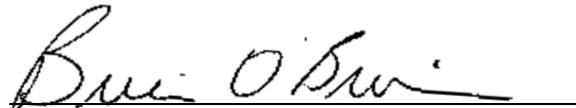
in discretion in the trial court's dismissal of the untimely, successive and repetitive collateral attack.

V. CONCLUSION

The successive and repetitive claims made by the defendant were barred by the one-year time limit under RCW 10.73.100 and by operation of RCW 10.73.160 in conjunction with CrR 7.8. The trial court did not err in dismissing the defendant's motion.

Dated this 29 day of December, 2016.

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Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Brian O'Brien", written over a horizontal line.

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DIVISION III

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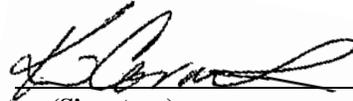
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington,
that on December 29, 2016, I a copy of the Brief of Respondent in this matter to:

William Murry Porter, DOC 847461
Coyote Ridge Correction Center
PO Box 769
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12/29/2016
(Date)

Spokane, WA
(Place)


(Signature)