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NO. 35451-2-III

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

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

KELLY EUGENE SMALL,

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant, Kelly Small, was convicted of Rape in the First Degree (Count 2), Burglary in the First Degree (Count 3), and Forgery (Count 4) based on an incident that occurred in February of 2006. [CP 51, 66] The jury also found beyond a reasonable doubt that Appellant committed Count 3 with aggravating factors that the burglary was committed with sexual motivation and that the victim was in the building at the time of the burglary. [CP 68] Appellant was sentenced on Count 2 to 236 months plus 120 months of enhancements and on Count 3 to 89 months plus 24 months of enhancements from the jury's special verdicts, specifically for the sexual motivation finding. [RP 55] At the time of sentencing, the court stated,

The Court did not impose an additional sentence for the aggravating circumstances that the victim was present in the building [for Count 3]. I felt that that was included in burg one, and in rape one. [10/5/12 RP 2822-23]

The court issued findings of fact and conclusions of law for sentencing. [CP 73-75] Regarding the burglary charge, the court stated as one of its legal conclusions:

4. Regarding Count III, Burglary in the First Degree, the Court imposes an additional 24 months, consecutive to the aforementioned sentence, regarding the verdict of the jury that the defendant committed the crime of Burglary in the First Degree with Sexual Motivation, and pursuant to RCW 9.94A.533(8);

5. The Court imposes no additional sentence regarding the jury's finding that the victim of the burglary was present in the building or residence when the crime was committed.

[CP 74]

Appellant appealed his sentence on the burglary count in *State v. Small*, 198 Wn.App. 1008, WL 959538 (Court of Appeals, 31185-6-III). The relevant basis of the appeal was that the 24 month mandatory sentencing enhancement under RCW 9.94A.533(8) applied to felony crimes committed on or after July 1, 2006 and Appellant's crime was committed in February of 2006. *Small*, WL 959538 at 6.

The court was unclear as to whether the sentencing court would have imposed the 24 month enhancement as an aggravating circumstance had the court been aware that the enhancement was not mandatory at the time of the offense:

It is not clear to us that the court would have imposed a discretionary exceptional sentence based on the sexual motivation finding. The court did not increase Mr. Small's sentence at all based on one of the aggravating circumstance [*sic*] found by the jury [] and in orally announcing its sentencing decision, it thrice characterized the 24 month increase for the sexual motivation finding as mandatory, not discretionary.... We find no indication that the trial court would have imposed an exceptional sentence for the burglary count had it realized that the addition of 24 months presently required by RCW 9.94A.533(8) did not apply.

Small, WL 959538 at 7. The court then "remand[ed] for resentencing on the burglary count." *Id.* The mandate was issued on April 12, 2017, ordering

the case to be “mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.” [CP 19]

Resentencing was held on July 18, 2017 and the order modifying Judgment and Sentence was entered July 19, 2017. [CP 8-9] At resentencing, the State requested the court re-impose the 24 month enhancement, not because it was mandatory under RCW 9.94A.533(8), but because the court had authority to issue an exceptional sentence based on the presence of sexual motivation as an aggravating factor. [RP 21:1-3, 8-12] Counsel for Appellant requested the court not impose any additional time for the sexual motivation finding. [RP 22:19-23]

The resentencing judge engaged in a discussion of the reasons for the remand and the Court of Appeals’ decision. [RP 24-26] The judge found that “it’s just coincidence that Judge Burchard imposed an exceptional sentence of 24 months.” [RP 27:2-3] The court imposed an exceptional sentence of 24 months consecutive to the underlying 89 month sentence. [RP 28, CP 9]

The court issued findings of fact in its association with the resentencing. [CP 8-9] The court found:

[T]he jury found two aggravating factors beyond a reasonable doubt: that the victim was present in the residence when the crime of burglary was committed, and

that the defendant committed the burglary with sexual motivation.

That each finding is a separate basis for an exceptional sentence.

The original sentencing on Count 3 was supported by the aggravating factors, and it appears the imposition of 24 months was based on those factors and not on RCW 9.94A.533.

The Court now finds that both aggravating factors found by the jury on Count 3 support an exceptional sentence of 24 months consecutive. In addition the standard range at the high end of sentencing range based on an offender score of 7.

That pursuant to RCW 9.94A.535(a), the Court now imposes an exceptional sentence on Count 3.

That the Court's sentence is based on the aggravating factors, and is not based on any mandatory sentencing provision in RCW 9.94A.533(a).

[CP 8-9]

Appellant now appeals the resentencing. Appellant also filed a corresponding Personal Restraint Petition based on the same issues asserted in his appeal. Respondent was given permission to reply to both the appeal and petition at the same time.

ARGUMENT

- A. The trial court had discretion to impose an exceptional sentence on resentencing based on aggravating factors found by the jury.

Collateral estoppel means “that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *State v. Tili*, 148 Wn.2d 350, 360 60 P.3d 1192 (2003). Collateral estoppel applies in criminal cases. *Id.* However, in criminal cases, the principal is not to be applied with a hypertechnical approach but with realism and rationality. *Id.* at 361.

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Id.* at 361.

The defendant argued that because the trial court decided not to impose an exceptional sentence at the first sentencing, the court was collaterally estopped from imposing the exceptional sentence on

resentencing. *Id.* at 361. The defendant relied on *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992) (*Collicott II*). The defendant argued that *Collicott II* held that “ a trial court which considers and rejects the State’s request for an exceptional sentence is collaterally estopped from imposing an exceptional sentence on remand for resentencing, based on the same facts considered at the first hearing.” *Id.* at 363. However, the Supreme Court stated that the “holding” in *Collicott II* is questionable because it did not command a majority on the collateral estoppel issue. *Id.* at 363. “[T]he discussion of collateral estoppel in *Collicott II* is not mandatory authority regarding the use of collateral estoppel in exceptional sentencing and may be considered dicta.” *Id.* at 364.

In *Collicott*, where the trial court decided the defendant’s conduct was the same criminal conduct but declined to impose an exceptional sentence at the first sentencing, it made the opposite decision at the resentencing while the “same criminal conduct” determination remained the same. *Id.* at 365. Thus, the same criminal conduct analysis had not changed between the two sentencings. *Id.* However, unlike *Collicott*, the court in *Tili* faced a different issue at resentencing than was before it at the original sentencing. *Id.* at 365. In *Tili* the question before the court was whether to impose an exceptional sentence on top of a presumptive sentence range to be served consecutively arising out of separate and

distinct conduct, while the issue at resentencing was whether to impose an exceptional sentence on top of a presumptive sentence arising out of the same conduct. *Id.* Therefore, the issues were different and the trial court was not barred by collateral estoppel on resentencing. *Id.*

The defendant also argued that collateral estoppel should bar the trial judge from imposing an exceptional sentence because the court stated at the first sentencing that he did not believe an exceptional sentence would be upheld by the trial court given the uncertainty of the law on merger and same criminal conduct. *Id.* at 366. The Supreme Court said that comments from the trial court showed that the court would have imposed an exceptional sentence, but for the uncertainty of the law. *Id.* at 366. Therefore, the issue of whether to impose an exceptional sentence was not identical between the first and second sentencing hearings because of the clarification in the law on resentencing. *Id.* at 367.

In the current case, the trial judge imposed an exceptional sentence based on the sexual motivation aggravator. The State's sentencing recommendation on resentencing was based only on the sexual motivation aggravator and made no real mention of the victim's presence aggravator. [RP 21:2-3] The trial court on re-sentencing imposed the same sentence that was ordered by the original sentencing court. [RP 27-28, CP 8-9] The trial court found that it was merely coincidence that the original

sentencing judge sentenced 24 months, which happened to be the same amount that was mandated under RCW 9.94A.533(8). [RP 27:2-3] Perhaps, stated another way, it is likely that the original sentencing judge was using the then mandatory 24 month time period as a guide in determining the appropriate amount of time to impose as an exceptional sentence.

With this in mind, the resentencing judge ordered a sentence that was consistent with the original trial judge's sentence, which incorporated the belief that the victim's presence aggravator was included in the charges themselves. [10/5/12 RP 2822-23, CP 78] However, notwithstanding that argument, there was no re-litigation of any actual legal finding. Appellant asserts that the original sentencing court's statement that "I felt that that was included in burg one, and in rape one" somehow amounts to a full legal finding. However, this statement is merely the sentencing judge's rationale for why he, in his discretion, did not impose any *additional* time based on the victim's presence aggravator. This is further supported by the fact that this "finding" is not included in the court's findings of fact and conclusions of law issued in association with the original sentencing; the court merely stated it was going to impose no additional time. [CP 77-79] The trial court on re-sentencing did not re-litigate any prior findings. The resentencing court simply used

its discretion to consider both aggravating factors in resentencing on remand.

Furthermore, the re-sentencing court was not collaterally estopped from using both aggravating factors in its sentencing because Count 3 had been remanded for re-sentencing, not for ministerial reasons, see Section B, *infra*.

B. The trial court did not exceed the mandate of the appellate court as the case was remanded for resentencing, not for a ministerial correction.

In *Small*, WL 959538, the appellate court concluded that “[i]t is not clear to us that the court would have imposed a discretionary exceptional sentence based on the sexual motivation finding.” *Id.* at 7. The court found “no indication that the trial court would have imposed an exceptional sentence for the burglary count had it realized that the addition of a 24 months presently required by RCW 9.94A.533(8) did not apply.” *Id.* The court concluded, “[w]e remand for resentencing on the burglary count.” *Id.* The court’s mandate of April 12, 2017 stated “[t]he cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.” [CP 19]

Appellant misconstrues the Court’s opinion in its previous ruling. The court had stated there was “no indication that the trial court would

have imposed an exceptional sentence for the burglary count had it realized that the additional 24 months presently required by RCW 9.94A.533(8) did not apply.” *Small*, WL 959583 at 7. However, Appellant interprets this as the court ordering that the 24 month enhancement should be vacated. Yet, the opinion ordered that the case be “remand[ed] for resentencing on the burglary count.” *Id.*

When the court remands for resentencing, the resentencing is an entirely new proceeding. In *State v. Kilgore*, 141 Wn.App. 817, 172 P.3d 373 (Div.2, 2007), *aff’d*, 167 Wn.2d 28 (2009), the appellate court reversed two of the defendant’s convictions and remanded the case to the trial court “for further proceedings.” *Id.* at 822. The State elected not to re-try the defendant on the remanded charges and instead, the trial court eliminated the convictions and reduced the offender score from 18 to 12. *Id.* at 824. Because the reduction did not change the defendant’s standard sentence range, the trial court elected not to conduct a resentencing. *Id.* at 821. The court found that the remand was “ministerial” because the trial court merely corrected the original judgment and chose not to exercise its discretion to resentence the defendant. *Id.* at 829.

In *State v. McNeal*, 142 Wn.App. 777, 175 P.3d 1139 (Div.2, 2008), *review denied*, 169 Wn.2d 1030 (2010), the court recognized that a conviction is final when both the conviction and sentence are final. *Id.* at

786. A sentence is not final when a case is remanded for sentencing because “the resentencing on remand [is] an entirely new sentencing proceeding.” *Id.* at 787. Had the court remanded for amendment of the judgment, the remand would be ministerial. *Id.* 787 n. 13.

Kilgore and *McNeal* together provide that a defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence. *State v. Toney*, 149, Wn.App. 787, 792, 205 P.3d 944 (Div.2, 2009), *review denied*, 168 Wn.2d 1027 (2010). In *Toney*, the court found that the defendant’s sentence was not final because the remand did not limit the trial court to making a ministerial correction; rather, the court unequivocally “remand[ed] for resentencing.” *Id.* This is further supported by the fact that the trial court exercised its discretion by conducting a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard. *Id.* at 793.

In *Tili*, 148 Wn.2d 350, the defendant presented a similar argument to Appellant’s. The defendant argued that the trial court exceeded its mandate as he asserted the trial court was instructed only to recalculate his offender score on resentencing. *Id.* at 365. The defendant relied on *Collicott*, 118 Wn.2d 649 (*Collicott II*). However, the issue in that case

was whether the trial court had authority to impose an exceptional sentence on remand when the case was remanded with an order directing the trial court to “redetermine the petitioner’s offender score” and the trial court had originally imposed a standard sentence range.” *Id.* at 365. *Collicott II* held that the trial court had exceeded the scope of the mandate by imposing the exceptional sentence at resentencing. *Id.* at 365 citing *Collicott II*, 118 Wn.2d at 661. However, the mandate in *Tili* required “further proceedings in accordance with the attached true copy of the opinion.” *Id.* at 365. In the attached opinion, the court held that the defendant’s sentence was required to be served concurrently “unless an exceptional sentence [was] imposed.” *Id.* at 366. The court ruled that based on this language, the trial court did not exceed the scope of the mandate by imposing an exceptional sentence on resentencing. *Id.* at 366.

In the current case, the court remanded the case for resentencing on the burglary charge. The court had ruled that it was unclear from the record whether the court would have imposed the 24 month exceptional sentence had the court known it was not mandatory. *Small*, WL 959538 at 7. This does not result in a ministerial remand to vacate the enhancement, but rather a remand for “resentencing” to allow the court to consider resentencing on the burglary charge as a whole. This includes the court’s ability to impose an exceptional sentence based on aggravating factors.

The trial court was within its authority to sentence Appellant to a 24 month enhancement based on the aggravating factor of sexual motivation, and the victim's presence if it so chose in its discretion.

C. The defendant has not established a basis for relief in his Personal Restraint Petition.

A personal restraint petition is a form of collateral attack. RCW 10.73.090(2). Two types of challenges may be raised in a collateral attack- constitutional or non-constitutional errors. *In re Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). To obtain relief on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that petitioner was actually and substantially prejudiced by the error. *Id.* at 672; *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Matter of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

The party bearing the burden is the reverse of that on direct appeal. "[I]n a direct appeal, the burden is on the state to establish beyond a reasonable doubt that any error of constitutional dimension is harmless, but on collateral review, the burden shifts to the petitioner ... [T]he petitioner must establish that the error was prejudicial." *In re Hagler*, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). The petitioner's burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice. *St. Pierre*, 118 Wn.2d

at 328. Although some errors that are per se prejudicial on direct appeal will also be per se prejudicial on collateral attack, “the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding.” *Davis*, 152 Wn.2d at 672. The Court has rejected the proposition that constitutional errors that are per se prejudicial on direct appeal will also be presumed prejudicial for the purposes of personal restraint petitions. *Orange*, 152 Wn.2d at 804; *St. Pierre*, 118 Wn.2d at 328-329.

The standard of review on a non-constitutional issue is different. Non-constitutional error requires more than a mere showing of prejudice. *Davis*, 152 Wn.2d at 672. The court will consider non-constitutional error only when “the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Id.* If a petitioner fails to meet the threshold burden of showing actual prejudice arising from error, the petition must be dismissed. *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Whether the challenge is based on constitutional or non-constitutional error, a petitioner must support a personal restraint petition with facts or evidence upon which the claims of unlawful restraint are based and not rely solely upon conclusory allegations. *In re Spencer*, 152 Wn.App. 698, 706, 218 P.3d 924 (Div.2, 2009) citing *Matter of Cook*, 114

Wn.2d 802, 813-814, 792 P.2d 506 (1990). The evidence presented must consist of “more than speculation, conjecture, or inadmissible hearsay.” *Id.* citing *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). A mere statement of evidence that the petitioner believes will prove his factual allegations is not sufficient. *Rice*, 118 Wn.2d at 886.

If the petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Id.* If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. *Id.* The affidavits must contain matters to which the affiants may competently testify. *Id.* The court need not order a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. *Id.* The purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. *Id.*

For the reasons stated in Sections A and B above, Respondent requests this Court deny Appellant’s petition. It should also be noted that Appellant was sentenced to 356 months on Count 2 while only 113 months on Count 3, the Count that is the subject of his Petition. [RP 55]

Therefore, even if this Court were to find Appellant's arguments persuasive, such a finding would not have any practical effect on the defendant's imprisonment and he is therefore not prejudiced.

CONCLUSION

Respondent requests that this court affirm the trial court's sentence as the trial court was not collaterally estopped from considering both aggravating factors on resentencing. Respondent further requests this Court deny the Appellant's Personal Restraint Petition.

Dated this 21 day of June, 2018

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 21st day of June, 2018, I provided service to the following a true and correct copy of the Respondent's Brief:

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