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No. 53214-6

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

STATE OF WASHINGTON,

Respondent,

v.

GAYLON LEE THIEFAULT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry

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STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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A. ASSIGNMENT OF ERROR

Because Initiative 593 violated the single subject requirement of article II, sen 19 of the Washington State Constitution, petitioner's life sentence under the Persistent Offender Accountability Act ("POAA") is unconstitutional and he is unlawfully restrained.

Issue pertaining to Assignment of Error

1. In 1999, petitioner was convicted of attempted second degree rape and sentenced to life in prison without the possibility of parole under the POAA, the product of Initiative 593, which Washington voters passed into law in 1993. In State v. Cloud, the Washington Court of Appeals held that Initiative 593 violated the single subject requirement of article II, sen 19 because a portion of the initiative relates to individuals who are not persistent offenders. The remedy for such a violation is to declare the entire initiative void. Is petitioner's sentence, which is the product of this initiative, also void?

2. Is petitioner unlawfully restrained under RAP 16.4(c)(2) and (c)(4)?

B. STATEMENT OF THE CASE

Petitioner Mr. Gaylon Lee Thieffault, age 42 was sentenced to a term of incarceration of Life Without The Possibility of Parole, pursuant to the Persistent Offender Accountability Act ("Three Strikes" provisions), RCW 9.94A.120, following his current conviction for attempted second degree rape and the trial court's own finding by a preponderance of the evidence that the defendant was also guilty of two prior "most serious offenses." CP 17-28;RP 44-46.

C. ARGUMENT

BECAUSE INITIATIVE 593 VIOLATED THE SINGLE SUBJECT RULE, THIEFFAULT LIFE SENTENCE IS UNCONSTITUTIONAL.

Seven years ago, in *State v. Thorne*, 129 Wn. 2d 736, 921 P.2d 514 (1996), the defendant argued that Initiative 593 violated article II, sen 19 of the Washington State Constitution, which provides, "no bill shall embrace more than one subject, and that shall be expressed in the title."

Specifically, Thorne pointed out that Initiative 593 "contains two distinct subjects: (1) provisions for life imprisonment for three-time persistent offenders convicted of most serious offenses, and (2) provisions making certain other offenders ineligible during mandatory minimum terms for any from of early release. *Thorne*, 129 Wn.2d at 757. Yet, the Initiative ballot title merely read, Shall criminals who are convicted of most serious offenses on three occasions be sentenced to life in prison without parole. *Thorne*, 129 Wn.2d at 757.

The Court found it unnecessary to decide whether the part of the Initiative which concerns release is beyond the scope of the ballot title because the part of the law which is involved in the case before us now is clearly within the scope of the title of the Initiative. *Thorne*, 129 Wn.2d at 758. This decision foreclosed future similarly-situated litigants (including *Thiefault*) from prevailing on this issue. Only a litigant challenging Initiative 593's second subject -- the change to earned early release credits... would be able to obtain a definitive answer on the constitutionality of the initiative under the single subject rule.

That litigant was Darrell Cloud. In 1999, Cloud, like *Thorne*, pointed out that Initiative 593 applied not only to persistent offenders, but also to first-time offenders like himself who were no longer eligible for earned early release time. *Cloud*, 95 Wn.App. at 616. Division One held that this latter provision, unrelated to persistent offenders, violated article II, sen 19 and that former RCW9.94A.120(4) was unenforceable as to Cloud.³ *Cloud*, 95 Wn.App. at 655-56.

Thiefault now relies on *Cloud*'s holding that Initiative 593 violated the single subject requirement of article II, sen 19. The remedy for a violation of the single subject rule is to strike the initiative in its entirety, which would include those portions establishing the persistent offender sentencing scheme applied to *Thiefault*. See *City of Burien v. Kiga*, 144 Wn.2d 819, 822, 828, 31 P.3d 659 (2001); *Amalgamated Transit v. State*, 142 Wn.2d 183, 191, 216, 11 P.3d 762 (2000).

The entire initiative must be declared void because it is impossible to know if either subject contained in the initiative would have had sufficient support standing alone. *Kiga*, 144 Wn.2d at 828. A challenger need not prove that the initiative would have failed without this logrolling. Mere possibility is enough. *Amalgamated*, 142 Wn.2d at 212 n.5.

Moreover, the decision in *Cloud* represents a significant change in the law under RCW 10.73.100(6). Where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a significant change in the law and satisfies RCW 10.73.100(6). In *re Personal Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206(2000); see also *In re Personal Restraint of Johnson*, 131 Wn.2d at 567-68 (retroactively applying intervening change in interpretation of sentencing statute).

In 1996, the Court held that Initiative 593 did not violate the single subject requirement of article II, section 19 and foreclosed any further argument on the issue by those subject to the persistent offender provisions. See *Thorne*, 129 Wn.2d at 758. With the intervening decision in *Cloud*, *Thorne*, is no longer sustainable.

2. Thiefault is Entitled to Relief.

RAP 16.4(c) defines the circumstances under which a petitioner can demonstrate unlawful restraint. Two apply here.

First, a petitioner is unlawfully restrained if his sentence was obtained in violation of the Constitution of the United State or the Constitution or laws of the State of Washington. RAP 16.4(c)(2). Because Thiefault was prosecuted and sentenced under the persistent offender provisions in violation of article II, sen 19 of the Washington Constitution, he is unlawfully restrained.

Second, in language that mirrors RCW 10.73.100(6), a petitioner is unlawfully restrained if there has been a significant change in the law material to his sentence. RAP 16.4(c)(4). For the reasons just discussed, the Cloud decision marks such a change.

And because Thiefault claim is constitutional, to prevail he need only demonstrate prejudice, rather than a complete miscarriage of justice -- the requisite standard for most collateral claims. See In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984).

Thiefault is currently serving a mandatory life sentence under an invalid sentencing statute. It is difficult to conceive of greater prejudice. Thiefault has demonstrated

that he is entitled to relief under RAP 16.4(c)(2) and (4).

D. **CONCLUSION**

Thiefault's sentence should be vacated and his case remanded for sentencing outside the persistent offender provisions.

DATED this 28 day of March, 2004.

Respectfully submitted,

A handwritten signature in cursive script, reading "Stephen Thiefault", is written over a horizontal line. The signature is fluid and somewhat stylized, with the first letter 'S' being particularly large and prominent.