

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal)
Restraint Petition of)
) No. 78156-7
)
) ANSWER TO
SCOTT W. SKYLSTAD,) MOTION FOR
) DISCRETIONARY
) REVIEW
Petitioner.)
_____)

I. IDENTITY OF MOVING PARTY

Respondent, State of Washington, asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Respondent seeks denial of petitioner's motion for discretionary review.

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BY C. J. [unclear]
C. J. [unclear]
STATE OF WASHINGTON
COURT OF APPEALS

III. FACTS RELEVANT TO MOTION

Petitioner was convicted at a jury trial in the Spokane County Superior Court of first degree robbery. He appealed that conviction to the Court of Appeals, Division Three. The State cross-appealed the trial court's ruling running to the two weapons enhancements concurrently. A separate appeal on an eluding conviction was consolidated with the robbery appeal. See COA

files 20945-8-III and 20994-0-III.

The Court of Appeals affirmed the convictions, reversed the enhancement ruling, and remanded for a new sentencing. This Court declined to review that ruling. See file no. 74682-6. The mandate issued May 14, 2004.

The trial court re-sentenced the defendant in July, 2004, and he again appealed to the Court of Appeals. See file no. 23241-7-III. Division Three reaffirmed its ruling on the weapons enhancements on October 11, 2005. After moving for reconsideration, defendant filed a petition for review with this Court on December 21, 2005. See file no. 78126-5.

While the motion for reconsideration was pending, defendant filed the current personal restraint petition (PRP) with the Court of Appeals on November 21, 2005. It was assigned file no. 24681-7-III. The Court of Appeals dismissed the PRP as untimely on December 15, 2005, without serving a copy or calling for a response from the Spokane County Prosecutor. Defendant subsequently

filed the current motion for discretionary review with this Court, asking that the dismissal order be reversed and the matter remanded to the Court of Appeals for a decision on the merits of the petition.

This Court directed that a response to the motion for discretionary review be filed and also permitted a response to the PRP itself. Respondent respectfully submits this response on the "finality" question presented by this case. Respondent will not address the merits of the PRP at this time in view of its position that this PRP was not timely filed.

IV. ARGUMENT

The decision of the Court of Appeals does not present an issue justifying the grant of review pursuant to the criteria of RAP 13.5(b).¹

¹ The motion for discretionary review references RAP 13.5(b)(1), which it asserts authorizes review for a conflict with a decision of this court. The RAP 13.5(b)(1) criterion for review is whether the Court of Appeals committed "obvious error" which rendered further proceedings useless. Respondent will assume this is the standard petitioner is actually arguing and will direct its remaining argument towards explaining why there was no error at all,

Accordingly, the motion for discretionary review should be denied.

The answer to the question is found right in the language of the challenged section. RCW 10.73.090(3) defines three ways in which a judgment is "final." The second of those is in question here:

(b) The date that an appellate court issues its mandate disposing of a timely filed direct appeal from the conviction.

RCW 10.73.090(3)(b) [emphasis supplied].

A conviction, in turn, can be entered by a defendant's plea or admission in open court, or by a verdict of a jury or a judge in a bench trial. RCW 10.01.060. In this case, defendant was convicted of the robbery by the jury verdict.

RCW 10.73.090(3)(b) speaks to one particular type of appeal -- the direct appeal following the verdict. With the issuance of the mandate, the case becomes final for collateral attack purposes. Nothing in that statute requires that the lower court be affirmed *en toto* or even

let alone "obvious" error.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW -4

affirmed at all. In other words, the case becomes final with the issuance of the mandate, regardless of what the appellate court's ruling actually was. Of course, if a conviction is set aside, there will be nothing to collaterally attack in the future. But the fact that a case is remanded for correction of a judgment or even a new sentencing hearing does not change the statutory requirement. The conviction became final when the appellate mandate issued.

The second appeal was from the new sentencing ordered by the Court of Appeals in the first appeal. Given RCW 9.94A.585(1) and the law of the case doctrine, the second appeal should not even have been permitted. Nonetheless, the fact that the new sentence was appealed from did not bring up the underlying convictions or trial. Those were final for chapter 10.73 purposes once the mandate issued on the first appeal.

This is consistent with long time doctrines and court rules concerning finality of judgments. One example comes from appeals taken

from post-judgment proceedings. At common law it was very clear that a post-trial ruling was not, in the absence of a statute, appealable and, even when appealable, did not bring up the underlying judgment. *E.g.*, Sound Investment Co. v. Fairhaven Land Co., 45 Wash. 262, 88 Pac. 198 (1907); State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951). Modern rules are the same. An appeal taken from a post-verdict ruling does not bring up the trial. Cox v. General Motors, 64 Wn. App. 823, 827 P.2d 1052 (1992) [appeal from order granting a new trial did not allow appellant to challenge pre-trial rulings]; Kemmer v. Keiski, 116 Wn. App. 924, 68 P.3d 1138 (2003).

Similarly, the rules governing appeals in criminal cases limit the scope of post-judgment appeals. RAP 2.4(c) provides, in part, that:

. . . the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely posttrial motion based on . . . (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.6 (new trial).

The only post-conviction criminal motions that bring up the underlying verdict are CrR 7.4 and CrR 7.6 (now found at CrR 7.5). Those also are the two pre-sentencing motions that can be brought to challenge a verdict. After judgment, the trial court can only consider a motion for relief from judgment under CrR 7.8. That motion is not one that brings up the underlying verdict. RAP 2.4(c).

There have many times been reported opinions in second appeals from new sentencing proceedings. None of those cases even suggest that an appeal from the new sentencing brought up the underlying verdicts. *E.g.*, State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996); State v. Conners, 90 Wn. App. 48, 950 P.2d 519, *review denied* 136 Wn.2d 1004 (1998). Indeed, a modification to a judgment and sentence required by an initial appeal is not even enough to permit challenges in a second appeal to the portions of the sentence that were unchanged at the second sentencing. *E.g.*, State v. Barberio, 121 Wn.2d 48, 846 P.2d

519 (1993) [failure to raise exceptional sentence in first appeal precluded challenge to exceptional sentence imposed on remand]; State v. Traicoff, 93 Wn. App. 248, 257-258, 967 P.2d 277 (1998), review denied 138 Wn.2d 1003 (1999) [could not challenge community placement conditions in appeal from new sentencing where challenge not raised in first appeal]. Rather, the rule of Barberio is that a sentence component that did not change from one judgment to the next will not be reviewed in the second appeal unless the trial court expressly discussed the provision at the second sentencing.²

The effect of one appeal is typically to foreclose at least some issues from consideration on a second appeal in the same case. Indeed, that is the purpose of the law of the case doctrine. Folsom v. Spokane County, 111 Wn.2d 256, 263-264, 759 P.2d 1196 (1988). The judgment is necessarily final as to some aspects of the case even if a sentence or other collateral issues are still

² Application of that rule in the current setting would necessarily preclude consideration of trial issues in this appeal.

alive. There is nothing strained or improper in reading RCW 10.73.090(3)(b) the same way. The Legislature intended that convictions become final when the mandate issued in the initial appeal. The fact that a new sentencing hearing was required in this (or any other) case simply did not change the legislative judgment. This is totally consistent with the case law decisions on finality of judgments noted above. If those judgments are conclusive for purposes of a second appeal, why are they not for collateral attack purposes?

Under the plain terms of the statute, this case became final on May 14, 2004. This PRP was filed six months after the anniversary of the mandate. It was untimely when filed and the Court of Appeals did not err in dismissing it.

Petitioner has failed to show "obvious error" justifying review. RAP 13.5(b)(1). The motion for discretionary review should be denied.

V. CONCLUSION

For the reasons stated above, respondent requests that the court deny petitioner's motion for discretionary review.

Respectfully submitted this 6th day of March, 2006.



Kevin M. Korsmo #12934
Deputy Prosecuting Attorney

Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint)	
Petition of:)	
)	No. 78156-7
SCOTT W. SKYLSTAD,)	
)	CERTIFICATE OF MAILING
Petitioner.)	
)	

CERTIFICATE

Kathleen L. Owens states: That I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party to the above-entitled action, and competent to be a witness therein; that on March 6, 2006, I mailed a true and correct copy of Answer to Motion for Discretionary Review, addressed to:

Scott W. Skylstad
 DOC #931646
 1830 Eagle Crest Way
 Clallam Bay, WA 98326

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

3/6/2006
 (Date)

Spokane, WA
 (Place)

Kathleen L. Owens
 (Signature)

RECEIVED
 SUPERIOR COURT
 CLALLAM COUNTY
 CLALLAM BAY, WA 98326
 08 MAR - 8 AM 7:55
 B. K. HERBERT
 CLERK