

NO. 82868-7
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VINCENT ADOLPH
PETITIONER,
V.
STATE OF WASHINGTON
RESPONDENT

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

B. DECISION

The decision at issue is whether the Court should grant discretionary review of the Court of Appeals decision dismissing the petitioner's second personal restraint provision (PRP).

C. ISSUES PRESENTED FOR REVIEW

1. Should review be granted where petitioner's second successive PRP was properly dismissed pursuant to RCW 10.73.140 and where the subsequent PRP is an abuse of writ?
2. Should review be granted where the petitioner's subsequent PRP did not present any basis to grant review under RAP 16.4?
3. Should review be granted where the petitioner's underlying PRP was not timely and equitable tolling did not apply?
4. Should review be granted where petitioner waived a challenge to the Lincoln County DUI conviction when he failed to properly raise the issue on his first appeal?
5. Should review be granted where petitioner sought exclusion of his Lincoln County DUI conviction in his subsequent PRP, but failed to specifically object to the existence of the conviction; and where the proper remedy even if he had specifically objected was to allow the State to provide additional information supporting the conviction?

D. STATEMENT OF THE CASE

Additional Procedural Facts

The defendant was found guilty on June 3, 2005, following a jury trial of Vehicular Homicide and Vehicular Assault. He was sentenced on September 19, 2005. The sentence included three

enhancements pursuant to RCW 46.61.520 for the defendant's prior DUI convictions, including a conviction for DUI in Lincoln County on March 19, 1992.

At sentencing, the trial court found the State properly proved the prior Lincoln County DUI conviction, based on the certified driving abstract¹ maintained by the Department of Licensing and the defendant's criminal history as maintained in the Judicial Information System.

In addition to a certified driving abstract, the State also filed a certified copy of both the Lincoln County docket and the Lincoln County judgment with the court on the date of sentencing. *RP Sentencing*, pg. 87. (The judgment is contained on the lower section of the original criminal citation). The defendant's attorney acknowledged the documents were valid and agreed to their being made part of the record. *RP Sentencing*, pg. 88. However, the Petitioner did not acknowledge these documents in his most recent Petition for Review.

The petitioner's conviction was affirmed by the Court of Appeals Div. III No. 24597-7-III in March 2007. The petitioner filed a Personal Restraint Peition, which was denied September 10, 2007; in Court of Appeals Div. III case No. 26367-3-III. The petitioner then filed a Petition for Review with the Washington State

¹ Even the copy of the driving abstract attached to petitioner's Motion for Discretionary review bears a certification. See *Motion for Discretionary Review*, Appendix B.

Supreme Court, which was denied on April 30, 2008. *See State v. Adolph*, 163 Wash.2d 1030, 185 P.3d 1194 (Table) (2008)

The petitioner then filed another Personal Restraint Petition (Court of Appeals Div. III No. 27277-0-III). In the subsequent PRP, the petitioner raised a new claim that the State failed to prove his prior Lincoln County DUI conviction. *Order Dismissing PRP, COA 27277-0-III, pg. 1*. On March 3, 2009, Chief Judge John A. Schultheis, of the Court of Appeals Division III, dismissed the petitioner's second personal restraint petition. The Judge found the second petition was successive and barred by RCW 10.73.140. *Order Dismissing PRP, COA 27277-0-III, pg. 1*. The Judge also ruled the defendant waived his challenge to the existence of the Lincoln County conviction where the petitioner agreed to the validity of the documents and agreed to make them part of the trial court record. *Order Dismissing PRP, COA 27277-0-III, pg. 2-3*.

The petitioner again seeks discretionary review by the Washington State Supreme Court of the Court of Appeals denial of petitioner's second PRP.

E. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

1. The Petitioner's second successive Personal Restraint Petition was properly dismissed pursuant to RCW 10.73.140 and is an abuse of writ.

a. RCW 10.73.140 mandated dismissal of the the successive PRP filed in the Court of Appeals.

RCW 10.73.140 states:

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 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.

The Court of Appeals did determine that the Petitioner had previously filed a Personal Restrain Petition and that in addition to waiving the challenge to the DUI conviction, that the petitioner also failed to show good cause why the issue was not raised earlier.

*Order Dismissing PRP.*² The Court of Appeals properly dismissed the petition.

² Petitioner argues that his violation of RCW 10.73.140 required the Court of Appeals to transfer his PRP to the Supreme Court. This interpretation is in opposition to the plain language of the statute and is not supported by the cases cited by petitioner in his motion. See Motion for Discretionary Review, pg. 14. For example, in the case of *In re Turay*, 150 Wn.2d. 71, the Supreme Court stated that the Court of Appeals *retains* the power to transfer a petition raising new grounds for relief to the Supreme Court. *Turay* at 86. Moreover, where the subsequent petition is time barred, as in this case, the Court of Appeals *must* dismiss the petition rather than transfer it to the Supreme Court. *Turay* at 87.

b. The Motion for Discretionary Review should be denied as an abuse of writ

A prisoner's second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ. *In re Pers. Restraint of Jeffries*, 114 Wash.2d 485, 487-88, 789 P.2d 731 (1990). If the defendant was represented by counsel throughout post conviction proceedings, it is an abuse of the writ for him or her to raise a new issue that was available but not relied upon in a prior petition. *Jeffries*, 114 Wash.2d at 492 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)).

Although no abuse of the writ will be found where a claim is based on newly discovered evidence or intervening changes in case law because they would not have been *available* when the earlier petition was filed; where counsel was fully aware of the facts supporting the *new* claim when the prior petition was filed, and there are no pertinent intervening developments, raising the *new* claim for the first time in a successive petition constitutes needless piecemeal litigation and, therefore, an abuse of the writ. *Jeffries*, 114 Wash.2d at 492.

The petitioner was represented by counsel through the entirety his first round of appeals. The facts supporting the newly raised issue were known to counsel, as they formed a basis of the

defendant's sentence and where contained in the report of proceedings.

The petitioner's successive petition is an abuse of the writ and the Motion for Discretionary Review should be denied.

2. Review should not be granted as there was no basis for the Appellate Court to grant relief under the second Personal Restraint Petition

RAP 16.4 states in part:

(a) Generally Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c)...

(c) Unlawful nature of restraint: The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions: The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

In the present case the Petitioner made no showing that his restraint was unlawful. He presented no facts to in his PRP to support any of the factors set out in RAP 16.4(c).

The trial and appellate courts had jurisdiction over the petitioner and the subject matter. The petitioner presented no facts to the contrary.

The verdict and sentence were not in violation of the Constitution of the United States or Washington State. Moreover, there have been no significant changes in the law that were material to the petitioner's conviction, sentence, or other orders entered; and there were no other legitimate grounds to justify the collateral attack.

3. The second Personal Restraint Petition was not timely

a. There was no statutory basis to permit the untimely Petition

RCW 10.73.090(1) states: No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

The term "valid on its face" has been interpreted to mean "without further elaboration." *In re Pers. Restraint of Stoudmire* 141 Wn.2d 342, 353, 5 P.3d 1240 (2000) (quoting *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986)).

Although the petitioner argued that the one year time limit in RCW 10.73.090 does not apply to petitions or motions based on one of the grounds listed in RCW 10.73.100 (such as newly discovered evidence; sufficiency of the evidence; or there has been a significant change in the law, which is material to the sentence), the petitioner made no showing that these grounds applied to his case. See, *RCW 10.73.100 (1), (4), (5), and (6)*.

In this case, the subsequent PRP was not timely. It was filed long past the one year limitation. The petitioner raised no issues that permitted review beyond the one year limitation. Because the petitioner's subsequent PRP was untimely, dismissal by the Court of Appeals was mandatory.

b. Equitable tolling does not apply

The legislature has erected a jurisdictional time bar to review of untimely collateral attacks upon facially valid judgments. A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article 1, § 13, is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. Any inquiry beyond the face of a final judgment results from legislative authorization. There is none that applies to the Petitioner's untimely collateral attack.

Legislative authorization for review beyond the face of a final judgment can be found in two separate statutes. The first statute, which applies only to superior courts, is RCW 4.72.010. See *State v. Sampson*, 82 Wn.2d 663, 665, 513 P.2d 60 (1973). The second statute, which applies to all courts of record, is RCW 7.36.130.

The habeas corpus statute, RCW 7.36.130, is derived from a statute passed by the first legislature of Washington Territory. As first enacted, the territorial habeas corpus statute was an absolute prohibition against collateral review of a facially-valid judgment by a court of competent jurisdiction. Laws of 1854, p. 213, § 445. That restriction was repeatedly upheld by the Washington Supreme Court. *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891); *In re Grieve*, 22 Wn.2d 902, 158 P.2d 73 (1945). In 1947, the habeas

corpus statute was amended to allow such challenges when the challenge is based upon a constitutional violation. Laws of 1947, chapter 256, § 3. “[T]hese statutory changes have never affected, nor could they affect, the core constitutional inquiry protected by our state suspension clause.” *In re Runyan*, 121 Wn.2d 432, 443, 853 P.2d 424 (1993).

In the 1970’s, the Supreme Court created personal restraint petitions as the procedural mechanism for carrying out the Legislature’s grant of jurisdiction at the appellate court level. See generally RAP 16.1(c); *Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987). These procedural rules, however, did not override or alter the restrictions placed upon the courts’ review of collateral attacks by the Legislature. See *In re Rafferty*, 1 Wash. 382, 25 P. 465 (1890).³

In 1989, the Legislature acted to restore some finality to criminal judgments by limiting the authority it had previously granted to courts to look behind the face of a judgment and sentence. *Honore v. Board of Prison Terms & Paroles*, 77 Wn.2d 660, 691, 466 P.2d 485 (1970) (Hale, J., concurring). Specifically, the Legislature restricted the number of petitions for relief a

³ Once the legislature acted to expand jurisdiction beyond that preserved by Const. art. I, § 13, Const. art. 4, § 4 permits the court to adopt procedural rules for dealing with the legislatively expanded scope of jurisdiction. *Holt v. Morris*, 84 Wn.2d 841, 529 P.2d 1081 (1974), overruled on other grounds, *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). To the extent any procedural rules regarding collateral attacks conflict with the legislature’s substantive grant of authority, the statute controls. See, e.g., *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997); *Abad v. Cozza*, 128 Wn.2d 575, 593 n. 2, 911 P.2d 376 (1996); *State v. Walker*, 93 Wn. App. 382, 967 P.2d 1289, 1293 (1998).

prisoner could file with respect to a single conviction and the length of time a prisoner could wait before bringing a petition. See RCW 10.73.090; RCW 10.73.100. The time-bar and the legislatively authorized grounds for waiving the one-year time-bar were incorporated into the jurisdictional statute governing all habeas corpus proceedings:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge the party when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated and the petition is filed within the time allowed by RCW 10.73.090 and 10.73.100.

See RCW 7.36.130.

That the RCW 10.73.090 time-bar is jurisdictional has been recognized by the Court in response to requests to consider collateral attacks filed after the expiration of the one-year period. See, e.g., *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998) (“The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more of the [grounds contained in RCW 10.73.100]”); *In re the Personal Restraint Petition of Benn*,

134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (court rules cannot be used to alter or enlarge the time limit contained in RCW 10.73.090). The doctrine of equitable tolling cannot be applied to jurisdictional statutes. See, e.g., *Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301 (1998). Cases applying equitable tolling to RCW 10.73.090 are contrary to the Washington Supreme Court authority that acknowledges the jurisdictional nature of the statute. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227, 39 A.L.R.4th 975 (1984); *State v. Langford*, 67 Wn. App. 572, 581, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007 (1993), cert. denied, 510 U.S. 838 (1993). The Supreme Court has not authorized the equitable tolling of the one-year time bar contained in RCW 10.73.090. *In re Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003).

Even though equitable tolling is available if a statute is not jurisdictional, the doctrine is used sparingly. See *State v. Duvall*, 86 Wn. App. 871, 875, 940, P.2d 671 (1997), review denied, 134 Wn.2d 1012 (1998). The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

In Washington equitable tolling is only appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. *Douchette v.*

Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). The purpose of RCW 10.73.090 is to further the State's compelling interest in the finality of criminal judgments. Finality serves the goals of rehabilitation, deterrence and punishment. *Kuhlmann v. Wilson*, 477 U.S. 426, 452-53, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986); *McCleskey v. Zant*, 499 U.S. 467, 491, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991); *Calderon v. Thompson*, 523 U.S. 538, 118, S. Ct. 1489, 1500-01, 140 L. Ed. 2d 728 (1998); *Shumway*, 136 Wn.2d at 399. The purpose of Petitioner's action is to upset a presumptively accurate conviction.

Essentially, Petitioner sought recognition of a new exception to the existing legislatively recognized exceptions to the one-year period contained in RCW 10.73.100. This is a step that a Court may not take. See, e.g., *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965) ("Courts will not read into statutes of limitations exceptions not embodied therein."); *Spokane v. State*, 198 Wash. 682, 694, 89 P.2d 826 (1939) ("To construe a further exception into the statute ... is to legislate judicially -- an abhorrent thing"). It is also a step that this Court refused to take in *In re Personal Restraint Petition of Carlstad*, 150 Wn.2d at 593 (refusing to accept a tardy collateral attack solely because the pro se litigant erroneously believed that the "mailbox rule" applied to state court pleadings).

Here, Petitioner identified no external impediment to his filing a timely collateral attack on the prior DUI conviction. There was no government action that barred his access to the courts or to his legal pleadings between 2005 and the present. The defendant's own inaction and neglect do not provide any exception to the one year time limit nor a basis for equitable tolling. This Court should refuse to grant review of the dismissal of the petitioner's untimely second PRP.

4. Discretionary review of the PRP is not appropriate where the petitioner failed to avail himself of his right to appeal

A defendant who has not appealed an issue may not use a personal restraint petition to raise issues he could have raised in a direct appeal, except for "grave constitutional errors." See *State v. Hall*, 18 Wn. App. 844, 847 (1977) (quoting *Koehn v. Pinnock*, 80 Wn.2d 338, 340, 494 P.2d 987 (1972)).

In his appeal, the petitioner failed to raise any challenge to his underlying DUI conviction. The Court of Appeals found petitioner's failure to raise the issue was a waiver of his challenge to the existence of the Lincoln Court conviction in the subsequent PRP. Review of the PRP dismissal should not be granted.

5. Discretionary review of the PRP is not appropriate where the State properly proved the underlying DUI conviction by a preponderance of the evidence

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wash.2d 867, 876, 123 P.3d 456 (2005); *State v. Lopez*, 147 Wash.2d 515, 519, 55 P.3d 609 (2002).

The best evidence to establish a defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. *Lopez*, 147 Wash.2d at 519, 55 P.3d 609 (citing *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999)). However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. *Ford* at 480 (citing *Cabrera*, 73 Wash.App. at 168, 868 P.2d 179.)

The State's burden under is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history. *Ford* at 480. Facts at sentencing need not be proved beyond a reasonable doubt. Washington courts have long held that in imposing sentence, the facts relied upon by the trial court must have some basis in the record. *Ford* at 482 (citing *State v. Bresolin*, 13 Wash.App. 386, 396, 534 P.2d 1394 (1975)).

In the present case, the State offered other comparable documents in the form of a certified record of the defendant's driving abstract and his criminal history record. The trial court properly found the State had proven the prior DUI by a preponderance of the evidence.

Moreover, if the State alleges the existence of prior convictions at sentencing and the defense fails to “specifically object” before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *State v. Bergstrom*, 162 Wash.2d 87, 92-94, 169 P.3d 816, 818 - 819 (2007).

If the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed. *Id.* (citing *In re Pers. Restraint of Goodwin*, 146 Wash.2d 861, 874, 50 P.3d 618 (2002)).

The State proved the underlying conviction by preponderance. The defendant did not provide a sufficient record to show his specific objection to the *existence* of the underlying conviction. Giving petitioner the benefit of the doubt, at best trial counsel objected to sufficiency of the evidence to prove the preponderance standard. Even if the defendant had *specifically* objected, and the Court found the State *had not* proved the conviction by preponderance, then the proper remedy would have been to remand the matter for an evidentiary hearing.

Moreover, in the present case, the State provided evidence of the conviction before sentencing, and then supplemented the

record with additional evidence of the conviction at the time of sentencing. The Petitioner's argument based on *State v. Rivers*, 130 Wn. App. 689 (2006), is without merit where the State did provide the certified conviction documents.

F. CONCLUSION

Review of the Court of Appeals dismissal of the petitioner's second PRP should not be granted where the Petitioner did not presented any basis to grant review under RAP 16.4. The second petition was not timely and equitable tolling did not apply to extend the filing period. Dismissal of the untimely petition was required.

Review should not be granted where the petitioner failed to raise a challenge to his DUI conviction on his previous appeal. His current Motion for Discretionary Review is an abuse of writ.

Additionally, the State sufficiently proved the underlying conviction by a preponderance of the evidence.

Dated this 29 day of Dec. 2009

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington