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SUPREME COURT
STATE OF WASHINGTON
2011 APR 14 P 2:46

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint
Petition of

No. 85377-1

JOSE TOLEDO-SOTELO,
Petitioner.

STATE'S
RESPONSE TO
MOTION FOR
DISCRETIONARY
REVIEW

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Jose Toledo-Sotelo is restrained pursuant to Judgment and Sentence in King County Superior Court No. 00-1-05743-8 KNT and 07-1-10361-5 KNT. Appendix A and B.¹

B. ISSUE PRESENTED.

Whether this personal restraint petition was properly dismissed, and review should be denied, where the petition is untimely because there is no fundamental defect on the face of the judgment and sentence.

C. STATEMENT OF THE CASE.

Jose Toledo-Sotelo pled guilty to two counts of child molestation in the first degree, and was found guilty by jury trial of bail jumping in 2007. Appendix A and B. Petitioner admitted that the child molestation crimes occurred on August 6, 1996. Appendix D, at 12. At the time of the plea, the parties agreed that the standard range for both child molestation crimes was 72 to 96 months. Appendix D, at 2. The judgment and sentence also reflects standard ranges of 72 to 96 months. Appendix A. The court sentenced petitioner to standard range sentences of 84 months as each child molestation convictions, to be served concurrently. Appendix A. No appeal was filed. The judgment and sentences were filed with the clerk of the trial court on May 16, 2008. Appendix A and B.

D. ARGUMENT.

REVIEW SHOULD BE DENIED BECAUSE THIS PETITION IS TIME-BARRLED.

No petition collaterally attacking a judgment and sentence 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

¹ Appendices A-D referenced herein were attached to the State's Response to Personal Restraint Petition filed July 12, 2010, in the Court of Appeals.

by a court of competent jurisdiction. RCW 10.73.090(1); see In re Personal Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is filed. RCW 10.73.090(3). The judgment in this case became final on May 16, 2008, when it was filed with the clerk of the trial court. Appendix A and B. This personal restraint petition was filed on May 14, 2010, more than one year later.

The one-year time limit only applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Personal Restraint of Thompson, 141 Wn.2d 712, 718-19, 10 P.3d 380 (2000). To be facially invalid, a judgment must have a more substantial defect than a technical misstatement that had no actual effect on the rights of the defendant. In re Personal Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental

defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

This Court requested a supplemental response addressing the correct standard range for the two counts of child molestation in the first degree committed on August 6, 1996. In 1996, the seriousness level of the crime of child molestation in the first degree was X. Former RCW 9.94A.320 (1996). In 1996, the standard range for a seriousness level X offense with an offender score of three was 67 to 89 months. Former RCW 9.94A.310 (1996). The standard range for a seriousness level X offense with an offender score of four was 72 to 96 months. Id. The judgment and sentence thus reflects an incorrect standard range if the offender score was three. However, the correct offender score in this case was four: three points for the other current child molestation in the first degree and one point for the bail jumping conviction from Cause No. 07-1-103615 KNT, for which the petitioner was being sentenced on the same date. See Former RCW 9.94A.360(1) and (17) (1996).

The documents of the plea can inform the inquiry as to whether the judgment and sentence is invalid on its face. In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). Both the judgment and sentence and the state's sentencing recommendation in the plea documents are explicit that the sentences for child molestation in the first degree were to be served concurrently with the bail jumping conviction in Cause No. 07-1-10361-5 KNT. Thus, the presence of the bail jumping conviction, which provides the fourth point in the offender score, is apparent on the face of the judgment and sentence and the documents of the plea form.

A miscalculated standard range constitutes a fundamental defect that inherently results in a complete miscarriage of justice, even if the sentence received was within the properly standard range. In re Johnson, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997). In this case, however, the standard range was not miscalculated. Petitioner was properly sentenced with a standard range of 72 to 96, because the correct offender score was four, not three. While the offender score is not properly reflected, the standard range is correct and thus, the range of punishment considered by the court at sentencing was correct. Because the mistake is in the offender score alone, and not

the standard range, the error is "a technical misstatement that had no actual effect on the rights of the defendant." McKiernan, 165 Wn.2d at 783. There is no fundamental defect that inherently results in a complete miscarriage of justice apparent on the face of the judgment and sentence. The judgment and sentence is valid on its face, and the petition is thus, time-barred. Petitioner is not entitled to relief.

E. CONCLUSION.

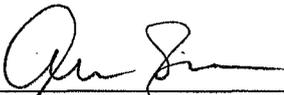
This personal restraint petition was properly dismissed.

Review should be denied.

DATED this 13th day of April, 2011.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 
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CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Jose Toledo-Sotelo, at the following address: DOC# 311886, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, the petitioner, containing a copy of the State's Supplemental Response to Personal Restraint Petition in In re Personal Restraint of Toledo-Sotelo, No. 85377-1, in the Supreme Court of the State of Washington.

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

U Brame 4/13/11
Name Date
Done in Seattle, Washington

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Ronda Larson, at the following address: Attorney General's Office, P.O. Box 40116, Olympia, WA 98504, the attorney for respondent Department of Corrections, containing a copy of the State's Supplemental Response to Personal Restraint Petition in In re Personal Restraint of Toledo-Sotelo, No. 85377-1, in the Supreme Court of the State of Washington.

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

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