

87501-4
No. 64265-1

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

DEVON ADAMS,

PETITIONER.

**SURREPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUL 29 AM 10:24

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I. INTRODUCTION

This surreply, as requested by the Court, is directed to the timeliness of Mr. Adams' PRP. In addition to this pleading, Adams relies on his previous pleadings, which also address the issue discussed herein.

The State argues that Adams' PRP is untimely and attempts to distinguish *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 614 (2008) by arguing in that case less than a year elapsed between finality and the filing of a PRP. However, because a facially invalid judgment is not a final judgment, less than a year elapsed between Adams' only final judgment and this PRP.

Further, Adams' PRP attacks his *new* judgment. When that new judgment was imposed it was a new judgment for purposes of conviction and sentence. Because Adams' petition was filed within a year of that new judgment, this petition is timely.

A. ARGUMENT

The statute is the starting place. RCW 10.73.090 provides that "(n)o 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." (emphasis supplied). Thus, Adams contends that where a judgment is invalid on its face, the judgment is not

final and the one year limitation does not commence.

Alternatively, Adams' new judgment which followed the vacation of his facially invalid judgment is the judgment under attack in this PRP.

Adams' case has not been split into two parts—a conviction and sentencing component, one which became final years ago and one which was final only recently.

Nevertheless, the State argues that a facially invalid judgment which reflects a sentencing error is nevertheless final for purposes of the underlying conviction. Recent caselaw upends the State's argument. *In re Personal Restraint of Bradley*, 165 Wash.2d 934, 205 P.3d 123 (2009). In that case, the court granted the personal restraint petition and permitted withdrawal of the plea when, as here, the defendant attacked both his sentence and plea based on an erroneous offender score. There, the State conceded that the miscalculated offender score rendered the judgment and sentence facially invalid and the court held this defect also rendered the plea involuntary because the defendant was misinformed about the length of his sentence, a direct consequence of the plea. The court then stated that the remedy for an involuntary plea was for the defendant to choose either to specifically enforce the plea agreement or withdraw the plea and held that he was entitled to withdraw his plea. *See also In re Pers. Restraint of McKiernan*, 165 Wash.2d 777, 203 P.3d 375 (2009) (In order to consider whether the plea agreement was invalid we must first find that the judgment

and sentence itself is facially invalid. Otherwise, review of the plea agreement is barred by RCW 10.73.090.).

According to the State's theory in this case, Bradley should not have been permitted to attack his conviction—only his sentence. Obviously, the State's position today conflicts with the holding of *Bradley*, and the logic of *McKiearnan*.

It would make no sense to permit a petitioner with a facially invalid judgment to attack his underlying conviction only if that conviction arose from a guilty plea, as was the case in *Bradley* or in *McKiearnan*.

Instead, when a facially invalid judgment is corrected and replaced by a new judgment, there is a corresponding new year to file a PRP.

The *Skylstad* court stated:

In criminal cases, “[t]he sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) (stating a judgment cannot be final if the sentence has been vacated); see also *State v. Harrison*, 148 Wash.2d 550, 561-62, 61 P.3d 1104 (2003) (stating after defendant's “sentence was reversed, ... the finality of the judgment is destroyed” and defendant's “prior sentence ceased to be a final judgment on the merits”); *Siglea*, 196 Wash. at 286, 82 P.2d 583 (“In a criminal case, it is the sentence that constitutes the judgment against the accused, and, hence, there can be no judgment against him until sentence is pronounced.”). Similarly, final means “the imposition of the sentence.” *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981) (per curiam); see also *Teague v. Lane*, 489 U.S. 288, 314 n. 2, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (“[A] criminal judgment necessarily includes the sentence imposed upon the defendant.”). Therefore, litigation on the merits continued and *Skylstad*'s judgment could not be final until his sentence was final.

160 Wash.2d at 950.

What that means for this case, is that Adams' judgment was not final until the facially invalid judgment was replaced by a facially valid judgment.

Measured from that date, Adams' petition is timely.

C. CONCLUSION

Based on the above, Mr. Adams' petition is timely.

DATED this 28th day of July, 2010.

Respectfully Submitted:

/s/ Jeffrey E. Ellis
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Attorney for Mr. Adams

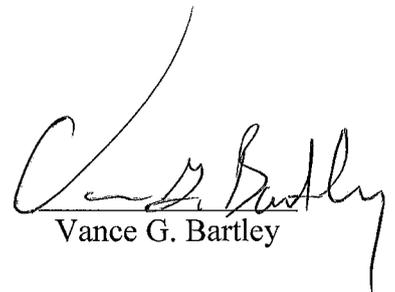
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 28, 2010, I served the parties listed below with a copy of Petitioner's Surreply In Support of Personal Restraint Petition as follows:

Dennis J. McCurdy
Senior Deputy Prosecuting Attorney
W 554 King County Courthouse
516 Third Ave
Seattle, WA 98104

7-28-10 Sea, WA
Date and Place


Vance G. Bartley