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NO. 71388-4-I

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

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In re the Personal Restraint Petition of:

BOBBY COLBERT,

Petitioner.

FILED  
Sep 4, 2015  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Susan K. Cook, Judge

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REPLY BRIEF OF PETITIONER

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A. ISSUES IN REPLY

1. Where defense counsel objected to the challenged instruction allocating the burden of proving consent to the accused, did the petitioner invite the error?

2. Where any attempt to raise the issue in a previous personal restraint petition was not specific enough to trigger judicial consideration, and the merits of the current issue were not previously heard and determined by a court, is the petitioner in the same position as the In re Tsai<sup>1</sup> petitioner who was denied relief?

3. Where the Supreme Court's recent decision in Tsai is grounded in well-established law and is not limited to immigration cases, should this Court follow the holding of that case?

4. In light of the defense theory and the State's arguments at trial to rebut that theory, has Colbert demonstrated that he was more likely than not prejudiced by the unconstitutional misallocation of the burden of proof?

B. ARGUMENT IN REPLY

1. THE PETITIONER DID NOT INVITE THE ERROR.

The State argues the petitioner invited the error by proposing, but then objecting to, the allocation of the burden in the jury instructions.

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<sup>1</sup> 183 Wn. 2d 91, 351 P.3d 138, 146 (2015).

Supplemental Brief of Respondent (SBOR) at 26-29. This argument is specious. The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). Defense counsel’s proposal of, but subsequent objection to, the instruction put the court on notice that the allocation of the burden to the defense was improper, thus “uninviting” the error. The State also ascribes significance to the fact that the court misinterpreted defense counsel’s objection. SBOR at 28. The State cites no authority for the proposition that a court’s misinterpretation of a proper objection (which defense counsel would have known was futile at the time) undercuts the objection or conjures invited error.

2. THE PETITIONER DID NOT PREVIOUSLY RAISE THE CURRENT ISSUE FOR PURPOSES OF THE SUCCESSIVE PETITION DOCTRINE AND IS NOT IN THE SAME POSITION AS THE *TSAI* PETITIONER DENIED RELIEF.

The State also argues that, under In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015), Colbert is in the same position as one of the petitioners in that case who was denied relief based on a prior litigation of the issue via collateral attack. SBOR at 24-26.

Under RAP 16.4(d), “[n]o more than one petition for similar relief on behalf of the same petition will be entertained without good cause shown.” “A successive petition seeks ‘similar relief’ if it raises matters

which have been ‘previously heard and determined’ on the merits or ‘if there has been an abuse of the writ or motion remedy.’” In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990) (quoting In re Pers. Restraint of Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984)). Ordinarily, a “petitioner . . . is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation.” In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnotes omitted). But if a petitioner’s first attempt to raise an issue does not trigger any judicial consideration of it and there is no reasonable basis to conclude that the issue’s merits were previously heard and determined, the issue may be raised again. In re Pers. Restraint of Greening, 141 Wn.2d 687, 700, 9 P.3d 206 (2000)

In Tsai, the Supreme Court denied relief to one of two petitioners under RAP 16.4(d). The Court noted that unlike the other petitioner Jagana, petitioner Tsai had already filed, with an attorney’s assistance, a motion to withdraw his guilty plea alleging the plea was involuntary because his attorney misadvised him about the immigration consequences of the plea. Tsai, 183 Wn.2d at 107-08. The trial court denied this motion, not because it was legally unavailable on the merits, but because it was untimely and not subject to equitable tolling. The Court observed that “Tsai did not appeal that decision and neither Padilla nor [State v.

Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), applying Padilla] addresses equitable tolling. Based on the arguments currently presented for our review, Tsai has not shown he is entitled to an evidentiary hearing on the merits of his PRP.” Tsai, 183 Wn.2d at 108 (citing RAP 16.4(d); Greening, 141 Wn.2d at 697).

This case is not like that of petitioner Tsai. As the State’s brief points out, Colbert’s first PRP, filed pro se, mentions the fact that there was an objection to the pertinent instruction at trial and states the direct appeal “omitted” the issue. SBOR at 5; SBOR, App. F at 9. This claim is not elaborated upon as a due process or burden shifting violation and appears to be part of an unsuccessfully articulated claim of ineffective assistance of appellate counsel. SBOR, App. F at 7, 9. As acknowledged in the State’s SBOR, moreover, this Court dismissed the vague suggestion of ineffective assistance of appellate counsel for failing to raise all possible issues as “too conclusory.” SBOR at 6; see also SBOR, App. H at 3 (“Colbert’s claims are not supported by the record, citation to pertinent authority, or meaningful analysis.”).

In Greening, akin to the facts of the present case, the Supreme Court held that even a better-articulated claim was insufficient to alert the court to a claim that Greening’s firearm enhancements should not have been run consecutively under the then-applicable SRA provision.

Greening had previously argued that “[his] charges werent [sic] ran [sic] together the proper way[,]” because “they charged [him] with three gun enhanc[e]ments, and three felony cases, when all the charges should have been ran [sic] together[.]” Greening, 141 Wn.2d at 699. Although it was possible to discern the general allegation, the Court of Appeals had rejected Greening’s claims as “bare” and unsupported. Id. The Greening Court therefore held that the issue was not “previously heard and determined” for purposes of successive petition analysis. Id. at 700.

As in Greening, any attempt to raise a related issue under the umbrella of ineffective assistance of appellate counsel did not trigger judicial consideration of the pertinent issue on the merits. This Court should, accordingly, reject the State’s contention that Colbert is situated similarly to Mr. Tsai and should therefore be denied relief.

In any event, as argued at page 25 of Colbert’s supplemental brief, a significant intervening change in law constitutes “good cause” justifying exception from bar on successive petitions. State v. Brown, 154 Wn.2d 787, 794-95, 117 P.3d 336 (2005) (holding RAP 16.4(d) and RCW 10.73.140 did not preclude filing of petition following change in law). Under either rationale, Colbert prevails on this issue.

3. THE HOLDING OF TSAI IS GROUNDED IN WELL ESTABLISHED LAW AND IS NOT LIMITED TO IMMIGRATION CASES.

The State also argues that “the decision on Tsai is limited to application in immigration cases.” SBOR at 24. The State is incorrect.

In Tsai, decided two months after Colbert filed his supplemental brief in this case, the Court observed that Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) did not announce a new rule *under Washington law*, and therefore, under Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), its rule applied retroactively to matters on collateral review. Tsai, 183 Wn.2d at 103.<sup>2</sup>

Yet the Padilla decision nonetheless represented a “significant change” in the law under RCW 10.73.100(6). As the Court explained, “[w]e have always defined the two phrases differently.” Tsai, 183 Wn.2d at 104. A “significant change” in state law and a “new” constitutional rule of criminal procedure are different phrases with different meanings that

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<sup>2</sup> Under Teague, new constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review. Tsai, 183 Wn.2d at 100 (citing Whorton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)). Because it is impossible to exhaustively define a defense attorney’s obligations under Strickland v. Washington, cases that merely apply the ordinary test for ineffective assistance of counsel to new facts do not announce new rules for Teague purposes. Tsai, 183 Wn.2d at 100 (citing Chaidez v. United States, 568 U.S. \_\_\_\_, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

serve different purposes. Id. at 105. In the former case, the purpose is reduction of procedural barriers to collateral relief in the interests of fairness and justice. In the latter case, the goal is to strengthen procedural barriers to collateral relief in the interests of finality. Id. at 104.<sup>3</sup>

Contrary to the State's argument, Tsai is not limited to its facts, and this Court should find that Colbert may raise this issue because State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014) does not stand for a new rule under Washington law (see Supp. Brief of Petitioner at 8-19) but, for purposes of RCW 10.73.100(6), it does represent a "significant change" in the law.

Colbert is, moreover, permitted to raise this issue for the reasons previously articulated in Colbert's supplemental brief. Supp. Brief of Petitioner at 8-24 (arguing that because W.R., 181 Wn.2d 757, rests on

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<sup>3</sup> As the Court explained, a significant change in state law occurs

"where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue." [Greening, 141 Wn.2d at 697.] By comparison, new rules [under] Teague . . . "are those that 'break[ ] new ground or impose[ ] a new obligation on the States or the Federal government [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (alterations in original) (quoting Teague, 489 U.S. at 301).

Tsai, 183 Wn.2d at 105.

interpretation of a 1975 statute, retroactivity is not at issue and, in the alternative, the rule in W.R. corrects a burden shifting error and therefore must be applied retroactively under Teague analysis).

4. THE PETITIONER CAN SHOW PREJUDICE.

The State argues, finally, that Colbert cannot show prejudice because the State proved forcible compulsion at trial.<sup>4</sup> SBOR at 29-31. The State appears to be arguing that because there was sufficient evidence of forcible compulsion, Colbert cannot show prejudice. This is not the test for prejudice. Cf. State v. Walker, 182 Wn.2d 463, 479, 341 P.3d 976, cert. denied, 135 S. Ct. 2844 (2015) (in context of prejudice resulting from unobjected-to prosecutorial misconduct, analysis of prejudice does not turn on a review of sufficiency of the evidence).

As argued in Colbert's supplemental brief, W.R., 181 Wn.2d 757, overruled two earlier cases, State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989) and State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). Those cases held that, notwithstanding the "conceptual overlap" between consent and the statutory element of forcible compulsion, an accused asserting that complainant consent could be required to prove such consent

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<sup>4</sup> "Forcible compulsion" is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6).

by a preponderance of the evidence. W.R., 181 Wn.2d at 763. Those cases were, however, incorrect and harmful because “[r]equiring a defendant to do more than raise a reasonable doubt is inconsistent with due process principles.” Id. at 766, 768.

Again, in closing, the State essentially argued that, as to whether there was consent, reasonable doubt was not enough for the jury to acquit:

[A]s to [K.P.] there is offered the defense of consent. But there has to also be some type of explanation as to why [K.P.] would do this, would complain, would say she was forced if she wasn't. . . . So there's several theories that Mr. Colbert has offered up. None of them hold water.

10RP 17 (Feb. 8, 2005 verbatim report).

Thus, rather than simply being permitted to marshal the facts in support of doubt as to forcible compulsion, the defense was required to embrace a “more likely than not” standard. 10RP 49. The State used this standard against Colbert to suggest that Colbert was required to assert a good reason K.P. would have fabricated the charges. 10RP 17. As explained in the Colbert’s supplemental brief, this argument urged the jury to find Colbert had failed to prove consent and that he was therefore guilty. Again, contrary to the State’s assertion, the test is not whether there was sufficient evidence of forcible compulsion. Given the defense theory at trial, and the State’s response to it, it was likely the jury’s verdict was affected by the unconstitutional misallocation of the burden of proof.

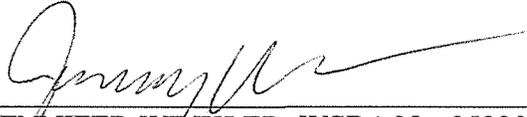
C. CONCLUSION

For the reasons stated above and in Colbert's supplemental brief, this Court should reverse the challenged conviction.

DATED this 4<sup>th</sup> day of September, 2015.

Respectfully submitted,

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