

FILED
SUPREME COURT
STATE OF WASHINGTON
3/2/2018 1:35 PM
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NO. 94950-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

KEVIN LIGHT-ROTH,

Petitioner.

**STATE'S ANSWER TO AMICI CURIAE BRIEF
OF THE ACLU OF WASHINGTON, ET AL.**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ARGUMENT IN RESPONSE TO AMICI'S ARGUMENTS

LIGHT-ROTH'S PETITION IS TIME-BARRED STATE v. O'DELL¹ DID NOT EFFECTIVELY OVERTURN STATE v. HA'MIM.²

Amici concede in their brief that in State v. O'Dell this Court “did not explicitly overrule [State v. Ha'mim in its entirety.” Brief of Amici, at 5. Amici argue that O'Dell can nonetheless constitute a significant change in the law pursuant to RCW 10.73.100(6) even if it did not effectively overrule Ha'mim. In so arguing, amici asks this Court to abandon the standard it first adopted in In re Pers. Restraint of Greening, 141 Wn.2d 687, 9 P.3d 206 (2000), and has consistently applied, most recently in In re Pers. Restraint of Flippo, 187 Wn.2d 106, 385 P.3d 128 (2016), State v. Miller, 185 Wn.2d 111, 371 P.3d 528 (2016), and In re Pers. Restraint of Domingo, 155 Wn2d 356, 119 P.3d 816 (2005). This Court's Greening standard gives effect to the legislature's intent to limit untimely collateral attacks. In re Pers. Restraint of Runyan, 121 Wn.2d 432, 450, 853 P.2d 424 (1993) (noting the legislature's intent to curtail the delay in challenging convictions). It also serves the goal of preserving the finality of convictions by allowing a new legal claim

¹ 183 Wn.2d 680, 358 P.3d 359 (2015).

² 132 Wn.2d 834, 940 P.2d 633 (1997).

to be made in an untimely collateral attack only when the claim was previously foreclosed by controlling precedent. See In re Pers. Restraint of Cook, 114 Wn.2d 802, 792 P.2d 506 (1990) (noting that collateral relief is limited because it undermines principles of finality). Light-Roth has not argued that the Greening standard is incorrect or harmful. Applying the Greening standard, O'Dell does not constitute a significant change in the law.

In Greening, this Court construed RCW 10.73.100(6) to mean that an appellate decision can constitute a significant change in the law only where “the intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” 141 Wn.2d at 697. This standard recognizes that “while litigants have a duty to raise *available* arguments in a timely fashion and may later be procedurally penalized for failing to do so . . . they should not be faulted for having omitted arguments that were essentially *unavailable* at the time.” Id. (emphasis in original).

In re Pers. Restraint of Domingo is particularly instructive of the principle that a new case must unambiguously overrule controlling precedent in order to be a significant change in the law pursuant to RCW 10.73.100(6). 155 Wn.2d at 356. In Domingo,

the petitioners argued that this Court's decisions in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000), significantly changed the law of accomplice liability. 155 Wn.2d at 359. But this Court noted that Cronin and Roberts had explicitly adhered to long-established precedent. Id. at 362. Domingo argued that dicta from this Court's prior decisions established a principle that was overturned in Cronin and Roberts. Id. at 365. This Court rejected that claim, finding that it had not overturned the holding of those prior cases. Id. This Court also rejected petitioners' claim that Cronin and Roberts constituted a "new interpretation' of the accomplice statute," primarily because the accomplice statute had not been amended in almost thirty years. Id. at 367.

Just like Cronin and Roberts, O'Dell explicitly adhered to the holding in Ha'mim that youth is not a per se mitigating circumstance but can be relevant to diminished culpability. O'Dell, 183 Wn.2d at 689. Light-Roth and amici can only cite to dicta from other cases for their claim that trial courts were foreclosed from considering youth in regard to mitigating circumstances. Like in Cronin and Roberts, Light-Roth and amici seem to argue that this Court has reinterpreted the relevant statute and found that it now means

something different from what this Court concluded it meant in Ha'mim. But the statute has not been amended. In both Ha'mim and O'Dell this Court concluded that the SRA in general, and RCW 9.94A.535 in particular, does not allow youth alone to be a basis for an exceptional sentence below the standard range, but allows attributes of youth which are demonstrated in the facts of the crime to be considered as to whether diminished culpability supports an exceptional sentence. Ha'mim, 132 Wn.2d at 846 ("The [SRA] does include a factor for which age could be relevant. RCW 9.94A.390 provides a non-exclusive list of illustrative factors a court may consider when imposing an exceptional sentence and includes as a mitigating factor that the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired."); O'Dell, 183 Wn.2d at 689 ("the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability.").

This Court has consistently adhered to the Greening standard. A new case must effectively overturn controlling precedent in order to meet the significant change in the law standard. For example, in State v. Miller, 185 Wn.2d 111, 116, 371

P.3d 528 (2016), this Court explained that a significant change in the law requires that the law change, not just counsels' understanding of the law on an unsettled question. Moreover, a case does not constitute a significant change in the law when it dispels dicta, but does not overrule a prior case's holding. Id. This Court cautioned that lowering the Greening standard "would create an unworkable standard and foster uncertainty." Id. Because the case that Miller claimed was a significant change in the law interpreted the plain language of a sentencing statute for the first time, nothing prevented Miller from making his argument at sentencing, rather than for the first time in an untimely collateral attack. Id. The argument was not "previously unavailable" to Miller, and thus there was no significant change in the law that would provide an exception to the time bar. Id.

Similarly, in In re Pers. Restraint of Flippo, 187 Wn.2d 106, 113, 385 P.3d 128 (2016), this Court held that State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), was not a significant change in the law. This Court noted that Blazina was firmly rooted in the plain statutory language, and that the decision clarified how to fully comply with the statute. Id. at 112. The Court concluded that prior

to Blazina the defendant could request that the trial court perform an individualized inquiry pursuant to the statute. Id.

Likewise, pursuant to Ha'mim, Light-Roth had the opportunity to argue for an exceptional sentence below the standard range based on RCW 9.94A.535(1)(e). He did not.

Amici argues that this untimely petition should be allowed because it challenges the validity of Light-Roth's incarceration. However, there is nothing invalid about Light-Roth's current sentence. In that respect, the error claimed in this case—the court's failure to sua sponte *consider* an exceptional sentence below the standard range—is quite different from the error presented in Greening. In Greening, there was no dispute that one-third of Greening's 18-year sentence had been unlawfully imposed because the sentencing court followed a decision that was subsequently overruled by this Court. 141 Wn.2d at 689. In contrast, there is nothing unlawful about Light-Roth's standard range sentence, which could be imposed again if there were a new sentencing hearing.

Finally, amici argue that if this Court were to conclude O'Dell is a significant change in the law, other PRPs could still be rejected “because the record does not support the petitioner's claim of

youthfulness.” Amici brief at 17-18. But if a defendant who committed an intentional murder of an acquaintance over a suspected theft, who threatened others to help him hide the murder, who tried to escape police custody, and who tried to suborn perjury can obtain relief by claiming years later that his youthfulness reduced his culpability, it is hard to imagine what sort of youthful defendant would not be entitled to similar relief.

B. CONCLUSION

State v. O'Dell does not constitute a significant change in the law. Light-Roth's petition is time-barred and should be dismissed.

DATED this 2nd day of March, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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March 02, 2018 - 1:35 PM

Transmittal Information

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Appellate Court Case Title: Personal Restraint Petition of Kevin Light-Roth
Superior Court Case Number: 03-1-00392-8

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