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STATE OF WASHINGTON
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NO. 98326-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ANTHONY THOMAS WALLER,

Respondent.

PETITIONERS SUPPLEMENTAL BRIEF

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A. ISSUE PRESENTED FOR REVIEW

RAP 2.2(b)(3) authorizes the State in a criminal case to appeal from “an order arresting or vacating judgment.” Waller filed a motion entitled “Motion to Vacate Judgment” under CrR 7.8(b) because he believed the trial court had imposed sentence without adequate consideration of his youth. The trial court granted his motion to vacate judgment and specifically ruled that it had vacated the judgment. Should the State be permitted to appeal this order under RAP 2.2(b)(3)?

B. STATEMENT OF THE CASE

Waller killed a homeless man by stabbing him with uncommon brutality over 40 times in the head with a screwdriver. He received an aggravated sentence of 36 years based on deliberate cruelty. CP 27-32. He did not seek an exceptional mitigated sentence based on youth because at the time of sentencing he still denied participation in the crime. After direct appeal in state court, multiple personal restraint petitions, and a federal habeas corpus review, his convictions and sentence remained in place. State v. Waller, 12 Wn. App. 2d 523, 524-26, 458 P.3d 817, 819 (2020).

In 2018, Waller filed a CrR 7.8 motion to vacate his judgment under the authority of In re Pers. Restraint of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017) and State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), alleging that the sentencing judge erred by failing to consider his youth. CP 38-46. The State opposed his request and moved to transfer the motion to the Court of Appeals to be treated as a personal restraint petition. CP 48-51. The trial court entered an order of transfer, CP 75-76, but Waller sought reconsideration of that order. CP 77-114. The court considered argument from the parties in open court. RP (6/1/18) 1-20. It then retracted its transfer order and granted Waller's motion to vacate judgment. CP 116-17, 124.

The State appealed directly to this Court because Division One of the Court of Appeals had already effectively rejected the State's arguments for appeal in a different case. See State v. Waller, S. Ct. No. 96051-8. The State moved for a stay in the trial court. The trial court responded with an order that made clear it had granted a motion to vacate the judgment.

Mr. Waller sought relief from *judgment* based on a court rule, CrR 7.8, that provides for relief from *judgment*. Thus, under the plain language of the court rules, it appears to this Court that when the State sought review of the Court's rulings (granting relief from judgment), the State appealed as a

matter of right under RAP 2.2(b)(3) (Arrest or Vacation of Judgment). ... Because review has been accepted, RAP 7.2 applies. It appears that RAP 7.2 does not provide for a resentencing hearing.

CP 145-46 (*italics in original*). This Court granted review and accepted briefing, but then remanded the case to the Court of Appeals for consideration in the first instance.

In the meantime, after it learned of this Court's decision in In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 422 P.3d 444 (2018), the trial court *sua sponte* reversed its CrR 7.8 order vacating the judgment. The Court of Appeals decided to issue an opinion even though the case was moot. Waller, 12 Wn. App. 2d at 534.

The Court of Appeals thereafter rejected the State's appealability arguments in a published decision. The first 11 pages of the decision simply recount the facts and the procedural history of the case. The analysis of the legal question covers a little over two pages of discussion and, for this Court's convenience, is copied here in its entirety.

The State asserts an order granting a CrR 7.8(b)(5) motion for relief from judgment requesting a new sentencing hearing to consider evidence of youth is "a ruling that vacates judgment." We disagree. Neither the cases the State cites nor CrR 7.8(b) supports the State's assertion.

In In re Personal Restraint Petition of Skylstad, 160 Wn.2d 944, 946, 162 P.3d 413 (2007), the court held that a judgment is not final for purposes of the one-year time bar under RCW 10.73.090 when the appeal of the defendant's sentence was still pending. The court states that in criminal cases, " [t]he sentence is the judgment." " Skylstad, 160 Wn.2d at 951-52 (quoting Berman v. United States, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937)). The court in Skylstad also cites State v. Harrison, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003) (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"), and State v. Siglea, 196 Wn. 283, 286, 82 P.2d 583 (1938) ("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."). Skylstad, 160 Wn.2d at 950. The court in Skylstad concluded the mandate was not a final judgment because "[a] final judgment means both the conviction and sentence are final." Skylstad, 160 Wn.2d at 955.

In another case cited by the State, State v. Larranaga, 126 Wn. App. 505, 506, 108 P.3d 833 (2005), we reversed the superior court order denying the defendant's CrR 7.8(b) motion for resentencing. We held the defendant had the right to appeal the order under RAP 2.2(a)(9). Larranaga, 126 Wn. App. at 508-09. RAP 2.2(a)(9) expressly states a defendant has the right to appeal "[a]n order granting or denying a motion for ... amendment of judgment." Unlike RAP 2.2(a)(9), RAP 2.2(b) designating the limited decisions the State has the right to appeal does not give the State the right to appeal a motion to amend a judgment.

It is well established that the court has the authority under CrR 7.8(b) to vacate a judgment and amend an erroneous sentence. State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996). RAP 2.2(b)(3) gives the State the right to appeal an order vacating a judgment. If a court grants a CrR 7.8(b) motion for relief from judgment by amending the judgment and sentence, the State has the right to appeal under RAP 2.2(b)(3). But where, as here, the

court does not amend the sentence, the judgment remains in effect. CrR 7.8(b). The plain and unambiguous language of CrR 7.8(b) states, “A motion under section (b) does not affect the finality of the judgment or suspend its operation.” The uncontroverted record establishes the court did not amend the judgment and sentence. The court granted Waller’s CrR 7.8(b)(5) motion for relief from judgment requesting a new sentencing hearing to consider his youth at the time of the offense and decide whether to amend the judgment and sentence. We dismiss the State’s appeal.

Waller, 12 Wn. App. 2d at 535-37. The State’s petition for review was granted. State v. Waller, 195 Wn.2d 1024 (2020).

C. ARGUMENT

The plain language of RAP 2.2(b) authorizes an appeal by the State when a trial court vacates a judgment. The Court of Appeals decision failed to faithfully apply this language of the court rule and prevents an appeal until after a resentencing hearing. That decision will undermine fundamental principles of sentencing finality, it will encourage litigants to forum-shop in filing collateral attacks, and it will cause uneven and inequitable decisions in collateral attacks around the State. The State respectfully asks this Court to reverse the decision of the Court of Appeals and to hold that the State may immediately appeal an order vacating judgment without waiting for a new judgment to be imposed.

1. THE PLAIN LANGUAGE OF RAP 2.2 AUTHORIZES AN APPEAL BY THE STATE UNDER THESE CIRCUMSTANCES.

RAP 2.2(b) delineates the circumstances under which the State may appeal a trial court ruling. It provides as follows:

(b) Appeal by State or a Local Government in Criminal Case.

Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

The plain language of subsection (b)(3) authorizes an appeal when a criminal judgment is arrested or vacated. Waller's motion to the trial court expressly asked the court to vacate his judgment. It was entitled, "Motion to Vacate Judgment." CP 39. The trial court expressly granted that request. CP 116-17. The court's

follow-up order made it clear that the court had vacated the judgment and that it would reconsider the sentence. CP 124.

Vacating a sentence vacates the judgment. See Appellant's Opening Brief at 7-9. A final judgment ends the litigation. In a criminal case, the final judgment includes the sentence imposed, so when the sentence is reversed, the judgment is vacated. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 949, 162 P.3d 413 (2007); State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (correcting an erroneous judgment amends the judgment). This Court has in the past entertained State's appeals from a ruling that vacated a criminal sentence. See State v. Miller, 185 Wn.2d 111, 371 P.3d 528 (2016) (State's appeal from order granting resentencing in untimely collateral attack); State v. Scott, 190 Wn.2d 586, 416 P.3d 1182 (2018) (State's appeal of order granting relief from judgment in untimely collateral attack on sentence imposed on youthful offender).

Thus, it is clear that the trial court granted Waller's motion to vacate the judgment and sentence and it ordered the matter to be scheduled for resentencing. Such an order falls under the plain language of RAP 2.2(b)(3). The State's appeal was proper under the rule and under these facts.

The Court of Appeals opinion does not, however, address these points. Instead, the Court of Appeals said that it disagreed that the court's ruling had vacated the judgment, and it looked to a completely *different* rule and to an appellate decision interpreting *that* rule, and then misinterpreted the appellate decision. Waller, at 535. The opinion is lacking in several important ways.

First, the Court of Appeals said that it disagreed with the State's argument that the sentence in a criminal case is part and parcel of the judgment. Waller, at 535. The decision lists the authorities the State relied upon, but it then fails to distinguish the cases or to explain why the cited cases do not support the State's argument. Waller, at 535-36. The decision fails to explain why an order granting a motion to vacate judgment is not an order vacating judgment. Instead, the decision simply shifts to a discussion of State v. Larranaga, but that case does not support the decision below.

In State v. Larranaga, 126 Wn. App. 505, 506, 108 P.3d 833 (2005), a defendant filed a CrR 7.8 motion in the trial court challenging the trial court's refusal to impose a Drug Offender Sentence Alternative (DOSA). The motion was denied. He then attempted to appeal the DOSA sentence. The appellate court in

Larranaga held that the *defendant's* appeal of the denial of the CrR 7.8 motion was proper under both RAP 2.2(a)(9) or (10) as *either* a motion to amend or to vacate the judgment. Larranaga, 126 Wn. App. at 509.

But the Court of Appeals in this case failed to acknowledge that the Larranaga court had authorized an appeal under *either* prong of RAP 2.2(a). The Court of Appeals held that Larranaga's appeal was allowed under RAP 2.2(a)(9), and so the State – which generally has more limited rights to appeal – could appeal only if a rule identical to RAP 2.2(a)(9) existed under RAP 2.2(b). In other words, the court here held that the State could appeal only if RAP 2.2(b) expressly authorized appeal of an order *amending* judgment. This reasoning sidesteps the State's plain language argument, and it misinterprets and misapplies the Larranaga case.

This decision misinterprets Larranaga. The Larranaga court held that a defendant has a right to appeal both an order *amending* judgment and an order *vacating* a judgment. Larranaga, at 509 (citing RAP 2.2(a)(9) and (10)). The State is not here appealing an order that simply *amends* the judgment, it is appealing an order that *vacates* the judgment and schedules a time and date to impose a new judgment. RAP 2.2(b)(3) is actually the functional equivalent

of RAP 2.2(a)(10), so the two rules – RAP 2.2(a) and (b) – are actually in harmony. Thus, RAP 2.2(a)(9) – which pertains only to a defendant’s right to appeal – does not preclude the State’s right to appeal under RAP 2.2(b)(3).

Finally, the Court of Appeals also cited to CrR 7.8(b) and observed that the express language of the rule provided that a motion under the rule did not affect the operation of the judgment. Waller, at 13. This assertion is true, but irrelevant. That particular sentence in CrR 7.8 simply makes clear that the *filing* of a CrR 7.8 motion does not, itself, affect the finality of a judgment. But the State is not appealing from the filing of a *motion*. The State is appealing from the *ruling* on a motion; it is appealing from an *order*. The cited language in CrR 7.8 does not apply to the effect of a court’s order. The question presented is the effect of an order, not the effect of a motion. Thus, that language in CrR 7.8 is inapposite and does not undercut the State’s argument.

2. RAP 2.2(b)(3) PRESERVES THE STATE'S ABILITY TO PROTECT THE FINALITY OF JUDGMENTS IN CRIMINAL CASES.

The finality of judgments and sentences has always been a critical theme when considering limits on collateral attacks.

Shumway v. Payne, 136 Wn.2d 383, 399, 964 P.2d 349 (1998) (“[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.”); In re Pers. Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983).

Before adoption of the SRA, indeterminate sentencing in Washington led to practices that were opaque and ever-changing. D. Boerner, *Sentencing in Washington* § 2.2(b), at 2-9 – 2-18 (1985). Victims and the community were routinely told that an offender had received a long sentence, only to later learn that the person had been paroled and was back in the community. The public had no idea when a person would be released from prison. Public confidence in the judiciary and in the criminal justice system suffered. The SRA was designed to, among other things, bring transparency and certainty to the sentencing process. See generally 13B Seth A. Fine & Douglas J. Ende, *Washington Practice: Criminal Law* § 4201 (2d ed. 1998).

An important component of that certainty was to limit a judge's authority to vacate a judgment and sentence years after it is imposed, thereby reopening wounds that should be left to heal. As explained by this Court nearly thirty years ago, the Sentencing Reform Act (SRA) emphasized the importance of determinate and final sentences and, accordingly, limited a trial court's authority to change a sentence after judgment was entered.

The SRA permits modification of sentences only in specific, carefully delineated circumstances. See D. Boerner, at 4-1 n. 6. Authority for increasing an offender's duration of commitment, for example, is provided by RCW 9.94A.200(2)(b). Early release from confinement, on the other hand, is provided for in RCW 9.94A.150.

Neither of these provisions provides authority for the reduction of Shove's term of incarceration. Nor can authority be implied from the SRA's general structure or purposes. Indeed, the implication from the SRA's underlying policy that criminal sentences fit the offender and his offense, and from the careful enumeration of the circumstances where early release is appropriate, is to the contrary. Cf. *Jepson v. Department of Labor & Indus.*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977) ("Where a statute provides for a stated exception, no other exceptions will be assumed by implication."); *In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) ("[E]xpress exceptions in a statute exclude all other exceptions."). We recognized as much in *State v. Rogers*, 112 Wn.2d 180, 183, 770 P.2d 180 (1989) where we held that RCW 9.94A.150 "prohibits early release absent existence of one of the statutory exceptions." Accordingly, we conclude that the trial court lacked authority to modify Shove's sentence.

State v. Shove, 113 Wn.2d 83, 86-87, 776 P.2d 132 (1989).

An order that vacates the judgment and sets the case for resentencing is an order vacating the judgment. It reopens the case and forces victims, their families, and the community to extend and relive the trauma of the crime. Such an order necessarily disrupts the finality of the judgment and sentence. RAP 2.2(b)(3) preserves the ability of prosecutors to appeal when finality is disturbed and before a new sentencing hearing is convened and a new sentence imposed.

3. THE DECISION OF THE COURT OF APPEALS WILL ENCOURAGE FORUM SHOPPING, WILL CAUSE INCONSISTENT RESULTS IN TRIAL AND APPELLATE COURTS IN SIMILAR ACTIONS, AND MAY LEAD TO UNJUST RESENTENCING HEARINGS.

Historically, constitutional collateral review in Washington developed on a case-by-case basis and resulted in “somewhat haphazard” procedures. 4A Lewis H. Orland & Karl B. Tegland, *Washington Practice: Rules Practice* 539 (7th ed. 2008). The modern rules of appellate procedure for postconviction relief were adopted in order to provide a “single unitary postconviction remedy.” Toliver v. Olsen, 109 Wn.2d 607, 610, 746 P.2d 809 (1987); In re Pers. Restraint of Runyan, 121 Wn.2d 432, 440, 853

P.2d 424 (1993). Although the legislature has authorized collateral attacks beyond what is required by the Washington constitution, collateral relief is still an “extraordinary remedy” that should be granted only where needed to avoid injustice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

Collateral attacks on a judgment may be filed in trial courts, too, but the law has attempted to treat collateral attacks the same regardless of the forum. For example, the criminal rules encourage transfer to the Court of Appeals to foster uniformity of approach. CrR 7.8(c)(2) (“The court *shall* transfer a motion...”) (italics added). Time limits for filing collateral attacks are the same whether an action is filed in the trial court as a habeas corpus petition, or as a motion for relief from judgment, or in the appellate court as a personal restraint petition. See RCW 9.73.090 and In re Pers. Restraint of Turay, 150 Wn.2d 71, 76-78, 74 P.3d 1194 (2003). There are limits in each court on successive or repetitive attacks. Compare RAP 16.4(d) with CrR 7.8(b). The standards for adjudicating the merits are similarly demanding. Compare In re Pers. Restraint of Cook, 114 Wn.2d at 812 (To obtain relief, “a petitioner must establish that the claimed error constitutes a fundamental defect which inherently results in a complete

miscarriage of justice”); with State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (Final judgments should be vacated or altered only in the very limited circumstances “where the interests of justice most urgently require.”) and State v. Olivera-Avila, 89 Wn. App. 313, 319, 949 P.2d 824 (1997) (relief should be granted only in “extraordinary circumstances” involving “fundamental and substantial irregularities in the court’s proceedings or irregularities extraneous to the court’s action.”).

The decision of the appellate court below upsets this equal treatment of actions filed in different courts and creates an advantage to filing a collateral attack on a sentence in the trial court. When the Court of Appeals decides that a petitioner is entitled to relief from judgment, as did the Court of Appeals decision in Light-Roth, the State may seek immediate review of that decision by this Court without having to first conduct a sentencing hearing. See RAP 13.4. Under the Court of Appeals decision in Waller, however, the State cannot seek immediate review of the exact same ruling when relief is granted in a trial court. Rather, the State must wait until *after* the victims, the surviving family members, and the community are put through the emotional trauma of a resentencing hearing. Depriving the State of the opportunity to

appeal a trial court ruling vacating a judgment, thus, makes it easier for a litigant to obtain a second sentencing through the trial court than it would be to obtain the same relief through a PRP filed in the appellate courts. The plain language of the rules of appellate procedure and this Court's case law interpreting those rules has made it clear that post-conviction attacks should not fare better in the trial court than in the appellate courts. Interpretations of rules that give a tactical advantage in one forum encourage forum shopping, which undercuts the goal of the rules of appellate procedure to create a unitary system for deciding collateral attacks.

Forum shopping will also lead to disparate and, at times, unjust results. If a defendant can obtain a new sentencing hearing more readily in the superior court, then litigants who file there will obtain an advantage over similarly situated litigants who happen to file in the appellate court. This is unfair.

More concerning, perhaps, is the fact that litigants filing in the superior court will get a new sentencing hearing – with its collateral damage on survivors and the public – even where they may not actually be entitled to such a new hearing. The Light-Roth issue presents a good example. Scores if not hundreds of cases statewide would have required resentencing had this Court affirmed

the Court of Appeals decision in Light-Roth. Instead, this Court reversed the decision. Thus, were the State not entitled to appeal the lower court decision in Light-Roth, scores and scores of cases would have been forced to unnecessary resentencing on cases where the collateral attack was brought in the trial court. The public's interest in finality is better served by waiting until a final decision from the Court is issued before allowing many resentencing hearings.

D. CONCLUSION

For all these reasons, the State respectfully asks this Court to reverse the decision of the Court of Appeals and hold that the State may appeal a decision granting a motion to vacate judgment.

DATED this 28th day of August, 2020.

Respectfully submitted,

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State's Petition for Review

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