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DEC 09 2013

King County Prosecutor
Appellate Unit

NO. 68740-9-1

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

In re the Personal Restraint Petition Of:

BENJAMIN SMALLS,

Petitioner

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

The Honorable Regina Cahan, Judge
The Honorable Gregory Canova, Judge

PETITIONER'S REPLY BRIEF

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A. ARGUMENT IN REPLY

BECAUSE SMALLS' JUDGMENT AND SENTENCE REVEALS, ON ITS FACE, THE INVALIDITY OF HIS PLEAS, HE IS ENTITLED TO WITHDRAW THOSE PLEAS.

The State cites In re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000), as authority rejecting Smalls' argument. BOR at 7. Specifically, the State notes that, although two of Stoudmire's convictions were vacated because the charges were filed beyond the statute of limitations, "the court did not find that the court's lack of authority to impose a judgment and sentence on counts that were barred by the statute of limitations entitled Stoudmire to withdraw his pleas to other counts." BOR at 7-8.

That the Stoudmire court did not vacate his remaining guilty pleas is hardly surprising, however, because Stoudmire never argued that the statute of limitations violations entitled him to that remedy. See Stoudmire, 141 Wn.2d at 346-347, 349-350 (only challenges to remainder of pleas based on plea court's failure to advise of mandatory community placement term or lack of factual basis; both claims dismissed as untimely). Stoudmire is not authority against an argument never made or decided.

In addition to Stoudmire, the State relies primarily on In re Personal Restraint of Coats, 173 Wn.2d 123, 267 P.3d 324 (2011),

and the Supreme Court's recent decision in State v. Adams, 178 Wn.2d 417, 309 P.3d 451 (2013). BOR at 12-14.

Coats is discussed at length, and distinguished, in Smalls' opening brief. Unlike Smalls' case, Coats' judgment and sentence did not demonstrate, on its face, the invalidity of Coats' plea. See Brief of Appellant, at 11-14. Rather, the judgment merely indicated the wrong maximum sentence for one of the offenses. Coats' sentence for that offense was actually correct. Coats, 173 Wn.2d at 127, 143. Because the judgment did not show that the sentencing court had exceeded its authority in any way, there was no facial invalidity. Id. at 135-136, 143. In contrast, Smalls' judgment very clearly involves several facial invalidities, i.e., violations of the court's authority, *and* these invalidities reveal an invalid plea.¹

¹ McKiernan, Hemenway, and Scott are also distinguishable. They merely establish that an invalid plea does not render a judgment and sentence facially invalid. See In re McKiernan, 165 Wn.2d 777, 782, 203 P.3d 375 (2009) ("an invalid plea agreement cannot on its own . . . render an otherwise valid judgment and sentence invalid"); In re Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002) (for plea challenge, "question is not . . . whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face"); In re Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012) ("RCW 10.73.090 does not provide a way for a petitioner to avoid the one year time limit for motions to withdraw a guilty plea on the theory that the judgment and sentence is not valid on its face because it is the product of an involuntary plea."). Instead, "[i]n order to consider whether the plea agreement was invalid [the reviewing court] 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." McKiernan, 165 Wn.2d at 781. Smalls has made this showing.

Adams does not dictate the outcome, either. In 2000, Adams was tried, convicted, and sentenced for murder and unlawful possession of a firearm. Adams, 309 P.3d at 452. In 2009, Adams successfully challenged his offender score and his overall sentence was reduced. Id. at 452-453. In a PRP filed four months later, he claimed his trial attorney had been ineffective for failing to develop and present a diminished capacity defense. To avoid the usual time bar for such a claim, he argued the original judgment had been invalid on its face, a valid judgment was not filed until 2009, and therefore his one year to file a PRP did not start to run until that time. Id. at 453.

The Supreme Court rejected the argument that any error on the face of the judgment opens the door to any other time-barred claim unrelated to that error:

Because the “valid on its face” precondition is an exception, once the one-year time limit has run, a petitioner may seek relief only for the defect that renders the judgment not valid on its face (or one of the exceptions listed in RCW 10.73.100). And when that defect is cured, the entry of a corrected judgment does not trigger a new one-year window for judgment provisions that were always valid on their face.

Adams, 309 P.3d at 454. The Court continued, “Contrary to what Adams contends, raising a claim under one of the exceptions under

RCW 10.73.090 does not open the door to other time-barred claims.” Id. Adams’ ineffective assistance of trial counsel claim was dismissed as time barred. Id. at 455-456.

Unlike Adams, Smalls does not argue that, simply because there are facial invalidities on his judgment, he can now raise any claim he wants. Rather, unlike Adams, the facial invalidities on Smalls’ judgment and sentence reveal and establish the very claim he now makes – that his guilty pleas were involuntary.

The State also offers policy arguments against Adams’ plea withdrawal. First, the State argues that “[a]ny invalidity regarding a plea is something that a defendant should easily recognize or discover within one year from his judgment and sentence becoming final.” BOR at 16. Most criminal defendants are not skilled in the law. Recognizing an invalidity is extremely difficult for a lay person. It can also be difficult for those well trained in the law. Indeed, in Smalls’ case, neither the trial prosecutor, defense counsel, or the judge recognized that Smalls could not be charged, much less convicted, of assault and that his sentence for murder was unlawful.

Second, the State argues that, because some evidence in a separate assault case against Smalls was destroyed following

dismissal of that charge as part of the plea deal in his current case, it “would be unfair” to allow Smalls to withdraw his pleas now. BOR at 16 n.5. The problem with this argument is that the State authorized destruction of the evidence in December 2009, merely three months after entry of Smalls’ judgment in this case and more than two years before Smalls’ March 2012 deadline for filing a PRP by right (one year from the March 2011 mandate in his appeal). See State’s Response to Personal Restraint Petition, at appendices A-5, C-5, C-6, C-7, and F-1. Thus, the timing of Smalls’ challenge has not caused any additional prejudice to the State.

In addition to facial invalidity under RCW 10.73.090(1), Smalls also has argued that his plea challenge is timely because, in light of the time barred assault conviction, the judgment was not rendered by a court of competent jurisdiction under RCW 10.73.090(1) and, under RCW 10.73.100(5), “[t]he sentence imposed was in excess of the court’s jurisdiction.” See Petitioner’s Opening Brief, at 17-19.

In response, the State correctly notes that, in State v. Peltier, 309 P.3d 506 (2013), a majority of the court held that a violation of the statute of limitations does not divest a trial court of

jurisdiction. See Peltier, 309 P.3d at 510-514. A petition is now pending in the Supreme Court, meaning the final word on this issue may be yet to come. See State v. Peltier, No. 89502-3 (filed 11/7/13). But even if Peltier ultimately controls, Smalls has demonstrated facial invalidity of his pleas, thereby excluding him from the one-year time limit in RCW 10.73.090(1).

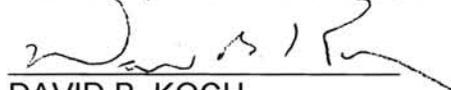
B. CONCLUSION

For the reasons discussed in Smalls' opening brief and above, in addition to the relief conceded by the State, Smalls should be permitted to withdraw his pleas.

DATED this 9th day of December, 2013.

Respectfully submitted,

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DIVISION ONE**

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)	
BENJAMIN SMALLS,)	COA NO. 68740-9-1
)	
Petitioner.)	
)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BENJAMIN SMALLS
DOC NO. 856519
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF DECEMBER, 2013.

x *Patrick Mayovsky*