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Supreme Court No. 102003-1
Court of Appeals No. 56475-1-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MICHAEL KELLY,

Petitioner.

PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER AND DECISION
BELOW**

Timothy Kelly, the petitioner, asks this Court to grant review of Court of Appeals' unpublished decision terminating review, issued on March 28, 2023. Mr. Kelly's motion to reconsider was denied on April 24, 2023.¹

In this decision, which was linked to the published disposition in Mr. Kelly's other case,² the Court of Appeals affirmed the trial court's refusal to resentence Mr. Kelly on the grounds that his request was a collateral attack that was time barred. Mr. Kelly had a prior drug possession that everyone agreed must be vacated under State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). But the trial court refused to resentence Mr. Kelly on the false grounds that he had already served his sentence. The Court of Appeals recognized this was wrong, but

¹ These rulings are attached in the appendix.

² State v. Kelly, __ Wn. App. 2d __, 526 P.3d 39 (2023). Mr. Kelly has filed a petition for review in that case as well.

still refused to remand for resentencing. This Court should grant review, reverse, and remand for resentencing.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether resentencing is required when an unconstitutional conviction is vacated pursuant to RCW 10.73.100(2)—an exception to the one-year time bar on collateral attacks, and vacation of the conviction necessarily results in both the judgment and sentence being vacated? State v. Waller, 197 Wn.2d 218, 228, 481 P.3d 515 (2021); In Pers. Restraint of Skylstad, 160 Wn.2d 944, 950, 162 P.3d 413 (2007).

2. Regardless of RCW 10.73.100(2), whether either (1) the facial invalidity exception or (2) the significant change in law exception to the one-year time bar to collateral attacks applies where the challenged sentence was based in part on prior drug possession convictions that are now unconstitutional and void?

C. STATEMENT OF THE CASE

Mr. Kelly refers this Court to his statement of the case set out in his Brief of Appellant.

To summarize, in 2006, based on convictions arising out of several burglaries, Timothy Kelly received lengthy criminal sentences in two separate cases. Based on a burglary conviction and several other convictions, including a drug possession conviction, the first case resulted in a sentence of about 10 years. The second case, which was based on stacking many duplicative firearm related sentences consecutively, resulted in a sentence of about 32 years. Because the second case was sentenced on a different day, the two sentences were ordered to run consecutively. Details about the second case, which is linked to this one, are set in Mr. Kelly's petition for review in that matter.

In 2021, based on this Court's decision in State v. Blake,³ which declared the drug possession statute unconstitutional, Mr. Kelly received some hope for relief. Mr. Kelly's sentence in the two cases had been based in part on convictions for drug possession, now void under Blake.

In this case, the trial court vacated Mr. Kelly's drug possession conviction. But the court refused to resentence him on the grounds that he had served this decade-long sentence.

In the other case, however, trial court resentenced Mr. Kelly by reducing his sentence by five years. The facts of that case are discussed in Mr. Kelly's petition for review in that matter.

Mr. Kelly appealed the trial court's refusal to resentence him in this case. The refusal to resentence Mr. Kelly was critical because if he had been resentenced on the same day as

³ 197 Wn.2d 170, 481 P.3d 521 (2021).

his other case, the trial court would have been required to impose concurrent sentences absent an exceptional sentence upward. RCW 9.94A.525(1); RCW 9.94A.589(1)(a). This could have reduced Mr. Kelly's effective total sentence by about 10 years. Less critically, it would have also required the trial court to reevaluate the imposition of legal financial obligations under current law.

The Court of Appeals agreed with Mr. Kelly that the trial court erred in concluding that resentencing was moot. Slip op. at 3. Mr. Kelly had not completed his sentence because he had not served the up to 36 months of community custody, which was tolled. Slip op. at 3-4.

The appellate court, however, affirmed on a new theory that Mr. Kelly's request for resentencing was time barred. Slip. op at 4-5. This was despite the fact that trial court had vacated Mr. Kelly's drug possession, which as explained below, meant the entire judgment and sentence had been vacated. Given the

lack of mootness, the Court of Appeals should have ordered resentencing.

D. ARGUMENT

- 1. Under controlling precedent, the trial court’s vacatur of the drug possession conviction resulted in both the judgment *and sentence* being vacated. Consequently, and contrary to the Court of Appeals’ decision, resentencing was required and the one-year time bar on collateral attacks was inapplicable.**

Challenges to a criminal judgement and sentence outside a direct appeal, i.e., a collateral attack, are subject to a one-year time bar. RCW 10.73.090(1). But this statute of limitations does not apply to challenges to unconstitutional convictions. RCW 10.73.100(2). Here, the trial court vacated the unconstitutional drug possession conviction in this case and the judgment, as permitted by the rules. CrR 7.8 (c)(2)(i). Once a judgment is vacated, the sentence is also necessarily vacated. State v. Waller, 197 Wn.2d 218, 228, 481 P.3d 515 (2021) (“Granting a CrR 7.8 motion . . . vacates the old sentence until the defendant can be resentenced.”); In Pers. Restraint of Skylstad, 160

Wn.2d 944, 950, 162 P.3d 413 (2007) (“In criminal cases, the sentence is the judgment.”) (cleaned up). Consequently, the vacatur of the drug possession conviction vacated *both* the judgment and sentence. Consequently, resentencing was required.

Notwithstanding this binding precedent, the Court of Appeals held that vacating the judgment under CrR 7.8 did not also vacate the sentence. And that resentencing Mr. Kelly required application of a different exception to the one-year time bar.

The Court of Appeals’ decision conflicts with precedent, Waller and Skylstad, meriting review. RAP 13.4(b)(1). The decision is critical because resentencings of Mr. Kelly in the two cases on the same day required the trial court to impose concurrent sentences absent an exceptional sentence upward justifying greater punishment. RCW 9.94A.525(1); RCW 9.94A.589(1)(a); State v. Rasmussen, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001); State v. Smith, 74 Wn. App. 844, 852-53,

875 P.2d 1249 (1994); State v. Bates, 51 Wn. App. 251, 254, 752 P.2d 1360 (1988). This would reduce Mr. Kelly's sentence about a decade. It would also require imposition of legal financial obligations under current law. Br. of App. at 17-20.

This issue is also one of substantial public interest meriting review. RAP 13.4(b)(4). When a trial court vacates an old unconstitutional conviction, which has been a frequent occurrence since Blake, the parties and courts need to know if resentencing is also required or is barred. Lack of clarity will lead to disparate results and unfairness in sentencing. This further justifies review. See State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017) ("Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values.").

2. The Court should grant review to decide whether either the facial invalidity exception or the substantial change in law exception to the one-year time bar on collateral attacks applies and permits resentencing in cases where an unconstitutional and void conviction was used in the previous sentencing.

Setting aside RCW 10.73.100(2), the time bar did not apply under either the facial invalidity exception, RCW 10.73.090(1), or the substantial change in law exception, RCW 10.73.100(6).

Relying on its published decision in Mr. Kelly's linked case, the Court of Appeals concluded that "the judgment and sentence is not facially invalid" here. The Court reasoned that even with the vacation of the drug possession conviction and not counting a prior unconstitutional drug possession conviction, Mr. Kelly's offender score and standard range did not change. And that this situation did not trigger the facial invalidity exception.

As explained in Mr. Kelly's petition for review in the linked case, this is incorrect. To the extent that this Court's

published order in In re Pers. Restraint of Richardson, 200 Wn.2d 845, 525 P.3d 939 (2022) is to the contrary, review should be granted to reevaluate whether the facial invalidity exception applies in these kinds of circumstances. Richardson was decided by five justices through an order and without the typical merits briefing and argument that usually precedes a significant decision. Mr. Kelly respectfully submits that Richardson is wrong and that the issue should be decided by all nine members of this Court through the more typical process.

Setting aside the facial invalidity exception, the significant change in law exception to the time bar applies. RCW 10.73.100(6). Contrary to the Court of Appeals' representation, it is not true that Mr. Kelly did "not claim that any of the RCW 10.73.100 exceptions apply to his sentence on the remaining convictions." Slip op. at 5. In his answer to the State's statement of additional authorities, filed on January 25, 2023, Mr. Kelly argued that the significant change in the law exception under RCW 10.73.100(6) applied. Answer at 3.

Under this exception, the time limit does not apply

where:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6) (emphases added)

Under RCW 10.73.100(6), the motion for resentencing was not barred because Blake is a significant change in the law that is retroactive and material to Mr. Kelly's sentence.

Blake, which declared the drug possession statute unconstitutional, is undoubtedly a significant change in the law.

See In re Pers. Restraint of Ali, 196 Wn.2d 220, 233-234, 474

P.3d 507 (2020). As a consequence of this decision, prior

simple possession convictions are unconstitutional and cannot be used in the offender score calculation.

The change in the law is material to Mr. Kelly's sentence because it resulted in vacation of Mr. Kelly's drug possession conviction in this case. It also resulted in the other prior drug possession convictions not scoring when they had previously. Although Mr. Kelly's offender score remained above a 9, the trial court could have reasonably found that the elimination of the possession convictions warranted a reduced sentence. It also meant that legal financial obligations had to be revisited under the current law. And significantly, because Mr. Kelly was being resentenced in two cases, the sentences in both cases were required to run concurrently absent an exceptional sentence justifying a departure from this rule. RCW 9.94A.589(1)(a). For any of these reasons, this makes the change in the law material to Mr. Kelly's sentence.

As for retroactivity, it is retroactive because Blake is a new substantive rule of constitutional law. See id. at 237. This

is because the decision held that it was beyond the State's power to enact a strict liability drug possessions statute that contained no *mens rea*.

In sum, both exceptions to the time bar in RCW 10.73.100(2) and RCW 10.73.100(6) apply.

Review should be granted on this issue because is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Fortunately, many people have been able to obtain relief because of Blake. But there are many people whose offender score will remain at a 9 or greater despite the elimination prior drug possession convictions in the scoring. These people should get relief if a sentencing court believes it is warranted. This is consistent with Blake, which recognized the unconstitutional drug possession statute “affected thousands upon thousands of lives, and its impact has hit young men of color especially hard.” 197 Wn.2d at 192. Resentencings are needed to address the problem of disproportionate sentences imposed on disadvantaged people

and people of color. Review should be granted, the Court of Appeals reversed, and this case remanded for resentencing. Because Mr. Kelly should have been resentenced in both of his cases and these resentencings were set for the same day, the sentences must be concurrent absent an exceptional sentence upward.

E. CONCLUSION

For the reasons outlined, this Court should grant review on these critical issues of substantial public interest and to correct the Court of Appeals' conflicting decision which is contrary to this Court's precedents.

This document contains 2,107 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 19th day of May, 2023.



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Appendix

April 24, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MICHAEL KELLY,

Appellant.

No. 56475-1-II


ORDER DENYING
MOTION FOR RECONSIDERATION

Appellant Timothy Kelly moves for reconsideration of the court's March 28, 2023 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Che

FOR THE COURT:



MAXA, P.J.

March 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY MICHAEL KELLY,

Respondent.

No. 56475-1-II

UNPUBLISHED OPINION

MAXA, P.J. – Timothy Kelly appeals the trial court’s order denying resentencing on multiple May 2006 convictions after vacating one of the convictions – for unlawful possession of a controlled substance (UPCS) – pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Kelly originally was sentenced to 116 months in confinement and up to 36 months of community custody. Kelly also was sentenced to 387 months for multiple November 2006 convictions.

The trial court denied resentencing on Kelly’s May 2006 convictions because he already had served his sentence and although Kelly’s offender score was reduced with the vacation of the UPCS conviction and another UPCS conviction previously included in his offender score, the standard sentencing range did not change.

Kelly argues that the trial court erred in declining to resentence him for the May 2006 convictions pursuant to *Blake*. The State argues that (1) Kelly's appeal is moot because he already has served the confinement portion of his sentence; and (2) Kelly's collateral attack in the trial court more than a year after his sentence became final was time barred because once his UPCS conviction was vacated, his judgment and sentence was facially valid.

We conclude that this appeal is not moot because Kelly has not yet served his term of community custody, but we hold that Kelly's request for resentencing was time barred. Accordingly, we affirm the trial court's order declining to resentence Kelly.

FACTS

In May 2006, Kelly was convicted of first degree burglary, two counts of second degree assault, first degree possession of stolen property, first degree attempted theft, and UPCS. Based on Kelly's criminal history, his offender score for the first degree burglary conviction was a 14, which gave him a standard sentencing range of 87-116 months. His offender score for the rest of his convictions was an 11, which gave him varying sentencing ranges for each of the other convictions.

Kelly was sentenced to 116 months for first degree burglary and lesser amounts for the remaining convictions. His sentences ran concurrently, giving him a total of 116 months in confinement. Kelly also was sentenced to up to 36 months of community custody on the first degree burglary and other convictions. As part of his community custody term, Kelly was prohibited from having contact with the victims, was to remain within a specified geographical boundary, and was to undergo an evaluation for substance abuse treatment.

In November 2006, Kelly was convicted of multiple other charges and was sentenced to 387 months of confinement.¹ The trial court ordered Kelly's sentences from the May 2006 and November 2006 cases to run consecutively, giving him a total sentence of 116 months plus 387 months.

In November 2021, the trial court considered the effect of *Blake* on Kelly's May 2006 convictions and sentences. The court vacated Kelly's May 2006 UPCS conviction and the related sentence and removed another UPCS conviction from his offender score but denied Kelly's request for resentencing on the remaining convictions.

Kelly appeals the trial court's order denying his request for resentencing.

ANALYSIS

A. MOOTNESS

Initially, the State argues that Kelly's appeal is moot because he already had served the confinement portion of his sentence when he requested resentencing and so the trial court could not provide any effective relief other than vacating Kelly's UPCS conviction and sentence. We disagree.

The expiration of a sentencing term renders a sentencing issue moot. *State v. T.J.S.-M.*, 193 Wn.2d 450, 454, 441 P.3d 1181 (2019). But here, Kelly has not completed his sentence. In addition to a term of incarceration, the trial court imposed up to 36 months of community custody as part of Kelly's sentence. The community placement portion of a sentence is tolled

¹ Kelly originally was sentenced to 327 months, but after appeal the sentence was increased to 387 months.

during the period that the defendant is in confinement. RCW 9.94A.171(3)(a).² Although Kelly completed the confinement portion of his sentence, he has not begun the community custody portion of his sentence because he is still incarcerated due to the November 2006 convictions. Therefore, his sentencing term has not expired.

In addition, at resentencing the trial court would have been able to provide effective relief other than vacating Kelly's UPCS conviction and sentence. The court would have the discretion to alter the conditions of Kelly's community custody term because several of the original conditions were discretionary. RCW 9.94A.703(3)(a)-(b). And Kelly's previous community custody sentence of up to 36 months now would be a fixed term of 18 months under current law. RCW 9.94A.701(2).

Therefore, we conclude that Kelly's appeal is not moot.

B. TIMELINESS OF RESENTENCING REQUEST

The State argues that Kelly's request in the trial court for collateral relief – resentencing – was time barred. We agree.

A collateral attack is “any form of postconviction relief other than a direct appeal.” RCW 10.73.090(2). Therefore, Kelly's request for resentencing was a request for postconviction relief. And the request came long after his judgment and sentence became final.

Under RCW 10.73.090(1), a defendant may not collaterally attack their judgment and sentence “more than one year after the judgment becomes final if the judgment and sentence is valid on its face” or one of the exceptions in RCW 10.73.100 applies. RCW 10.73.100 lists six exceptions to the one-year time limit. Unless a defendant shows that the judgment and sentence

² Although the sections of chapter 9.94A cited in this opinion have been amended several times since the events at issue in this case, the amendments do not affect our analysis so we cite to the current versions of these sections.

is facially invalid or one of the RCW 10.73.100 exceptions applies, a collateral attack is time barred. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002).

The State concedes, and we agree, that Kelly's request to vacate his UPCS conviction and associated sentence is timely under RCW 10.73.100(2) because that conviction was unconstitutional. However, Kelly does not claim that any of the RCW 10.73.100 exceptions apply to his sentence on the remaining convictions. Therefore, his request for resentencing was time barred unless the judgment and sentence is facially invalid.

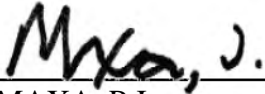
Here, although Kelly's offender score changed due to his UPCS conviction being vacated and another UPCS conviction being removed, his standard sentencing range did not change. Therefore, the trial court accurately calculated the standard sentencing range and his sentence still was within the SRA-authorized sentencing range. In Kelly's linked case involving the resentencing for his November 2006 convictions, this court held that the judgment and sentence is not facially invalid in this situation. *State v. Kelly*, No. 56461-1-II, slip op. at 10-11 (Wash. Mar. 21, 2023), <https://www.courts.wa.gov/opinions/pdf/D2%2056461-1-II%20Published%20Opinion.pdf>.

Because Kelly's judgment and sentence remained facially valid after the UPCS conviction was vacated and another UPCS conviction was removed from his offender score, his request for resentencing was time barred. Although the trial court did not expressly base its ruling on untimeliness, we can affirm on any grounds that the record supports. *State v. Gudgell*, 20 Wn. App. 2d 162, 183, 499 P.3d 229 (2021). Accordingly, we do not address the merits of his appeal.

CONCLUSION

We affirm the trial court's order declining to resentence Kelly.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

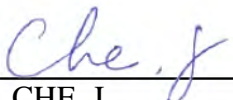


MAXA, P.J.

We concur:



LEE, J.



CHE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56475-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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