No. 42441-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHERRI A. BOSESKI,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 09-1-00034-8

BRIEF OF RESPONDENT

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2. Whether Boseski's petition is "mixed," raising both untimely and timely claims under RCW 10.73.100.

3. Whether Boseski's remaining arguments are frivolous.

B. STATEMENT OF THE CASE.

In the early morning hours of January 8, 2009, Tumwater Police Officers Kelly Clark and Ken Driver went to Sherri Boseski's apartment, responding to a reported disturbance. CP 266. Officer Driver knocked on Boseski's door; she told him to go away, refusing to open it, yelling "Fuck you! Fuck you guys! Joe, the fucking cops are here!"[1] Id. Boseski also threatened to kill the officers if they entered her apartment, promising that she was going to get her gun. Id. at 267 (At one point, Boseski warned: ""If anyone comes in, someone's going to die!"").

Several minutes later, Boseski threw open her front door, stepped out into the hallway, and pointed a handgun at Officer Driver. Id. But before she was able to shoot, Officer Clark tased

[1] Boseski's neighbor, Keya Sotelo, told police that she heard "a lot of thumping" and screaming—and that she thought a man was in Boseski's apartment. CP 266. Officer Clark stated that he did not hear any male voices. Id. at 270. While no one else was found inside, id. at 267, Boseski said that a friend had been at her apartment but had left before police arrived, id. at 90.

Boseski—knocking her down and her handgun free.[2] Id. After the officers secured Boseski's gun and placed her in handcuffs, she assaulted Officer Clark, attempting to kick him several times. Id. at 271. Boseski also told the officers that "she was attacked before by cops and she was going to shoot us if we were going to remove her from her apartment." Id. at 267. The officers arrested Boseski for first degree assault. Id. at 267, 271.

Later that day, the trial court found that there was probable cause to arrest Boseski for first degree assault; it also ordered a Safe to be at Large Evaluation.[3] 1/8/09 RP 4, 7.

On January 9, 2009, the State charged Boseski by Information with second and third degree assault, alleging

> "In that the defendant . . . [in violation of RCW 9A.36.021(1)(c),] in the State of Washington, on or about January 8, 2009, did intentionally assault another with a deadly weapon," CP 281; and
>
> "In that the defendant . . . [in violation of RCW 9A.36.031(1)(g)] did intentionally assault a law enforcement officer or other

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[2] While not particularly relevant to the State's response, it is worth noting that Boseski could have been shot. See, e.g., 7/9/09 RP 14-15:

> THE COURT: . . . She could be dead because she could have been shot had there been a slightly different situation. If this involved a sniper standing back to see what was going on when a weapon is pointed at a law enforcement officer, that's a time when deadly force could be used. The law enforcement chose not to do that, not to have deadly force, and that's fortuitous.

[3] The evaluation suggested that Boseski, who at the time of her arrest was an army captain and a licensed nurse, "voluntarily enter into an inpatient treatment at Madigan to do her MH [Mental Health] assessments and other workups that may be asked of her." 1/14/09 RP 9; CP 91. The army temporarily committed Boseski to Madigan Hospital, administered medical treatment, and released her around February 1, 2012. See 1/20/09 RP 6.

> employee of a law enforcement agency who was performing his or her official duties at the time of the assault," id.

The First Amended Information filed on January 20, 2009, added a firearm enhancement to the charge regarding RCW 9A.36.021(1)(c), CP 283; and the Second Amended Information filed on June 22, 2009, removed the First Amended Information's firearm enhancement, re-alleging the State's original charges, CP 285.

On June 22, 2009, Boseski changed her plea—pleading guilty to Count I and II as stated in the Second Amended Information. 6/22/09 RP 7. Before the trial judge accepted Boseski's plea, he read her factual statement into the record:

> THE COURT: "On January 8th in Thurston County" – and that's 2009?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: "*I intentionally assaulted a person and inflicted reckless substantial bodily harm.*[4] I also intentionally assaulted a police officer who was performing his official duties at the time of assault."

Id. at 5-6 (emphasis added).

The trial judge told Boseski that she was pleading guilty to second and third degree assault, id. at 4, and found that her plea was made knowingly, intelligently, and voluntarily, id. at 7. Boseski also plead guilty to Count I and Count II as stated in the Amended

[4] As the court is aware, this language tracks subsection (a) of second degree assault—not subsection (c) as alleged in the Information, First Amended Information, and Second Amended Information. RCW 9A.36.021(1)(a), (c); CP 281-85.

Information in her Statement of Defendant on Plea of Guilty. CP 55. Boseski's statement also included the standard ranges for Count I, which is 6-12 months, and Count II, which is 3-8 months. Id. at 50.

On July 9, 2009, the trial judge sentenced Boseski to ten months on Count I (the second degree assault charge) and eight months on Count II (the third degree assault charge), ordering that the sentences run concurrently.[5] 7/9/09 RP 16-17. Boseski signed her judgment and sentence, CP 68-69, which stated that she pled guilty to RCW 9A.36.021(1)(c)—which references a deadly weapon—and RCW 9A.36.031(1)(g), id. at 62. Her judgment also advised Boseski that she could collaterally attack it:

> Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any . . . motion to withdraw guilty plea . . . must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. [sic] RCW 10.73.090.

CP 67.

On July 7, 2011, Boseski filed a motion to withdraw her guilty plea. 7/7/11 RP 3. She argued that RCW 10.73.090's one-year time limit does not bar her withdrawal because her statement regarding her guilty plea did not mention a deadly weapon, making

[5] At Boseski's sentencing, the trial judge commented on the State's dismissal of its firearm enhancement, noting that "it's clear that a firearm was involved." 7/9/09 RP 15.

her judgment invalid on its face. 7/7/11 RP 6. Boseski also said that she was unaware that she could collaterally attack her judgment (among other things). Id. at 11. The trial judge rejected Boseski's arguments, stating

> This is a difficult case. . . . But I'm going to deny the motion. I think it is time barred. . . . I find – I'm not going into manifest injustice, equitable, because I think it's time barred. . . .
>
> I think it's valid on its face. I think the second amended information was subsection (1)(c), she didn't say it, deadly weapon, but it's clearly [sic] the subsections are the same.

Id. at 21-22. The trial judge also denied Boseski's motion for reconsideration. CP 307.

Boseski filed a notice of appeal on August 5, 2011, re-alleging the same arguments that the trial judge rejected at her motion hearing and on reconsideration—all of which, the State maintains, are time barred under RCW 10.73.090 (among other reasons to deny the appeal). CP 308.

C. ARGUMENT.

1. Boseski's collateral attack is time barred (1) because her judgment is valid on its face and (2) because RCW 10.73.100(1) does not apply.

A petitioner has one year from the time his or her judgment becomes final to file a personal restraint petition or other form of collateral attack, such as a motion to withdraw a guilty plea. RCW 10.73.090(1), (2). A judgment is "final" when it is filed with the clerk

of the trial court, when an appellate court issues its mandate disposing of a timely direct appeal, or when the U.S. Supreme Court denies a timely petition for certiorari to review a decision affirming a conviction on direct appeal—whichever comes last. RCW 10.73.090(3).

The one-year limit may be avoided only if the petitioner's judgment is *invalid on its face* or was entered by a court without competent jurisdiction, RCW 10.73.090(1), or if the petition is based solely on one or more of the statutory exceptions to the time limit listed in RCW 10.73.100, id. "CrR 7.8(b) provides that motions made under this rule are subject to RCW 10.73.090, .100, .130, and .140," which "evinces a strong intention on the rule drafters' part that motions made under CrR 7.8 in superior court are subject to the same limitations . . . that apply to PRPs." See, e.g., State v. Robinson, 153 Wn.2d 689, 695-96, 107 P.3d 90 (2005).

a. Boseski's judgment is valid on its face because (1) the trial court properly exercised its power; (2) her plea documents are irrelevant; and (3) she plead guilty to the charges in the Second Amended Information.

For purposes of the exception to the time limit for facially invalid judgments, the general rule is that a judgment and sentence is invalid if the trial court actually exercised authority (statutory or otherwise) it did not have. In re Pers. Restraint of Scott, No.

82951-9, at 8 (March 1, 2012); In re Pers. Restraint of Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). Examples of invalid judgments include:

> When the face of the judgment shows without resort to other materials that the sentence exceeds the duration allowed by statute, In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008); In re Pers. Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005);
>
> If it is clear from the face of the judgment that the trial court included a "washed out" prior conviction in the petitioner's offender score, In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 100 P.3d 805 (2004); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 865-67, 50 P.3d 618 (2002);
>
> If a defendant was convicted of a nonexistent crime, In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004);
>
> If the combined term of total confinement and community custody imposed by the trial court exceeds the statutory maximum for the crime, In re Pers. Restraint of Brooks, 166 Wn.2d 664, 671-73, 211 P.3d 1023 (2009); and
>
> If the judgment and sentence demonstrated that the defendant had been charged with a crime after the statute of limitations had run, In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000).

As emphasized in Coats, invalidity has regularly been found when the court actually exercised a power it did not have. Id. at 136.

In order to avoid the time limit, the judgment and sentence must also be invalid "on its face"—that is, "on its face" modifies "valid." Id. at 138 (emphasis added). A judgment is invalid "on its face" if a fatal defect is evident from the face of the judgment without "further elaboration." In re Pers. Restraint of Clark, 168

Wn.2d 581, 585, 230 P.3d 156 (2010); Goodwin, 146 Wn.2d at 866. Although the defect must appear on the face of the judgment without "further elaboration," the "face" of the judgment may include such items as the charging documents, Hinton, 152 Wn.2d at 858; In re Pers. Restraint of Thompson, 141 Wn.2d 712, 716, 10 P.3d 380 (2000), and verdict forms, Scott at 1. And when the judgment is based on a guilty plea, the "face" of the judgment includes those documents signed as part of the plea agreement. Stoudmire, 141 Wn.2d at 353.

> Taken together, we have found invalidity based upon *charging documents*, *verdicts*, and *plea statements of defendants on plea of guilty*. We have not rested our decision on jury instructions,[6] trial motions, and other documents that relate to whether the defendant received a fair trial.

Coats, 173 Wn.2d at 140 (emphasis added).

Plea documents are relevant in this regard only where they may disclose invalidity in the judgment and sentence itself, not where they simply disclose a defect in the plea. Clark, 168 Wn.2d at 587; In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 781-82; 203 P.3d 375 (2009); In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). If a judgment facially imposes a correct community placement term, a petitioner may not

[6] Scott also stated in its lead opinion that "charging documents and verdict forms, *but not the jury instructions*, may be consulted to determine whether a judgment and sentence is valid on its face." Id. at 10 (emphasis added); see also Coats, 173 Wn.2d at 140 n.11.

assert that the judgment is facially invalid simply because the plea statement did not inform him of the correct community placement term. See, e.g., Hemenway, 147 Wn.2d at 532-33.

In Hemenway, the defendant

> pleaded guilty without being told that, as a direct consequence of his plea, he would serve mandatory community placement. As an accused is entitled to know all the direct consequences of a plea, Hemenway [the defendant] contended that his plea was not knowing, voluntary, and intelligent and, critically for our purposes, that the invalidity of the plea infected the judgment and sentence.
>
> If Hemenway had raised that challenge in a timely personal restraint petition, he likely would have prevailed. . . . But this court rejected Hemenway's argument that he was entitled to the same relief in an untimely collateral challenge. As we noted, "The question is not, however, whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence."

Coats, 173 Wn.2d at 141 (internal cites omitted) (quoting Hemenway, 147 Wn.2d at 531-33).

"This principle was bluntly recapitulated in McKiearnan: "an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid."" Coats, 173 Wn.2d at 141-42 (quoting McKiernan, 165 Wn.2d at 782). In McKiearnan, the court rejected the defendant's claim that his judgment and sentence is facially invalid, noting that

the defendant was convicted of a valid crime by a court of competent jurisdiction and was sentenced within the appropriate standard range. Id. at 782. McKiearnan also emphasized that "[i]n order to consider whether the plea agreement was invalid, we must first find that the judgment and sentence itself is facially invalid." Id. at 781.

Similarly, in Clark, the defendant argued "that examination of his guilty plea reveals that he was improperly informed about the consequences of his plea, thus making the judgment and sentence invalid on its face." Id. at 586. Citing Hemenway, the Clark court rejected the defendant's arguments: "Clark's judgment and sentence correctly reflects the law. Even though Clark's plea agreement may be flawed, those flaws do not render his judgment and sentence facially invalid." Id. at 587.

Clark also rejected the defendant's claim that the order amending his judgment and sentence is void because he was denied the due process rights of notice, an opportunity to be heard, and the right of counsel—reasoning that such a determination requires the court to go beyond the face of the judgment and sentence. Id. The Clark court refused to consider an affidavit, some declarations, and other documentary evidence that the defendant provided: "[I]f Clark must resort to external documents in

the hope of rendering his judgment and sentence invalid, then the judgment and sentence cannot be invalid on its face." Id. at 587-88.

In this case, Boseski's judgment and sentence was final on July 9, 2009, CP 68-69, and Boseski did not file her motion to withdraw her guilty plea until July 7, 2011, 7/711 RP 3—almost two years later. Because motions made under CrR 7.8(b) in superior court are subject to the same limitations that apply to PRPs, Robinson, 153 Wn.2d at 695-96, Boseski's motion is time barred under RCW 10.73.090(1) unless her judgment is facially invalid. Id.

Her judgment is valid because the trial court had authority to sentence Boseski to second and third degree assault—or as Coats expresses it, the trial court's sentence was within its power. Id. at 135, 136. Unlike West and Tobin, Boseski's judgment does not demonstrate a sentence in excess of the duration allowed by statute: Boseski was sentenced to (1) ten months for second degree assault, which carries a maximum term of ten years, 7/9/09 RP 17; RCW 9A.20.021(1)(b); and (2) eights months for third degree assault, which carries a maximum term of five years, 7/9/09 RP 17; RCW 9A.20.021(1)(c).[7] Her judgment did not indicate a washed out prior conviction, see, e.g., LaChapelle, 153 Wn.2d at 6;

[7] Boseski's convictions ran concurrently, 7/9/09 RP 17, and the record indicates that Boseski served only six months in prison, 7/7/11 RP 10.

a conviction for a nonexistent crime, see, e.g., Hinton, 152 Wn.2d at 857; or that she was charged after the statute of limitations had run, Stoudmire, 141 Wn.2d at 354. Boseski's judgment also advised her that she could collaterally attack it and that the time limit was one year. CP 67.

While the "face" of Boseski's judgment includes charging documents, verdicts, and plea documents, Coats, 173 Wn.2d at 140, Boseski's plea documents are irrelevant because her judgment and sentence is facially valid, see, e.g., id. at 141-42 (citing Hemenway, 147 Wn.2d at 533); McKiernan, 165 Wn.2d at 782)("an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid.").

Boseski's judgment, however, is valid even if her plea statement is examined, as she explicitly pled guilty to the Second Amended Information's charges. 6/22/09 RP 7. Notably, Count I in the Second Amended Information referenced RCW 9A.36.021(1)(c), which states that "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . *Assaults another with a deadly weapon.*" CP 285 (emphasis added).

The State acknowledges that Boseski's factual statement did not mention a deadly weapon, but there is no doubt that a firearm was involved—as Boseski pointed her gun at Officer Driver. Id. at 267, 268 (Tumwater police officers also logged Boseski's handgun into evidence). Boseski wants her judgment and sentence to reflect actions that did not occur so that—apparently—she can find a job, see, e.g., 7/7/11 RP 19—but her factual statement's failure to mention a deadly weapon will not undo her judgment because it is valid on its face.[8]

Any assertion that equitable tolling prevents application of RCW 10.73.090's one-year time bar is without merit. Appellant's Opening Brief (Appellant's Brief) at 10-13. "Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed." In re Pers. Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008)(citing In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003)). "However, any application of equitable tolling . . . *must only be done in the narrowest of*

[8] While Coats does not require a showing of prejudice to surpass the one-year bar, it notes that "We can find no case—and the petitioner has directed us to none—where we have actually *held* that prejudice need not be shown." Coats, 173 Wn.2d 142 (emphasis in original). Boseski is unable to show prejudice in this case because while RCW 9A.36.021(c) was not explicitly mentioned in Boseski's plea, Boseski did state that she was pleading guilty to Counts I and II as alleged in the Second Amended Information. CP 55; 6/22/09 RP 7. And as the trial court noted, it's clear that a firearm was involved. See, e.g., CP 267.

circumstances and where justice requires." In re Pers. Restraint Carter, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011)(emphasis added).[9] Boseski claims that "RCW 10.73.110 requires the court to advise the defendant of the time limit," Appellant's Brief at 11-12—and she is correct. But Boseski fails to acknowledge that RCW 10.73.110 requires notice "At the time *judgment and sentence* is pronounced. . . ." Id. (emphasis added). Her judgment included such notice. CP 67.

Additionally, Boseski alleges that she was unable to read her judgment and that the judge and her attorney did not advise her of the time bar. Appellant's Brief at 13. Not only is her claim inconsistent with the record, CP 67-68, but it also relies on facts alleged in Boseski's declaration, CP 127. Boseski's reliance on her declaration to show that her judgment is facially invalid flies in the face of Washington's jurisprudence regarding collateral attacks: if the defendant "must resort to external documents in the hope of rendering his judgment and sentence invalid, then the judgment and sentence cannot be invalid on its face." Clark, 168 Wn.2d at 587-88.

b. RCW 10.73.100(1) does not apply because the EMS's report is not newly discovered evidence.

[9] In Bonds, for instance, all but three justices agreed that equitable tolling did not apply when "the court's inaction in reviewing his PRP to determine its merit left him in a situation where his counsel, once appointed, court not discover the public trial issue until after the statute of limitation had run." Id. at 144.

RCW 10.73.100 lists six enumerated exceptions to the one-year time limit: (1) newly discovered evidence uncovered with reasonable diligence; (2) facial or as applied unconstitutionality of the statute under which the petitioner was convicted; (3) double jeopardy; (4) insufficient evidence to support the conviction (if the petitioner plead not guilty); (5) a sentence in excess of the trial court's jurisdiction; and (6) a significant and material change in the law that applies retroactively. RCW 10.73.100.

In determining whether the exemption for newly discovered evidence applies, courts employ the same standard as that applicable to motions for new trial based on newly discovered evidence. In re Pers. Restraint of Lord, 123 Wn.2d 296, 319, 868 P.2d 835 (1994); see In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 493, 789 P.2d 731 (1990)(citing State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). The evidence (1) must be such that it would probably change the result of the trial; (2) must have been discovered since trial; (3) must not have been discoverable before trial by the exercise of due diligence; (4) must be material; and (5) must not be merely cumulative or impeaching. Lord, 123 Wn.2d at 320 (quoting Williams, 96 Wn.2d at 223).

The defendant in Lord, for example, presented a doctor's report that analyzed procedures and tests available prior to the

defendant's trial, retested certain exhibits, and expressed disagreement with some of the State Crime Laboratory's conclusions. Id. at 320. Refusing to consider this evidence as an exception to RCW 10.73.100(1), Lord stated that "in addition to the fact that this evidence was available before trial, it is also only cumulative or impeaching." Id.

The same is true in this case. Boseski alleges that her motion is not time barred because an Emergency Medical Services (EMS) report[10] states that she went to the hospital (which, she claims, she did not do). Appellant's Brief at 13 (citing RCW 10.73.100(1)). But Boseski's argument misses the point. First, Boseski fails to address any of the required five prongs. See, e.g., Williams, 96 Wn.2d at 223. Second, the EMS's report has no bearing on Boseski's guilty plea and is immaterial.

Third, Boseski could have discovered it before pleading guilty because the report was created over five months before she entered her plea. Compare 6/22/09 RP 3, 7 with CP 134. Finally, the EMS's report—at most—indicates inconsistencies between the police officers' and the EMS's reports. Compare id. at 271 with id. at 135. While the reports' inconsistencies may constitute

[10] It appears as though Boseski's argument arises from the portion of the EMS report that states "P/ Exam, v/s, Pt transported via TPD to SPH [Providence St. Peter's Hospital]." CP 135.

impeaching evidence, evidence used to impeach does not constitute new evidence under RCW 10.73.100(1).[11]

2. Boseski's petition is "mixed" because it contains at least one claim that is time barred—and it therefore must be dismissed.[12]

If a petition is "mixed," that is, it raises both untimely claims and claims that are exempt from the time limit under RCW 10.73.100, it must be dismissed. In re Pers. Restraint of Stenson, 150 Wn.2d 207, 220, 76 P.3d 241 (2003); In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 702, 72 P.3d 703 (2003). The court in this circumstance will not analyze all claims to determine which are timely and which are not—and it will not decide timely claims. Hankerson, 149 Wn.2d at 703. If a petition is mixed, courts will only address challenges to the facial validity of the judgment and sentence or to the trial court's jurisdiction. RCW 10.73.090(1); Stenson, 150 Wn.2d at 220.

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[11] If the court considers Boseski's judgment invalid on its face or if it holds that the EMS's report constitutes an exception under RCW 10.73.100(1), Boseski must still show that she was actually and substantially prejudiced by constitutional error or that her trial suffered from a fundamental defect of a nonconstitutional nature that inherently resulted in a complete miscarriage of justice. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007); In re Pers. Restraint of Cook, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990). Given that Boseski pointed her gun at Officer Driver and that police took her gun into evidence, it's unlikely that Boseski can show that she was either "actually and substantially prejudiced" or that her plea resulted in a "complete miscarriage of justice."

[12] Although this is an appeal of the trial court's denial of a collateral attack, it is essentially a Personal Restraint Petition. Under CrR 7.8 (c)(2), the court should have transferred the motion to the Court of Appeals as a PRP rather than addressing and denying it.

The Stenson court opined that:

> A petition which relies upon RCW 10.73.100 to overcome the one-year time bar in RCW 10.73.090 cannot be based upon any grounds other than the six grounds in RCW 10.73.100. Stenson's [the defendant's] claim that there is newly discovered evidence . . . does not satisfy the conditions of RCW 10.73.090 and is not within the exceptions delineated in RCW 10.73.100. Therefore, Stenson's petition is "mixed." In Stoudmire, we concluded that when a claim falls outside RCW 10.73.100 the petitioner may not take advantage of the exceptions in RCW 10.73.100. . . . We recently affirmed our holding in Stoudmire in . . . Hankerson . . ., indicating that "*if a personal restraint petition claiming multiple grounds for relief is filed after the one-year period of RCW 10.73.090 expires, and the court determines that at least one of the claims is time barred, the petition must be dismissed.*"

Stenson, 150 Wn.2d at 220 (emphasis added) (internal cites omitted).

In this case, Boseski's claims regarding equitable tolling and newly discovered evidence are without merit. See argument briefed at pages 13-14, 15-17. She also raises the following arguments:

> "The Court's Acceptance of Ms. Boseski's Guilty Plea Constitutes Manifest Injustice," Appellant's Brief at 14;
>
> "Ms. Boseski's Guilty Plea was not Knowingly, Intelligently, and Voluntarily Entered Because It Lacks a Factual Basis," id. at 15;

"Ms. Boseski did not Plead Guilty to the Elements of 9A.36.021(c) and Notice of the Criminal Elements[13] of the Offense is Required," id. at 22;

"Ms. Boseski's Plea was not Knowing, Voluntary, and Intelligent when Ms. Boseski Lacked Competency at Arraignment," id. at 24;

"Acceptance of Ms. Boseski's Plea, While She was Mentally Ill and Unable to Understand the Charges, Constituted Manifest Injustice," id. at 29; and

"Ms. Boseski Received Ineffective Assistance from Counsel, Causing Manifest Injustice," id. at 34.

None of these arguments allege that Boseski's judgment is facially invalid or entered by a court without competent jurisdiction, which may be considered even if a petition is mixed, Stenson, 150 Wn.2d at 220, and none fit within RCW 10.73.100's six exceptions, id. Boseski's petition is therefore mixed—as it contains at least one claim that is time barred—and must be dismissed.[14]

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[13] Boseski also says that notice of a statute's "critical elements" is required. Appellant's Brief at 22. Given her argument's context and the cases Boseski cites, it appears that her reference to "criminal elements" was unintended.

[14] In light of Boseski's mixed petition, it is worth mentioning that there is no indication that the legislature intended an invalidity in the judgment to waive the time bar for all untimely claims regardless of whether they relate to the judgment's validity. Coats, 173 Wn.2d at 170 (Stephens, J., concurring). Similarly, if a petition raises a claim that fits one of the six enumerated exceptions to the time bar listed in RCW 10.73.100, courts will only consider that specific claim. Id. Boseski's judgment is facially valid and she has not raised a claim under RCW 10.73.100—but even if she had, the court's floodgates would remain shut as to her other untimely claims, preventing their consideration.

3. Boseski's remaining arguments are frivolous because they are timed barred, mixed, and—for purposes of this section—do not apply to her case.

"The "process of 'winnowing out weaker arguments . . . and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy"." In re Pers. Restraint of Lord, 123 Wn.2d 296, 302, 868 P.2d 835 (1994)(quoting Smith v. Murray, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986)(quoting Jones v. Barnes, 463 U.S. 745, 751-52, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). While the State, as always, stands corrected and acknowledges that Boseski's 37-page brief does not approach the 387-page brief that the court admonished in Lord, id. at 302, Boseski's remaining six arguments (quoted above at pages 18-19) are frivolous.

First, Boseski states that the court's acceptance of her guilty plea constitutes a manifest injustice, Appellant's Brief at 14, but she fails (1) to actually argue that her guilty plea constitutes a manifest injustice, and (2) to cite one case that involves a collateral, time barred attack.

Second, Boseski states that her guilty plea was not knowingly, intelligently, and voluntarily entered because it lacked a factual basis. Id. at 15. Her argument ignores established precedent because—as Coats and Hemenway caution—""The

question is not . . . whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face."[15] Coats, 173 Wn.2d at 141 (quoting Hemenway, 147 Wn.2d at 533). But even if her collateral attack was timely, Boseski fails to reconcile the inconsistencies between her factual basis (which did not reference a deadly weapon) and her decision to explicitly plead guilty to Count I as stated in the Second Amended Information (which referenced a deadly weapon). Compare 6/22/09 RP 5-6 with id. at 7.

Third, Boseski claims that she did not plead guilty to RCW 9A.36.021(1)(c)'s elements—as the State failed to give her notice of its "critical elements." Appellant's Brief at 22. Again, the cases Boseski cites do not demonstrate error. In In re Pers. Restraint of Ness, 70 Wn. App. 817, 855 P.2d 1191 (1993), for instance, the court elaborated on the rule mentioned in State v. Rigsby, 49 Wn. App. 912, 747 P.2d 472 (1987):

> The court shall not accept a guilty plea without determining that it is made with an understanding of the nature of the charge. CrR 4.2(d); In re Montoya, 109 Wn.2d 270, 278, 744 P.2d 340 (1987). The constitution does not require that the defendant admit to every element of the charged crime. In re Hews, 108 Wn.2d 579, 596, 741 P.2d 983 (1987). *An*

[15] Boseski also discusses State v. Kiper, No. 30760-0-II, 2004 Wash. App. LEXIS 1895 (August 17, 2004). Not only is Kiper unpublished, RAP 10.4(h); GR 14.1(a)("A party may not cite as an authority an unpublished opinion of the Court of Appeals."), it does not involve collateral attacks, see Kiper, 2004 Wash. App. LEXIS 1895.

> *information which notifies a defendant of the nature of the crime to which he pleads guilty creates a presumption that the plea was knowing, voluntary and intelligent.* Hews, at 596. *A defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime.* Montoya, at 278; Hews, at 595.

Ness, 70 Wn. App. at 821 (emphasis added). In this case, the Second Amended Information (in addition to the Information and the First Amended Information) lists RCW 9A.36.021(1)(c) and states that the defendant "did intentionally assault another with a deadly weapon." CP 285. The trial judge also found that her guilty plea was knowingly, intelligently, and voluntarily entered. 6/22/09 RP 7. Boseski knew the nature of the State's charges.[16]

Fourth, Boseski argues that her plea is not knowing, voluntary, and intelligent because she lacked competency at her arraignment. Appellant's Brief at 24. Washington employs a two-part test for legal competency: "(1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001)(citing State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985)). "The determination of

[16] On February 10, 2009, for instance, Boseski and her attorney acknowledged receipt of the State's charges, waived formal reading, and entered not guilty pleas for Count I and II. CP 173.

whether a competency examination should be ordered rests generally within the discretion of the trial court." Fleming, 142 Wn.2d at 863 (citing State v. Thomas, 75 Wn.2d 516, 518, 452 P.2d 256 (1969)). In making its determination, trial courts examine the ""defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel."" Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

The facts in this case indicated that:

> Boseski's neighbor said that she thought a male was in Boseski's apartment, CP 266; Boseski said that her friend left before police arrived (she did not specify whether her friend was a male), id. at 90; and Officer Driver said that he only heard female voices, id. at 270;
>
> Boseski told the Safe to be at Large evaluator that she understood the State's alleged charge, id. at 90;
>
> The evaluator concluded that Boseski "was fully oriented and fully affected during the interview," id. at 91;
>
> The trial judge commented at Boseski's arraignment that she was looking much better, id. at 173; and
>
> At the time of her arraignment, the Army had released Boseski from its mental health facility, see 1/20/09 RP 6.

None of these facts demonstrate that Boseski was unable to understand the nature of the State's charges or that she was incapable of assisting her counsel.

Fifth, Boseski claims that the trial court's acceptance of her plea constituted a manifest injustice because she was legally incompetent. Appellant's Brief at 29. Boseski's argument fails because no evidence indicates that Boseski was legally incompetent at the time of her plea (see argument briefed at pages 22-23).

Finally, Boseski claims that she received ineffective assistance of counsel, causing a manifest injustice. Appellant's Brief at 34. As with all ineffective assistance of counsel claims, the Strickland rule governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). "In a plea bargaining context, "effective assistance of counsel" merely requires that counsel "actually and substantially [assist] his client in deciding whether to plead guilty."" State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)(citing State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

In this case, the State is unable to substantiate any of Boseski's claims—as they are all alleged in her declaration. CP 127-31. But it is clear (1) that the trial judge originally found

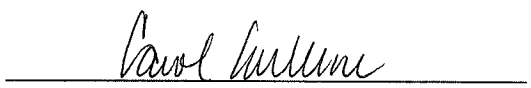
probable cause to arrest Boseski for first degree assault, 1/8/09 RP 4; (2) that the State's First Amended Information charged Boseski with a firearm enhancement, CP 283; and (3) that the State agreed to dismiss the firearm enhancement in exchange for Boseski's guilty plea, 6/22/09 RP 5. While Boseski's counsel's $20,000 legal fee may have been unreasonable, CP 224, Boseski cannot show that her counsel's performance was either deficient or prejudicial to her case. Indeed, if not for her counsel's performance—she may have spent an additional three years in prison. RCW 9.94A.533(3)(b).

D. CONCLUSION.

Boseski's collateral attack is time barred (1) because her judgment is valid on its face and (2) because RCW 10.73.100(1) does not apply. Her collateral attack should also be dismissed because it is mixed. Boseski's remaining arguments are without merit, as they do not apply to her case.

The State respectfully asks this court to affirm the trial court's denial of Boseski's motion to withdraw her guilty plea.

Respectfully submitted this 4th day of April, 2012.



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THURSTON COUNTY PROSECUTOR

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