68168-1

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COA NO. 68168-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM CARNEY,

Appellant.

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

The Honorable Carol A. Schapira, Judge

BRIEF OF APPELLANT

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FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to dismiss. CP 40.

2. The court erred in entering conclusion of law 2.1, which states "The Court has jurisdiction over the parties and subject matter of this criminal insanity proceeding. Pursuant to In re Well, 133 Wn.2d 433, 443, 946 P.2d 750 (1997), Mr. Carney's collateral attack of his 1982 civil commitment under State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983) is time barred. The Defendant's Motion to Dismiss is denied." CP 40.[1]

Issue Pertaining to Assignments of Error

Collateral attacks on final judgments must generally be made within one year, but notice must be given of the time bar. Appellant did not receive such notice. Did the court err in ruling appellant's collateral attack on the underlying commitment order was time-barred?

B. STATEMENT OF THE CASE

In 1982, the State charged William Carney with first degree arson based on the allegation that he set a fire in his room inside of an apartment building. CP 1-2. At a jury trial, the court granted the State's motion to enter a plea of not guilty by reason of insanity (NGRI) on behalf of Carney.

[1] The "Order Revoking Conditional Release," which contains the written findings of fact and conclusions of law, is attached as appendix A.

CP 30. Carney's counsel subsequently moved for withdrawal of the insanity plea. CP 34. The court denied that motion. CP 34. The jury returned a verdict of not guilty by reason of insanity. CP 3-4, 88. The court entered an order of involuntary commitment, placing Carney into the custody of the Department of Social and Health Services (DSHS) for hospitalization at Western State Hospital. CP 4-5.

Since his acquittal by reason of insanity, Carney has remained subject to involuntary commitment. CP 42-47. During the past 30 years, he has been confined to Western State Hospital for substantial periods of time. CP 42-45. On several occasions, Carney received conditional release status but lost that status due to non-compliance with release conditions. CP 42-45. Most recently, the State moved for revocation of Carney's conditional release due to noncompliance. CP 45-47.

Defense counsel filed a motion to dismiss in response, arguing the underlying verdict was constitutionally invalid because the NGRI plea was interposed by the State, which violated Carney's right to control his own defense pursuant to State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). CP 26-36. According to counsel, it was too late to file a personal restraint petition in the Court of Appeals based on In re Pers. Restraint of Well, 133 Wn.2d 433, 443, 946 P.2d 750 (1997). CP 28; RP 233-34. But counsel maintained the challenge to the NGRI verdict was not truly a collateral

attack. CP 28-29 (citing State v. Holsworth, 93 Wn.2d 148, 154, 607 P.2d 845 (1980) (defendant's challenge to use of certain prior convictions in habitual criminal proceeding was neither "collateral nor retroactive. The challenge instead is to the present use of an invalid plea in a present criminal sentencing process.")). In response, the State argued the motion to dismiss was really a collateral attack that was time barred pursuant to Well. CP 62.

Following an evidentiary hearing on the merits of the State's revocation petition, the court revoked Carney's conditional release status and ordered him into the custody of DSHS for inpatient treatment. CP 40; RP[2] 234. The court denied Carney's motion to dismiss, concluding "[t]he Court has jurisdiction over the parties and subject matter of this criminal insanity proceeding. Pursuant to In re Well, 133 Wn.2d 433, 443, 946 P.2d 750 (1997), Mr. Carney's collateral attack of his 1982 civil commitment under State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983) is time barred." CP 40 (CL 2.1); RP 232-34. This appeal follows. CP 41.

[2] The verbatim report of proceedings is referenced as follows: RP - one consecutively paginated volume consisting of 6/13/11, 6/21/11, 7/11/11, 8/1//11, 9//9/11 and 9/23/11.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO REACH THE MERITS OF CARNEY'S COLLATERAL ATTACK ON TIME BAR GROUNDS.

Carney is subject to involuntary commitment because the jury in 1982 found him not guilty by reason of insanity. As recognized by the trial court, the motion to dismiss was in effect a collateral attack on the underlying commitment order from 1982. But the constitutional right to equal protection requires notice of the statutory one year time bar for bringing a collateral attack on an NGRI commitment. In re Pers. Restraint of Bratz, 101 Wn. App. 662, 668-70, 5 P.3d 759, review denied, No. 70137-7 (2000). Without notice, the one year time bar does not apply and the collateral attack must be addressed on its merits. Carney did not receive notice of the time bar. The court therefore erred in ruling Carney's collateral attack on the commitment verdict was time barred under RCW 10.73.090. Remand is appropriate to allow the court to address Carney's collateral attack on its merits.

a. The Trial Court In The Arson Case Unconstitutionally Imposed A Not Guilty By Reason Of Insanity Defense On Carney.

About 11 months after the jury found Carney not guilty by reason of insanity, the Supreme Court issued its decision in State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). The Supreme Court held a trial court

could not impose the affirmative defense of insanity over a competent defendant's objection because every defendant has the constitutional right to control his own defense. Jones, 99 Wn.2d at 737, 740.

The trial court in Jones entered an NGRI plea sua sponte because it believed Jones had a viable insanity defense without which he was likely to be convicted. Id. at 747. The plea was entered over Jones's objection and with no inquiry into whether his desire to forgo an NGRI plea was intelligent and voluntary. Id. This was error. Id.

Reasoning that a defendant's right to raise or waive the defense of insanity should be no different from a defendant's right to assert or waive other defenses like alibi or self defense, Jones observed "courts do not impose these other defenses on unwilling defendants." Id. at 743. Jones embraced the proposition that "[courts] should not force any defense on a defendant in a criminal case." Id. at 740 (quoting North Carolina v. Alford, 400 U.S. 25, 33, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

Carney was found competent to stand trial on the arson charge. CP 59-62. The minutes show the trial court granted the State's motion to enter an NGRI plea. CP 30. The court subsequently denied the defense motion to withdraw the insanity plea. CP 34.

This was error under Jones. The court cannot impose an NGRI defense on an unwilling defendant. The motion to dismiss correctly

advanced that argument. CP 27-28. The error was necessarily prejudicial because the jury found Carney not guilty by reason of insanity — the very result Carney wished to avoid by withdrawing the NGRI defense. CP 88. The jury should not have been allowed to consider such a verdict because Carney did not want to pursue an NGRI defense. As a result of the NGRI verdict, Carney has spent the last 30 years in involuntary commitment.

b. Lack Of Notice Exempts Carney's Collateral Attack From The One Year Time Bar.

The trial court, in presiding over revocation proceedings, did not dispute the merits of Carney's argument. Instead, the court refused to entertain the argument at all on the ground that the collateral attack on the 1982 civil commitment was time barred pursuant to In re Pers. Restraint of Well, 133 Wn.2d 433, 443, 946 P.2d 750 (1997). CP 40 (CL 2.1).

The Court in Well addressed the petitioner's collateral attack on an NGRI plea in relation to RCW 10.73.090. Well, 133 Wn.2d at 435. RCW 10.73.090(1) provides "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." This provision took effect on July 23, 1989. S.H.B. No. 1071, Laws of 1989, ch. 395.

Before RCW 10.73.090 took effect, the law imposed no time limits on a criminal defendant's right to collaterally attack a prior conviction. See Final Legislative Report, 51st Leg. (Wash. 1989) at 17 (S.H.B. 1071) ("Current law imposes no time limit on filing a personal restraint petition."). RAP 16.4(d), which addressed personal restraint petitions, did not contain any time requirements prior to its incorporation of the time limit expressed in RCW 10.73.090. State v. Landon, 69 Wn. App. 83, 90, 848 P.2d 724 (1993). The one year time bar set forth in RCW 10.73.090 applies to collateral attacks filed more than one year after July 23, 1989. RCW 10.73.130.

There are statutory notice requirements for the one year time bar. RCW 10.73.110 states "At the time judgment and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100."

RCW 10.73.120 provides "As soon as practicable after July 23, 1989, the department of corrections shall attempt to advise the following persons of the time limit specified in RCW 10.73.090 and 10.73.100: Every person who, on July 23, 1989, is serving a term of incarceration, probation, parole, or community supervision pursuant to conviction of a felony."

The failure to provide or attempt to provide the requisite notice allows an untimely collateral attack to be heard on its merits. See, e.g., In re Pers. Restraint of Vega, 118 Wn.2d 449, 823 P.2d 1111 (1992) (time bar waived where Department of Corrections did not attempt to advise offender of time bar).

In Well, the petitioner sought reversal of his commitment on the ground that his 1980 NGRI plea was not knowing and voluntary. Well, 133 Wn.2d at 435. The Court held Well's personal restraint petition was time barred by RCW 10.73.090. Id. The Court rejected Well's claim that the statutory time limit did not apply to collateral attacks on commitment orders entered pursuant to an acquittal of a criminal charge on grounds of insanity. Id. at 437-38, 442-43.

The Court also rejected Well's statutory argument that he was entitled to notice of the one year time bar, holding those committed to a mental institution pursuant to an NGRI plea are not statutorily entitled to notice because they are not included in any of the statutorily designated classes of RCW 10.73.120. Id. at 443-44. But the Court specifically left open the issue of whether a person brining a collateral attack could assert a constitutional right to notice of the time limit. Id. at 444 ("We do not rule on whether one might be constitutionally entitled to notice of the time limit, since Well did not raise any such constitutional claim.").

The constitutional question left open in Well was decided in Bratz. The court in Bratz held the lack of a notice requirement in RCW 10.73.120 for those committed pursuant to an NGRI plea violated the constitutional right to equal protection. Bratz, 101 Wn. App. at 668-70.

"The Equal Protection Clause requires that persons similarly situated with respect to legitimate purposes of the laws receive like treatment." Id. at 668 (citing In re Pers. Restraint of Knapp, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984)); U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12. Applying a rational basis test, Bratz determined "There can be no rational basis for requiring that notice of the time limit to collaterally attack a judgment be given to convicted felons but not to those hospitalized following NGI pleas. The only explanation that can be proffered other than animus to the mentally ill is that the statute's non-inclusion of the criminally committed was an unfortunate legislative oversight. Yet, even if the resulting classifications were unintentional, they are arbitrary and, thus, violate rational basis review." Bratz, 101 Wn. App. at 669-70. The court therefore reached the merits of Bratz's petition and granted relief. Id. at 673, 676-77.

Carney's challenge to the NGRI verdict should be addressed on its merits for the same reason. The constitutional right to equal protection requires that Carney receive the benefit of the same time bar notice as

convicted felons. Id. at 668-70. Carney was advised of his right to a direct appeal at the time of "sentencing," but he did not receive any notice of the time bar to collateral attacks. CP 63. This is not surprising, given that there was no time limit to bringing a collateral attack in 1982. See Final Legislative Report, 51st Leg. (Wash. 1989) at 17 (S.H.B. 1071) ("Current law imposes no time limit on filing a personal restraint petition.").

In the ensuing years, Carney was in the custody of Western State Hospital or on conditional release. Those responsible for Carney's care and custody would not have notified Carney of the time bar for collaterally attacking the underlying commitment order. It is not in their job description. See WAC 388-875 WAC (addressing evaluation, placement, care and discharge of criminally insane person committed to the care of the department of social and health services).

In any event, there is no evidence in the record that Carney received such notice or that anyone responsible for Carney's supervision attempted to give notice. Carney's collateral attack must be deemed exempt from the one year time bar. See State v. Schwab, 141 Wn. App. 85, 92, 167 P.3d 1225 (2007) ("There is no evidence in our record showing that the trial court or DOC notified Schwab that he had only one year to collaterally attack the judgment. Thus, Schwab did not receive the

affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.").

D. CONCLUSION

Carney requests remand to allow the trial court to consider the collateral attack on the underlying commitment order on its merits. In the event this Court declines to do so, Carney alternatively requests remand to allow the trial court to determine whether Carney was notified of the time bar, as required by constitutional right to equal protection.

DATED this 14th day of September 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
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Attorneys for Appellant

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. WILLIAM CARNEY, Defendant.	No. 82-1-00963-2 SEA ORDER REVOKING CONDITIONAL RELEASE

This matter comes before the court pursuant to the State's petition to revoke the defendant's conditional release pursuant to RCW 10.77.190. The court heard testimony in this matter on September 23, 2011. The State was represented by Senior Deputy Prosecutor Alison Bogar and the defendant, who was present during proceedings, was represented by attorney Kevin McCabe. Based on the testimony of Cindy Owens, LPN, Jessica Milas, Kya Miller, MSW and Jill Young, WSH Community Program Manager as well as the admitted exhibits, the court makes the following findings:

1. William Carney was conditionally released subject to the terms of the court's April 30, 1996 conditional release order. This Order was modified on September 7, 2007. Among other things, the 2007 order required Mr. Carney to (1) Follow treatment plan and attend scheduled activities and therapy sessions as directed by the Community Program Staff per 3.1(b);

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(2) remain in the current state of remission from the effects of mental disease or defect and have no significant deterioration of mental condition or other significant sign of decompensation per 3.1(e); and (3) maintain good conduct in the community and not violate any laws or ordinances per 3.1(h).

2. On June 3, 2011, the Secret Service arrived unannounced at the Maple Creek Residential Facility to investigate William Carney. He had been calling President Obama at the White House to set up a meeting with the president. When refused, Mr. Carney told the White House Staff that he was putting them on a "list."

3. On June 15, 2011, as a result of the investigation and numerous other incidents Cindy M. Owens, LPN, and Administrator of Maple Creek Residential Care served Mr. Carney with a thirty-day eviction notice. Ms. Owens testified she had noticed a steady decline in Mr. Carney's mental state since approximately April 2011. He was constantly accusing staff of poisoning his food. He was hording large volumes of paper and trash in his room, which he refused to clean and refused to allow housekeeping to clean.

Ms. Owens also testified that his behavior was becoming a safety risk to other residents. Ms. Owns did not feel she could provide safe care and housing to Mr. Carney any longer. When Maple Creek staff entered his room on July 11, 2011, they found large amounts of trash and papers stacked in his room. See Ex. 3. They also found two bottles containing urine in his room. See Ex. 3(c). Mr. Carney's room presented a significant safety hazard to Mr. Carney, staff, and other residents.

4. As a result of the eviction notice, the court scheduled a hearing on July 11, 2011, which Mr. Carney refused to attend. Mr. Carney initially told his therapist, Kya Miller, over the

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phone that he was not going to attend. She called him back a little while later to see if he had reconsidered. He was still refusing to attend.

Ms. Miller and Ms. Young, the WSH Community Program Manager, then drove to Maple Creek to talk to him in person. They found him disheveled and filthy. His clothes were stained and he had a strong odor coming from his body. Ms. Young recognized that Mr. Carney was exhibiting signs of decompensation. He was refusing to go to court. He was refusing to move out of Maple Creek. Ms. Young could not redirect Mr. Carney, who was unable to hold a reality-based conversation with her. When Ms. Young entered Mr. Carney's room the stench made her gag and she had to leave the room immediately.

Ms. Young determined that Mr. Carney was in need of intensive in-patient treatment and immediately returned him to WSH.

5. The Risk Review Board met on July 27, 2011. It was noted that as of that date, Mr. Carney had still not showered, still appeared disheveled and unclean. The Risk Review Board unanimously determined that Mr. Carney's conditionally release should be revoked.

6. The court finds that Mr. Carney did violate his conditions of release by not attending court as required, by exhibiting signs of decompensation and engaging in such behavior that required the attention of the Secret Service.

7. The court also finds that the state of Mr. Carney's room on July 11, 2011, including the large amount of paper and garbage horded in the room, and the storing of bodily fluids presented a risk to the safety of the staff and residents at Maple Creek.

II. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact and the record and file herein, the Court makes the following Conclusions of Law:

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2.1 Jurisdiction. The Court has jurisdiction over the parties and subject matter of this criminal insanity proceeding. Pursuant to *In re Well*, 133 Wn.2d 433, 443, 946 P.2d 750 (1997), Mr. Carney's collateral attack of his 1982 civil commitment under *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983) is time barred. The Defendant's Motion to Dismiss is denied.

2.2 Conditional Release: Due to the violations of the conditional release order and the threat to public safety presented, the court determines that it is appropriate to revoke Mr. Carney's conditional release.

IT IS HEREBY ORDERED THAT: Mr. Carney's conditional release is REVOKED pursuant to RCW 10.77.190. He shall be remanded to the care, control and custody of the Department of Social and Health Services for inpatient treatment until further order of this court.

DONE IN OPEN COURT this 23rd day of Nov, 2011.

JUDGE CAROL SCHAPRA

JUDGE CAROL SCHAPIRA

Presented by:

By: _____
Alison Bogar, WSBA# 30380
Senior Deputy Prosecuting Attorney
Attorney for State of Washington

Copy received; presentation waived

By: _____
Kevin McCabe WSBA #28821
Attorney for Defendant
AS TO FORM, DEFENDANT OBJECTS TO ALL FINDINGS OF FACT AND CONCLUSIONS OF LAW KV

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DIVISION ONE

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	)	
Respondent,	)	
	)	
vs.	)	COA NO. 68168-1-I
	)	
WILLIAM CARNEY,	)	
	)	
Appellant.	)	

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 14TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM CARNEY
WESTERN STATE HOSPITAL
9601 STEILACOOM BOULEVARD SW
LAKEWOOD, WA 98498

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky