90174-1

31166-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROCKY R. KIMBLE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

I. IDENTITY OF MOVING PARTY 1

II. STATEMENT OF RELIEF SOUGHT 1

III. FACTS RELEVANT TO MOTION 1

IV. GROUNDS FOR RELIEF 2

A. APPLICABLE STANDARD OF REVIEW OF MOTION 2

B. ISSUES THAT COULD BE ARGUED IF THEY HAD MERIT 3

1. Did The Trial Court Properly Transfer This Matter To The Court Of Appeals? 3

2. Is The Motion Barred By RCW 10.73.090? 4

3. Is The Judgment Valid On Its Face? 4

4. Did The Trial Court Lack Authority To Enter A Sentence Based On An Offender Score Of 3? 5

5. Did The Prior Wisconsin Robbery Conviction Wash Out? 5

6. Did The Offender Score Improperly Include 2 Points For The Prior Wisconsin Robbery Conviction ? 6

7. Did The Offender Score Improperly Include 1 Point For The Current Burglary Offense? 7

8. Under *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Did The Sentencing Court Lack Authority To Enter An Exceptional Sentence? 7

9. Would Evidence Tending To Show Mr. Kimble Was Misinformed About Various Consequences Of His Guilty Plea Show The Judgment Was Not Valid On Its Face? 7

V. CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE GOODWIN, 146 Wn.2d 861,
50 P.3d 618 (2002) 5

IN RE PERS. RESTRAINT OF JOHNSON, 131 Wn.2d 558,
933 P.2d 1019 (1997) 5

IN RE SCOTT, 173 Wn.2d 911,
271 P.3d 218 (2012) 8

STATE V. EVANS, 154 Wn.2d 438,
114 P.3d 627 (2005) 7

STATE V. HAIRSTON, 133 Wn.2d 534,
946 P.2d 397 (1997) 3

STATE V. KILGORE, 167 Wn.2d 28,
216 P.3d 393 (2009) 7

STATE V. MOEURN, 170 Wn.2d 169,
240 P.3d 1158 (2010) 5

STATE V. THEOBALD, 78 Wn.2d 184,
470 P.2d 188 (1970) 3

SUPREME COURT CASES

ANDERS V. CALIFORNIA, 386 U.S. 738,
87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) 3

SMITH V. ROBBINS, 528 U.S. 259,
120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) 3

STATUTES

RCW 9.94A.030 6

RCW 9.94A.525 ..... 5, 6, 7

RCW 9.94A.525(3) 5

RCW 9.94A.589 7

COURT RULES

CrR 7.8 4

RAP 18.3(a)(2) 3

I. IDENTITY OF MOVING PARTY

Janet Gemberling, appointed counsel for Rocky Kimble, asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Ms. Gemberling asks the court to permit her to withdraw as counsel.

III. FACTS RELEVANT TO MOTION

In 2000, Mr. Kimble pleaded guilty to first degree rape and residential burglary. (CP 13-20) In the written plea agreement, Mr. Kimble acknowledged the existence of a prior 1994 Wisconsin conviction for robbery. (CP 8, 15) The court accepted his plea and entered judgment and sentence based on an offender score of 3 for each of the offenses. (CP 31, 33-35) Based on that offender score, the maximum standard range sentence for the rape conviction would be 160 months. (CP 33) The court entered findings of fact and conclusions of law supporting a finding that the rape was committed with exceptional cruelty and imposed an exceptional sentence of 360 months. (CP 35, 41-46)

Mr. Kimble appealed his conviction, challenging the constitutionality of his exceptional sentence. (CP 47) In July 2001,

Commissioner Slak granted the State's motion to affirm on the merits. (CP 47-48)

In 2012, Mr. Kimble filed a motion to withdraw his guilty plea, alleging that his conviction was invalid on its face because it was based on an incorrectly calculated offender score and standard range sentence. (CP 59-63) Mr. Kimble argued that his Wisconsin robbery conviction had washed out or, alternatively, it was not a serious violent offense and therefore should not have counted for 3 points in his offender score. (RP 72-76) He further argued that his guilty plea was involuntary because not only was the standard range improperly calculated but additionally his trial counsel had failed to inform him that in pleading guilty he would be waiving the right to have his sentence decided by a jury. (CP 75-78)

Finding the offender score had been correctly calculated and the motion had not been timely filed, the superior court transferred the matter to this court. (CP 91-92)

IV. GROUNDS FOR RELIEF

A. APPLICABLE STANDARD OF REVIEW OF MOTION.

When appointed counsel, after conscientious examination of the case, determines that her client's appeal is wholly frivolous, she should

advise the court of this and request permission to withdraw. *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *see Smith v. Robbins*, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); *State v. Theobald*, 78 Wn.2d 184, 185, 470 P.2d 188 (1970).

> If counsel appointed to represent an indigent defendant can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent. The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues.

RAP 18.3(a)(2); *see State v. Hairston*, 133 Wn.2d 534, 946 P.2d 397 (1997). Prior to granting the motion to withdraw, the court must first ascertain whether the appeal is, in fact, wholly frivolous. *Hairston*, 133 Wn.2d at 537.

B. ISSUES THAT COULD BE ARGUED IF THEY HAD MERIT.

1. Did the trial court properly transfer this matter to the Court of Appeals?

> (b) On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding . . .
> (c) Procedure on Vacation of Judgment.
> . . .
> (2) *Transfer to Court of Appeals*. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled

to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8.

2. Is The Motion Barred By RCW 10.73.090?

> (1) 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.
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes . . . a motion to withdraw guilty plea . . . .
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
> (a) The date it is filed with the clerk of the trial court;
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction . . . .

RCW 10.73.090.

3. Is The Judgment Valid On Its Face?

Generally, a judgment and sentence is valid on its face unless the trial court actually exercised authority it did not have. *In re Scott*, 173 Wn.2d 911, 917, 271 P.3d 218, 221 (2012). "Otherwise, a judgment and sentence is valid on its face even if the petitioner can show some error that might have received relief if brought on direct review or in a timely personal restraint petition." *Id.*

4. Did The Trial Court Lack Authority To Enter A Sentence Based On An Offender Score Of 3?

"A sentencing court acts without statutory authority . . . when it imposes a sentence based on a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) *quoting In re Pers. Restraint of Johnson,* 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

5. Did The Prior Wisconsin Robbery Conviction Wash Out?

> (2)(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525. "[A]a prior class B felony conviction other than a sex offense is not to be included in an offender score if the offender had spent *10* consecutive years in the community without committing a crime." *State v. Moeurn*, 170 Wn.2d 169, 173, 240 P.3d 1158 (2010).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The defendant was sentenced on the Wisconsin robbery conviction on March 22, 1994. Second degree

robbery under RCW 9A.56.210 is a class B felony. There is no lesser degree of robbery in Washington.

6. Did The Offender Score Improperly Include 2 Points For The Prior Wisconsin Robbery?

> (9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

RCW 9.94A.525.

> (45) "Serious violent offense" is a subcategory of violent offense and means:
> . . .
> (vii) Rape in the first degree; . . .

RCW 9.94A.030.

> (54) "Violent offense" means:
> (a) Any of the following felonies:
> (i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;
> . . .
> (xi) Robbery in the second degree;
> . . .
> (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection.

RCW 9.94A.030.

7. Did The Offender Score Improperly Include 1 Point For The Current Burglary Offense?

> (1) . . . Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525.

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score:

RCW 9.94A.589.

8. Under *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Did The Sentencing Court Lack Authority To Enter An Exceptional Sentence?

Blakely applies only to cases that are pending direct review or are not yet final. *State v. Kilgore*, 167 Wn.2d 28, 35, 216 P.3d 393 (2009) *citing State v. Evans,* 154 Wn.2d 438, 444, 114 P.3d 627 (2005).

9. Would Evidence Tending To Show Mr. Kimble Was Misinformed About Various Consequences Of His Guilty Plea Show The Judgment Was Not Valid On Its Face?

> 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. CrR 7.8; *In re Pers. Restraint of Hemenway,* 147 Wash.2d 529, 532, 55 P.3d 615 (2002). The trial judge still has the authority to render judgment and any error must be raised in a timely challenge or a timely motion to withdraw the plea. CrR 7.8; *see also In re Pers. Restraint of Clark,* 168 Wash.2d 581, 586–87, 230 P.3d 156 (2010) (involuntary plea does not render judgment not valid on its face).

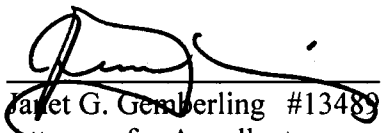
In re Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012).

V. CONCLUSION

The court should review the record and determine whether this appeal is wholly frivolous and, if so, grant counsel's motion to withdraw.

Dated this 25th day of March, 2013.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31166-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
ROCKY R. KIMBLE,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on March 25, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Timothy Rasmussen
trasmussen@co.stevens.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on March 25, 2013, I mailed a copy of the Appellant's Brief in this matter to:

Rocky R. Kimble
#808179
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001

Signed at Spokane, Washington on March 25, 2013.

Jill S. Reuter #38374
Attorney at Law