

NO. 44141-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT T. WHEELER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth T. Martin

No. 05-1-02167-7

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

 1. Does Defendant's challenge to the appellate court ordered correction to his judgment and sentence on remand fail to raise an issue for review?1

 2. Has Defendant improperly attempted use this appeal to relitigate a previously rejected collateral attack of his guilty plea?1

 3. Is defendant incapable of proving his counsel was ineffective for failing to urge the trial court to reconsider an issue the Court of Appeals already decided in his case?.....1

B. STATEMENT OF THE CASE.1

C. ARGUMENT.....3

 1. DEFENDANT'S APPEAL SHOULD BE DISMISSED FOR FAILING TO RAISE AN ISSUE FOR REVIEW.3

 2. DEFENDANT IMPROPERLY EMPLOYS A TIMELY APPEAL FROM THE CORRECTION OF HIS JUDGMENT TO PRESENT AN UNTIMELY APPEAL OF HIS CONVICTION5

 3. DEFENDANT CANNOT PROVE HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO URGE THE TRIAL COURT TO CONSIDER AN ISSUE THE COURT OF APPEALS ALREADY DECIDED IN HIS CASE6

D. CONCLUSION.8

Table of Authorities

State Cases

<i>Folsom v. County of Spokane</i> , 111 Wn.2d 256, 264, 759 P.2d 1196 (1988)	4
<i>In re Pers. Restraint McKieraran</i> , 165 Wn.2d 777, 203 P.3d 375 (2009)	4, 6
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011)	2, 4, 5, 6, 7
<i>In re Toledo-Sotelo</i> , 176 Wn.2d 759, 297 P.3d 51 (2013).....	5
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 41-2, 123 P.3d 844 (2005).....	4
<i>State v. Barberio</i> , 121 Wn.2d 48, 51, 846 P.2d 519 (1993).....	4
<i>State v. Bowerman</i> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990).....	7
<i>State v. Brown</i> , 159 Wn. App. 366, 370, 245 P.3d 776 (2011).....	7, 8
<i>State v. Collicott</i> , 118 Wn.2d 649, 660, 827 P.2d 263 (1992).....	4
<i>State v. Gaut</i> , 111 Wn. App. 875, 880-81, 46 P.3d 832 (2002)	5
<i>State v. Gore</i> , 101 Wn.2d at 486-87, 681 P.2d 227 (1984)	5
<i>State v. Kilgore</i> , 167 Wn.2d 28, 40, 216 P.3d 393 (2009)	3, 6
<i>State v. Lee</i> , 162 Wn. App. 852, 857, 259 P.3d 294 (2011).....	3
<i>State v. Mahone</i> , 98 Wn. App. 342, 346, 989 P.2d 583 (1999).....	3
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 889 P. 2d 1251 (1995)	7
<i>State v. Richardson</i> , 177 Wn.2d 351, 302 P.3d 156 (2013)	5

<i>State v. Rowland</i> , 160 Wn. App. 316, 328-29, 249 P.3d 635 (2011).....	3
<i>State v. Schwab</i> , 163 Wn.2d 664, 676, 185 P.3d 1151 (2008).....	3, 4, 7
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	7

Statutes

RCW 10.73.090	4, 6
RCW 10.73.100	4

Rules and Regulations

CR 11	8
RAP 12.2	7
RAP 12.4	5
RAP 13.5A.....	5
RAP 2.5(c)(2)	3, 4
RAP 5.2	5, 6
RAP 7(d).....	7
RAP 9	7
RPC 3.3.....	7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does Defendant's challenge to the appellate court ordered correction to his judgment and sentence on remand fail to raise an issue for review?
2. Has Defendant improperly attempted use this appeal to relitigate a previously rejected collateral attack of his guilty plea?
3. Is defendant incapable of proving his counsel was ineffective for failing to urge the trial court to reconsider an issue the Court of Appeals already decided in his case?

B. STATEMENT OF THE CASE.

Defendant pleaded guilty to first degree child rape and first degree child molestation on April 17, 2006. CP 40. The trial court sentenced Defendant under the Special Sex Offender Sentencing Alternative (SSOSA). CP 37. It suspended most of the 131.75 month standard range sentence for the child rape, and 89 month standard range sentence for the child molestation. *Id.* CP 37. Defendant's judgment became final when he failed to file a timely notice of appeal. *Id.* The trial court imposed the suspended time as total confinement when it revoked Defendant's SSOSA for noncompliance in 2009. *Id.*

Defendant filed a personal restraint petition ("PRP") in 2010, contending he was entitled to withdraw his guilty plea because the

judgment and sentence misstated the maximum sentence for his offenses. *Id.*; App.Br.at 1. The judgment listed the maximum sentence of "twenty years and/or a fine of \$50,000" for first degree child rape, and "10 years and/or a fine of \$20,000" for first degree child molestation. CP 37. The correct maximum sentence for those class A felonies was "life in prison and/or a fine of \$50,000." *Id.* The Court of Appeals correctly observed the outcome of Defendant's PRP was controlled by *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011), which required it be "grant[ed] ... only for the purpose of remanding to the trial court for correction of the maximum sentences set forth in [his] judgment and sentence." CP 38 (40489-3-II). The trial court corrected the judgment as ordered on October 12, 2012. CP 35; RP 3-4.

Defendant filed a notice of appeal on November 6, 2012. CP 40. His appeal reasserts the time-bar challenge to his guilty plea that the Court of Appeals rejected when it decided his PRP. *See* App.Br. at 1-2; CP 37. Defendant further asserts his trial counsel was ineffective for failing to move for reconsideration of his PRP below when the trial court corrected his judgment and sentence on remand.

C. ARGUMENT.

1. DEFENDANT'S APPEAL SHOULD BE DISMISSED FOR FAILING TO RAISE AN ISSUE FOR REVIEW.

- a) The trial court corrected Defendant's judgment as directed by the Court of Appeals.

A trial court does not create an issue for review when it corrects a judgment and sentence as ordered by the Court of Appeals on remand without exercising independent discretion. *State v. Kilgore*, 167 Wn.2d 28, 40, 216 P.3d 393 (2009)(citing *State v. Mahone*, 98 Wn. App. 342, 346, 989 P.2d 583 (1999); *State v. Rowland*, 160 Wn. App. 316, 328-29, 249 P.3d 635 (2011)).

The trial court corrected Defendant's judgment and sentence as directed by this Court without taking any further action in his case. RP 4; CP 35-39. There is consequently no issue for review.

Defendant appears to argue the trial court should have allowed him to withdraw his guilty plea despite this Court's denial of that relief in his untimely collateral attack. *See* App.Br. at 1; CP 37-39. The trial court would not have been free to deviate from this Court's resolution of that issue had Defendant raised it on remand.¹ *Kilgore*, 167 Wn.2d at 38-39 (citing RAP2.5(c)(2); *State v. Schwab*, 163 Wn.2d 664, 676, 185 P.3d 1151 (2008); *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263

¹ Defendant failed to preserve the issue he is attempting to relitigate on appeal by failing to raise it below. RP 5; App.Br. at 10; *see also e.g., State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011)(citing RAP 2.5).

(1992)); see also *In re Coats*, 173 Wn.2d at 123; *In re Pers. Restraint McKieraran*, 165 Wn.2d 777, 203 P.3d 375 (2009); RCW 10.73.090;.100. This appeal would fail even if the trial court was empowered to grant the relief Defendant claims was erroneously withheld as a trial court's failure to exercise sentencing discretion when correcting a judgment on remand is not a judicial act capable of review. See *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993).

- b) To the extent this appeal can be interpreted as seeking reconsideration of Defendant's PRP it should be denied because this Court properly decided the PRP pursuant to prevailing Supreme Court authority.

RAP 2.5(c)(2) empowers appellate courts to review the propriety of a earlier decision in the case at the instance of a party and decide the case according to the appellate court's opinion of the law at the time of later review. *Schwab*, 163 Wn.2d at 672 (citing *Roberson v. Perez*, 156 Wn.2d 33, 41-2, 123 P.3d 844 (2005)). Such reconsideration may be warranted where the prior decision was "clearly erroneous" in a way that works "a manifest injustice to one party ... and no corresponding injustice ... to the other party if the erroneous holding were set aside." *Roberson*, 156 Wn.2d at 41-2 (citing *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988)). It may also be warranted where there has been an intervening change in the law. *Schwab*, 163 Wn.2d at 673 (citing *Roberson*, 156 Wn.2d at 42).

This Court properly applied binding Supreme Court precedent when it rejected the untimely collateral attack of Defendant's guilty plea due to the facial validity of his judgment. CP 38-39 (*citing In re Coats*, 173 Wn.2d at 123).² The law that directed this Court's analysis has not changed and continues to require the result this Court reached. *See State v. Gore*, 101 Wn.2d at 486-87, 681 P.2d 227 (1984); *State v. Richardson*, 177 Wn.2d 351, 302 P.3d 156 (2013)(*citing In re Coats*, 173 Wn.2d at 123); *see also In re Toledo-Sotelo*, 176 Wn.2d 759, 297 P.3d 51 (2013) (facially invalidity not established by "technical misstatement that had no actual effect on the rights of the petitioner...")(quoting *In re Pers. Restraint McKieraran*, 165 Wn.2d 777 (2009)(mistaken statement regarding maximum sentence on judgment and sentence did not render it facially invalid). Defendant has failed to raise an issue warranting review.

2. DEFENDANT IMPROPERLY EMPLOYS A TIMELY APPEAL FROM THE CORRECTION OF HIS JUDGMENT TO PRESENT AN UNTIMELY APPEAL OF HIS CONVICTION.

Appeal from final judgment will be dismissed if it is not taken within 30 days. *See State v. Gaut*, 111 Wn. App. 875, 880-81, 46 P.3d 832 (2002) (*citing* RAP 5.2). A forfeited right to appeal a conviction based on a guilty plea cannot be revived through a timely appeal from a

² Defendant did not timely move for reconsideration of that ruling under RAP 12.4, or seek discretionary review under RAP 13.5A.

correction of judgment. *Id.*; see also *Kilgore*, 167 Wn.2d at 38-39; *Coats*, 173 Wn.2d 123; *McKieraran*, 165 Wn.2d 777.

Defendant's ability to appeal his conviction was foreclosed when his judgment became final in 2006. *See* CP 37. He cannot circumvent the preclusive effect of RAP 5.2's time limit by introducing a time-barred challenge to the underlying guilty plea through an appeal from the appellate court ordered technical correction to his judgment and sentence. *See Id.*; RAP 5.2.³ Defendant's attempt to obtain review of an untimely appeal should be rejected as improper.

3. DEFENDANT CANNOT PROVE HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO URGE THE TRIAL COURT TO CONSIDER AN ISSUE THE COURT OF APPEALS ALREADY DECIDED IN HIS CASE.

A defendant endeavoring to prove ineffective assistance of counsel must prove (1) defense counsel was deficient, *i.e.*, counsel fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would

³ The time to collaterally attack that judgment expired in 2007. RCW 10.73.090; CP 37-9.

have been different. *State v. Brown*, 159 Wn. App. 366, 370, 245 P.3d 776 (2011)(citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 889 P. 2d 1251 (1995)). A failure to make either showing terminates review. *Id.* (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Appellate review of counsel's performance starts from a strong presumption of reasonableness. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Defense counsel has a duty to investigate reasonable lines of defense, but "has no duty to pursue strategies that reasonably appear unlikely to succeed." *Brown*, 159 Wn. App. at 371 (quoting *McFarland, supra*, at 334 n.2.). Counsel's failure to raise novel legal theories or arguments is not ineffective assistance. *Id.*

Defendant claims his trial counsel was ineffective for failing to argue the alleged invalidity of his guilty plea when the trial court corrected his judgment on remand. App. Br. at 1. His trial counsel accurately observed the trial court corrected Defendant's judgment as ordered by the Court of Appeals. RP 3-4; CP 35-39. Counsel had an affirmative duty to refrain from advocating disregard of this Court's binding interpretation of controlling Supreme Court authority below. *See* CP 38 (citing *In re Coats*, 173 Wn.2d at 143; *see also Schwab*, 163 Wn.2d at 671-72⁴ (appellate court's decision "is binding on the parties" and "governs all subsequent proceedings in the action"); RPC 3.3 (a lawyer shall avoid conduct that

⁴ *But see*, RAP 12.2, RAP 7(d), RAP 9.

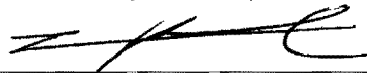
undermines the integrity of the adjudicative process). Whereas counsel had no duty to futilely advance arguments this Court already rejected in Defendant's case as it is not incumbent on counsel to pursue strategies reasonably unlikely to succeed. *See e.g.* CR 11 (sanctions for frivolous arguments); **Brown**, 159 Wn. App. at 371. Defendant's failure to show deficient representation or prejudice terminates review of his ineffective assistance claim.

D. CONCLUSION.

This appeal should be dismissed as it fails to raise an issue for review. Defendant may not properly relitigate a time-barred collateral attack of his guilty plea in a direct appeal from an appellate court ordered correction of his judgment and sentence.

DATED: September 19, 2013.

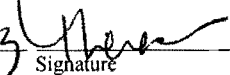
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PIERCE COUNTY PROSECUTOR

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