

NO. 59975-5-1

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

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STATE OF WASHINGTON

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In re Personal Restraint  
Petition of

GARTH D. SNIVLEY,  
  
Petitioner.

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BRIEF IN OPPOSITION TO  
PERSONAL RESTRAINT PETITION

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## **I. ISSUES**

(1) A person was committed as a sexually violent predator, based on part on prior criminal convictions. Does that commitment re-open the statutory period for collaterally attacking those convictions?

(2) A judgment and sentence imposed an erroneous period of community placement. Does that sentencing error eliminate any time limit for attacking the underlying conviction?

(3) When a person is sentenced to a term of community placement that is beyond the court's jurisdiction, does that create a statutory exception to the time limit on challenges to the underlying conviction?

## **II. STATEMENT OF THE CASE**

Between 1990 and 1993, the petitioner, Garth Snively, sexually abused several boys. One of these boys disclosed the abuse in June, 1993. This disclosure led to the questioning of four other boys, who also disclosed abuse. Ex. 2.

Based on these disclosures, an information was filed charging the petitioner with two counts of first degree child molestation. Count 1 charged him with molesting one boy between July 1, 1990 and May 30, 1993. Count 2 charged molestation of

four other boys between the same dates. Ex. 1. The petitioner pled guilty to these charges. The plea statement advised the petitioner that he would be sentenced to community placement “for at least 1 year.” Ex. 3, ¶ 5(j).

The defendant’s guilty plea received extensive publicity in news media. Following the plea, two other boys reported that they had been molested in similar manners. Ex. 10. Based on these disclosures, an information was filed charging the petitioner with one count of indecent liberties, committed against two boys “on or about the 2<sup>nd</sup> day of July, 1984 through 1987.” Ex. 9. The petitioner pled guilty to this charge as well. Again, the plea statement advised him that he would be sentenced to community placement “for at least one year.” Ex. 11 ¶ 5(j).

On January 25, 1994, the petitioner was sentenced on all three charges. The court imposed concurrent standard range sentences totaling 130 months’ confinement. The court also imposed two years of community placement on each charge. The judgments were filed on January 27. Ex. 5, 12. No appeal was filed.

In December, 2000, the petitioner filed a motion to vacate these judgments, claiming that he was misadvised concerning he

potential length of community placement. The State filed a response. It argued that the motion was time-barred and sought transfer to this court. Ex. 6. The trial court transferred the motion for consideration as a personal restraint petition. Ex. 7. This court dismissed the petition as untimely. Ex. 8.

### **III. ARGUMENT**

This personal restraint petition challenges both the petitioner's criminal convictions and his commitment as a sexually violent predator. The Snohomish County Prosecutor was responsible for the proceedings that led to the convictions. She is therefore also responsible for responding to any challenges to those convictions. See RAP 16.9. In contrast, the sexually violent predator proceedings were prosecuted by the Attorney General. The Snohomish County Prosecutor has no authority to respond to any challenges to that commitment. Accordingly, this brief addresses only the validity of the criminal convictions.

RCW 10.73.090(1) sets out a time limit on challenges to criminal convictions:

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.

When a petition is not filed within the allowable time, “[n]o court or judge shall inquire into the legality of any judgment ... whereby the party is in custody.” RCW 7.36.130; see In re Turay, 150 Wn.2d 71, 79, 74 P.3d 1194 (2003). Since the judgments in the present case were not appealed, they “became final” when they were filed, on January 27, 1994. RCW 10.73.090(3)(a). The present petition was filed in April, 2007. It is untimely by over 12 years.

The petitioner argues three reasons why his petition should be considered, notwithstanding the time limit. With regard to all of the convictions, he claims that the period for challenge re-opened when the convictions were used as predicates for commitment as a sexually violent predator. With respect to the indecent liberties conviction, he claims that (1) the judgment is invalid on its face and (2) his petition falls within the exception for sentences in excess of the court’s jurisdiction, as set out in RCW 10.73.100(5). All of these arguments should be rejected.

**A. UNDER BINDING SUPREME COURT PRECEDENT, THE USE OF A CONVICTION IN A SUBSEQUENT PROCEEDING DOES NOT PROVIDE A NEW OPPORTUNITY FOR CHALLENGING THAT CONVICTION.**

The petitioner claims that the use of convictions in subsequent proceedings “renews” the statutory period for challenging those convictions. This claim is inconsistent with both statutory language and binding Supreme Court precedent.

RCW 10.73.090(1) bars any “collateral attack” that is filed beyond the time limit. That term is given a broad definition:

For the purposes of this section, “collateral attack” means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

RCW 10.73.090(2).

In the present proceeding, the petitioner is seeking to be relieved from the continuing consequences of his convictions. This relief is post conviction, and is not a direct appeal. Under the statutory definition, it therefore constitutes a “collateral attack” that is governed by the time limit.

The Supreme Court rejected an argument similar to the one that the petitioner is raising, in one of the cases consolidated under In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993). The petitioner

Kelly had pleaded guilty to burglary, allegedly without being adequately advised of his rights. He was later convicted of robbery. At sentencing, the trial court counted the burglary convictions to increase the sentencing range for the robbery. Kelly filed a personal restraint petition within one year of the robbery conviction, but more than one year after the burglary convictions. Id. at 427-28.

The Supreme Court held that this petition was untimely:

Kelly argues that the 1-year limit should not begin to run against him until his prior convictions are used in the sentencing for his present conviction. To allow such a reading would undermine the very purpose of RCW 10.73.090, which is to encourage prisoners to bring their collateral attacks promptly.

Id. at 450. Similarly in the present case, it would undermine the purpose of the time limit to allow the petitioner to bring an otherwise untimely challenge to his convictions, simply because those convictions were used in a later proceeding.

The petitioner cites to In re Paschke, 80 Wn. App. 439, 909 P.2d 1328 (1996). There, the petitioner challenged his commitment as a sexually violent predator, claiming that some of the predicate convictions were invalid. In a footnote, Division Three of this court

rejected a claim that the petition was untimely under RCW 10.73.090:

It would appear Mr. Paschke's challenge is untimely only if it is viewed as a challenge to the restraint imposed in [his] prior convictions. Here, Mr. Paschke is seeking relief from restraint imposed as a result of the finding he is a sexually violent predator. While that finding is based, in part, on the prior convictions, the one year time limit commences as of the date of the sexual predator finding.

Paschke, 80 Wn. App. at 445 n. 2.

Paschke did not cite any authority for this analysis. The holding cannot be reconciled with Runyan. There, the petitioner similarly argued that he was not challenging his prior convictions, but only their *use* in computing his offender score in a later case. The Supreme Court rejected this distinction, so this court must reject a similar distinction.

In any event, even if Paschke were correct, it does not authorize a challenge to the convictions themselves – only to their subsequent use. At most, Paschke might authorize a challenge to the SVP commitment.<sup>1</sup> The petitioner here is requesting that “the guilty pleas and the prior criminal convictions [be] WITHDRAWN and VACATED.” Brief in Support of PRP at 38 (petitioner's

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<sup>1</sup> As already mentioned, this brief does not address challenges to the SVP commitment.

emphasis). Paschke does not authorize an untimely request for such relief.

This analysis disposes of the petitioner's challenge to the child molestation convictions. The judgment and sentence in that case correctly imposed two years of community placement, as required by law. Ex. 5 at 3. Any misadvice in the plea statement would not render the *judgment* invalid on its face, so as to establish an exception to the time limit. See In re Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). The challenges to the child molestation convictions are barred by RCW 10.73.090.

**B. THE IMPOSITION OF AN INVALID SENTENCE DOES NOT AUTHORIZE UNTIMELY CHALLENGES TO THE UNDERLYING CONVICTION.**

With regard to the indecent liberties conviction, the petitioner correctly points out an error in the judgment and sentence. The judgment and sentence lists the date of this crime as "7/2/84-1987." Ex. 9 at 1. It imposes two years of community placement. Ex. 9 at 3. A two-year period of community placement was not available for crimes committed before July 1, 1990. Former RCW 9.94A.120(8)(b), as amended by Laws of 1990, ch. 3, § 705. Even one year of community placement was not available for crimes

committed before July 1, 1988. Former RCW 9.94A.120(8)(a), as amended by Laws of 1988, ch. 153, § 2.

Under RCW 10.73.090, “invalid on its face’ means the judgment and sentence evidences the invalidity without further elaboration.” In re Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). In the present case, the judgment and sentence for indecent liberties provides a two-year term of community placement. It also specifies an offense date that renders community custody unavailable. Both of these appear on the face of the judgment and sentence, without further elaboration. To the extent that the judgment imposed community placement, it is “invalid on its face.”

The existence of a sentencing error does not, however, invalidate the underlying conviction. The Supreme Court pointed this out in a case involving the unlawful imposition of a concurrent sentence:

The entire judgment of the trial court is not rendered void or unenforceable. The conviction still stands. The appropriate remedy is resentencing to correct the erroneous sentence imposed.

Brooks v. Rhay, 92 Wn.2d 876, 878, 602 P.2d 356 (1979).

In the present case, the error in the judgment and sentence could be cured by striking the community placement provision. If such relief is still meaningful, it is available to the petitioner without regard to the time limit.<sup>2</sup> This error does not, however, allow the petitioner to withdraw his guilty plea.

Under RCW 10.73.090, a claim that a judgment is “invalid on its face” can be raised without regard to the time limit. The inclusion of such a claim does not, however, open the judgment to attack on any other grounds. Rather, the grounds for challenge are limited to those allowed under RCW 10.73.090 and 10.73.100. If a petition includes grounds that are permissible under RCW 10.73.090, and other grounds that do not fall within either statute, only the grounds that are covered by RCW 10.73.090 will be considered. The remaining grounds will be dismissed. In re Stoudmire, 141 Wn.2d 342, 348-50, 5 P.3d 1240 (2000).

This is the situation in the present case. This court can consider the petitioner’s claim that the judgment and sentence improperly imposed community placement. If necessary, the court

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<sup>2</sup> In a pleading filed eight years ago, the prosecutor conceded that the petitioner was entitled to have the community placement provision stricken. Ex. 6 at 4. The petitioner has never made any effort to obtain such relief.

can cure that error by correcting the judgment and sentence. The existence of this claim does not, however, change the applicability of the time limit to any other claims. The petitioner's challenge to the underlying conviction must itself fall within an exception to the time limit. If it does not, it must be dismissed.

**C. ALTHOUGH THERE IS A STATUTORY EXCEPTION FOR CHALLENGES TO SENTENCES OUTSIDE THE COURT'S JURISDICTION, THIS DOES NOT AUTHORIZE UNTIMELY CHALLENGES TO THE UNDERLYING JUDGMENT.**

The petitioner also seeks to rely on a statutory exception to the time limit:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

...

(5) The sentence imposed was in excess of the court's jurisdiction. . .

The petitioner correctly points out that the sentence provision imposing community placement was in excess of the court's jurisdiction. Consequently, the time limit would not apply to a petition that was based *solely* on a challenge to this sentencing provision. The availability of such a challenge does not, however, allow the petitioner to raise other challenges that do not fall within any exception. A petition is subject to the time limit unless it raises

*solely* claims that fall within an exception. A “mixed petition” -- one that contains both barred and unbarred issues – is subject to dismissal. In re Hankerson, 149 Wn.2d 695, 699-700, 72 P.3d 703 (2003).

In the present case, the petitioner’s basic claim is that his plea was involuntary because he was not advised of potential sentencing consequences. This is not the same as a claim that an improper sentence was *imposed*. These two kinds of error occur at different stages of proceeding, and they may or may not coincide. The potential sentence of which a defendant is advised may or may not be the same as the actual sentence that he receives. A defendant could receive correct advice and an erroneous sentence, or erroneous advice and a correct sentence. Or both could be erroneous, either in the same way or in different ways.

Nor are the remedies for the two kinds of claim the same. If an illegal sentence is imposed, the remedy is correction of the sentence. Brooks, 92 Wn.2d at 878. If a plea has been based on misadvice of sentencing consequences, the remedy may be withdrawal of the plea or specific performance – which may include a *requirement* to impose an otherwise *illegal* sentence. State v.

Turley, 149 Wn.2d 395, 69 P.3d 338 (2003); State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

When a defendant has received a sentence outside the court's jurisdiction, he may seek correction of that sentence. Under RCW 10.73.100(5), such a challenge is not subject to any time limit. This does not, however, allow the defendant to challenge the underlying *conviction*. Here, the defendant does not seem to want any change in his sentence – he wants the *conviction* overturned. This claim does not fall within any exception to the statutory time limit, so it is barred by RCW 10.73.100.

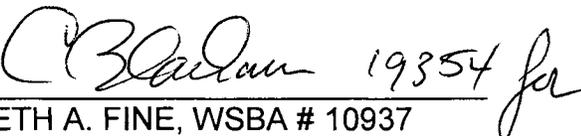
#### **IV. CONCLUSION**

With respect to the petitioner's conviction for child molestation, the judgment and sentence is valid on its face. With respect to the conviction for indecent liberties, the judgment contains a sentencing error, but this does not extend the time for challenging the underlying guilty plea. The petitioner's challenges

to both judgments are therefore time barred. The personal restraint petition should be dismissed.

Respectfully submitted on December 19, 2008.

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