

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

In re Personal Restraint)	
Petition of)	
)	
)	No. 62395-8-1
)	
)	KING COUNTY'S
)	SUPPLEMENTAL
)	RESPONSE
ARMONDO SEPULVEDA,)	
Petitioner.)	
_____)	

A. SUPPLEMENTAL ISSUES PRESENTED.

1. Whether this petition should be dismissed as untimely where petitioner cannot establish that it was timely.

2. Whether this petition should be dismissed as untimely where petitioner received actual notice of the time bar in November 1989.

3. Whether this petition should be dismissed where the Washington Supreme Court has already held that the information on the plea form did not substantively misinform the petitioner as to the maximum sentence.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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4. Whether this petition should be dismissed where withdrawal of the plea twenty years after it was entered based on a technical misstatement would be unjust.

B. SUPPLEMENTAL STATEMENT OF THE CASE.

After pleading guilty to rape in the first degree and robbery in the first degree, Armondo Sepulveda was sentenced to 72 months of total confinement on November 3, 1989. Appendix A.¹ He was ordered not to have contact with the victim for "the maximum term of life." Appendix A. In the "Sentencing Data" paragraph of the judgment and sentence, the maximum term for Count I is written as "20 years to LIFE." Appendix A. Sepulveda did not appeal. The judgment and sentence was filed with the clerk of the trial court on November 7, 1989. Appendix C. Because Sepulveda did not appeal, no transcript of the sentencing hearing was prepared. The court reporter's notes from the sentencing hearing cannot now be located. Appendix D, attached hereto.

Sepulveda has completed his sentence in this matter. He is currently serving a sentence of life for a subsequent conviction.

¹ Appendices A-C referenced herein were attached to King County's Response to Personal Restraint Petition filed October 14, 2009.

D. ARGUMENT.

THIS PETITION SHOULD BE DISMISSED BECAUSE PETITIONER WAS ADVISED OF THE TIME BAR IN NOVEMBER 1989, PETITIONER WAS NOT SUBSTANTIVELY MISINFORMED AS TO THE MAXIMUM SENTENCE, AND WITHDRAWAL OF THE PLEA TWENTY YEARS LATER WOULD BE UNJUST.

In requesting a supplemental response, this Court directed the State to provide a copy of the sentencing transcript or explain why no such transcript can be obtained. The sentencing hearing occurred on November 3, 1989, before the Honorable Susan Agid. It was reported by court reporter Pat Stretsky, who has since retired. The sentencing proceeding was not otherwise recorded. Ms. Stretsky's notes could not be located by the King County Superior Court. See Appendix D, attached hereto. Thus, the State is unable to provide the sentencing transcript.

A petitioner filing a personal restraint petition has the burden of proving that the petition is timely. In re Personal Restraint of Quinn, ___ Wn. App. ___, 206 P.3d 208, 217 (2010). Because Sepulveda delayed in filing his collateral attack, he cannot prove that he was not orally advised of the time bar at sentencing. He should not benefit from his lack of due diligence. This Court should hold that because the sentencing transcript is no longer available,

petitioner cannot meet the burden of showing that the sentencing court failed to advise him of the time bar as directed by RCW 10.73.110. His self-serving declaration, signed April 7, 2009, that he was not informed of the time bar at sentencing is not credible. He could not have an accurate recollection of everything the sentencing court said twenty years after the fact.

The Department of Corrections has established that Sepulveda was notified of the one-year time bar on November 14, 1989, as an incoming inmate at the Washington Corrections Center. See Affidavit of Kurt Peterson, attached to Response of the Department of Corrections. In In re Personal Restraint of Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993), the State Supreme Court held that the same notice provided to Sepulveda was adequate to impose the time bar. In re Personal Restraint of Vega, 118 Wn.2d 449, 823 P.2d 1111 (1992), is also instructive. In that case it was undisputed that petitioner had not been advised of the one-year time bar as required by RCW 10.73.120 while in federal prison, and thus the court did not apply the time bar. Id. at 450. However, the court explicitly stated, "had there been actual notification or even attempted actual notification, the petition would have been properly denied." Id. at 451.

Even assuming that Sepulveda was not orally advised of the time bar at sentencing on November 3, 1989, Sepulveda was notified of the time bar at the Washington Corrections Center on November 14, 1989. Sepulveda's petition is untimely because it was filed more than a year after he received actual notice of the time bar on November 14, 1989.

Moreover, even if his claim was not time-barred, he is not entitled to relief. As argued in King County's initial response, this Court should hold that the Supreme Court decision in In re Personal Restraint of McKiearnan, 165 Wn.2d 777, 203 P.3d 375 (2009), is dispositive of Sepulveda's claim that his plea was involuntary.

Sepulveda's sole contention is that he was misadvised of a direct consequence of his plea because the plea form stated the statutory maximum as "20 years to life" rather than life. But the identical claim was rejected in McKiearnan. As in this case, both the plea agreement and the judgment and sentence in McKiearnan stated the statutory maximum as "20 years to life." Id. at 779. While the state supreme court primarily held that the judgment and sentence in McKiearnan was valid on its face, the court's decision also addressed the merits of McKiearnan's claim that his plea was

involuntary. The court stated, "We conclude that *he was not substantively misinformed as to the maximum sentence*, his judgment and sentence is not invalid on its face, and his petition is time barred." Id. (emphasis added). The court also stated, "[e]ven as misstated, McKiernan was aware of the maximum amount of time he could serve in confinement." Id. at 783. In conclusion, the court stated, "[p]etitioner was not substantively misinformed as to the maximum sentence." Id. This holding is binding on this Court and dispositive of Sepulveda's claim. Sepulveda, like McKiernan, was not substantively misinformed as to the maximum sentence. He has failed to establish a prejudicial constitutional error or a fundamental defect that inherently resulted in a complete miscarriage of justice.

Finally, as argued in King County's original response, even if Sepulveda had been substantively misinformed as to a direct consequence, which he has failed to show, withdrawal of the plea *twenty* years after entry of the plea would be unjust. In State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998), the state supreme court addressed the question of when a defendant who has been misadvised as to a consequence of a plea may be allowed to withdraw his plea. The court stated:

When a defendant is misinformed of the potential sentence, numerous factors must be analyzed when fashioning an appropriate remedy:

(1) Whether the error was inadvertent or the product of bad faith on the part of the State; where bad faith is found to exist, the court should give considerable weight to the choice of remedy;

(2) whether retrial of petitioner on the original charges would be frustrated by the absence of witnesses of either the State or the defendant;

(3) whether the discrepancy between the sentence imposed and the one anticipated by the plea agreement is great or small;

(4) the seriousness of the offenses to which the pleas were entered;

(5) whether the particular remedy selected will, in a fair way, restore defendant to the position he would have been in had the violation of CrR 4.2(d) not occurred.

134 Wn.2d at 621. An analysis of these factors in the present case shows that withdrawal of the plea is not warranted. First, the Statement of Defendant on Plea of Guilty appears to have been filled out by the defense attorney, as is customary.² Second, because the crime was committed over 20 years ago it is almost a certainty that significant evidence has been lost or destroyed, and the witnesses will have little memory of the events. Third, and most importantly, there is no discrepancy between the sentence imposed and the sentence anticipated. Indeed, the standard range

² The handwriting on the plea form is consistent with defense counsel's handwriting below the signature line for "Defendant's Attorney."

sentence imposed was slightly less than the State was requesting. Even assuming that Sepulveda believed that the statutory maximum was only 20 years, he did not receive a sentence that exceeded 20 years. Fourth, rape in the first degree and robbery in the second degree are statutorily defined as "most serious offenses." RCW 9.94A.030(29)(o). As to the fifth factor, it is obvious that Sepulveda's present stated desire to withdraw his plea has nothing to do with the voluntariness of that plea, and is simply an attempt to invalidate his current persistent offender sentence. All of the five factors set forth in Morley weigh against allowing Sepulveda to withdraw his plea.

Likewise, in State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988), the state supreme court held that where the defendant was misadvised of the direct consequences of his plea the court may preclude the defendant from withdrawing the plea, and give the defendant the remedy of specific performance instead, if compelling reasons exist not to allow the remedy. Plea withdrawal may be unfair if essential witnesses or evidence has been lost. Id.

Withdrawal of Sepulveda's plea, twenty years after it was entered, would almost certainly be unfair where physical evidence of the crime, such as the victim's clothing, have almost certainly

been destroyed and witnesses moved. Even assuming the victim and the officers involved in the investigation can now be located, their recollection would be greatly diminished now that twenty years have passed. A petitioner should not be allowed to wait for years, until he is certain that the State's evidence can no longer be marshaled, and then challenge the voluntariness of his plea as to a minor matter, and be allowed to withdraw his plea, leaving the State unable to proceed. This is particularly true where the defendant already has received specific performance: a sentence that the did not exceed 20 years. The State believes that withdrawal of Sepulveda's plea under these circumstances, more than twenty years later, would be unfair. At the very least, a superior court hearing would be required on remand to determine whether the State's evidence has been lost to such a degree that withdrawal of the plea would be unjust. See State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); State v. Turley, 149 Wn.2d 395, 401, 69 P.3d 338 (2003).

E. CONCLUSION.

This petition should be dismissed.

DATED this 28th day of April 2010.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 
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Senior Deputy Prosecuting
Attorney
Attorneys for Respondent
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APPENDIX D

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint of

No. 62395-8-I

ARMONDO SEPULVEDA,

DECLARATION OF JOHN SALAMONY

Petitioner.

I, JOHN SALAMONY, hereby declare as follows:

1. I am the Court Operations Manager for the King County Superior Court.
2. On April 5, 2010, I was contacted by Wynne Brame of the King County Prosecuting Attorney's Office. Ms Brame requested that the sentencing hearing in State v. Sepulveda, No. 89-1-04558-0, which was held on November 3, 1989 before the Honorable Susan Agid and reported by court reporter Pat Stretsky, be transcribed.
3. Ms. Stretsky retired in October of 1999, and is no longer available.
4. Several attempts to locate Ms. Stretsky's notes were made. The notes could not be located. The sentencing hearing was not otherwise recorded. Thus, there is no way to prepare a transcript of the sentencing hearing.

Daniel T. Satterberg, Prosecuting Attorney
APPELLATE UNIT
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9650, FAX (206) 296-9009

1 Under penalty of perjury under the laws of the State of Washington, I certify that the
2 foregoing is true and correct to the best of my knowledge and belief.

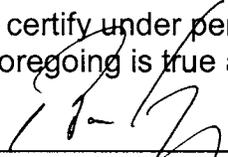
3 Signed and dated by me this 28 day of April, 2010, at Seattle, Washington.

4  4/28/10
5 JOHN SALAMONY

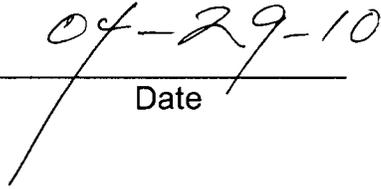
CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Jeffrey Ellis, at the following address: Ellis, Holmes & Witchley, 705 Second Avenue, Suite 401, Seattle, WA 98104, attorneys for the petitioner, containing a copy of King County's Supplemental Response in In re Personal Restraint of Sepulveda, No. 62395-8-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



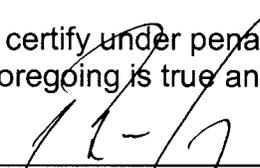
Name
Done in Seattle, Washington



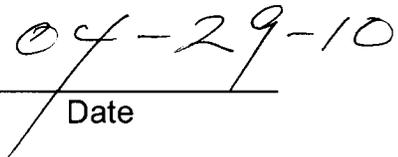
Date

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Ronda Larson, at the following address: Office of the Attorney General, P.O. Box 40116, Olympia, WA 98504, attorney for the Department of Corrections, containing a copy of King County's Supplemental Response in In re Personal Restraint of Sepulveda, No. 62395-8-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date