

64472-6

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NO. 64472-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN JAMES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Whether this appeal should be converted to a personal restraint petition and dismissed where the trial court erroneously failed to transfer the defendant's untimely collateral attack to this Court pursuant to CrR 7.8(c)(2).

B. STATEMENT OF THE CASE.

In 1995, John James was convicted by a jury of the crimes of rape in the first degree, robbery in the first degree and burglary in the first degree while armed with a deadly weapon. CP 6. The court imposed an exceptional sentence of 500 months based on the vulnerability of the 79-year-old victim and multiple acts of rape. CP 43-45. This Court affirmed the convictions and sentence on appeal. CP 49. Mandate issued on June 20, 1997. CP 42.

James filed two personal restraint petitions that were dismissed by this Court in 2003 and 2005. CP 55-65, 96.

In 2009, James filed a motion to modify or vacate his sentence, challenging his offender score. CP 22-32. The superior court denied the motion as untimely. CP 14. James appeals.

C. ARGUMENT.

1. THE TRIAL COURT WAS REQUIRED TO TRANSFER THE UNTIMELY MOTION TO THE COURT OF APPEALS FOR CONSIDERATION AS A PERSONAL RESTRAINT PETITION.

CrR 7.8(c)(2) provides that the superior court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition *unless* the Superior Court determines that the motion is not time-barred by the provisions of RCW 10.73.090 *and* either (1) the defendant has made a substantial showing that he is entitled to relief, or (2) resolution of the motion requires a factual hearing.

RCW 10.73.090 provides that no motion collaterally attacking a judgment and sentence 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. RCW 10.73.090(1). A judgment becomes final on the date that it is filed with the clerk of the trial court, or the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, whichever is later. RCW 10.73.090(3). In the present case, James' conviction became final on June 20, 1997, when this Court issued its mandate. James'

2009 motion collaterally attacking his sentence was filed more than one year after the judgment became final, and was untimely. The superior court failed to comply with CrR 7.8(c)(2) when it denied the motion rather than transferring it to this Court.

2. THIS COURT SHOULD CONVERT THIS APPEAL TO A PERSONAL RESTRAINT PETITION AND DISMISS THE PETITION.

Because the parties agree that the superior court should have transferred the motion to modify the judgment to this Court for consideration as a personal restraint petition, the most expeditious relief would be for this Court to convert this appeal to a personal restraint petition and dismiss it.

This petition must be dismissed as a successive, untimely petition. RCW 10.73.140 bars the Court of Appeals from considering a collateral attack when the petitioner has previously filed a personal restraint petition unless the petitioner shows good cause why the ground currently asserted was not raised earlier. This statutory bar includes all collateral attacks, including habeas corpus petitions. In re Personal Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). If the petitioner fails to show good

cause why the ground asserted was not raised earlier, and the petition is also time-barred, this Court must dismiss the petition.

In re Personal Restraint of Turay, 150 Wn.2d 71, 87, 74 P.3d 1194 (2003). James has shown no good cause why the issue he raises now was not raised in one of his earlier petitions.

James' petition is untimely as well as successive. As stated above, RCW 10.73.090 provides that no motion collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final. This one-year time limit only applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). This petition is untimely unless an error can be established on the face of the judgment and sentence. James has not established that his judgment and sentence is invalid on its face. He claims, that his offender scores were miscalculated, but no miscalculation is apparent on the face of the judgment and sentence. The judgment and sentence reflects that his offender scores were correctly calculated to be 11, based on four prior non-violent adult

convictions¹ (counting one point each), three prior non-violent juvenile adjudications (counting one-half point each), one prior violent juvenile adjudication (counting two points) and two violent current offenses (counting two points each). CP 96, 98, 103-06. See Former RCW 9.94A.360.

James argues on appeal that his motion should be remanded to the trial court rather than converted to a personal restraint petition pursuant to State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008). This argument should be rejected. In Smith, like this case, the superior court erroneously denied an untimely collateral attack. Id. at 863. Division Two of this court refused to convert the matter to a personal restraint petition because the defendant had not been advised that such a conversion could bar future petitions due to the successive petition rule set forth in RCW 10.73.140. Id. However, remand to the trial court in the present case would serve no purpose because the current petition is itself a successive petition barred by RCW 10.73.140. Even if James

¹ James' contention that his offender scores were 10 rather than 11 seems to be based on his failure to realize that King County Cause No. 93-1-02492-6 resulted in his conviction of two separate crimes, each counting one point in his current offender score.

withdrew his motion on remand, he is still subject to the successive petition bar because of his two prior personal restraint petitions.

Similarly, the argument that converting this appeal into a PRP would subject James to the abuse of writ doctrine in the future is mistaken. The abuse of writ doctrine acts as a procedural bar only if the petitioner was represented by counsel *throughout* post-conviction proceedings. In re Personal Restraint of Perkins, 143 Wn.2d 261, 265 n.5, 19 P.3d 1027 (2001). James was not represented by counsel in his 2005 personal restraint petition. For that reason, the abuse of writ doctrine would not apply to a future petition. Id.

D. CONCLUSION.

This Court should convert this appeal to a personal restraint petition and dismiss it as successive and untimely.

DATED this 16th day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JAMES, Cause No. 64472-6-1, in the Court of Appeals, Division I, for 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.

W Brame
Name
Done in Seattle, Washington

6/16/10
Date

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