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STATE OF WASHINGTON
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WASHINGTON STATE COURT OF APPEALS
DIVISION I

In re the Personal Restraint of) No. 72582-3-I
) REPLY TO RESPONSE TO
VINH Q. TRAN,) PERSONAL RESTRAINT
Petitioner.) PETITION (PRP)

COMES NOW VINH Q. TRAN (hereinafter denoted "Petitioner"), pro se, and submits this Reply to the States Response (Hereinafter "Resp.") to the underlying Personal Restraint Petition (PRP) under the above entitled Case.

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

As admitted in the Resp., Petitioner's Judgment and Sentence (J&S) is invalid on its face; consequently, there is no authority for Petitioner's restraint. See Resp., p. 9.

B. RESTATEMENT OF THE ISSUE.

Where Respondent admits that Petitioner's J&S is invalid on its face, must this matter be remanded for correction of the J&S?

C. STATEMENT OF THE CASE.

The Statement of the Case is that as set forth in

Part III of the PRP, and of which is adopted and incorporated herein by reference as if set forth in full.

D. ARGUMENT.

Respondent erroneously infers that Petitioner makes three claims. Resp., p. 6. This is a misstatement of the facts.

Petitioner makes only one claim: Petitioner's sentence was imposed based upon a miscalculated offender score. See PRP, Part IV(1). Respondent's contentions are frivolous and misleading; Petitioner objects based thereupon and moves to Strike for same.

1. STANDARD OF REVIEW.

The Standard of Review is that as set forth in Part V of the PRP, and of which is adopted and incorporated herein by reference as if set forth in full.

2. THE PRP IS NOT MIXED.

Respondent's attempt at rhetoric sophistry is not well taken. Specifically, Respondent claims that Petitioner's PRP is a mixed Petition unless it raises claims which fall within one of the six exemptions enumerated at RCW 10.73.100, or if the grounds raised fit under the two exceptions contained in RCW 10.73.090, to wit: (1) that the J&S is facially invalid; or (2) that the court rendering the judgment was not of competent jurisdiction. Resp., p. 7-16, inclusive(citing In re PRP of Stoudmire, 141 Wn. 2d 342, 348-49, 5 P. 3d 1240

(2000)). Respondent argues that because only one of Petitioner's grounds for relief falls under the exemption of RCW 10.73.100 (double jeopardy, RCW 10.73.100(3)) the entire PRP must be dismissed. Resp., p. 15-16.

Respondent disregards the contentions of its own argument. That is to say, Respondent acknowledges that Stoudmire provides that a PRP is mixed if it raises grounds which are exempt under EITHER RCW 10.73.090 OR RCW 10.73.100, and also raises grounds which are not exempt under either of the two said RCW's. Resp., p. 15. Respondent also acknowledges that Petitioner's Offender Score is miscalculated. Resp., p. 9 ff. A sentence based upon an incorrect offender score is a facial invalidity. In re PRP of Johnson, 131 Wn. 2d 558, 568-69, 933 P. 2d 1019 (1997).

Notwithstanding the admitted fact that Petitioner's claim of a miscalculated offender score is a verity, and despite acknowledging that a miscalculated offender score and concomitant sentence invalidates the J&S, and despite acknowledging that an invalid J&S is an exemption to the procedural time bar of RCW 10.73.090(1), Respondent needlessly controverts that the PRP is mixed and must be dismissed. Resp., p. 16. But admittedly the PRP is not mixed, because--as acknowledged--the PRP is based upon a miscalculated offender score and concomitant sentence, necessarily invalidating the J&S and exempting the PRP

from the one year time-bar under RCW 10.73.090(1). Respondent's own argument regarding a mixed petition belies itself.

Further, as this court clearly set forth in In re PRP of Rowland, 149 Wn. App. 496, 503-04, 204 P. 3d 953 (2009), under RCW 10.73.090, a challenge to a J&S that is not valid on its face may be brought at any time. For the Petitioner who can rely on RCW 10.73.090, there is no need to establish exceptions under RCW 10.73.100. Id. To the extent that Petitioner herein claims facial invalidity based upon a miscalculated offender score, Respondent's argument is moot.

Because the Respondent admits that Petitioner's offender score is miscalculated, the J&S is invalid on its face, the PRP is exempt from the one year time-bar of RCW 10.73.090(1) and Petitioner is entitled to the remedy he seeks.

(a) Respondent Admits That Petitioner's Offender Score Is Miscalculated.

Respondent admits that Petitioner's offender score is miscalculated. Resp., p. 9. "It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based upon a miscalculated offender score." State v. Roche, 75 Wash. App. 500, 513, 878 P. 2d 497 (1997). A J&S outside of the authority of the trial court is invalid. State v. Smissaert, 103 Wn. 2d 636,

639, 694 P. 2d 654 (1985).

Respondent's argument is frivolous and without merit and must be disregarded by the court.

i. Petitioner Is Entitled To A Correct Offender Score Calculation On His J&S.

Respondent contends that because the removal of the erroneously included juvenile conviction would render his offender score as a "10," it does not render the J&S facially invalid because the correction still results in an offender score above "9". Resp., p. 9. Respondent's argument fails for two reasons, severally.

First, Respondent fails to account for the remainder of the offender score calculation arguments in the PRP. This juvenile adjudication is only one of three errors predicated upon which comprise the entirety of Petitioner's offender score miscalculation. Together, said three errors constitute an offender score total of "4"--9 points less than the "13" originally calculated and 6 points less than the "10" that is calculated by merely removing the erroneously included juvenile adjudication.

Second, the trial court calculated Petitioner's exact offender score as a "13," which is not correct. This is not the case where the court stopped calculating at 9 points; the trial court specifically denoted the erroneous calculation as "13". A facially invalid J&S should be corrected. State v. Casarez, 64 Wn. App. 910,

915, 826 P. 2d 1102 (1992), affirmed sub nom State v. Garza-Villareal, 123 Wn. 2d 42, 864 P. 2d 1378 (1993); State v. Rodriguez, WL 5011113 (2014)("The remedy for an improperly calculated offender score is remand for resentencing using the correct offender score.").

ii. Petitioner Is Entitled To A Correct Offender Score Calculation Utilizing The "Same Criminal Conduct" Statute, Burglary Anti-Merger Statute Notwithstanding.

Respondent erroneously contends that Petitioner is not entitled to relief based upon his "same criminal conduct" argument because he fails to point to any evidence in the record to support his claim. Resp., p. 12 ff. Respondent purports that Petitioner fails to address the burglary anti-merger statute and that the trial court had authority to punish Petitioner separately for the burglary and robbery even if the crimes were the "same criminal conduct." Resp., p. 13 ff.

Petitioner respectfully directs this court's attention to p. 11 of the underlying PRP, whereby Petitioner specifically addressed the contentions that Respondent complains were omitted. Respondent's argument is, again, frivolous, is dilatory and without merit.

3. PETITIONER CANNOT--AND DID NOT--WAIVE A CHALLENGE TO A MISCALCULATED OFFENDER SCORE.

Respondent contends that Petitioner agreed that his offenses should be counted separately, and that as a result he has waived his right to raise this issue in the

PRP. Resp., p. 16 ff. Respondent is mistaken in its argument.

A review of ¶11 of p. 8 of Appendix E to Resp. belies the Respondents contentions that Petitioner agreed to facts which denoted his crimes to be separate and distinct conduct. The last sentence of said ¶ is telling:

"I agree that the judge may review the certifications for determination of probable cause as a basis for this plea, but not for sentencing."

Id(underline added for emphasis). Contrary to the self-serving argument Respondent laid out pertaining to the "same criminal conduct" claim, Petitioner specifically reserved the right to claim "same criminal conduct" because--as articulated by Respondent on p. 18 of the Resp.--"the issue of 'same criminal conduct' involves an analysis of the facts surrounding the crimes, and requires an exercise of the sentencing court's discretion, [and] the 'failure to identify a factual dispute for the court's resolution' results in a waiver of the issue by the defendant. Goodwin, 146 Wn. 2d at 875 (quoting State v. Nitsch, 100 Wn. App. 512, 520, 997 P. 2d 1000, review denied, 141 Wn. 2d 1030 (2000))." Petitioner succinctly set forth his reservation that the underlying facts to be used at sentencing were not stipulated to as those being used as a basis for the entry of the plea--namely, the certifications for

probable cause. Respondent cannot propound an argument that Petitioner waived this issue and then provide the record which belies such an argument; such an action is illogical and is not conducive to the attainment of Respondent's purposes.

Because Petitioner specifically reserved the facts to be used at sentencing, he did not waive this claim and is not precluded from raising the same in his PRP.

4. PETITIONER'S FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT IN COUNTS V AND VII MERGE.

The Respondent argues that Petitioner and his accomplices broke into Ms. Giang's home armed with handguns and, after having stolen \$3000 and assorted jewelry, Petitioner proceeded to strike Ms. Giang on the head with a handgun in order to force her to give more information as to where additional valuables were located. Resp., p. 22 ff. Respondent arbitrarily contends that the pistol-whipping was a "later act of assault [which] did not further the already-completed robbery." Resp., p. 23. Respondent argues that Petitioner had already taken the victims property using force and violence and displaying a handgun, and that the pistol-whipping incident was a non-connected, independent act. Id. Again, Respondent's argument is belied by the record.

WHILE Petitioner was ransacking the Giang residence, he pistol-whipped Ms. Giang in order to force her

compliance in revealing hiding places of money. PRP, Ex. A, ¶5. This was not an instance where the robbery had already occurred and then Petitioner went back and independently assaulted Ms. Giang; rather, at the outset of the robbery, Petitioner pistol-whipped Ms. Giang in order to gain her compliance in the robbery. Because Petitioner had to take Ms. Giang's money and jewelry by force and violence in order to sustain the robbery in Count V, and the force and violence therein consisted of Petitioner pistol-whipping Ms. Giang to force her to reveal the hiding places for the cash (Count VII), Petitioner's assault in Count VII merges into the robbery in Count V and are not separately punishable. State v. Vladovic, 99 Wn. 2d 413, 419, 662 P. 2d 853 (1983); State v. Johnson, 92 Wn. 2d 671, 680, 600 P. 2d 1249 (1979).

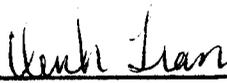
This is so because when the degree of one offense is raised by conduct separately criminalized by the legislature, the two crimes are intended to be punished as a "single offense" through the greater crime. State v. Freeman, 153 Wn. 2d 765, 772-73, 108 P. 3d 753 (2005); Vladovic, supra at 421. Because Count VII merges with the greater crime of Count V, the underlying assault in Count VII must be vacated.

E. CONCLUSION.

Based on the foregoing, Petitioner's PRP is timely, with merit, and properly before this court. This court

must grant the PRP for the reasons set forth therein and remand this matter back to the trial court for further proceedings. Petitioner respectfully requests so.

Respectfully submitted this 10 day of January, 2015.



VINH Q. TRAN, Pro Se.

DECLARATION AND CERTIFICATE OF SERVICE BY MAIL

COMES NOW VINH Q. TRAN, declares and certifies:

That on the 10 day of January of the year two thousand fifteen I caused to be deposited in the U.S. Mail, First class and postage pre-paid, legal mail system, under Cause No. 72582-3-I, the following documents, to wit:

- * Reply to Response to Personal Restraint Petition; and
- * Declaration of Service by Mail.

Addressed to the following:

*Washington State Court of Appelas, Division I
600 University Street
Seattle, WA 98101-1176

* King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 981044

I declare and certify under penalty of perjury of the laws of the United States of America that the foregoing is true and correct, to the best of my knowledges.

Dated as aforementioned hereinabove in the city of Aberdeen, Grays Harbor County, Washington, United States.

With All Rights Reserved,
Avec Tous Droits Reserves,

Vinh Tran
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STATE OF WASHINGTON
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