

NO. 35326-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK DRUM,

Appellant.

In re the Personal Restraint of

PATRICK DRUM,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00007-2

CORRECTED BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 11, 2007, Port Orchard, WA. *Eric Fong*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Drum's collateral motion as untimely where his facially valid judgment and sentence became final more than a year before he filed his motion to amend?

2. Whether, even if his claims were not time-barred, Drum has failed to show that the claims he raised below had any substantive merit?

3. Whether Drum's request that his 2005 sentence be reviewed under RAP 2.4(b) must be rejected because it would be absurd to allow that provision to overrule the Legislature's intent that claims for collateral relief not be entertained more than one year after the judgment becomes final?

4. Whether RCW 10.77.100(6) provides grounds to retroactively apply the Legislative amendments to the DOSA provisions of the SRA to Drum's case where there was no explicit legislative intent to apply the amendments retroactively?

II. STATEMENT OF THE CASE

Patrick Drum pled guilty on February 22, 2005, to a reduced charge of second-degree burglary. RP (2/22/05) 2, 6. As part of the plea agreement the State agreed to recommend a sentence under the Drug Offender Sentencing Option (DOSA). RP (2/22/05) 3, CP 23. The trial court followed the State's recommendation, imposing a 59.5-month DOSA sentence, with 30 months

accordingly suspended. RP (2/22/05) 9-10, CP 28.

Drum reappeared before the court in May 2005, because the Department of Corrections had taken the position that Drum was ineligible for a DOSA sentence because he had a prior burglary conviction when he was a juvenile. RP (5/5/05) 2. At the hearing on the matter defense counsel conceded that the DOC was correct, and as a result Drum was indeed ineligible for the DOSA sentence. RP (5/27/05) 3. Counsel therefore recommended that Drum be resentenced at the bottom of the standard range. RP (5/27/05) 3. The State concurred, and the trial court accordingly imposed a bottom-of-the-range sentence of 51 months. RP (5/27/05) 4, CP 52. Drum himself raised no objection, conceding, "That's the way it goes when you get high and go into people's houses." RP (5/27/05) 4. Defense counsel did not argue that Drum should be entitled to specific performance of the plea agreement or to withdraw his plea. No appeal was taken at that time.

On July 20, 2006, Drum filed a motion to amend his sentence, alleging that because a juvenile adjudication is not a "conviction" his prior juvenile offenses should not have been used to bar his DOSA sentence or have been included in his offender score. CP 74. The trial court denied the motion as untimely. RP (8/18/06) 2.

III. ARGUMENT RE BRIEF OF APPELLANT

A. **BECAUSE DRUM'S FACIALLY VALID JUDGMENT AND SENTENCE BECAME FINAL MORE THAN A YEAR BEFORE HE FILED HIS MOTION TO AMEND, THE TRIAL COURT PROPERLY DISMISSED THE MOTION AS UNTIMELY.**

1. *Drum's petition, filed more than a year after his conviction became final, was untimely and was properly dismissed.*

Drum's conviction became final at the very latest in May 2005, when the amended judgment was filed and he failed to appeal. See RCW 10.73.090(3)(b). RCW 10.73.090(1) provides:

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 and sentence is valid on its face and was rendered by a court of competent jurisdiction.

This provision explicitly applies to collateral attacks filed in the Superior Court. CrR 7.8(b). Drum filed the instant petition in July of 2006. The petition is thus over a year late and the trial court properly dismissed it.

There is no good cause exception to the statute of limitations:

While it is true that a personal restraint petitioner must demonstrate good cause before an appellate court will consider a second petition for similar relief on behalf of the same petitioner, this requirement is in addition to -- not an exception to -- the requirement that the petitioner comply with the one-year limitation period set forth in RCW 10.73.090 and .100.

Shumway v. Payne, 136 Wn.2d 383, 398-99, 964 P.2d 349 (1998).

Although RCW 10.73.100 sets forth exceptions to the rule, Drum has failed to suggest that any of the exceptions apply. Nor do they. Drum's claim does not involve newly-discovered evidence, a facially unconstitutional statute, a double-jeopardy violation, the sufficiency of the evidence, or a sentence in excess of the court's jurisdiction. RCW 10.73.100.

2. *Drum's judgment and sentence is valid on its face.*

Drum argues that his judgment and sentence is "invalid on its face," Brief at 16, and that the time limit in RCW 10.73.090 therefore does not apply. He is incorrect.

Drum's reliance on *In re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002), is misplaced. In *In re Hemenway*, 147 Wn.2d 529, 55 P.3d 615 (2002), the Supreme Court subsequently clarified that the "facial invalidity" inquiry is directed to the judgment and sentence itself. *Hemenway*, 147 Wn.2d at 532. "Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration. *Hemenway*, 147 Wn.2d at 532. Here the judgment and sentence shows that Drum was given a standard range sentence. No invalidity is shown. The trial court properly dismissed Drum's motion as time barred.

B. EVEN WERE HIS CLAIMS NOT TIME-BARRED DRUM DOES NOT ASSERT THAT THE CLAIMS HE RAISED BELOW HAD ANY SUBSTANTIVE MERIT.

In the motion from which the instant appeal is taken, Drum raised only two claims: that his juvenile adjudications did not prevent the imposition of a DOSA sentence, and that his juvenile adjudications should not have been included in his offender score. Drum concedes in his brief that the former claim is without basis, Brief at 9-10, and the latter is clearly also untenable. RCW 9.94A.525. Thus even were the claims raised below timely, Drum fails to show any basis for relief. The ruling below should be affirmed.

C. IT CANNOT BE PRESUMED THAT RAP 2.4 WAS INTENDED TO OVERRULE THE LEGISLATURE'S INTENT THAT CLAIMS FOR COLLATERAL RELIEF NOT BE ENTERTAINED MORE THAN ONE YEAR AFTER THE JUDGMENT BECOMES FINAL.

Drum also claims that this Court should, under the auspices of RAP 2.4(a) & (b), permit him to appeal the 2005 resentencing. Drum's reasoning would allow RAP 2.4 to swallow RCW 10.73.090 whole, and should not be entertained.

As the Supreme Court noted in *Shumway*, 136 Wn.2d at 397-98, the time limitation set forth in RCW 10.73.090 "is a mandatory rule that acts as a bar to appellate court consideration" of collateral attacks, unless the petitioner

shows that an exception under RCW 10.73.100 applies. RAP 2.4(b) is not listed as one of the applicable exceptions.

Moreover, were his reasoning applied, RCW 10.73.090 would be rendered utterly meaningless. Presumably every time-barred claim will relate back to the judgment and sentence or the proceedings surrounding its entry. Under Drum's logic, no claim could thus ever be untimely. Plainly this would be an absurd result and directly contrary to the legislative intent when it enacted this substantive limitation on collateral relief. This argument should be rejected.

IV. RESPONSE TO PERSONAL RESTRAINT PETITION

A. RESPONSE

The State respectfully moves this court for an order dismissing the petition with prejudice because the legislative amendments to the statute governing the Drug Offender Sentencing Alternative do not apply retroactively.

B. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of Patrick Drum lies within the amended judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on May 27, 2005, in cause number 05-1-

00007-2, upon Drum's conviction of second-degree burglary.

C. ARGUMENT

RCW 10.77.100(6) DOES NOT PROVIDE GROUNDS TO RETROACTIVELY APPLY THE LEGISLATIVE AMENDMENTS TO THE DOSA PROVISIONS OF THE SRA TO DRUM'S CASE.

In his PRP, Drum argues that amendments to the DOSA statute that took effect some ten months after he was resentenced should apply to make him eligible for a DOSA sentence. This claim lacks merit.

Drum relies on RCW 10.73.100(6), which provides an exception to the one-year bar on collateral attacks where:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

(Emphasis supplied). Neither of the two italicized conditions has been met here.

The Legislature has specified only that the amendment set forth in Laws of 2005, ch. 460 "takes effect October 1, 2005." Laws of 2005, ch. 460 § 3. The legislature has thus not "expressly provided" that the amendment

should apply to Drum's case.

Likewise, in interpreting a previous amendment to the DOSA provisions, this Court determined that where the Legislature has not expressly indicated that a retroactive effect was intended, none should be given:

DOSA is criminal and penal, and the 1999 amendments to it do not contain an express declaration on retroactivity. Accordingly, we are constrained to hold that the 1999 amendment does not apply to crimes committed before its effective date.

State v. Toney, 103 Wn. App. 862, 865-66, 14 P.3d 826 (2000). Drum fails to explain why this reasoning does not apply here. His personal restraint petition should be dismissed.

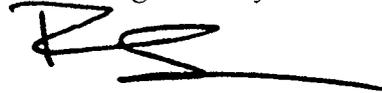
V. CONCLUSION

For the foregoing reasons, Drum's conviction and sentence should be affirmed.

DATED June 11, 2007.

Respectfully submitted,

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