

Original

FILED
COURT OF APPEALS
DIVISION II

NO. 36038-1

08 APR 14 PM 4: 53

STATE OF WASHINGTON
BY *cm*
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SYLVESTER MAHONE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 95-1-01236-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly deny a motion for relief of judgment on procedural grounds when the collateral attack raised grounds that had been previously rejected on the merits in prior proceedings and defendant offered no reason why further review was justified? 1

 2. Was the motion for relief from judgment properly denied as an untimely collateral attack when it was filed nearly eight years after the judgment became final and did not fall within any exceptions to the time bar?..... 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT.....6

 1. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RELIEF OF JUDGMENT WHEN IT RAISED A CLAIM THAT WAS MERELY A REFORMULATION OF A CLAIM THAT HAD PREVIOUSLY BEEN REJECTED ON THE MERITS.....6

 2. THE COLLATERAL ATTACK WAS PROPERLY DISMISSED AS IT WAS TIME BARRED UNDER RCW 10.73.090..... 11

D. CONCLUSION. 14

Table of Authorities

State Cases

<i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)	8
<i>In re Detention of Aguilar</i> , 77 Wn. App. 596, 603, 892 P.2d 1091 (1995)	12
<i>In re Hagler</i> , 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).....	11
<i>In re Jeffries</i> , 114 Wn.2d 485, 488, 789 P.2d 731 (1990)	8, 10
<i>In re Pers. Restraint of Becker</i> , 143 Wn.2d 493, 496, 20 P.3d 409 (2001)	6, 7
<i>In re Pers. Restraint of Hemenway</i> , 147 Wn.2d 529, 531, 55 P.3d 615 (2002)	13
<i>In re Pers. Restraint of Stoudmire</i> , 141 Wn.2d 342, 5 P.3d 1240 (2000)	13
<i>In re Personal Restraint of Gentry</i> , 137 Wn.2d 378, 388, 972 P.2d 1250 (1999)	6
<i>In re Personal Restraint of Johnson</i> , 131 Wn.2d 558, 564, 933 P.2d 1019 (1997)	8
<i>In re Personal Restraint of Taylor</i> , 105 Wn.2d 683, 688, 717 P.2d 755 (1986)	8
<i>In re the Personal Restraint of Well</i> , 133 Wn.2d 433, 441, 946 P.2d 750 (1997)	6
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998).....	13
<i>State v. Brand</i> , 120 Wn.2d 365, 369-71, 842 P.2d 470 (1992).....	6, 7
<i>State v. Carroll</i> , 81 Wn.2d 95, 101, 500 P.2d 115 (1972).....	11
<i>State v. Gaut</i> , 111 Wn. App. 875, 881, 46 P.3d 832 (2002)	8, 9

State v. Gutierrez, 92 Wn. App. 343, 347, 961 P.2d 974 (1998)..... 11

State v. King, 130 Wn.2d 517, 530-31, 925 P.2d 606 (1996)..... 12

Constitutional Provisions

Fifth Amendment, United States Constitution 12

Article I, Section 9, Washington State Constitution..... 12

Statutes

RCW 10.73.0907, 11, 12, 13

RCW 10.73.090(1) 11

RCW 10.73.090(2)6

RCW 10.73.090(3)(b)..... 12

RCW 10.73.1007, 12, 13

RCW 10.73.1307

RCW 10.73.1407

Rules and Regulations

CrR 7.8.....3, 5, 6, 7, 8, 9

RAP 2.2(a)(10)8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny a motion for relief of judgment on procedural grounds when the collateral attack raised grounds that had been previously rejected on the merits in prior proceedings and defendant offered no reason why further review was justified?
2. Was the motion for relief from judgment properly denied as an untimely collateral attack when it was filed nearly eight years after the judgment became final and did not fall within any exceptions to the time bar?

B. STATEMENT OF THE CASE.

This is an appeal from a denial of a post-judgment motion for relief seeking a withdrawal of a guilty plea. A procedural history of this case is as follows:

Appellant Sylvester Mahone (“defendant”) pleaded guilty to murder in the second degree in 1995; his plea occurred after five days of jury trial on a charge of murder in the first degree and after four witnesses had testified regarding defendant’s participation in the murder. CP 5-9, 13-16. Prior to sentencing, defendant moved to withdraw his guilty plea or, in the alternative, to substitute new counsel. CP 10-12. Defendant claimed that his attorney had forced him into pleading guilty and that his

plea was not voluntary. *Id.* The court denied the motion and imposed sentence on October 24, 1995. CP 17, 18-28. Defendant appealed. CP 29. While this matter was pending appeal and after new counsel had been appointed, defendant brought a “supplemental” motion to withdraw his guilty plea. CP 30-34, 35-37, 38-44. This motion claimed that defendant’s trial attorney was ineffective because, among other things, he allegedly discouraged an alibi witness from testifying on defendant’s behalf. *Id.* The defendant claimed that when he learned the witness would not testify that he panicked and entered a guilty plea. *Id.* The court denied the motion after an evidentiary hearing. CP 45-46. Defendant filed a notice of appeal from this order. CP 47. The Court of Appeals consolidated the two appeals and affirmed the trial court in rejecting defendant’s claims that his attorney was ineffective and that his plea was involuntary. CP 50-61. The mandate issues on May 18, 1998. CP 62.

In September 1998, the Court of Appeals dismissed a personal restraint petition filed by defendant challenging his 1995 murder conviction because defendant merely repeated claims raised and dismissed in his appeal. CP 68-69. In February 2000, the Court of Appeals dismissed, as meritless, defendant’s personal restraint petition which alleged that he should be allowed to withdraw his guilty plea because he was not informed of the possibility that he would be required to pay appellate costs. CP 120-121

On July 15, 2002, defendant filed a motion to withdraw his plea in the trial court and on October 1, 2002 he filed an amended motion to withdraw his plea on the grounds that the statute proscribing murder in the second degree was unconstitutional as applied to his conduct; however, the arguments in support of this claim was that he did not understand the elements of the crime and/or that the State did not have the evidence to prove the elements. CP 127-137, 142-152. The court denied the motions noting that the ruling from the Court of Appeals dated September 5, 1997 addressed the same or similar issues. CP 158; *see also* CP 51-61. Defendant filed a notice of appeal from this ruling. CP 159-162.

While this appeal was pending, defendant filed another motion to withdraw his plea contending that the prosecutor had engaged in misconduct. CP 163-168. He filed these pleadings again on December 10, 2002. CP 178-183. On January 9, 2003, the court denied this motion without a hearing. CP 194-195. The order indicated that the motion was denied because it was time barred and because it failed to establish a basis for the grant of relief under CrR 7.8. *Id.* Defendant filed a notice of appeal from entry of this order. CP 197-201.

Apparently, the Court of Appeals consolidated these two appeals as it issued a mandate listing two appellate case numbers on March 1, 2005. CP 208-209. The mandate indicates that the trial court was affirmed (in an order issued March 30, 2004) but the superior court file

does not contain a copy of this order setting forth the reasoning of the appellate court. *Id.*

The State then realized that there had been a clerical error in the defendant's judgment; the trial court had orally imposed two years of community placement but that requirement had not been included in the written judgment and sentence. CP 210-223; 227-248. The court brought defendant back to court with counsel and entered an order correcting the judgment. CP 283-284. Defendant appealed the entry of this order. CP 291-293. On appeal, he challenged the court's ability to enter this order; he also raised a claim that this condition showed that his plea was not voluntary as he had not been informed of the mandatory two year term of community supervision; he also filed a personal restraint petition regarding these issues which was consolidated with the appeal. CP 602-611. The court rejected both claims. *Id.* As for the voluntariness claim, the court noted that defendant was informed that *at least* one year of community placement would be imposed and that he had not raised any objection when the court imposed a term of term years. *Id.* By not raising an immediate objection, he waived any claim of error to the imposition of this condition. *Id.*

While trying to obtain review at the Supreme Court of this decision of the Court of Appeals, defendant filed another personal restraint petition raising the same claims. CP 482-483. The court dismissed it as defendant had failed to show why any reconsideration was warranted. *Id.*

Over the years defendant has made numerous challenges to his conviction by filing motions for relief of judgment and personal restraint petitions; he has appealed whenever the superior court denied one of his post-judgment motions for relief. CP 29, 47, 65-66, 67, 98-103, 122, 159-162, 197-201, 291-293, 294-297, 567-572. There have been, at least, ten notices of appeal filed under this cause number. CP 29, 47, 67, 65-66, 159-162, 197-201, 291-293, 294-297, 567-572.

The order that is the subject of the current appeal pertained to a motion for relief from judgment under CrR 7.8 that defendant had filed on January 17, 2007. *See* CP 485-559. In his motion defendant claims that his trial counsel was ineffective for not objecting to the term of community placement when the court imposed it at sentencing and that his plea was involuntary.

The court denied the motion without a hearing. CP 564. The order denying indicated that a hearing was unnecessary because “no new issues are raised since the denial of Mahone’s last motion raising similar issues.” CP 564.

On February 27, 2007, defendant filed a timely notice of appeal from an order denying motion for relief from judgment which had been entered on February 5, 2007. CP 564, 567-572.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RELIEF OF JUDGMENT WHEN IT RAISED A CLAIM THAT WAS MERELY A REFORMULATION OF A CLAIM THAT HAD PREVIOUSLY BEEN REJECTED ON THE MERITS.

The term “collateral attack” means any form of post-conviction relief other than a direct appeal and includes such actions as 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 re the Personal Restraint of Well*, 133 Wn.2d 433, 441, 946 P.2d 750 (1997). If there is to ever be finality of judgment, collateral attacks of a criminal conviction and sentence cannot be used as a means of simply reiterating issues finally resolved at trial and upon appellate review. *In re Pers. Restraint of Becker*, 143 Wn.2d 493, 496, 20 P.3d 409 (2001). “Personal restraint petitions must raise new points of fact and law that were not or could not have been raised in the principal action.” *Id.*, citing *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Motions for relief of judgment under CrR 7.8 are “the functional equivalent of personal restraint petitions for the purpose of applying statutory limitations on successive writs.” *State v. Brand*, 120 Wn.2d 365, 369-71, 842 P.2d 470 (1992).

RCW 10.73.140 limits successive personal restraint petitions. RCW 10.73.140 states, in the relevant part: “If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition *on similar grounds*, and shows good cause why the petitioner did not raise the new grounds in the previous petition.” (Emphasis added). Despite the reference to the “court of appeals” in RCW 10.73.140, the Supreme Court has held that the “same provisions and limitations apply in both the trial court and the appellate court to applications for postconviction relief.” *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 497, 20 P.3d 409 (2001). CrR 7.8 specifically makes this provision applicable to motions for relief of judgment filed in the superior court.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140.

CrR 7.8.

The statute refers to a collateral attack that is brought on “similar grounds” as an earlier challenge. RCW 10.73.140. Courts may not consider such a motion if the movant has previously brought a collateral attack on the same or substantially similar grounds. *Brand*, 120 Wn.2d at 370. A “ground” is “a distinct legal basis for granting relief” and the

“prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application.” *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986); *see also In re Personal Restraint of Johnson*, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997). “Simply ‘revising’ a previously rejected legal argument, however, neither creates a ‘new’ claim nor constitutes good cause to reconsider the original claim.” *In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). The Washington Supreme Court noted that defendant may sometimes try to disguise “similar grounds” by raising the claim a second time based on different factual allegations or supported by different legal arguments or be couched in different language. *Id.* As an illustrative example, the court noted that a “claim of involuntary confession predicated on alleged psychological coercion does not raise a different ‘ground’ than does one predicated on physical coercion.” *Id.*

Although an order denying a CrR 7.8 motion is appealable as of right under RAP 2.2(a)(10), the appellate court’s scope of review is limited to the issues raised by that motion. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). “On review of an order denying a motion to vacate, only ‘the propriety of the denial not the impropriety of the underlying judgment’ is before the reviewing court.” *Id.* (quoting *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)). A criminal defendant cannot obtain review of an unappealed -or a previously appealed- final judgment by trying to convert an appeal of a

denial of a CrR 7.8 motion in to a direct appeal of the judgment. *Gaut*, 111 Wn. App. at 881.

Defendant's current appeal pertains to a denial of a CrR 7.8 motion which was denied without a hearing based upon the written materials submitted. *See* CP 564. Under *Gaut*, it is the propriety of the denial of the motion and not the impropriety of the underlying judgment that is before this court for review.

On appeal, defendant argues that his plea was involuntary and, therefore, the court erred in denying the motion. This argument presumes that the court denied the motion for relief after considering defendant's claims on the merits. The court never reached the merits of defendant's claims; it denied the motion on procedural grounds. CP 564. Defendant does not address the procedural reasons the court gave for denying motion, but the history of this case shows that the court acted properly.

As set forth in the statement of the case, from 1995 onward defendant has alleged repeatedly two grounds for relief: 1) his plea was not voluntary; and, 2) his trial counsel was ineffective. He has revised and rephrased these claims over time. His plea was involuntary because: 1) he was forced into entering a plea after his attorney gutted his defense and performed ineffectively at trial; 2) he did not understand that the elements of the crime in relation to his acts; 3) he did not understand that he would have to pay appellate costs; 4) the prosecutor engaged in misconduct; or 5) he did not understand that he would have to serve two years of community

placement. He has asserted that his attorney was ineffective for: 1) intimidating an alibi witness into not testifying on defendant's behalf; 2) failing to cross-examine the State's witnesses; 3) disagreeing with defendant about the best line of defense; or 4) failing to object when the court orally imposed two years of community placement.

More than one court has dealt with the merits of these claims. The trial court found when denying his first two motions to withdraw his guilty plea that his attorney was not ineffective and that he had not shown his plea to be involuntary; the Court of Appeals upheld these rulings again finding on the merits that there was no ineffective assistance and that the plea was voluntary. CP 50-61. Again in the appeal following the entry of the order correcting judgment (and in the consolidated personal restraint petition), the court addressed defendant's claim that he was not informed of the mandatory term of community placement and that this rendered his plea involuntary and rejected his arguments. CP 602-611.

As the Supreme Court made clear in *Jeffries*, rewording a claim or using a different factual basis to support the same claim does not present a new ground for relief. Defendant is going over the same ground that has been addressed in previous appeals – whether his plea was voluntary and whether his trial counsel was effective. The trial court properly dismissed the petition as failing to raise any new claims that had not been previously addressed. The trial court's denial should be affirmed.

2. THE COLLATERAL ATTACK WAS PROPERLY DISMISSED AS IT WAS TIME BARRED UNDER RCW 10.73.090.

An appellate court will generally affirm the decision of the trial court upon any ground supported by the record, even if it is not the ground utilized by the trial court. *State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115 (1972); *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). Here the motion for relief from judgment was properly denied as time-barred under RCW 10.73.090.

Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders; these are significant costs, and they require that collateral relief be limited in state as well as federal courts. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Because of the costs and risks involved, there is a time limit in which to file a collateral attack. RCW 10.73.090(1) subjects collateral attacks to a one-year statute of limitation. The statute 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 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). The statute of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars appellate consideration of collateral attacks after the limitation period has passed, unless the

defendant demonstrates that the collateral attack falls within an exemption to the time limit under RCW 10.73.090 (facial invalidity or lack of jurisdiction) or is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

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

(6) 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.

RCW 10.73.100. *See also State v. King*, 130 Wn.2d 517, 530-31, 925

P.2d 606 (1996); *In re Detention of Aguilar*, 77 Wn. App. 596, 603, 892

P.2d 1091 (1995).

In the instant case, defendant's judgment became final on no later than May 18, 1998, the date the mandate issued on the first direct appeal.

CP 62; RCW 10.73.090(3)(b). Defendant had until May 18, 1999, to file a

timely collateral attack. Defendant filed this collateral attack on January 17, 2007, or almost eight years too late. *See* CP 485-559.

The defendant bears the burden of proving that his collateral attack falls within an exception to the one-year time limit. *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet that burden of proof, the defendant must state the applicable exception within his pleadings. *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000). Defendant failed to articulate any exception to the time bar in his motion. Moreover, his claims – ineffective assistance of counsel and involuntary plea – are not covered by the exceptions listed in RCW 10.73.090 or RCW 10.73.100. *Stoudmire*, 141 Wn.2d at 349 (ineffective assistance claim and his claim that there was no factual basis for the third degree rape of a child charge fall neither within RCW 10.73.090 nor within RCW 10.73.100); *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 531, 55 P.3d 615 (2002) (holding that a defendant’s collateral attack was time barred where he filed the petition more than one year past the one year time limit and the defendant’s only challenge was that his plea was not voluntary, knowing, and intelligent, because he was not informed of the term of mandatory community placement).

In addition to the reason given by the trial court, the motion for relief from judgment could have been properly denied as an untimely collateral attack under RCW 10.73.090.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the order entered below denying the motion for relief from judgment on procedural grounds.

DATED: April 14, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by US. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/14/08 [Signature]
Date Signature

FILED
COURT OF APPEALS
DIVISION II
08 APR 14 PM 4:53
STATE OF WASHINGTON
BY _____
DEPUTY