

NO. 36477-8

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

STATE OF WASHINGTON, RESPONDENT

v.

DEAN ALAN ROYER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 95-1-01997-0

AMENDED BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

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

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

1. Did the trial court properly dismiss defendant's CrR 7.8 motion as untimely pursuant to RCW 10.73.090 when it was filed over eight years after defendant's judgment became final and defendant failed to establish a valid exception to the time-bar?

(Appellant's Assignment of Error Nos. 1 and 5)

2. Did the trial court properly rely on a certified copy of defendant's 1988 robbery judgment in determining that petitioner was a persistent offender when the judgment was not unconstitutionally invalid and was not previously determined to have been unconstitutionally obtained?

(Appellant's Assignment of Error Nos. 2, 3 and 4)

3. Has defendant failed to demonstrate ineffective assistance of counsel as his evidence does not show both deficient performance and resulting prejudice necessary to succeed on this claim?

(Appellant's Assignment of Error No. 6)

B. STATEMENT OF THE CASE.

1. Procedure

On April 26, 1995, the State filed an Information charging DEAN ALAN ROYER (hereinafter “defendant”) with one count of first degree burglary, one count of unlawful possession of a firearm, one count of second degree assault, and two counts of first degree assault. CP 122-125. Defendant was subject to former RCW 9.94A.120(4)¹ and a possible sentence of life imprisonment without the possibility of parole because of prior convictions for robbery and assault.

On October 17, 1995, defendant entered a plea of guilt to the charge of unlawful possession of a firearm. The remaining charges were tried to a jury. The jury convicted defendant of first degree burglary (with deadly weapon) and three counts of second degree assault.²

A sentencing hearing was held on January 22, 1996. The State offered certified copies of defendant’s two prior convictions for “most serious offenses” to support its request for a life sentence under the Persistent Offender Accountability Act (“POAA”).³ CP 171-190 (Ex. 1 and 2). There is no indication in the record that defendant challenged his prior convictions. Defendant’s only argument at sentencing was a

¹ RCW 9.94A.120(4) has been recodified as RCW 9.94A.505(2)(a)(v), which refers to RCW 9.94A.570.

² The jury could not agree on the two counts of first degree assault and so considered the lesser-included offense of second degree assault.

³ This Act is also referred to as Initiative 593 and the “Three Strikes” law.

challenge to the constitutionality of the POAA. CP 129-170. Based on defendant's criminal history, the court found him to be a Persistent Offender pursuant to former RCW 9.94A.120(4)⁴ and sentenced him to life without the possibility of parole. CP 110-119.

Defendant filed a direct appeal challenging both his conviction for second degree assault and the constitutionality of the POAA. See, COA No. 20351-1-II. The Court of Appeals, Division Two, rejected defendant's claims and affirmed his judgment. The mandate from the direct appeal issued on August 3, 1998. CP 192.

On December 27, 2006 and again on March 30, 2007, defendant filed a CrR 7.8 motion in the trial court claiming that his prior conviction for second robbery was unconstitutional and, therefore, could not be used to impose a life sentence under the Persistent Offender Accountability Act ("POAA"). CP 2-30, 36-65. Instead of transferring the motion to this court as a PRP under CrR 7.8(c)(2), the superior court summarily denied the motion as untimely. CP 99-100.

Defendant now timely appeals the court's order dismissing his CrR 7.8 motion. CP 101-103.

⁴ Former RCW 9.94A.120(4) has been recodified as RCW 9.94A.505(2)(a)(v), which refers to RCW 9.94A.570.

2. Facts

The substantive facts of the offense are not pertinent to the issues raised in this appeal.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DISMISSED
DEFENDANT'S CrR 7.8 MOTION AS
UNTIMELY.

Defendant claims that the trial court erred when it dismissed his CrR 7.8 motion as untimely.

CrR 7.8 motions are subject to RCW 10.73.090(1), which 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.

Defendant filed his CrR 7.8 motion more than eight years after his judgment and sentence became final.⁵ Thus, the trial court properly dismissed defendant's motion as time-barred unless he can show that (1) the time-bar does not apply because the judgment is facially invalid or because it was not rendered by a court of competent jurisdiction, or (2)

⁵ Defendant's judgment became final on August 3, 1998, when the Court of Appeals issued its mandate on defendant's direct appeal. RCW 10.73.090(3)(b).

one or more of the six time-bar exceptions enumerated in RCW 10.73.100⁶ applies to each of the otherwise time-barred issues. Defendant attempts to avoid the time-bar by claiming that his judgment is facially invalid and that the sentence was imposed in excess of the court's jurisdiction under RCW 10.73.100(5). Neither claim has merit.

a. Defendant's judgment is not facially invalid.

Defendant claims that he is exempt from the one-year time-bar because his judgment and sentence is invalid on its face.

A defendant may challenge his sentence, despite the one-year bar of RCW 10.73.090, if he can show that his judgment and sentence is invalid on its face. See, In re Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618

⁶ RCW 10.73.100 provides:

The time limit specific in RCW 10.73.090 does not apply to a petition or motion that 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 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.

(2002). A judgment and sentence is invalid on its face if it evinces the invalidity without further elaboration. Goodwin, 146 Wn.2d at 866. If the court must go beyond the verdict, sentence, and judgment to make the determination that the judgment and sentence is constitutionally invalid, then the judgment and sentence is not facially invalid. In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000); State v. Ammons, 105 Wn.2d 175, 189, 713 P. 2d 796, 718 P. 2d 796 (1986). As our Supreme Court has explained:

[T]he relevant question in a criminal case is whether the judgment and sentence is valid on its face, not whether related documents, such as plea agreements, are valid on their face. Such documents may be relevant to the question whether a judgment is valid on its face, *but only if they disclose facial invalidity in the judgment and sentence itself.*

In re Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003)(citing In re Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002))(italics added).

Here, defendant cites the law regarding facial invalidity but fails to support the law with evidence that would indicate his judgment is, in fact, invalid. Instead, defendant makes the circular claim that “the plea was invalid on its face because ... the trial court exceeded its jurisdiction by relying on a document that purported to be a plea to robbery but that in fact was legally insufficient on its face to be a plea to any crime.” Br. of App. at 6. But, for purposes of determining timeliness, the issue is not

whether the *former* plea paperwork is facially invalid, but rather whether the defendant's *current* judgment is facially invalid. In this case, it is not. Unlike other cases finding facial invalidity, there is nothing here to indicate that defendant's offender score was miscalculated (In re Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002)), that he was sentenced beyond the maximum or that the statute of limitations had expired for his crime (In re Stoudmire, 141 Wn.2d 342, 354-56, 5 P.3d 1240 (2000)) or that the crime to which he pled guilty did not exist at the time of his offense (In re Thompson, 141 Wn.2d 712, 718-19, 10 P.3d 380 (2000)). Defendant fails to show a facial invalidity of this nature with respect to his *current* judgment. Defendant's claim that the prior conviction is erroneous is simply not apparent from the face of the judgment. Moreover, even if you reach the substance of defendant's claim, it has no merit. See, Argument §2, below. Therefore, the exception to the one-year time limit for defendant to bring his CrR 7.8 motion does not apply.

b. The sentence imposed was not in excess of the court's jurisdiction.

Defendant also claims that he is exempt from the time-bar under RCW 10.73.100(5) because his sentence was imposed in excess of the court's jurisdiction. This claim also lacks merit.

Jurisdiction in the context of RCW 10.73.100(5) includes personal and subject matter jurisdiction. In re Vehlewald, 92 Wn. App. 197, 200, 963 P.2d 903 (1998)(citing State v. Klump, 80 Wn. App. 391, 397, 909 P.2d 317 (1996)). A court has subject matter jurisdiction where the court has the authority to adjudicate the type of controversy in the action. Vehlewald, 92 Wn. App. at 202 (citing State v. Moen, 129 Wn.2d 535, 545, 919 P.2d 69 (1996)). A court “does not lose subject matter jurisdiction merely by interpreting the law erroneously.” Id.

In Vehlewald, the defendant argued that his sentence was in excess of the court’s jurisdiction and that his petition was therefore excepted from the time-bar because the court made an erroneous determination regarding same criminal conduct. Vehlewald, 92 Wn. App. at 199. The reviewing court disagreed: “Whether or not erroneous, a same criminal conduct determination does not implicate the sentencing court’s jurisdiction.” Vehlewald, 92 Wn. App. at 199.

Defendant relies on In re Stoudmire to support his claim that the sentence was imposed in excess of the court’s jurisdiction. See, Br. of App. at 6. Stoudmire is inapposite to this case. In Stoudmire, the sentencing court imposed a sentence that exceeded the statutory maximum for the crime. Stoudmire, 141 Wn.2d at 355-56. More than one year after the judgment became final, Stoudmire petitioned for relief. The court properly determined that the excessive sentence created a facially invalid

judgment, which exempted Stoudmire's petition from the one-year time bar under RCW 10.73.090. Notably, the court did not rely on RCW 10.73.100(5) to avoid the time-bar. In re Stoudmire is simply irrelevant to petitioner's claims under RCW 10.73.100(5).

Here, the court had subject matter jurisdiction for the crime under Wash. Const. art. IV, §6 ("the superior court shall have original jurisdiction ... in all criminal cases amounting to felony"); State v. Franks, 105 Wn. App. 950, 22 P.3d 269 (2001). The court had personal jurisdiction over the petitioner pursuant to RCW 9A.04.030(1) and authority to render the particular judgment pursuant to CrR 7.2 and 7.3. Any error in imposing a life sentence under the POAA, assuming *arguendo* that error occurred, does not implicate the court's jurisdiction. This exception to the time-bar is therefore not available to the defendant.

c. Conclusion.

Defendant fails to show that his current judgment is facially invalid, that the sentencing court lacked competent jurisdiction, or that any of the six time-bar exceptions enumerated in RCW 10.73.100 apply. Therefore, the trial court properly dismissed his motion as untimely.

2. EVEN IF THIS CLAIM HAD BEEN BROUGHT IN A TIMELY MANNER, DEFENDANT WOULD NOT BE ENTITLED TO RELIEF; DEFENDANT'S PRIOR ROBBERY CONVICTION IS A VALID CONVICTION AND THE COURT PROPERLY RELIED ON THE JUDGMENT IN ORDER TO DETERMINE THAT DEFENDANT WAS A PERSISTENT OFFENDER.

The three strikes rule of the Sentencing Reform Act of 1981 chapter 9.94A RCW, requires a trial court to sentence a defendant to life imprisonment without the possibility of parole. RCW 9.94A.570. This statute is commonly referred to as the Persistent Offender Accountability Act ("POAA"). A persistent offender is one who has two prior "most serious offense" convictions. RCW 9.94A.030(33)(a). Second degree robbery and second degree assault are considered "most serious offenses." RCW 9.94A.030(29)(b), (o).

Before the State may use a prior conviction to enhance a defendant's sentence, it must prove the existence of that conviction by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The best evidence of the conviction is the prior judgment and sentence. Ford, 137 Wn.2d at 480.

The State need not prove the constitutional validity of a defendant's prior convictions "unless they have been previously declared unconstitutional or were facially unconstitutional." State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). "Constitutionally invalid on its face means a conviction which

without further elaboration evidences infirmities of a constitutional magnitude.” State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719, cert. denied, 479 U.S. 930 (1986). “The conviction need not show that a defendant’s rights were not violated; rather, for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant’s rights were violated.” State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430, review denied, 144 Wn.2d 1014 (2001). Additionally, a “defendant may not impeach the conviction by offering testimony that his or her rights were violated.” Gimarelli, 105 Wn. App. at 375 (citing State v. Bemby, 46 Wn. App. 288, 291-92, 730 P.2d 115 (1986)). In other words, unless a prior conviction previously has been found to be unconstitutional, a sentencing court’s review for purposes of using the prior conviction to impose a life sentence is limited to the face of the judgment and sentence for that prior conviction. The requirement that the alleged defect be apparent on the face of the conviction is necessary to avoid turning sentencing proceedings into appellate review of all prior convictions. Gimarelli, 105 Wn. App. at 375 (citing Ammons, 105 Wn.2d at 188).

When challenging a guilty plea to be used at a later sentencing, the defendant must not only show that the plea forms were deficient, but he must also show that the sentencing court deprived him of constitutional safeguards. Gimarelli, 105 Wn. App. at 376. The burden is not on the State to prove that the pleas were entered constitutionally. Ammons, 105

Wn.2d 175; Gimarelli, 105 Wn. App. 370. Rather, it is defendant's burden to show that his prior judgment (and accompanying guilty pleas), on their face, did not provide constitutional safeguards. Ammons, 105 Wn.2d at 189. Washington courts have previously determined that a defendant's claim that he was not informed of the elements of the crime when he pleaded guilty cannot be determined from the face of a guilty plea form and, therefore, does not render the conviction invalid on its face for purposes of sentencing. Ammons, 105 Wn.2d at 189; Bembry, 46 Wn. App. at 290.

Ammons and Bembry are dispositive of defendant's claim. Thus, even if defendant brought this challenge in a timely manner, which he did not, he would not have been entitled to relief.⁷ Defendant's only claim is that the plea form from his robbery conviction does not list all of the elements of the crime. Per Ammons and Bembry, failure to include all the elements of a charge does not create a constitutionally invalid conviction,

⁷ Defendant did not challenge his prior conviction at the sentencing hearing or on appeal. Rather, defendant waited over eight years before he provided a copy of the prior robbery plea documents and challenged the validity of the plea. Thus, defendant's claim that the trial court erroneously relied on the "facially invalid" robbery plea when it determined that defendant was a persistent offender is misleading. Br. of App. at 7-11. The trial court never considered the plea documents because they were not provided to the court. In fact, it appears that defendant never even challenged his criminal history. The only evidence presented by the State was a certified copy of the prior judgment, which does not show any invalidity. Thus, defendant's claim that the court relied on a facially invalid plea is inaccurate – the court never had the plea documents before it.

which would prevent that conviction from being included in the offender score.

A sentencing hearing is not the appropriate forum to determine the constitutionality of a prior conviction that is valid on its face. Defendant's recourse, if any, is to challenge the constitutionality of his prior guilty plea collaterally with a personal restraint petition under RAP 16.3.⁸ A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered. Ammons, 105 Wn.2d at 188.

Defendant did not challenge his prior robbery conviction in 1996, when he was sentenced as a persistent offender. Instead, he waited eight years to make the claim. Defendant's claim lacked merit then and it lacks merit now. The trial court properly relied on the judgment from defendant's prior robbery conviction for purposes of determining that defendant was a persistent offender.

⁸ Defendant claims that, at the time of his prior robbery conviction, he was not advised of the time limits in RCW 10.73.090. See Br. of App. at 5, n.1. Defendant can raise this issue if and when he files a collateral attack in that case. But it does not affect the timeliness of his present CrR 7.8 motion. Defendant was properly advised of the time limits in this case. CP 171.

3. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE VALIDITY OF THE PRIOR ROBBERY CONVICTION.

In a criminal prosecution, the federal and State constitutions guarantee the right of an accused to the assistance of counsel. U.S. CONST. amend VI; WASH. CONST. art. I, § 22. Ineffective assistance violates the right to counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Pirtle, 136 Wn.3d 467, 487, 965 P.2d 593 (1998). To show ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. State v. Cox, 109 Wn. App. 937, 940, 38 P.3d 371 (2002)(citing Strickland, 466 U.S. at 687). To satisfy the “performance” part of the test, defendant must prove that defense counsel’s representation “fell below an objective standard of reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

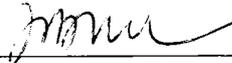
As argued above, defendant’s prior robbery conviction was a valid conviction for purposes of sentencing. Interestingly, defendant’s counsel

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court
affirm defendant's conviction and sentence.

DATED: December 19, 2007.

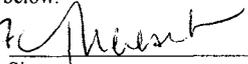
GERALD A. HORNE
Pierce County
Prosecuting Attorney



ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. 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.

12-19-07 
Date Signature