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COURT OF APPEALS
DIVISION II

08 JUN 16 AM 9: 53

No. 36746-7-II

STATE OF WASHINGTON
BY cm

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN D. MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause No. 04-1-01815-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the trial court erred in finding that Moore's pro se CrR 7.8 motion was time-barred.

2. If the motion was not time-barred, whether the appropriate remedy is remand to the trial court.

B. STATEMENT OF THE CASE.

1. The State accepts Moore's statement of the case.

C. ARGUMENT.

1. Moore is correct that his CrR 7.8 motion was not time-barred.

The order from which Moore appeals was issued on September 14, 2007. [CP 77] The mandate ending review of his direct appeal of the same case was issued on March 13, 2008. [CP 79]. Moore correctly argues that CrR 7.8(b) and RCW 10.73.090, the pertinent parts of which are set forth verbatim in his opening brief at page 4, provide that the one-year limit did not begin to run until the mandate issued.

2. Although Moore is correct on that issue, remand to the trial court is not the best remedy in this matter. It would be a better use of judicial resources for this court to consider this appeal as a personal restraint petition and decide the issues to which error was not assigned.

a. The Superior Court order denied the CrR 7.8 motion on two grounds, one of which Moore did not appeal.

In addition to its finding that the motion was time-barred, the trial court also held that the sentence imposed did not exceed the statutory maximum, since the maximum is life in prison. [CP 77, 46]. Because Moore did not appeal that ruling, it will stand. On remand the trial court will again deny the motion, because it was correct on that issue, and Moore will most likely appeal again. In order to avoid the repetitious appeal and remand of the matter, it would be the best use of judicial resources for this court to consider this appeal as if it were a PRP and decide the issue of the statutory maximum.

b. The trial court was correct that, because the statutory maximum for first degree robbery is life in prison.

Other than legal financial obligations, the terms of a sentence under the Sentencing Reform Act cannot extend beyond the statutory maximum for the crime committed. RCW 9.94A.505(5). Therefore, the total penalty served, including the period of confinement and the subsequent period of community custody, must not exceed the statutory maximum penalty for the offense, even when an exceptional sentence is imposed. State v. Guerin, 63 Wn. App. 117, 121, 816 P.2d 1249 (1991).

In his motion, Moore confuses the standard sentencing range with the statutory maximum for the crime. Robbery in the first degree is a class A felony (RCW 9A.56.200(2)), and the statutory maximum for a class A felony is life in prison (RCW 9A.20.021(1)(a)). No matter what the term of community custody imposed by the court, Cook's sentence will not exceed life.

c. Moore raised other issues in his motion which were not addressed by the trial court, nor did he appeal the court's failure to do so.

In his motion, Moore argued that he received an exceptional sentence without the jury finding the grounds to do so, in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, (2004). That is not correct; he received a standard range sentence. [CP 44-48].

Moore also asserted, without argument, that his offender score was incorrectly calculated as two, when it should have been one. However, his offender score was actually calculated to be six [CP 46] and since he did not argue the issue, it is impossible to address his claim of error.

D. CONCLUSION

Moore is correct that his CrR 7.8 motion in Superior Court was not time-barred. Because the trial court also denied his motion

on the ground that his sentence did not exceed the statutory maximum, it would be a better use of judicial resources for this court to treat the remaining issues as a personal restraint petition rather than remand to Superior Court, as any future rulings by the court would certainly be appealed. The State respectfully asks this court to affirm the trial court's denial of the CrR 7.8 motion on all grounds other than the time issue.

Respectfully submitted this 13th of June, 2008.

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on June 13, 2008.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 6/13/08

Signature: [Handwritten Signature]

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