

COURT OF APPEALS  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

*ZOR*

IN RE THE PERSONAL	)	NO. 38025-1-II
RESTRAINT PETITION OF	)	RESPONSE TO
	)	PERSONAL RESTRAINT
GERALD WHITE, III	)	PETITION

Comes now Edward G. Holm, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner is currently serving a life sentence in the custody of the Washington Department of Corrections pursuant to a "three-strikes" sentence in Thurston County Cause No. 96-1-00633-9. PRP at 1. He is not under restraint or a disability resulting from the guilty plea which he is challenging in this petition. The State's argument will be set forth below.

II. STATEMENT OF PROCEEDINGS

The State accepts White's statement of proceedings.

### III. RESPONSE TO ISSUES RAISED

#### 3.1. White is not under restraint or disability resulting from his 1990 conviction for second degree robbery.

The grounds for a personal restraint petition (PRP) are found in RAP 16.4. The predicate for seeking relief is that the petitioner be under restraint as a result of the conviction he attacks.

16.4(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

White is apparently, according to his petition, serving a life sentence as a result of being convicted of a later three-strike offense for which he was charged in 1996. Though this 1990 conviction, resulting from a guilty plea, may constitute one of the three strikes, he is under restraint as a result of the 1996 conviction. He is under restraint because he refused to stop committing serious crimes, not because of this 1990 conviction.

White cites to no cases holding that an earlier conviction constitutes a “restraint” when a defendant seeks to avoid a life sentence imposed as a result of a later conviction. The only case the State has found that may be relevant is In re Pers, Restraint of Powell, 92 Wn.2d 882, 602 P.2d 711 (1979), which noted, without further elaboration, that “an unlawful conviction can serve as a restraint on liberty due to collateral consequences affecting one adjudged to be a habitual criminal” under RCW 9.92.090. Id., at 887. In that case, however, the issue was whether the defendant could bring a PRP to challenge a conviction when she was a serving a longer, concurrent sentence for another unchallenged conviction, and the overall length of her incarceration would not be affected. The State maintains that this is insufficient authority for White to challenge a conviction which resulted from a plea of guilty, which occurred more than eighteen years ago, and for which he is no longer under any State supervision.

RAP 16.4 permits consideration of a PRP only when the petitioner clears the “restraint” hurdle. White has not done so.

3.2 White's petition should be time-barred.

The time limit for collateral attacks on convictions is contained in RCW 10.73.090.

10.73.090 Collateral attack—One year limit. (1) 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. . . . .

White does not claim that the trial court was without jurisdiction, but rather that the judgment and sentence is invalid on its face.

a. There should be some reasonable limit to the time in which a defendant may collaterally attack a conviction, even if he was not informed at sentence of the one-year limit.

White is correct that RCW 10.73.110, passed in 1989, requires a sentencing court to advise defendants of the one-year limit imposed by RCW 10.73.090 and 10.73.100. There is nothing in the record provided that indicates he was informed of that limit at his sentencing. He is further correct that State v. Schwab, 141 Wn. App. 85, 167 P.3d 1225 (2007), held that, even though Schwab did not file a collateral attack within one year, he was not barred from doing so because he

had not been informed of the limit at sentencing. This is not the same thing as saying that there is no end to the time in which a collateral attack may be filed.

White cites to several cases for his argument that his PRP is not time-barred. In Schwab, *supra*, the defendant was convicted in May of 2004 and sought review in July of 2005, only slightly more than one year. In In re Pers. Restraint of Vega, 118 Wn.2d 449, 823 P.2d 1111 (1992), Vega was convicted and was serving time in a federal prison before RCW 10.73.110 was passed. The State did not make an effort to notify him of the deadline. The opinion does not disclose the time between the conviction and the collateral attack. Similarly, all of the consolidated cases in In re Pers. Restraint of Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993) involved defendants who were convicted prior to the passage of the statute, but they were barred from collateral attack because the Department of Corrections had made an effort to notify them. Finally, White cites to State v. Golden, 112 Wn. App. 68, 47 P.3d 587 (2002), which involved a collateral attack on a juvenile conviction eight years afterward.

None of these cases address the question of whether the court

can put a limit on the length of time available to a defendant who was not told at sentencing that he or she had no more than one year in which to bring a collateral attack, nor has the State found any. The State maintains that there is nothing unreasonable about permitting such attacks for some period of time after the one-year limit has expired, but there is no good reason to allow such attacks to occur in perpetuity. White states in his petition, at page 1, that he is currently serving a life sentence as a result of being found to be a persistent offender following a 1996 conviction. It would arguably be reasonable had he brought this action in 1996, or shortly thereafter, but he has been under this life sentence for twelve years without bringing a collateral attack on his 1990 judgment.

Washington courts have long recognized the value of limiting collateral attacks.

[C]ollateral 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 which require that collateral relief be limited.

In re Pers. Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983).

Allowing a collateral attack after eighteen years does not further this

policy. The State asks this court to hold that eighteen years is too long a time to permit a personal restraint petition under these circumstances, even though White did not receive notice of the limit.

3.2. The judgment in this matter is not facially invalid because of the criminal history listed.

To determine facial invalidity, the court is, appropriately enough, limited to a review of the face of the sentencing documents.

To determine facial invalidity of a prior conviction, the sentencing court may review the judgment and sentence and any other document that qualifies as “the face of the conviction”. . . . The face of the conviction has been interpreted to include those documents signed as part of a plea agreement. . . . In reviewing the plea agreement documents, where a clear determination of the constitutional invalidity cannot be made, the conviction is not facially invalid. . . . If the “trial court would have to go behind the verdict and sentence and judgment to make” a determination on constitutional validity, the conviction is not facially invalid. . . .

In re Pers. Restraint of Thompson, 143 Wn. App. 861, 866-67, 181 P.3d 858 (2008) (cites omitted). “Constitutionally invalid on its face’ means a conviction which without further elaboration evidences infirmities of constitutional magnitude.” State v. Ammons, 105 Wn.2d 175 188, 713 P.2d 719 (1986). “A judgment and sentence is invalid

on its face if. . . the alleged defect is evident on the face of the document without further elaboration.” In re Pers. Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). “The defendant, not the State, ‘bears the burden of establishing the unconstitutionality of his or her prior convictions at such a proceeding.’” Thompson, 143 Wn. App. at 866.

In White’s case, the only documents signed as part of the plea agreement are the Statement of Defendant on Plea of Guilty, Petitioner’s Appendix C, and the Judgment and Sentence, Petitioner’s Appendix B. The criminal history provided by the Department of Corrections, Petitioner’s Appendix A, was prepared in October of 1996 for an entirely different sentencing proceeding and has no relevance to the documents in this case. In citing to the criminal history and the transcript of the sentencing hearing, White is asking this court to go beyond the sentencing documents, something the courts have refused to do. See Thompson, *supra*, at 867.

White claims that the 1976 robbery conviction listed on the Judgment and Sentence makes it invalid on its face because, 1976 being more than ten years prior to 1990, the conviction would have

washed out. However, the test is not the length of time between convictions.

RCW 9.94A.525(2)(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

There is no information in the sentencing documents that tells us when the ten years began running. If he had probation or parole violations (the 1976 conviction would have pre-dated the Sentencing Reform Act (SRA)), he may well not have spent ten years in the community before his 1990 conviction. He argues that error is obvious because of the 1974 burglary conviction written on the judgment and sentence, but that was crossed off, and therefore it is not part of the sentencing documents for the court to consider. The guilty plea statement does not mention any conviction by offense, but acknowledges an offender score of two. Because second degree robbery is a violent offense (see sentencing scoring sheet, Appendix A to this response), the prior robbery

counted as two under the SRA. Thus the guilty plea statement and the judgment and sentence agree.

White further argues that the judgment and sentence is invalid because no maximum penalty or fine is included on the document. However, those maximums *are* contained on the first page of the guilty plea statement, which White signed. By looking solely at the sentencing documents, the court can find that he was properly advised.

3.3 White's guilty plea is not invalid for lack of advisements about the direct consequences of his plea.

a. Sentencing range.

As discussed above, White has failed to show from the face of the judgment and sentence and the guilty plea statement that he was misinformed about his offender score. The colloquy at sentencing is not part of the sentencing documents. Neither is the criminal history as prepared by the Department of Corrections in 1996 for an entirely different sentencing (and there is nothing in the documents presented by the petitioner to indicate that it was the court that was in error rather than DOC). The sentencing court in 1990 can not

be held to be incorrect based on a summary prepared six years later. White signed both the guilty plea statement and the judgment and sentence, and if they were incorrect he was in the best position to know. He argues that the 1974 burglary should not have washed out, but as discussed above, nothing on the face of the documents informs a reviewing court that he is correct. Both the 1974 and 1976 convictions were pre-SRA, and there may well have been other factors affecting the scoring that are not part of the documents. In any event, the 1974 conviction was crossed off and isn't part of the record. In Thompson, *supra*, Thompson's maximum sentence was incorrectly stated in the guilty plea form, but correct on the judgment and sentence, and this court said:

From a review of the face of these documents alone, we do not know whether Thompson was informed of the correct maximum possible sentence on each crime. We concede that given the discrepancy between the forms, Thompson's convictions may be unconstitutional. Like State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 796 (1986) though, because a determination cannot be made from review of the forms alone, Thompson's claim fails.

Thompson, 143 Wn. App. at 867-68. White has similarly failed to

carry his burden. Even if the offender score was incorrectly calculated, such is not apparent from the face of the sentencing documents.

In his statement on plea of guilty, White stipulated that his offender score was two. The only prior offense listed in the judgment and sentence was a 1976 conviction for second degree robbery, which, as discussed above, would result in an offender score of two. There is no inconsistency to invalidate the judgment and sentence. By stipulating to the offender score, White waived any challenge to his criminal history.

[I]f the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

State v. Bergstrom, 162 Wn.2d 87, 94, 169 P.3d 816 (2007),(citing to In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)).

A sentence in excess of the court's statutory authority is subject to challenge. Goodwin, *supra*, at 869. However, White argues that his offender score was actually five, not two. Petition, page 10. If he is correct, then his sentence was not in excess of the court's

authority, but was rather an extremely favorable outcome for him.

Further, even if the sentence were unauthorized due to an incorrect calculation of the offender score, the remedy is not withdrawal of the guilty plea but resentencing.

This court has been clear that the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed. (Cites omitted) ("Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.")

In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005); see also Goodwin, *supra*, at 869.

b. License revocation.

White argues that he was not informed of the mandatory driver's license revocation that followed his conviction because he used a vehicle in the course of committing his crime. He is correct; that advisement does not appear on the face of the judgment and sentence or guilty plea statement. He argues that this is a direct consequence of his plea. The State disagrees.

A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. . . . The court has distinguished direct

from collateral consequences by “whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s *punishment* . . .

State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (cite omitted, emphasis added). Some of the consequences that have been held to be “direct” include “the statutory maximum sentence, ineligibility for the Special Sex Offender Sentencing Alternative program, the obligation to pay restitution, mandatory community placement, consecutive sentences, and any mandatory minimum term.” In re Pers. Restraint of Matthews, 128 Wn. App. 267, 272, 115 P.3d 1043 (2005). Revocation of a driver’s license is not punishment. State v. Dykestra, 127 Wn. App. 1, 13, 110 P.3d 758 (2005); Williams v. Dept. of Licensing, 85 Wn. App. 271, 277, 932 P.2d 665 (1997); State v. Griffin, 126 Wn. App. 700, 705, 109 P.3d 870 (2005) (“[T]he general rule in Washington has long been ‘the suspension or revocation of a driver’s license is not penal in nature and is not intended as punishment, but is designed solely for the protection of the public in the use of the highways.’”)

Because the license revocation, if it in fact occurred, is not punishment, it is not a direct consequence of White’s plea. He cites to

State v. Wilson, 117 Wn. App. 1, 75 P.3d 573 (2003) for the proposition that license revocation is a direct consequence of a plea, and specifically to this sentence: “Wilson was advised of the direct consequences of his plea, that his driver’s license might be suspended or revoked, and that the prosecutor would recommend no contact with the victim, jail time, and two years probation.” Id., at 11. He reads this sentence to say “He was advised of the direct consequences of his plea, *which include possible license revocation.*” A more reasonable reading is “He was advised of the direct consequences of his plea, *and in addition, other consequences such as license revocation.*” This second interpretation is even more likely considering that license revocation was apparently not mandatory in Wilson’s case, but only “possible.” Direct consequences are those that represent an immediate and automatic effect on punishment. A possible license revocation would not be immediate and automatic.

White cites to State v. Hopkins, 109 Wn. App. 558, 567, 36 P.3d 1080 (2001), a Division One decision, for the holding that license revocation is punitive. However, Hopkins is a DUI case, and the court found that license revocation was punitive because the DUI statute

labeled it as such.

Because of the statute's unambiguous language ("shall be punished as follows"), we conclude that a license revocation imposed as part of a sentence under former RCW 46.61.5055 is a penalty for the crime of driving under the influence.

Id., at 567. White did not plead to DUI, and RCW 46.20.285(4) does not classify license revocation as punishment.

46.20.285. Offenses requiring revocation. The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver's conviction of any of the following offenses, when the conviction has become final:

. . . . .  
(4) Any felony in the commission of which a motor vehicle was used.

There is nothing in this statute to take it out of the general rule that license revocation is not punishment, and therefore not a direct consequence of pleading guilty.

White has failed to carry his burden of establishing that he was not advised of all the direct consequences of his plea.

### 3.4 Standard of Review

In order to obtain collateral relief by means of a personal restraint petition, White must demonstrate either an error of

constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). He has failed to demonstrate a constitutional error at all, and any nonconstitutional error, such as the lack of notice of the one year time limit for collateral attack, did not result in a complete miscarriage of justice.

#### IV. CONCLUSION.

For all of the reasons argued above, the State respectfully asks this court to deny his personal restraint petition.

RESPECTFULLY SUBMITTED this 23<sup>d</sup> day of September, 2008.

EDWARD G. HOLM  
Prosecuting Attorney

  
\_\_\_\_\_  
CAROL LA VERNE, WSBA#19229  
Deputy Prosecuting Attorney

# **APPENDIX A**

**ROBBERY, SECOND DEGREE**

(RCW 9A.56.210)

CLASS B FELONY

VIOLENT

*(If sexual motivation finding/verdict, use form on page III-19)*

**I. OFFENDER SCORING (RCW 9.94A.525(8))**

**ADULT HISTORY:**

Enter number of serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony convictions..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony dispositions..... x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony convictions..... x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
(Round down to the nearest whole number)

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**II. SENTENCE RANGE**

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	43 - 57 months	53 - 70 months	63 - 84 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-7 or III-8 to calculate the enhanced sentence.
- D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).

**III. SENTENCING OPTIONS**

A. If sentence is one year or less: community custody may be ordered for up to one year (RCW 9.94A.545).

- *The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules*

CERTIFICATE OF SERVICE FILED SEP 24 PM 10:15

I certify that I served a copy of the Respondent's Response to Personal  
Restraint Petition No. 38025-1-II, on all parties or their counsel of record  
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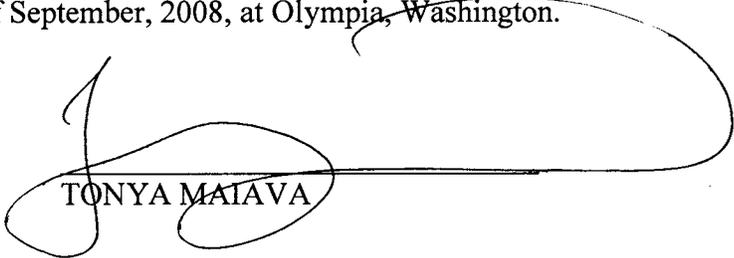
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TO:

JEFF ELLIS  
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I certify under penalty of perjury under laws of the State of  
Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of September, 2008, at Olympia, Washington.

  
TONYA MAIAVA