

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

IN RE THE PERSONAL)	NO. 45426-2-II
RESTRAINT PETITION OF)	SUPPLEMENTAL
)	RESPONSE TO
MICHAEL WHEELER)	PERSONAL RESTRAINT
)	PETITION

Comes now Jon Tunheim, 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. RESPONSE TO ISSUES RAISED

This court has ordered supplemental briefing in this matter addressing whether Wheeler's judgment and sentence is facially invalid.

A judgment and sentence is invalid when the sentencing court exercised a power it did not possess. In re Pers. Restraint of Coats, 173 Wn.2d 123, 136, 267 P.3d 324 (2011). If the judgment and sentence is facially invalid, a petitioner making a collateral attack may avoid the one year time bar of RAP 16.4 and RCW 10.73.090. RCW

10.73.090(1). To determine whether a judgment and sentence is facially invalid, the reviewing court may look beyond the four corners of the document, but is limited to documents which show that there is a legal error making the judgment and sentence invalid. Coats, 173 Wn.2d at 138-39.

In Wheeler's case, his judgment and sentence shows that he was convicted of third degree statutory rape in 1985. He was convicted of violation of the sex offender registration law in 2000, where the date of the crime was between September of 1997 and April of 1998. See Judgment and Sentence attached to Wheeler's petition. If the Court of Appeals was correct in State v. Taylor, 162 Wn. App. 791, 259 P.3d 289 (2011), Wheeler's Judgment and Sentence would be facially invalid. The Taylor court found that the definition of a sex offense did not include the crime for which Taylor was convicted, and therefore the State could not prove all of the essential elements of the offense. Taylor, 162 Wn. App. at 800.

Wheeler's offense of failing to register occurred in 1997 and 1998. He must be sentenced according to the law as it was in those years. At that time, the definition of sex offense in RCW 9.94A.030

did not include the saving language discussed at length in Taylor, 162

Wn. App. at 795, 799. RCW 9.94A.030(33) read:

“Sex offense” means:

(a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) A felony with a finding of sexual motivation under RCW 9.94A.127 or 13.40.135; or

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

LAWS OF 1997, Ch. 340, § 4; Ch. 365, § 1.

The court in Taylor held that a crime is a sex offense only if it is currently a violation of the SRA. Taylor, 162 Wn. App. at 795-96. Because the statute under which Wheeler was convicted in 1985 was repealed in 1988, LAWS OF 1988, Ch. 145, § 24, and the obligation to register as a sex offender did not become law until 1990, LAWS OF 1990, Ch. 3, § 402, statutory rape could not be a sex offense for purposes of the registration requirement. Id. at 795-96.

Under Taylor, Wheeler’s judgment and sentence would be facially invalid because it is possible to tell these facts from looking at the document itself. The State argues, however, that the Taylor court

strained the interpretation of the word "is" in former RCW 9.94A.030(33)(a). Third degree statutory rape was codified as RCW 9A.44.090 in 1985. LAWS OF 1979, ex. sess. Ch. 244 § 6. It is far more reasonable to conclude that the legislature intended that any crime which was at any time included in 9A.44 RCW "is" a sex offense. In addition, the Taylor opinion does not explain why it matters that the statutory rape law was repealed before the registration requirement was enacted. Taylor, 162 Wn. App. at 795-96. If only an offense which "is" a violation of 9A.44 RCW is a sex offense for purposes of the registration statute, then a crime defined in a repealed statute would not be a sex offense regardless of the relationship of the repeal to the 1990 enactment of the registration statute.

The court's objective in statutory interpretation is to determine and implement the intent of the legislature. Estate of Bunch v. McGraw Residential Center, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). The court starts with the plain meaning of the statute and the plain meaning ""may be gleaned 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent

about the provision in question.” Id. at 432 (quoting other cases, cites omitted). In the legislation creating the requirement that sex offenders register, the legislature said:

The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in section 402 of this act.

LAWS OF 1990, Ch. 3, § 401.

The interpretation of the Taylor court did not implement this policy. If monitoring the whereabouts of sex offenders is a priority, it is not likely that the legislature meant to exempt offenders who were convicted before the 1990 legislation was enacted. Therefore, the State asks this court to find that Wheeler's conviction for statutory rape did constitute a sex offense under former RCW 9.94A.030(33) and that his judgment and sentence is facially valid.

IV. CONCLUSION

If this court follows Taylor, Wheeler's judgment and sentence is facially invalid. If it does not, then it is facially valid and his petition should be denied as time barred. The State respectfully asks this court to find that Wheeler's judgment and sentence is facially valid.

RESPECTFULLY SUBMITTED this 14th day of July, 2014.

JON TUNHEIM
Prosecuting Attorney



CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of Supplemental Response to Personal Restrain Petition on the date below as follows:

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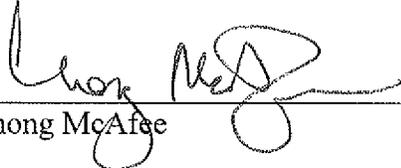
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COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND--

MICHAEL EDWARD SCHWARTZ, APPELLANT'S
ATTORNEY
MSCHWARTZ@CALLATG.COM

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

Dated this 14th day of July, 2014, at Olympia, Washington.



Chong McAfee

THURSTON COUNTY PROSECUTOR

July 14, 2014 - 9:19 AM

Transmittal Letter

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Court of Appeals Case Number: 45426-2

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Sender Name: Chong H McAfee - Email: mcafeec@co.thurston.wa.us

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mschwartz@callatg.com