FILED
JUN 14 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 29546-0-III

IN THE COURT OF APPEALS, DIVISION III,

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

PATRICK LOWDEN

Appellant

BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. The Superior Court had no jurisdiction to deny the Appellant's CrR 7.8 Motion.

II.

ISSUES PRESENTED

1. Whether it was an abuse of discretion for the trial court judge to deny the Appellant's CrR 7.8 Motion.
2. Whether the Court of Appeals should convert the motion to a Personal Restraint Petition (PRP).

III.

STATEMENT OF THE CASE

Mr. Patrick Lowden was convicted of murder in the first-degree in 1994. (CP 5-17) He was sentenced to a life imprisonment. (CP 5 – 17) He appealed to the Court of Appeals, and this court affirmed his first-degree murder conviction. (CP 19-35)

Mr. Lowden also filed a Personal Restraint Petition in 2005 in the Court of Appeals. That petition was also denied by this court. *See* In re PRP of Lowden, No. 23879-2-III.

In 2010, Mr. Lowden filed a CrR 7.8 motion in the Stevens County Superior Court requesting a correction of sentence that was denied by the trial court judge in an order dated on November 10, 2010. (CP 97-99). Mr. Lowden now appeals that order entered by the court. (CP 100-103)

IV.

ARGUMENT

A. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT JUDGE TO DENY THE APPELLANT'S CrR 7.8 MOTION BASED UPON LEGAL PRECEDENT AND WASHINGTON STATE LAW.

Under Washington case precedent and statutory law, if a "defendant is convicted of a Class A felony, for which a life sentence is the maximum penalty, there is effectively no statutory maximum limit on the number of years the defendant may be ordered to serve." *State v. Thomas*, 113 Wash. App. 755, 722, 54 P.3d 719, (2002); RCW 9A.20.021(1)(a).

Mr. Lowden's argument that the court did not have jurisdiction to deny his CrR 7.8 Motion for Correction of Sentence is completely without merit. When requested and if necessary the trial court retains the power and duty to correct a sentence. *See State v. Smissaert*, 103 Wash.2d 636, 639, 694 P.2d 654

(1985); *see also In re Personal Restraint of Goodwin,* 146 Wash.2d 861, 866, 50 P.3d 618 (2002); RCW 10.73.090; *McNutt v. Delmore,* 47 Wash.2d 563, 565, 288 P.2d 848 (1955) ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the *erroneous* sentence, when the error is discovered"). (emphasis added). Sentencing provisions outside of the authority of the trial court are "illegal" or "invalid." *Smissaert,* 103 Wash.2d at 639, 694 P.2d 654.

Here, the trial court had the **statutory authority to deny the motion for a correction of sentence**. RCW 9A.20.021(1)(a). As the court states in the order the "maximum sentence for a conviction for murder in the first degree....in 1994 and presently is confinement for a term of life imprisonment." (CP 97) *See* RCW 9A.20.021(1)(a). The Court of Appeals, Division I, has stated in *State v. Thomas* that a "defendant is convicted of a Class A felony, for which a life sentence is the maximum penalty, there is effectively no statutory maximum limit on the number of years the defendant may be ordered to serve." *State v. Thomas*, 113 Wash. App. 755, 722, 54 P.3d 719, (2002).

The court did not abuse it's discretion in denying the motion based upon statutory authority and case precedent. *State v. Thomas*, 113 Wash. App. 755, 722, 54 P.3d 719, (2002); RCW 9A.20.021(1)(a). An abuse of discretion is present **only** if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable

reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). That has not occurred in this case.

B. THE COURT OF APPEALS SHOULD NOT CONVERT THIS MOTION TO A PERSONAL RESTRAINT PETITION.

The Appellant cites to CrR 7.8(c)(2) as his legal authority for transferring this case to the Court of Appeals as a Personal Restraint Petition. CrR 7.8(c) is the procedure on the vacation of judgment, not correction of sentence. See CrR 7.8(c).

Furthermore, it also does not apply because CrR 7.8(c)(2) states that a court shall transfer a vacation of judgment unless it is barred by RCW 10.73.090.

RCW 10.73.090 explicitly states that:

> (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.
>
> (2) For the purposes of this section, "collateral attack" means any form of post conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, **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 (emphasis added)

This Judgment and Sentence was entered 16 years ago in this case. (CP 5 – 17) Based upon statutory authority the sentence is valid upon its face and it

does not qualify as a PRP under RCW 10.73.090. *State v. Thomas*, 113 Wash. App. 755, 722, 54 P.3d 719, (2002); RCW 9A.20.021(1)(a); RCW 10.73.090.

CONCLUSION

Based upon the legal arguments above, the trial judge's order denying the correction of sentence should be affirmed based upon statutory authority and case precedent. *State v. Thomas*, 113 Wash. App. 755, 722, 54 P.3d 719, (2002); RCW 9A.20.021(1)(a).

Dated this 10th day of June, 2011.

Shadan Kapri WSBA # 39962
Senior Deputy Prosecuting Attorney
Stevens County
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Mr. David Koch, Nielsen Broman & Koch PLLC, 1908 E. Madison Street, Seattle, WA 98122 and to Mr. Patrick Lowden, #722227, 191 Constantine Way, Aberdeen, WA 98520 on June 10, 2011.

Shadan Kapri,
Senior Deputy Prosecuting Attorney