

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 SEP 15 A 11: 31
BY RONALD R. CARPENTER
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint)
Petition of)
) No. 77973-2
)
) STATE'S
) RESPONSE TO MOTION
) FOR SUBSTITUTION AND
) SUPPLEMENTAL PLEADING
COREY BEITO,)
Petitioner.)
_____)

A. FACTS RELEVANT TO MOTION.

Corey Beito was charged by information with aggravated murder in the first degree for strangling 14-year-old Jessica Seim. After several appeals, Beito's conviction and exceptional sentence was affirmed.

Beito subsequently filed this personal restraint petition, alleging that imposition of an exceptional sentence based on judicial fact-finding violated the rule set forth in Blakely v. Washington, 524 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403

(2004). The Court of Appeals dismissed the petition in October of 2005. Counsel for petitioner, Gregory Link, filed a timely Motion for Discretionary Review on November 14, 2005. This Court called for a response from the State in November of 2006, and allowed for a reply to be filed by Mr. Link. The State filed a response on January 17, 2007. Mr. Link filed a reply on January 25, 2007.

Consideration of review was deferred pending this Court's decision in State v. Recuenco, No. 74964-7. Recuenco was decided on April 17, 2008. This Court requested additional briefing by no later than July 21, 2008. Both parties timely filed their supplemental briefing on July 21, 2008.

On August 18, 2008, Mr. Ellis attempted to file in this Court a "Notice of Appearance and Supplemental Pleading in Support of Discretionary Review." Mr. Ellis represented that family members of Mr. Beito recently retained him, and that Mr. Beito no longer wanted appointment of counsel. The pleading was rejected for filing on that day. On August 19, 2008, Mr. Ellis filed a "Motion to Permit Substitution of Counsel; Motion to Reconsider Petitioner's Request to File a Supplemental Brief Through New Counsel."

The State has no objection to substitution of counsel.

However, the State does object to the new pleading filed by Mr. Ellis, which is not authorized by the RAPs or by this Court's previous orders in this case. This case has been extensively briefed over the past three years, and Mr. Ellis's additional briefing is untimely. Moreover, Mr. Ellis' brief would not be helpful to this Court. It does not address the main argument made in the State's briefing: that petitioner has failed to establish actual and substantial prejudice where he waived his right to a jury trial. Moreover, Mr. Ellis's briefing raises an entirely new issue: that the aggravating factor was not charged. For these reasons, Mr. Ellis's untimely supplemental pleading, which raises a new issue three years after the motion for discretionary review was initially filed, was properly rejected by this Court.

B. ARGUMENT.

BEITO'S CLAIM OF CHARGING ERROR WOULD REQUIRE THIS COURT TO ADOPT A NEW RULE OF CRIMINAL PROCEDURE THAT WOULD NOT BE APPLICABLE TO BEITO'S CASE.

Beito argues for the first time in Mr. Ellis's supplemental pleading submitted on August 18, 2008, that Beito should have been charged with any aggravating factors that were imposed. None of this Court's precedents have so held. Indeed, since the decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), was issued, this Court has nonetheless affirmed exceptional sentences that were not charged in the charging document in State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006). And indeed, prior to issuance of the Blakely decision the appellate courts of Washington have affirmed hundreds, if not thousands, of exceptional sentences that were not charged in the charging documents. Mr. Ellis fails to explain how the new rule of criminal procedure set forth in Blakely, which was based on the Sixth Amendment's guarantee of a jury trial, would change the notice requirements contained in other, non-jury provisions of the

federal and state constitutions.

More fundamentally, Mr. Ellis is arguing for a new rule of criminal procedure, that if adopted by this Court, would not apply to Beito's case, which became final in 2004. New rules of criminal procedure do not apply retroactively to cases that were final when the new rule was announced. In Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the United States Supreme Court set forth a new formulation for determining the retroactive application of new rules. Pursuant to Teague, when a court's decision results in a new rule, that rule applies to all cases pending on direct review. Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004). As to convictions that were already final when the new rule was announced, new substantive rules, such as interpretations of criminal statutes, generally apply retroactively. Id. In contrast, new rules of procedure do not apply retroactively unless the new rule constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (citing Teague, 489 U.S. at 311). In order to fall within this narrow category the rule must be one "without which the likelihood of an

accurate conviction is *seriously* diminished." Id. (emphasis in original) (citing Teague, 489 U.S. at 313). A charging error has no effect on the accuracy of the criminal proceeding. The new rule advanced by Mr. Ellis is a new rule of criminal procedure that would not apply to cases that are already final, and could not be applied to Beito's case.

C. CONCLUSION.

Mr. Ellis's additional pleading was properly rejected. Beito has failed to establish constitutional error that resulted in actual and substantial prejudice. This personal restraint petition was properly dismissed. The motion for discretionary review should be denied.

DATED this 12th day of September, 2008.

Respectfully submitted,

DAN SATTERBERG
King County Prosecuting Attorney

by 
ANN SUMMERS, #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
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CERTIFICATION OF SERVICE 2008 SEP 15 A 11:31

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Jeffrey Ellis, at the following address: Ellis, Holmes & Witchley, 705 Second Avenue, Suite 401, Seattle, WA 98104, attorney for the petitioner, containing a copy of the State's Response to Motion for Substitution and Supplemental Pleading in In re Pers. Restraint of Corey Beito, No. 77973-2, in the Supreme Court of the State of Washington.

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

W Brame 9/15/08
Name Date
Done in Seattle, Washington

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gregory Link, Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101, attorneys for the petitioner, containing a copy of the State's Response to Motion for Substitution and Supplemental Pleading in In re Pers. Restraint of Corey Beito, No. 77973-2, in the Supreme Court of the State of Washington.

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

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Done in Seattle, Washington

FILED AS
ATTACHMENT TO EMAIL

OFFICE RECEPTIONIST, CLERK

To: Whisman, Jim
Cc: Summers, Ann; Jeff Ellis; Greg Link
Subject: RE: Beito, No. 77973-2

Rec. 9-15-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]
Sent: Monday, September 15, 2008 11:22 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Summers, Ann; Jeff Ellis; Greg Link
Subject: Beito, No. 77973-2

Dear Supreme Court Clerk,

Attached is the State's Response to Beito's Motion to Substitute Counsel and Supplemental Pleading.

Please let me know if there are any difficulties with this filing.

James M. Whisman, WSBA No. 19109
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
King County Prosecuting Attorney's Office
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**** New email address: jim.whisman@kingcounty.gov ****