

No. 78156-7

SUPREME COURT OF THE STATE OF WASHINGTON

In Re The Personal
Restraint Petition of:

SCOTT W. SKYLSTAD,

Petitioner.

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REPLY TO THE ANSWER TO MOTION
FOR DISCRETIONARY REVIEW



SCOTT W. SKYLSTAD

DOC # 931646, CC2

Clallam Bay Correction Center

1830 Eagle Crest Way

Clallam Bay, WA 98326

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A. Identity of Petitioner

SCOTT W. SKYLSTAD asks this court to grant the relief sought in Personal Restraint Petition (COA No. 24681-7-III [Appendix D]) after reversing the decision of the Division III Court of Appeals in the [MOTION] FOR DISCRETIONARY REVIEW.

B. Decision

The decision for review is enclosed in Petitioners "[MOTION] FOR DISCRETIONARY REVIEW" (see Appendix C thereto). The Division III Court of Appeals dismissed Petitioners Personal Restraint Petition (COA No. 24681-7-III [Appendix D]) under RCW 10.73.090, when there has NOT been an issuance of "a certificate of finality" (pursuant to RAP 12.9 (e)) due to the fact that the second appeal is still pending in this case under Supreme Court Case No. 78126-5. According to RAP 12.9 (a), "by initiating a separate review of the lower court decision entered after issuance of the mandate" (the second appeal [No. 78126-5]) automatically invoked the "RECALL OF MANDATE" Rule pursuant to RAP 12.9 (a). Thus, there has been NO "final judgment" for RCW 10.73.090 purposes. Further, Mr. Skylstad has based his PRP on Newly Discovered Evidence (see Exhibits' A & B to the PRP [Appendix D to the MOTION FOR DISCRETIONARY REVIEW]) that was withheld from the trial; which, excludes the provisions of RCW 10.73.090, if in fact the time clock started (which it has NOT). (see RCW 10.73.100 (1)). Thus, there has been "obvious error" committed by the Division III

Court of Appeals ~ that has "departed from the accepted and usual course of proceedings" when misapplying a time bar to the Petition (see RAP 13.5 (b), (1)&(2)).

C. Issues Presented for Review

No.1: Whether any of the Law cited by Respondent applies to the case at hand, and, if not, does Respondent's argument NOT have any bases in law and/or fact?

No.2: Whether the one-year time clock of RCW 10.73.090 starts after the first appeal, when there has never been a nunc pro tunc order by any court directing any such action take place?

No.3: Whether RCW 9.94A.585, and/or, "The Law of the case Doctrine" barred the second review (appeal) requiring "final judgment"?

No.4: Whether the second appeal (review) automatically Recalled the mandate and stayed the one-year time clock of RCW 10.73.090?

No.5: Whether a Personal Restraint Petition (PRP) that is based on "NEWLY DISCOVERED EVIDENCE" that was with-held from Mr. Skylstad's trial, which excludes the one-year time requirements of RCW 10.73.090, should be dismissed?

No.6: Whether the undisputed facts, law, and evidence set forth by Mr. Skylstad in his PRP establishes meritorious grounds for relief?

D. Statement of the Case

The statement of the case is contained in the opening briefs. Additionally, it should be noted that the only issue disputed by Mr. Skylstad is the fact that Respondent states that Petitioner has asked that this "matter be remanded to the Court of Appeals for a decision on the merits of the Petition (see ANSWER TO MOTION FOR DISCRETIONARY REVIEW, page 3). Contrary to this, Petitioner RESPECTFULLY ASKS that this Court exercise it's "original concurrent jurisdiction" pursuant to RAP 16.3 (c) "in [this] personal restraint proceeding..." as this PRP is undisputed and the one-year time clock of RCW 10.73.090 either does NOT apply, as this petition is based on Newly Discovered Evidence (as shown in Appendix D of MOTION FOR DISCRETIONARY REVIEW [Exhibts A & B]) that was with-held from the trial, and/or, that the one-year time clock has NOT ever started due to the pending appeal (see Supreme Court Case No. 78156-7).

E. Law & Argument

RESPONDENT'S ANSWER IS FRIVOLOUS

No.1: Respondent has used law & facts in the Answer that is

totally NOT relevant to the case at hand. In fact, NOT a single case cited by respondent is applicable to the issues herein.

RCW 10.73.110 requires that: "At the time judgement and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100". In the AMENDED JUDGMENT AND SENTENCE (see Appendix A - to the [MOTION] FOR DISCRETIONARY REVIEW) part 5.1, on page 9, reads that:

"COLLATERAL ATTACK ON JUDGEMNT. Any Petition or motion for collateral Attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas petition, motion to vacate judgment, motion to withdraw guilty plea, motion for a new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090."

Pursuant to RAP 2.1 (a), 6.1 and 2.2 (a) (1) & (13), Petitioner initiated review (appeal) of the AMENDED JUDGMENT AND SENTENCE described herein (COA No. 23241-7-III and Supreme Court No. 78126-5). This case is still pending. Under ALL relevant case law, there is NO "legitimate expectation of finality in a sentence [judgment] due to a pending appeal..." see Washington v. Hardesty, 129 Wash.2d 303 (1996); However, upon "...completion of the proceeding in the appellate court when review [appeal] is not accepted...", a "Certificate of Finality" "will issue" pursuant to RAP 12.5 (e).

In this case, there has never been issuance of the "Certificate of Finality" due to the fact that there has never been "final judgment" due to the pending review process not yet being complete. Thus, there is no reasonable expectation of finality in this case with a pending appeal and no Certificate of Finality.

Further, In Hardesty, (Id.) the Court held that: "...judgment is effective as of the date of entry... ..from entry of the amended judgment..."[129 Wash.2d Page 313]. In State v. Stoudmire, No. 31195-0-II (2005), the Division II Court of Appeals held that: "...under State v. Smissaert, 103 Wn.2d 636, 640, 694 P.2d 654 (1985), the effective date of a corrected judgment is the date of entry, 'not' the date of the original judgment [as Respondent has incorrectly argued in the ANSWER TO MOTION FOR DISCRETIONARY REVIEW]..." Smissaert, 103 Wn.2d at 638; citing Stoudmire, (Id.).

As described herein, Respondent has misapplied the relevant Law. As shown, there is **NOT** a "legitimate expectation of finality" for collateral attack purposes, and, **NO** "Certificate of Finality" due to the pending appeal (review). Thus, Mr. Skylstad's Personal Restraint Petition (PRP) is timely under the relevant Law.

THERE HAS NEVER BEEN A NUNC PRO TUNC ORDER

No.2: The only way for the one-year time clock of RCW 10.73.090

to have started after the appeal of the original JUDGMENT & SENTENCE, as Respondent incorrectly argues, is if there was a nunc pro tunc ORDER issued ~ which there has never been.

"A trial court has discretionary power to enter a nunc pro tunc judgment where justice so requires. Such discretionary action may not be disturbed upon appeal except upon a clear showing that the ruling was manifestly unreasonable. In re Estate of Carter, 14 Wash. App. 271, 276, 540 P.2d 474 (1975). The purpose of a nunc pro tunc order is to record some prior act of the court which was actually performed [56 Wash.App. Page 411] but entered into the record at the time. State v. Mahlhorn, 195 Wash. 690, 692 (1938); Ryan, 146 Wash. at 117; quoting Washington v. Rosenbaum, 56 Wash.App. 407, 784 P.2d 166 (1989).

Here, Respondent claims the one-year time clock started upon completion of the first appeal, even though there is a second appeal still pending...

As described herein, the only way the time could have started upon the completion of the first appeal is if the court had issued a nunc pro tunc ORDER directing such occurrence to take place. Respondent is in error on this issue as there has never been any such ORDER, and, pursuant to the relevant and applicable Law of the case, the one-year time clock of RCW 10.73.090 has NOT begun due to the pending appeal.

**RCW 9.94A.585 (1) & "THE LAW OF CASE DOCTRINE" DO NOT APPLY
TO THIS CASE**

No.3: Respondent incorrectly points to RCW 9.94A.585 (1) and "The Law of the Case Doctrine" in the ANSWER, incorrectly arguing that the second appeal (that is still pending in this Court under Supreme Court No. 78126-5) is some how precluded, which started the one-year time of RCW 10.73.090. This argument is totally with-out merit for the following reasons:

RCW 9.94A.585 (2) is the relevant Law when applied to this Case, which reads:

"A sentence outside of the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with court rules adopted by the Supreme Court."

RCW 9.94A.585 (2).

Here, Mr. Skylstad contested a sentence "outside of the standard sentence range" based on the Constitutional Prohibitions of the State and Federal ex post facto Clauses. (see the pending PETITION FOR DISCRETIONARY REVIEW under Supreme Court Case No. 78126-5).

The "court rules adopted by the Supreme Court" are the Rules of Appellate Procedure (known as the RAP Rules). Accordingly, RAP 2.5 (c) states:

"Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case, and where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."

RAP 2.5 (c), (1) & (2).

"...[T]he law of the doctrine begins with Greene v. Rothchild, 68 Wash. 2d 1, 414 P.2d 1013 (1966), which is the "foundation case for modern analysis" of the law of the case doctrine... In Greene, this court held that the law of the case doctrine is a discretionary rule that should not be applied when the result would be "manifest injustice":

Under the doctrine of "law of the case", as applied in this jurisdiction, the parties, the trial court, and the court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled"..." quoting Washington v. Worl, 129 Wash.2d 416, 918 P.2d 905 (1996).

"By using the term 'may' RAP 2.5 (c) (2) is written in discretionary, rather than mandatory, term. See Folsom v. County of Spokane, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). The plain language of the rule affords appellate courts discretion in it's application. RAP 2.5 (c) (2) codifies at least two historically recognized exception to the law of the case doctrine that operate independently.

First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. See, e.g. First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or., 108 Wn.2d 324, 333, 738 P.2d 263 (1987). This common sense formulation of the doctrine assures that the appellate court is not obliged to perpetuate it's own error.

Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal [as was the case here in State v. DeSantiago, 149 Wn.2d 402 (2003)]. See RAP 2.5 (c) (2) (authorizing appellate courts to review prior decision on the basis of the law at the time of the later review). citing Roberson v. Perez, No. 75486-1 (2005).

Here, there was clearly a change in the Law when DeSantiago was over-ruled. Then, when the appeals court applied that ruling

to Mr. Skylstad to increase the sentence, Mr. Skylstad appealed under ex post facto grounds. This appeal is still pending and has never been objected to under any of the issues raised by Respondent.

As described herein, the second appeal was NOT barred by either "The Law of the case Doctrine", and/or, RCW 9.94A.585, and, accordingly, there has been no final judgment to start the RCW 10.73.090 time clock for collateral attack review as the appeal is still pending in this court.

AUTOMATIC RECALL OF MANDATE RULE

No.4: By initiation of the second "separate review (the second appeal) of the lower court decision entered (the AMENDED JUDGMENT & SENTENCE)", "after issuance of the Mandate", automatically evoked the "RECALL OF MANDATE" Rule under RAP 12.9 (a); which states in relevant part that:

"...[B]y initiating a separate review of the lower court decision...[will]...recall the mandate..."
RAP 12.9 (a) (in relevant part).

Here, Respondent has correctly stated that the mandate was issued after the first review (appeal) directing resentencing; However, after entry of the AMENDED JUDGMENT & SENTENCE the second appeal (review) was initiated, which automatically evoked the RECALL OF MANDATE Rule of RAP 12.9 (a). Because the mandate is still recalled, as the review is still pending in this Court

(see Case No.78156-7), which, in-effect, has stopped the RCW 10.73.090 time clock for these collateral attack purposes. Thus, there is NO issuance of the "mandate disposing of [the] timely filed direct appeal..."(RCW 10.73.090 (3) (b)), due to the RECALL OF MANDATE (RAP 12.9 (a)), as this appeal (review) is still pending (No.78156-7).

As described herein, there is NO "mandate disposing of a timely filed appeal" due to the "RECALL OF MANDATE" from the initiation of the currently pending review still in effect. Accordingly, the RCW 10.73.090 time clock is NOT ticking as the appeal is NOT yet final... Therefore, the PRP is timely brought and should be decided as well. Mr. Skylstad is entitled to relief.

NEWLY DISCOVERED EVIDENCE

No.5: Besides the fact that there has NOT been "final judgment" due to the currently pending review (appeal) of the AMENDED JUDGMENT & SENTENCE (No. 78156-7), the PRP is based on NEWLY DISCOVERED EVIDENCE that excludes the provisions of RCW 10.73.090.

RCW 10.73.100 (1) states:

"Collateral attack—When one year time limit not applicable. The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion..."

RCW 10.73.100 (1).

Here, the PRP is based entirely on NEWLY DISCOVERED EVIDENCE that was with-held from the trial, as well as from Mr. Skylstad. Everything else is in relation back, as the Law so requires. This evidence shows that Mr. Skylstad's Attorney was NOT working on behalf of the defense, and, in-fact, had a direct conflict of interest that resulted in undermining key aspects of the defense while secretly securing unlawful and/or unlawfully obtained evidence of the prosecution. Further, this evidence shows Mr. Skylstad is innocent of the crimes convicted of, after being wrongly convicted by the acts and/or omissions mentioned herein. (see MOTION FOR DISCRETIONARY REVIEW, Appendix D ~ the PRP of SCOTT W. SKYLSTAD [see EXHIBITS A&B for the NEWLY DISCOVERED EVIDENCE, and EXHIBITS C&D, for evidence that relates back]).

AS described herein, NEWLY DISCOVERED EVIDENCE shows that the restraint is unlawful, which negates the one-year time clock of RCW 10.73.090 (even though the appeal is still pending and there has been NO "final judgment", which also negates the time clock of RCW 10.73.090). Thus, the PRP is timely and Mr. Skylstad has demonstrated meritorious grounds for relief.

**THE UNDISPUTED LAW & FACTS OF MR. SKYLSTAD'S PRP HAS SETFORTH
MERITORIOUS GROUNDS FOR RELIEF FROM UNLAWFUL RESTRAINT**

No.6: The petitioner, Mr. Skylstad, is under a "restraint" pursuant to RAP 16.4 (a) & (b), which is "unlawful" pursuant to RAP 16.4 (c), (2) & (3), and, because this Court gave Respondent the opportunity to "identify in the response all material disputed question of fact" pursuant to RAP 16.9 and 16.10 (b), (see also:ORDER from the Court dated Jan. 30, 2006), the petition is undisputed and Mr. Skylstad RESPECTFULLY ASKS this Court "to grant appropriate relief" pursuant to RAP 16.3 (c), 16.4 (a), and 16.14 (c).

"The remedy of Habeas Corpus found early expression in the Magna Carta, and was carried and embedded into our Federal constitution by this nation's founding fathers. In the context of imprisonment in connection with criminal offenses, the writ of Habeas Corpus provides a speedy device to test the constitutionality of the detention. To insure it's availability, both the federal constitution and the states constitution prohibit suspension of the writ except under extreme circumstances. U.S. Const. art. 1, § 9; Const. art. 1, § 13. In this state, the writ, by legislative enactment, with certain reservations, is available to "Every person restrained of his liberty under any pretense whatever,..." RCW 7.36.010..." quoting In re Application for a writ of Habeas Corpus of Elwood Joseph Honore, 77 Wash.2d 660

(1970) (in relevant part).

RAP 16.3 (a) states:

"Habeas Corpus and Postconviction Relief. Rules 16.3 through 16.15 and rules 16.24 through 16.27 establish a single procedure for original proceedings in the appellate court to obtain relief formally available by a petition for writ of habeas corpus or by an application for post-conviction relief."

RAP 16.3 (a).

Here, this court should "grant appropriate relief" pursuant to RAP 16.4 (a), as the PRP is undisputed in accordance with RAP 16.9. Further the restraint is "unlawful" pursuant to RAP 16.4 (c), (2) & (3).

"A collateral attack of a criminal judgment and sentence should not simply reiterate the issues resolved at trial and on direct review. It should raise new points of fact and law that were not or could not have been raised in the principle action. In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964 (1994). The petition must be supported by facts or evidence upon which the petitioner's claim of unlawful restraint is based...Cook, 114 Wn.2d at 813-14. A petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay. " In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); quoting State v. Nordmark, 103 Wash.App. 1039, 103 Wash. App. 1039 (2000); see also RAP 16.7 (2) (i).

As shown herein, Mr. Skylstad has demonstrated with overwhelming facts and Law (that is supported by ALL the evidence) that the restraint is unlawful. This PRP is undisputed and Mr. Skylstad should be GRANTED relief.

F. Conclusion

Based on the above facts and authorities, Petitioner SCOTT W. SKYLSTAD RESPECTFULLY ASKS that this Court find that due to the pending appeal in this Court, there has NOT been "final judgment" for RCW 10.73.090 purposes, and, therefore, the PRP is timely brought. Further, because Respondent has NOT disputed the petition, Mr. Skylstad has established meritourous grounds for relief. Based on this undisputed PRP, Mr. Skylstad further RESPECTFULLY ASKS that this Court GRANT the appropriate relief by vacating the convictions and remanding for a new trial with new counsel.

RESPECTFULLY SUBMITTED this 23rd. day of March, 2006.

A handwritten signature in black ink, appearing to read "Scott W. Skylstad", written over a horizontal line.

SCOTT W. SKYLSTAD

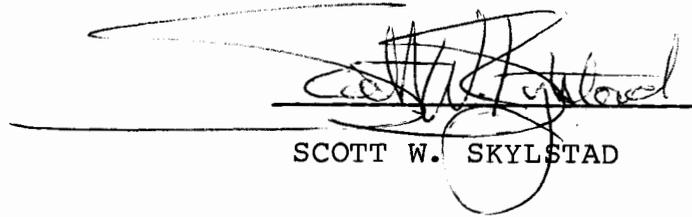
Petitioner, Pro Se

PROOF OF SERVICE

I, SCOTT W. SKYLSTAD, hereby declare and/or certify, by my signature, under the penalty of perjury, that on this 3 rd. day of April, 2006, I served via U.S. mail postage prepaid, on copy of the: REPLY TO THE ANSWER TO MOTION FOR DISCRETIONARY REVIEW, to the attorneys' of record:

Hon. Steven J. Tucker
Spokane County Prosecutor
Mr. Kevin Korsmo, Deputy
110 W. Mallon Ave.
Spokane, WA 99260

SIGNED this 3rd. day of April, 2006.


SCOTT W. SKYLSTAD