

NO. 81102-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL W. McKIERNAN,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 4

A. THE PETITION IS BARRED BY THE STATUTORY TIME LIMIT ON COLLATERAL ATTACK..... 4

1. An Erroneous Sentencing Provision In A Judgment And Sentence Does Not Open The Underlying Conviction To An Untimely Attack..... 6

2. When A Plea Statement Contains Erroneous Advice As To Sentencing Consequences, This Advice Does Not Render The Subsequent Judgment And Sentence “Invalid On Its Face.” 8

3. Under Both The Language And Policy Of RCW 10.73.090, A Judgment And Sentence Cannot Become “Invalid On Its Face” Because Of Errors In A Plea Statement..... 11

B. THE PETITIONER WAS CORRECTLY ADVISED THAT, IF THE SENTENCING COURT FOUND SUBSTANTIAL AND COMPELLING CIRCUMSTANCES, HE COULD RECEIVE ANY SENTENCE UP TO LIFE IMPRISONMENT..... 14

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

WASHINGTON CASES

Brooks v. Rhay, 92 Wn.2d 876, 602 P.2d 356 (1979)..... 6
In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)..... 6
In re Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002) 9, 11
In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) 9
In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004)..... 15, 16
In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993) 10, 12
In re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000)..... 7, 9
In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000)..... 9
In re Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003)..... 4
State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980) 15
State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)..... 16
State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 16

WASHINGTON STATUTES

RCW 10.37.090(1)..... 4
RCW 10.73.090 4, 6, 7, 11
RCW 10.73.090(3)(a)..... 4
RCW 10.73.100 5, 7
RCW 10.73.130 5
RCW 7.36.130 4

I. ISSUES

(1) A judgment and sentence imposed a lawful sentence at the bottom of the standard sentence range. The judgment and sentence also contained a provision that incorrectly listed the maximum sentence as "20 Yrs. to Life." Does this inclusion of this provision excuse compliance with the statutory time limit on collateral attack, so as to allow the petitioner to raise an otherwise untimely claim that he was mis-advised of the sentencing consequences of his guilty plea?

(2) The plea statement incorrectly stated that the maximum sentence was "twenty years to life imprisonment." It correctly stated that the standard range was 36-48 months, and the defendant was sentenced within that range. Does the portion of the plea statement that sets out the maximum sentence render the resulting judgment and sentence "invalid on its face," so as to allow the challenge to be raised beyond the statutory time limit?

(3) If the challenge can be raised, is the guilty plea invalid, where the petitioner was correctly told that (a) he would receive a standard-range sentence absent substantial and compelling reasons not to do so, and (b) if such reasons were found, the court could impose any sentence up to life imprisonment?

II. STATEMENT OF THE CASE

On March 14, 1987, the petitioner, Michael W. McKiernan, was hitchhiking on Highway 99 in Snohomish County. He was picked up by 70-year-old Elliott Wright. Mr. Wright drove the petitioner to a location in Everett. The petitioner grabbed his shirt and demanded money. He said that he had a knife and was going to kill Mr. Wright. Mr. Wright gave the petitioner all of his money, which amounted to \$5.05. The petitioner then told Mr. Wright to get out of the car. When Mr. Wright started to open the door, the petitioner punched him in the nose. He shoved Mr. Wright onto the road and drove off in his car. Mr. Wright suffered a laceration on his nose and a probable fracture of the right maxilla. App. B.¹

The petitioner was charged with first degree robbery. App. C. On May 14, 1987, the petitioner entered a plea of guilty. No transcript of this hearing has been obtained. The plea statement stated that the maximum sentence was "twenty (20) years to life imprisonment." The standard sentence range was "confinement for at least 36 months and not more than 48 months." App. C at 1 ¶ 5.

¹ The State was never directed to respond to the personal restraint petition. Certified copies of some of the relevant documents were attached to the State's Answer to Motion for Discretionary Review. References to the record in this brief will cite the appendices to that Answer.

The State agreed to recommend a sentence of 36 months' confinement. App. C, State's Sentence Recommendation.

The plea statement advised the petitioner of the effect of that recommendation:

I have been informed and fully understand that the court does not have to follow anyone's recommendation as to sentence. I have been fully informed and understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range either I or the state can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

App. C at 2, ¶ 15.

The petitioner was sentenced on May 19, 1987. The court accepted the State's recommendation and sentenced the petitioner to 36 months' confinement, the bottom of the standard range. Under "sentencing data," the judgment and sentence listed the maximum term as "20 Yrs. to Life." The judgment and sentence was filed the following day, May 20. App. D. No appeal or other challenge was filed for over 20 years.

On October 10, 2007, the petitioner filed a personal restraint petition. The Court of Appeals dismissed the petition without serving it on the respondent or calling for an answer. The petitioner

moved in this court for discretionary review. The State filed an answer, which was limited to providing reasons why review should not be granted. This court granted review. This supplemental brief is the first opportunity that the State has had to address the merits of the petition.

III. ARGUMENT

A. THE PETITION IS BARRED BY THE STATUTORY TIME LIMIT ON COLLATERAL ATTACK.

RCW 10.37.090(1) sets a time limit on collateral attacks:

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.

When a petition is not filed within the allowable time, “[n]o court or judge shall inquire into the legality of any judgment ... whereby the party is in custody.” RCW 7.36.130; see In re Turay, 150 Wn.2d 71, 79, 74 P.3d 1194 (2003).

Since the judgment in the present case was not appealed, it “became final” when it was filed, on May 20, 1987. RCW 10.73.090(3)(a). The statutory time limit applies to petitions filed after July 23, 1990, so that date was the effective time limit in the

present case. RCW 10.73.130. The present petition was filed on October 10, 2007. It is untimely by over 17 years.

RCW 10.73.100 sets out several exceptions to the time limit. These cover petitions that are based solely on (1) newly discovered evidence, (2) unconstitutionality of the statute that the defendant was convicted of violating, (3) double jeopardy, (4) insufficiency of evidence, (5) the imposition of a sentence in excess of the court's jurisdiction, or (6) a significant change in the law that is retroactively applicable. The petitioner does not claim that any of these exceptions are applicable.

The petitioner does claim that the judgment can be challenged because it was not "valid on its face." His analysis confuses two distinct claims of error: one involving the judgment and sentence, the other involving the plea statement. The error in the judgment and sentence does not provide any valid basis for challenging the underlying conviction. The error in the plea statement could provide a basis for challenging the conviction, but it does not render the judgment and sentence "invalid on its face." Consequently, there is no basis for allowing a challenge to the conviction beyond the statutory time limit.

1. An Erroneous Sentencing Provision In A Judgment And Sentence Does Not Open The Underlying Conviction To An Untimely Attack.

Under RCW 10.73.090, “invalid on its face’ means the judgment and sentence evidences the invalidity without further elaboration.” In re Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). In the present case, the judgment and sentence lists a maximum term of “20 Yrs. to Life.” This appears on the face of the judgment and sentence, without further elaboration. If that provision renders the judgment and sentence invalid, the judgment is “invalid on its face.”

The existence of a sentencing error does not, however, invalidate the underlying conviction. The court pointed this out in a case involving the unlawful imposition of a concurrent sentence:

The entire judgment of the trial court is not rendered void or unenforceable. The conviction still stands. The appropriate remedy is resentencing to correct the erroneous sentence imposed.

Brooks v. Rhay, 92 Wn.2d 876, 878, 602 P.2d 356 (1979).

In the present case, the error in the judgment and sentence could be cured by striking the words “20 Yrs. to.” This “remedy” would have no significance for anyone, and the petitioner does not appear to seek it. The recitation in the judgment of the maximum sentence had no impact on the sentence actually imposed --- a

standard range sentence of 36 months' confinement. The existence of a meaningless error in the sentencing provisions does not justify withdrawal of the underlying guilty plea.

Under RCW 10.73.090, a claim that a judgment is "invalid on its face" can be raised without regard to the time limit. The inclusion of such a claim does not, however, open the judgment to attack on any other grounds. Rather, the grounds for challenge are limited to those allowed under RCW 10.73.090 and 10.73.100. If a petition includes grounds that are permissible under RCW 10.73.090, and other grounds that do not fall within either statute, only the grounds that are covered by RCW 10.73.090 will be considered. The remaining grounds will be dismissed. In re Stoudmire, 141 Wn.2d 342, 348-50, 5 P.3d 1240 (2000).

This is the situation in the present case. This court can consider the petitioner's claim that the judgment and sentence misstated the statutory maximum. If necessary, it can cure that error by correcting the judgment and sentence. The existence of this claim does not, however, change the applicability of the time limit to any other claims. The petitioner's challenge to the underlying conviction must itself fall within an exception to the time limit. If it does not, it must be dismissed.

2. When A Plea Statement Contains Erroneous Advice As To Sentencing Consequences, This Advice Does Not Render The Subsequent Judgment And Sentence “Invalid On Its Face.”

This petitioner’s basis for challenging the conviction is that his guilty plea was allegedly based on mis-advice concerning the maximum sentence for the crime. This alleged error is similar to but distinct from the misstatement in the judgment and sentence. Since sentence was imposed five days after the plea was entered, nothing in the judgment and sentence could have had any possible effect on the petitioner’s decision to enter the guilty plea.

With respect to the information in the plea statement, the situation is different. That information was of course known to the defendant at the time of the plea. Nevertheless, any error in that statement does not appear on the face of the judgment and sentence. Consequently, any such error does not prevent the judgment from being “valid on its face,” so that it can be challenged beyond the statutory time limit.

This court has sometimes been willing to consider “documents signed as part of a plea agreement” in determining “facial invalidity.” This only occurs, however, under narrow circumstances:

The question is not ... whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence.

In re Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002).

Case law illustrates this distinction. When plea documents showed that some of the charges were filed after the statute of limitations had run, they could be considered in determining the “facial” validity of the judgment and sentence. Stoudmire, 141 Wn.2d at 354. Similarly, plea documents could be considered when they showed that the defendant had been convicted of an offense that did not become a crime until two years later. In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). They could likewise be considered when they showed that the defendant had been convicted of a non-existent crime. In re Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004).

In contrast, plea documents could not be considered when they merely showed that the defendant was mis-advised of the sentencing consequences of his plea. Such documents might show the invalidity of the *plea*, but they did not demonstrate the invalidity of the *judgment*. Hemenway, 147 Wn.2d at 533. The situation in the present case is substantially the same as that in

Hemenway. Even if the plea documents show that the plea was invalid, this does not demonstrate that the *judgment and sentence* was invalid *on its face*.

The statutory time limit was applied to another claim similar to that in the present in In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993). One of the petitioners (Graham) was told in his plea statement that his maximum sentence was “not less than 20 years.” He was also told that the standard range was between 41 and 54 months. In fact, he had committed his crime prior to the Sentencing Reform Act, so his term of confinement could be changed by the Indeterminate Sentence Review Board. In his personal restraint petition, Graham claimed that he did not realize that he could serve more than 54 months. Runyan, 121 Wn.2d at 438-39. This court applied the time bar and dismissed the claim. Id. at 454.

The same analysis applies here. Like Graham, the petitioner claims that he was not properly informed of the sentencing consequences of his plea. The validity of this claim cannot be determined from the face of the judgment and sentence. An examination of plea documents might show that the plea was invalid, but it cannot show that the *judgment and sentence* was invalid *on its face*. Consequently, the claim does not fall within any

exception to the statutory time limit. It therefore cannot be considered.

3. Under Both The Language And Policy Of RCW 10.73.090, A Judgment And Sentence Cannot Become “Invalid On Its Face” Because Of Errors In A Plea Statement.

The analysis in Hemenway is consistent with both the language and policy of RCW 10.73.090. That statute precludes an untimely challenge “if the judgment and sentence is valid on its face.” Grammatically, the possessive pronoun “its” must refer to the phrase “judgment and sentence.” The pronoun cannot refer to plea documents, which are not even mentioned in that paragraph. It is logically impossible for a judgment and sentence to be rendered invalid “on its face” by documents that do not appear on the face of the judgment and sentence.

This interpretation is also necessary to accomplish the purpose of RCW 10.73.090, which was to restore finality of criminal judgments.

In streamlining the postconviction collateral review process, RCW 10.73.090 *et seq.* have preserved unlimited access to review in cases where there truly exists a question as to the validity of the prisoner’s continuing detention. However, as this court warned almost 20 years ago, postconviction collateral review was never intended to be a superconstitutional procedure enabling the petitioner to institute appeal upon appeal and review upon review in forum after

forum ad infinitum. This general 1-year time limit is a reasonable and constitutional method for ensuring that collateral review does not degenerate into such a procedural merry-go-round.

Runyan, 121 Wn.2d at 453-54 (citation omitted).

The statutory exceptions were intended to reflect narrow categories of cases that would remain permanently open to challenge:

In addition to preserving the constitutional core of habeas corpus, this statute also allows exceptions when later developments bring into question the validity of the petitioner's continuing detention. Exceptions are made for circumstances which impact directly on the guilt or innocence of the petitioner, such as the discovery of new evidence, or convictions obtained with insufficient evidence. An exception is made for convictions barred by double jeopardy, which are also prohibited by article 1, section 9 of our constitution. Similarly, an exception is made for convictions under unconstitutional statutes, which are as no conviction at all and invalidate the prisoner's sentence. The statute also leaves open avenues for pursuing collateral relief when subsequent changes in the law could apply retroactively to the petitioner's case, which is a circumstance which could not always be readily ascertained within 1 year of final conviction. These exceptions are broader than is necessary to preserve the narrow constitutional scope of habeas relief. The Legislature, of course, is free to expand the scope of collateral relief beyond that which is constitutionally required, and here it has done so to include situations which affect the continued validity and fairness of the petitioner's incarceration.

Id. at 445 (citations omitted).

These policy considerations are fully applicable to the present case. Twenty years ago, there was strong evidence that the petitioner was guilty of robbery. In the face of that evidence, he chose to plead guilty. He expected a standard range sentence – and he received exactly what he expected. Now, 20 years later, he wants to overturn his conviction because he allegedly received incorrect advice concerning the possible length of an exceptional sentence -- a contingency that he did not expect and that did not occur.

These circumstances do not resemble those in which the legislature or this court has recognized exceptions to the time limit. It is fundamentally unfair to leave a conviction in effect when (for example) the underlying crime did not exist, prosecution was barred by the statute of limitations, the evidence was insufficient to establish the defendant's guilt, or newly discovered evidence demonstrates his innocence. It is not unfair to leave a conviction in effect when no question of the defendant's innocence is involved, but he may have received technically incorrect advice concerning the consequences of his plea. Under these circumstances, the finality of the conviction should not be disturbed.

B. THE PETITIONER WAS CORRECTLY ADVISED THAT, IF THE SENTENCING COURT FOUND SUBSTANTIAL AND COMPELLING CIRCUMSTANCES, HE COULD RECEIVE ANY SENTENCE UP TO LIFE IMPRISONMENT.

If the statutory time limit does not apply to the petitioner's claims, they should be rejected on the merits. Although the language of the plea form was not ideal, it correctly informed the petitioner of the sentencing consequences that resulted from his guilty plea.

The defendant was told that the standard sentencing range was 36-48 months. App. C at 1 ¶ 5. He was told that the court was required to impose a sentence within that range absent a finding of substantial and compelling circumstances. Id. at 2 ¶15. If such circumstances had been found, there was no limitation on the court's discretion other than the statutory maximum, which was stated as twenty years to life. Id. at 1 ¶ 5. Thus, the defendant was correctly warned that the sentence could be as much as life imprisonment, if the court found substantial and compelling circumstances that would justify such a sentence.

This advice satisfied due process requirements.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences. A defendant need not be

informed of all possible consequences of his plea, but he must be informed of all direct consequences.

In re Isadore, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004) (citations omitted). This includes advice of the maximum sentence which could be imposed. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

The due process requirement is that the defendant be correctly advised of what sentence could be imposed on *him* as a consequence of *his* plea. There is no requirement that he be given a sentencing treatise explaining what sentence might be imposed on other people in other cases. Thus, the “maximum sentence” of which the defendant must be advised is the maximum sentence that could be imposed on him, not the sentence that might be imposed on other people in other cases.

It is true that a sentencing court cannot alter the “maximum sentence,” in the sense of limiting its statutory authority or the authority of other courts in future cases. It is equally true that the court can set the “maximum sentence” that will apply in a *specific* case. Once the court imposes a term of confinement, that term becomes a “maximum” that binds not only the Department of

Corrections, but the court itself. See State v. Hardesty, 129 Wn.2d 303, 312, 915 P.2d 1080 (1996).

In the present case, the defendant was told that, if the court found substantial and compelling circumstances, it could impose any sentence up to the maximum of “twenty years to life imprisonment.” The plea statement made it clear that, with appropriate findings, the defendant could be sentenced to more than 20 years, up to life imprisonment. It also made it clear that he could be sentenced to less than 20 years, particularly since the standard sentencing range was considerably less than that. The plea statement thus informed the defendant that if the court made appropriate findings, it could impose any sentence that it considered appropriate, from no confinement to life imprisonment.

This court has refused to inquire into the materiality of specific sentencing factors in a defendant’s plea decision. “A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.” Isadore, 151 Wn.2d at 302. This is true whether the actual sentencing range is lower or higher than the defendant anticipated. State v. Mendoza, 157 Wn.2d 582, 591 ¶ 18, 141 P.3d 49 (2006).

The reasoning of these cases is, however, irrelevant to the present case. Their analysis assumes that the defendant has received some misinformation that could affect a rational person's decision – that the defendant feared or hoped for some outcome different than what was really available. Here, there was no such misinformation. Absent a finding of substantial and compelling circumstances, the petitioner could have hoped for a sentence of as little as 36 months (which he received). He could have feared a sentence of as much as 48 months. With a finding of substantial and compelling circumstances, he could have hoped for a sentence of no confinement. He could have feared a sentence of 20 years or any greater amount up to life. All of those hopes and fears were well founded.

The petitioner in this case received accurate advice concerning the consequences of his plea. He knew what he could hope for and what he could fear. Because this advice was phrased in awkward language, he now wants to withdraw his guilty plea to a robbery committed over 20 years ago. The victim of that crime is now 91 years old – if he is alive at all. Under the circumstances, it would be unconscionable to require a trial of this crime after this

length of time. There is no basis for allowing the petitioner to withdraw his guilty plea.

IV. CONCLUSION

The personal restraint petition should be dismissed.

Respectfully submitted on August 8, 2008.

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