

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY JOR
DEPUTY

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

ERNEST CARTER,

Petitioner.

84606-5

NO. 37048-4-II
(09-2-04521-1, (97-1-04547-1))

SUPPLEMENTAL MEMORANDUM
OF RESPONDENT FOLLOWING
REFERENCE HEARING.

A. STATEMENT OF THE CASE:

1. Personal Restraint Petition.

On December 10, 2008, this court transferred this matter to the trial court pursuant to RAP 16.11 (b) for a reference hearing:

ORDERED that this petition is transferred to the superior court for a reference hearing and the entry of findings of fact regarding whether Carter received notice of the one-year time limit for collateral attacks.

2. Reference Hearing.

On March 26, 2009, this matter came before the Honorable Bryan Tollefson for a reference hearing.

1 Petitioner, petitioner's trial counsel, Harai Alipuria, and the trial prosecuting
2 attorney, Patrick Cooper, testified at the hearing.

3 Most of the witnesses could not recall specifics of the sentencing hearing. Alipuria
4 could not recall what his common practice was with handling judgment and sentences. RP
5 7, 3/20/09. However, Cooper recalled that the judgment and sentence forms were on
6 multi-copy paper with five or six copies and each copy was distributed to a separate party:
7 the court, jail, defense attorney, defendant, and the prosecuting attorney. RP 37, 42. It
8 was always Cooper's practice to distribute the copies accordingly. RP 38. While Cooper
9 could not remember all aspects of the hearing, Cooper was able to recall that petitioner was
10 "engaged or speaking with his attorney and in close contact with him as to what was going
11 on and what he wanted to do and what he thought should be done in the case." RP 41,
12 3/20/09. Cooper also explained that the fingerprint page of the judgment was done at the
13 time of sentencing, most likely right after the judge signed the judgment and sentence. RP
14 38-39, 3/20/09.

15 During direct examination Petitioner claimed to have a fairly clear memory of the
16 hearing, including what he walked into the courtroom with, and what he left with. RP 14-
17 16. He further claimed during cross-examination that he remembered everything about
18 "that sentencing." RP 33. However, when pressed for specific details about the hearing
19 and judgment and sentence, petitioner said he could not recall placing fingerprints on the
20 judgment and sentence, nor could he recall other details of the judgment and sentence. RP
21 33, 3/20/09.

22 Finally, petitioner admitted during the hearing that he recalled receiving a copy of
23 the judgment and sentence in 2002. RP 23, 3/20/09. However, he did not bother looking
24 at page 7 which contained the notice of the one year time limit, until 2007. RP 23,
25 3/20/09.

1 At the conclusion of the hearing, the court found that petitioner did not receive a
2 copy of the notice of advice on right to collateral attack. The court concluded that
3 petitioner did receive a copy of the judgment and sentence at the time of sentencing. RP 1-
4 2, 3/26/09. Findings of Fact, Appendix A.

5 B. LAW AND ARGUMENT:

- 6
7 1. THIS COURT SHOULD DISMISS THE PERSONAL
8 RESTRAINT PETITION AS TIME BARRED WHERE
9 THE TRIAL COURT FOUND THAT PETITIONER
10 RECEIVED A COPY OF THE JUDGMENT AND
11 SENTENCE AND THE JUDGMENT CONTAINED
12 NOTICE OF THE ONE YEAR TIME BAR.

13 RAP 16.14(b) outlines the standard of review in this case:

14 A decision of a superior court in a personal restraint
15 proceeding transferred to that court for a determination on
16 the merits is subject to review in the same manner and under
17 the same procedure as any other trial court decision.

18 RAP 16.14(b); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d
19 1250, 1267 (1999). A personal restraint petition is a civil matter. *In re Gentry*, 137
20 Wn.2d 378, 409, 972 P.2d 1250 (1999). The burden of proof in a personal restraint
21 petition is by a preponderance of the evidence. *Id.* The petitioner has the burden of
22 proving the claimed error by a preponderance of the evidence; and the *further burden of*
23 *proving by a preponderance of the evidence that the claimed error resulted in actual and*
24 *substantial prejudice. Id.*

25 ““In reviewing findings of fact entered by a trial court, an appellate court's role is
limited to whether substantial evidence exists to support its findings.”” *Gentry*, 137 Wn.2d
at 410 (quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712,
732 P.2d 974 (1987)). ““Substantial evidence exists when the record contains evidence of
sufficient quantity to persuade a fair-minded, rational person that the declared premise is

1 true.” *Id.* (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154,
2 943 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998).

3 Generally, a petitioner has a “heavy burden to persuade [an appellate court that] the
4 trial court’s assessment of . . . conflicting evidence it heard during the reference hearing
5 was erroneous.” *Gentry*, 137 Wn.2d at 410. “Conflicting evidence may still be
6 substantial, so long as some reasonable interpretation of it supports the challenged
7 findings.” *Id.* (citations omitted).

8 Here, petitioner contests only one factual finding of the court: “Defendant did
9 receive a copy of the Judgment and Sentence at the time of sentencing.” FOF 10. An
10 examination of the record and the court’s other findings, show that there is substantial
11 evidence to support this finding and that the trial court correctly concluded that petitioner
12 failed to meet his burden of establishing that he did not receive a copy of the judgment and
13 sentence.

14
15 Petitioner presented for the first time at the reference hearing that he did not receive
16 a copy of the judgment and sentence. See “Declaration of Le’Taxione” at page 1.
17 Petitioner admitted during cross examination that he had never taken the position before
18 that he did not receive a copy of the judgment and sentence. RP 33, 3/20/09. It is more
19 likely, given the passage of time (the judgment was entered on 9/23/98), that the petitioner
20 cannot recall receiving a copy of the judgment and sentence. For example, petitioner could
21 not recall any other detail contained on the judgment and sentence. RP 38-39, 3/20/09.
22 However, the prosecutor’s testimony was that it was always his practice to provide a copy
23 of the judgment and sentence to each of the parties, including one for the attorney and one
24 for the defendant. RP 38, 3/20/09. The trial court entered a factual finding that the
25

1 judgment and sentence was prepared on a multi-copy form. FOF 9. Also, unlike the
2 advice of right to collateral attack, the judgment and sentence bore evidence of defendant's
3 receipt and handling of the document. For example, the judgment contained defendant's
4 fingerprints. RP 38-29, 3/20/09. Based on this, the trial court declined to find that the
5 "fingerprint form is not probative on the issue of whether Mr. Carter was given a copy of
6 the Judgment at the time he was sentenced." See FOF 9 (crossed out). The judgment also
7 bears the signature of defendant's attorney. (Appendix A – State's Response to Personal
8 Restraint Petition).

9
10 Given the evidence presented at the hearing: that petitioner was present at the
11 sentencing hearing, that multiple copies of the judgment were always distributed, and that
12 petitioner was actively involved and represented by counsel, the trial court properly
13 concluded that defendant received a copy of his judgment and sentence.

14 This court must conclude that the petitioner's personal restraint petition is time barred
15 where the record supports that defendant received a copy of the judgment and sentence. Even if
16 the record did not support that defendant received a copy of the judgment and sentence, the fact
17 that notice is contained in the judgment – a public document – is sufficient to comply with notice
18 requirements. The trial court is required to notify a defendant at sentencing of the time limits
19 specified in RCW 10.73.090 and RCW 10.73.100. RCW 10.73.110. Once the court gives notice
20 of the collateral attack time limits as contained in the judgment and sentence, the court's
21 obligation under RCW 10.73.110 is fulfilled. *State v. Robinson*, 104 Wn. App. 657, 664, 17
22 P.3d 653 (2001). The advisement in this case properly referred the petitioner to RCW 10.73.090
23 and RCW 10.73.100, and notified him that his right to file a collateral attack may be limited to
24 one year. This case stands in contrast to *State v. Schwab*, 141 Wn.App. 85, 92, 167 P.3d 1225
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1 (2007), where there was no evidence in the record to support that the trial court complied with
2 any of the notice requirements of RCW 10.73.110.

3 It is the petitioner's duty to establish that the one year time bar does not apply. *See*
4 *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998) (the defendant bears the burden
5 to prove that an exception to the RCW 10.73.090 statute of limitations applies). Simply asserting
6 that the trial court did not "read" to the defendant the timeline provisions of RCW 10.73.090 is
7 not enough to meet that burden. In drafting the notice provisions, the legislature contemplated
8 that some prisoners would potentially never have notice of the timelines, and yet their matters
9 would still be time barred. *See In re Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993) (holding that
10 under RCW 10.73.120, DOC's attempted notice to petitioner of the time limits specific in RCA
11 10.73.090 suffices to hold petitioner to the time lines, whether or not he received actual notice) .

12
13 The fact that defendant may have chosen to ignore or discard notice provisions contained
14 in the judgment and sentence (both in 1998 and 2002) does not establish lack of notice. At best,
15 defendant could put forth a claim for equitable tolling of the one year statute of limitations under
16 the circumstances. However, simply claiming ignorance of the limitations period does not toll
17 the limitations period. The fact that a petitioner is untrained in the law, was proceeding without a
18 lawyer, or may have been unaware of the statute of limitations for a certain period does not
19 warrant tolling. *See Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir.2004) (ignorance of the law
20 does not justify tolling); *Holloway v. Jones*, 166 F.Supp.2d 1185, 1189 (E.D.Mich.2001) (lack of
21 professional legal assistance does not justify tolling); *Sperling v. White*, 30 F.Supp.2d 1246,
22 1254 (C.D.Cal.1998) (citing cases establishing that ignorance of the law, illiteracy, and lack of
23 legal assistance do not justify tolling).
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2 In Washington, the one year time bar operates as a statute of limitations that may be
3 subject to equitable tolling. *In re Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008). “The purpose of
4 statutes of limitations is to shield defendants and the judicial system from stale claims. When
5 plaintiffs sleep on their rights, evidence may be lost and memories may fade.” *Burns v.*
6 *McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630, 633 (2006) (citing, *Crisman v. Crisman*, 85
7 Wn. App. 15, 19, 931 P.2d 163 (1997)).

8
9 Equitable tolling is to be used sparingly and courts look to the same standards
10 applicable in civil cases when analyzing tolling issues in the post conviction relief context.
11 *Bonds*, 165 Wn.2d 135, 141, 144, 196 P.3d 672 (2008). Courts are reluctant to apply
12 exceptions to legislative time limits. *Id.* At 143. A petitioner must show that he failed to
13 meet the timeline provisions due to bad faith, deception, or false assurances. 165 Wn.2d at
14 144. Petitioner cannot meet that high burden in this case. There was no external
15 impediment which prevented petitioner from timely bringing his petition to this court.
16 Nothing in this case bears a close resemblance to other cases where tolling was analyzed.
17 *See In re pers. Restaint Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) (equitably
18 tolling one-year time limit where court failed on three occasions to address petitioner's
19 meritorious attack on his guilty plea); *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116
20 (2002), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003) (applying equitable tolling in
21 split decision, where, due to mistakes by petitioner's attorney, the court, and the
22 immigration service, petitioner was unaware until after a one-year time limit that he would
23 be deported if he pleaded guilty).

1 Here, the petitioner's judgment was entered in 1998. He was given notification in
2 his judgment in 1998 that collateral attacks are subject to a one year time bar. For
3 whatever reason, petitioner sat on that claim and now tries to press this court for a way
4 around the one year time bar. Petitioner has failed to meet his burden of establishing that
5 the one year statute of limitations is inapplicable to his case, and for this reason the court
6 must dismiss his petition.

7 C. CONCLUSION:

8 The State respectfully requests that this court uphold the trial court's findings and
9 dismiss the personal restraint petition as untimely.

10
11 DATED: August 13, 2009.

12 GERALD A. HORNE
13 Pierce County
14 Prosecuting Attorney

15 
16 MICHELLE LUNA-GREEN
17 Deputy Prosecuting Attorney
18 WSB #27088

18 Certificate of Service:

19 The undersigned certifies that on this day she sent via *air mail*
20 to the attorney of record true and correct copies of the document to which this certificate
21 is attached. This statement is certified to be true and correct under
22 penalty of perjury of the laws of the State of Washington.
23 Signed at Tacoma, Washington, on the date below.

24 *8/13/09* *Theresa Kar*
25 Date Signature

STATE OF WASHINGTON
COUNTY OF PIERCE
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BY *ZDR*
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