

COURT OF APPEALS
DIVISION II

No. 37230-4-II

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

IN RE THE RESTRAINT OF:

DANIEL J. STOCKWELL,

Petitioner.

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Judgment in Pierce County Superior Court No. 86-1-00878-2
The Hon. Robert H. Peterson, Presiding

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ORIGINAL

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A. ISSUE RAISED IN SUPPLEMENTAL BRIEF

1. How does the Supreme Court's decision in *In re McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009), effect this case?

B. ARGUMENT

1. *The Holding of McKiearnan*

The Supreme Court granted review of Mr. Stockwell's Motion for Discretionary Review and remanded the case to this Court for reconsideration in light of *In re McKiearnan, supra. In re Stockwell*, Sup. Ct. No. 82204-2, Order (11/6/09). This order is significant because if the Supreme Court believed that *McKiearnan* compelled the rejection of Mr. Stockwell's PRP, presumably, it would have simply denied review.

In *McKiearnan*, the defendant was convicted of first degree robbery in 1987. The guilty plea form and judgment both stated the maximum sentence was "twenty (20) years to life imprisonment," when in fact the correct maximum was "life imprisonment." In 2007, Mr. McKiearnan filed a Personal Restraint Petition ("PRP"), and argued that the one year time limit of RCW 10.73.090 did not apply because the judgment was not valid on its face as it stated the wrong legal maximum. 165 Wn.2d at 780-81.

The Supreme Court held that the PRP was time-barred:

McKiernan was convicted of a valid crime by a court of competent jurisdiction and was sentenced within the appropriate standard range. [Footnote omitted] He was aware of the standard range sentence he would receive and that he could be sentenced up to a maximum term of life imprisonment. A sentencing court may deviate from the standard sentencing range if it finds there are "substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.120(2) (1987), *currently codified as* RCW 9.94A.535. In this case, pursuant to the provisions of former RCW 9.94A.120, had the sentencing court found a substantial and compelling reason to do so, it could have sentenced McKiernan to a term within the standard range, to life imprisonment, or anywhere in between. The maximum was life in prison whether he was informed that the maximum sentence was 1 year to life, 10 years to life, or 20 years to life. To be facially invalid, a judgment and sentence requires a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner. Even as misstated, McKiernan was aware of the maximum amount of time he could serve in confinement.

165 Wn.2d at 782-83.

2. *In Mr. Stockwell's Case the Error on the Judgment was More than a Technical Mistake*

Mr. McKiernan argued that because the guilty plea form and judgment listed the maximum as "twenty (20) years to life imprisonment," the judgment was invalid on its face and RCW 10.73.090 did not apply.

The Supreme Court held that because Mr. McKiernan was still informed

that the maximum was “life,” it did not matter if he was informed the maximum was “1 year to life, 10 years to life, or 20 years to life. . . . Even as misstated, McKiearnan was aware of the maximum amount of time he could serve in confinement.” *In re McKiearnan*, 165 Wn.2d at 782-83.

In contrast, Mr. Stockwell was never informed of the proper maximum. Both the judgment and sentence and the guilty plea statement list the legal maximum as “twenty (20) years” or “20 years.” *Personal Restraint Petition*, Ex. 2 & 3. “Life” is never mentioned. Thus, unlike Mr. McKiearnan, Mr. Stockwell “was substantively misinformed as to the maximum sentence.” *McKiearnan*, 165 Wn.2d at 783.

Because the judgment in Mr. Stockwell’s case did not state that the maximum was “life,” as the judgment in *McKiearnan* undisputably did, *McKiearnan* supports Mr. Stockwell’s position – that the judgment was invalid on its face.

In this regard, nothing in *McKiearnan* departed from past precedent holding that one of the essentials of a valid conviction is a citation to the proper legal maximum, whether or not the maximum stated was lower or higher than what the law required. *See State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 141

P.3d 49 (2006). *See also In re Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004) (declining to adopt materiality test when defendant was not informed of proper direct consequences of conviction). In *McKiernan*, the Supreme Court held that stating that the maximum was “20 years to life” was not a significant mistake because the judgment (and guilty plea form) still stated the proper maximum. Here, though, the proper maximum was not set out.

The judgment in this case was not valid on its face; RCW 10.73.090 does not apply; the guilty plea was not knowingly and voluntarily made; and, therefore, Mr. Stockwell’s rights to due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3 were violated.

3. *Other Issues Exist in this Case That Were Not at Issue in McKiernan*

Mr. McKiernan simply argued that RCW 10.73.090 did not apply because the judgment was, in his view, facially invalid. Mr. McKiernan did not advance any other reason why the time bar of RCW 10.73.090 did not apply to his case. *See McKiernan*, 165 Wn.2d at 781 (“McKiernan does not claim that his petition meets any of the exceptions to the one year time bar listed in RCW 10.73.100.”). Mr. McKiernan therefore never

made any claim that the time bar of RCW 10.73.090 did not apply to him because the Department of Corrections failed to comply with the requirements of RCW 10.73.120 regarding the giving of notice of the time limits to individuals under DOC's supervision.¹ Accordingly, there is no discussion in *McKiernan* of cases such as *In re Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993) and *In re Vega*, 118 Wn.2d 449, 823 P.2d 1111 (1992).

In contrast, the evidence is undisputed that Mr. Stockwell was under the supervision of DOC on July 23, 1989, and that DOC failed to comply with the statutory mandate of attempting to provide him "[a]s soon as practicable" with notice of the time limits and exceptions set out in RCW 10.73.090 and RCW 10.73.100. RCW 10.73.120. Because of DOC's failure to comply with RCW 10.73.120, RCW 10.73.090 simply does not apply to Mr. Stockwell, *In re Vega*, 118 Wn.2d at 450-51; *State v. Golden*, 112 Wn. App. 68, 78, 47 P.3d 587 (2002).

DOC did apparently post a notice in various DOC offices about the time limits. However, this notice was not posted until December 5, 1989, *State's Response to Personal Restraint Petition*, App. H, which was after

¹ The decision in *McKiernan* is silent on the subject of Mr. McKiernan's custody/supervision status on July 23, 1989.

Mr. Stockwell received the order of discharge on October 27, 1989.

Personal Restraint Petition, Ex. 5 Thus, this attempt to provide notice did not comply with the statutory requirement that the notice be given “[a]s soon as practicable,” which means “immediately.” *State v. Trevino*, 127 Wn.2d 735, 744, 903 P.3d 447 (1995). This tardy posting also does not satisfy due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, because it was not reasonably calculated to apprise Mr. Stockwell, someone who was not on supervision at the time of the posting, of the time limits. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Moreover, because Mr. McKiearnan never raised a claim that RCW 10.73.090 did not apply because of a violation of RCW 10.73.120, what was also not at issue in *McKiearnan* was whether a defendant’s subjective knowledge or lack of knowledge of the one year time limit was determinative of whether a PRP should be dismissed. In contrast, in Mr. Stockwell’s case, the Acting Chief Judge of the Court of Appeals originally dismissed Mr. Stockwell’s petition because Mr. Stockwell had not submitted evidence that he did not receive *actual notice* of the time-limits of RCW 10.73.090 from any source. Order Dismissing Petition

(9/23/08) at 3. With all due respect, this subjective knowledge standard is wrong and conflicts with the Supreme Court's holdings in *Runyan* and *Vega*. In any case, on October 9, 2008, Mr. Stockwell submitted to the Supreme Court a supplemental certification stating that he had no knowledge and was never given any notice by anyone of the requirements of RCW 10.73.090 and RCW 10.73.100 before July 24, 1990, the effective date of the statute. App. A. This certification should be considered by this Court now that the case has been remanded.

Additionally, the application of a new standard of subjective knowledge arbitrarily changed the rules in Mr. Stockwell's case, depriving him of due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L.Ed.2d 175 (1980) (violation of state criminal procedural rules can violate procedural due process). None of these issues were raised or discussed in *McKiearnan*.

The State has already recognized in its pleadings to the Supreme Court that the Court of Appeals below likely utilized the wrong standard, but argued that because the "order below is not published . . . any faulty reasoning will not be adopted by other courts." *Response to Motion for*

Discretionary Review (Sup. Ct. No. 82204-2) at 6.² Given the State's concession that this Court used the wrong standard to determine whether RCW 10.73.090 should cut-off Mr. Stockwell's access to the courts, this Court's prior ruling should be reassessed and abandoned.

DOC failed to give Mr. Stockwell actual or constructive notice of the strict time-bar of RCW 10.73.090. Accordingly, Mr. Stockwell's PRP should not be dismissed.

² In its pleading to the Supreme Court, the State argued:

The decision below found that the time bar was applicable to the petitioner's collateral attack. This decision was correct. The State would agree with petitioner that the order dismissing petition seems to focus unnecessarily on whether petitioner had adequately disproved his lack of actual notice. Regardless of the reasoning, the court reached the correct result in finding that the time bar applied to the petition, and that petitioner was required to show an applicable exception to the time bar. The order below is not published, and, therefore, any faulty reasoning will not be adopted by other courts.

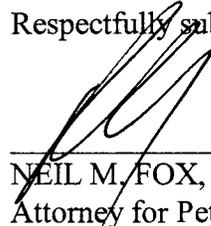
Response to Motion for Discretionary Review (Sup. Ct. No. 82204-2) at 6 (App. B).

C. **CONCLUSION**

For the foregoing reasons, and the reasons set out in the Motion for Discretionary Review, the Personal Restraint Petition and the Reply Brief of Petitioner, this Court should grant the PRP and vacate the conviction in this case. Mr. Stockwell's rights to due process of law under both U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, have been violated.

DATED this 10 day of December 2009.

Respectfully submitted,



NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

APPENDIX A

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF:

DAN STOCKWELL,

Petitioner.

NO. _____

COA NO. 37230-4-II

CERTIFICATION OF DANIEL
J. STOCKWELL

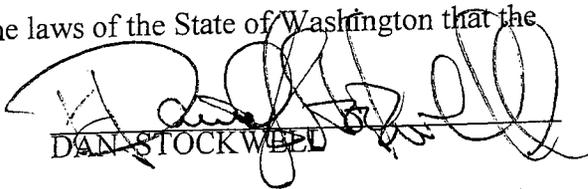
I, Dan Stockwell, certify and declare as follows:

1. I am the petitioner in this Personal Restraint Petition.

2. As noted in my prior certification, with regard to Pierce County Superior Court No. 86-1-00878-2, I was never given notification by the Department of Corrections of the requirements of RCW 10.73.090 & .100 regarding limitations on collateral attack petitions. Prior to July 24, 1990, I had no knowledge of and was never given any notice by anyone else as to the requirements of RCW 10.73.090 & .100.

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

X 10/06/08
DATE AND PLACE


DAN STOCKWELL

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
DAN STOCKWELL,
Petitioner.

NO. _____

COA NO. 37230-4-II

CERTIFICATE OF SERVICE

I, Breanna Caldwell, certify and declare, that on the 8 day of October 2008, I deposited a copy of the "Certification of Daniel J. Stockwell" with proper postage attached, addressed to:

Kathleen Proctor
Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. South, Room 946
Tacoma WA 98402-2171

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

10/8/08 Seattle, WA
DATE AND PLACE


BREANNA CALDWELL

APPENDIX B

NO. 82204-2

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

DAN STOCKWELL, RESPONDENT

Court of Appeals Cause No. 37230-4
Appeal from the Superior Court of Pierce County
The Honorable Robert H. Peterson, Presiding

No. 86-1-00878-2

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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Tacoma, WA 98402
PH: (253) 798-7400

of Corrections is not the determinative question. The determinative question is whether the Department of Corrections satisfied its duty under RCW 10.73.120; *Runyan* has answered that question in the affirmative. Petitioner's argument that the department has not fulfilled its duty because he did not receive actual notice is contrary to the holding of *Runyan* and is without merit.

The decision below found that the time bar was applicable to the petitioner's collateral attack. This decision was correct. The State would agree with petitioner that the order dismissing petition seems to focus unnecessarily on whether petitioner had adequately disproved his lack of actual notice. Regardless of the reasoning, the court reached the correct result in finding that the time bar applied to the petition, and that petitioner was required to show an applicable exception to the time bar. The order below is not published, and, therefore, any faulty reasoning will not be adopted by other courts. Petitioner fails to show that this issue meets any of the criteria in RAP 13.5.

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6 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
7 DIVISION TWO

8 IN RE THE PERSONAL RESTRAINT OF
9 DAN STOCKWELL,
10 Petitioner.

COA NO. 37230-4-II

11 CERTIFICATE OF SERVICE

09 DEC 10 PM 2:05
STATE OF WASHINGTON
BY [Signature]
DEPUTY

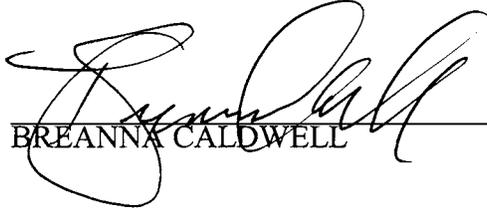
COURT OF APPEALS
DIVISION II

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13 I, Breanna Caldwell, certify and declare, that on the 10th day of December 2009, I
14 deposited a copy of the "Supplemental Memorandum of Petitioner" into the United States
15 Mail with proper first-class postage attached, addressed to:

16 Kathleen Proctor
17 Pierce County Prosecuting Attorney's Office
18 930 Tacoma Ave. South, Room 946
Tacoma WA 98402-2171

19 I certify or declare under penalty of perjury under the laws of the State of Washington
20 that the foregoing is true and correct.

21
22
23 12/10/09 Seattle, WA
DATE AND PLACE


BREANNA CALDWELL