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COURT OF APPEALS
DIVISION II

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No. 37230-4-II

STATE OF WASHINGTON
BY  DEPUTY

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

IN RE THE RESTRAINT OF:

DAN STOCKWELL,

Petitioner.

REPLY BRIEF 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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RCW 10.73.090 *passim*

RCW 10.73.100 *passim*

RCW 10.73.120 *passim*

U.S. Const. 14 3,8,11

A. ISSUES IN REPLY

1. Has the State met its burden of compliance with RCW 10.73.120?
2. Can a notice posted on a Department of Corrections bulletin board, which is not posted until after a defendant's discharge, be effective to comply with RCW 10.73.120?
3. Was the form notice that was posted complete?
4. To determine if a judgment is not valid on its face, must a court conclude the judgment is "void?"
5. Does the Washington State Supreme Court's decision in State v. Weyrich, No. 80061-8 (May 8, 2008), foreclose the State's arguments that Mr. Stockwell's plea should not be withdrawn?
6. Has the State shown that it would be unjust to vacate the conviction?

B. ARGUMENT

1. ***Because the State Did Not Comply with RCW 10.73.120, the Rigid Time Bars of RCW 10.73.090 Do Not Apply***

The State argues that Mr. Stockwell's petition is time-barred because on December 5, 1989, the Director of the Department of

Corrections Division of Community Corrections, Dave Savage, directed that various offices of his agency post a notice prepared by the Attorney General about limitations on the right of collateral attack. State's Response to Personal Restraint Petition at 8 & Appendix H. The State also suggests that Mr. Stockwell's delay in filing this PRP "has foreclosed the State from obtaining any evidence of more specific attempts to inform petitioner of the time bar in RCW 10.73.090." Response to Personal Restraint Petition at 8. These arguments should be rejected.

In RCW 10.73.120,¹ the Legislature directed that the Department of Corrections "attempt to advise" those on community supervision about the "time limit specified in RCW 10.73.090 and 10.73.100" "[a]s soon as practicable after July 23, 1989." In In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993), the Supreme Court found compliance with this statute based upon the posting of the Attorney General's notice in community corrections' offices. Regarding the one defendant in Runyan who was on

¹ This statute provides:

As soon as practicable after July 23, 1989, the department of corrections shall attempt to advise the following persons of the time limit specified in RCW 10.73.090 and 10.73.100: Every person who, on July 23, 1989, is serving a term of incarceration, probation, parole, or community supervision pursuant to conviction of a felony.

DOC supervision at the time,² the Court held: “Probationers and parolees, such as Kelly, were provided notice through the posting of such notice in community corrections offices in December of 1989.” 121 Wn.2d at 452.

However, Mr. Kelly was on parole between March 11, 1988, and December 11, 1990, Runyan, 121 Wn.2d at 438, and thus the posting of the notice as to him was adequate. In contrast, Mr. Stockwell was on supervision only until October 25, 1989, the date he received his final discharge. Ex. 5 to PRP. Therefore, the posting of a notice in a Department of Corrections office after December 5, 1989 – at a time when Mr. Stockwell was no longer on supervision -- cannot be relied upon and was not reasonably calculated to provide Mr. Stockwell with the notice required under the statute, or, for that matter, under the Due Process Clause of U.S. Const. amend. 14. See State v. Nelson, 158 Wn.2d 699, 702-03, 147 P.3d 553 (2006) (due process requires notice that is reasonably calculated to apprise the absentee person of the pendency of a matter).

As for the three defendants in Runyan, none of them could say that “no attempt whatsoever was undertaken” to provide them with notice. 121

² The other two defendants were in prison.

Wn.2d at 153. Here, though, no attempt whatsoever was undertaken to provide Mr. Stockwell with notice.

Additionally, the affidavit provided in Runyan (and submitted by the State in this case) does not explain how a nearly five month delay from the legislatively set date of July 23, 1989, in any way would constitute “as soon as practicable.” The Supreme Court has held in other contexts that the words “as soon as practicable” means “immediately.” State v. Trevino, 127 Wn.2d 735, 744, 903 P.3d 447 (1995). There is no reason to attach a different meaning in this context. While this five month delay was not meaningful as to the three Runyan defendants (because they were still incarcerated or on supervision after the notices were posted), the delay is important in this case because the DOC discharged Mr. Stockwell in those intervening five months.

The State complains that Mr. Stockwell’s delay in filing this petition prevents it from finding additional evidence. However, the State does not explain what other possible evidence there could be in Mr. Stockwell’s case that did not exist at the time even that Runyan was litigated. The only attempt that DOC apparently ever made to give those on supervision notice of the deadlines was by posting notices in various

offices at some time *after* December 5, 1989. The State makes no claim that other types of notifications were ever attempted. Additionally, it is not as if Mr. Stockwell intentionally delayed filing this PRP for 18 years after RCW 10.73.090-.100 was adopted so that there would be less chance that documentation of hypothetical DOC compliance with RCW 10.73.120 would be lost. Rather, it is *the State* which has brought up a conviction from the mid-80s to justify locking Mr. Stockwell up for the rest of his life. If the State can reach back into history and use convictions from a different generation to give someone a life sentence now, the State should keep better records.

Finally, even if the notice attached to Mr. Savage's affidavit was posted, it was insufficient. RCW 10.73.120 makes it clear that DOC shall advise those on supervision of the "time limit specified in RCW 10.73.090 and 10.73.100." Emphasis added. In this case, while the notice Mr. Savage ordered to be posted advised of the restrictions of RCW 10.73.090, Response to Personal Restraint Petition at App. H, the warnings did not include the provisions set out in RCW 10.73.100:

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;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

Thus, the warnings in the notices posted in December 1989 were inaccurate and did not follow the legislative mandate.

The statutory language of RCW 10.73.120 is mandatory. Without proof that the statute was followed, the time-bar of RCW 10.73.090 cannot

be used to block a court from reaching the merits of a case. In re Vega, 118 Wn.2d 449, 450-51, 823 P.2d 1111 (1992); State v. Golden, 112 Wn. App. 68, 78, 47 P.3d 587 (2002).

In Vega, the Supreme Court held that the rigid time bar of RCW 10.73.090 could not be applied where DOC made no attempt to contact a prisoner serving a sentence in federal prison of the time limits in the statute. Notably, the Court did not look to see if the prisoner had alternative methods of finding out, *on his own*, what the time limits were.³ Rather, the Court held that if DOC made no attempt to notify him of the time restrictions, as was required by RCW 10.73.120, the prisoner's post-conviction petition could not be denied as untimely under RCW 10.73.090. No attempt at notification; no time-bar.

While the State can adopt procedural rules for post-conviction relief, the State itself must be bound by those same rules and cannot

³ The State suggests that somehow notice given in 2004 of the applicability of RCW 10.73.090 - .100 to the Kitsap County conviction would constitute compliance with RCW 10.73.120. State's Response at 9-10. The problem with this argument is that the notification was confined to the 2004 charge, and does not generally state the law with regard to any earlier convictions " "Any petition or motion for collateral attack on *this* judgment and sentence . . ." App. G to State's Response (emphasis added). This notice would not lead someone to think that there is a state statute governing collateral attacks which did not exist in the mid-1980s and which somehow was retroactively applied to convictions taking place before the effective date of the statute. Moreover, the duty in RCW 10.73.120 was that belonging to the DOC in 1989 and cannot be cured by advisement in some other case by the court in 2004.

arbitrarily apply them. Otherwise, due process of law under U.S. Const. amend. 14 would be violated. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (violation of state criminal procedural rules can violate procedural due process).

Here, there was no evidence that the Department of Corrections ever attempted to notify Mr. Stockwell about the requirements of RCW 10.73.090 and 10.73.100, as soon as practicable after July 23, 1989. Accordingly, both as a matter of statutory construction and as a matter of federal due process of law under U.S. Const. amend. 14, this petition cannot be barred under RCW 10.73.090.

2. *The Conviction is Invalid on its Face*

The State argues that the conviction in this case was not absolutely “void,” citing to In re Bass v. Smith, 26 Wn.2d 872, 176 P.2d 355 (1947). State’s Response at 11. This case dates from the era before habeas corpus was fully developed as a remedy. Nonetheless, the issue here is not whether the judgment in Mr. Stockwell’s case is “absolutely void,” for purposes of granting habeas relief, as it was in Bass. Rather, the issue is whether for purposes of RCW 10.73.090, the judgment is “valid on its face.” This “statutory” invalidity is different than the type of

constitutional infirmity required under Bass. See In re Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (facial invalidity is broader than constitutional invalidity).

While the judgment in Mr. Stockwell’s case is not “absolutely void” and is not constitutionally invalid on its face, it is not valid – it contains the wrong statutory maximum. Accordingly, it is invalid for purposes of RCW 10.73.090.

3. *Where the Plea Sets Out the Wrong Maximum Sentence, Prejudice is Presumed*

The State argues that even if the guilty plea form and judgment contain the wrong statutory maximum, the petition should be dismissed because Mr. Stockwell cannot make out a showing of prejudice. Further the State argues that the Court should not grant Mr. Stockwell’s petition because it will undercut the life sentence in the Kitsap County case. The Court should reject such result-oriented legal analysis.

First, the State’s argument regarding prejudice is not viable after the Washington State Supreme Court’s decision in State v. Weyrich, ___ Wn.2d ___, ___ P.3d ___ (No. 80061-8, May 8, 2008). In Weyrich, the defendant pled guilty to three counts of first degree theft and an unlawful check issuance charge. The guilty plea forms stated that the maximum

sentence was five years, when, in fact, it was ten years in prison for the theft charges. Mr. Weyrich was sentenced within the correct standard ranges. Prior to sentencing, Mr. Weyrich tried to withdraw the pleas on the ground that the pleas were not knowing, voluntary and intelligent. The trial court denied the motion and the Court of Appeals affirmed, on the ground that the mistake had no bearing on the plea. The Supreme Court in a *per curiam* decision reversed:

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); CrR 4.2(d) (2005). A defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea. See CrR 4.2(g), no. 6(a). A defendant may challenge the voluntariness of his plea where he is misinformed of the sentencing consequences. Mendoza, 157 Wn.2d at 587-91. The defendant need not establish a causal link between the misinformation and his decision to plead guilty. Id. at 590; In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

The State concedes that Weyrich was misinformed that the statutory maximum for the theft crimes was 5 years, rather than the correct 10 years. See RCW 9A.20.021(1)(b); RCW 9A.56.030(2). Weyrich did not waive the error but timely moved to withdraw his pleas before sentencing. See Mendoza, 157 Wn.2d at 591-92. The State's argument that the error did not actually affect Weyrich's decision to plead guilty requires the sort of subjective hindsight inquiry into Weyrich's decision of which Mendoza and Isadore disapprove. "Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary

when based on misinformation regarding a direct consequence [of] the plea" Id. at 591. . . .

...

Because Weyrich was misinformed that the statutory maximum sentence for the thefts was 5 years, he should have been allowed to withdraw his pleas.

Slip Op. at 2-3.

Under Weyrich, prejudice is presumed. It does not matter that the incorrect maximum was less than the actual maximum. It is irrelevant that the defendant was not actually sentenced to the maximum. Nor does it matter that the *State* could not go in and increase the maximum after the fact. See State v. Hall, 162 Wn.2d 901, 177 P.3d 680 (2008) (State could not vacate conviction under In re Andress, 147 Wn.2d 901, 177 P.3d 580 (2008) over defendant's objection, even though a defendant could vacate conviction if he or she chose to do so).

The facts are undisputed. Mr. Stockwell was told the wrong statutory maximum at the time he pled guilty. As a matter of due process under U.S. Const. amend. 14, the plea was not knowingly, intelligently and voluntarily made. The judgment should be vacated and the plea withdrawn.

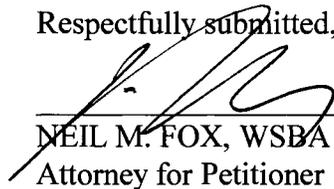
The State argues that withdrawal of the plea would somehow be “unjust” to the State, suggesting that it is hesitant even to contact the complainant from 1985 (C.S) for fear of causing her trauma. C.S., though, is Mr. Stockwell’s step-daughter (now “Christina Monroe”) and actually testified against him in Kitsap County Superior Court No. 03-1-01319-4. Ms. Monroe is living in Washington State and has been interviewed about both the Kitsap County case and the instant case, and claims to have a memory of the Pierce County case. Exhibit 1. Accordingly, the State cannot claim that it would be “unjust,” and, in any case, any claim should be tested after an evidentiary hearing.

C. CONCLUSION

For the foregoing reasons, and the reasons set out in the PRP, this Court should vacate the conviction and withdraw the plea.

Dated this 13 day of May 2008.

Respectfully submitted,



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

EXHIBIT 1

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

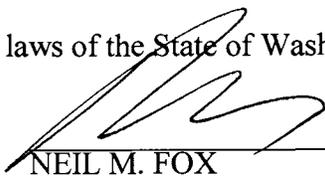
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| IN RE PERSONAL RESTRAINT OF: DANIEL J. STOCKWELL, Petitioner. | } | NO. 37230-4-II CERTIFICATION OF NEIL M. FOX |
|---|---|--|

I, Neil M. Fox, certify and declare as follows:

1. I am an attorney licensed to practice law in the State of Washington. I represent Mr. Stockwell, the petitioner.
2. The complainant in Pierce County Superior Court No. 86-1-00878-2 was Christina Sawyer. Ms. Sawyer was Mr. Stockwell's step-daughter.
3. Ms. Sawyer's name is now "Christina Monroe." Ms. Monroe was a witness for the prosecution in Kitsap County Superior Court No. 03-1-01319-4.
4. As of November 2007, Ms. Monroe resided in University Place, Washington, and, based upon her statements to my investigator, she claims to have a memory of her allegations against Mr. Stockwell from 1986.

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

5/13/05 Seattle WA
DATE AND PLACE


NEIL M. FOX

