

Supreme Court Case No. 86018-1

IN THE SUPREME COURT OF WASHINGTON STATE

Lowell Finstad,
Petitioner Pro Se

v.

State of Washington,
Respondent.

STATE OF WASHINGTON
2017 MAY 23 AM 8:17
CLERK
OFFICE OF THE CLERK
COURT OF APPEALS
1000 UNIVERSITY STREET
SEASIDE, WA 98148

MOTION FOR DISCRETIONARY REVIEW OF COURT
OF APPEALS ORDER DISMISSING PETITION UNDER
COA NO. 41877-1-II

Lowell Finstad, Petitioner Pro Se
Larch Correction Center
15314 NE Dole Valley RD
YACOLT W.A 98175
EHU G 15-L #312497

TABLE OF CONTENTS

A. IDENTITY OF PETITIONERPage 1
B. COURT OF APPEALS DECISIONPage 1
C. ISSUES PRESENTED FOR REVIEWPage 1
D. STATEMENT OF THE CASEPage 1
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTEDPage 3
F. CONCLUSIONPage 8

Appendixes

Appendix -*A*: Court of Appeals Decision Dismissing Petition Under Cause No. 41877-1-II

Appendix -*A*: Plea Agreement Cause No. 06-1-01137-6

Appendix -*B*: Plea Agreement Cause No. 06-1-02072-3

Appendix -*C*: Plea Agreement Cause No. 07-1-00611-7

Appendix -*D*: Plea Agreement Cause No. 07-1-01996-1

Appendix -*E*: J & S Cause No. 06-1-01137-6

Appendix -*F*: J & S Cause No. 06-1-02072-3

Appendix -*G*: J & S Cause No. 07-1-00611-7

Appendix -*H*: J & S Cause No. 07-1-01996-1

Appendix -*I*: J & S Cause No. 06-1-01073-6

Table Of Authorities

State v. Eitls, 94 Wn.2d 489, 617 P.2d 993 (1980)Page 4, 7

State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006)Page 6, 7, 8

In Re Pers. Restraint of Gardner, 94 Wn.2d 504, 617 P.2d 1001 (1980)Page 4

In Re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)Page 4, 6, 7

In Re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002)Page 6

In Re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004)Page 4

In Re Pers. Restraint of Moore, 116 Wn.2d 30, 803 P.2d 300 (1991)Page 4

State v. Murray, 118 Wn.App. 518, 77 P.3d 1188 (2003)Page 6

Thompson, 141 Wn.2d @ 723Page 4, 6

Other Authorities

RCW 9.94A.589 (1)(a)Page 5

RCW 9.94A.535Page 5

RAP 13.4 (b)Page 3

A. IDENTITY OF PETITIONER

Lowell Finstad, Petitioner Pro Se asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Mr. Finstad seeks review of the Court of Appeals decision entitled 'Order Dismissing Petition' entered on April 21, 2011 by the Honorable Acting Chief Judge Worswick. A copy of the decision is attached hereto as Appendix - A./

C. ISSUES PRESENTED FOR REVIEW

1. Under the SRA and prevailing Washington State Jurisprudence is it permissible for a Defendant to agree to an unlawful sentence?
2. Did the Court of Appeals err in holding that Mr. Finstad cannot challenge the validity of his consecutive sentence without challenging the validity of the entire plea?

D. STATEMENT OF THE CASE

On November 9, 2007 Mr. Finstad plead guilty to Possession of a Controlled Substance, with intent to Deliver Cocaine, under Cause Number 06-1-01137-6, Appendix A; Delivery of a Controlled Substance, Methamphetamine, under Cause Number 06-1-02072-3 Appendix B; Witness Intimidation, under Cause Number 07-1-00117 Appendix C; and Attempted Arson in the First Degree, under Cause Number 07-1-01996-1, Appendix D. [It should be noted that the State claimed in its response at page 1 to Mr. Finstad's Initial Petition that the Arson Charge under 07-1-01996-1 was left uncharged as a result of this global plea agreement. The Court of Appeals

seemingly agreed. See Order Dismissing Petition at the end of page 1 and the top of page two, where the Acting Chief Judge stated, "His sentences were part of an agreement to resolve four filed cases and one unfiled case against him." This however is not the case as the Arson Charge was adjudicated and sentenced along with cause numbers 06-1-01137-6; 06-1-02072-3; and, 07-1-00611-7.] See Appendixes E and I.

Also included within this global plea agreement, was an agreement that the time Mr. Finstad previously received following his jury trial under cause number 06-1-01073-6 Appendix I would run consecutive to cause numbers 06-1-01137-6 and 06-1-02072-3 See Appendixes A and B. [There is no error assigned to this portion of the consecutive sentence.]

On November 14, 2007 Mr. Finstad was sentenced under the following cause numbers wherein he received the following sentence, under each respective cause number. Under Cause Number 06-1-01137-6, Mr. Finstad received a forty month term of imprisonment on each count of conviction to run concurrent with each other and 07-1-00611-7 and 07-1-01996-1, but consecutive with the counts of conviction under Cause Number(s) 06-1-02072-3 and 06-1-01073-6, Appendix E. Under Cause Number 06-1-02072-3 Mr. Finstad was sentenced to a term of imprisonment of forty months, which was ordered to run concurrent with 07-1-00611-7 and 07-1-01996-1, but consecutive with 06-1-011376 and 06-1-01073-6, Appendix F. Under Cause Number 07-1-006117 Mr. Finstad was sentenced to a term of imprisonment of forty months, to run concurrent with all incorporated cause numbers, including cause

number 06-1-01073-6, Appendix G. Under Cause Number 07-1-01996-1, Mr. Finstand was sentenced to a term of imprisonment of thirty-six months, also ordered to run concurrent with all incorporated cause numbers, including cause number 06-1-01073-6 Appendix I.

Also as explained above, as a result of Mr. Finstad's plea to the above cause numbers, the Court ordered the term of confinement under cause number 06-1-01073-6 to run consecutive with Cause Numbers 06-1-00137-6 and 06-1-02072-3, cases which under RCW 9.94A.589(1)(a) should have been concurrent to each other, but consecutive with 06-1-01073-6.

For clarification purposes, please take notice once again that Mr. Finstad is only assigning error to the consecutive sentences imposed under cause number(s) 06-1-01137-6 and 06-1-02072-3 as applied solely between each other, as the Judgment and Sentences along with the respective plea agreements show clear and unequivocal evidence of the violation therein.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Standard of Review

RAP 13.4 (b) provides the following criteria for the Supreme Court's acceptance of a petition for Discretionary Review. That criteria is as follows:

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Argument

This Court has repeatedly held that 'an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law. In re Pas. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004). See also Goodwin, 146 Wn.2d at 870, where this Court held, "A plea bargaining agreement cannot exceed the statutory authority given to the Courts." (Quoting In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)); Thompson, 141 Wn.2d at 723, holding; "The actual sentence imposed pursuant to a plea bargain must be statutorily authorized..." (Quoting In re Pers. Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)).

A defendant simply 'cannot empower a sentencing court to exceed its statutory authorization.' State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority.

As shown above in this case Mr. Finstad entered into a multi case plea agreement under cause numbers 06-1-01137-6; 06-1-02072-3; 07-1-00611-7; 07-1-01996-1. Cause Number 06-1-01137-6 contained two counts of conviction which were ordered to run concurrent with each other and Cause Numbers 07-1-00611-7 and 07-1-01996-1, but consecutive to both cause numbers 06-1-01073-6 and 06-1-02072-3. While it was proper to run Cause Number 06-1-01137-6 consecutive with Cause Number 06-1-01073-6 as 06-1-01073-6 was sentenced on a separate day; it was improper under the SRA to run 06-1-01137-6 consecutive with 06-1-02072-3 as both those cause numbers were

plead to and sentenced on the same day.

In addition, Cause Number 06-1-02072-3, which only contained one count of conviction was ordered to run concurrent to cause numbers 071-00611-7 and 07-1-01996-1, but consecutive to cause numbers 06-1-01073-6 and 06-1-02072-3. Again, while it was proper to run Cause Number 06-1-02072-3 consecutive with Cause Number 06-1-01073-6 as 06-1-01073-6 was sentenced on a separate day; it was improper under the SRA to run 06-1-02072-3 consecutive with 06-1-01137-6 as both those cause numbers were plead to and sentenced on the same day.

RCW 9.94A.589 (1)(a) provides in pertinent part; "Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, that if the Court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under RCW 9.94A.535. ..."

It is thus clear under the unambiguous provisions contained within RCW 9.94A.589 the Sentencing Court in this case was required to run Cause Numbers 06-1-01137-6; 06-1-02072-3; 07-1-00611-7; and 07-1-01996-1 concurrent with each other. The only Cause Number the Court was allowed to run consecutive with anything was 06-1-01073-6 as that case was adjudicated and sentenced at a separate

time than the four cases sentenced on November 14, 2007.

A Judgment and Sentence is invalid on its face if it exceeds the duration allowed by statute and the alleged defect is evident on the face of the document without further elaboration. See In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); Thompson, 141 Wn.2d at 718-19. Whether the Sentencing Court has exceeded its statutory authority under the Sentencing Reform Act of 1981, Chapter 9.94A RCW (SRA), is an issue of law. State v. Murray, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003).

The errors contained within Mr. Finstad's Judgment and Sentences are plain on the face of the documents. Moreover, the Court of Appeals does not dispute that an error exists, rather they held, citing State v. Ermels, 156 Wn.2d 528, 540-41, 131 P.3d 299 (2006) that "In a package deal such as Mr. Finstad agreed to, he cannot challenge the validity of his consecutive sentence without challenging the validity of the entire plea."

In that regard, it is important to note that Mr. Finstad's case is remarkably different than Mr. Ermels case. In State v. Ermels, 156 Wn.2d 528, 540-41, 131 P.3d 299 (2006) the following facts are at issue:

"Joshua James Ermele pleaded guilty to manslaughter in the second degree after he stomped on the head of an unconscious victim and the man later died. As part of his plea agreement, Ermels stipulated to facts supporting an exceptional sentence based on victim vulnerability, and he stipulated that there was a legal basis for an exceptional sentence. He also specifically waived his right to appeal the basis for and propriety of an exceptional sentence. Ermels nevertheless argued to the Court of Appeals, after Blakely v. Washington was decided, that he had not knowingly, intelligently, and

voluntarily waived his right to appeal or his right to have a jury find the facts necessary to support his exceptional sentence."

This Court concluded as follows:

"...Ermels cannot obtain the remedy he seeks. Ermels stipulated to the facts supporting his exceptional sentence and that there was a legal basis for an exceptional sentence. Because those elements were indivisible from the rest of his plea agreement, he cannot challenge the exceptional sentence without challenging the entire plea."

None of the facts relevant to this Court's decision in State v. Ermels are present in Mr. Finstads case. Mr. Finstad did not stipulate to any facts in support of an exceptional sentence. Mr. Finstad did not waive his right to appeal the imposition of an exceptional sentence. Nor did Mr. Finstad agree to an exceptional sentence. Moreover, the sentence imposed in Mr. Finstad's case, unlike that imposed in Ermels' case, is an unlawful sentence.

Thus, the Court of Appeals reliance on State v. Ermels, 156 Wn.2d 528, 540-41, 131 P.3d 299 (2006) is misplaced.

This Court has been clear that "the imposition of an unauthorized sentence does not require the vacation of the entire Judgment or granting a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed. Eilts, 94 Wn.2d at 496. See also Goodwin, 146 Wn.2d at 877, where this Court held, "Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the Judgment and Sentence that was correct and valid when imposed."

While it is true that nothing prevents a defendant from waiving his Apprendi rights, that did not happen in this case. Thus the

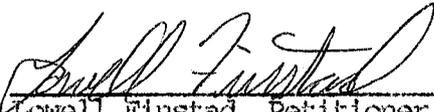
Court of Appeals reliance on State v. Ermels, is misplaced and is in conflict with several of this Courts decisions and decisions of the Court of Appeals in cases factually similar to the issues present in Mr. Finstad's case.

In conclusion, it cannot be disputed that the sentence imposed in this case regarding cause numbers 06-1-01137-6 and 06-1-02072-3, where these two cases were ordered consecutive to each other without the imposition of an exceptional sentence was error. Moreover, the proper remedy in this case is correction of the error and not vacation of the entire plea agreement.

F. CONCLUSION

Mr. Finstad respectfully requests that this Court enter an order granting review of the Court of Appeals dismissal of his Personal Restraint Petition as its order is in conflict with several decisions of the Washington State Supreme Court as well as the Court of Appeals and contains questions significant to both the Constitutions of this State and the United States of America.

Respectfully Submitted on this 17 day of MAY, 2011.



Lowell Finstad, Petitioner Pro Se
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YACOLT W.A 98675

Appendix - A - 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of

Lowell DeBry Finstad

Petitioner.

No. 41877-1-II

ORDER DISMISSING PETITION

FILED
COURT OF APPEALS
11 APR 21 PM 1:56
JAMES C. ...
TERRY

FINSTAD seeks relief from personal restraint imposed as a result of his 2007 guilty pleas to unlawful possession of methamphetamine with intent to deliver and to unlawful possession of cocaine with intent to deliver under cause number 06-1-01137-6. The trial court imposed 40-month sentences for those convictions, concurrent with each other. But it made them consecutive to a 40-month sentence it imposed for his plea of guilty to delivery of methamphetamine under cause number 06-1-02072-3. He argues that because the sentences were imposed in the same sentencing proceeding, the consecutive sentence was an exceptional sentence in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). And he argues that his judgment and sentence is exempt from the one-year time bar contained in RCW 10.73.090(1) because the exceptional sentence is facially invalid and is beyond the jurisdiction of the trial court.

But the remedy he seeks, resentencing him to concurrent rather than consecutive sentences, is not available to him under the circumstances. His sentences were part of an

agreement to resolve four filed cases and one unfiled case against him. That agreement included the State's dismissal of school zone enhancements that could have added 48 months of flat time to his sentence. In a "package deal" such as *Finstad* agreed to, he cannot challenge the validity of his consecutive sentence without challenging the validity of the entire plea. *State v. Ermels*, 156 Wn.2d 528, 540-41, 131 P.3d 299 (2006). *Finstad* does not challenge the validity of the entire plea and so cannot seek resentencing on the consecutive sentence.

Finstad does not show that he is entitled to the relief that he seeks. Accordingly, is hereby

ORDERED that *Finstad* petition is dismissed as frivolous under RAP 16.11(b).

DATED this 21st day of April, 2011.



Acting Chief Judge

cc: *Lowell D Finstad*
Michael C. Kinnie
Clark County Clerk
County Cause No. 06-1-01137-6

IN THE WASHINGTON STATE SUPREME COURT

Lowell Finstad,)	COA No. 41777-1-II
Petitioner Pro Se,)	S.C. No. _____
)	
v.)	CERTIFICATE OF SERVICE
)	
WASHINGTON STATE,)	
Respondent.)	

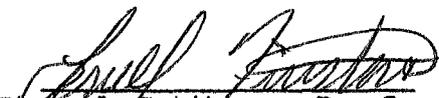
CERTIFICATE OF SERVICE

I, Lowell Finstad, hereby certify that I caused a true and correct copy of the attached 'Motion For Discretionary Reveiw' to be served upon all parties listed herein below, in the manner herein indicated:

- | | |
|--|---|
| (X) Washington State Supreme Court
Supreme Court Clerk, C J Merritt
415 12th Ave S.W.; P.O. BOX 40929
Olympia, WA 98504-0929 | (X) First Class Mail
Postage Prepaid
() Personal Service
() Other: _____ |
| (X) Court Of Appeals, Division Two
950 Broadway, Ste 300 MS TB-06
Tacoma, WA 98402-4454 | (X) First Class Mail
Postage Prepaid
() Personal Service
() Other: _____ |
| (X) <u>Honorable Arthur D Curtis</u>
<u>Clark County Prosecutors Office</u>
<u>Po Box 5000</u>
<u>Vancouver WA 98666-5000</u> | (X) First Class Mail
Postage Prepaid
() Personal Service
() Other: _____ |

I, Lowell Finstad, hereby certify that the above statements are true and correct to the best of my knowledge and belief.

Respectfully Submitted on this 24th day of April, 2011.


 Lowell Finstad, Petitioner Pro Se
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YACOLT W.A 98675