

87501-4
NO. 64265-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of
DEVON ADAMS,
Petitioner.

**STATE'S SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT PETITION**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

RECEIVED
JUN 15 PM 2:51

TABLE OF CONTENTS

	Page
A. <u>QUESTION PRESENTED</u>	1
B. <u>ANSWER</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>ARGUMENT</u>	2
E. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Goodwin, 146 Wn.2d 861,
50 P.3d 618 (2002)..... 7

In re Pers. Restraint of Skylstad,
160 Wn.2d 944, 162 P.3d 413 (2007)..... 1, 2, 3, 5, 6, 8

State v. Barberio, 121 Wn.2d 48,
846 P.2d 519 (1993)..... 7

State v. Gaut, 111 Wn. App. 875,
46 P.3d 832 (2002)..... 6

State v. Kilgore, 167 Wn.2d 28,
216 P.3d 393 (2009)..... 7

State v. Schwab, 141 Wn. App. 85,
167 P.3d 1225 (2007), rev. denied,
164 Wn.2d 1009 (2008), cert denied,
129 S. Ct. 1348 (2009) 3

Statutes

Washington State:

RCW 10.73.090..... 1, 2, 3, 4, 5

A. QUESTION PRESENTED

At the request of this Court, the State answers the following question: How does In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007), affect the State's argument that Adams' restraint petition attacking his 10-year old judgment is untimely?

B. ANSWER

The Supreme Court's decision in Skylstad supports the State's position wholly and completely. The Court in Skylstad ruled that Skylstad's restraint petition attacking his judgment was not time-barred because his judgment and his sentence never became final--one or the other was always under review. Such is not the case here. Both Adams' judgment and his sentence became final on September 5, 2000.

Now, nearly 10 years after his judgment and his sentence became final, Adams argues that he can revive his ability to attack his judgment because he found a flaw in his sentence. Nothing in Skylstad or RCW 10.73.090 supports such a tactical and procedural maneuver. Once Adams' judgment and sentence became final, neither was under review, and one year passed, Adams lost his ability to attack his judgment. A contrary position

would lead to the absurd result that a judgment *never* becomes final so long as a petitioner can find any flaw with his sentence, no matter how much time has passed since his judgment and sentence became final.

C. STATEMENT OF THE CASE

The State relies on the procedural and factual summary and the attached appendices from the State's Response to Personal Restraint Petition.

D. ARGUMENT

In the State's Response to Personal Restraint Petition, the State argued that Adams' petition attacking his judgment is untimely. Subsequently, this Court directed the State to file a Supplemental Response addressing the impact of the Supreme Court's decision in In re Skylstad. As will be discussed below, the decision in Skylstad wholly and completely supports the State's position that Adams' petition attacking his judgment is untimely.

Criminal defendants can bring collateral attacks against their judgment and sentence but must do so within one year of their judgment being final. RCW 10.73.090. A petitioner bears the

burden to proving an exception to the statute of limitations applicable to a post-conviction motion applies. State v. Schwab, 141 Wn. App. 85, 90, 167 P.3d 1225 (2007), rev. denied, 164 Wn.2d 1009 (2008), cert denied, 129 S. Ct. 1348 (2009).

The Court in Skylstad was asked to determine when "a judgment is final" for purposes of the time limitations of RCW 10.73.090. Skylstad, 160 Wn.2d at 945-46. The State's position was that Skylstad's judgment had already become final despite the fact that a reviewing court had ordered Skylstad to be resentenced and Skylstad was still challenging his sentence imposed upon remand. The Supreme Court disagreed with the State's position, ruling that the time-bar limitations of RCW 10.73.090 do not prevent a defendant from challenging his judgment until both the defendant's judgment and sentence become final.

Skylstad's judgment and sentence never became final. Adams' judgment and sentence did. A time line for each defendant is necessary to see how the two cases differ.

Skylstad's Court History

1. 2/8/02--convicted of first-degree robbery with a firearm enhancement.
2. 10/7/03--Court of Appeals affirms conviction but reverses and remands for re-sentencing.

3. 5/4/04--Supreme Court denies review.
4. 5/14/04--Mandate issues.
5. 7/28/04--Skylstad is sentenced anew.
6. 10/11/05--Court of Appeals affirms the sentence.
7. 11/21/05--Skylstad files a restraint petition challenging the judgment.
8. 12/15/05--Court of Appeals dismisses petition challenging the judgment, stating that the mandate issued on 5/14/04 triggered the time-bar limitations under RCW 10.73.090.
9. 9/6/06--Supreme Court denies Skylstad's direct appeal of his sentence.
10. 9/15/06--Mandate issues on Skylstad's direct appeal of his sentence.
11. 7/19/07--Supreme Court rules Skylstad's restraint petition was not time-barred because his sentence was always being challenged and thus his judgment and sentence was not final.

Adams' Court History

1. 4/6/00--Adams found guilty as charged.
2. 9/5/00--Adams sentenced--Adams does not file a direct appeal of either his judgment or his sentence.
3. 9/5/00--for purposes of RCW 10.73.090, Adams' judgment and sentence becomes final.

4. 4/6/09--Adams challenges his sentence in the trial court, claiming his offender score was incorrectly calculated.
5. 6/1/09--Trial court resentences Adams with a corrected offender score.
6. 10/12/09--Adams files a restraint petition challenging his judgment.

The Supreme Court ruled that the one-year time limitation of RCW 10.73.090 never began to run in Skylstad's case, stating:

Skylstad's direct appeal from his conviction cannot be disposed of until both his conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues. Therefore, because his second appeal was still pending, no final judgment was entered and the one-year limitation had not yet begun. Skylstad's PRP is not time-barred.

Skylstad, at 954. Skylstad never had a one-year period after his judgment and sentence were final before he challenged his judgment in his restraint petition. At no time prior to the filing of his petition were Skylstad's conviction or sentence final and not being challenged. In contrast, there was a nine-year period in which Adams' judgment and sentence were final, neither his judgment nor his sentence being under challenge.

In addition, the dichotomy that was identified in Skylstad simply does not exist here. As the Supreme Court noted, under the State's interpretation of RCW 10.73.090 (that the mandate

indicating that the judgment was final is the triggering timing event even though the mandate required Skylstad be resentenced), Skylstad would be prevented "from ever being able to collaterally attack his sentence if his second appeal takes longer than a year." Skylstad, at 953. But, as the Court stated, "no construction should be accepted [of a statute] that has unlikely, absurd, or strained consequences." Skylstad, at 948.

Adams contends that because he was able to identify an error in his sentence, he is now completely free to challenge his conviction. In other words, Adams essentially posits that there can be no time bar to collaterally attacking any judgment so long as an error in a defendant's sentence can be discovered at any point in time. This Court should not adopt such an interpretation of the statute. It certainly cannot be what is contemplated under the rules and laws of appellate procedure that finality is virtually never assured. This is both an absurd and unlikely result and is inconsistent with existing law.

For example, an unappealed final criminal judgment cannot be restored to an appellate track by means of moving to withdraw the guilty plea and appealing the denial of the motion. State v. Gaut, 111 Wn. App. 875, 46 P.3d 832 (2002). Along a similar vein, simply

"[c]orrecting 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." In re Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002); see also State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) (Supreme Court affirms dismissal of appeal where the court of appeals had previously remanded the case to the trial court after dismissing one of two counts of rape, the trial court then imposed the same exceptional sentence with a corrected offender score, and Barberio appealed the sentence); State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (judgment is final when no appealable issue remains, implying that after a remand and resentencing, a defendant would be able to appeal only on the limited issue wherein the trial court exercised discretion when imposing the new sentence).

Nearly ten years after his conviction, Adams seeks to "revive" his ability to challenge his judgment. It is unlikely that the Legislature intended to allow such a result, the reopening of the ability to challenge a conviction simply because of the discovery of a sentencing error a decade later. This Court should not read the

rule so broadly. The reach of the decision in Skylstad is not so great that it extends to cases such as Adams.

E. CONCLUSION

For the reasons cited herein and the reasons cited in the State's Response to Personal Restraint Petition, this Court should find that Adams' attack on his 10-year old judgment is untimely.

DATED this 16 day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeff Ellis, the attorney for the appellant, at Ellis, Holmes & Witchley PLLC, containing a copy of the State's Supplemental Response to Personal Restraint Petition, in STATE V. ADAMS, Cause No. 64265-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

06/16/10
Date