No. 94591-8

FILED
COURT OF APPEALS
DIVISION II

2017 APR 25 AM 10: 21

STATE OF WASHINGTON
BY _____
DEPUTY

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

IN RE THE PERSONAL RESTRAINT PETITION OF	)	
	)	NO. 49853-7-II
WILLIAM CRAIG SCHORR,	)	REPLY BRIEF
PETITIONER,	)	

A. ARGUMENT

1. The State asks the following questions in its response...

> " Must the petition be dismissed defendant knowingly, intelligently and voluntarily waived his right to appeal or collaterally attack his judgment and sentence as part of his plea agreement and the doctrine of invited error precludes review of this issue?

Response pg 1-2. The answer is "no"

2. In support of a "yes" answer to the question, nevertheless, the State proffers the following alternative facts.

> " A review of defendant's plea agreement shows that he knowingly, voluntarily, and intelligentl waived any right to appeal or collaterally attack his judgment and sentence. He even specifically waived the right to collateral attack under RCW 10.73 which is what he is doing in filing this personal restraint petition. There is no question that this waiver was done knowingly, intelligently, and voluntarily by the defendant as evident from the language of the agreement, defendants own statements, and the declaration of his attorney.

See Response, pg. 4

In support of a "yes" answer regarding the doctrine of invited error precludes review, the State proffers the following alternative facts.

> "the petitioner agreed he would be subject to the imposition of a particular sentence in exchange for reduced charges eliminating the possibility that he would be subjected to the death penalty or a sentence of life without the possibility of parole. The parties agreed that after pleading guilty to the charges in the amended information, the defendants standard range would be 291 months to 388 months on the murder, the sentences on the other charges would run concurrently to the sentence on the murder pursuant to statute and the firearm enhancements would add 120 months to be served consecutively pursuant to statute. Defendant also signed a stipulation on prior record and offender score which reflected his standard range on the murder charge and the two firearm sentence enhancements."

See Response, pg. 4

3. Premises considered, this Court should decline to adopt the States conclusion on page 4 and 5 of its response when the reality is, the petitioner's appeal waiver is invalid because the sentence attached to the first degree robbery is unauthorized by law and the first degre robbery conviction on which the sentence is based is completely without authority of law. In regards to the "invited error doctrine," it does not apply in circumstances where a sentencing court has exceeded its statutory. authority

4. Therefore, the first question is, "is separate convictions and sentences for violating RCW 9A.32.030(a)(c) authorized under the Sentencing Reform Act (SRA)?

In 2006, the Supreme Court answered that question in State v. Williams, 131 Wn.App, 128 P.3d 98, (2006) where it held, separate convictions for the predicate crime of robbery in the first degree is contrary to the legislative intent and the offense of first degree robbery and first degree felony murder merge"). Washington State Legislature clearly indicatd that it did not intend multiple punishments for first degree robbery and first degree felony murder. Id. Absnt this clear indication, the trial court was required to enter a final judgment of conviction on greater offense, count I, and vacate the conviction on the lesser offense, count II, first degree robbery as held under Rutledge v. United States, 517 U.S. at 306, 116 S.Ct. 1241 (endorsing this practice).

5. The 75 month sentence and 60 month enhanced sentence based on that conviction is it without authority of law? As noted above, one of the elements of first felony murder is the predicate felony. RCW 9A.32.030(1)(c). Robbery in the first degree is a predicate offense of first degree felony murder. RCW 9A.32.030(1)(c). see 11 Wash Pattern Jury Instr. Criminal Law 27.04 at 303 (2d.ed 1994). In order to find a defendant guilty of felony murder, the State does not attempt prove the murder, in the contrary, it must prove the first degree robbery and the killing of the victim in the course

of or in immediate flight from that robbery.

RCW 9A.32.030(1)(c) criminalizes the act of causing the death of the victim in the course of the predicate offense which aggravates the lesser included offense in a greater offense of first degree murder. See Rutledge, Id at 300, 307 ("one of the petitioner convictions . . . is unauthorized punishment for a separate offense and must be vacated") (quoting Ball, 470 U.S. at 864). It does not criminalize the first degree robbery for the trial court to be authorized to impose the contested sentence. See In re Personal Restraint of Hinton, 152 Wn.2d 861, 100 P.3d 805. In that case Hinton, and others, were convicted of Second degree felony murder based on the predicate felony of assault. At the time he committed his act no statute established a crime of second degree felony murder resting on assault. A conviction under former RCW 9A.32.050 resting assault as the underlying felony was not a conviction of a crime at all. Obviously, the same is true where petitioner has been convicted of the predicate offense under RCW 9A.32.030(1)(a) is not a conviction of a crime at all.

6. Although, the robbery conviction on which the 60 month enhances sentence is based is completely without authority of law, the enhanced penalty provision under RCW 9.94A.602,510 could not be used in a conviction for first degree robbery. see In re Carle, 90 Wn.2d 443.

7. As demonstrated above, the conviction and sentence is illegal. The State has not disputed this but rather take refuge under petitioner's plea of guilty and the attached waiver of appeal. Response. It is undisputed petitioner, under the advise of counsel plead guilty and signed the waiver. Does a plea of guilty and an otherwise valid waiver of postconviction appeal prevent a defendant from attacking an "illegal sentence"?

8. In the Matter of McNut, 42 Wn.2d 563, 283 P.3d 848 petitioner was sentenced to an erroneous sentence under the habitual criminal act. The trial court had the inmate returned and entered a judgment doubling the sentence it entered prior. The inmate argued that the second sentence was void The Suprem Court stated when a sentence has been imposed for which there is no authority of law, the trial court has the power and duty to correct it the erroneous sentence, when the error was discovered. McNut, 47 Wn.2d at 565, 288 P.2d 850.

9. McNut was cited with approval in Brooks, Hinton, and Carle. In Brooks the sentencing court imposed concurrent sentences. But the sentencing court acted contrary to law in ordering the sentences to run currently. The Supreme Court noted that case law clearly holds that the trial court has the power and duty to correct the erroneous sentence. The Court held the entire judgment of the trial court is noh erroneous.

The conviction still stands. The appropriate remedy is resentencing to correct the erroneous sentence imposed. Brooks, 92 Wn.2d at 878, 602 P.2d 351.

In Carle, he plead guilty to first degree robbery while armed with a deadly weapon, to wit a 38 caliber colt revolver. Carle was sentenced to not more than 20 years. Due to the enhanced penalty Carle was subject to a minimum 5 year sentence. He did not appeal or otherwise challenge the application of the enhanced penalty. The Supreme Court decided Workman holding the enhanced penalty penalty provision could not be used in a conviction for first degree robbery. Carle, 90 Wn.2d 443, 584 P.2d 382. Thereafter Carle applied for relief by PRP alleging two grounds first, pursuant to RAP 16.4(c)(2), it was alleged that the sentence imposed is a violation of the law of the State of Washington and second, pursuant to RAP 16.(c)(4), it was contended that Workman effected a significant change in the law which was material to his sentence. In granting the petition, the Supreme Court held, because the trial court imposed an erroneous sentence, and since the error has now been discovered, the Court has both the power and duty to correct it.

In Hinton, in granting his personal restraint petition, the Court citing Goodwin, 146 Wn.2d 861, 90 P.3d 618 stated "an individual cannot, by way of a negociated ples agreemnt, agree to a sentence in excess of that allowed

by law and thus cannot waive such a challenge and Carle 93 Wn.2d at 33 ("petitioner entitled to relief from a sentence not authorized by law, observing the courts power and duty to correct such an erroneous sentence").

The Hinton Court applied the McNut rule on erroneous sentences imposed without authority of law to a conviction on which that sentence is based is without authority of law. The Court stated that, the fact that the petitioner plead guilty does not make any difference citing Thompson, 141 Wn.2d at 723 ("a plea agreement to plead guilty to a nonexistent crime does not foreclose collateral relief because a plea agrment cannot exceed the statutory granted the court"). Hinton, 152 Wn.2d 861, 100 P.3d 805.

10. This Washington State rule is consistent with the Circuits. "an otherwise valid waiver of postconviction rights or appeal rights does not prevent a defendant from attacking "an illegal sentence." See Andis, 333 F.3d at 891 Dereo, 223 F.3d at 923-24. Assuming that a waiver has been entered into knowingly and voluntarily the courts will still refuse to enforce and otherwise valid waiver if to do so would result in a miscarriage of justice. Dereo, 223 F.3d at 932-24 (stating that a waiver of appellate rights not prohibit appeal of an illegal sentence or a claim asserting ineffective assistance of counsel) see also Michaelson, 141 F.3d at 872 N.3 (describing the right to appeal illegal sentence)

The Federal Courts define an illegal sentences as "when the sentence is in excess of a statutory provision or otherwise contrary to applicable statute. A sentence is not illegal if the punishment meted out was not in excess of that prescribed by the relevant statute . . . or the terms of the sentence itself are not lgally or constitutionally invalid in any other respect." See United States v. Peltier, 312 F.3d at 938.

11. The petitioner's conviction and sentence within this category he therefore cannot waive his right to appeal his sentence. Michealson, 141 F.3d 867, cert denied, 525 U.S. 942, 119 S.Ct. 363.

12. Although, Schorr conduct is immaterial to the legal questions being addressed, nevertheless, h is aware that his case involves horrifying conduct and heartbreaking loss of life, the cost in human terms is immeasuruable. Judges are not immune to those horrors. Yet, to assure lawful and fair treatment of all person convicted under a statute that have criminalized Schorr's act as one crime, but did not criminalize his actions as three crime, for the court to impose conviction and punishment on all three crimes entitles petitioner to relief. This court obligation is to see that the law is carried out uniformly and justly. quoting Hinton.

13. The last question is whether appellate review is precluded under the invited error doctrine?

This question is answered by State v. Hughes, 2017 Wash.App. LEXIS 153. In that case, the Court ordered, as a condition of community custody, a Mental Health Evaluation. Hughes appealed. On appeal the State argued Hughes invited the error. In effect at the time of Hughs offense, a relevant statute provided that before ordring a mental health eval or tratmnt, the court must ultilize a presentence report to find (1) an offender is a mentally ill person as defined in RCW 71.24.025, and (2) the defendants condition likely influenced the crime. The Court stated this statutory procedure was not followed. The Court remanded for the trial court to strike the condition unless it determine it can presently and lawfully comply with the statute.

In State v. Phelps, 113 Wn.App. 347, 354, 57 P.3d 624, which was cited with approval by Hughes, similary, the State argued that the invited error doctrine barred Phelp from complaining of the alleged errors because, like Schorr, h participated in creating them by agreeing to the conditions in the plea bargain. The Court held, although Phelps clearly invited the challenged sentence, to the extent he can show that the sentencing court exceeded it statutory authority, the invited error doctrine will not preclude appellate review. Phelps, 113 Wn.App. at 354 (citing Goodwin, 146 Wn.2d 861, 50 P.3d 618).

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14. The cases cited by the State in its response, Breedlove, Wakefield, and Henderson are distinguishable from Schorr's particular circumstances, to the extent, the trial court in those cases acted within its statutory authority in imposing the sentences where as in the instant case it did not. Fn.1.

15. In conclusion, Schorr's conviction and sentence for counts III and V are not authorized by law and nor does his plea of guilty, appeal waiver, or the invited error doctrine precludes him from review of those errors because the courts actions are in violation of the laws of the State of Washington. For these reason, Schorr respectfully request that the Court grant his petition as it did in Carle and Hinton.

Respectfully submitted by

Sir Reginald Bell, Sr
Inmate Legal Advisor for

Dated this 16 day of April, 2017

WILLIAM CRAIG SCHORR
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Certificate of Service
The undersigned certifies that on this day I delivered by U.S. mail to the States attorney of record true and correct copies of the document to which this certificate is attached.

4-19-2017 [signature]
DATE SIGNATURE

FN.1, "Henderson involved an erroneous jury instruction even under those circumstances the invited error doctrine does not preclude review if the error resulted from ineffective assistance of counsel. see State v. Kyllo, 166 Wn.2d 856. Here, Schorr's plea was not knowing, voluntary, and intelligently made where his appointed attorney misinformed him about the sentencing laws.