

NO. ~~64983-7-1~~  
59975-5

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

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In re Personal Restraint  
Petition of

GARTH D. SNIVELY,  
  
Petitioner.

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SUPPLEMENTAL BRIEF OF  
RESPONDENT STATE OF WASHINGTON

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STATE OF WASHINGTON

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## **I. SUPPLEMENTAL ISSUES**

The court has requested supplemental briefing on the following issues:

(1) What is the effect on this case of In re McKiernan, 165 Wn.2d 777, 203 P.3d 375 (2009)?

(2) Can the holding of In re Paschke, 80 Wn. App. 439, 909 P.2d 1328 (1996), be reconciled with In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993)?

## **II. STATEMENT OF THE CASE**

The facts are set out in the Brief in Opposition to Personal Restraint Petition.

## **III. SUPPLEMENTAL ARGUMENT**

### **A. McKIERNAN SUPPORTS THE STATE'S POSITION AS TO ONE CONVICTION AND IS IRRELEVANT AS TO THE OTHER.**

#### **1. Since The Judgment For Child Molestation Is Valid On Its Face, McKiernan Indicates That It Cannot Be Challenged On The Basis Of Any Error In The Plea Agreement.**

The present petition involves a challenge to two separate judgments, one for child molestation (ex. 5 to PRP response) and one for indecent liberties (ex. 12). The child molestation judgment contains no facial error. It sentenced the petitioner to two years of community placement, which was the correct term for crimes committed on or after July 1, 1990. Ex. 5 at 3; Laws of 1990, ch. 3,

§ 705. The State's brief argues that because any error did not appear on the face of the judgment, the conviction could not be challenged outside the time limit. Brief in Opp. to PRP at 5-8. McKiernan reinforces this argument.

In McKiernan, the plea statement erroneously described the maximum sentence as "20 years to life imprisonment." In fact, the maximum was simply life imprisonment. The judgment and sentence likewise misstated the maximum term as "20 yrs. to life." McKiernan, 165 Wn.2d at 777 ¶ 3. The court held that this error on the judgment was a "technical misstatement that had no actual effect on the rights of the petitioner." Since the judgment was not facially invalid, it could not be attacked outside the time limit. Id. at 783 ¶ 10.

In reaching this decision, the court re-stated the rule that errors on a plea agreement do not by themselves invalidate the judgment.

A reviewing court may use the documents signed as part of a plea agreement to determine facial invalidity if those documents are relevant in assessing the validity of the judgment and sentence. But an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid. The plea documents are only relevant to help determine if the judgment and sentence itself is facially invalid.

Id. at 781-82 ¶ 8.

The petitioner continues to argue that errors in the plea statement render the judgment invalid. Petitioner's Supp. Brief at 4. The quoted portion of McKiernan disposes of this argument. The *judgment* properly sentenced the petitioner to the proper period of community placement. Erroneous advice as to community placement does not render the ensuing judgment invalid on its face. In re Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002). Under McKiernan, the child molestation conviction cannot be challenged outside the time limit.

**2. With Regard To The Indecent Liberties Judgment, McKieran Does Not Discuss What Challenges Can Be Raised To A Judgment That Contains A Facial Error.**

The indecent liberties judgment does contain a facial error. It sentenced the petitioner to a term of community placement, which was not available at the time of the charged crimes. Ex. 12 at 3; Laws of 1988, ch. 153, § 2. Because this error is apparent on the face of the judgment, the erroneous portion of the judgment can be challenged outside the time limit. Nevertheless, as explained in the State's brief, this does not open the judgment to other challenges. Brief in Opp. to PRP at 8-11; see In re Stoudmire, 141 Wn.2d 342, 348-50, 5 P.3d 1240 (2000).

McKiernan does not address this situation. As discussed above, the court held that the judgment there was valid on its face. Consequently, the court had no occasion to consider the scope of challenges that would be available for an invalid judgment. McKiernan does not change the rule of Stoudmire. Under Stoudmire, a judgment that is invalid on its face cannot be attacked on grounds unrelated to that invalidity, if the attack is brought outside the time limit.

**B. PASCHKE CANNOT BE RECONCILED WITH RUNYAN, WHICH HOLDS THAT THE TIME FOR CHALLENGING A PRIOR CONVICTION IS NOT RE-OPENED BY THE USE OF THAT CONVICTION IN A SUBSEQUENT PROCEEDING.**

In Runyan, one of the petitioners (Kelly) challenged prior convictions that had been used to compute his offender score. He argued that “the 1-year limit should not be to run against him until his prior convictions are used in the sentencing for his current conviction.” The court rejected this argument as “undermin[ing] the very purpose of RCW 10.73.090, which is to encourage prisoners to bring their collateral attacks promptly.” Runyan, 121 Wn.2d at 450.

Three years later, in Paschke, Division Three of this court said that when a sexually violent predator finding is based on a

prior conviction, the one-year time limit commences as of the date of the finding. Paschke, 90 Wn. App. at 445 n. 2. This holding is inconsistent with Runyan. Under Runyan, the use of a prior conviction in a subsequent proceeding does not provide a new one-year time period. Although this decision was reached in the context of sentencing, there is no reason for applying a different rule in the context of a sexually violent predator proceeding. As in Runyan, allowing the belated challenge would undermine the statutory purpose of encourage convicted persons to file collateral attacks promptly.

The petitioner cites Brock v. Weston, 31 F.3d 887 (9<sup>th</sup> Cir. 1994). That case involves interpretation of the federal habeas corpus statute, 28 U.S.C. § 2254. That statute is substantially different than Washington law.

Under the federal statute, a writ of habeas corpus is only available if the petitioner is “in custody.” 28 U.S.C. § 2254(a). Once a sentence has expired, the convicted person is no longer “in custody” pursuant to that conviction. Collateral consequences of a conviction are insufficient to render the person “in custody.” Maleng v. Cook, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 1923 (1989). A person may, however, be in custody pursuant to

some subsequent conviction. In that case, the person may be able to challenge the subsequent conviction “as enhanced by the allegedly invalid prior conviction.” Id. at 493.

In Brock, the Ninth Circuit Court of Appeals applied this doctrine to a sexually violent predator proceeding. The petitioner there was confined as a sexually violent predator. He was “in custody” pursuant to this commitment. This did not allow him to raise a direct challenge to a prior conviction. Brock, 31 F.3d at 889. It did, however, allow him to challenge that prior conviction insofar as it served as a predicate for his current commitment. Id. at 891. The Third Circuit Court of Appeals reached a similar result with regard to a conviction that, after it was served, was used as a basis for revoking parole in another case. Young v. Vaughn, 83 F.3d 72 (3<sup>rd</sup> Cir.), cert. denied, 519 U.S. 944, 117 S. Ct. 333, 136 L. Ed. 2d 245 (1996).

In contrast, Washington law has no “custody” requirement. Rather, it requires that the petitioner be under “restraint.” RAP 16.4(a). “Restraint” includes any “disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b). Unlike federal habeas corpus proceedings, a personal restraint proceeding *can* be used to challenge collateral consequences.

The Federal “custody” requirement is not a time limit. Its purpose is not to encourage prompt challenges to convictions. Rather, that requirement is “designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.” Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973). Since the federal “custody” requirement serves a different purpose than the Washington time limit, cases construing that requirement provide no guidance for the interpretation of RCW 10.73.090.

In any event, this court cannot follow the federal cases, even if it considered them both relevant and persuasive. Under the federal cases, a person whose sentence is enhanced by a prior conviction could challenge his current sentence “as enhanced by the prior conviction.” This is exactly what the petitioner Kelly tried to do in Runyan. The Supreme Court rejected that attempt. Runyan, 121 Wn.2d at 449-50.

Even when a Washington statute is similar to a federal statute (which is not the case here), this court is bound by the Washington Supreme Court’s interpretation of the state statute. This court is not at liberty to follow any contrary interpretations of the federal statute. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d

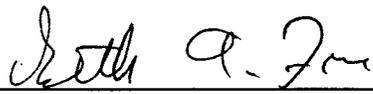
227 (1984). Under Runyan, the use of a prior conviction in a new proceeding does not re-open the time for challenging that conviction. As a result, the petitioner's challenges here are untimely.

#### IV. CONCLUSION

For these reasons, as well as those set out in the State's previous brief, the personal restraint petition should be dismissed.

Respectfully submitted on September 18, 2009.

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