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COURT OF APPEALS  
STATE OF WASHINGTON  
2013 APR 24 PM 1:23

NO. 68935-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**RAYNE DEE WELLS, JR.,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

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**RESPONDENT'S BRIEF**

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ORIGINAL

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## **I. SUMMARY OF ARGUMENT**

Rayne Wells appealed from correction of his judgment and sentence as ordered by the Washington State Supreme Court following a prior personal restraint petition. After the corrected judgment and sentence was entered, Wells moved to withdraw the guilty plea claiming that he was misinformed of his standard range. The State had conceded that some of his prior criminal history before age fifteen should not have been scored at the time of the prior sentencing under the laws then in effect. The trial court transferred the motion to withdraw the guilty plea to the Court of Appeals which was assigned case number 69080-9 by the Court of Appeals and is pending a decision.

Wells' appointed counsel from the appeal filed an appellant's opening brief, which did not address the correction of the judgment and sentence or any errors therein. Instead, it argued that the trial court erred in transferring the motion to withdraw the guilty plea and should remand the motion to the trial court.

The State contends the motion to withdraw the guilty plea was a subsequent collateral attack. Thus, request to remand for the hearing on the motion to withdraw the guilty plea should be denied.

## **II. ISSUES**

1. Is the present notice of appeal from a corrected judgment and sentence untimely where the judgment and sentence was being corrected pursuant to ruling from the Washington State Supreme Court?
2. Where the defendant previously sought collateral relief and could have addressed the offender score claims, is the present collateral attack precluded as successive and untimely?
3. Did the trial court err in transferring the motion to withdraw the guilty plea?

## **III. STATEMENT OF THE CASE**

On December 22, 2000, Rayne Wells was charged with Unlawful Possession of a Firearm in the First Degree, Malicious Mischief in the Second Degree and Escape in the Second Degree in Skagit County Superior Court #00-1-00610-1. CP 1-2. The charges were based upon offenses occurring in Skagit County and Wells' escape from a facility he was held at in King County pursuant to a Skagit County court order. CP 5-10.

On December 22, 2000, Wells pled guilty. CP 42-9. At that time, the defendant was eighteen. CP 42. Wells agreed to have his cases from

juvenile court handled in adult superior court. 12/22/00 RP 3,<sup>1</sup> (See Appendix A, transcript of guilty plea and sentencing hearing). The guilty plea form indicated ranges of 22 to 29 months on counts 1 and 3 and 12+ to 14 months on count 2. CP 42. These ranges are consistent with an offender score of 6. The parties agreed that Wells would receive an exceptional sentence downward of 12+ months of prison time to run concurrent with the time ordered in an Island county case. CP 44.

The trial court followed the agreed exceptional sentence downward of 12+ months of prison time as well as an agreement for concurrent time between a Skagit County case and an Island County case. CP 102-3. The judgment and sentence had errors in the named offense in count 1, omission of the criminal history and omission of the ranges for the offenses. CP 102-4.

On April 17, 2009, Wells filed a notice of appeal of the extension of jurisdiction for collection of legal financial obligations. CP 3.

On December 14, 2009, Wells filed the Motion for Relief of Judgment under CrR 7.8 in the trial court. CP \_\_, Sub No. 27, Motion F/DEFT filed December 13, 2009, Supplemental Designation of Clerk's Paper's pending. The petition alleged the trial court lacked jurisdiction over

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

12/22/00 RP	Guilty plea and Sentencing,
6/4/12 RP	Entry of Corrected Judgment and Sentence,
6/14/12 RP	Preliminary review of Motion to Withdraw Guilty Plea.

acts in King County, lacked jurisdiction over Wells because he was under age eighteen at the time of the offenses, failed to require proof of a prior serious conviction, was incompetent at the time of the plea and was prejudiced because his counsel was ineffective.

On January 22, 2010, the trial court transferred the matter to the Court of Appeals for consideration as a personal restraint petition. CP \_\_\_, Sub No. 34, Order of Transfer to Court of Appeals filed January 22, 2010, Supplemental Designation of Clerk's Paper's pending.

On June 10, 2011, the Court of Appeals issued a decision denying the petition in case number 64891-8-I. CP \_\_\_, Sub No. 82, Certificate of Finality filed October 3, 2012, Supplemental Designation of Clerk's Paper's pending.

On August 31, 2011, Wells filed a motion for discretionary review, which was assigned Supreme Court case number 86225-7. On March 16, 2012, the Supreme Court entered a ruling denying conditionally denying review. CP \_\_\_, Sub No. 82, Certificate of Finality filed October 3, 2012, Supplemental Designation of Clerk's Paper's pending. The ruling held that despite the judgment and sentence's omissions of offender score, ranges, maximum sentence and criminal history, that these were technical flaws that had no effect on Wells' rights. See Appendix B at page 2, Ruling Conditionally Denying Review. The Commissioner held the judgment and

sentence was not “invalid” for purposes of escaping the time bar on collateral attacks. See Appendix B at page 3. The Commissioner denied review on the condition that the State obtain a corrected judgment and sentence. Wells did not seek modification of the commissioner’s ruling.<sup>2</sup>

On June 4, 2012, the trial court conducted a hearing. The State filed an amended information that changed count 1 to Unlawful Possession of Firearm in the Second Degree to match the guilty plea. 6/4/12 RP 2, CP 97. At the hearing, the State concluded that three offenses occurring before age fifteen which had been considered by the parties in determining the offender score for the purposes of the plea, should not have been included in criminal history. 6/4/12 RP 2-3. Those three offenses were TMVWOP in Skagit County case 96-8-00257-1, offense date April 29, 1996, sentencing July 9, 1996, and Burglary in the Second Degree and Theft of a Firearm in Skagit County case 97-8-00019-4 occurring on January 8, 1997 and sentenced on February 19, 1997.<sup>3</sup> Wells’ counsel addressed concern over the score and

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<sup>2</sup> Wells walked a fine line in obtaining a correction of the judgment and sentence as opposed to a full resentencing which would have included numerous subsequent felony convictions which would have caused his offender score to be 9 or more.

<sup>3</sup> Prior to February 1, 1997, juvenile offenses occurring before age 15 were not included in offender score Laws of Washington 1995, ch 316 § 1. The statute was amended in 1997 to include offenses before age 15 in offender score. Subsequent case law has only allowed the sentencing scheme to be applied to offenses occurring after the date of the legislative enactment. State v. Swecker, 154 Wn.2d 660, 667, 115 P.3d 297 (2005).

that a new motion to withdraw guilty plea could be pursued. 6/4/12 RP 3-4.<sup>4</sup>

The State specifically noted that Wells should address the issues of the corrections to the judgment and sentence in the Supreme Court.

Well, your Honor, on this issue, with respect to the Court considering a motion to withdraw a guilty plea, a renewed motion, I should note that this actual - - action actually started from the motion in the trial court to withdraw a guilty plea, which is transferred to the Court of Appeals, the person granted the petition was denied by a commissioner there, affirmed by a panel that discretionary review was sought, a commissioner of the state Supreme Court is the one who demanded the matter be sent back for correction of the judgment and sentence.

So, at that point Mr. Wells can go back, assuming the Court approves it, his motion is already in the state Supreme Court, and he can address the issues that the corrected judgment and sentence addressed as to them.

6/4/12 RP 5.

The trial court entered a corrected judgment and sentence. CP 50-8, 6/4/12 RP 20-2. The corrected judgment and sentence listed offender score and ranges omitting juvenile offenses which in fact had been determined not to apply and noting that a prior adult conviction had subsequently been vacated. CP 51.

On June 14, 2012, the case came before the trial court on preliminary review of the defendant's motion to withdraw the guilty plea. 6/14/12 RP 2.

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<sup>4</sup> Wells' main focus was that he did not get the benefit of a bargain by having an exceptional sentence downward. In fact, certain of the counts had previously been filed in juvenile court. If they had remained in juvenile court they could have resulted in a harsher juvenile sentence given the difference in juvenile versus adult scoring rules.

Wells' counsel addressed the claim that the correction of the judgment and sentence removed the exceptional sentence as to two counts, but in effect gave him an exceptional sentence on the Malicious Mischief in the Second Degree. 6/14/12 RP 4-5. The trial court noted that the Supreme Court was in the position to address the correction of the judgment and sentence, noting the commissioner's ruling entered on June 7, 2012 which is described in more detail below. 6/14/12 RP 7-8. The trial court also did not find the need for a fact finding hearing. 6/14/12 RP 9. The trial court transferred the motion to the Court of Appeals for consideration as a personal restraint petition. CP 108. That petition is pending in Court of Appeals case number 69080-9.

On June 15, 2012, Wells filed a notice of appeal of the "exceptional sentence imposed on Count II and the lack thereof on I and II and transfer of CrR 4.8 motion entered on 06-04-12 and 06-14-12." CP 109.

On July 5, 2012, Wells filed a second notice of appeal in the trial court. CP 111. The notice of appeal was designated as seeking review of "decision forwarding CrR 4.2 motion to Court of Appeals as PRP and exceptional sentence high on count II." CP 111.

While Wells' motion for discretionary review was still pending, he had filed a separate personal restraint petition. On November 10, 2011, Wells then filed directly in the Supreme Court which was assigned case

number 86706-2. Wells raised the three grounds previously raised in his motion filed in the trial court on December 14, 2009. Wells also raised the issue of the offender scoring of his prior juvenile history. The petition claimed he was mis-advised of the standard range because of inclusion of three juvenile offenses occurring before age 15 which for a time would not have been included in criminal history. The State contended that at the time of his guilty plea, juvenile felony offenses occurring prior to age 15 were included in offender score and would be at resentencing at this time. Wells asserted his convictions for TMVWOP, Burglary in the Second Degree and Theft of a Firearm did not count pursuant to offender score pursuant to In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805, 807 (2004). Thus, Wells recognized that his offender score calculation was made based upon the understanding of the law at the time and did include the prior juvenile conviction. The State addressed the issue in the response filed in the Supreme Court. See Appendix C at pages 16-8, State's Response to Personal Restraint Petition.<sup>5</sup>

On June 7, 2012, the Supreme Court Commissioner entered a Ruling Dismissing Personal Restraint Petition. See Appendix D, Ruling Dismissing

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<sup>5</sup> The State is aware that this pleading is not part of the record of this case, but provides this brief to show the content of Wells' prior pleadings addressing the offender scoring issues which were referenced in the Appendix A to the Brief of Appellant and to rebut the claims of Wells' counsel that the offender scoring issue was not considered.

Personal Restraint Petition. That ruling noted the prior decision had been entered in 86225-7 and that Wells had not moved to modify that ruling. The commissioner noted that Wells contended that his guilty plea was involuntary because of errors in the judgment and sentence. See Appendix D at page 3. The commissioner noted that “neither of those claims is exempted from the time limit under RCW 10.73.090. See In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000).” See Appendix D at page 3. A department of the Supreme Court denied a subsequent motion to modify the commissioner’s ruling. See Appendix E (Order filed September 6, 2012 in case 86706-2).

#### **IV. ARGUMENT**

##### **1. Wells’ notice of appeal is untimely.**

Wells was sentenced on December 22, 2000. He filed two notice of appeals following corrections to a judgment and sentence entered June 4, 2012, pursuant to a personal restraint petition he pursued. The corrections are not a new judgment and sentence. His notices of appeal are untimely. CrR 7.2, RAP 5.2.

Wells prior judgment and sentence was entered on December 22, 2000. Wells had filed a notice of appeal from an order extending jurisdiction to collect legal financial obligations in 2009, but he did not file a notice of appeal from that judgment and sentence. And in fact, his notices of appeal

are of the order denying the motion to withdraw the guilty plea and of the exceptional sentences entered.

Wells appellate counsel did not address the timeliness of his appeal, instead addressing the collateral relief Wells sought by filing the motion to withdraw the guilty plea and contending collateral relief was not untimely. Brief of Appellant at page 9. However, there was no denial of the motion to withdraw the guilty plea. Instead there was a transfer of the motion pursuant to CrR 7.8(C)(2). Thus, the collateral attack is not properly before this Court on appeal. In fact, the transfer of the motion to withdraw guilty plea is presently pending in Court of Appeals case number 69080-9. Wells' counsel has converted the personal restraint petition which this court is considering in case 69080-9 to the present direct appeal.

Despite the pending petition and pending review by this Court, Wells' contends the petition was not time barred and that the matter should be returned to the trial court for a reference hearing. Brief of Appellant at pages 15-6. As detailed below, the petition is both barred as successive and untimely.

Furthermore, Wells' appeals filed were of the "exceptional sentence imposed on Count II and the lack thereof on I and II and transfer of CrR 4.8 motion entered on 06-04-12 and 06-14-12" and the "decision forwarding CrR 4.2 motion to Court of Appeals as PRP and exceptional sentence high

on count II.” CP 109, 111. Wells fails to assign error to the exceptional sentences. “A party's failure to assign error or argue an issue precludes appellate consideration.” State v. Kipp, 171 Wn. App. 14, 27, 286 P.3d 68 (2012) *citing* RAP 10.3(g); Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003). Thus, he fails to seek relief under the notice of appeal he filed.

**2. Wells’ personal restraint petition is barred as both successive and untimely.**

**i. Wells pursued two prior collateral attacks and failed to address the criminal history.**

Wells has previously filed two collateral attacks. First he filed a motion to withdraw a guilty plea which was transferred to the Court of Appeals and then considered by the Supreme Court. See Appendix B. Then he filed a second personal restraint petition in the Supreme Court. See Appendices C, D and E. The ruling by the Supreme Court in the second petition specifically noted that Wells had failed to seek to modify the prior Supreme Court ruling. See Appendix D at page 1.

Wells has made no showing why he failed to pursue the motion in a prior petition or shown good cause why he did not raise the new grounds in the previous petition. In fact, the prosecutor at the trial court noted that Wells could seek to address the offender score issue in the Supreme Court. Wells did not do so in case 86225-7. And in case 86706-2, Wells raised the

offender scoring issue in supplemental pleadings, but the Supreme Court precluded review given that he had not raised the issue in his prior petition.

Mr. Wells also argues that his judgment and sentence is facially invalid. RCW 10.73.090(1). That argument was also rejected in Mr. Wells's earlier petition.

See Appendix D at page 2.

Thus, the present petition in the Court of Appeals is a second collateral attack prohibited by RCW 10.73.140.

If a person has previously filed a petition for personal restraint, **the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.** Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them.

RCW 10.73.140 (emphasis added).

**ii. Wells' raising of the offender scoring issue is untimely.**

The State contends that Wells' challenge on the same grounds raised in the Supreme Court in case 86706-2 is untimely. RCW 10.73.090 requires petitions to be filed within one year if the judgment and sentence is facially valid.

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and

sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, “collateral attack” means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090. If a guilty plea has incorrect ranges that does not automatically result in a facially invalid judgment and sentence.

However, an allegedly involuntary plea is not an error of facial invalidity and cannot be raised on an untimely petition absent a RCW 10.73.100 exception. In re Pers. Restraint of Clark, 168 Wn.2d 581, 587, 230 P.3d 156 (2010).

In re Pers. Restraint of Toledo-Sotelo, \_\_\_ Wn.2d \_\_\_, 297 P.3d 51, 56-57 (2013).

To be facially invalid, a judgment and sentence requires a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner. Even as misstated, McKiearnan was aware of the maximum amount of time he could serve in confinement. We hold that McKiearnan has failed to establish that the judgment and sentence was facially invalid and his PRP is therefore time barred under RCW 10.73.090.

In re Pers Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375

(2009).

The personal restraint petition is an extraordinary remedy to be applied only in limited circumstances. In particular, a personal restraint petition can be filed only within one year after the challenged judgment becomes final, provided that the judgment is valid on its face. Jose Toledo-Sotelo filed an untimely personal restraint petition but argues that his judgment and sentence recited an incorrect offender score and offense seriousness level. In other cases, these errors might make the judgment facially invalid. But here, the trial court coincidentally used the sentencing range that resulted from the correct offender score and seriousness level. Thus the sentencing court did not exceed its statutory authority under the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, and the judgment and sentence is valid on its face.

In re Pers. Restraint of Toledo-Sotelo, \_\_ Wn.2d \_\_\_, 297 P.3d 51, 52

(2013).

Here, Wells agreed to the sentence imposed. Upon correction of the judgment and sentence, he received the same sentence which was served concurrently with another case and was completed over a decade ago. The State contends that the sentence imposed in the initial judgment and sentence and as corrected was within the trial court's jurisdiction. Therefore, his judgment and sentence is not facially invalid under RCW 10.73.090. Given Wells failure to allege a basis under RCW 10.73.100, for extending the one-year time bar, the State contends the motion to withdraw the guilty plea was not timely and must be denied.

**V. CONCLUSION**

Wells' requests relief of remand for a hearing on whether his motion to withdraw guilty plea should be granted. Given the argument presented above, this relief must be denied.

DATED this 23<sup>rd</sup> day of April, 2013.

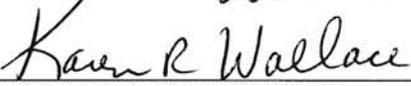
SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer Dobson & Dana Nelson, addressed as Nielsen Broman Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 23<sup>rd</sup> day of April, 2013.

  
KAREN R. WALLACE, DECLARANT

# **APPENDIX A**



1 DECEMBER 22, 2000

2 --oOo--

3 MR. WILLETT: Your Honor, it's not on the  
4 calendar, you should have a brand spanking new file there.  
5 Your Honor, this is Rayne D. Wells, and cause number is  
6 00-1-00610-1. Mr. Wells was charged with a couple of crimes  
7 in juvenile court, and there was an additional escape charge  
8 that occurred while he was a juvenile but wasn't referred  
9 until after he had turned 18. Mr. Wells since then  
10 unfortunately has had some additional difficulties in his  
11 life, and he's going to be going to the Department of  
12 Corrections for a year and a day from Island County.

13 It appeared to be a reasonable resolution of this  
14 matter, given that I don't think Mr. Wells would want to go  
15 to -- he was looking at JRA on the juvenile offenses, I  
16 didn't think it made much sense for him to go to JRA for a  
17 period of time and then get released to Department of  
18 Corrections to do a year and a day, and Mr. Wells and  
19 counsel agreed that that probably didn't make much sense.

20 So what we're going to ask is that Mr. Wells is  
21 stipulating to decline of juvenile court jurisdiction, and  
22 we're refileing these charges in Superior Court. He's  
23 charged with unlawful possession of firearm in the second  
24 degree, malicious mischief in the second degree, and escape  
25 in the second degree. It's his intention to enter a plea to

1 those three charges, and we are going to be asking jointly  
2 that the Court sentence him to what would be an exceptional  
3 sentence of a year and a day, to run concurrent with the  
4 time that he's going to be serving for Island County.

5 And the basis for the exceptional sentence beyond  
6 the agreement, your Honor, is the fact that these events did  
7 occur when he was a juvenile, he would not have been looking  
8 at the sort of consequences as a juvenile that he is now  
9 looking at as an adult, but he is basically trying to do  
10 this to clean things up so he can go off to DOC, get that  
11 time taken care of, and hopefully take advantage of some of  
12 the opportunities there. And not have any -- basically,  
13 have a clean slate when he returns.

14 So that's what -- that's my understanding of the  
15 circumstances, your Honor. Unfortunately, Mr. Wahl has been  
16 representing Mr. Wells, and he's a person I've been having  
17 the discussions with, but I'm sure that he has gotten  
18 Mr. Hoff up to speed on this, and Mr. Hoff is standing in  
19 for Mr. Wahl this morning.

20 MR. HOFF: That's correct, your Honor, Glen Hoff  
21 for Mr. Wells. I was asked to step in today and handle this  
22 proceeding by Mr. Wahl. And yes, Mr. Willett, his arguments  
23 regarding the request for an exceptional sentence downward  
24 is consistent with what Mr. Wahl has informed me. It makes  
25 sense, makes a lot of sense to do this. And I think that's

1 kind of what the exceptional statute was designed kind of to  
2 do, is to allow the Court to have discretion to do things  
3 that make sense.

4           And he does have a pending Island County commit  
5 for a year and a day in the Department of Corrections.  
6 We're asking this to run concurrent, and I think the  
7 rationale here is that we benefit by -- Mr. Wells benefits  
8 by there not being any additional Department of Corrections  
9 time, of course, and it's a concurrent sentence. And the  
10 benefits to the State is that they're getting a high score  
11 for Mr. Wells. They're getting a much higher score. And  
12 they're also foregoing what may otherwise be issues that  
13 could possibly have acquitted Mr. Wells on some charges. So  
14 I think both sides are benefiting, I would ask that you  
15 agree with our recommendation.

16           Furthermore, there was bail posted on this. I've  
17 asked the Court to exonerate that bail, it appears to be at  
18 the last hearing, and Mr. Wells informs me that he served 19  
19 days on this. I would ask that he be given credit.

20           MR. WILLETT: I'm sure that Mr. Wells has served  
21 some time on this, so he would be entitled to any time that  
22 he has already served on this.

23           MR. HOFF: That's all I have, your Honor.

24           THE COURT: Maybe I should take the plea.

25           DEFENDANT: Guilty, sir. All three.

1 THE COURT: I know that. I know that, we have  
2 certain formalities.

3 DEFENDANT: All right.

4 THE COURT: Does this seem like a good idea to  
5 you, too?

6 DEFENDANT: Yes, sir. I understand about the  
7 points and all. Just want to get it over with.

8 THE COURT: Get it over with?

9 DEFENDANT: Uh-huh.

10 THE COURT: Do you understand that you're giving  
11 up some very important constitutional rights by doing this?

12 DEFENDANT: Yes, sir.

13 THE COURT: Anybody make any threats or any  
14 promises other than what's set forth in this?

15 DEFENDANT: No, sir.

16 THE COURT: Do you understand that I don't have to  
17 go along with the sentencing recommendation?

18 DEFENDANT: Yes, sir.

19 THE COURT: Do you have any questions about this  
20 at all?

21 DEFENDANT: No, sir.

22 THE COURT: To the charge, count one, unlawful  
23 possession of a firearm second degree, what is your plea,  
24 guilty or not guilty?

25 DEFENDANT: Guilty.

1           THE COURT: Count two, malicious mischief in the  
2 second degree?

3           DEFENDANT: Guilty.

4           THE COURT: Count three, escape in the second  
5 degree?

6           DEFENDANT: Guilty.

7           THE COURT: The Court finds the pleas to be  
8 knowingly, intelligently and voluntarily made, that the  
9 defendant understands the charges and consequences of the  
10 plea. Based on the affidavits of Officers Bottlinger, Curry  
11 and Deats, there's a factual basis for the pleas. Find him  
12 guilty of all three counts.

13          MR. WILLETT: Your Honor, if we could proceed to  
14 sentencing today.

15          THE COURT: Okay, well, I think I've heard  
16 everybody's sentencing --

17          MR. WILLETT: The only other thing that may come  
18 up, and I don't even know if it will, is there may be some  
19 restitution being requested regarding the malicious  
20 mischief, and at this point I don't know. It didn't cause  
21 substantial damage, if there's any restitution I think it's  
22 just whatever it cost to have the guy come in and reset the  
23 fire extinguisher -- or the fire detection system.

24                 So we would reserve that request for restitution,  
25 and inquire of Mr. Wells whether he wants to be present for

1 a restitution hearing or if he wants to leave that to his  
2 attorney to work out.

3 THE COURT: Unnecessary?

4 DEFENDANT: Unnecessary.

5 THE COURT: Anything else you want to say on  
6 sentencing, Mr. Wells?

7 DEFENDANT: No, sir.

8 THE COURT: Tough way to grow up, isn't it?

9 DEFENDANT: Yeah, it is.

10 THE COURT: I notice some of the names of the  
11 people that you were running around with, they aren't very  
12 good people to be running around with.

13 DEFENDANT: Yes, sir.

14 THE COURT: Okay, I think it's reasonable, based  
15 on the stipulation of the parties, and I would sign findings  
16 to the effect that this will be an exceptional sentence  
17 downward, justified under the circumstances. And on all  
18 three counts I'll sentence him concurrently to 12 months and  
19 a day, and that's to run concurrently with the Island County  
20 cause. \$610 in court costs. And restitution at a hearing  
21 to be set -- when?

22 MR. WILLET: Maybe the 2nd of February, your  
23 Honor, we already set one on that day.

24 THE COURT: And the defendant has waived his  
25 presence. Take advantage of your opportunities down there,





# **APPENDIX B**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12 MAR 16 AM 7:11  
RONALD R. GARDNER  
CLERK

In the Matter of the Personal Restraint of:  
RAYNE DEE WELLS, JR.,  
Petitioner.

NO. 86225-7  
RULING CONDITIONALLY  
DENYING REVIEW

Rayne Wells pleaded guilty in 2000 to second degree unlawful possession of a firearm, second degree malicious mischief, and second degree escape. The trial court imposed an exceptional sentence below the standard range of 12 months and one day. But the judgment and sentence lists a conviction for first degree unlawful possession of a firearm. Mr. Wells did not appeal. In 2009 he filed a motion in the superior court to withdraw his pleas. The court transferred the motion to Division One of the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2). The acting chief judge dismissed the petition, and Mr. Wells now seeks discretionary review in this court. RAP 16.14(c); RAP 13.5A(a)(1).

Because Mr. Wells filed his collateral attack more than one year after his judgment and sentence became final, he must show that his judgment and sentence is facially invalid or was entered without competent jurisdiction, or he must raise solely grounds for relief exempt from the time limit under RCW 10.73.100; *In re Pers.*

631/139

*Restraint of McKiearnan*, 165 Wn.2d 777, 781, 203 P.3d 375 (2009). Mr. Wells contends that the superior court lacked jurisdiction because the juvenile division of that court retained jurisdiction past his 18th birthday. Mr. Wells was originally charged in juvenile court with the firearm and malicious mischief counts. He was charged with second degree escape after his 18th birthday. At his plea and sentencing hearing, Mr. Wells stipulated to a decline of juvenile jurisdiction. A previously entered juvenile court form purporting to extend juvenile jurisdiction past Mr. Wells's 18th birthday failed to set forth statutorily mandated findings and was therefore ineffective for purposes of extending juvenile jurisdiction. RCW 13.40.300(1)(a); *In re Pers. Restraint of Morris*, 19 Wn. App. 613, 615, 576 P.2d 1333 (1978). Thus, the trial court had competent jurisdiction.

Mr. Wells also claims his judgment and sentence is facially invalid. RCW 10.73.090(1). The judgment and sentence contains a number of flaws. It is silent on the offender score, sentencing range, maximum sentence, and criminal history. It lists the crime of conviction as first degree unlawful possession of a firearm, which corresponds with the amended information, but the plea documents and the verbatim report of the plea hearing plainly indicate that Mr. Wells pleaded guilty to second degree unlawful possession of a firearm. It appears that the original first degree unlawful possession charge was mistakenly listed in the amended information and judgment and sentence form. The trial court nonetheless imposed an exceptionally low sentence of 12 months and one day, well below the bottom of the standard range for either first or second degree unlawful possession of a firearm. The record thus shows a series of technical flaws that had no actual effect on Mr. Wells's rights. See *McKiearnan*, 165 Wn.2d at 783. Though obviously technically flawed, the judgment and sentence is not "invalid" for purposes of escaping the time bar on collateral attack. See *In re Personal Restraint of Coats*, 173 Wn.2d 123, 143, 267 P.3d 324

(2011) (misstatement of maximum sentence did not render otherwise valid standard-range sentence facially invalid).<sup>1</sup>

Although Mr. Wells's collateral attack is time barred, his judgment and sentence should be corrected to remedy the flaws described above. Accordingly, the motion for discretionary review is denied on the condition that the State obtain a corrected judgment and sentence. The State shall file a copy of the corrected judgment and sentence in this court by not later than 10 days after it is entered by the trial court.



---

COMMISSIONER

March 16, 2012

---

<sup>1</sup> Mr. Wells raised other issues in his personal restraint petition that he does not renew here.

# **APPENDIX C**

PLEASE RETURN  
FOR Ronald  
AT PA'S & RETURN

NO. 86706-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the PERSONAL RESTRAINT PETITION of

**RAYNE DEE WELLS, JR,**

Petitioner,

PETITION OF CONVICTON IN THE  
THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR  
SKAGIT COUNTY

RECEIVED  
SKAGIT COUNTY  
PROSECUTING ATTORNEY  
STATE OF WASHINGTON  
2012 JAN 18 AM 10:38  
RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
12 JAN 17 AM 8:21  
BY RONALD R. CARPENTER  
CLERK

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

SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015  
Senior Deputy Prosecuting Attorney  
Office Identification #91059

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COPY

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## **I. SUMMARY OF RESPONSE TO PETITION**

Rayne Wells filed the present personal restraint petition from his 2000 conviction directly in the Supreme Court. The grounds for the petition are that the Superior Court lacked jurisdiction, that he was misadvised of the consequences of his plea and his counsel was ineffective. Wells seeks vacation of the convictions, a decline hearing or vacation of the convictions and withdrawal of his guilty pleas. Wells previously filed a CrR 7.8 motion which included the same grounds in the trial court which was transferred to the Court of Appeals for consideration as a personal restraint petition and denied. Discretionary review of the Court of Appeals decision is pending.

The present petition is a second petition raising the same issues which were denied and for which Wells is presently seeking discretionary review. As well as the previous motion, this petition is also untimely. The factual grounds in the petition also support that Wells is not entitled to relief, having long since completed his sentence on the charges. The petition here must be denied.

## **II. ISSUES RELATING TO PETITION**

1. Is a prior CrR 7.8 motion, transferred to the Court of Appeals for consideration as a personal restraint petition, a previous personal restraint petition?

2. Is a second petition raising issues previously raised in a prior collateral relief?
3. Is the present petition filed more than one year after his conviction was final untimely?
4. Is the judgment and sentence valid on its face?
5. Does a Superior Court have jurisdiction to enter a judgment and sentence against an individual over the age of 18?
6. Is a petitioner entitled to raise a claimed mis-advice of claimed direct consequences ten years after his guilty plea where he has completed his sentence?
7. Where the petitioner received an agreed exceptional sentence downward of less than half the range he was facing, has he established his trial counsel was ineffective and that he was prejudiced thereby?

### **III. STATEMENT OF THE CASE**

On December 22, 2000, Rayne Wells was charged with Unlawful Possession of a Firearm in the First Degree, Malicious Mischief in the Second Degree and Escape in the Second Degree in Skagit County Superior Court #00-1-00610-1. See Appendix A attached hereto (Information and probable cause declaration). The charges were based upon offenses

occurring in Skagit County and based upon Wells escape from a facility he was held at in King County pursuant to a Skagit County court order. See Appendix B.

On December 22, 2000, Wells pled guilty. At that time, the defendant was eighteen. See attached Appendix C (Statement of Defendant on Plea of Guilty). Wells agreed to have his cases from juvenile court handled in adult superior court. See Appendix D (Transcript of plea and sentencing hearing).

Pursuant to Wells' plea agreement he received an exceptional sentence downward from 29 months to 12+ months of prison time as well as an agreement for concurrent time between a Skagit County case and an Island County case. See attached Appendix E and F (Judgment and Sentence and Findings of Fact and Conclusions of Law for An Exceptional Sentence).

On December 14, 2009, Wells filed the Motion for Relief of Judgment under CrR 7.8 in the trial court. See attached Appendix G.

On January 12, 2010, Wells, while at the Department of Corrections filed a note for motion setting a hearing for January 22, 2010, without a request to be transported. See attached Appendix H.

On January 20, 2010, the State filed a response noting the matter should be transferred to the Court of Appeals pursuant to CrR 7.8(c). See Attached Appendix I (Supplemental Response at page 5).

On January 22, 2010, the trial court transferred the matter to the Court of Appeals for consideration as a personal restraint petition. See attached Appendix J.

On June 10, 2011, the Court of Appeals issued a decision denying the petition in case number 64891-1-I. See Appendix K.

On August 31, 2011, after motions to extend time were granted, Wells filed a motion for discretionary review, in Supreme Court case number 86225-7. This motion is pending.

On November 10, 2011, Wells filed the present petition in the Supreme Court. Wells petition raises the three grounds previously raised in his motion filed in the trial court on December 14, 2009. See petition at pages 1, 9 and 14 and Appendix G at pages 5, 6 and 7.

#### **IV. ARGUMENT**

##### **1. The present petition is an untimely successive petition.**

The present petition raises claims of lack of adult court jurisdiction due to juvenile court jurisdiction, errors in entry of conviction for Unlawful Possession of a Firearm in the First Degree and Ineffective Assistance of

counsel. These same three issues were raised at the trial court in his motion filed on December 14, 2009. See Appendix G at pages 5-7. That motion was subsequently transferred to the Court of Appeals for consideration as a personal restraint petition and denied. Discretionary review of that order denying the petition is still pending in the Supreme Court.

Thus, the present petition is a second collateral attack prohibited by RCW 10.73.140.

If a person has previously filed a petition for personal restraint, **the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.** Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them.

RCW 10.73.140 (emphasis added).

Wells appears to acknowledge the existence of this requirement by alleging that his petition should not be barred because he had filed a motion under CrR 7.8 in the trial court which was transferred to the Court of Appeals “without notice and without Petitioner’s presence.” Petition at page 4. Wells fails to note that he in fact was at the Department of Corrections when he filed the note for calendar for hearing on his motion and did not request to be present. See Appendix H. In addition, his motion recognized that the trial court had the authority if it so found that

no factual hearing was required, to transfer the matter to the Court of Appeals. See Appendix G at page 4.

Wells further argues he should have been given the option to withdraw the motion given the preclusive effect on subsequent petitions. Wells cites to State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008) to support this contention. In State v. Smith, the superior court erroneously denied the defendant's CrR 7.8(c) motion as untimely under the amended version of RCW 10.73.090. On appeal, the court declined to convert the matter to a personal restraint petition because the defendant had not been advised that such a conversion could have future collateral consequences resulting from the successive petition rule. See State v. Smith, 144 Wn. App. at 863-64, RCW 10.73.140. Therefore, the court remanded the matter to permit the superior court to enter an order complying with CrR 7.8(c). No such situation exists in the present case.

Wells was aware of the requirement of the trial court to transfer the case to the Court of Appeals for consideration as a personal restraint petition. He cited to that portion of the CrR 7.8 transfer rule in his motion. And a trial court may only rule on the merits of a CrR 7.8 motion if the motion is timely filed *and* either of the two prerequisites is met; otherwise the trial court *must* transfer timely motions to this court. State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). He does not claim to have

sought withdrawal of that motion or the petition after transferred as occurred in Smith. And Wells was the one who noted the motion for a hearing without requesting presence.

Thus, Wells failure to comply with the requirement that he certify that he has not previously filed a petition on similar grounds precludes further review under RCW 10.73.140 of the present petition.

**2. Wells' petition is untimely as it was filed more than a year after the conviction was final.**

Wells pled guilty and was sentenced on December 22, 2000. The present petition was filed more than ten years after that sentencing. Wells contends his petition is not barred by RCW 10.73.090(1) because his judgment and sentence is invalid on its face. He contends the judgment and sentence did not list the statutory maximum, criminal history or standard range and erroneously indicates that the plea on count I was to Unlawful Possession of a Firearm in the First Degree. Petition at page 5. The State contends these are not errors in which the court exceeded its statutory authority given the agreed exceptional sentence imposed.

First, to avoid RCW 10.73.090's one-year time bar on challenging judgments that are valid on their face, the error must render the judgment and sentence "invalid." Not every error renders a judgment and sentence "invalid." *See, e.g., McKiernan*, 165 Wn.2d at 783, 203 P.3d 375. Mere typographical errors easily corrected would not render a judgment invalid. Similarly, errors in fact such as a date or

place would not necessarily render a judgment invalid. *Id.* But, argues Coats, any error of law such as an error concerning the maximum sentence converts an otherwise valid judgment into an invalid one.

However, a careful review of our cases reveals that **we have only found errors rendering a judgment invalid under RCW 10.73.090 where a court has in fact exceeded its statutory authority in entering the judgment or sentence.**

In re Pers. Restraint of Coats, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2011)  
(83544-6, Slip Op. at page 5, 2011 WL 5593063 (Wash. Nov. 17, 2011))  
(emphasis added).

Second, the judgment and sentence must be valid “on its face.” “On its face” modifies “valid.” Put another way, for the petitioner to avoid the one-year time bar, he or she must show that the judgment and sentence is “facially invalid.” *E.g., LaChapelle*, 153 Wn.2d at 6, 100 P.3d 805 (*citing In re Pers. Restraint of Goodwin*, 146 Wn. 2d 861, 865–67, 50 P.3d 618 (2002)).

In re Pers. Restraint of Coats, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2011)  
(83544-6, Slip Op. at page 7, 2011 WL 5593063 (Wash. Nov. 17, 2011))  
(emphasis added).

In Coats, the judgment and sentence misstated the maximum possible sentence, but the defendant was sentenced within the standard range. Thus, the trial court was held not to have exceeded its statutory authority and the judgment and sentence was not facially invalid. In re Pers. Restraint of Coats, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2011) (83544-6, Slip

Op. at page 10, 2011 WL 5593063 (Wash. Nov. 17, 2011)) (emphasis added).

Similarly here, the judgment and sentenced misstated that count I was the first degree charge. The guilty plea statement indicated the plea was to Unlawful Possession of a Firearm in the Second Degree. See Appendix C. At the plea hearing the prosecutor indicated the charge was second degree.

He's charged with unlawful possession of firearm in the second degree, malicious mischief in the second degree and escape in the second degree. It's his intention to those three charges, and we are going to be asking jointly that the Court sentence him to what would be an exceptional sentence of a year and a day, to run concurrent with the time that he's going to be serving for Island County.

12/22/10 RP 2-3, See Appendix D. Thus, there was a misstatement as to the degree on the judgment and sentence. Furthermore, the omissions of the statutory maximums or the standard ranges do not establish that the trial court exceeded its statutory authority in imposing the agreed exceptional sentence. Although these are errors on the judgment and sentence they do not render it facially invalid.

Wells also contends that his guilty plea statement contains the wrong statutory maximum. Petition at page 5. However, as explained above and indicated in the plea transcript, the plea was to Unlawful Possession of a Firearm in the Second Degree. Thus, there was no incorrect statutory

maximum. Furthermore, a claimed error on the guilty plea is not an error on judgment and sentence indicating it is invalid on its face.

As we noted, “[t]he question is not, however, whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence.” Hemenway, 147 Wn.2d at 533, 55 P.3d 615 (footnote omitted). This principle was bluntly recapitulated in McKiearnan: “an invalid plea agreement cannot on its own overcome the one year time bar or render an otherwise valid judgment and sentence invalid.” McKiearnan, 165 Wn.2d at 782, 203 P.3d 375. In short, we may examine a plea statement to evaluate a claim that a judgment and sentence is not valid on its face, but not the other way around.

In re Pers. Restraint of Coats, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2011) (83544-6, Slip Op. at page 8, 2011 WL 5593063 (Wash. Nov. 17, 2011)) (emphasis added).

Wells also claims that his claim is not time barred because of a jurisdictional issue. Petition at page 5. As explained below in the next argument section, he was over age 18 at the time of his guilty plea and thus, the trial court did have statutory authority over him.

Therefore, the judgment and sentence is not facially invalid and Wells’ petition is untimely.

- 3. The Superior Court had jurisdiction over Wells because he was over age 18 and the order extending jurisdiction was insufficient.**

Wells claims that the adult division of the Superior Court did not have jurisdiction over him because of a previous juvenile court order extending jurisdiction beyond age 18. Petition at page 7. Wells does not dispute that he was over the age of 18 at the time of his plea in adult court.

The State contends the ex-parte boilerplate order retaining juvenile jurisdiction failed to make the required findings supporting retention of juvenile court jurisdiction.

Juvenile court jurisdiction beyond age 18 for offenses committed by juveniles under age 18 is not automatic. RCW 13.04.030 which establishes juvenile jurisdiction does not discuss jurisdiction what occurs after a juvenile turns 18. Instead, RCW 13.40.300(1)(a) permits a juvenile to be under the jurisdiction of the juvenile court once the juvenile turns 18. That statute reads in pertinent part:

(1) In no case may a juvenile offender be committed by the juvenile court to the department of social and health services for placement in a juvenile correctional institution beyond the juvenile offender's twenty-first birthday. **A juvenile may be under the jurisdiction of the juvenile court or the authority of the department of social and health services beyond the juvenile's eighteenth birthday only if prior to the juvenile's eighteenth birthday:**

**(a) Proceedings are pending seeking the adjudication of a juvenile offense and the court by written order setting forth its reasons extends jurisdiction of juvenile court over the juvenile beyond his or her eighteenth birthday;**

...

(2) If the juvenile court previously has extended jurisdiction beyond the juvenile offender's eighteenth birthday and that period of extension has not expired, the court may further extend jurisdiction by written order setting forth its reasons.

(3) In no event may the juvenile court have authority to extend jurisdiction over any juvenile offender beyond the juvenile offender's twenty-first birthday except for the purpose of enforcing an order of restitution or penalty assessment.

(4) Notwithstanding any extension of jurisdiction over a person pursuant to this section, the juvenile court has no jurisdiction over any offenses alleged to have been committed by a person eighteen years of age or older.

RCW 13.40.300(1)(a) (emphasis added).

As it turns out the particular order in the present case was a form order containing the findings based upon the statutory language, did not contain particularized findings and did not specify a period of time over which the Court's jurisdiction was extended. See Appendix L (juvenile court order). In In re Pers. Restraint of Morris, 19 Wn. App 613, 576 P.2d 1333 (1978) the court held that an order extending jurisdiction written in boilerplate language, which contained only conclusory phrases and no solid reasons for extending juvenile jurisdiction, was not valid. In re Pers. Restraint of Morris, 19 Wn. App. at 615, 576 P.2d 1333<sup>1</sup>. Here the similar

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<sup>1</sup> Morris evaluated the same language from a former version of the same statute.

type of boilerplate language was entered and the order was entered ex parte prior to any hearing on the juvenile court case<sup>2</sup>.

Since there was no valid order extending jurisdiction, this Court should not permit Wells to assert a decade later that his agreement to plead guilty should be permitted to be withdrawn.

In addition, the State contends since jurisdiction may be extended by operation of the court's determination under RCW 13.40.300(1)(a) there are reasons to extend the jurisdiction beyond the juvenile's 18<sup>th</sup> birthday. Further, where there are valid reasons to not assert juvenile court jurisdiction the superior court which has jurisdiction to hear both adult superior court matters and juvenile matters can determine that jurisdiction need not be extended further under RCW 13.40.300. Here, Wells and the prosecutor agreed that since Wells was facing being sentenced to JRA on the juvenile offenses and the Department of Corrections on other offenses, that it would benefit Wells to have all his cases sentenced to the Department of Corrections. 12/22/10 RP 1-3, Appendix D.

RCW 9.94A.030(31) (2009) defines offender as a person over age eighteen or subject to automatic jurisdiction of RCW 13.04.030 or decline

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<sup>2</sup> As it turns out there was not one order of extension but three separate orders each with the same boilerplate finding of extension and each one presented prior to Wells' first appearance before the juvenile court.

pursuant to RCW 13.04.110. Wells was over age eighteen at the time of the filing of the adult superior court case. This was not a case of decline pursuant to RCW 13.40.110 and therefore, there are not specific findings of the trial court required to support a transfer a juvenile to adult superior court. The court can determine under RCW 13.40.300 that there are reasons to not continue with the juvenile court jurisdiction. Wells so agreed and should not be permitted to assert that the Superior Court lacked jurisdiction at the time of his plea.

In addition, the State contends that a juvenile can waive jurisdiction in juvenile court where matters of age are at issue. The Washington Supreme Court has noted the three components of juvenile court jurisdiction.

In State v. Werner, 129 Wn.2d 485, 487, 918 P.2d 916 (1996), this court specifically clarified the nature of juvenile court jurisdiction. Significantly, the juvenile court is a division of the superior court; it is not a separate court. Id. at 492, 918 P.2d 916. The Werner court recognized that there are “ ‘three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.’ ” Id. at 493, 918 P.2d 916 (*quoting In re Marriage of Little*, 96 Wn.2d 183, 197, 634 P.2d 498 (1981)). The superior court has jurisdiction over the subject matter of juvenile offenses under article IV, section 6 of the Washington Constitution and RCW 2.08.010. Superior courts also have personal jurisdiction over juveniles who commit crimes in Washington. RCW 9A.04.030; State v. Golden, 112 Wn. App. 68, 74, 47 P.3d 587 (2002).

In re Pers. Restraint Petition of Dalluge, 152 Wn. 2d 772, 779, 100 P.3d 279 (2004). The Dalluge court held that under the statute, juvenile court has jurisdiction over the person and crimes pursuant to RCW 13.04.030.

In Dalluge, the State had charged Dalluge in adult court under the automatic jurisdiction of RCW 13.04.030(1)(e)(v)(A). The State later amended the information to lesser charges which did not involve automatic jurisdiction, but Dalluge's counsel did not seek to return his case to juvenile court. The Supreme Court found that Dalluge's counsel was ineffective, but instead of reversal, provided Dalluge the remedy of return to Superior Court for a decline hearing.

In doing so, the Dalluge court noted that juveniles can by their action waive a decline hearing that results in loss of juvenile jurisdiction.

Finally, Washington courts have held that under very limited circumstances, where a juvenile willfully deceives an adult criminal court into believing that he or she is an adult and does not correct the error, the defendant waives his or her right to proceed in juvenile court, and adult criminal court jurisdiction can be deemed proper on that basis alone. Sheppard v. Rhay, 73 Wn.2d 734, 739, 440 P.2d 422 (1968); State v. Mendoza-Lopez, 105 Wn. App. 382, 387-89, 19 P.3d 1123 (2001) (finding no waiver absent willful deception); State v. Anderson, 83 Wn. App. 515, 519-21, 922 P.2d 163 (1996) (finding no waiver where juvenile's correct age was revealed at trial); Nelson v. Seattle Mun. Court, 29 Wn. App. 7, 10, 627 P.2d 157 (1981).

In re Pers. Restraint Petition of Dalluge, 152 Wn.2d 772, 781, 100 P.3d 279 (2004).<sup>3</sup> Dalluge is also a case involving decline to adult court.

Thus, the court in Dalluge recognizes that waiver of juvenile court jurisdiction can occur. In the present case, Wells was over age 18. Technically, waiver of juvenile jurisdiction was not even necessary. The State could have dismissed the juvenile court case and thus divested the juvenile court of jurisdiction. Here the State just did so after the plea was entered rather than before. This is a procedural situation that Wells should not be able to raise to challenge the plea.

Furthermore, the State contends that Wells, as the individual filing the personal restraint petition would have the burden of proof of an unlawful restraint. He has not established that he did not agree to the court's exercise of adult court jurisdiction which is permissible under RCW 13.40.300. Therefore, he has failed to meet his burden.

**4. Wells has not established the claimed mis-advice of direct consequences meriting relief.**

Wells makes three claims regarding mis-advice on his guilty plea contending this permits the present attack. He claims he was mis-advised of

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<sup>3</sup> Even though the Dalluge court suggests that waiver of decline hearings that divests the juvenile court of jurisdiction is limited in application to cases involving deception as to age, it must be remembered that those cases involved individuals who were under age 18. Here Wells was over age 18 at the time of the adult court plea and he was made aware that

the standard range because of inclusion of three juvenile offenses occurring before age 15 which for a time would not have been included in criminal history. He contends he was mis-advised of the degree of unlawful possession of a firearm he was pleading guilty to. And, he contends that as a result he was also mis-advised of the statutory maximum for the offense.

The State contends that at the time of his guilty plea, juvenile felony offenses occurring prior to age 15 were included in offender score and would be at resentencing at this time. Wells filed a declaration indicating his understanding of his criminal history. Petition at Appendix A, page 1, section 3. However, Wells did not note that he did have prior juvenile convictions for TMVWOP, Burglary in the Second Degree and Theft of a Firearm. See Appendix M at page 2. Wells instead referenced these three prior convictions in the argument of his petition asserting that they did not count pursuant to offender score pursuant to In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805, 807 (2004). Thus, Wells recognizes that his offender score calculation was made based upon the understanding of the law at the time and did include the prior juvenile conviction. Thus, it was perceived at the time to be based the correct standard range in the guilty plea form. However, as opposed to the situation in LaChapelle, here Wells received an agreed exceptional

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the juvenile division of the court was not exercising jurisdiction because of his plea

sentence which did not exceed what Wells now contends was the correct range. Petition at page 12 (Wells contends the correct range was 12+ to 14 months). And as opposed to LaChapelle, here the judgment and sentence is not invalid on its face. In the absence of an incorrect range in the Judgment and Sentence and a sentence which did not exceed the statutory authority of the Court, Wells fails to establish that he was prejudiced such that he is entitled to this belated collateral relief.

As to the claims regarding the degree of unlawful possession of a firearm he pled guilty to, as argued above the judgment and sentence has scrivener's error on the first page indicating that the degree was first degree. Wells recognizes in the rest of the petition that he pled guilty to Unlawful Possession of a Firearm in the Second Degree. Thus, the remedy is to correct the judgment and sentence, not permit withdrawal of the guilty plea.

**5. Wells' trial counsel was not ineffective where Wells obtained an exceptional sentence downward of 12+ months to run concurrent with another sentence.**

Wells makes numerous contentions that claimed errors establish ineffectiveness of counsel. Petition at page 15. However, there is an individual explanation as to each claim listed on page 15.

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agreement.

On the burden of proof of the prior for Unlawful Possession of a Firearm in the First Degree, Wells pled guilty to Unlawful Possession of a Firearm in the Second Degree. Requiring proof of validity of the predicate offense was unnecessary.<sup>4</sup> Proof of criminal history for sentencing, listing offender score, standard range and maximum penalty was unnecessary given the agreed exceptional sentence to run concurrent with another Department of Corrections sentence. The guilty plea had the correct range and offender score as described above. There was an error listing the charge as first degree unlawful possession of a firearm, but this was immaterial to the conviction. The choice to plead guilty at all was of benefit to Wells to avoid a JRA disposition in addition to the adult felony sentence. See Appendix D at page 2, 4. Challenging the jurisdiction of the trial court was a tactical decision to avoid punishment at both JRA and the Department of Corrections. Venue was not improper in Skagit County since the escape was from confinement pursuant to a Skagit County court order. See CrR 5.1.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would**

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<sup>4</sup> In fact Wells did have a prior Burglary in the Second Degree conviction as a juvenile. This is a "serious offense." See RCW 9.41.040(1)(a), RCW 9.41.010(3), (16)(a), Appendix M at page 2.

**have been different.** State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995) (emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (emphasis added). Where Wells obtained a sentence wholly concurrent to a sentence imposed in another court and avoided a separate JRA commitment, Wells' counsel was effective. Wells laundry list of claims fails to establish ineffective assistance.

And, furthermore, Wells last contention in this portion of his claim is an example of his misunderstanding of juvenile court jurisdiction creating a false contention. Wells contends: "These three convictions added three points to his offender score which could easily have been half points had he remained in juvenile court, which they would have, but for counsels

erroneous advice.” Petition at page 16. But the escape had never been filed in juvenile court as such, it would not have been subject to juvenile court jurisdiction. Thus, it would not have been reduced to a half point, and the most reduction Wells could have obtained in offender score would have been a single point. Although offender score may matter to Wells at this time given his offenses subsequently accumulated, it did not matter at the time of the plea as indicated by counsel. 12/22/00 RP 4, Appendix D. Counsel was not ineffective in the negotiated the pleas.

**6. Wells’ contention he is suffering from restraint is insufficient.**

Wells contends he is subject to restraint because he is serving a sentence in Skagit, Snohomish, and San Juan County for a total sentence of 221 months. Petition at page 6. Wells fails to indicate that the offender score on the sentencing on the most serious offense which he is serving time on in Skagit County carries an offender score of 15 and a standard range sentence. See Appendix M. Even were he to obtain relief of withdrawal of the guilty pleas, there is no indication that the trial court there would reduce his sentence should his offender score be reduced by these three additional points.<sup>5</sup>

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<sup>5</sup> Wells notes that he has had one prior conviction reversed which was included in offender score. However, Wells does not indicate what he believes his offender score would be reduced to, even if he were to prevail and seek dismissal of all three counts herein.

V. CONCLUSION

For the foregoing reasons, the personal restraint petition must be denied.

DATED this 13<sup>th</sup> day of January, 2012.

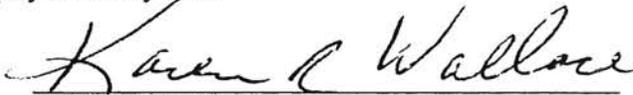
SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Rayne Dee Wells, Jr, DOC#819131, addressed as Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13<sup>th</sup> day of January 2012.

  
KAREN R. WALLACE, DECLARANT

# **APPENDIX D**

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JUN 7 2012

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BY RONALD R. CARPENTER

CLERK

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

RAYNE DEE WELLS, JR.,

Petitioner.

NO. 86706-2

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Rayne Wells pleaded guilty in 2000 to second degree unlawful possession of a firearm, second degree malicious mischief, and second degree escape. The trial court imposed an exceptional sentence below the standard range of 12 months and one day. But the judgment and sentence listed a conviction for *first* degree unlawful possession of a firearm. Mr. Wells did not appeal. In 2009 he filed a motion in the superior court to withdraw his pleas, which the court transferred to Division One of the Court of Appeals for treatment as a personal restraint petition. CrR 7.8(c)(2). The acting chief judge dismissed the petition, and I conditionally denied discretionary review in a ruling entered on March 16, 2012, directing the State to obtain a corrected judgment and sentence to remedy technical flaws. No. 86225-7. Mr. Wells did not move to modify that ruling. In November 2011 Mr. Wells filed another personal restraint petition directly in this court. Now before me for determination is whether to dismiss the petition or refer it to the court for a decision on the merits. RAP 16.5(b); RAP 16.11(b).

637/158

Because Mr. Wells filed his current petition more than one year after his judgment and sentence became final, the petition is untimely unless the judgment and sentence is facially invalid or was entered without competent jurisdiction, or unless Mr. Wells raises solely grounds for relief exempt from the time limit under RCW 10.73.100; *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 781, 203 P.3d 375 (2009). Mr. Wells contends that the superior court lacked jurisdiction because the juvenile division of that court retained jurisdiction past his 18th birthday. But I rejected that argument on the merits in my ruling on Mr. Wells's first collateral challenge. As explained there, Mr. Wells was originally charged in juvenile court with the firearm and malicious mischief counts. He was charged with second degree escape after his 18th birthday. At his plea and sentencing hearing, Mr. Wells stipulated to a decline of juvenile jurisdiction. A previously entered juvenile court form purporting to extend juvenile jurisdiction past Mr. Wells's 18th birthday failed to set forth statutorily mandated findings and was therefore ineffective for purposes of extending juvenile court jurisdiction. RCW 13.40.300(1)(a); *In re Pers. Restraint of Morris*, 19 Wn. App. 613, 615, 576 P.2d 1333 (1978). The trial court thus had competent jurisdiction. Mr. Wells fails to demonstrate good cause for raising this issue again. RAP 16.4(d); *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 566-67, 933 P.2d 1019 (1997).<sup>1</sup>

Mr. Wells also argues that his judgment and sentence is facially invalid. RCW 10.73.090(1). That argument was also rejected in Mr. Wells's earlier petition. As I explained, the flaws on the face of the judgment and sentence had no actual effect on Mr. Wells's rights in light of his lenient sentence. *See McKiearnan*, 165 Wn.2d at 783. Such technical flaws did not render the judgment and sentence

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<sup>1</sup> The State contends that Mr. Wells's petition is improperly successive under RCW 10.73.140. But that provision applies to the Court of Appeals, not to the Supreme Court. *State v. Brown*, 154 Wn.2d 787, 794, 117 P.3d 336 (2005).

“invalid” for purposes of escaping the time bar on collateral attack. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 143, 267 P.3d 324 (2011) (misstatement of maximum sentence did not render otherwise valid standard-range sentence facially invalid). As noted, I directed the State to obtain a corrected judgment and sentence. Mr. Wells does not show that the corrections were not made.

Finally, Mr. Wells contends that his guilty plea was involuntary because of errors in the judgment and sentence, and that defense counsel was ineffective. But neither of those claims is exempt from the time limit under RCW 10.73.100. *See In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000). Mr. Wells’s petition is thus time barred.

The personal restraint petition is dismissed.<sup>2</sup>



COMMISSIONER

June 7, 2012

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<sup>2</sup> On June 6, 2012, Mr. Wells moved to stay his current petition pending correction of his judgment and sentence in light of my ruling in No. 86225-7. Mr. Wells fails to show how correction of technical flaws affects the finality of his judgment and sentence for purposes of RCW 10.73.090(1). *See State v. Kilgore*, 167 Wn.2d 28, 41, 216 P.3d 393 (2009) (judgment remained final where trial court did not exercise independent judgment on remand). And he fails to show how correction of his judgment and sentence raises exempt grounds for relief. The motion for stay is denied.

# **APPENDIX E**

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of  
RAYNE DEE WELLS, JR.,  
Petitioner.

NO. 86706-2

ORDER

Department II of the Court, composed of Chief Justice Madsen and Justices Chambers,  
Fairhurst, Stephens and González, considered this matter at its September 5, 2012, Motion  
Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 6<sup>th</sup> day of September, 2012.

For the Court

*Madsen, C.J.*  
CHIEF JUSTICE

BY RONALD B. CARPENTER  
CLERK  
2012 SEP -6 A 8:45

FILED  
SUPREME COURT  
WASHINGTON