IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of: ERNEST A. CARTER, Respondent.	No. 37048-4-II UNPUBLISHED OPINION

Armstrong, J. — We previously considered this personal restraint petition challenging Ernest A. Carter's[1] 1998 robbery convictions and his sentencing as a persistent offender. We held that Carter's challenge to his shackling during trial was untimely, but we granted relief after holding that Carter was actually innocent of being a persistent offender. The Supreme Court granted the State's petition for review and held that the actual innocence exception did not apply. It then remanded the petition to this court for consideration of Carter's other claimed exceptions to the one-year time bar. Finding that these exceptions do not entitle Carter to relief, we deny the petition.

Facts

When tried in Pierce County on two counts of first degree robbery in 1998, Carter had prior convictions in California and Oregon for assault with a firearm on a peace officer and attempted murder. Consequently, he was eligible for life imprisonment without the possibility of parole under the Persistent Offender Accountability Act (POAA), former RCW 9.94A.120 (1994), if found guilty of one or both robbery counts. The jury convicted Carter on both counts. The trial court concluded that his California assault and Oregon attempted murder convictions

[1] Carter changed his name to Le'Taxione after his conviction. Because his court documents use his former name, this opinion does as well.

were comparable to most serious offenses in Washington and sentenced him to life in prison.

Carter appealed, challenging his convictions on the ground that jurors saw his shackles during trial and also challenging the comparability of his California conviction. In an unpublished opinion, we rejected any claim of error regarding the shackling as well as Carter's contention that his California assault conviction was comparable to third degree assault of a police officer in Washington and thus not a most serious offense. *State v. Carter*, 100 Wn. App. 1028, 2000 WL 420660, at *5, 12-13. Carter petitioned for review, arguing that his California assault conviction was not comparable to assault in Washington because the California assault statute did not require the specific intent the Washington statute requires. Our Supreme Court denied review, and we issued our mandate on October 18, 2000. When Carter filed a habeas petition raising the comparability issue, a federal district court dismissed it as procedurally barred on March 29, 2002.

Carter filed this personal restraint petition on October 3, 2007. He again sought relief based on the visibility of his shackles during his trial and the comparability issue. We rejected his claim that his petition was not subject to the one-year time bar because he did not receive notice of that statute of limitation from the trial court. *In re Pers. Restraint of Carter*, 154 Wn. App. 907, 914, 230 P.3d 181 (2010), *reversed and remanded*, 172 Wn.2d 917, 263 P.3d 1241 (2011). We also rejected his claim that a recent change in the law warranted our reconsideration of the shackling issue. *Carter*, 154 Wn. App. at 916 (citing RCW 10.73.100(6)). Turning to the comparability issue, we held that the mixed petition rule barred consideration of Carter's claim that there was a significant change in the law material to the comparability issue as well as his claim that the sentence imposed was in excess of the trial court's jurisdiction. *Carter*, 154 Wn.

App. at 917 n.2 (citing RCW 10.73.100(6) and RCW 10.73.100(5)). And, because we granted relief on Carter's claim that he was actually innocent of being a persistent offender, we did not reach his argument that his judgment and sentence was facially invalid under RCW 10.73.090. *Carter*, 154 Wn. App. at 924 n.6.

The State petitioned for review of our analysis of the actual innocence exception, and Carter cross-petitioned for review, raising all previously argued exceptions to the time bar regarding the comparability claim and seeking review of our denial of his shackling claim. *Carter*, 172 Wn.2d at 921. The Supreme Court granted review of the State's petition, denied review of Carter's petition, and held that we had erred in granting Carter relief. *Carter*, 172 Wn.2d at 921, 933-34. The Court also remanded so that we could consider Carter's alternative claims to avoid the time bar; i.e., his argument that there was a significant change in the law material to the comparability issue (RCW 10.73.100(6)), that the sentence imposed was in excess of the court's jurisdiction (RCW 10.73.100(5)), and that his judgment and sentence was facially invalid (RCW 10.73.090). *Carter*, 172 Wn.2d at 933.

Analysis

I. Exceptions under RCW 10.73.100

Personal restraint petitions generally are prohibited if not filed within one year after the judgment and sentence becomes final. RCW 10.73.090(1). A petition is exempt from the one-year time limit, however, if the judgment and sentence is facially invalid or if it was not rendered by a court of competent jurisdiction. RCW 10.73.090(1). There are also statutory exceptions to the time bar for certain categories of issues. RCW 10.73.100. The petitioner bears the burden of

proving that an exception to the RCW 10.73.090 statute of limitation applies. *State v. Schwab*, 141 Wn. App. 85, 90, 167 P.3d 1225 (2007).

Carter's convictions became final when we filed our mandate on October 18, 2000. RCW 10.73.090(3)(b). Filed in 2007, this petition challenged both his shackling and his sentencing. The Supreme Court did not review our conclusion that Carter had adequate notice of the one-year time limit for filing personal restraint petitions, or our conclusion that his shackling claim was untimely under RCW 10.73.100(6), so these conclusions remain the law of the case and do not warrant further analysis. *See State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992) (appellate court's decision supersedes a lower court decision only on issues the appellate court decides).

A. Mixed Petition Rule

The Supreme Court has stated that where one or more of the grounds asserted for relief in a personal restraint petition falls within the exceptions in RCW 10.73.100 and one or more does not, the petition is a "mixed petition" that must be dismissed. *In re Pers. Restraint of Coats*, ___ P.3d ___, 2011 WL 5593063, at *23 (Wash. 2011) (Stephens, J., concurring); *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 85-86, 74 P.3d 1194 (2003) (citing *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 697, 702-03, 72 P.3d 703 (2003); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000)). As the Court has explained,

> [O]nce the court determines that any one of the claims raised do not fall within an exception, the petition must be dismissed without any further consideration. *Hankerson*, 149 Wn.2d at 702-03, 72 P.3d 703. The court will not advise as to which claims are time barred and which are not, nor will the court decide claims under RCW 10.73.100 that are not time barred. *Id.*

Turay, 150 Wn.2d at 86; *see also In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 370 n.10, 119 P.3d 816 (2005) (where one of the grounds asserted for relief fall within the exceptions in RCW 10.73.100 and one or more do not, the petition is a mixed petition that must be dismissed without considering the other issues presented). "Only those claims which satisfy the conditions of RCW 10.73.090, namely claims which challenge the facial validity of the judgment and sentence or which challenge the jurisdiction of the court, may be addressed when we are presented with a mixed petition." *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003) (citing *Stoudmire*, 141 Wn.2d at 349-52). The *Stenson* court was tempted to discuss the merits of each claim despite the fact that one was untimely but declined to do so, reasoning that any such discussion would be "merely dicta and might be viewed as undermining our decisions in *Stoudmire* and *Hankerson.*" *Stenson*, 150 Wn.2d at 221.

In adherence to this case law and the mixed petition rule, we held in our initial opinion that because Carter had not succeeded in showing that he was entitled to relief under RCW 10.73.100(6) on the shackling issue, we could not consider his claims for relief from his persistent offender sentencing under RCW 10.73.100(5) and (6). *Carter*, 154 Wn. App. at 917 n.2.

The Supreme Court did not refer to the mixed petition rule in directing us on remand to consider these additional claims for relief. But, given the express directive issued, we will address the merits of those claims.

B. Significant Change in the Law

The one-year time limit does not apply to a personal restraint petition if the issue raised depends on a significant change in the law that is material to the petitioner's conviction or

sentence and applies retroactively. RCW 10.73.100(6); *see also In re Pers. Restraint of Crabtree*, 141 Wn.2d 577, 584, 9 P.3d 914 (2000). One test to determine whether an intervening case represents a significant change in the law is whether the defendant could have argued the issue before publication of the decision. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.2d 837 (2005). Another test is whether an intervening decision has effectively overturned a prior appellate decision that was originally determinative of a material issue. *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). Carter argues here that a significant change in California law relieves him of the time bar and entitles him to sentencing relief.

Where a defendant's criminal history includes out-of-state convictions, the Sentencing Reform Act (SRA) requires them to be classified according to the comparable offense definitions and sentences provided by Washington law. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Ford*, 137 Wn.2d at 479. If the elements are not identical, or if the foreign statute is broader than the Washington statute, the sentencing court may look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

For a defendant to be sentenced as a persistent offender, he must (1) have been convicted in Washington of a felony defined as a most serious offense, and (2) have been previously convicted on at least two separate occasions, in this state or elsewhere, of felonies that, under the

laws of this state, would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525. RCW 9.94A.030(37).[2] The SRA includes within the definition of most serious offenses any class A felony, second degree assault, and any federal or out-of-state conviction that under the laws of this state would be classified as a most serious offense. RCW 9.94A.030(32).

Carter argues that a change in California law demonstrates that his conviction for assault of a peace officer with a firearm is not a strike because it is not comparable to a most serious offense in Washington. He argues that when the California Supreme Court announced in 2001 that assault is a general intent crime under California law, it changed the law and demonstrated that a California assault cannot be comparable to assault in Washington, which is a specific intent crime. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Abuan*, 161 Wn. App. 135, 158, 257 P.3d 1 (2011).

The California case at issue is *People v. Williams*, 26 Cal. 4th 779, 111 Cal. Rptr. 2d 114, 29 P.3d 197 (2001). Instead of changing the law, the *Williams* court adhered to long-established precedent in holding that the crime of assault, as defined in California statutes, does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. "Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *Williams*, 26 Cal. 4th at 790. In so holding, the court stated that it did not disturb its previous holdings that assault is a general intent crime. *Williams*, 26 Cal. 4th at

[2] We cite current sentencing statutes for clarity where they reflect the law in effect when Carter committed his crimes. *State v. Swiger*, 159 Wn.2d 224, 227 n.3, 149 P.3d 372 (2006).

788 (citing *People v. Colantuono*, 7 Cal. 4th 206, 215-16, 26 Cal. Rptr. 2d 908, 865 P.2d 704 (1994) and *People v. Rocha*, 3 Cal. 3d 893, 899, 92 Cal. Rptr. 172, 479 P.2d 372 (1971)).

Carter asserts that before *Williams*, he could not argue that his California assault was a general intent crime and thus not a strike, and he contends that this change in the law applies retroactively. But during Carter's direct appeal, his attorney filed a motion for accelerated review of his sentence and, citing *Colantuono* and *Rocha*, argued that his California assault was not comparable to assault in Washington because of the different intents required. Carter again referred to the different intent elements in arguing to the Washington Supreme Court that his petition for review should be granted. As a result, Carter does not establish that *Williams* raised a new point of law that he could not argue before its issuance. Nor does Carter show that *Williams* constitutes an intervening decision that effectively overturned a prior appellate decision. Consequently, Carter does not succeed in showing that a significant change in the law entitles him to relief. *See* RCW 10.73.100(6).

C. Sentencing in Excess of Trial Court's Jurisdiction

Without citing any supporting authority, Carter also argues in his petition that he is entitled to relief because the persistent offender sentence he received exceeded the trial court's jurisdiction. *See* RCW 10.73.100(5) (time bar does not apply where the sentence imposed was in excess of the trial court's jurisdiction). A court has subject matter jurisdiction where it has the authority to adjudicate the type of controversy in the action, and it does not lose subject matter jurisdiction merely by interpreting the law erroneously. *In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 201-02, 963 P.2d 903 (1998) (citing *State v. Moen*, 129 Wn.2d 535, 545, 919

P.2d 69 (1996)). Consequently, a sentence is not jurisdictionally defective for purposes of triggering the exception in RCW 10.73.100(5) because it is in violation of a statute or based on a misinterpretation of a statute. *In re Pers. Restraint of Richey*, 162 Wn.2d 865, 872, 175 P.3d 585 (2008). Carter thus cannot avail himself of this exception to the time bar even if his California conviction is not comparable to a Washington strike offense.

II. Facial Invalidity

Carter contends that he is entitled to sentencing relief because his California conviction washed out and because his judgment and sentence lacks an offender score. He contends that these errors render his judgment and sentence facially invalid, thereby exempting his request for sentencing relief from the time bar. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866-67, 50 P.3d 380 (2002) (judgment that includes washed-out felony convictions is exempt from time bar).

The one-year statutory bar does not apply to judgments and sentences that appear facially invalid. RCW 10.73.090(1); *In re Pers. Restraint of LaChappelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004). A judgment and sentence is facially invalid if it evidences the invalidity without further elaboration, although a court may look to charging documents, verdicts, and plea agreements to determine facial invalidity. *Coats*, 2011 WL 5593063, at *8; *Goodwin*, 146 Wn.2d at 866.

Carter argues that his California conviction should have washed because it is equivalent to the Washington gross misdemeanor offense of unlawful discharge of a firearm. RCW 9.41.230. As the State points out, this argument is actually a claim that his California conviction should not count as a strike rather than a wash-out claim. The wash-out rules apply only to felony

convictions. RCW 9.94A.525. With one exception, misdemeanor convictions are not included in offender scores and thus do not wash. *See Ford*, 137 Wn.2d at 479.[3] This argument apparently reframes the comparability question in a manner designed to overcome the time bar. An allegedly erroneous comparability determination does not render a judgment and sentence facially invalid because such error can be determined only by examining the facts of the foreign conviction as well as the elements of both the foreign and state offenses, which typically are not available solely by resort to court documents. *See In re Pers. Restraint of Banks*, 149 Wn. App. 513, 520-21, 204 P.3d 260 (2009) (where petitioner claimed prior California convictions were not comparable to Washington felonies, alleged error was not evident on the face of the judgment and sentence, nor shown by documents related to his plea, so judgment and sentence was valid on its face); *In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 505-06, 204 P.3d 953 (2009) (where petitioner was sentenced following trial, plea documents relating to prior convictions were irrelevant in assessing facial invalidity of current judgment and sentence). This argument does not support Carter's claim of facial invalidity.

Carter cites no authority for his second contention that his judgment and sentence is facially invalid because it does not include an offender score. An offender score calculation was unnecessary, however, because Carter's life sentence was mandatory given the three strikes calculation. *See Carter*, 2000 WL 420660, at *13; *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005) (distinguishing between using prior convictions to determine offender score or as predicate strike offenses for POAA). Even if the trial court should

[3] Where the current conviction is for a felony traffic offense, a sentencing court may include serious misdemeanor traffic offenses in the offender score. RCW 9.94A.525(11).

have included an offender score in the judgment and sentence, its omission does not render the document invalid.

Having considered Carter's alternative claims for relief as directed, we deny his personal restraint petition as untimely.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Penoyar, C.J.