IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADRIAN CONTRERAS-REBOLLAR, Appellant.	No. 40962-3-II (consolidated with) 41672-7-II
In re Personal Restraint Petition of, ADRIAN CONTRERAS-REBOLLAR, Petitioner.	UNPUBLISHED OPINION

Hunt, J. — Adrian Contreras-Rebollar appeals his resentencing on remand following his earlier appeal of his jury convictions for two counts of first degree assault and one count of second degree unlawful firearm possession. He argues that (1) the resentencing court erred in denying his request to procure new counsel; (2) he was entitled to have a jury, rather than the resentencing court, determine whether he had been on community custody when he committed the assaults and unlawful firearm possession; (3) the resentencing court miscalculated the date on which his community custody had ended; and (4) his counsel at resentencing hearing was

ineffective for failing to conduct an independent determination of when Contreras-Rebollar's community custody ended. We remand for resentencing to consider Contreras-Rebollar's community custody status at the time of the charged offenses.

Contreras-Rebollar also filed a personal restraint petition (PRP) and a supplemental personal restraint petition, which we consolidated with his direct appeal. We deny his first petition because it reiterates issues that we rejected in his previous direct appeal in 2009; we dismiss his supplemental petition because it was not timely filed.

FACTS

Contreras-Rebollar previously appealed his convictions and sentence in 2007.[1] We affirmed his convictions and remanded for resentencing, which he now appeals.[2]

I. Previous Convictions, Sentencing, and Appeal

On July 15, 2004, Adrian Contreras-Rebollar pled guilty to one count of third degree assault; the trial court sentenced him to 9 months of incarceration, with credit for 91 days of time served, plus 12 months of community custody. A year later, after his release from incarceration, but while still on community custody for the 2004 assault, Contreras-Rebollar committed second degree unlawful possession of a firearm on July 21, 2005. He pled guilty, and on August 29 the trial court sentenced him to 3 months of incarceration, with credit for 40 days of time served.[3]

[1] *State v. Contreras-Rebollar*, noted at 149 Wn. App. 1001 (2009).

[2] *Contreras-Rebollar*, noted at 149 Wn. App. 1001**,** 2009 WL 448902, at *1.

[3] He received no additional community custody for this new unlawful firearm possession conviction.

This new conviction tolled[4] the earlier incomplete community custody for his 2004 assault conviction.

The following year, on April 12, 2006, Contreras-Rebollar committed two counts of first degree assault and one count of second degree unlawful possession of a firearm, for which a jury convicted him in February 2007. At sentencing, the State alleged, but did not offer documentary proof, that he had prior convictions and had been on community custody when he committed these most recent April 12, 2006 crimes.[5] Contreras-Rebollar "refused to sign any documents at his sentencing, including the stipulation on prior record and offender score and the judgment and sentence." *Contreras-Rebollar*, 2009 WL 448902, at *3. The trial court sentenced him to 380 months of incarceration.[6]

Contreras-Rebollar appealed. In a 2009 unpublished opinion, we affirmed Contreras-Rebollar's convictions but remanded for resentencing "so that the State [could] produce evidence of Contreras[-Rebollar]'s prior convictions and community custody status."[7]

[4] Former RCW 9.94A.171(3) (2000), which was then in effect, provided, "Any period of community custody . . . shall be tolled during any period of time the offender is in confinement for any reason."

[5] *Contreras-Rebollar*, 2009 WL 448902, at *6.

[6] *Contreras-Rebollar*, 2009 WL 448902, at *3.

[7] *Contreras-Rebollar*, 2009 WL 448902, at *6.

II. Resentencing on Remand

A. Request for New Counsel

At the 2010 resentencing hearing on remand, Contreras-Rebollar was represented by one of two counsel who had represented him at trial. Counsel advised the resentencing court that Contreras-Rebollar had "retained [prospective new counsel] to come in and handle the resentencing on this issue, and they would like to move the Court to substitute counsel and set [re]sentencing over for a week or two so that [prospective new counsel] can come up to speed on the case." Report of Proceedings (RP) (June 29, 2010) at 3. The State objected, asserting (1) "The only issue is whether [Contreras-Rebollar] has the prior convictions mentioned in the [judgment and sentence] and whether he was on community custody status at the time of the offense"; and (2) "[T]here's no real issue that involves being brought up to speed. It's a pure issue of proving the [Contreras-Rebollar]'s prior convictions." RP (June 29, 2010) at 4.

When the resentencing court asked prospective new counsel how long he needed to prepare, he replied that he would need until August 6, more than four weeks away. When the resentencing court responded that it was "looking at today or Friday," prospective new counsel replied, "There's no way I can do it as early as Friday." RP (June 29, 2010) at 5. Skeptical about requesting this much time to prepare for the resentencing, the court ruled, "I'm going to decline then to allow [prospective new counsel] to substitute for [current counsel] for purposes of the [re]sentencing." RP (June 29, 2010) at 7.

Contreras-Rebollar then said, "I would like to fire [current counsel] at this time as my attorney." RP (June 29, 2010) at 7. The resentencing court responded, "I'm willing to let

[prospective new counsel] substitute if he can be ready by next week. I'm not going to wait until August 6th." RP (June 29, 2010) at 8-9. When prospective new counsel stated that he "[couldn't] make that commitment," the resentencing court ruled, "So I'm going to decline to allow [prospective new counsel] to substitute for [current counsel]. I'm going to decline to allow [current counsel] to withdraw." RP (June 29, 2010) at 9. Contreras-Rebollar then interjected, "I don't have an attorney at this time. I fired both my attorneys at this time." RP (June 29, 2010) at 9. The resentencing court then responded, "I'm not allowing you to fire [current counsel]. He'll be representing you at this hearing. This is late notice." RP (June 29, 2010) at 9.

B. Community Custody Calculation

The resentencing court and the parties then discussed whether Contreras-Rebollar had been on community custody on April 12, 2006. The resentencing court calculated that his community custody (from his 2004 third degree assault conviction) had begun on January 15, 2005, and that, absent any intervening periods of confinement, it would have ended on January 15, 2006. The State explained that Contreras-Rebollar had been "held" for three months on his subsequent second degree unlawful possession of a firearm conviction in 2005, which had tolled his community custody term. RP (June 29, 2010) at 11. The resentencing court then added three months to the original community custody end date of January 15, 2006, for a new end date of April 15, 2006, and asked the parties whether "that sound[ed] about right." RP (June 29, 2010) at 11. Defense counsel replied, "It does sound right." RP (June 29, 2010) at 11. The resentencing court then stated, "Plus or minus a few days[,] [Contreras-Rebollar] still would have been on community custody until approximately April 15, 2006." RP (June 29, 2010) at 11.

Contreras-Rebollar did not object.

The State then provided the resentencing court with certified copies of the judgment and sentences of Contreras-Rebollar's three prior convictions.[8] When the resentencing court asked for its resentencing recommendation, the State responded, "[M]y understanding is the Court just had to, as opposed to resentence, recalculate and affirm that the prior [judgment and sentence from Contreras-Rebollar's February 2007 convictions] was accurate." RP (June 29, 2010) at 12. Defense counsel responded:

> Your Honor, I've been back through the Division II Court of Appeals opinion [that affirmed Contreras-Rebollar's February 2007 convictions but remanded for resentencing]. I've been back through [the judgments and sentences for Contreras-Rebollar's prior convictions] provided by the State. It [the original judgment and sentence from Contreras-Rebollar's February 2007 convictions] does appear to be correct as to sentencing.
> [. . .]
> My analysis [a]s the attorney concurs with [the State]; however, my client still takes issue and wishes to make a record that he disagrees with the calculation, he disagrees with the community custody calculation, and he disagrees with me being [his] attorney, and make a record and renew all his prior objections to sentencing and make sure there's a record of that for appeal should that come up.

RP (June 29, 2010) at 13.

When the resentencing court asked whether Contreras-Rebollar wanted to make any other statements before resentencing, he objected (1) that the resentencing court should have allowed him to substitute new counsel for resentencing; and (2) that the jury, not the resentencing court, should have been the fact-finder about whether he had been on community custody on April 12,

[8] These three prior convictions included the 2005 conviction for one count of second degree unlawful possession of a firearm; the 2004 conviction for third degree assault; and one count of unlawful possession of an imitation controlled substance with intent to distribute, to which Contreras-Rebollar had pled guilty as a minor in 2003. This 2003 juvenile adjudication has no bearing on the community custody timing issue here.

2006. The resentencing court rejected these arguments.

C. Resentencing Order Presentation

On July 2, 2010, the State presented its resentencing order, and the resentencing court stated, "[Counsel], I know Mr. Contreras-Rebollar wants a new attorney, but we dealt with that the other day." RP (July 2, 2010) at 18. Defense counsel responded:

> Your Honor, as a preliminary matter, as we come on the record today, Mr. [Contreras-]Rebollar asked me to make a new motion that I be allowed to withdraw as his attorney prior to presentation of findings of fact and conclusions of law. As his attorney I would voice his request to the Court and make a motion.

RP (July 2, 2010) at 18-19. The resentencing court replied:

> I said the other day if [prospective new counsel] could be here, I would allow that. He said he can't be here until August. The remand was to see if the State could prove the offender score at the time of sentencing. They did so. It's not, quote, administerial, but it's something like that.

RP (July 2, 2010) at 19. Defense counsel then said, "If the Court is ordering me to proceed, I will." RP (July 2, 2010) at 19. The resentencing court did not say whether it was "ordering" current counsel to continue. RP (July 2, 2010) at 19.

Defense counsel next explained that he had reviewed the resentencing order's findings and conclusions but that he did not know "the extent to which [Contreras-Rebollar] approves or disapproves" of the resentencing order. RP (July 2, 2010) at 19. Contreras-Rebollar then interjected:

> And I would like to make a further record on that. I just want Your Honor to know for the record that a defendant is entitled to representation of his choice. That is a Sixth Amendment right at all major stages of a criminal proceeding including sentencing.
>
> Sentencing is a major stage of a criminal proceeding and I am entitled to an attorney by law. I have fired my attorney.

RP (July 2, 2010) at 20. The resentencing court replied, "[W]e debated this a few days ago. It's kind of a nonissue today." RP (July 2, 2010) at 20. Contreras-Rebollar responded:

> Then I would like to put something else further on the record for those findings. Those findings are incorrect.
>
> [The findings] are against my Sixth Amendment constitutional rights to a jury trial, which I have not waived. I have a right to a jury trial.
>
> [A] defendant is entitled to have a jury decide whether an actual portion should be added for the community custody. I have not waived my right for a jury trial, and I object to Your Honor's finding that I was on community custody at the time of the event.

RP (July 2, 2010) at 21.[9]

The resentencing court then signed the resentencing order, which stated that Contreras-Rebollar had been on community custody as of April 12, 2006, and that "the sentence imposed on February 16, 2007, is hereby re-imposed in all and every respect." CP at 90. Contreras-Rebollar appeals this resentencing order.

ANALYSIS

I. Request for New Counsel

Contreras-Rebollar first argues that the resentencing court violated his right to counsel under the Sixth Amendment to the United States Constitution by denying his requests to "fire" his then current counsel and to retain new counsel for the resentencing hearing. Br. of Appellant at 17. We agree with the State that the resentencing court did not err because (1) the Sixth Amendment guarantees a defendant only the right to effective counsel, not the right to any particular counsel he chooses; and (2) Contreras-Rebollar's last-minute request would have

[9] The sentencing court did not explicitly rule on this objection and did not explain why it disagreed with Contreras-Rebollar. *See* RP (July 2, 2010) at 22.

required a one-month continuance, which would have been unreasonable for a resentencing on remand where the only issues for the resentencing were the existence of Contreras-Rebollar's prior convictions and whether he had been on community custody as of April 12, 2006.

A. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to assistance of counsel at any critical stage in a criminal prosecution. *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). The "'essential aim [of this right] is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.'" *Roberts*, 142 Wn.2d at 515 (quoting *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). Accordingly, "[t]he right to retained counsel of choice is [ ] not a right of the same force as other aspects of the right to counsel; a criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." *State v. Price*, 126 Wn. App. 617, 631-32, 109 P.3d 27 (2005) (citing *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994)).

When a defendant requests a continuance to obtain new counsel, the trial court must balance the defendant's interest in counsel of his choice against the public's interest in the prompt and efficient administration of justice. *Price*, 126 Wn. App. at 632. The factors that the trial court should consider include: (1) whether prior defense-requested continuances were granted, (2) the defendant's reasons for requesting a change of counsel, (3) "whether denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial

nature," and (4) whether preferred counsel is available and prepared. *Price*, 126 Wn. App. at 632.

We review a trial court's denial of a request for new counsel for an abuse of discretion. *Price*, 126 Wn. App. at 632.

> A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; an abuse of discretion also occurs when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

State v. Ramirez-Estevez, 164 Wn. App. 284, 289-90, 263 P.3d 1257 (2011), *review denied*, 173. Wn.2d 1030 (2012). The trial court did not abuse its discretion here.

B. Denial of New Counsel Request Not Erroneous under *Price* Factors

The first *Price* factor[10] weighed against Contreras-Rebollar's request for new counsel. The resentencing court had already granted one continuance of the original resentencing from June 25, 2010, to June 29 because counsel did not appear on June 25.

The second *Price* factor[11] also weighed against Contreras-Rebollar's request for new counsel. Contreras-Rebollar's reason for requesting a change of counsel was his allegation that there was "a conflict of interest in [counsel's] representing [Contreras-Rebollar] at [the] resentencing,"[12] but Contreras-Rebollar fails to articulate why he had a "conflict of interest" with

[10] *Price*, 126 Wn. App. at 632.

[11] *Price*, 126 Wn. App. at 632.

[12] RP (June 29, 2010) at 7.

counsel.[13] Instead, Contreras-Rebollar baldly asserts that he was entitled to new counsel under Rules of Professional Conduct (RPC) 1.7 and 1.9, which concern "concurrent conflict[s] of interest" and duties to former clients, respectively. RPC 1.7(a). Again, Contreras-Rebollar fails to explain how counsel's representation of him during the resentencing hearing violated these rules. Accordingly, we do not further address this argument.[14]

Similarly, the third and fourth *Price* factors[15] weighed against substitution of counsel on the day of Contreras-Rebollar's rescheduled resentencing. New counsel was available but unable to be prepared to take over the hearing that day or even the next week. By new counsel's own admission, substitution would have required yet another continuance to prepare, causing a significant delay. Prospective new counsel was requesting a five-week continuance to study and to dispute Contreras-Rebollar's prior convictions, if necessary. He rejected the resentencing court's offer of an alternative shorter one-week continuance and insisted on a continuance of more than one month, which the resentencing court was not willing to grant.

Yet there were only two relatively simple issues for the resentencing hearing: the existence of Contreras-Rebollar's prior convictions and whether he had been on community

---

[13] This alleged conflict of interest was apparently related to Contreras-Rebollar's first direct appeal in which he had argued that his two trial co-counsel were ineffective; we previously rejected this ineffective assistance argument. *See* RP (June 29, 2010) at 8; *Contreras-Rebollar*, 2009 WL 448902, at *7-9.

[14] "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *State v. Hathaway*, 161 Wn. App. 634, 650 n.10, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

[15] *Price*, 126 Wn. App. at 633.

custody on April 12, 2006. The community custody question, for example, essentially turned on a mathematic date calculation, not on the skill of any particular attorney. Contreras-Rebollar failed to show that the difference between the new and current counsel would have had a significant impact on the resentencing hearing; thus, Contreras-Rebollar did not show that denial of his motion to substitute counsel was likely to result in identifiable prejudice to his case of a material or substantial nature." *Price*, 126 Wn. App. at 632.

Taken together, all four *Price* factors supported that the public's interest in the prompt and efficient administration of justice outweighed Contreras-Rebollar's interest in counsel of his choice. *Price*, 126 Wn. App. at 632. We hold, therefore, that the resentencing court did not abuse its discretion by denying Contreras-Rebollar's last minute request for new counsel.

II. Community Custody

A. Fact-Finder

Contreras-Rebollar next argues that the resentencing court denied his Sixth Amendment right to a jury trial because a jury, rather than the sentencing court, should have determined whether he had been on community custody as of April 12, 2006. He contends that committing a crime while on community custody is a "sentencing enhancement[]," which requires a finding by a jury. Br. of Appellant at 18. Again, we agree with the State that, under existing United States Supreme Court and Washington Supreme Court precedent, Contreras-Rebollar was not entitled to have a jury determine his community custody status.

Our Washington Supreme Court has squarely addressed and rejected this same argument:

> [B]ecause the community placement sentence determination is a determination about a defendant's status as recidivist, does not require the independent judgment

> of a fact finder about facts related to a defendant's commission of the current offense, and can be readily determined by a limited examination of the record flowing from the prior conviction, we conclude that a court, rather than a jury, may, pursuant to *Almendarez-Torres*,[16] make, constitutionally, the . . . community placement determination.

State v. Jones, 159 Wn.2d 231, 247, 149 P.3d 636 (2006), *cert. denied*, *Thomas v. Washington*, 549 U.S. 1354 (2007). Until and unless our Supreme Court overrules *Jones*, we are bound to follow it. *See State v. McKague*, 159 Wn. App. 489, 514, 246 P.3d 558, *aff'd*, 172 Wn.2d 802 (2011).

Contreras-Rebollar also argues that, because the resentencing court, and not the jury, determined his community custody status, the resentencing court "simultaneously denied him the requirement of proof beyond a reasonable doubt." Br. of Appellant at 19. But our Supreme Court has previously rejected this argument. *Jones*, 159 Wn.2d at 240-241. In *Jones*, our Supreme Court (1) followed *Almendarez-Torres*, in which the United States Supreme Court declined to hold that the State must prove, and that a jury must determine, a defendant's prior convictions beyond a reasonable doubt;[17] and (2) reasoned that "the *Almendarez-Torres* prior conviction exception . . . encompass[es] facts that follow necessarily or as a matter of law from the fact of a prior conviction, such as the defendant's community placement status." *Jones*, 159 Wn.2d at 243, 247. Following *Jones* here, we hold that the Sixth Amendment[18] did not require the State to prove Contreras-Rebollar's community custody status beyond a reasonable doubt.

---

[16] *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[17] *See McKague*, 159 Wn. App. at 513.

[18] U.S. Const. amend. VI.

Accordingly, we hold that the resentencing court did not violate Contreras-Rebollar's Sixth Amendment[19] jury trial right when it determined that he had been on community custody on April 12, 2006, when he committed the charged crimes.

[19] U.S. Const. amend. VI.

B. Status at Time of Charged Crimes

Contreras-Rebollar also argues that the trial court erred as a matter of fact by determining that he had been on community custody on April 12, 2006, the date of the charged crimes.[20] We previously remanded to the sentencing court "for resentencing so that the State [could] produce evidence of Contreras[-Rebollar]'s prior convictions and community custody status." *Contreras-Rebollar*, 2009 WL 448902, at *6. But the record before us on appeal does not contain sufficient information for us to review the accuracy of the resentencing court's determination of Contreras-Rebollar's community custody status at the time of the charged crimes. Therefore, we must remand for yet another resentencing.

Contreras-Rebollar asserts that he was *not* on community custody as of April 12, 2006, because he had been released from his unlawful firearm possession incarceration on September 19, 2005 (based on his "assuming the customary 1/3 good time awarded by the Pierce County Jail.") Br. of Appellant at 26. In his direct appeal, he cites no part of the record to support his assertion that he received such good time credit or that he was actually released on that date. And the record before us shows only that (1) Contreras-Rebollar had been previously sentenced for his unlawful firearm possession conviction to three months of incarceration, with credit for 40 days of time served, and (2) this incarceration period ended, and his community custody term

[20] Contreras-Rebollar argues that the sentencing court's "'off the cuff'" calculations violated his right to have his community custody status proved beyond a reasonable doubt. Br. of Appellant at 27. But the standard of proof for a community custody determination is "preponderance of the evidence," not beyond a reasonable doubt. *See McKague*, 159 Wn. App. at 517; *Jones*, 159 Wn.2d at 243, 247. Nevertheless, the record on appeal is insufficient for our review under even this "preponderance of the evidence" standard of proof.

recommenced, on October 20, 2005, not September 19, 2005.[21] And in his PRP, Contreras-Rebollar makes no assertions to matters potentially outside the record that might support his assertions.

Similarly, in his direct appeal, Contreras-Rebollar also assumes that his community custody was tolled on August 29, 2005 (when he *was sentenced for* unlawful firearm possession), instead of July 21, 2005 (when he *was presumably taken into custody for* unlawful firearm possession).[22] Again, he cites nothing in the record to support this assumption or to show that his community custody was tolled on August 29, 2005, rather than on July 21, 2005. Nor does he allege supporting facts outside the record in his PRP.

Nothing in the record before us refers to any good-time credit—whether Contreras-Rebollar had earned it or whether the resentencing court considered such credit in reviewing his community custody status during our previous remand for resentencing. Nor does the record on appeal show, as Contreras-Rebollar asserts, that his community custody began on December 11, 2004, was tolled from August 28, 2005 thru September 18, 2005, began again on September 19, 2005, and finally expired on December 31, 2005. We usually do not consider arguments that lack

---

[21] Contreras-Rebollar committed unlawful firearm possession on July 21, 2005, and likely was taken into custody on the same day. The record does not actually state whether Contreras-Rebollar was taken into custody on the same date that he committed unlawful firearm possession. But, when Contreras-Rebollar was sentenced on August 29, 2005, he received credit for 40 days of time served, which means Contreras-Rebollar was in confinement for 40 days before he was sentenced. There are 40 days from and including July 21, 2005, to and also including August 29, 2005. He was sentenced on August 29, 2005. If he served 3 months with credit for 40 days of time served, then his incarceration ended on October 20, 2005.

[22] Contreras-Rebollar's assumption contradicts his own brief where, on page 11, he asserts that he was on community custody from January 15, 2005 to July 20, 2005. *See* Br. of Appellant at 11.

citations to the record. *State v. Nelson*, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006); RAP 10.3(a)(5). Moreover, here, the record does not show that the resentencing court actually miscalculated Contreras-Rebollar's community custody tolling and recommencement.

Nevertheless, the record suggests that the resentencing court may not have taken into account any good time credit to which Contreras-Rebollar may have been entitled and that might have affected its determination of whether he had been on community custody at the time he committed the charged crimes. We reiterate that we specifically remanded "for resentencing so that the State can produce evidence of Contreras[-Rebollar]'s . . . community custody status." *Contreras-Rebollar*, 2009 WL 448902, at *6. In our view, the directives of our previous remand were not fully satisfied. Therefore, we must remand once more because we cannot tell on the record before us whether Contreras-Rebollar's community custody status was accurately determined, despite the specific terms of our previous remand for resentencing and determination of community custody.

Accordingly, we remand again for resentencing, at which the State should put on the record all facts pertinent to Contreras-Rebollar's community custody status at the time he committed the charged crimes, including any good time credit calculation to which he may have been entitled.

III. Effective Assistance of Counsel

Next, Contreras-Rebollar argues that his resentencing hearing counsel rendered ineffective assistance because he failed to "independently calculate" whether Contreras-Rebollar had been on community custody as of April 12, 2006. Br. of Appellant at 30. This argument fails.

To succeed on an ineffective assistance of counsel claim, the defendant bears the burden of showing (1) that trial counsel's performance was deficient and (2) trial counsel's deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting the test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Trial counsel's performance is deficient if it "falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because of the "deference afforded to decisions of defense counsel in the course of representation,"[23] there exists a "'[s]trong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Legitimate trial strategy or tactics do not count as deficient performance, but "a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Ano*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

Once the defendant shows deficient performance, he then must establish prejudice by showing that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). Failure to

[23] *Grier*, 171 Wn.2d at 33.

demonstrate *both* prongs of the test defeats a defendant's ineffective assistance of counsel argument on appeal. *Grier*, 171 Wn.2d at 33 (citing *Thomas*, 109 Wn.2d at 225-26 (adopting the test from *Strickland*, 466 U.S. at 687)).

Contreras-Rebollar does not meet the first prong of the test because he fails to show that counsel's performance was deficient. The resentencing court performed its community custody calculation in the presence of counsel, Contreras-Rebollar, and the State. And when the resentencing court determined that Contreras-Rebollar's community custody had expired on April 15, 2006, counsel, who had studied the judgments and sentences from Contreras-Rebollar's previous convictions, replied, "It does sound right." RP (June 29, 2010) at 11. These facts show that counsel was informed and prepared and, thus, negate Contreras-Rebollar's argument that counsel's performance "f[ell] 'below an objective standard of reasonableness.'"[24] *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Because Contreras-Rebollar fails to meet the first prong of the ineffective assistance of counsel test, we need not address the second prong. We hold, therefore, that Contreras-Rebollar has failed to show that his counsel rendered ineffective assistance at resentencing.

IV. Personal Restraint Petitions

A. Primary Personal Restraint Petition

In his primary PRP, Contreras-Rebollar argues that (1) his trial counsel back in early 2007 rendered ineffective assistance of counsel by failing to propose the "[d]efense of [a]nother" jury instruction; and (2) the trial court erroneously excluded co-counsel from the trial. PRP at 22.

[24] That the record does not contain more complete information about these calculations does not show that counsel was deficient in his representation.

Contreras-Rebollar previously advanced, and we rejected, these same arguments in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *3, *7 ("[Contreras-Rebollar] claims that he did not receive a fair trial because . . . the trial court removed [co-counsel] from the proceedings" and "Contreras[-Rebollar] also argues that he received ineffective assistance of counsel because defense counsel . . . failed to propose a 'defense of another' instruction.")

"The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnotes omitted). "An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits." *Davis*, 152 Wn.2d at 671 n.14 (citing *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986)). "The interests of justice are served by reexamining an issue if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Davis*, 152 Wn.2d at 671 n.15 (citing *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)).

Contreras-Rebollar concedes that his ineffective assistance of counsel argument is "the same underlying previously heard and determined issue" from his first direct appeal, but he argues that we, nevertheless, should "allow for relitigation" under RAP 16.4(c)(3). Pet'r Resp.

to Resp't Br. at 17. RAP 16.4(c)(3) provides that a restraint is unlawful if "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction." But Contreras-Rebollar does not provide any new "[m]aterial facts" with his petition[25]; instead, he merely provides additional copies of the record.

Contreras-Rebollar also argues that his exclusion of co-counsel issue in his petition differs from the exclusion issue he argued in his first direct appeal because (1) "on his direct appeal the fundamental underlying principle issue argued was that of a mere trial court discretional error"; and (2) in contrast, the exclusion issue in his petition is "of the magnitude of a direct structural defect in which [he] was critically denied his [constitutional] rights." Pet'r Resp. to Resp't Br. at 9. Contrary to Contreras-Rebollar's argument, (1) we considered his constitutional rights in his first direct appeal; and (2) in his petition, he presents essentially the same issue that he presented in his first direct appeal. *Contreras-Rebollar*, 2009 WL 448902, at *5. He cannot avoid this problem by merely "'couching his argument in different language.'" *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992), *reh'g denied, amended and superseded*, 997 F.2d 512 (1993)). Accordingly, we deny his petition.

[25] Contreras-Rebollar attached an affidavit to his supplemental petition and another affidavit to his reply brief. But neither of these affidavits present "[m]aterial facts . . ., which in the interest of justice require vacation of the conviction." RAP at 16.4(c)(3).

B. Supplemental Personal Restraint Petition

Contreras-Rebollar also filed a supplemental personal restraint petition, which we deny as untimely and, therefore, do not further consider.[26] Personal restraint petitions may not be filed "more than one year after the judgment becomes final."[27] RCW 10.73.090(1). A "judgment becomes final" on the last of the following dates: (1) the date the judgment is filed with the trial court clerk, (2) the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, or (3) the date that the United States Supreme Court denies a timely certiorari petition to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3). Because we previously remanded for resentencing, this case was not final for purposes of petitioning the United States Supreme Court for certiorari review; thus, this third option does not apply here.

Thus, the later of the two possible remaining dates (first and second options) for finality of the judgment is April 14, 2010, when we issued our mandate of Contreras-Rebollar's direct appeal. *See* CP at 56. Accordingly, the last day on which he could have filed a timely PRP was one year later. But he did not file his supplemental PRP until November 22, 2011, more than seven months after the one-year limit time had expired.[28] Holding, therefore, that his

---

[26] "'Though the appellate rules do not expressly authorize or prohibit amendment to PRPs, we have accepted amendments to a PRP made within the statutory time limit.'" *In re Pers. Restraint of Davis*, 151 Wn. App. 331, 336, 211 P.3d 1055 (2009) (quoting *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008)), *review denied*, 168 Wn.2d 1043 (2010). Contreras-Rebollar, however, filed his supplemental petition outside the statutory time limit.

[27] RCW 10.73.100 provides exceptions to this time bar, none of which apply here.

[28] The only exception that arguably might apply to Contreras-Rebollar's supplemental PRP is the fifth exception: "The sentence imposed was in excess of the court's jurisdiction." RCW

supplemental petition is untimely, we deny it.

We remand for yet another resentencing, at which the State may produce evidence of Contreras-Rebollar's community custody status. We also deny Contreras-Rebollar's PRP and supplemental PRP.

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.

Hunt, J.

We concur:

Penoyar, J.

Johanson, A.C.J.

10.73.100(5). It is true that Contreras, in his direct appeal presently before us, challenges the sentencing court's calculation of his community custody term. But his argument that a trial court miscalculated a community custody term does not implicate "jurisdiction" of the trial court. *See In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 201, 963 P.2d 903 (1998).