IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:	)	**No. 27651-1-III**
RAYNE DEE WELLS, JR.,	)	**Division Three**
Petitioner.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Rayne Wells filed a motion to withdraw his guilty plea seven years after the legal basis for doing so became apparent. The trial court believed that Mr. Wells did not act within a reasonable time and transferred the matter to this court for consideration as a personal restraint petition (PRP). We agree that the delay in seeking relief was unreasonable and dismiss the petition.

FACTS

Mr. Wells pleaded guilty in the Douglas County Superior Court on August 6, 2001, to one count of forgery and two counts of second degree theft. He was sentenced that same day to concurrent 29 month terms. The offenses were committed on separate dates in July 2000. The judgment and sentence recognized an offender score of nine that

consisted of the two other current offenses, five prior adult felony convictions, and five prior juvenile felony adjudications. Three of the juvenile offenses apparently were committed before Mr. Wells's fifteenth birthday.

After serving the Douglas County sentences, Mr. Wells was convicted of a series of felony offenses in Skagit and Snohomish counties. The lengthiest sentence for those offenses was a term of 150 months for first degree robbery. The partial judgment and sentence provided by Mr. Wells indicates that the trial court recognized 16 prior felony offenses in scoring that crime.[1] Included in that tally are the three Douglas County convictions entered in 2001.

On November 13, 2008, Mr. Wells filed motions in Douglas County for relief from judgment under CrR 7.8 and to withdraw his guilty plea under CrR 4.2. He alleged that the 2001 judgment and sentence was invalid due to the inclusion of the three juvenile convictions that predated his fifteenth birthday. The trial court accepted Mr. Wells's argument that the 2001 judgment appeared invalid on its face for purposes of applying the statutory bar on untimely collateral attacks. The court also determined that the motions were untimely because they had not been brought within a reasonable time. Under the strictures of CrR 7.8(c)(2), the trial court transferred the matter to this court for consideration as a PRP.

[1] It appears that the offender score for the robbery conviction was 15.5.

The Chief Judge of this court appointed counsel for Mr. Wells after also finding that the matter did not appear barred by RCW 10.73.090. After briefing from the parties, the matter was considered by this panel without argument.

ANALYSIS

The petition was not timely brought. The trial court also correctly determined that Mr. Wells unreasonably delayed bringing his motion. Resolution of this matter requires us to apply two provisions of CrR 7.8 and consider the history of a series of legislative amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW.

CrR 4.2(f) governs motions to withdraw guilty pleas brought before sentencing. However, "If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8." The latter rule states in the sections relevant here:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) The judgment is void; or
> (5) Any other reason justifying relief from the operation of the judgment.
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

> (c) Procedure on Vacation of Judgment.
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> . . . .
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> (2) *Transfer to Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8.

The legislative history involves directives over the scoring of juvenile offenses. When first enacted, trial courts were required to include juvenile offenses in the offender score unless the defendant had been younger than 15 when the crimes were committed or the offender had reached age 23. Former RCW 9.94A.360(1) (1983); Laws of 1983, ch. 115 § 7. Amendments followed over the years and in 1997 the provision was eliminated, effectively counting all juvenile prior offenses subject to normal "wash out" provisions. *See* Laws of 1997, ch. 338, § 5.

The decision in *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999) held that an earlier 1990 amendment involving the scoring of juvenile sex offenses would not be applied "retroactively" to offenses that had "washed out" of the offender score prior to the change. *Id.* at 193. The Legislature responded by enacting RCW 9.94A.345, which provides that sentencing proceedings are to be conducted under the law in effect at the time of the crime. Laws of 2000, ch. 26, § 2. One month after the sentencing in this

case, *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001) was issued. *Smith* addressed the 1997 amendments involving the pre-age 15 offenses. *Smith* ruled that the enactment of RCW 9.94A.345 still did not clarify whether the Legislature intended the 1997 amendment to apply "retroactively" to "previously washed out juvenile adjudications." *Id.* at 675.

The Legislature responded by clarifying that a previously "washed out" conviction would count in the offender score if current law required it. Laws of 2002, ch. 107, § 1. The Supreme Court agreed that the legislative intent to include previously "washed out" offenses was clear and the amendments were effectual. *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004).

Also relevant to this discussion is *In re Personal Restraint of LaChapelle*, 153 Wn.2d 1, 100 P.3d 805 (2004). There the court ruled that a pre-age 15 conviction entered prior to the 1997 amendment did not count in the offender scores of defendants sentenced in 1998, effectively equating those offenses to ones that had "washed out" under *Smith.* *Id.* at 12-13.

It is against this historical backdrop that we must consider Mr. Wells's challenge. First, however, we note a serious impediment to our consideration of this petition. The one year limitation on collateral attacks found in RCW 10.73.090 applies if a judgment

"is valid on its face." In assessing facial invalidity, courts look to the judgment and sentence form and any accompanying plea documents. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). It is the petitioner's burden to prove that a collateral attack was timely brought. *In re Pers. Restraint of Quinn*, No. 60180-6-I (filed March 8, 2010).

The judgment and sentence form supplied in this case does not include the date of birth for Mr. Wells. Thus, on its face, the judgment form does not show that any pre-age 15 convictions were used against him. Review of the plea form prepared by defense counsel shows that it, too, does not include a date of birth for Mr. Wells. Finally, the charging documents included in the State's reply likewise do not include a birth date for Mr. Wells. Nothing in this documentation casts doubts on the offender score used in this case. The judgment and sentence is "valid on its face." Thus, this PRP is barred by RCW 10.73.090.

Since the parties have addressed the merits of the issue, we will also address the trial court's determination that the motion was untimely brought. CrR 7.8(b) requires that challenges to a judgment and sentence be brought "within a reasonable time." We agree with the trial court that it was not reasonable to delay this matter for seven years.

This court previously addressed this argument in *State v. Zavala-Reynoso*, 127

Wn. App. 119, 110 P.3d 827 (2005). There, the defendant pleaded guilty and acknowledged a sentencing range predicated on six out-of-state convictions. *Id.* at 121. Thirty-two months later he filed a CrR 7.8 motion that challenged both his offender score calculation and the term of community supervision imposed on him. This court determined that the offender score calculation challenge was untimely under the rule. *Id.* at 123. The offender score calculation did not fall within CrR 7.8(b)(4) (void judgment) or (b)(5) (other reason requiring relief). *Id.* Instead, the allegation at most put the case within CrR 7.8(b)(1) (mistake) and was subject to a one year limit for challenge. *Id.* This court therefore denied the offender score challenge.[2] *Id.*

Zavala-Reynoso compels us to find this challenge, too, is untimely. While Mr. Wells argues that his sentence is void because of the offender score calculation error, we previously rejected a similar argument in *Zavala-Reynoso.* However, even if this case involved a void judgment, the challenge is still untimely. Allegations brought under CrR 7.8(b)(4) must be brought within a reasonable time. That is not what happened here. The basis for petitioner's underlying argument is *Smith*, which held that RCW 9.94A.345 did not make the 1997 amendments to the SRA "retroactive." *Smith*, 144 Wn.2d at 672. That decision was released a mere month after sentencing in this case. Mr. Wells had

[2] This court did find that the excessive term of community supervision could be challenged. *Zavala-Reynoso*, 127 Wn. App. at 123-124.

ample time to file a timely challenge to his sentence. He did not. Instead, he brought this action only after completing his sentence and committing new offenses. We conclude the seven year delay was not reasonable and that this action was untimely under CrR 7.8(b).

Mr. Wells has not met his burden of proving that the judgment and sentence was invalid on its face. He also has not established that he brought this action within a reasonable period of time. For each of those reasons, we conclude that the petition must be dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Brown, A.C.J.

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Sweeney, J.