

FILED
SUPREME COURT
STATE OF WASHINGTON
12/1/2022
BY ERIN L. LENNON
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

JESS RICHARD SMITH,
Petitioner.

No. 101453-8

Court of Appeals No. 84548-9-I
RULING DENYING REVIEW

In 2006 Jess Smith was convicted in King County Superior Court of first degree felony murder and first degree manslaughter. On appeal Division One of the Court of Appeals affirmed the felony murder conviction but agreed the manslaughter conviction violated double jeopardy principles and remanded for further proceedings. The mandate on appeal was issued in April 2010. In October 2010 Smith filed a motion in superior court under CrR 7.8 seeking to vacate his judgment and sentence.¹ That court transferred the motion to the Court of Appeals for treatment as a personal restraint petition. That same month, the superior court entered an order vacating the manslaughter conviction without resentencing Smith on the felony murder conviction. Smith appealed the amended judgment, challenging his felony murder conviction on double jeopardy grounds and arguing the superior court erroneously transferred the CrR 7.8 motion to the Court of Appeals for treatment as a personal restraint petition. The Court of Appeals stayed consideration of the personal restraint petition pending the

¹ This ruling refers to Smith using the pronouns by which he identifies himself in his briefing.

appeal. In the appeal, the court, in an opinion issued in April 2012, held that the transfer order was not appealable, and it refused to consider challenges to the original felony murder conviction because Smith should have raised those challenges in his original appeal of that conviction. The court issued its mandate in June 2012. Meanwhile, in October 2011 Smith filed another personal restraint petition. He subsequently moved to lift the stay on the transferred petition that had originated as a CrR 7.8 motion and to dismiss that petition so he could proceed under his new petition. The court granted the motion. As to the new petition, the acting chief judge of the Court of Appeals ultimately found it an untimely "mixed" petition and dismissed it on that basis.

In October 2022 Smith filed another personal restraint petition in the Court of Appeals asking the court to revisit his 2011 petition. Finding no basis for doing so, the acting chief judge dismissed the petition as untimely and improperly successive. Smith now seeks this court's discretionary review. RAP 16.14(c).

Because Smith filed the current personal restraint petition more than one year after the judgment and sentence became final on direct appeal, the petition is untimely unless the judgment and sentence is facially invalid or was entered without competent jurisdiction, or unless Smith asserts solely grounds for relief exempt from the time limit under RCW 10.73.100. RCW 10.73.090; *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 348-49, 5 P.3d 1240 (2000). Smith does not assert any such grounds but rather urges that the stay issued in connection with the transferred CrR 7.8 motion rendered his October 2011 petition timely. It did not. The stay only put off consideration of the transferred petition pending resolution of Smith's appeal. It did not have the effect of suspending the time limit on other petitions. Smith seeks to challenge his original judgment and sentence for first degree felony murder, which became final on direct appeal in April 2010. His October 2011 petition was therefore untimely unless it was

exempt from the time limit. It was not exempt. It was therefore properly dismissed, and Smith offers no legitimate reason for revisiting that petition.

In sum, the acting chief judge properly dismissed Smith's current personal restraint petition as untimely.

The motion for discretionary review is denied.²

Walter M. Burt
DEPUTY COMMISSIONER

December 1, 2022

² Smith requests an award of fees and costs. Fees and costs are not available in connection with a personal restraint petition, and in light of this ruling, Smith is not a prevailing party in any event. The request is therefore denied.

APPENDIX

B

Appx. B

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

IN THE MATTER OF THE
PERSONAL RESTRAINT OF:
JESS RICHARD SMITH,
Petitioner.

No. 84548-9-I
ORDER OF DISMISSAL

In 2006, a jury convicted Jess Smith of first degree felony murder and first degree manslaughter in King County Superior Court No. 00-1-05900-7 KNT. On appeal, this court affirmed the felony murder conviction, struck the manslaughter conviction on double jeopardy grounds and remanded to the trial court for any necessary further proceedings. State v. Smith, No. 58779-0-I, noted at 148 Wn. App. 1021 (2009), review denied, 168 Wn.2d 1011, 227 P.3d 295 (2010). The mandate was issued in April 2010.

In October 2010, Smith filed a CrR 7.8 motion to vacate the 2006 judgment and sentence, which the trial court transferred to this court for consideration as a personal restraint petition. In re Pers. Restraint of Smith, No. 66364-0-I.¹ That same month, the trial court entered an order vacating the manslaughter conviction and maintained Smith's original sentence. Smith appealed the amended judgment, claiming that the trial court erred in transferring the CrR 7.8 motion and challenged his first degree felony murder conviction on double jeopardy grounds. This court

¹ The petition was dismissed on Smith's motion in July 2012.

held that the transfer order was not appealable and it refused to consider his arguments regarding the felony murder conviction because he should have raised any such challenge in his direct appeal of that conviction. State v. Smith, No. 66335-6-I, noted at 167 Wn. App. 1051 (2012).

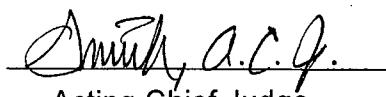
In October 2011, Smith filed another personal restraint petition (No. 68084-6-I), where he claimed that (1) his constitutional rights were violated when the State was allowed to charge a higher degree after vacation of his 2001 guilty plea and/or his conviction for first degree felony murder violates double jeopardy; (2) the trial court failed to properly instruct the jury on self-defense; (3) the State was required to charge first degree felony murder and second degree intentional murder in the alternative; (4) the trial court failed to notify him and defense counsel of an inquiry from the jury and responded privately rather than in open court; (5) defense counsel provided ineffective assistance; and (6) he was entitled to relief under Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The acting chief judge concluded that Smith, at best, had presented a “mixed petition” and dismissed it.² See In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 702-03, 7 P.3d 703 (2003) (a petition containing at least one time-barred matter must be dismissed).

² Since that time, Smith has continued to collaterally attack his original 2006 judgment and sentence and his 2010 amended judgment and sentence. See No. 72689-7-I (asserting newly discovered evidence claim); No. 75785-7-I (asking that his prior petition No. 68084-6-I be reconsidered); No. 75795-4-I (repeating newly discovered evidence claim); No. 78817-5-I (challenging dismissal of two prior petitions); No. 81331-5-I (raising double jeopardy claim); No. 83665-0-I (arguing a recent Supreme Court decision was a significant change in the law that was material to his case).

In October 2022, Smith filed this petition claiming that “[t]he interests of justice requires the court to revisit [his] Time Barred previous PRP that was overlooked on Stay” and appended the opening brief to his 2011 petition No. 68084-6-I. As noted, petition No. 68084-6-I was dismissed as a mixed petition. This is the second time Smith has asked this court to reconsider the issues he raised in that petition. Moreover, he has not set forth any legal grounds or authority for such reconsideration. His petition is untimely, successive, and clearly frivolous. Therefore, it must be dismissed. In re Pers. Restraint of Khan, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Now, therefore, it is hereby

ORDERED that this personal restraint petition is dismissed under RAP 16.8.1(b).



Acting Chief Judge

**Additional material
from this filing is
available in the
Clerk's Office.**