

APPENDIX A

FILED
JUN 21 2017
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

MICHAEL VASILIIY KOLESNIK,

Petitioner.

NO. 93924-1

RULING DENYING REVIEW

Michael Kolesnik stabbed a uniformed police officer multiple times in the side of the head with a screwdriver while the officer was trying to subdue him. Mr. Kolesnik was convicted in 2006 of first degree assault. The jury returned special verdict findings that Mr. Kolesnik was armed with a deadly weapon other than a firearm and that he did "know that the victim was a law enforcement officer who was performing his or her official duties" when assaulted. Based on the latter finding, which is an aggravating factor under RCW 9.94A.535(3)(v), the trial court imposed an exceptional sentence of 20 years (including a two-year deadly weapon enhancement). Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal, issuing its mandate in 2009. Mr. Kolesnik subsequently filed a personal restraint petition in the Court of Appeals that was dismissed in 2010. In August 2016 Mr. Kolesnik filed two more personal restraint petitions directly in this court. The petitions were transferred to the Court of Appeals, where they were

consolidated and dismissed by the acting chief judge as untimely. Mr. Kolesnik now seeks this court's discretionary review. RAP 16.14(c).

To obtain review in this court, Mr. Kolesnik must demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). And because he filed his current collateral challenge more than one year after his judgment and sentence became final, Mr. Kolesnik must demonstrate that the judgment and sentence is facially invalid or was entered without competent jurisdiction under RCW 10.73.090(1), or he must assert solely exemptions from the one year limit under RCW 10.73.100. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 422, 309 P.3d 451 (2013). But even if he passes that threshold, Mr. Kolesnik, as a personal restraint petitioner challenging his judgment and sentence, must establish that a constitutional error occurred resulting in actual and substantial prejudice or that a nonconstitutional error occurred that inherently caused a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014); *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 508-09, 301 P.3d 450 (2013). Moreover, if Mr. Kolesnik fails to present an arguable basis for collateral relief in law or fact given the constraints of the personal restraint petition procedure, his collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Mr. Kolesnik contends that the State failed to prove the law enforcement aggravating factor beyond a reasonable doubt. Insufficient evidence is a potentially exempt ground for relief under RCW 10.73.100(4). But the evidence in this case overwhelmingly showed that Mr. Kolesnik knew he was speaking with a uniformed police officer who, while on patrol duty, had responded to a call that Mr. Kolesnik was acting bizarrely in front of a grocery store. Mr. Kolesnik bolted when the officer

asked to pat him down for officer safety reasons. Mr. Kolesnik slipped, allowing the officer an opportunity to subdue him on the ground. Mr. Kolesnik fought the officer and started stabbing him on the side of the head with a long sharp object, injuring him. A screwdriver was found near the scene of the encounter. Ample evidence supported the jury's special verdict.

Mr. Kolesnik relatedly complains that the jury was not instructed to find beyond a reasonable doubt that "the victim's status as a law enforcement officer is not an element of the offense." RCW 9.94A.535(3)(v). Mr. Kolesnik partly argues this alleged deficiency constitutes facial invalidity under RCW 10.73.090(1). A facially invalid sentence is one that the trial court lacked authority to impose. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 135-36, 267 P.3d 324 (2011). A sentence that substantively violates the Sentencing Reform Act is facially invalid. *See State v. Chambers*, 176 Wn.2d 573, 584, 293 P.3d 1185 (2013). The reviewing court is not confined to the four corners of the judgment and sentence in assessing whether a lawful sentence was imposed. *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 799-800, 272 P.3d 209 (2012).

The aggravating factor at issue is that the offense "was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." RCW 9.94A.535(3)(v). In this case, the victim's status as a law enforcement officer was not an element of the charged offense of first degree assault. *See* RCW 9A.36.011(1). But whether a victim's status as a law enforcement officer is an element of the charged offense is a legal question beyond the purview of a jury's factfinding role. It did not have to be informed of that "element" of the aggravating factor. Furthermore, Mr. Kolesnik does not identify any authorities, and I have found none, requiring that this part of the aggravating factor be included in a special verdict

and related instructions. Viewing the evidence and records presented, the trial court did not exceed its authority when it imposed an exceptional sentence based on the jury's valid finding that Mr. Kolesnik knew that his victim was a law enforcement officer engaged in his official duties.

Mr. Kolesnik also claims that appellate counsel was ineffective in relation to the special verdict question. Ineffective assistance of appellate counsel is not an exempt ground for relief under RCW 10.73.090 or RCW 10.73.100. *In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 445, 309 P.3d 459 (2013). And a claim that appellate counsel was ineffective in not raising a claimed trial court error on direct appeal is a new and separate claim in relation to the underlying trial court error. *Id.* at 447. Mr. Kolesnik relies on *In re Personal Restraint of Wilson*, 169 Wn. App. 379, 279 P.3d 990 (2012), to argue that his ineffective assistance claim is "part and parcel" of his insufficiency and instructional error claims. In *Wilson*, however, a claim that *trial counsel* was ineffective in proposing an erroneous jury instruction, the assertion of which was necessary to avoid the doctrine of invited error on direct review, was truly "part and parcel" of the claim of instructional error raised in the timely original petition. Whether appellate counsel should have raised a potentially meritorious claim of trial court error is a separate issue, and it is time-barred in this instance. *See Haghighi*, 178 Wn.2d at 447 (rejecting application of *Wilson* to a claim of ineffective assistance of appellate counsel).¹

¹ Consolidation of Mr. Kolesnik's two personal restraint petitions collectively results in a "mixed" petition that cannot be considered because it asserts both exempt and nonexempt grounds for relief. *See In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702-04, 72 P.3d 703 (2003) ("mixed" petition must be dismissed). But in fairness to Mr. Kolesnik, who did not request consolidation, that procedural rule is not applied in this instance.

In sum, Mr. Kolesnik fails to identify a valid basis for avoiding the one-year limit on collateral review. The acting chief judge thus properly dismissed his consolidated petitions.²

The motion for discretionary review is denied.



ACTING COMMISSIONER

June 21st, 2017

² Because the petitions were time-barred, the Court of Appeals correctly declined to consider whether to transfer the successive petitions to this court. *See In re Pers. Restraint of Turay*, 150 Wn.2d 71, 86-87, 74 P.3d 1194 (2003).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of
MICHAEL VASILIIY KOLESNIK,
Petitioner.

Nos. 49250-4-II and 49254-7-II
(consolidated)

ORDER DISMISSING
PETITIONS

FILED
COURT OF APPEALS
DIVISION II
2016 NOV 14 P.12:10
STATE OF WASHINGTON
BY *WEE*

Michael Kolesnik seeks relief from personal restraint imposed following his 2007 conviction for one count of first degree assault. In these, his second and third petitions,¹ which we consolidated, he argues that the State did not prove the aggravating factor underlying his exceptional sentence beyond a reasonable doubt, that the trial court erred in not submitting part of the aggravating factor to the jury and that he received ineffective assistance of appellate counsel.

RCW 10.73.090(1) requires that a petition be filed within one year of the date that the petitioner's judgment and sentence becomes final. Kolesnik's judgment and sentence became final on May 5, 2009, when we issued the mandate following his direct appeal. RCW 10.73.090(3)(b). He did not file his petitions until August 1 and 2, 2016, more than one year later.² Unless he shows that one of the exceptions contained in RCW 10.73.100

¹ See Order Dismissing Petition, *In re Personal Restraint of Kolesnik*, No. 40798-1-II (February 2, 2010).

² Kolesnik filed his petitions with the Washington State Supreme Court. That court transferred his petitions to this court under RAP 16.5.

applies or that his judgment and sentence is facially invalid, his petitions are time-barred.

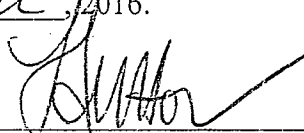
In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002).

The evidence was sufficient to prove beyond a reasonable doubt that he committed his assault against a law enforcement officer and that the victim's status as a law enforcement officer was not an element of the crime of first degree assault. Thus, RCW 10.73.100(4) does not exempt his petition. His claim that the question of the victim's status should have been submitted to the jury cannot be determined from the face of his judgment and sentence, so he does not show that his judgment and sentence is facially invalid. And his claim of ineffective assistance of appellate counsel does not fall within any of the exceptions contained in RCW 10.73.100. His petitions are therefore time-barred.³

Accordingly, it is hereby

ORDERED that Kolesnik's petitions are dismissed under RAP 16.11(b).

DATED this 14th day of November, 2016.



Acting Chief Judge Pro Tempore

Cc: Michael V. Kolesnik
Clark County Prosecuting Attorney
Clark County Clerk
Cause No. 05-1-02752-5

³ Although Kolesnik's petition is successive, we dismiss it rather than transfer it to our Supreme Court because it is also untimely. *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 86-87, 74 P.3d 1194 (2003).

APPENDIX C

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2017
BY SUSAN L. CARLSON
CLERK

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of

MICHAEL VASILIIY KOLESNIK,

Petitioner.

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No. 93924-1

ORDER

Court of Appeals

No. 49250-4-II

(consolidated with No. 49254-7-II)

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins, and Gordon McCloud, considered this matter at its October 3, 2017, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Acting Commissioner's ruling is denied.

DATED at Olympia, Washington, this 4th day of October, 2017.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

APPENDIX D

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