

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

In the Matter of the Personal Restraint )	
Petition of )	No. 80995-0
)	
ROBERT CHARLES BONDS, JR., )	
)	En Banc
Respondent. )	
_____ )	Filed November 26, 2008

C. JOHNSON, J.— We are asked to determine whether, under the facts of this case, we will recognize equitable tolling as an exception to the time bar provided under RCW 10.73.090 and permit Robert Charles Bonds, Jr., to submit an otherwise untimely amended personal restraint petition (PRP). The Court of Appeals applied equitable tolling to allow Bonds to amend his PRP more than one year after his judgment and sentence became final. This permitted Bonds to raise a claim alleging violation of his right to a public trial and the public’s right to open court proceedings. The Court of Appeals granted relief, vacated Bonds’s convictions, and ordered a new trial. We find that equitable tolling does not apply in these circumstances and reverse the Court of Appeals.

## FACTUAL AND PROCEDURAL HISTORY

Bonds was tried and convicted in Pierce County of two counts of attempted first degree murder and one count of unlawful possession of a firearm. During trial, the court admitted redacted out-of-court statements of Bonds's codefendants. Four times during trial, the court closed the proceedings while certain witnesses testified.

Division Two of the Court of Appeals affirmed Bonds's convictions on direct appeal, *State v. Miller*, noted at 122 Wn. App. 1074 (2004), and the judgment and sentence became final on May 9, 2005. Bonds timely filed a PRP in the Court of Appeals on July 22, 2005, asserting that the out-of-court statements of his codefendants violated his confrontation rights and that appellate counsel was ineffective in not raising that issue. Bonds also requested the assistance of counsel. The State filed its answering brief on October 10, 2005. For reasons unknown, the acting chief judge did not rule on Bonds's petition until May 4, 2006. At that time, the judge found Bonds's PRP was not frivolous, referred the petition to a panel of judges for a decision on the merits, and appointed counsel. The one year time limit on collateral attack under RCW 10.73.090 passed a few days later.

On July 25, 2006, Bonds's counsel moved under RAP 16.4 (PRP grounds for remedy) to submit an amended PRP, adding the claim that the trial court violated Bonds's right to a public trial and the public's right to open court proceedings. The State objected, but a Court of Appeals commissioner granted Bonds's motion. The Court of Appeals denied the State's motion to modify the commissioner's ruling, and this court denied discretionary review, leaving the State free to argue to the Court of Appeals that Bonds did not timely raise the public trial issue. The parties then briefed that issue.

The Court of Appeals held that equitable tolling allowed the court to consider the public trial issue by way of Bonds's otherwise untimely amended PRP, held that Bonds's public trial right was violated, and granted the PRP in a split and unpublished decision. The court reversed Bonds's convictions and remanded for a new trial. *In re Pers. Restraint of Bonds*, noted at 141 Wn. App. 1032 (2007). We granted the State's motion for discretionary review.

#### ISSUE

Whether equitable tolling permits Bonds to submit an otherwise untimely amended PRP.

## ANALYSIS

Under RCW 10.73.090 the time limit for collateral attack of a criminal judgment and sentence is one year after the judgment becomes final.<sup>1</sup> Collateral attack includes the filing of a PRP. RCW 10.73.090 is a mandatory rule that acts as a bar to appellate court consideration of PRPs filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based on one of the exemptions enumerated in RCW 10.73.100.<sup>2</sup> We have upheld the constitutionality

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<sup>1</sup> RCW 10.73.090 reads:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, “collateral attack” means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

<sup>2</sup> These exemptions are for newly discovered evidence, convictions under unconstitutional statutes, convictions barred by double jeopardy, convictions obtained with insufficient evidence, sentences in excess of the court’s jurisdiction, or significant changes in the law which will apply retroactively to the petitioner’s case. RCW 10.73.100.

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of RCW 10.73.090. *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 444, 853 P.2d 424 (1993).

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. This discretionary allowance accords with RAP 16.10(c), which permits an appellate court to call for additional briefs at any stage of consideration of a PRP.<sup>3</sup>

The State submits that the time limit in RCW 10.73.090 is a jurisdictional requirement, which precludes application of equitable tolling, and that we should reverse on this basis. We disagree. This court has previously referred to the time limit in RCW 10.73.090 as a statute of limitation. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998). And the Court of Appeals has expressly held that RCW 10.73.090 functions as a statute of limitation and not as a jurisdictional bar, and is thus subject to the doctrine of equitable tolling. *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000). We reject

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<sup>3</sup> RAP 16.10(c) reads: “The appellate court may call for additional briefs at any stage of the consideration of the [personal restraint] petition.”

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the contention that the statute is jurisdictional and address whether equitable tolling applies in this case.

We begin our analysis by looking to the statute. Equitable tolling of a statute of limitation is appropriate when consistent with the policies underlying the statute and the purposes underlying the statute of limitation. The purpose underlying the time limit in RCW 10.73.090 is to manage the flow of post-conviction collateral relief petitions by requiring collateral attacks to be brought promptly. Limiting attacks to a one-year period, except in instances provided in RCW 10.73.100, also promotes finality of judgments. Here, we must determine whether application of equitable tolling in these circumstances would be consistent with the purposes of RCW 10.73.090. Case law from this court is instructive.

Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). It acts as an exception to the statute of limitations that should be used sparingly and does not extend broadly to allow claims to be raised except under narrow circumstances.

We have adopted a framework to determine when equitable tolling should apply in the civil context, and all three divisions of the Court of Appeals have incorporated this analysis into criminal cases. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). In *Millay*, a civil case, we established that equitable tolling is allowed when justice requires and when the predicates for equitable tolling are met. The predicates we identified there were bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. We agree that these same factors apply in the criminal context.

We have previously touched on application of equitable tolling in the criminal context. *Carlstad*, 150 Wn.2d 583. In *Carlstad*, a petitioner gave a PRP to prison officials for mailing days before the one-year time limit was to expire. Due to delay in mailing, the PRP was not filed until after expiration of the statutory deadline. We declined to decide the issue of equitable tolling, the form of relief requested as an alternative to adoption of a mailbox rule. We did, however, recognize that equitable tolling was unavailable under the circumstances because the petitioner did not demonstrate that the prison officials acted in bad faith, deception, or false

assurances. This reasoning is consistent with the narrowness of the equitable tolling exception.

The State argues that the Court of Appeals, by accepting Bonds's amended PRP after the filing deadline, undermined principles of finality and acted contrary to *Benn*, 134 Wn.2d 868. In *Benn*, the petitioner filed a timely PRP, then moved to supplement his petition with new issues nearly three years later. Noting that the appellate rules had no analog to CR 15(c) allowing an amendment to relate back to the date of the original pleading, and further noting that RAP 18.8(a) (authorizing waiver or alteration of court rules) does not apply to a statute of limitation like RCW 10.73.090, we held the newly raised theories were time-barred. Though *Benn* is factually analogous to the present case and supports our conclusion here, in *Benn*, petitioner did not assert application of equitable tolling.

However, in both *Carlstad* and *Benn*, we adhered rather strictly to the statute of limitation applicable to post-conviction collateral attack. And though we did not foreclose equitable tolling in *Carlstad*, we suggested a rule, synonymous to the rule in civil cases, which would make equitable tolling available only in instances where

petitioner missed the filing deadline due to another's malfeasance. The Court of Appeals, however, has applied equitable tolling less sparingly. *See Hoisington*, 99 Wn. App. 423 (equitably tolling one-year time limit where court failed on three occasions to address petitioner's meritorious attack on his guilty plea); *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), *review denied*, 149 Wn.2d 1020 (2003) (applying equitable tolling in split decision, where, due to mistakes by petitioner's attorney, the court, and the immigration service, petitioner was unaware until after a one-year time limit that he would be deported if he pleaded guilty).

Here, Bonds contends that equitable tolling should apply because the court's inaction in reviewing his PRP to determine its merit left him in a situation where his counsel, once appointed, could not discover the public trial issue until after the statute of limitation had run.<sup>4</sup> We first note that there is no constitutional right to

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<sup>4</sup> The State points out that the Court of Appeals, by stating it delayed review of the PRP for 10 months, may have examined the wrong timeframe. RAP 16.11(a) provides that "[t]he Chief Judge will consider the petition promptly after the time has expired to file petitioner's reply brief." Under RAP 16.10(a)(2), petitioner's reply brief "should be filed within 30 days after the answering brief is served on petitioner." The State filed its answering brief on October 10, 2005. Assuming the State served Bonds that same day, under RAP 16.10(a)(2), Bonds's reply brief should have been filed by November 10, 2005. Instead, Bonds filed his reply brief on December 19, 2005. Nevertheless, under RAP 16.11(a), the time for Bonds to file a reply brief expired November 10, 2005, and the Chief Judge should have considered Bonds's petition promptly after that date. The Chief Judge considered Bonds's petition on May 4, 2006, resulting in a 6 month,

counsel in post-conviction collateral attacks. And, as the State points out, counsel will be provided at state expense only after the chief judge has determined that the issues raised by the petition are not frivolous. In such cases, the issues generally are limited to those raised in the petition and identified by the court as having some merit. Moreover, while Bonds's contention may be true, nothing prevented Bonds from timely asserting the public trial issue himself. Indeed, we require a pro se petitioner to comply with applicable rules and statutes and hold them to the same responsibility as an attorney.

We are reluctant to apply exceptions to legislative time limits. Adopting a rule for equitable tolling in the criminal context that mirrors the predicates in the civil context is consistent with the purposes of RCW 10.73.090 and this court's rather strict adherence to the statute of limitation in *Benn* and *Carlstad*. Applying equitable tolling to Bonds's situation, however, would undercut finality of judgments, encourage untimely filing and amendments to collateral attacks, and unjustifiably expand the narrow equitable tolling exception.

Bonds has not met the high burden of demonstrating that the amended PRP

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rather than a 10 month, delay.

was untimely due to bad faith, deception, or false assurances. At most, Bonds claims that he did not identify the public trial claim on his own and that the Court of Appeals delayed the appointment of counsel.

We hold that application of the narrow equitable tolling exception under the facts of this case does not serve the purpose of RCW 10.73.090. Therefore, Bond's amended PRP was untimely and we do not reach the public trial issue. We reverse the Court of Appeals and reinstate Bonds's convictions.<sup>5</sup>

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<sup>5</sup> Bonds filed a motion to dismiss the State's motion for discretionary review as being untimely. The Court of Appeals considered Bonds's amended PRP on the merits and filed its decision on November 14, 2007. Under RAP 16.14(c), when the Court of Appeals decides a PRP on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in RAP 13.5A. RAP 13.5A refers to RAP 13.5(a), which requires a party to file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after the decision is filed. The State's pleading was first filed in Division Two of the Court of Appeals on December 14, 2007, but was received and filed with the Supreme Court on December 18, 2007. While the State was technically four days late under RAP 13.5(a), under RAP 18.23, "A pleading will be considered timely filed by the Supreme Court and the Court of Appeals *if it is timely filed in any Division of the Court of Appeals or in the Supreme Court.*" (Emphasis added.) Because the State timely filed its pleading in the Court of Appeals, under RAP 18.23, we hold the motion for discretionary review was timely and deny Bonds's motion to dismiss.

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AUTHOR:

Justice Charles W. Johnson

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WE CONCUR:

Justice Susan Owens

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Justice Barbara A. Madsen

Justice James M. Johnson

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