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Court of Appeals
Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CARSIE JAMES TIKKA, aka CARSON TIKKA<br><br>Appellant. | No. 50212-7-II<br><br>UNPUBLISHED OPINION |

MAXA, C.J. – Carsie Tikka appeals his sentence for his convictions of two counts of first degree child rape and two counts of first degree child molestation, and the trial court's imposition of a DNA collection fee as a legal financial obligation (LFO). In a statement of additional grounds (SAG) Tikka challenges his convictions.

In 2017, the trial court sentenced Tikka to life without the possibility of early release as a persistent offender under the Persistent Offender Accountability Act (POAA) based on his current convictions and a 1999 conviction for attempted first degree child molestation. Under RCW 9.94A.030(38), a "persistent offender" is a person who has been convicted twice "as an offender" of certain enumerated offenses. RCW 9.94A.030(35) defines "offender" to include a person who has committed a felony and is 18 years old or older. Tikka claims that he was not convicted "as an offender" in 1999 because that conviction related to an offense committed over a date range that included when he was under 18.

We hold that (1) Tikka was convicted "as an offender" in 1999 because he was over 18 years old at the time of his conviction, (2) the DNA collection fee imposed as an LFO must be stricken, and (3) Tikka's multiple claims asserted in his SAG have no merit.

Accordingly, we affirm Tikka's convictions and Tikka's sentence of life without the possibility of early release as a persistent offender, but we remand for the trial court to strike the DNA collection fee from the judgment and sentence.

## FACTS

In June 1999, the State charged Tikka with attempted first degree child molestation. The information stated that the offense occurred between June 20, 1992 to August 27, 1998 and that Tikka did an act that was a substantial step toward commission of the crime by attempting to have sexual contact with two victims.

Tikka pleaded guilty. He stated in his guilty plea statement that he attempted to have sexual contact with the two victims "between or about the 20th day of June, 1992 through the 27th day of August, 1998." Clerk's Papers at 56. The court entered a judgment and sentence in November 1999. Tikka's date of birth is January 11, 1979. Between June 1992 and August 1998, Tikka was 13 to 19 years old. But Tikka was 20 years old when he was charged and convicted.

In February 2017, the State charged Tikka with committing two counts of first degree child rape, one count of attempted first degree child rape, and two counts of first degree child molestation. A jury subsequently convicted Tikka of all charges, although the trial court vacated the attempted first degree child rape conviction to avoid double jeopardy.

At sentencing, Tikka and the State agreed that Tikka was a persistent offender under the POAA because of his 1999 conviction for attempted first degree child molestation. Based on the

1999 conviction, the trial court found that Tikka was a persistent offender and sentenced him to life without the possibility of early release. The trial court imposed one LFO: a $100 DNA collection fee. Tikka appeals his 2017 sentence of life without the possibility of early release under the POAA and the imposition of the DNA collection fee.

## ANALYSIS

### A. QUALIFICATION AS A PERSISTENT OFFENDER

Tikka argues that the trial court erred in sentencing him as a persistent offender under the POAA because he was not convicted of a prior offense "as an offender" as defined in RCW 9.94A.030(35). Specifically, he claims that the State did not prove that he was convicted "as an offender" because he was a juvenile for most of the date range charged for his 1999 conviction for attempted first degree child molestation. We disagree.

#### 1. Legal Principles

A defendant may challenge a sentence that is illegal or erroneous for the first time on appeal. *State v. Crow*, 8 Wn. App. 2d 480, 512, 438 P.3d 541, *review denied*, 193 Wn.2d 1038 (2019). We review de novo a trial court's finding that a prior conviction is a strike for persistent offender purposes. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

A persistent offender is defined to include an "offender" who has been convicted of a felony considered a "most serious offense" and who has been convicted of one of certain specified sex offenses, including first degree child rape and first degree child molestation and the attempt to commit those crimes, and previously has been convicted "as an offender" of one of those same offenses. RCW 9.94A.030(38)(a)(i), (b)(i)-(ii). An "offender" is defined as

> a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.

RCW 9.94A.030(35).[1]

The State has the burden of proving by a preponderance of the evidence that a prior conviction can be used as a strike offense under the POAA. *State v. Saenz*, 175 Wn.2d 167, 172, 283 P.3d 1094 (2012). In addition, the State has the burden of proving that in the prior conviction, the defendant was convicted "as an offender." *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009).

2. Analysis

Tikka focuses on his age when he committed the offense that resulted in his 1999 conviction for attempted first degree child molestation. He argues that because it is unknown how old he was when he committed the offense giving rise to that conviction, the State did not sustain its burden of proving that he was convicted "as an offender" as required under RCW 9.94A.030(38)(b)(ii).

However, RCW 9.94A.030(35) does not require that we look to Tikka's age at the time he committed the prior offense. An "offender" is defined as a "person who has committed a felony . . . *and* is eighteen years of age or older." RCW 9.94A.030(35)(emphasis added). This language necessarily focuses on the offender's age when he or she was convicted. The statute does not require an offender to be 18 years old *when he committed the felony*.

Here, Tikka was 20 years old at the time of his conviction. Therefore, Tikka was convicted as an "offender" within the meaning of RCW 9.94A.030(35) and his conviction

[1] We refer to the current versions of these statutes, which are the same in all material respects to the versions in effect when Tikka committed the offenses that resulted in his 2017 convictions.

constitutes a strike offense under the POAA. We hold that the trial court did not err in sentencing Tikka as a persistent offender.

B. SAG CLAIMS

1. Right to a Grand Jury

Tikka asserts that his due process rights were violated because he was not indicted by a grand jury. However, under article I, section 25 of the Washington Constitution, the State may prosecute a person for offenses by either information or indictment. *State v. Havens*, 171 Wn. App. 220, 225, 286 P.3d 722 (2012). This provision is not repugnant to the Fifth Amendment. *Id.* In addition, a grand jury indictment is not required to assure due process of the law. *Id.* Therefore, we hold that the State was not required to indict Tikka by grand jury and the failure to do so did not violate due process.

2. Double Jeopardy

Tikka appears to assert that his convictions for first degree child rape and attempted first degree child rape violate double jeopardy. But the State dismissed the conviction for attempted first degree child rape because it was for the same conduct as the conviction for first degree child rape and was precluded by double jeopardy protections. Therefore, we reject this claim.

3. Confrontation Clause

Tikka appears to assert that his confrontation rights under the Sixth Amendment to the United States Constitution were violated because he was not "confronted" by two of the State's witnesses. The confrontation clause is primarily concerned with testimonial statements. *State v. Wilcoxon*, 185 Wn.2d 324, 331, 373 P.3d 224 (2016). But Tikka does not identify any such statements. Although RAP 10.10 does not require an appellant to refer to the record or cite authority, Tikka is required to inform this court of the "nature and occurrence of alleged errors."

RAP 10.10(c). Tikka's assertion of error is too vague to allow us to identify the issues, and we do not address it.

4. Ineffective Assistance of Counsel

Tikka asserts that he received ineffective assistance of counsel in violation of the Sixth Amendment. He claims that defense counsel failed to use compulsory process to obtain witnesses, specifically, a medical professional, in his favor. He also claims that defense counsel failed to ask the questions Tikka instructed him to ask.

However, "[w]hen an ineffective assistance claim is raised on appeal, this court may consider only facts contained in the record." *State v. Estes*, 188 Wn.2d 450, 467, 395 P.3d 1045 (2017). Tikka's assertions rely on facts that are outside the record. Therefore, we do not address them.

In addition, Tikka asserts that defense counsel "stumbled, faltered, and didn't even think about what he was saying." SAG at 7. But this assertion of error is too vague to allow us to identify the issues, and we not address it. RAP 10.10(c).

5. Excessive Bail

Tikka asserts that his bail, set at $500,000, was an excessive amount in violation of the Eighth Amendment. The record before us does not contain the transcript of Tikka's bail hearing or other explanation of how the trial court determined the amount of bail. Therefore, this issue depends on facts outside the record and we not address it. *Estes*, 188 Wn.2d at 467.

In addition, an issue is moot if we no longer can provide effective relief. *State v. Ingram*, 9 Wn. App. 2d 482, 490, 447 P.3d 192 (2019). Because Tikka is no longer subject to pretrial detention, we cannot provide him with an effective remedy for the trial court's alleged error and

his excessive bail claim is moot. *Id.* We decline to consider this issue as a matter of continuing and substantial public interest.

6. Cruel and Unusual Punishment

Tikka asserts that his sentence of life without the possibility of early release is cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court has held that a sentence of life without the possibility of early release does not violate the Eighth Amendment. *State v. Witherspoon*, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014).

7. *Brady* Violation

Tikka asserts that his due process rights were violated because the prosecutor "introduced exculpatory evidence and did not produce it at trial." SAG at 4. Specifically, the State's failure to produce a cell phone and laptop violated the rule promulgated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

To establish a *Brady* violation, "(1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) th[e] evidence must have been suppressed by the State, either willfully or inadvertently, and (3) the evidence must be material." *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015) (internal citations omitted).

At trial, an investigating officer testified that she reviewed a phone that Tikka gave as a gift to the victim for evidentiary value, but neither she nor the digital crimes unit found anything on the phone. Tikka fails to show that this evidence was exculpatory. The victim testified that Tikka showed him an image of a naked man on a tablet that Tikka gifted to him. The officer testified that she tried to obtain the tablet, but it "had [been] sold . . . to somebody" and she was unsuccessful in her efforts to retrieve it. 6 Report of Proceedings (RP) at 577. Therefore, the State did not suppress this evidence. Accordingly, we reject Tikka's *Brady* claim.

8. Malicious Prosecution

Tikka asserts that the State maliciously and selectively prosecuted him in order to get a guilty plea. He claims that the State improperly left out evidence and improperly added a double jeopardy charge.

RCW 9.94A.411(2)(a)(ii) states, "The prosecutor should not overcharge to obtain a guilty plea." On the other hand, the prosecutor may file charges that will "significantly enhance the strength of the state's case at trial." RCW 9.94A.411(2)(a)(i)(A).[2] Here, the record contains no indication that the State improperly charged Tikka in order to compel a guilty plea. Accordingly, we reject this claim.

C. IMPOSITION OF DNA COLLECTION FEE

Tikka argues, and the State concedes, that the DNA collection fee imposed as an LFO must be stricken. We agree.

In 2018, the legislature amended RCW 43.43.7541, which establishes that the DNA collection fee no longer is mandatory if the offender's DNA previously had been collected because of a prior conviction. This amendment applies prospectively to cases pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

The record reflects that Tikka has a previous felony conviction in Washington, and the State concedes that his DNA previously was collected because of a prior conviction. Therefore, we accept the State's concession and order that the DNA collection fee be stricken.

[2] We refer to the current versions of these statutes, which are the same in all material respects to the versions in effect when Tikka committed the offenses that resulted in his 2017 convictions.

## CONCLUSION

We affirm Tikka's convictions and sentence of life without the possibility of early release as a persistent offender, but we remand for the trial court to strike the DNA collection fee from the judgment and sentence.

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.

MAXA, C.J.

We concur:

LEE, J.

SUTTON, J.