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Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY JAY HUVER, Appellant.	No. 52171-7-II UNPUBLISHED OPINION

CRUSER, J. — Anthony Jay Huver appeals from the superior court's denial of his CrR 7.8 motions to correct his sentence following his guilty plea convictions on two counts of second degree assault and one count of unlawful possession of a controlled substance, methamphetamine. Through counsel, he argues that we should strike the criminal filing fee and the deoxyribonucleic acid (DNA) collection fee that the superior court imposed in his original judgment and sentence. In a pro se statement of additional grounds for review[1] (SAG), Huver further contends that the superior court erred when it denied his CrR 7.8 motions in which he argued that a 1979 juvenile adjudication should not have been included in his offender scores because it had washed out of his criminal history or had been vacated.

[1] RAP 10.10.

Because Huver did not timely appeal his judgment and sentence, the fees imposed in the original judgment and sentence are outside the scope of our review, and we decline to review whether the criminal filing fee and DNA collection fee should be struck. And because Huver fails to establish that his juvenile adjudication should not have been included in his offender scores, we affirm the trial court's denial of his CrR 7.8 motions.

FACTS

Huver pleaded guilty to two counts of second degree assault and one count of unlawful possession of a controlled substance, methamphetamine. Using the criminal history and offender score calculations that Huver had stipulated to, the superior court entered the judgment and sentence on January 11, 2017.

In the judgment and sentence, the court imposed a criminal filing fee and a DNA collection fee. Although the superior court advised Huver that he had the right to appeal and that any such appeal must be filed within 30 days, Huver did not appeal from the judgment and sentence within that time.

In September and October 2017, Huver filed two pro se CrR 7.8 motions in which he argued that he was entitled to a resentencing because his offender scores erroneously included a 1979 juvenile adjudication that had "washed out" of his offender scores once he reached the age of 23. Clerk's Papers (CP) at 44, 59. The superior court heard these motions on February 23, 2018.

At the start of the motion hearing, the State advised the superior court that although it disagreed with Huver's CrR 7.8 motions, it had identified another issue with his offender score

related to his drug offense. The State asserted that it had a motion and order "to correct as to that."[2] Verbatim Report of Proceedings (VRP) (Feb. 23, 2018) at 2. The court granted the State's motion to correct the judgment and sentence and issued an order correcting the judgment and sentence. This order changed the offender score for the drug offense from 7 points to 5 points and altered the related sentencing range for that offense. The court entered this order nunc pro tunc to January 11, 2017.

Huver then argued his CrR 7.8 motions, but he presented a different argument than in his written motions. Instead of asserting that his juvenile adjudication had washed out because he had been 14[3] at the time of the juvenile offense, he asserted that when he committed the juvenile offense he had been advised that his juvenile record would be "permanently sealed" when he turned 18 and the adjudication could not be "used against [him]." *Id.* at 4.

During the hearing, the superior court commented that Huver's CrR 7.8 motions were timely. After hearing argument, the court advised the parties that it would issue a written order addressing Huver's CrR 7.8 issues.

On March 2, the court entered its written order denying Huver's CrR 7.8 motions. The written order did not explain the basis of the denial.

[2] There is no written motion addressing this issue in the appellate record.

[3] Although Huver asserted that he was 14 at the time of the juvenile offense, the record shows that he was actually 15 when he committed the offense.

On March 29,[4] Huver filed a notice of appeal. In his notice of appeal, Huver stated that he was seeking review of the January 11, 2017 judgment and sentence. He attached to the notice of appeal the January 11, 2017 judgment and sentence; the February 23, 2018 order amending the judgment and sentence nunc pro tunc to January 11, 2017; and the March 2, 2018 order denying Huver's CrR 7.8 motions. Huver did not move to file a late notice of appeal.

ANALYSIS

I. SCOPE OF REVIEW

As a preliminary matter, we must determine what issues are properly before us in this appeal. Although appellate counsel challenges the imposition of the criminal filing fee and DNA collection fee, this argument is not properly before this court because the fees are part of Huver's January 11, 2017 judgment and sentence, and this appeal is from the superior court's denial of his CrR 7.8 motion, not the judgment and sentence.

To be timely, an appeal must be filed within 30 days of the date of the decision at issue. RAP 5.2(a). Huver's judgment and sentence was issued on January 11, 2017, and he did not file a notice of appeal within 30 days of that date. And even if we presume that the February 23, 2018 nunc pro tunc order could have reset the time in which a notice of appeal was allowed, Huver filed his notice of appeal on March 29, 33 days after the superior court issued the February 23, 2018 order, and he did not move to file a late notice of appeal. The notice of appeal was timely only in relation to the March 2, 2018 order denying his CrR 7.8 motions. Thus, the denial of the CrR 7.8

[4] Huver mailed his notice of appeal from prison on March 29, 2018. Under the mailbox rule, the notice of appeal is therefore deemed to have been filed on March 29, 2018. GR 3.1(a).

motions is the only decision before us on appeal, and we decline to reach Huver's challenge to the fees imposed in the judgment and sentence.[5]

II. CrR 7.8 Motions

We now turn to the appeal from the order denying Huver's CrR 7.8 motions. Because Huver fails to show that his juvenile adjudication should not have been included in his offender scores, we affirm.[6]

The order dismissing Huver's CrR 7.8 motions does not state what grounds the superior court relied on when it concluded that the motions must be dismissed. But because the court stated during the hearing that the motions were timely and retained the motions rather than transferring them to this court under CrR 7.8(c)(2), we assume that the court found that Huver had made a substantial showing that he was entitled to relief and then rejected both of his arguments on the merits. Accordingly, we address the argument raised in Huver's written CrR 7.8 motions and the oral motion Huver made during the motion hearing.

[5] *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), which held that the legislature's 2018 amendments to various LFO statutes applies to cases pending on appeal, does not apply here because Huver's judgment and sentence is not pending on appeal. We note, however, that our decision does not preclude Huver from moving to file a late notice of appeal if he believes that he has grounds to do so.

[6] Huver also contends that he received ineffective assistance of counsel when his counsel failed to object to the inclusion of the juvenile adjudication in his offender scores. Because Huver fails to show that the trial court erred in including the juvenile adjudication in his offender scores, Huver fails to show that his counsel's failure to object was deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (to prevail on an ineffective assistance of counsel claim, the appellant must show that his counsel's performance was deficient and that the deficient performance prejudiced him); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Accordingly, his ineffective assistance of counsel claim fails.

In his written motions, Huver argued that his juvenile adjudication had washed out of his offender scores because he was under 14 when he committed the juvenile offense. He further argues that although his juvenile adjudication would not wash out under the current sentencing law, the adjudication washes out because the changes in the law since the date of the adjudication are not retroactive under *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245 (2001), *superseded by statute*, LAWS OF 2002, ch. 107, § 1. These arguments fail.

We review offender score calculations de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). Generally, a sentencing court is required to sentence an offender under the law in effect when the current offense was committed. RCW 9.94A.345.

Before 1997, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, generally did not include juvenile adjudications in an offender score calculation. *In re Pers. Restraint of Jones*, 121 Wn. App. 859, 862-63, 88 P.3d 424 (2004). In 2002, the legislature amended the SRA to include juvenile adjudications in an offender score even if they had not been counted as part of a previously imposed sentence. *Id.* at 868 (citing LAWS OF 2002, ch. 107, § 1).

In *Jones*, we examined the effect of these amendments on the inclusion of juvenile adjudications in offender score calculations based on when the current offense or offenses occurred. *Id.* at 870. We concluded that "[i]f the current adult offense occurred on or after June 13, 2002, the prior juvenile adjudication counts." *Id.* Here, the current offenses occurred well after 2002. Accordingly, the juvenile adjudication was properly included in Huver's offender score.

Huver also argued that the post-1997 amendments do not apply because, under *Smith*, the relevant statutory amendments are not retroactive. But *Smith* was superseded by statute. *See id.* at 867-70. And in *Jones*, we held that the relevant amendments to the SRA applied to all crimes

committed after 2002. *Id.* at 870-71. Because Huver's juvenile adjudication was properly included in his offender scores, the superior court did not err in denying written CrR 7.8 motions.

Huver further argues that the use of his juvenile adjudication in his offender score amounted to ex post facto punishment. But the use of the juvenile adjudication to determine the offender score for his current convictions does not increase the punishment for the prior juvenile adjudication, so there is no ex post facto issue here. *State v. Nordlund*, 113 Wn. App. 171, 193, 53 P.3d 520 (2002).

The additional argument that Huver raised for the first time at the motion hearing was that the juvenile adjudication should not have been included in his offender scores because he had been advised by the court sentencing him for the juvenile offense that it "would be permanently sealed and it could never be used against [him]" after he turned 18. VRP (Feb. 23, 2018) at 4. He appears to contend that by including the juvenile adjudication in his offender score, the sentencing court deprived him of due process by contradicting what the juvenile court had told him.

But an adjudication "may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon." Former RCW 9.94A.030(11)(b) (2016). And there is nothing in the record showing that Huver's juvenile adjudication had been vacated under any of these statutes or pursuant to a governor's pardon. Accordingly, the superior court did not err in denying Huver's oral CrR 7.8 motion.

Because Huver did not timely appeal the judgment and sentence, the fees imposed in the original judgment and sentence are outside the scope of our review, and we decline to review them.

And because Huver does not establish that his juvenile adjudication should not have been included in his offender scores, we affirm the superior court's denial of his CrR 7.8 motions.

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.

CRUSER, J.

We concur:

MAXA, P.J.

GLASGOW, J.