FILED

April 10, 2012

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	**No. 29737-3-III**
Respondent,	
	Division Three
v.	
JESSE JAMES REYNOLDS,	
	UNPUBLISHED OPINION
Appellant.	

Siddoway, J. — Jesse James Reynolds appeals the trial court's denial of his motion to correct his sentence for first degree robbery based on what he contends was an incorrect offender score. The parties dispute whether his motion clearly communicated that he was relying on a wash out of his juvenile convictions under RCW 9.94A.525(2)(b). In the end, it does not matter. Mr. Reynolds does not demonstrate that either the "same criminal conduct" ground assumed by the trial court or the wash-out argument made on appeal would support excluding the juvenile convictions in calculating his offender score. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Mr. Reynolds pleaded guilty to first degree robbery in April 2010, admitting that he had helped others rob Evarado Vasquez of his wallet and had then searched Mr. Vasquez's car for other items of value. The court sentenced him to 52 months' confinement. The sentence was based upon an offender score of two, in light of four prior juvenile convictions for first degree malicious mischief committed in 2002, for which Mr. Reynolds was sentenced in 2004.

In June 2010, Mr. Reynolds filed a CrR 7.8 motion to modify or correct his judgment and sentence. He argued that his offender score should have been one, because his juvenile convictions were charged under the same case number and consisted of the same criminal conduct. The State opposed the motion, providing the trial court with documentation from Mr. Reynolds' juvenile case demonstrating that the charges involved crimes committed on different dates, involving different victims, and were therefore not the "same criminal conduct" as defined in RCW 9.94A.589(1)(a).

For reasons that are not clear from the record, Mr. Reynolds filed a second CrR 7.8 motion on the same ground in July 2010. No action had yet been taken on his first motion. On July 22, the court considered the first or second motion and response without oral argument.[1] It denied the motion, signing an order presented by the State that

[1] The record is not clear which motion was considered, but both presented the same grounds and request for relief.

noted that Mr. Reynolds' juvenile convictions were for crimes committed on separate dates against different victims.

In January 2011, Mr. Reynolds filed a third CrR 7.8 motion. On appeal, Mr. Reynolds argues that the ground for the third motion was that his offender score should have been zero, because his juvenile convictions had washed out. As articulated in his motion, however, which included a brief history of the 2004 disposition order on his four charges of malicious mischief and attached juvenile court records as an appendix, the "grounds" for the motion included the following handwritten itemization:

> 1° Degree [sic] with an incorrect offender score of 2 when it should have been based on 0 score.
> Additional grounds for correction of offender score.
> See attached appendix pg 1 thru 4.
> Also RCW 9.94A.525(5)(a)(9) [sic].
> RCW 9.94A.589 under criminal history section.
> Former RCW 9.94A.360(4) [1995] wash out period.
> Case law *State v. Tiscorino*, 124 Wn. App. 476, 98 P.3d 529 (2004)[, *withdrawn*, 127 Wn. App. 190, 110 P.3d 265 (2005)].

Clerk's Papers (CP) at 61.

On the day that this third motion came on for hearing, the prosecutor expressed surprise that Mr. Reynolds had filed a further motion, reporting she had not seen it. The court continued the motion for a week. The prosecutor reported back to the court the next week, having by then seen the third motion, that Mr. Reynolds "had the exact same motion in July of 2010," and that "an order denying that motion was already entered."

Report of Proceedings (Jan. 27, 2011) at 4. She presented an order of dismissal identical to the order entered by the court to dismiss Mr. Reynolds' prior motion. This time, the trial court modified the proposed order to state that the motion was denied because "the same motion has been heard & decided." CP at 68.

Mr. Reynolds appeals. He contends that the prosecutor committed misconduct in representing to the court that the January 2011 motion had already been decided and argues error and abuse of discretion on the part of the court in failing to appoint counsel for Mr. Reynolds and consider the motion.

ANALYSIS

I

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). "'A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal.'" *State v. Talley*, 134 Wn.2d 176, 183 n.6, 949 P.2d 358 (1998) (quoting *State v. Coppin*, 57 Wn. App. 866, 874 n.4, 791 P.2d 228 (1990)).

To place the prosecutor's duty in perspective given the misconduct alleged

here—her misreading or mischaracterization of Mr. Reynolds' motion—we also consider Mr. Reynolds' duty to explain the basis of his motion. A motion to correct an offender score, as a motion for relief from a judgment on grounds of mistake, is governed by CrR 7.8(b)(1). To obtain relief under CrR 7.8, an "[a]pplication shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based." CrR 7.8(c)(1). CR 7(b)(1), applicable to criminal cases via CrR 8.2, further states that a "motion . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

A comparison of Mr. Reynolds' January 2011 motion with his earlier motions reveals that they are virtually identical. The only meaningful difference is the second page of itemized grounds included in the January motion, set forth above. Two of the statutory citations included in that itemization—RCW 9.94A.525(5)(a) or (9)[2] and .589—have nothing to do with convictions washing out. The third statute cited, former 9.94A.360(4), excluded a number of offenses in calculating an offender score if committed by a juvenile at the time he or she was under age 15, but the law was changed in 1997. Exclusion of juvenile offenses under that provision has not applied at any time relevant to Mr. Reynolds' criminal history. The *Tiscorino* decision included in Mr.

[2] While Mr. Reynolds cited RCW 9.94A.525(5)(a)(9), there is no such section.

Reynolds' itemization was a decision of this court dealing with the pre-1997 exclusion of juvenile offenses. The *Tiscorino* decision was withdrawn after the disposition of Mr. Tiscorino's appeal was corrected for an intervening Supreme Court decision on an unrelated issue. The decision Mr. Reynolds cites should no longer be cited for any purpose. *See Tiscorino*, 127 Wn. App. 190.

There is nothing about the motion papers or the proceedings below to suggest that the prosecutor's representation to the court was anything other than her understanding of a vaguely-framed motion. We find no improper conduct.

II

Mr. Reynolds next argues that the trial court erred in failing to appoint counsel to assist him in presenting the motion. It is well established that there is no constitutional right to counsel in postconviction proceedings other than the first direct appeal of right. *Pennsylvania v. Finely*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1990). While Washington court rules authorize appointment of counsel in some postconviction proceedings where it would not be constitutionally required, appointment is limited to cases in which the chief judge of the Court of Appeals, in the case of personal restraint petitions, and the superior court judge, in the case of CrR 7.8 motions, determines from initial review that the petition or motion appears to establish grounds for relief. RAP

16.11(b), 16.15(h); *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). If a CrR 7.8 motion does establish grounds for relief, counsel may be provided if not already available. *Robinson*, 153 Wn.2d at 696. We review a trial court's CrR 7.8 ruling for an abuse of discretion. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005).

Even reading Mr. Reynolds' CrR 7.8 motion as based on the ground advanced on appeal—that his offender score was in error because his first degree malicious mischief convictions had washed out—he fails to demonstrate that his motion established grounds for relief. His judgment and sentence reflect a date of sentence for the malicious mischief counts of April 2, 2004. Under RCW 9A.48.070(2), malicious mischief in the first degree is a class B felony. Prior class B felony convictions (other than sex offenses) are excluded from the offender score if the offender has spent 10 consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(b). The 10-year wash-out requirement applies to "both adult and juvenile prior convictions." Former RCW 9.94A.525(2)(f) (2008).

The trial court did not abuse its discretion based on its understanding of Mr. Reynolds' motion and would not have abused its discretion even if it had understood Mr. Reynolds to rely on a wash out of his juvenile crimes under RCW 9.94A.525(2)(b).

III

Mr. Reynolds' third challenge—that the trial court abused its discretion by failing

to consider his third motion—also fails in light of his failure to demonstrate that he might be entitled to relief.[3]

This is not a case in which the trial court categorically refused to consider Mr. Reynolds' motion. *Cf. State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (trial court has considerable discretion in sentencing, but its discretion does not extend to categorically refusing to entertain a request falling within the strictures of the Sentencing Reform Act of 1981, chapter 9.94A RCW, and principles of due process of law). The court denied the motion based on its belief that the motion lacked merit and, for that reason, had previously been denied.

Reviewing the denial of the motion for abuse of discretion, the most we can say for Mr. Reynolds' position on appeal is that if his motion could be clearly understood to raise a challenge to his offender score under the wash-out provision of RCW 9.94A.525(2)(b) (and in fairness to the trial court, we do not believe that it can) then the trial court denied the motion for a wrong reason, and therefore an untenable reason. Even giving Mr. Reynolds the benefit of that doubt, however, the error would be harmless. Under the nonconstitutional harmless error test, applicable here because violation of a court rule is at issue, reversal is appropriate only if, within reasonable probabilities, the

---

[3] Neither party argues that the trial court followed improper procedure by failing to transfer Mr. Reynolds' motion to the Court of Appeals under CrR 7.8(c)(2). We therefore do not address the transfer procedure called for by the rule.

outcome of the motion for relief would have been materially affected if the error had not occurred. *Robinson*, 153 Wn.2d at 697.

Had the trial court understood Mr. Reynolds to be basing his challenge on RCW 9.94A.525(2)(b), it still would have had no basis for concluding that his juvenile convictions should have been excluded in determining his offender score. Mr. Reynolds had not spent the required 10 consecutive years in the community without committing a crime resulting in a conviction.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

____
Siddoway, J.

WE CONCUR:

____
Korsmo, C.J.

____
Kulik, J.