COLORADO COURT OF APPEALS **2017COA102**

Court of Appeals No. 16CA0704
Jefferson County District Court No. 09CR3045
Honorable Dennis Hall, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Douglas L. Baker,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Román and Lichtenstein, JJ., concur

Announced July 27, 2017

Cynthia H. Coffman, Attorney General, William G. Kozeliski, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas L. Baker, Pro Se

¶ 1 Defendant, Douglas L. Baker, appeals the district court's order denying his postconviction motion challenging his designation as a sexually violent predator (SVP). We conclude that Baker can challenge his SVP designation in a Crim. P. 35(c) motion and that his motion is not time barred. We reverse the order and remand for further proceedings.

I. Background

¶ 2 While Baker was living with his friend's family, he had sexual intercourse several times with his friend's fourteen-year-old daughter.

¶ 3 Baker pleaded guilty to one count of sexual assault on a child by one in a position of trust.

¶ 4 According to the Sexually Violent Predator Assessment Screening Instrument (Screening Instrument), Baker met the criteria to be designated an SVP. In terms of the relationship criterion in the SVP statute, the Screening Instrument found that Baker "established a relationship" with the victim primarily for the purpose of sexual victimization.

¶ 5 At the sentencing hearing in July 2012, the district court sentenced Baker to ten years to life in the custody of the

Department of Corrections (DOC). The court stated, "The defendant was screened by the evaluators to determine whether he was a sexually violent predator. And the evaluators determined that he was a sexually violent predator, so the Court will adopt the findings." Baker's counsel objected to the SVP finding and stated that she would follow up with a written motion articulating the objection and requesting a hearing on the issue.

¶ 6 The same day, the district court issued a mittimus that included the SVP designation. There is no indication in the record that Baker's counsel ever filed a written objection to the SVP designation. Baker also did not file a direct appeal challenging any aspect of the judgment, including the SVP designation.

¶ 7 Approximately one year later, Baker's counsel filed a Crim. P. 35(b) motion to reconsider Baker's sentence, arguing that a probationary sentence was appropriate. Baker's counsel also stated that it was not Baker's fault that she was filing the Crim. P. 35(b) motion late. The district court accepted the late-filed motion but denied it on the ground that Baker's DOC sentence remained appropriate.

¶ 8 In 2015, Baker filed a pro se Crim. P. 35(a) motion to correct an illegal sentence, claiming that he was entitled to an additional nineteen days of presentence confinement credit (PSCC). In its response, the prosecution conceded that Baker was entitled to an additional eighteen days of PSCC. The court issued an amended mittimus that included the additional eighteen days of PSCC. Baker later filed a motion seeking a ruling on his Crim. P. 35(a) motion, and the court entered an order stating that it had already ruled on the motion by amending the mittimus to include the additional PSCC.

¶ 9 Soon after, in early 2016, Baker filed the motion at issue, which he titled "Motion to Vacate Sexually Violent Predator Status Pursuant to C.R.S. § 18-3-414.5(1)(a)." In the motion, Baker argued that, under *People v. Gallegos*, 2013 CO 45, 307 P.3d 1096, the district court had erred in simply adopting the findings in the Screening Instrument without making its own findings whether the relationship criterion of the SVP statute had been met. Baker also argued that the judgment did not become final until 2015 when the district court corrected the illegal sentence, the correction of the illegal sentence renewed the time to file a Crim. P. 35(b) or Crim. P.

35(c) motion, and he was entitled to have the *Gallegos* decision applied in this case.

¶ 10 The prosecution argued in response that the district court could not reconsider Baker's SVP designation under Crim. P. 35(b) because an SVP designation is not a part of a criminal sentence.

¶ 11 In Baker's reply, he argued that pro se pleadings should be construed liberally and that he "likely should have styled his pro se motion as one for relief pursuant to Crim. P. 35(c)."

¶ 12 The district court issued an order denying the motion because, among other reasons, it had no authority to reconsider Baker's SVP designation under Crim. P. 35(b).

II. Standard of Review

¶ 13 We review de novo. *See People v. Chipman*, 2015 COA 142, ¶ 26, 370 P.3d 330, 334 (an appellate court reviews a district court's summary denial of a postconviction motion de novo); *People v. Romero*, 197 P.3d 302, 305 (Colo. App. 2008) (the proper interpretation of statutes and rules of criminal procedure present questions of law that we review de novo).

III. Was Baker's Motion Cognizable Under Crim. P. 35?

¶ 14 Baker contends that his motion was cognizable under Crim. P. 35. We disagree that it was cognizable under Crim. P. 35(a) or Crim. P. 35(b), but we conclude it was cognizable under Crim. P. 35(c).

A. Crim. P. 35(a) and Crim. P. 35(b)

¶ 15 The supreme court has clarified that an SVP designation is not part of a criminal sentence. *Allen v. People*, 2013 CO 44, ¶ 7, 307 P.3d 1102, 1105 ("Unlike a criminal sentence, the SVP designation is not punishment. . . . [A] trial court's decision to designate an offender as an SVP is legally and practically distinct from its sentencing function.").

¶ 16 Thus, the district court properly concluded that it could not reconsider Baker's SVP designation under Crim. P. 35(b). *See id.* (authorizing a district court to reconsider a criminal sentence); *People v. Brosh*, 2012 COA 216M, ¶¶ 7-14, 297 P.3d 1024, 1026-27 (a district court may not reconsider an SVP designation under Crim. P. 35(b)).

¶ 17 For the same reason, we agree with the People's contention that a defendant cannot challenge an SVP designation under Crim. P. 35(a). *See id.* (authorizing a district court to correct a criminal

"sentence" that was not authorized by law, that was imposed without jurisdiction, or that was imposed in an illegal manner).

B. Crim. P. 35(c)

¶ 18 The district court does not appear to have considered whether Baker could challenge his SVP designation under Crim. P. 35(c). Although Baker did not label his postconviction motion as a Crim. P. 35(c) motion, we construe the arguments in his motion and reply brief as raising a claim under that rule.[1] *See People v. Bergerud*, 223 P.3d 686, 697 (Colo. 2010) (citing cases for the proposition that a court must liberally construe a pro se pleading and apply the

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[1] Although the People do not contend that Baker's motion should be barred as successive, we conclude it was not. Crim. P. 35(c)(3)(VII) provides that a district court "shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought. . . ." The plain language of that provision indicates that it applies where a direct appeal or postconviction proceeding was "previously brought." Here, Baker did not file any direct appeal (or any previous Crim. P. 35(c) motion), so we conclude that Crim P. 35(c)(3)(VII) does not apply here. In so concluding, we disagree with the suggestion in *People v. Canody*, 166 P.3d 218 (Colo. App. 2007), that a defendant is barred from raising a legitimate postconviction claim simply because "it is the type of contention that ordinarily is raised on direct appeal." *Id.* at 221; *see also People v. Delgado*, 2016 COA 174, ¶ 27 (one division of the court of appeals is not obligated to follow a decision by another division in a different case).

applicable law, irrespective of whether the pro se litigant has mentioned it by name).

1. Judgment

¶ 19 The People contend that Baker's claim challenging his SVP designation is not cognizable under Crim. P. 35(c). They argue that Crim. P. 35(c) authorizes only a collateral attack on a conviction or sentence, and an SVP designation is not part of a conviction or sentence. *See, e.g.*, Crim. P. 35(c)(2)(I) (authorizing a postconviction claim that a conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of Colorado).

¶ 20 The People construe Crim. P. 35(c) too narrowly. "Crim. P. 35(c) provides broad and inclusive postconviction remedies . . . ." *Naranjo v. Johnson*, 770 P.2d 784, 787 (Colo. 1989). Crim. P. 35(c)(2) in particular lists six different bases for postconviction relief. Included in that list are "[a]ny grounds otherwise properly the basis for collateral attack upon a criminal judgment." Crim. P. 35(c)(2)(VI); *see also* § 18-1-410(1)(g), C.R.S. 2016 (same). Thus,

Crim. P. 35(c) not only allows a collateral attack on a conviction or sentence, but also on any part of the judgment in a criminal case.[2]

¶ 21 Is an SVP designation part of a criminal "judgment"? Crim. P. 32(b)(3)(I) provides,

> [a] judgment of conviction shall consist of a recital of the plea, the verdict *or findings*, the sentence, the finding of the amount of presentence confinement, and costs, if any are assessed against the defendant, the finding of the amount of earned time credit if the defendant had previously been placed in a community corrections program, an order or finding regarding restitution as required by section 18-1.3-603, C.R.S., and *a statement that the defendant is required to register as a sex offender*, if applicable.

(emphasis added); *see also* Black's Law Dictionary 970, 972 (10th ed. 2014) (defining "judgment" as, among other things, "[a] court's final determination of the rights and obligations of the parties in a case" and defining "judgment of conviction" as, among other things, "[t]he written record of a criminal judgment, consisting of the plea, the verdict *or findings*, *the adjudication*, and the sentence") (emphasis added).

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[2] Section 16-5-402(1), C.R.S. 2016, is similarly broad, discussing time limits for a collateral attack on a "conviction *or adjudication*." (Emphasis added.)

¶ 22 Thus, a criminal "judgment" includes "findings" made by the district court and any statement that the defendant is required to register as a sex offender.

¶ 23 An SVP designation is a statutory creation, and the SVP statute itself provides that an SVP designation is indeed a "finding," which ultimately requires, among other things, registration as a sex offender. *See* § 18-3-414.5(2), C.R.S. 2016 ("[T]he court shall make specific findings of fact and enter an order concerning whether the defendant is a sexually violent predator. If the defendant is *found* to be a sexually violent predator, the defendant shall be required to register [as a sex offender] . . . .") (emphasis added).

¶ 24 Also, notably, section 18-3-414.5(2) indicates that a district court should enter its SVP finding directly on the mittimus, providing further support for the conclusion that an SVP designation is part of the "judgment." *See id.* ("If the department of corrections receives a mittimus that indicates that the court did not make a specific finding of fact or enter an order regarding whether the defendant is a sexually violent predator, the department shall immediately notify the court . . . .").

¶ 25 Further, an SVP designation is inextricably intertwined with the underlying conviction of one of the sexual offenses enumerated in section 18-3-414.5(1)(a)(II). Thus, for example, if a defendant were able to obtain reversal of his or her conviction of the underlying sexual offense on direct appeal or in a postconviction proceeding, the SVP designation based on the conviction would also have to be vacated.

¶ 26 For these reasons, we conclude that an SVP designation is part of a criminal "judgment" under Crim. P. 35(c)(2)(VI).

2. Collateral Attack

¶ 27 We also consider whether Baker's postconviction motion can be properly characterized as a collateral attack on the SVP designation. *See* Crim. P. 35(c)(2)(VI) (A defendant may raise a postconviction claim based on any grounds "otherwise properly the basis for collateral attack" upon a criminal judgment.).

¶ 28 As an initial matter, we emphasize the plain language of Crim. P. 35(c)(2) itself, which provides that, in specified circumstances, a defendant may raise a postconviction claim "*[n]otwithstanding* the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction

was affirmed upon appeal." *Id.* (emphasis added). So although Baker did not file a direct appeal challenging his SVP designation, under the plain language of Crim. P. 35(c)(2), he is not foreclosed from challenging the designation in a postconviction proceeding.

¶ 29 Nevertheless, the People contend that a defendant may only raise a *constitutional* challenge in a Crim. P. 35(c) proceeding. The problem with that proposition is that it contravenes the plain language of Crim. P. 35(c) itself. For example, Crim. P. 35(c)(2)(I) allows for a postconviction claim that a conviction was obtained or sentence imposed "in violation of the Constitution *or laws* of the United States or the constitution *or laws* of this state." (Emphasis added.) That language plainly indicates that a defendant may bring a constitutional claim *or* a statutory claim in a Crim. P. 35(c) motion. Also notable, Crim. P. 35(c)(2)(VI) provides — quite broadly — that a defendant may raise a postconviction claim based on "*[a]ny grounds* otherwise properly the basis for collateral attack upon a criminal judgment." (Emphasis added.) Although the supreme court has stated that "postconviction proceedings are intended to correct constitutional error," *People v. Rodriguez*, 914 P.2d 230, 253 (Colo. 1996), that does not necessarily preclude a

defendant from seeking relief under Crim. P. 35(c) from a statutory violation.

¶ 30 We now turn to the merits of Baker's contention regarding his SVP designation in light of *Gallegos*.

3. Application of *Gallegos* to a Case on Collateral Review

¶ 31 The analysis in *Gallegos* had three parts. First, the supreme court described the Screening Instrument's role in the SVP designation process and clarified that the Sex Offender Management Board has never been empowered to define the terms in the relationship criterion of the SVP statute. *See Gallegos*, ¶¶ 8-10, 307 P.3d at 1099-100. Notwithstanding this clarification in *Gallegos*, since 1999 the SVP statute has required district courts to "make specific findings of fact" in support of their SVP determinations. *See* Ch. 286, sec. 9, § 18-3-414.5(2), 1999 Colo. Sess. Laws 1149; *Brosh*, 251 P.3d at 460-61; *Tuffo*, 209 P.3d at 1231. The statute has never allowed a district court to adopt wholesale the Screening Instrument's conclusion regarding the relationship criterion.

¶ 32 Second, the *Gallegos* court clarified the meaning of the phrase "established a relationship" under the relationship criterion of the

SVP statute. *See Gallegos*, ¶¶ 11-12, 307 P.3d at 1100. The analysis was exceedingly brief and straightforward, focusing only on the plain and ordinary meaning of the term "establish." *See id.* Further, at the time of the district court's SVP designation in this case in 2012, two divisions of this court had already interpreted the phrase "established a relationship" in the same or similar way. *See People v. Gallegos*, 240 P.3d 882, 884 (Colo. App. 2009), *rev'd on other grounds*, 2013 CO 45, 307 P.3d 1096; *People v. Tixier*, 207 P.3d 844, 847 (Colo. App. 2008), *disagreed with on other grounds by People v. Hunter*, 2013 CO 48, 307 P.3d 1083.

¶ 33 Third, the *Gallegos* court clarified the meaning of the phrase "promoted a relationship" under the relationship criterion of the SVP statute. *See id.* at ¶¶ 14-17, 307 P.3d at 1100-01. Although the meaning of that phrase is more ambiguous, there too the supreme court simply applied the plain and ordinary meaning of the term "promoted." *Id.* Further, when the district court designated Baker an SVP in 2012, two divisions of this court had already interpreted the phrase "promoted a relationship" in the same or similar way. *See People v. Valencia*, 257 P.3d 1203, 1207 (Colo. App. 2011); *Tixier*, 207 P.3d at 848.

¶ 34 In other words, *Gallegos* did not announce a significant change in the law, but instead simply clarified what the SVP statute has always meant. Accordingly, *Gallegos* was an entirely foreseeable decision that is applicable to a case on collateral review. *See People v. Madden*, 87 P.3d 153, 159 (Colo. App. 2003) ("Judicial interpretations that are foreseeable and defensible in reference to [a] statute can be retroactively applied to a criminal defendant."), *rev'd on other grounds*, 111 P.3d 452 (Colo. 2005); *see also People v. Grenemyer*, 827 P.2d 603, 607 (Colo. App. 1992); *cf. Welch v. United States*, ___ U.S. ___, ___, 136 S. Ct. 1257, 1264-65 (2016) (discussing the distinction between new substantive criminal rules, which apply retroactively to cases on collateral review, and new procedural criminal rules, which do not).

IV. Baker's Motion Was Not Time Barred

¶ 35 In *Leyva v. People*, 184 P.3d 48 (Colo. 2008), the supreme court held that "when an illegal sentence is corrected pursuant to Crim. P. 35(a), it renews the three-year deadline for collaterally attacking the original judgment of conviction pursuant to Crim. P. 35(c)." *Leyva*, 184 P.3d at 50-51.

¶ 36 Here, Baker filed a Crim. P. 35(a) motion to correct an illegal sentence in 2015, claiming an entitlement to additional PSCC. The People conceded the motion for the most part, and the district court granted additional PSCC. Case law indicates that this amounted to the correction of an illegal sentence pursuant to Crim. P. 35(a). *See People v. Fransua*, 2016 COA 79, ¶ 17, ___ P.3d ___, ___ ("A claim for PSCC is cognizable under Crim. P. 35(a) as a sentence not authorized by law.") (*cert. granted* Dec. 5, 2016); *People v. Roy*, 252 P.3d 24, 27 (Colo. App. 2010) ("Whether a defendant in any particular case is entitled to [PSCC] depends, as a matter of law, on whether the applicable statutory scheme authorizes such credit. Similarly, whether a defendant is statutorily entitled to credit that has not been awarded against his or her sentence presents a question of whether the sentence is contrary to the statutory scheme and thus is 'not authorized by law.' Such an error is subject to correction under Crim. P. 35(a).") (citation omitted).

¶ 37 Applying the rule from *Leyva*, we conclude that correction of an illegal sentence in 2015 renewed the time for Baker to file a Crim. P. 35(c) motion. *See Leyva*, 184 P.3d at 50-51. Thus, Baker's postconviction motion challenging his SVP designation,

which he filed in early 2016 and which was cognizable under Crim. P. 35(c), was not time barred.

¶ 38 The People present two arguments in support of their contention that Baker's motion was time barred. First, they argue that granting additional PSCC does not amount to the correction of an illegal sentence under Crim. P. 35(a), and that *Fransua* and *Roy* were wrongly decided. We disagree for the reasons stated in *Roy*, in particular that the statutory scheme creates a legal entitlement to a particular amount of PSCC, and that the amount of PSCC directly affects the length of the sentence that the defendant ultimately serves. *See* § 18-1.3-405, C.R.S. 2016.

¶ 39 The People also argue that the rule from *Leyva* — that the correction of an illegal sentence under Crim. P. 35(a) renews the three-year deadline for collaterally attacking the original judgment of conviction pursuant to Crim. P. 35(c) — should be limited to the situation where the new Crim. P. 35(c) claim is somehow related to the illegality of the sentence. The People rely on a statement in *Leyva* reading, "If an illegality is discovered in a prisoner's sentence, the prisoner should be allowed to pursue any good-faith arguments

for postconviction relief addressing how that illegality potentially affected his or her original conviction." 184 P.3d at 50.

¶ 40 We again disagree with the People, for two reasons. First, if the supreme court had intended to limit its holding in the way advanced by the People here, it could have said so, but did not. Instead, the supreme court phrased the question presented, and its holding, broadly — that the correction of an illegal sentence on one count renews the three-year deadline for collaterally attacking "the original judgment of conviction" pursuant to Crim. P. 35(c). *Leyva*, 184 P.3d at 49, 50-51. The supreme court stated that broad question presented and its broad holding repeatedly throughout the opinion — in the introduction, at the beginning of its analysis, and in the concluding paragraph. *See id.*

¶ 41 Second, the supreme court in *Leyva* remanded the case for consideration of the defendant's ineffective assistance of counsel claims on all of the defendant's convictions, even though it determined the defendant's sentence was illegal on only one count. *See* 184 P.3d at 50-51. Thus, the scope of the remand confirms the breadth of the supreme court's holding.

¶ 42 Although the decision in *People v. Dunlap*, 222 P.3d 364, 368-70 (Colo. App. 2009), could be construed as interpreting *Leyva* more narrowly then we have done, we believe that decision is distinguishable. *Dunlap* did not consider the finality of a conviction under section 16-5-402(1). Rather, *Dunlap* addressed the finality of a conviction for the purposes of determining appellate jurisdiction. *Dunlap*, 222 P.3d at 368. *Leyva* on its face does not apply to appellate jurisdiction. *Leyva*, 184 P.3d at 50 n.2 ("Our [decision] has no effect on matters such as the jurisdiction of appellate courts or the time limits for filing appeals, as those matters are controlled by different rules and statutes employing different standards."). Thus, *Dunlap* rightly distinguished *Leyva*. *Dunlap*, 222 P.3d at 368. Since we are not concerned here with appellate jurisdiction, but with the timeliness of postconviction claims under section 16-5-402, *Leyva* — not *Dunlap* — applies.

V. Conclusion

¶ 43 Based on the foregoing, we conclude that the district court erred by denying Baker's postconviction motion without considering whether the motion was cognizable under Crim. P. 35(c). We also conclude that the motion was cognizable under Crim. P. 35(c) and

was not time barred. Therefore, we reverse the order and remand the case for the district court to reconsider Baker's SVP designation in light of *Gallegos*. We agree with the People's suggestion that Baker should be appointed counsel on remand. The district court should reconsider Baker's SVP designation based on the existing record.

JUDGE ROMÁN and JUDGE LICHTENSTEIN concur.