IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65355-5-I
Respondent,	)	DIVISION ONE
v.	)	
LONNIE LEE BURTON,	)	UNPUBLISHED
Appellant.	)	FILED: June 6, 2011

Cox, J. — In this court's third review of this case, Lonnie Burton argues that the trial court denied his constitutional right to counsel and right to be present. Burton was not present and the trial court did not appoint him counsel when it entered an order striking an unconstitutional community custody provision from his judgment and sentence, as directed by the supreme court. Because the trial court's action was purely ministerial and required no exercise of discretion, Burton's constitutional rights were not violated. We affirm.[1]

In 1994, a jury convicted Burton of first degree rape, first degree robbery, and first degree burglary. This court's previous opinion, State v. Burton,[2] outlines the facts regarding Burton's underlying convictions and first two

[1] We deny Respondent's Motion to Dismiss Appeal.

[2] Noted at 101 Wn. App. 1041, 2000 WL 987045, review denied, 142 Wn.2d 1009 (2000).

appeals. This court affirmed his judgment and sentence,[3] including the imposition of the following special community custody condition:

> 11. Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.[4]

Subsequently, the supreme court decided State v. Bahl.[5] It held that Bahl's community custody provision restricting his access to or possession of pornographic materials was unconstitutionally vague.[6]

The supreme court then granted review of Burton's personal restraint petition challenging community custody condition 11, cited above. It ordered the case be "remanded to the trial court for amendment of the judgment and sentence consistent with State v. Bahl . . . ."[7]

On remand, the trial court entered an order striking the condition. The court did not hold a resentencing hearing.

Burton appeals.

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[3] Id. at *1.

[4] Clerk's Papers at 82.

[5] 164 Wn.2d 739, 193 P.3d 678 (2008).

[6] Id. at 758.

[7] Clerk's Papers at 139.

RIGHT TO BE PRESENT

Burton argues that the trial court denied his due process right to be present when it corrected his judgment and sentence without conducting a resentencing hearing where he was present. We disagree.

A defendant has a constitutional right to be present at sentencing, including resentencing.[8] But, when resentencing involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present.[9] Constitutional challenges are reviewed de novo.[10]

Here, the supreme court directed the trial court to amend Burton's judgment and sentence so that it complies with Bahl. The trial court did so by striking condition 11. It did not make any other amendments to the judgment and sentence. Entry of the order correcting the judgment and sentence was a purely ministerial act that required no exercise of direction. As such, Burton's right to be present was not violated.

Burton argues that Mathews v. Eldridge[11] requires the court to provide

[8] State v. Rodriguez Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (citing State v. Rupe, 108 Wn.2d 734, 743, 743 P.2d 210 (1987)).

[9] Id. (citing State v. Davenport, 140 Wn. App. 925, 931-32, 167 P.3d 1221 (2007), review denied, 163 Wn.2d 1041 (2008)).

[10] Islam v. Dep't of Early Learning, 157 Wn. App. 600, 608, 238 P.3d 74 (2010).

[11] 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

him with an opportunity to be heard. But, the Mathews balancing test does not apply to criminal cases.[12] Therefore, it does not control here.

Burton also argues that the court's directive to amend the judgment and sentence consistent with Bahl required a resentencing hearing.[13] He is mistaken.

In Bahl, the supreme court ordered that the case be "remand[ed] to the trial court for resentencing."[14] Burton asserts that, because the supreme court concluded that the proper remedy in Bahl was resentencing, he is entitled to a new sentencing hearing in this case. But, he provides no persuasive argument why we should disregard the supreme court's directive in this case—to amend the judgment and sentence, and substitute the court's directive in Bahl—to remand for resentencing. Because the trial court must strictly comply with a directive from an appellate court, this argument is not persuasive.[15]

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[12] State v. Heddrick, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009) (citing Medina v. California, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) ("the Mathews balancing test does not provide the appropriate framework for assessing the validity of state procedural rules")).

[13] Bahl, 164 Wn.2d at 761-62.

[14] Id.

[15] See State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006) ("Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court.") (citing Harp v. Am. Sur. Co. of New York, 50 Wn.2d 365, 368, 311 P.2d 988 (1957)).

RIGHT TO COUNSEL

Burton argues that the trial court denied his right to the assistance of counsel when it failed to appoint him counsel before correcting his judgment and sentence. We disagree.

A criminal defendant has a right to the assistance of counsel at every "critical stage" of a criminal proceeding, including sentencing.[16] "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'"[17] Resentencing can be a critical stage of the proceedings if it involves more than the court's performance of a ministerial act.[18]

Here, the trial court's order striking the unconstitutional community custody condition from Burton's judgment and sentence evidenced a purely ministerial act. Entry of that order was not a "critical stage" of his criminal proceedings. Burton was not entitled to the assistance of counsel at that stage.

We affirm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

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[16] U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005).

[17] Heddrick, 166 Wn.2d at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

[18] Davenport, 140 Wn. App. at 932.

/s/ Dwyer, C. J. /s/ Schindler, J.