IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 66359-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
MICHAEL SCOTT LATOURETTE,	)	
	)	
Appellant.	)	FILED: July 23, 2012
	)	

Leach, C.J. — Michael Scott LaTourette appeals from the judgment and sentence entered at his resentencing pursuant to this court's mandate. LaTourette alleges that the trial court erred in (1) imposing deadly weapon sentence enhancements, (2) denying his motion for a new judge and rejecting his affidavit of prejudice, (3) denying him access to legal research materials, and (4) denying him notice of the hearing and the State's sentencing recommendations. The sentence imposed by the trial court comports with our mandate, and LaTourette's remaining issues lack merit. We affirm.

FACTS

Following a jury trial, LaTourette was convicted of robbery, attempted kidnapping, and assault. The jury found by special verdict that he was armed with a deadly weapon during the commission of each crime.

This is LaTourette's second appeal in this case. In his first appeal, we affirmed

his convictions but remanded for resentencing after (1) the State conceded that the assault and attempted kidnapping were the same criminal conduct, (2) the State conceded that the robbery and attempted kidnapping were the same criminal conduct, and (3) we concluded that the trial court erroneously imposed firearm sentence enhancements, given that the jury found by special verdict that LaTourette was armed with a deadly weapon, not specifically a firearm.

On October 20 and November 10, 2010, pursuant to this court's mandate, the trial court resentenced LaTourette and made the following changes: (1) the assault and attempted kidnapping were counted as the same criminal conduct, (2) the robbery and attempted kidnapping were counted as the same criminal conduct, and (3) the deadly weapon sentence enhancements were imposed in place of the erroneous firearm sentence enhancements. The trial court also permitted LaTourette to raise a new challenge to the State's calculation of his offender score.

LaTourette argued to the trial court that he had been denied access to legal materials. The trial court rejected LaTourette's argument on the basis that the only issue at resentencing not governed by this court's mandate was the calculation of his offender score. LaTourette conceded that he had researched that issue "quite thoroughly" and was provided with copies of the documentation of his prior convictions and the relevant case law.

At the resentencing hearing, LaTourette filed a motion for a change of judge and an affidavit of prejudice. LaTourette conceded that the motion was not timely and that the affidavit was the third he had filed against the trial court. The trial court denied his

motion and rejected his affidavit of prejudice as untimely and successive.

LaTourette also argued that he had insufficient notice of the sentencing hearing and the State's sentencing recommendations. The trial court concluded, based on the record, that LaTourette received timely notice and was fully apprised of the State's sentencing recommendations.

LaTourette appeals.

ANALYSIS

Deadly Weapon Enhancements

LaTourette first asserts that the trial court erred in imposing deadly weapon sentence enhancements upon his resentencing. This claim is without merit.

By special verdicts, the jury found that LaTourette was armed with a deadly weapon at the time he committed each crime. In LaTourette's prior appeal, we held that under our Supreme Court's decision in State v. Williams-Walker,[1] the trial court had statutory authority to impose the deadly weapon enhancements. The Williams-Walker court explained that when a jury finds by special verdict that a defendant used a deadly weapon in committing the crime, the trial court is bound by that determination to impose a deadly weapon enhancement, even if the weapon was a firearm:

> In the cases before us, the juries were given special verdict forms for a deadly weapon enhancement, and they returned answers in the affirmative. The fact that the State provided notice in the information to each of the defendants that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding.[2]

[1] 167 Wn.2d 889, 225 P.3d 913 (2010).

Based on this authority, our mandate directed the trial court to impose deadly weapon sentence enhancements instead of firearm enhancements. The trial court did so. There was no error.

Recusal

LaTourette next alleges that the trial court abused its discretion by refusing to recuse itself at the resentencing hearing. His claim is without merit.

RCW 4.12.040(1) allows a party to a superior court proceeding one opportunity to demonstrate that the judge hearing or trying the action is prejudiced against a party or attorney or their interests and provides,

> No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

RCW 4.12.050 describes the procedure to establish this prejudice and provides, in pertinent part,

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case . . . and before the judge presiding has made any order or ruling involving discretion . . . AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.[3]

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[2] Williams-Walker, 167 Wn.2d at 899.

[3] RCW 4.12.050(1) (emphasis added); see also State v. Hansen, 107 Wn.2d 331, 333, 728 P.2d 593 (1986).

This court reviews for abuse of discretion a trial court's refusal to recuse in response to such a motion.[4]

The trial court properly rejected LaTourette's affidavit of prejudice because it was both untimely and successive. LaTourette conceded that the trial court had already made "numerous rulings" and did not claim that his affidavit of prejudice was timely under the statute. He also conceded that he had already filed three affidavits of prejudice against the trial court. LaTourette's concessions demonstrate that the trial court acted within its discretion in denying his motion. The trial court did not err.[5]

Access to Legal Materials

LaTourette contends that he was denied access to legal resources and materials to prepare for resentencing. The evidentiary record reveals that LaTourette's claim is without merit.

A pro se defendant is entitled to reasonable access to legal materials.[6] However, the scope of a hearing in superior court following remand is determined by the limiting language of the mandate issued on remand, the specific directions stated in the opinion, and the Rules of Appellate Procedure (RAP).[7] The mandate governs all

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[4] In re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997).

[5] LaTourette also asserts that the trial court's rejection of his affidavit of prejudice violated the appearance of fairness doctrine. However, he does not offer any argument on the issue. We decline to address it. State v. Johnson, 119 Wn.2d 167,170-71, 829 P.2d 1082 (1992) (appellate court will not review an issue raised in passing or unsupported by authority or persuasive argument).

[6] State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987).

[7] State v. Collicott, 118 Wn.2d 649, 662-63, 827 P.2d 263 (1992). RAP 12.2 provides in part that

> [u]pon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective

subsequent proceedings in the action.[8]

The trial court did not exercise any discretion regarding the sentence provisions controlled by this court's mandate. The mandate specifically directed the trial court to resentence LaTourette "with the attempted kidnapping and the robbery constituting the same criminal conduct and the assault and the attempted kidnapping constituting the same criminal conduct." We also directed the trial court to strike the firearm enhancements and instead impose the deadly weapon enhancements. LaTourette was not entitled to argue these matters, which were expressly governed by the mandate.

The record reveals that to the extent LaTourette needed to prepare or present a defense, he did so. Upon remand, the court sentenced LaTourette pursuant to the mandate but allowed him to challenge the State's calculation of his offender score.[9] LaTourette conceded to the trial court that he had researched that issue "quite thoroughly." On November 10, 2010, before the court resentenced LaTourette, the State verified that LaTourette had received copies of his prior convictions and case law that had been left for him at the jail. In his argument to the court, he repeatedly cited relevant statutes and case law and quoted portions of multiple cases. The record

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> and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

[8] RAP 12.2.

[9] The ruling was within the trial court's discretion because it was consistent with this court's decision on appeal. See State ex rel. City of Spokane v. Superior Court, 150 Wash. 13, 16, 272 P. 60 (1928). In this appeal, LaTourette did not challenge the trial court's calculation of his offender score at resentencing.

reveals that LaTourette had sufficient access to legal research materials to allow him to prepare to address the only issue upon which the trial court exercised its discretion at resentencing.[10] There was no error.

Notice of Hearing, Opportunity To Be Heard

LaTourette alleges that he had no notice that he was to be transported to the King County jail for resentencing and was never adequately apprised of the State's sentencing recommendations. The record demonstrates that LaTourette is incorrect.

The right to procedural due process is guaranteed under the Washington Constitution article I, section 3 and the United States Constitution amendments V and XIV, section 1. The State may not deprive a defendant of a protected liberty interest without procedural safeguards, which at a minimum include notice and an opportunity to be heard.[11]

The evidentiary record reveals that LaTourette had adequate notice of the October 20 resentencing hearing. First, LaTourette received a copy of this court's September 24, 2010, mandate. He knew that he would be resentenced and was apprised of the mandate's requirements. Second, on October 10, the State filed a notice of the resentencing hearing, scheduled for October 20. On October 11, LaTourette sent the superior court clerk a motion and a proposed order for transport to the King County jail for the hearing, which he acknowledged was scheduled before the superior court "on the 20th day of October, 2010."

[10] LaTourette contended that he needed additional legal resources to research and argue numerous other issues. However, none of the issues LaTourette claimed he needed to research were before the trial court on resentencing.

[11] In re Pers. Restraint of Bush, 164 Wn.2d 697, 704, 193 P.3d 103 (2008).

LaTourette was also specifically informed of the State's sentencing recommendations. The State read its sentencing recommendation into the record at the October 20 hearing, and the trial court continued the resentencing to November 10 to permit LaTourette to challenge his offender score. During the November 10 hearing, LaTourette complained that he had not been given "any notice of what the State has been seeking." The court disagreed and reminded LaTourette that the State had read its recommendations into the record at the October 20 hearing.

In these circumstances, LaTourette fails to demonstrate any violation of his due process rights.

Issues Pertaining to Trial, Original Sentencing

LaTourette's numerous other arguments are not properly raised in the context of this appeal from his resentencing following remand.[12] The claims are barred under RAP 2.5(c)[13] because the trial court did not consider them on remand.[14]

Moreover, LaTourette had the opportunity to raise these challenges in his first appeal. Generally, a defendant is prohibited from raising issues on a second appeal that were or could have been raised in the first.[15] Our Supreme Court stated in State v. Sauve[16] that even an issue of constitutional import cannot be raised in a second appeal:

> Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal. Nonetheless, defendant is not without a remedy. He may choose to apply for a personal restraint petition under

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[12] LaTourette challenges the sufficiency of the charging document and the sufficiency of the evidence supporting count I, robbery in the first degree. LaTourette also challenges the sufficiency of the evidence supporting count II, attempted kidnapping in the first degree, claiming the kidnapping was merely "incidental" to the robbery, as it was attempted but not completed. He challenges the jury instruction pertaining to the charge of attempted kidnapping, asserting that the instruction omitted the third charged element of the offense—i.e., "flight thereafter." He further challenges the deadly weapon jury instruction, the trial court's evidentiary rulings at trial, and the adequacy of his trial counsel's representation at trial and asserts that prosecutorial misconduct deprived him of a fair trial.

[13] RAP 2.5(c)(1), provides, "If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case."

[14] State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

[15] State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); State v. Jacobsen, 78 Wn.2d 491, 493, 477 P.2d 1 (1970); State v. Corrado, 94 Wn. App. 228, 236, 972 P.2d 515 (1999).

[16] 100 Wn.2d 84, 87, 666 P.2d 894 (1983) (quoting In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)).

> RAP 16.3, 16.4, and with a prima facie showing of actual prejudice arising from constitutional error would be entitled to "a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12".

LaTourette's remedy for any constitutional error he could have raised in his first appeal is through a personal restraint petition.

Finally, LaTourette alleges that he was denied notice and an opportunity to be heard at his initial sentencing hearing. He concedes that this issue was raised in his first appeal. LaTourette provides no authority allowing him to raise the same issue we rejected in his prior appeal. We decline to revisit the issue.

Affirmed.

Leach, C.J.

WE CONCUR:

Spearman, J.

Becker, J.