IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67356-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
RODNEY ALBERT SCHREIB, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 3, 2012

Spearman, J. — Rodney Schreib, Jr. pleaded guilty to three counts of child molestation in the first degree on March 26, 2009. The trial court imposed a Special Sex Offender Sentencing Alternative (SSOSA) sentence and entered a judgment and sentence on May 14, 2009. After Schreib failed to follow certain conditions of his sentence, the State filed several motions to revoke the SSOSA. The trial court held a hearing on the last of these motions, filed March 14, 2011, at the same time that it heard Schreib's post-judgment motion to withdraw his guilty plea. It granted the State's motion and entered an order modifying the judgment and sentence, imposing a term of community custody for life. It ruled that Schreib's motion to withdraw his guilty plea was untimely under CrR 7.8 and denied the motion. These two rulings are at issue on appeal.[1] Schreib claims the

trial court (1) imposed a judgment exceeding its authority in the order modifying the judgment and sentence (specifically, he refers to the term of community custody for life); and (2) erred in finding his motion to withdraw his guilty plea untimely.

As to the first claim, we agree with Schreib and accept the State's concession of error. As to the second, we hold the trial court did not err in finding his motion untimely. But we agree with the parties that the trial court was required to transfer the motion to this court as a personal restraint petition (PRP) under CrR 7.8(c). Before we review Schreib's motion to withdraw his guilty plea as a PRP, however, a threshold issue is whether the PRP is now timely. Because the record does not indicate if and when Schreib received notice of the time limits on collateral attack, as required by rule and statute, a reference

[1] Schreib's arguments in briefing to this court are not entirely aligned with the orders designated in his notice of appeal. First, while he designates the orders denying his motion for pro se legal access and denying his motion to dismiss, his briefing contains no argument regarding access to legal materials, the central issue in those two motions. An issue not briefed is deemed waived. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). Also, Schreib claims the trial court deprived him of his constitutional right to counsel by granting his request to represent himself on the motion to withdraw his guilty plea. This claim is apparently intended to bolster his argument that the court erred in denying his motion to withdraw his guilty plea. But he did not designate the pertinent order, "Findings and Order Re Waiver of Counsel" entered April 20, 2011, in his notice of appeal. Under RAP 5.3(a)(3), a notice of appeal must "designate the decision or part of the decision which the party wants reviewed." An exception exists if an undesignated order "prejudicially affects the decision designated in the notice." RAP 2.4(b). However, Schreib does not explain how the court's ruling on waiver of counsel affected the court's order denying his motion to withdraw his guilty plea. Even if we considered this issue, Schreib concedes that he had no constitutional right to counsel on the post-judgment motion to withdraw his guilty plea in the trial court. A defendant is entitled to appointment of counsel on a motion to withdraw guilty plea prior to judgment. State v. Davis, 125 Wn. App. 59, 63-64, 104 P.3d 11 (2004). But "a criminal defendant has no constitutional right to counsel in post-conviction proceedings other than the first direct appeal of right." State v. Forest, 125 Wn. App. 702, 707, 105 P.3d 1045 (2005) (citing Pa. v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); State v. Winston, 105 Wn. App. 318, 321, 19 P.3d 495 (2001)). Schreib does not claim he was harmed by the trial court's proceeding as if he did have a right to counsel on that motion.

hearing is appropriate. This case is remanded for further proceedings.

FACTS

On October 15, 2008, Schreib (D.O.B. 10/10/90) was charged with four counts of child molestation in the first degree for acts against C.A.J.[2] The crimes were alleged to have occurred between May 1, 2007 and August 31, 2007, when Schreib was 16 years old. Schreib pleaded guilty to three of the counts on March 26, 2009. The State agreed to dismiss the fourth count and to recommend a SSOSA sentence if approved by the Department of Corrections (DOC). On May 14, 2009, Schreib was sentenced to 98 months of confinement but was granted a SSOSA and the sentence was suspended. He was required to comply with a sex offender treatment plan.

The State filed motions to revoke the SSOSA on December 7, 2009 and October 1, 2010. The first motion was resolved by a stipulated agreement. The second motion was denied by the trial court, which instead entered an order modifying the judgment and sentence to include four months of confinement plus additional conditions. The State filed another motion to revoke the SSOSA on March 14, 2011.[3]

On April 19 and 20, Schreib filed motions to act pro se and have standby counsel. On April 20, an initial hearing was held on the State's motion to revoke

[2] On October 2, 2008, Schreib was interviewed at the sheriff's office, where he admitted certain conduct as to C.A.J.

[3] The State alleged that Schreib had become transient, had unapproved contact with minors, stayed overnight at a residence where minors were present, failed to take prescribed medications, and failed to disclose contact with minors to the DOC or his treatment provider. .

the SSOSA. Schreib's counsel, Wesley Richards, told the court that Schreib wanted to represent himself with Richards as standby counsel.[4] The court conducted a colloquy with Schreib and granted his request to represent himself, indicating Richards remained as standby counsel for the moment. It entered written "Findings and Order Re Waiver of Counsel." Clerk's Papers (CP) at 71.

Schreib filed a pro se "Motion for Courtroom Ruling 8.3(b) Dismissal" on May 3, 2011, seeking dismissal of the "pending prosecution" based on the limited time he was permitted access to pro se legal materials at the jail. At a May 11 hearing, Schreib argued for relief, citing CrR 7.8 and CrR 8.3(b). The court noted that Schreib was apparently contesting the validity of his confession and seeking to withdraw his guilty plea. The court discussed the time limitations on withdrawal of a guilty plea under CrR 4.2, CrR 7.8, and RCW 10.73.100, noting that such a motion would likely be untimely. It noted that Schreib needed to decide what relief he was seeking and prepare a motion to be heard. The court allowed Schreib to maintain access to legal materials. A written order was entered denying Schreib's motion to dismiss.

On May 25, 2011, Schreib filed a pro se motion to withdraw his guilty plea, citing CrR 7.8, cases, and court rules.[5] On June 1, the trial court held a

[4] Richards indicated he was willing to act as standby counsel for the revocation matter but had reservations about doing so for Schreib's motion to dismiss or a potential motion to withdraw guilty plea, either of which might include claims of ineffective assistance of trial counsel, who had been from Richards' office.

[5] At a hearing that day before a different judge, attorney Sharon Fields appeared and stated that she had been appointed as conflict counsel for purposes of Schreib's motion to withdraw his plea.

hearing on Schreib's motion to withdraw his guilty plea and the State's motion to revoke the SSOSA. Regarding the former, the State argued that Schreib had failed to provide any affidavits supporting his motion and failed to establish a basis for an evidentiary hearing under CrR 7.8. Schreib argued that CrR 7.8 required the motion to be transferred to this court as a PRP. The court denied Schreib's motion to withdraw his guilty plea, ruling that it was governed by CrR 7.8 because it was made after entry of judgment and that it was untimely filed outside the one-year limit of CrR 7.8. It did not transfer the motion to this court.

The trial court then heard testimony on the State's motion to revoke the SSOSA and ordered the SSOSA revoked.[6] On June 15, 2011, the court entered an order modifying the judgment and sentence. The order, in section 1.2, imposes community custody "for life pursuant to RCW 9.94A.507 (former RCW 9.94A.712)." CP at 92. On June 27, the court entered a written order denying Schreib's motion to withdraw his guilty plea. Schreib filed a notice of appeal on July 5, 2011.

DISCUSSION

Before us on appeal are the trial court's orders (1) modifying the judgment and sentence and (2) denying Schreib's motion to withdraw his guilty plea. We address these in turn.

Order Modifying Judgment and Sentence

[6] The court found Schreib had unapproved contact with minors, remained overnight at a residence where minors resided, and failed to disclose the contact with minors to his treatment provider or the DOC. The court also found Schreib had failed to make adequate progress in treatment.

Schreib contends, and the State concedes, that the trial court lacked authority to order a term of community custody "for life" in its order modifying the judgment and sentence. We agree.

The trial court, after making a determination to revoke the SSOSA, entered an order modifying the judgment and sentence. The order imposed the previously suspended 98-month sentence and provided that "[c]ommunity Custody is hereby imposed for life pursuant to RCW 9.94A.507 (former RCW 9.94A.712)." CP at 92. But RCW 9.94A.507 states that "[a]n offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section." RCW 9.94A.507(2). The offenses in this case were alleged to have occurred when Schreib was 16 years old.

The term of community custody for life exceeded the trial court's statutory sentencing authority and is invalid. See State v. Smissaert, 103 Wn.2d 636, 639, 694 P.2d 654 (1985) (sentencing provisions outside authority of court are "illegal" or "invalid"). We remand for correction of the error. See In re Sentences of Jones, 129 Wn. App. 626, 631, 120 P.3d 84 (2005) (remanding for resentencing after determining superior court lacked authority to impose part of sentence).

Order Denying Motion to Withdraw Guilty Plea

Schreib contends the trial court erred in finding his motion to withdraw his guilty plea untimely. We do not agree. Under RCW 10.73.090(1), "[n]o petition or

motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." "Collateral attack" includes a motion to withdraw guilty plea. RCW 10.73.090(2). A judgment becomes final on the last of the following dates:

> (a) The date it is filed with the clerk of the trial court;
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
> (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090(3). Here, where subsection does not apply, and Schreib did not file a timely direct appeal from the conviction under subsection (3)(b), the judgment became final on May 14, 2009, when the judgment and sentence was filed with the clerk of the trial court. Schreib filed his motion to withdraw his guilty plea on May 25, 2011, over two years later.

Schreib now argues that the one-year bar did not apply to his motion because (1) he was not advised of the time limits on collateral attack at the time of sentencing and (2) the judgment and sentence was not "valid on its face" because the June 15, 2011 order modifying the judgment and sentence contained an error as to the term of community custody. He also argues his motion was timely because the judgment did not become "final" under RCW 10.73.090(1) until entry of the orders of modification on December 1, 2010 and June 15, 2011.

Schreib made none of these arguments to the trial court; he only argued that the court was required to transfer his motion as a PRP. Arguments not raised before the trial court are generally waived on appeal. RAP 2.5(a); State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Trial courts "must be given a chance to view and correct the claimed error before the matter can be reviewed" by an appellate court. State v. Hammond, 64 Wn.2d 591, 593, 392 P.2d 1010 (1964). Schreib's position, for which he cites no authority, is that the trial court had a sua sponte duty to ascertain whether there were any reasons not to apply the one-year bar. We agree, however, that the trial court was required to transfer the motion to this court as a PRP under CrR 7.8(c). Schreib's motion to withdraw his guilty plea is therefore converted to a PRP.

Timeliness of PRP

Before we consider the merits of Schreib's PRP,[7] a threshold issue is

[7] The allegations in Schreib's motion to withdraw his guilty plea can be categorized into the following claims:

(1) Sentencing: Schreib was sentenced under the wrong guidelines.
(2) Prosecutorial delay: Because he was 16 at the time of the commission of the offenses, Schreib should have been charged and tried in juvenile court. He also asserts ineffective assistance of counsel in connection with this issue. He asserts that his plea was unknowing, unintelligent, and involuntary because he was unaware of these issues surrounding juvenile court jurisdiction.
(3) Confession: Schreib was mentally disabled, mentally unstable, and not properly medicated at the time of his confession. Detectives had his father leave the interview room. Defense counsel did not investigate how the confession was obtained in light of his vulnerabilities. There was no hearing to determine the admissibility of his confession.
(4) Schreib's mental state: Schreib's guilty plea was unknowing, unintelligent, and involuntary because he was mentally unstable.
(5) Corpus delicti: The corpus delicti rule applied because the State relied solely on his confession.

whether it is a timely collateral attack under RCW 10.73.090. Schreib's arguments as to the timeliness of his motion to withdraw his guilty plea are relevant to this issue.[8] His first argument is that the time bar did not apply because he was not advised of the time limits on collateral attack at the time of sentencing. We remand for a reference hearing on this issue.

Courts are required by rule and statute to advise defendants at sentencing of the time limits on collateral attack. CrR 7.2(b) states:

> Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant: . . . (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. These proceedings shall be made a part of the record.

CrR 7.2(b). RCW 10.73.110 states, "At the time judgment and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100."

The one-year bar in RCW 10.73.090(1) is conditioned on compliance with RCW 10.73.110, requiring notice of its terms. State v. Golden, 112 Wn. App. 68, 78, 47 P.3d 587 (2002) (citing In re Pers. Restraint of Vega, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992). "RCW 10.73.110 is unambiguous. It imposes the duty that the court shall advise the defendant at the time judgment and sentence is pronounced in a criminal case of the time limit specified in RCW 10.73.090." Id. at 78. When a statute requires notice, the failure to comply creates an

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(6) Lack of evidence: The State failed to show evidence of sexual contact and did not prove intent.

[8] Under RCW 10.73.100, the time limit in RCW 10.73.090 does not apply to a PRP based solely on one or more of the grounds specified therein. Schreib does not argue, and it does not appear, that his motion to withdraw his guilty plea is based solely on one or more of those grounds.

exemption to the time bar. In re Pers. Restraint of Carter, 154 Wn. App. 907, 914, 230 P.3d 181 (2010), as amended (Aug. 24, 2010), rev. granted, 170 Wn.2d 1001, 245 P.3d 226 (2010), rev'd and remanded on other grounds, 172 Wn.2d 917, 263 P.3d 1241 (2011) (citing Vega, 118 Wn.2d at 451).

Here, it does not appear in the record before us that Schreib was orally advised at the time of sentencing of the time limits applicable to collateral attack under RCW 10.73.090. And no document such as a "Notice of Rights on Appeal and Certificate of Compliance with CrR 7.2(b)" appears to have been filed in the court docket. The State relies on a DOC document that was not before the trial court to show that Schreib received a copy of the judgment and sentence one day after sentencing.[9] It cites Carter to argue that receipt of the judgment and sentence is sufficient to meet the notice requirements of the rule and statute.[10] Nevertheless, the State suggests it is appropriate to remand for a reference hearing to address whether (and, if so, when) Schreib received a copy of the judgment and sentence. We agree and remand for a reference hearing.[11]

CONCLUSION

[9] The DOC document, titled "Conditions, Requirements, and Instructions," appears to contain Schreib's signature next to a line stating, "I have received a copy of the Judgment and Sentence on this cause." The judgment and sentence advised of the time limits on collateral attack. The DOC document is the subject of Schreib's motion to strike and the State's motion to supplement the record. We grant the motion to strike and deny the motion to supplement.

[10] In Carter, the court held a PRP was untimely, even though the sentencing court did not orally inform the petitioner of the time limits on collateral attack at the time of sentencing (it is unclear from the opinion when sentencing took place), where the petitioner acknowledged receiving a copy of his judgment and sentence in 2002, the judgment and sentence advised him of the limits on collateral attack, and he did not file a PRP until 2007. Carter, 154 Wn. App. at 913-14.

[11] We do not reach Schreib's remaining arguments as to why the one-year time bar did not apply or why his motion to withdraw his guilty plea was timely.

We remand for (1) correction of the error in the order modifying the judgment and sentence and (2) a reference hearing with appointed counsel on the issue of whether Schreib received notice of the time limits on collateral attack. The trial court's determination of the notice issue will bear on whether Schreib's PRP is now timely and requires consideration on the merits by this court. Finally, under the unique circumstances of this case we find it appropriate to permit Schreib to withdraw his current PRP before the reference hearing should he so choose.[12]

Remanded for further proceedings consistent with this opinion.

Spearman, J.

WE CONCUR:

Leach Dwyer, J.

[12] It appears from briefing submitted to this court that Schreib wishes to raise other issues in a collateral attack. In the interests of efficiency, unless time-barred, Schreib should be permitted to raise those issues in a single PRP.