Filed
Washington State
Court of Appeals
Division Two

November 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JOHN MCWHORTER, Respondent.	No. 55774-6-II UNPUBLISHED OPINION

LEE, J. — The State appeals the superior court's order denying its motion to transfer John McWhorter's CrR 7.8 motion to this court and granting a resentencing hearing. Because the superior court's order is not appealable under RAP 2.2(b), we dismiss the State's appeal.

FACTS

In 1997, McWhorter pleaded guilty to first degree rape, second degree rape, and first degree robbery all with firearm sentencing enhancements. McWhorter was 17 years old at the time of the crimes.

Per the plea agreement, both McWhorter and the State argued for a sentence within the standard sentencing range, which was 120-158 months for the first degree rape plus a 60 month firearm sentencing enhancement, 77-102 months on second degree rape plus a 60 month firearm sentencing enhancement, and 51-68 months on first degree robbery plus a 60 month firearm sentencing enhancement. However, they disagreed about how the three firearm sentencing enhancements should be imposed—consecutively or concurrently.

Despite the plea agreement, the sentencing court imposed a sentence of 496 months total confinement, which included an exceptional sentence of 316 months and three consecutive 60 month firearm sentencing enhancements. Following appeal, McWhorter's sentence was amended to order the firearm sentencing enhancements to run concurrent to each other but consecutive to the exceptional upward sentence. This resulted in 376 months of total confinement.

In August 2016, McWhorter filed a motion to modify his judgment and sentence to consider youth as a mitigating factor. The motion was transferred to this court for consideration as a personal restraint petition (PRP) because the superior court determined the motion was time barred. We stayed consideration of the PRP pending the outcome of various cases addressing juvenile sentencing. *See* Order Remanding CrR 7.8(c) Transfer Order, *In re Pers. Restraint of McWhorter*, No. 49557-1-II (November 3, 2020); Letter Ruling*, In re Pers. Restraint of McWhorter*, No. 49557-1-II (January 17, 2020). We then remanded the case back to the superior court for further consideration in light of recent Supreme Court opinions addressing juvenile sentencing. Order Remanding CrR 7.8(c) Transfer Order, *In re Pers. Restraint of McWhorter*, No. 49557-1-II (November 3, 2020).

McWhorter filed a memorandum arguing that he was entitled to resentencing because it was clear that his youth was not considered as a mitigating factor in his sentencing. The State moved to transfer McWhorter's motion back to this court because McWhorter could not make a substantial showing that he was entitled to relief. The State argued that McWhorter was unable to make a substantial showing that he is entitled to relief because he could not show actual and substantial prejudice.

The superior court concluded that McWhorter's motion was not time barred. The superior court also concluded:

> The second issue is whether Mr. McWhorter has made a substantial showing that he is entitled to relief. The State argues he has not shown prejudice, citing the case of *In re the PRP of Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019). The Court concludes *Meippen* is factually and legally distinguishable. In particular, the *Ha'mim* [case, 132 Wn.2d 834, 940 P.2d 633 (1997),] which was decided just six months prior to Mr. McWhorter's sentencing, demonstrates that his age and youth were not and could not be considered by Judge Conoley. Mr. McWhorter has made a substantial showing that he is entitled to relief.

Clerk's Papers at 170. The superior court denied the State's motion to transfer McWhorter's CrR 7.8 motion and ordered a resentencing hearing.

The State appeals.

ANALYSIS

The State appeals the superior court's order denying its motion to transfer McWhorter's CrR 7.8 motion and granting a resentencing hearing. Because this order is not appealable by the State under RAP 2.2(b), we dismiss the State's appeal.

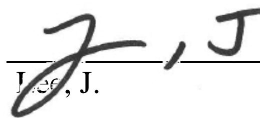
In a criminal case, the State may only appeal the following decisions: a final decision other than a not guilty verdict, a pretrial order suppressing evidence, an order arresting or vacating judgment, an order granting a new trial, certain juvenile dispositions, and certain sentences. RAP 2.2(b)(1)-(6). A CrR 7.8 order may be appealable by the State, if the order is an order that necessarily vacates the current judgment and sentence. *State v. Waller*, 197 Wn.2d 218, 225, 229, 481 P.3d 515 (2021).

Here, the order denying the State's motion to transfer McWhorter's CrR 7.8 motion is not appealable under any provision of RAP 2.2(b) nor does it necessarily vacate McWhorter's judgment and sentence. Further, the superior court's order granting resentencing, in this case, does not necessarily vacate McWhorter's judgment and sentence. McWhorter did not request that the superior court vacate his judgment and sentence, and nothing in the superior court's oral ruling or

written order states that McWhorter's judgment and sentence is vacated prior to the resentencing. Based on the record before this court, McWhorter's judgment and sentence was not necessarily vacated by the superior court's order. Accordingly, neither portion of the superior court's order is appealable by the State.

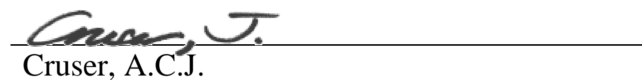
Because the superior court's order is not appealable by the State under RAP 2.2(b), we dismiss the State's appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Lee, J.

We concur:

Worswick, J.


Cruser, A.C.J.