

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

TED JENSEN,

Respondent.

No. 39166-0-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Ted Jensen appeals his resentencing, arguing that he did not intelligently or voluntarily waive his right to counsel below, that he was denied his right to prepare an adequate defense, and that the trial court (1) abused its discretion by failing to grant or consider various motions, (2) erred by imposing multiple firearm enhancements, and (3) violated his double jeopardy rights. He also raises several additional issues in his Statement of Additional Grounds (SAG). We affirm.

FACTS

This case is Jensen’s second appeal. Jensen, convicted of first degree assault with a deadly weapon, felony harassment with a deadly weapon, and first degree vehicle prowling with a deadly weapon, previously appealed his conviction and sentence. Along with Jensen’s previous appeal, the State cross-appealed, asserting “that the trial court erroneously failed to include one point for community placement when calculating Jensen’s placement score” under *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006). Clerk’s Papers (CP) at 76-77. This court affirmed Jensen’s convictions but agreed with the State on the offender score issue and remanded for resentencing.

For various reasons, the trial court’s resentencing proceedings involved multiple

appearances and two trial court judges. At Jensen's first appearance on resentencing, Jensen sought to represent himself. He claimed to have completed most of the work, and stated, "I don't even think I'll need a law library." Verbatim Report of Proceedings (VRP) at 1. The trial court conducted a colloquy and approved Jensen's request to represent himself. During the colloquy, the trial court told Jensen "the fact that you are representing yourself doesn't entitle you to additional services through the jail. So, you may be hampered just by the fact that you are in custody." VRP at 4. Jensen advised the court that his only special request was for the jail to make copies of his documents for the court, so he could keep his originals. Then the trial court discussed the State's position that the sentencing proceeding involved only legal issues and confirmed that Jensen understood this position. The trial court then set sentencing over to the judge who had conducted the jury trial.

At the next proceeding, the State requested that the trial court conduct a more thorough colloquy. The trial court did so and specifically asked Jensen if he understood that the only issue is the law, not the facts. Jensen said that he did. The trial court again made it clear that Jensen could have a court-appointed attorney if he wanted one.

Ultimately, Jensen agreed to stand-by counsel, which the trial court appointed. Jensen then asked, "Did the judge entertain my motions to submit these two on this thing?" VRP at 19. The trial court replied, "I'm going to have you talk to a lawyer. He is going to help you with getting the paperwork done . . . Anything else you would want him to help you with. But, you will be able to make the pitch at your sentencing." VRP at 20. The trial court then put the matter over to allow standby counsel time to become familiar with the case.

At the next hearing, Jensen, through his standby counsel, immediately asked for a one week continuance. Jensen, pro se, then sought to raise some of his arguments at the hearing. The trial court stated that “[t]he only issue on this matter is sentencing. The other issues that you want to [. . .] bring up have not been addressed by the Court of Appeals in this opinion.” VRP at 24. The trial court ultimately said, however, that Jensen “can file his papers. I’ll take a look at [them]. I’m skeptical about whether or not this issue can be raised at this hearing.” The trial court then set the matter over for one week. Jensen filed a series of motions, including a “motion to admit evidence previously unavailable” and a “petition for access/review of individual juror information.” CP at 90, 106.

At the final resentencing hearing the State reiterated its position that the only issue before the court “is to add the community custody point making [Jensen’s] offender score on the assault in the first degree charge 7 rather than 6.” VRP at 27. Jensen, pro se, presented a motion for a continuance because he came across new information that the State had relied upon and that he had not been able to read the documents before the hearing. Jensen then explained that he had evidence to dispute the State’s position regarding community placement in 2002.

The trial court denied his motion for a continuance. The State reminded the court of the facts of the case, including the relevant enhancement issues. The trial court, without considering defendant’s motions, then sentenced Jensen to the middle of the standard range, imposing 279 months of confinement. Jensen appeals.

ANALYSIS

I. Waiver of Right to Counsel

Jensen first contends that he did not knowingly and intelligently waive his right to counsel, because the trial court misadvised him regarding the resources that he was entitled to as a pro se defendant. A criminal defendant may waive his right to be represented by counsel and may choose instead to represent himself. *State v. Woods*, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001). The defendant must waive his right knowingly, voluntarily, and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The preferred method for determining the validity of a waiver of the right to counsel is “a court’s colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused’s defense.” *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

Jensen argues that the trial court’s statement during the colloquy regarding available services in the jail was incorrect, and precluded Jensen from knowingly and intelligently waiving his right to counsel. Jensen further argues that under *Silva*, the colloquy was insufficient and created structural error compelling reversal. But *Silva* does not stand for the proposition that any minor mistake made during a colloquy automatically requires reversal.

And as the State points out, the trial court conducted not one, but two colloquies that covered a wide range of issues that Jensen would face as a pro se defendant. The trial court informed Jensen as to his maximum sentence, his standard range, his responsibilities to make legal

presentations to the court and that he would be at an overall disadvantage in representing himself. Jensen clearly stated that he understood the issues and that he wanted to represent himself. In light of this, and the lack of authority for Jensen's position that any misadvisement, however minor, requires reversal, his argument fails.

II. Right to Prepare a Defense

Jensen next contends that he was denied his right to prepare a defense because the Cowlitz County Jail failed to provide him with reasonable resources. Pro se defendants are entitled to reasonable access to legal materials, paper, writing materials, etc. *State v. Nicholas*, 55 Wn. App. 261, 267-68, 776 P.2d 1385 (1989). Jensen references the fact that he provided materials to his standby counsel, which apparently he did not timely file, and a handwritten pleading stating that the Jail had provided him "no access to basics needed for proper/adequate preparation of materials for court" as the basis for his argument. Appellant's Reply Br. at 2.

It simply cannot be determined from the record whether the Cowlitz County Jail actually denied Jensen access to resources that he needed to prepare his pro se defense, aside from Jensen's own statements at the resentencing hearing and in his brief that he was not provided such resources. The record demonstrates, however, that Jensen was able to provide materials to his standby counsel for filing. Because the record does not support Jensen's position, his argument fails. *See State v. McFarland*, 127 Wn.2d 322, 33, 899 P.2d 1251 (1995) (a personal restraint petition is the appropriate method to obtain review of matters outside the record).

III. Motion for a Continuance

Jensen also contends that the trial court abused its discretion in failing to grant his motion for a continuance at the resentencing hearing, arguing that he was denied access to reasonable resources for preparation of his defense. The decision to grant a motion for a continuance is within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). And any such decision is reviewed for an abuse of discretion. *Downing*, 151 Wn.2d at 272. A trial court abuses its discretion when a decision is based on untenable grounds or for untenable reasons. *Downing*, 151 Wn.2d at 272.

Jensen has failed to adequately demonstrate an abuse of discretion in this instance. The trial court explored Jensen's argument for a continuance, and upon determining that he was trying to present additional facts regarding the issue of community custody, denied his motion. Jensen's argument presumes that the substantive issues and motions that he sought to raise on resentencing were properly before the court, which they were not. His argument fails.

IV. Post-Conviction Community Custody Motion

Jensen contends that the trial court abused its discretion and violated his due process rights by failing to rule on his post-conviction motion regarding community custody.¹ Jensen argues that the trial court essentially granted him leave to file a CrR 7.8 motion.²

Jensen relies on the trial court's statement to him that he could file whatever motions he

¹ Jensen, through this motion, wanted to show that he was not on community custody.

² CrR 7.8 allows a party to seek relief from a judgment or order in the case of clerical mistakes, newly discovered evidence and other mistakes, subject to certain conditions.

wanted to. But that passing statement does not accurately reflect the trial court's position on whether or not it would actually consider Jensen's motions. Instead, it is clear from the record that the trial court's understanding of the issue before the court was only resentencing based on an additional offender score point. And the prior Court of Appeals opinion in this case, which remanded for resentencing for that purpose only, supports this. *State v. Jensen*, 144 Wn. App. 1017, 2008 WL 1875945 at 15. As a result, the trial court did not abuse its discretion here. Jensen's argument fails.

V. Multiple Firearm Enhancements

Jensen further contends that when multiple offenses are the "same criminal conduct," they count as a single sentence and cannot be the basis for separate firearm enhancements. Br. of Appellant at 21. But our Supreme Court recently rejected this argument, holding that the enhancement statute is unambiguous and "a sentencing court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses that amount to the same criminal conduct under the sentencing statute." *State v. Mandanas*, 168 Wn.2d 84, 90, 228 P.3d 13 (2010).

Along with this, Jensen also contends that the trial court's imposition of additional incarceration for a deadly weapon enhancement in conjunction with his assault conviction violated his double jeopardy rights. But our Supreme Court recently reaffirmed that no double jeopardy violation occurs when the trial court imposes additional punishment based upon the defendant's use of a firearm or other deadly weapon during a crime. *State v. Kelley*, 168 Wn.2d 72, 78, 226 P.3d 773 (2010).

And finally, Jensen contends that multiple consecutive sentence enhancements imposed by the court based on the jury's findings that he used a single weapon in the multiple counts violate double jeopardy. But *Kelley*, 168 Wn.2d at 78 and *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010), two recent Supreme Court cases, also rejected this argument. Thus, all of Jensen's arguments relating to the multiple firearm enhancements fail.

VI. Statement of Additional Grounds

Jensen raises a series of additional issues in a SAG, including that (1) the trial court erred in sentencing him to the maximum allowed in two counts, (2) he received ineffective assistance of counsel when his standby counsel failed to properly file documents, (3) the trial court badgered and coerced the defendant into accepting standby counsel, (4) the trial court erred in not properly reviewing the judgment and sentence presented by the State before entering it and for failing to provide Jensen with a copy, (5) the State committed prosecutorial misconduct that prejudiced him, (6) the trial court improperly allowed the State to act outside of its proper role at sentencing, and (7) the trial court erred in failing to entertain Jensen's various motions.

A. *Maximum Term Sentencing*

Jensen first contends that the trial court erred in sentencing him to the maximum term allowed on his convictions for felony harassment and first degree vehicle prowling, even though the trial court stated that it would sentence him in accordance with the midrange. The trial court did impose a midrange sentence on the first degree assault charge, and on all charges sentenced him within the applicable standard range. RCW 9.94A.510; RCW 9.94A.515. And sentencing decisions within the standard range are only reviewed in rare instances, such as where the

sentencing court refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. RCW 9.94A.585. Thus, Jensen's argument fails.

B. *Ineffective Assistance of Counsel*

Jensen next contends that he was denied effective assistance of counsel when his standby counsel failed to "ensure paperwork was processed properly." SAG at 4.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Once appointed, standby counsel owes a defendant limited duties and obligations that, when violated, prejudice the proceedings and require reversal. *State v. McDonald*, 143 Wn.2d 506, 512-13, 22 P.3d 791 (2001); *see also State v. Pugh*, 153 Wn.App. 569, 580, 222 P.3d 821 (2009). These duties and obligations of standby counsel, and thus the extent of the defendant's right, are limited because the defendant "assume[s] complete responsibility for [his] own representation." *McDonald*, 143 Wn.2d at 512. The primary role of standby counsel is to provide technical information and to be prepared to represent the defendant in the event that he is no longer able to represent himself. *Pugh*, 153 Wn. App. at 580 (citing *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987)).

Jensen has failed to meet his burden here. The only issue before the court on resentencing was the addition of a point to his offender score. The issues he sought to raise through his

39166-0-II

various pleadings were not. Thus, any failure on the part of his standby counsel for failing to timely file them was not prejudicial. Jensen's argument fails.

C. Appointed Counsel

Jensen further contends that the sentencing court erred when it badgered and coerced him into accepting appointed counsel. As part of its colloquy, the trial court simply reiterated Jensen's rights to counsel. Jensen was the one who suggested standby counsel. The record simply does not support Jensen's claim that the trial court badgered or coerced him into accepting standby counsel. Thus, his argument fails.

D. Adequate Review of Judgment and Sentence

Jensen next contends that the trial court erred in failing to properly review the judgment and sentence presented by the State before entering it and for failing to provide Jensen with a copy of the document for review during the discussion. Jensen argues that the trial court also relied on the State's "fraudulent narrative" regarding its contents. SAG at 8. In making this argument, Jensen fails to adequately "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). The record here simply does not substantiate Jensen's argument. Thus, this argument fails.

E. Prosecutorial Misconduct

Jenson also contends that he "was placed at serious and considerable prejudice by the tactics and delaying actions of the State." SAG at 9. He goes on to argue that the State withheld records and other miscellaneous documents that he needed in order to adequately prepare his defense. Although the rules of appellate procedure do not require Jensen to cite to the record or authority in his SAG, nonetheless he has an obligation to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). This court is not required to search the record to

find support for his claims. RAP 10.10(c). It is unclear what exactly Jensen is referring to here. There is absolutely nothing in the record to substantiate his argument that the State prejudiced him through delaying tactics or otherwise. Thus, his argument fails.

F. Improper Reliance on State's Sentencing Statements

Jensen asserts that the trial court erred when it relied on the State's explanation of the court's prior rulings regarding sentencing without seeking Jensen's input. Jensen goes on to argue that in doing so, the trial court essentially denied him his constitutional rights. Again, it is unclear what error, if any, Jensen is referring to. RAP 10.10(c). The State simply provided a brief recitation of the history in this case for the trial court's benefit. There is nothing to suggest doing so was improper. Thus, Jensen's argument fails.

G. Failure to Entertain Various Motions and Petitions

Jensen finally contends that the trial court erred in failing to entertain his various motions, including a "Petition for Review of Individual Juror Information," a "Motion to Review Evidence and Authorities to [D]etermine Deadly Weapon Enhancement," a "Motion for Modification of Judgment and Sentence," and for failing to review two documents, an "Order for Release" and "WA ST DOC's documentation of total cost of supervision." SAG at 12. But this argument is essentially the same as his argument that the trial court abused its discretion in failing to consider his post-conviction community custody motions. Because we addressed this issue above and because the only issue on resentencing was to add an offender score point, these motions were not properly before the court. Thus, his argument fails.

We affirm.

39166-0-II

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Taylor, J.P.T.