

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. HOLCOMB,

Appellant.

No. 40470-2-II

Consolidated with:

No. 40790-6-II

UNPUBLISHED OPINION

Johanson, J. — Michael A. Holcomb appeals a contempt order finding him in contempt at his sentencing hearing and imposing a sanction of 60 days’ confinement. He asserts that the sentencing court failed to follow the statutory procedure required under RCW 7.21.050(1) by refusing him an opportunity to “speak in mitigation of the contempt” and by failing to impose sanctions immediately. In his Statement of Additional Grounds for Review¹ (SAG), he further asserts that he was denied release despite posting bail. We affirm.

¹ RAP 10.10.

FACTS

In November 2009, the State charged Holcomb with possession of heroin. Holcomb pleaded guilty. He remained out on bail until his March 1, 2010 sentencing hearing.

The case proceeded to sentencing on March 1. When defense counsel asked for a short continuance, the sentencing court² questioned why Holcomb, who had nine prior offenses, was not already in custody³ and why his bail had not been increased following his guilty plea. Although the sentencing court agreed to continue the sentencing hearing, it increased Holcomb's bail to \$25,000 and remanded Holcomb into custody.

The sentencing hearing reconvened on March 8. After hearing the parties' recommendations, the sentencing court asked Holcomb if he had anything to say. Holcomb's response to the court included the use of profanity three times, despite the trial court's repeated admonitions to Holcomb that his behavior was in contempt of court. The sentencing court had Holcomb removed from the courtroom. Later that day, Holcomb returned to court, and defense counsel advised the sentencing court that Holcomb was asking to "purge the contempt," and wanted to apologize for his "outburst." Verbatim Report of Proceedings (VRP) (Mar. 8, 2010) at 9. Holcomb then "apologize[d] for [his] outburst." VRP (Mar. 8, 2010) at 9. After briefly discussing some scheduling issues, the sentencing court announced that it was setting a hearing for the next morning to "determine what sanction, if any, to impose" for the contempt. VRP (Mar. 8, 2010) at 10. Defense counsel responded, "Like I said, for the record, he is willing to

² A different judge accepted Holcomb's guilty plea.

³ The State explained that Holcomb had "[p]osted bail." VRP (Mar. 1, 2010) at 3.

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purge it at this time and he has apologized to the Court.” VRP (Mar. 8, 2010) at 10. The sentencing court responded by repeating the date and time of the next hearing.

The next day, the sentencing court acknowledged that the hearing was to address the contempt issue and stated, “The statute requires that the defendant in these kinds of situations be given an opportunity to speak in mitigation. So, this is Mr. Holcomb’s opportunity, [defense counsel].” VRP (Mar. 9, 2010) at 11. Defense counsel explained that Holcomb had been angry in part because defense counsel had not explained the bail process following the guilty plea and in part because he would not be able to “say goodbye” to his new wife. VRP (Mar. 9, 2010) at 12. He also stated that Holcomb was upset by the 24-month sentence. The sentencing court then asked Holcomb if he wanted to say anything and Holcomb again apologized for his “outburst.” VRP (Mar. 9, 2010) at 13.

The sentencing court issued written findings of fact and conclusions of law on the contempt issue. The findings stated that Holcomb had engaged in inappropriate behavior before a crowded courtroom despite the sentencing court’s admonishment. Although the sentencing court acknowledged that Holcomb had apologized for his behavior, it found that he had committed “two acts of contempt” and ordered him to serve 60 days in jail prior to entry of the judgment and sentence.⁴ The sentencing court also stated that Holcomb had been “provided an opportunity to speak in mitigation as required by RCW 7.21.050.” Clerk’s Papers at 25. Holcomb appeals the contempt order.⁵

⁴ It also ordered that Holcomb would not receive credit for the 60 days against his sentence.

⁵ While this appeal was pending, the sentencing court also denied Holcomb’s motion to withdraw

ANALYSIS

I. Contempt Issues

RCW 7.21.050(1) provides:

The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge *shall impose the sanctions immediately after the contempt of court or at the end of the proceeding* and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. *The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.* The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(Emphasis added). Holcomb argues that the sentencing court erred in imposing contempt sanctions without allowing him the opportunity to speak in mitigation and in failing to impose sanctions immediately after finding him in contempt or by the end of the proceedings in which the contempt occurred. We disagree.

The sentencing court was not untimely in formally entering sanctions the day after the contempt occurred, after giving Holcomb a full opportunity to speak in mitigation. *See State v. Hobble*, 126 Wn.2d 283, 296, 892 P.2d 85 (1995) (imposing contempt sanctions one week after contempt occurred during trial proceedings was “timely” under RCW 7.21.050(1)). The record also shows that the sentencing court gave Holcomb ample opportunity to speak in mitigation; first

his guilty plea prior to entry of the judgment and sentence and a request for a “furlough.” VRP (May 24, 2010) at 4. After the sentencing court filed the judgment and sentence on May 24, 2010, Holcomb filed a second notice of appeal. We consolidated the notices of appeal. Holcomb does not, however, raise any issues related to the judgment and sentence or the order denying his motion to withdraw his guilty plea.

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on the day of the contempt, after allowing Holcomb the opportunity to calm down, and then the following day before entering the actual contempt order.

We note that RCW 7.21.050(1) does not expressly require that the court allow the person subject to the contempt order to speak in mitigation immediately following the contemptuous act. It merely requires that the person have an opportunity to speak before sanctions are formally imposed, unless there are compelling circumstances. Furthermore, compelling circumstances clearly existed here where Holcomb engaged in several outbursts in a short period of time during open court. Some delay in offering Holcomb the opportunity to speak in mitigation was appropriate. We hold that the sentencing court complied with RCW 7.21.050(1)'s requirements.

II. Bail Issue

In his SAG, Holcomb appears to assert that the sentencing court denied him release despite his having posted the required \$25,000 bail. Although the record suggests that Holcomb may have attempted to request release on bail, there is nothing in the record before us showing that he posted the required bond. Because this issue involves matters outside the record, we cannot consider it on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

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We affirm.

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.

Johanson, J.

We concur:

Armstrong, P.J.

Hunt, J.