**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| **STATE OF WASHINGTON,** | ) | **No. 28831-5-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **JOHN GARZA DIAZ,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |
| | ) | |

Sweeney, J. — The defendant here appeals an indeterminate sentence imposed following a plea of guilty to child rape. His criminal conduct spanned from 1998 to 2004. The statutory sentencing scheme for child rape changed from a determinate sentencing scheme to an indeterminate sentencing scheme in 2001. He urges that he was entitled to be sentenced under the former determinate sentencing scheme. But there is ample evidence of child rape after the statutory change to indeterminate sentencing for crimes of child rape to support the sentencing court's decision to sentence him under the new indeterminate scheme. We therefore affirm the sentence imposed for rape of a child.

FACTS

Juan Garza Diaz molested and raped his biological daughter from 1998 to 2005. The molestation escalated to rape starting in late 2001 when the child was 9 years old and continued until early 2005 when the child was 12 years old. This factual background is set out in the presentence investigation report that includes Mr. Diaz's statements to a presentence investigator. The State charged him with a single count of first degree rape of a child.

Mr. Diaz pleaded guilty in August 2006 to first degree rape of a child. In his statement on plea of guilty, Mr. Diaz said: "Between March 2004 and March 1998 I had sexual intercourse with W.C. a person less than 12 years of age, not my spouse while being more than 24 months older." Clerk's Papers (CP) at 27. The court accepted Mr. Diaz's plea and ordered a presentence investigation.

Mr. Diaz fled the state prior to completion of the investigation. He was arrested in Texas in February 2008 and transported back to Washington. He then argued that he was not effectively represented and moved to withdraw his plea. The court was not persuaded and denied his motion. Mr. Diaz next underwent a psychosexual evaluation as part of the special sex offender sentencing alternative presentence investigation. Mr. Diaz admitted to the evaluator that he had intercourse with the victim starting when she was 10 years old. She was 10 years old on March 12, 2002. The court sentenced Mr. Diaz to an indeterminate sentence pursuant to former RCW 9.94A.712 (2001). That statute called for an indeterminate sentence to be

bracketed by a minimum term within a standard range (here 111-147 months) and a maximum set by the statutory maximum for the crime (here life imprisonment). The court imposed a minimum sentence of 111 months and a maximum of life in prison, plus community custody for life.

DISCUSSION

Mr. Diaz appeals this sentence. He contends that he should not have been sentenced under former RCW 9.94A.712[1] to an indeterminate sentence because that statute applied only to those offenses committed after 2001. Mr. Diaz argues that both the charging documents and his statement on plea of guilty refer to his crime as occurring from 1998 to 2005, and RCW 9.94A.712 was not effective until September 1, 2001.

The question here is what statutory sentencing scheme (RCW 9.94A.712 or former RCW 9.94A.120 (2000)) applies, or should have been applied, by the court sentencing Mr. Diaz. That is a question of law and so our review is de novo. *State v. Taylor*, 111 Wn. App. 519, 522, 45 P.3d 1112 (2002). More specifically, the question is whether this record supports the sentencing court's implicit finding that an act of rape occurred after the triggering date of the new indeterminate statutory scheme, September 1, 2001.

The court must, of course, apply the sentencing statute in effect at the time the

[1] There have been several versions of former RCW 9.94A.712 (2001) *recodified as* RCW 9.94A.507 (Laws of 2008, ch. 231, § 33). We refer exclusively to the original for clarity. The later versions do not influence the analysis here.

defendant committed his offense. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). RCW 9.94A.712 required that the court impose an indeterminate sentence for convictions of first degree rape of a child, with a minimum term within a standard sentencing range and a maximum term of the statutory maximum for the offense. RCW 9.94A.712(1)(a)(i), (3). The court must also sentence the offender to community custody for the maximum statutory sentence. RCW 9.94A.712(5). But RCW 9.94A.712 applies to crimes committed after September 1, 2001. The statutory sentencing scheme in effect before that date called for a determinate sentence within a standard sentencing range. Former RCW 9.94A.120.

The State charged Mr. Diaz with first degree rape of a child based on allegations that Mr. Diaz had sexual intercourse with the victim from 1998 to 2005. RCW 9.94A.712(1) applies to crimes committed on or after September 1, 2001. This is after the date of the commission of at least some of the criminal acts charged here. Accordingly, the sentencing court must have had information that at least one of the multiple acts included in the single count occurred after the triggering date of RCW 9.94A.712.

*In re Personal Restraint of Crabtree* is controlling. 141 Wn.2d 577, 9 P.3d 814 (2000). There, the petitioner pleaded guilty to first degree child rape and first degree child molestation; he admitted that he committed the offenses between June 1, 1988 and August 31, 1988, as charged. *Id.* at 585.

The charging period spanned the effective date of the relevant statute, as is the case here. *Id.* at 580 (citing former RCW 9.94A.120(8)(a) (1988)). The Supreme Court concluded that evidence, other than his statement on plea of guilty, showed he committed the offenses during the period covered by the statute. *Id.* at 585. Specifically, (there as here) a psychological evaluation showed that Mr. Crabtree admitted to rape and molestation after the effective date of the statute. *Id.* at 586.

Here, Mr. Diaz admitted to a presentence investigator that he had intercourse with this child victim when she was 10 years old. The victim would have been 10 on March 12, 2002. These dates are after the September 1, 2001, effective date of the statute. That coupled with Mr. Diaz's statement on plea of guilty provides ample factual support for the sentencing court's conclusion that an act of child rape occurred after the effective date of RCW 9.94A.712. The fact that he may have also raped this child before the triggering date of this statute does not undermine the factual basis for application of the later statute and his sentence. *Crabtree*, 141 Wn.2d at 585.

Statement of Additional Grounds

Mr. Diaz also makes a number of assignments of error, independent of his appellate counsel.

A. *Miranda* Warnings

Mr. Diaz asserts that police failed to inform him of his *Miranda*[2] rights at the time

of arrest.

The State may not use a criminal defendant's statements acquired during custodial interrogation absent *Miranda* warnings. *Miranda*, 384 U.S. at 444. The State violates a defendant's constitutional rights if it seeks to introduce unwarned statements at trial. *United States v. Patane*, 542 U.S. 630, 641, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004). The only remedy for failure to give *Miranda* warnings is the "'exclusion of unwarned statements.'" *Id.* at 641-42 (quoting *Chavez v. Martinez*, 538 U.S. 760, 790, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003)).

No such violation occurred here. Mr. Diaz pleaded guilty to the charge of first degree rape of a child and the State did not seek to introduce any statements made during custodial interrogation.

B. Right to Counsel

Mr. Diaz asserts that he was denied his right to counsel because during custodial interrogation he requested an attorney three times and he was refused counsel. The record does not support his claim.

C. Counsel of Choice

Mr. Diaz asserts that the judge refused to let him hire a different attorney. There is certainly a right to counsel but there is no right to the counsel of the defendant's

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

choice. *State v. Romero*, 95 Wn. App. 323, 327, 975 P.2d 564 (1999). And we review the decision on the appointment of new counsel for an abuse of discretion. *Varga*, 151 Wn.2d at 200.

Here, the court appointed defense counsel. Mr. Diaz then wrote a letter to the judge requesting new counsel in October 2005. Mr. Diaz then absconded and failed to appear for sentencing on October 11, 2006. He was later apprehended in Texas and extradited back to Washington. The court then appointed new counsel. That lawyer withdrew because of a conflict and the court appointed a third lawyer. That is the record here. There is no record of any decision on Mr. Diaz's 2005 request for new counsel and, certainly, no record of objections to appointed counsel other than the 2005 request. In short, there is not enough for us to pass on his complaint.

D. Ineffective Assistance of Counsel

Finally, Mr. Diaz asserts that he received ineffective assistance of counsel because his appointed attorney failed to consider several of the arguments he suggested. Mr. Diaz says he told his attorney that the arresting officer failed to read him his *Miranda* rights but the attorney did not think the argument was viable. Mr. Diaz also claims that he told his attorney that he was denied counsel on three prior occasions and the attorney's response was the same. Mr. Diaz also says that his attorney failed to question many witnesses and failed to ask the court to pay for a polygraph.

To prove a claim of ineffective

assistance of counsel, the claimant must show (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel was effective, and Mr. Diaz must show that there was no legitimate tactical reason for counsel's conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Decisions made during the course of a trial are often tactical and are, therefore, best left to the lawyer trying the case. *Id.* at 336. There is no showing on this record of any failure to advise of *Miranda* rights, or denial of counsel, or of the loss of witnesses because of counsel's failures.

We affirm the sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Sweeney, J.

Korsmo, A.C.J.

Brown, J.