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Court of Appeals
Division II
State of Washington
11/6/2019 2:22 PM

NO. 52670-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

XAVIER M. MAGANA,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 09-1-03325-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

Xavier Magana, hereinafter referred to as “the defendant” pleaded guilty to first degree murder and unlawful possession of a firearm. Eight years later, the defendant filed several motions to “Correct Judgment and Sentence” with the trial court including those to compel discovery. The trial court properly denied the defendant’s time barred and frivolous.

II. RESTATEMENT OF THE ISSUES

- A. DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT’S UNTIMELY MOTIONS WHEN HE FILED THEM SEVERAL YEARS AFTER THE ONE YEAR TIME-BAR?
- B. EVEN *ASSUMING ARGUENDO*, THAT THE DEFENDANT’S ISSUES FELL WITHIN AN EXCEPTION TO THE ONE YEAR TIME-BAR, ARE HIS CLAIMS FRIVOLOUS AND WITHOUT MERIT?

III. STATEMENT OF THE CASE

On July 13, 2009, the Pierce County Prosecutor’s Office filed an information charging appellant with murder in the first degree and unlawful possession of a firearm. CP 1-2. The information was later amended to allege some aggravating circumstances on each count. CP 5.

On February 9, 2011, the parties were back before the court, as the prosecutor was willing to file a second amended information, dismissing the enhancements on count I and dismissing the unlawful possession of firearm charge entirely, in exchange for the defendant's plea of guilty. CP 6. Defendant and his attorney presented the court with a completed statement of defendant on plea of guilty. CP 7-15. At sentencing, the court imposed a high end standard range sentence of 333 months confinement and 36 months of community custody, indicated restitution would be set at a restitution hearing, ordered payment of \$2,200 in legal financial obligations and entered a no contact order with the victim's family. CP 18-30.

On January 4, 2018, the defendant filed a motion to correct order and judgment and sentence. CP 247-264. On October 1, 2018, the trial court denied the defendant's motion after "having reviewed the records and files herein". CP 91-92, 97, 192-194, 185-191. On October 9, 2018, the defendant filed a Notice of Appeal regarding the court's decision to deny his motion. CP 195-197, 203-214.

IV. ARGUMENT

A. THIS COURT PROPERLY DENIED DEFENDANT'S UNTIMELY MOTION WHERE IT WAS FILED FIVE YEARS AFTER THE ONE YEAR TIME-BAR.

RCW 10.73.090(1) subjects CrR 7.8 motions to a one-year statute of limitation. The statute provides:

No 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.

RCW 10.73.090(1). The time bar is applicable to any petition filed more than one year after July 23, 1989. RCW 10.73.130. The statute of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars consideration of motions filed after the limitation period has passed, unless the defendant demonstrates that the motion falls within an exemption to the time limit under RCW 10.73.090 (facial invalidity or lack of jurisdiction), or one of the exceptions listed in RCW 10.73.100.

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction;
or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100. *See also, State v. King*, 130 Wn.2d 517, 530-31, 925 P.2d 606 (1996); *In re Detention of Aguilar*, 77 Wn. App. 596, 603, 892 P.2d 1091 (1995).

The moving party bears the burden of proving that his motion falls within an exception to the one-year time limit. *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet that burden of proof, the party must state the applicable exception within his motion. *In re Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000). Neither the Supreme Court nor the Court of Appeals may grant relief on a petition that is time barred. *See* RAP 16.4(d).

Under RCW 10.73.090(3), 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.

The defendant's judgment in this case became final on March 14, 2013, the date the appellate court issued its mandate disposing of this direct appeal. *See* RCW 10.73.090. The defendant had one year from that date to file any petitions or motions challenging his judgment and sentence. Defendant waited five years before filing several motions to correct judgment and sentence with the trial court in October of 2018. Those motions presumably fall under CrR 7.8 as a request for relief from judgment. Because the defendant filed his motions well beyond the one year time limit allowed under RCW 10.73.090, his motions were time barred. The defendant fails to articulate how his motions fall within any exceptions to the time bar. Rather, he claims that his sentence is facially invalid without providing any articulable basis to support that claim. Where

the defendant failed to meet his burden of establishing that his claims fall within the one year exception to the time bar, the trial court properly denied his motions to correct judgment and sentence. As such, this Court should dismiss his claims and affirm his conviction.

B. EVEN ASSUMING THE DEFENDANT'S CLAIMS FELL WITHIN AN EXCEPTION TO THE TIME BAR, THEY ARE FRIVOLOUS AND WITHOUT MERIT.

Even assuming *arguendo*, that the defendant's claims fell within the one year exception to the time-bar. His claims are all without merit.

- a. The trial court did not err by denying the defendant's motion to produce mitigating and exculpatory evidence or hold an evidentiary hearing where it is well-established that a defendant is not entitled to postconviction discovery.

CrR 4.7 applies to pretrial discovery procedures. Our Supreme Court observed that pretrial discovery principles do not apply to postconviction processes. *State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011). Although the State has an ongoing duty to disclose evidence, this duty does not extend eternally to post-conviction proceedings. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-391, 972 P.2d 1250 (1999). "Prisoners seeking post-conviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief." *Gentry*, 137 Wn.2d at 391. There is no generalized

constitutional or rule-based right to discovery in noncapital, post-conviction proceedings. *Gentry*, 137 Wn.2d at 389-394.

The defendant filed several motions including one to produce discovery such as “mitigating evidence and exculpatory evidence” in the form of witness statements, cell phone GPS coordinates. CP 56-71, 93-96, 106-136-139. He also filed a motion requesting that this Court take judicial notice of his request for said discovery. However, the defendant is not entitled to ongoing discovery post-conviction from the State. *Id.* Because CrR 4.7 does not apply to post-conviction proceedings, the trial court did not err by denying his motion to compel post-trial discovery and/or hold an evidentiary hearing. As such, this Court should dismiss this claim and affirm his conviction.

- b. The trial court did not err when it denied his motions outside his presence where he has no constitutional right to be present during the denial of his motions.

A defendant has the constitutional right to be present at all critical stages of the proceedings. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970)(citing U.S. Const. amend VI, confrontation clause); Wn. Const. art. I, sec. 22; CrR 3.4. But a defendant does not have

the right to be present if legal matters are at issue rather than the resolution of facts. *In the matter of the Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

The defendant mistakes a criminal defendant's constitutional due process right to be present at all critical stages during criminal prosecution as extending to hearings on postconviction collateral issues. There is no constitutional right to be present when the trial court denies a CrR 7.8 motion. As such, his claim fails as he has no constitutional right to appear in person to present his argument.

- c. The trial court did not err when it denied his motions without first appointing him counsel as there is no constitutional right to counsel in postconviction proceedings.

There is no constitutional right to counsel in postconviction proceedings, other than the first direct appeal of right. *Gentry*, 137 Wn.2d at 390. Defendant had no constitutional right to counsel where he filed his motion several years after pleading guilty to murder in the first degree. Thus, the trial court did not err by denying his motion to compel without first appointing counsel.

- d. The trial court did not err when it denied the defendant's motions in the absence of a public hearing where the right to a public trial does not extend beyond trial.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the United States Constitution. Wash. Const. article I, section 10; *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." *Lormor*, 172 Wn.2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing) and *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, see *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and *State v. Strobe*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008).

Here, the defendant mistakes the right to public trial as extending to hearings on postconviction collateral issues. There is no legal authority to suggest that the trial court's decision to grant or deny a postconviction motion for relief must be done in open court. Where there exists no right to

public trial during postconviction proceedings, this Court should dismiss his claim and affirm his conviction.

- e. The trial court did not err when it denied his motions without providing a reason where there is no requirement to do so.

Defendant contends that the trial court erred by failing to provide a reason when it denied his motions to correct judgment and sentence. This claim fails where there is no legal authority which requires the court to do so. The defendant cites to *Beers v. Ross*, in support of his claim. Brief of Appellant at 18. His reliance on *Beers* is misplaced. In *Beers*, this Court held that the trial court was required to state a reason for denying homeowners' motion to file untimely reply to neighbor's counterclaim in a quiet title action, which resulted in judgment on the pleadings for neighbor who argued in summary judgment motion only that because homeowners failed to reply, she was entitled to judgment in her favor. *Beers v. Ross*, 137 Wn. App. 566, 571, 154 P.3d 277 (2007). This was a civil case which has absolutely no bearing on whether a trial court needs to provide a reason when denying a postconviction claim for relief. Where the trial court is not required to provide a reason for denying the defendant's post conviction motion for relief, this Court should dismiss his claim and affirm his conviction.

- f. The trial court did not err when it denied the defendant's motion to correct judgment and sentence where defendant challenges a non-existent exceptional sentence.

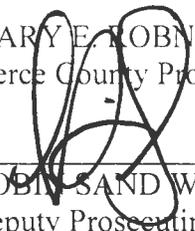
The defendant appears to argue that he was given an exceptional sentence in excess of his standard range. Brief of Appellant at 19. A review of the claim however, shows it is without merit as petitioner was not sentenced to an exceptional sentence. An exceptional sentence is a sentence outside the standard range. RCW 9.94A.535. Petitioner's standard range was 250-333 months, and petitioner was sentenced to 333 months of confinement, within the standard range. Because petitioner's sentence was within the standard range for his offense, petitioner fails to show in this claim that his judgment and sentence is invalid on its face.

V. CONCLUSION

For the foregoing reasons, the State asks that this Court dismiss the defendant's claims and affirm his conviction.

RESPECTFULLY SUBMITTED this 6th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


ROBIN SAND WSB# 47838
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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