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No. 53790-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FOREST EUGENE AMOS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

**Respondent's Brief/Response to Appellate
Counsel's Motion to Withdraw**

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I. ISSUES

- A. Did appellate counsel correctly determine there are no nonfrivolous issues on appeal and therefore should be permitted to withdraw as court appointed counsel by this Court?
- B. Did the trial court abuse its discretion when it denied Amos's CrR 7.8(b) motion to modify his judgment and sentence?

II. STATEMENT OF THE CASE

A jury convicted Amos of four counts of forgery and four counts of criminal impersonation in the first degree. CP 1. Each count of forgery was paired up with a count of criminal impersonation, and the court determined the four counts of criminal impersonation were the same criminal conduct for sentencing purposes. CP 103-04, 120. The State requested Amos receive an exceptional sentence due to his high offender score and the multiple current offenses resulted in some of the counts going unpunished absent an exceptional sentence. CP 81-83. The trial court sentenced Amos to the requested 29 months on each count of forgery, to run consecutive to each other, resulting in a 116 month sentence. CP 1-6, 104-05, 113-14. The trial court entered the required findings of fact and conclusion of law for the exceptional sentence. CP 113-14. Amos has appealed that conviction and sentence on direct review (COA No. 504006-II),

which is still pending due to it being stayed during the conclusion of *In re Amos*, 1 Wn. App. 2d 578, 406 P.3d 707 (2017). CP 15.

Amos, while his direct appeal was stayed, filed a CrR 7.8(b) motion to modify the judgment and sentence. CP 14-37. Amos was appointed counsel, as requested, further briefing was allowed, and a hearing was held. See RP (5/7/19); CP 23, 39-116. Amos argued his exceptional sentence was in excess of the statutory maximum sentence allowed because he was convicted of Class C felonies, and therefore, his maximum aggregate sentence for all counts could be five years. RP (5/7/19) 3-7; CP 14-37, 40-52. The State argued Amos's position was contrary to the plain meaning of the statute. RP (5/7/19) 9-18. The trial court denied Amos's CrR 7.8(b) motion. RP (5/7/19)18-20; CP 120-22. Amos timely appeals the denial of his motion. CP 130-34.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. APPELLATE COUNSEL HAS CORRECTLY DETERMINED THERE ARE NO NONFRIVOLOUS ISSUES ON APPEAL.

Counsel has identified (2) potential appellate issues: (1) does RCW 9.94A.506(3) and RCW 9.94A.535 prohibit the sentencing

court from imposing a consecutive sentence that exceeds the statutory maximum sentence designated in RCW 9A.20.021 when sentencing a defendant for multiple crimes to an exceptional sentence using the free crimes aggravator, and (2) is the language in RCW 9.94.535 ambiguous, and therefore subject to the rule of lenity in regards to the phrase “subject to the limitations in this section”? Motion at 2-3. Counsel correctly notes each of these issues lack merit. Counsel also has requested permission from the Court to withdraw as Amos’s court appointed counsel.

A motion to withdraw as court appointed counsel on review on the ground there is no basis for a good faith argument must “be accompanied by a brief referring to anything in the record that might arguably support the appeal.” *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970), *citing Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); *see also* RAP 15.2(i); RAP 18.3(a). The indigent defendant should be given a copy of this brief and allowed time to raise any issues of his or her choosing. *Id.* The court then decides whether the case is wholly frivolous after a full examination of the proceedings. *Id.*

Amos’s counsel has complied with this procedure. The State concurs with counsel’s assessment that there are not any

meritorious issues. The State, while understanding Amos's counsel's addressment of the issues, would respectfully point out, if this were a full briefing, the State would be countering the issues as follows below. Even with the State's reassessment of how the issues must be presented to this Court, there are still no meritorious issues to present. Amos has not filed a *pro se* brief. Therefore, this Court should grant counsel's motion to withdraw and affirm Amos's sentence.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED AMOS'S CrR 7.8(b) MOTION.

The trial court did not abuse its discretion when it denied Amos's CrR 7.8(b) motion to modify his judgment and sentence. Amos's motion was based on an alleged error in the maximum sentence the trial court was allowed to impose when it sentenced Amos to a 116 month exceptional sentence. Amos cannot relitigate the issues below, the only issue before this Court is the trial court's determination of the CrR 7.8(b) motion. This Court should affirm the trial court's denial of the CrR 7.8(b) motion to modify Amos's judgment and sentence.

1. Standard Of Review.

A trial court's determination of a CrR 7.8(b) motion is reviewed for abuse of discretion, and the findings of fact that support this

decision are reviewable for substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997).

Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008.

Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

At this point, there are no assignments of error to the findings of fact and conclusion of law. CP 120-22.

2. A CrR 7.8(b) Motion Is A Collateral Attack And The Defendant Must Establish Actual And Substantial Prejudice To Be Entitled To Relief From Their Judgment And Sentence.

CrR 7.8 allows for relief from final judgment when a defendant provides sufficient proof of:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Motions brought under CrR 7.8(b) are also subject to RCW 10.73.090, RCW 10.73.100, RCW 10.73.130, and RCW 10.73.140, all which govern collateral attacks. A motion for a collateral attack pursuant to CrR 7.8(b) must be filed within one year of the judgment being final with the exception of collateral attacks brought under subsections (1) and (2), which must be brought within a reasonable time.

Reviews of alleged errors on collateral attacks are distinct from review on direct appeal. *In re Stockwell*, 179 Wn.2d 588, 597, 316 P.3d 1007 (2014). “[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and

sometimes costs society the right to punish admitted offenders.” *Id.* (internal quotations and citations omitted).

In *Stockwell* the Court analogized the burden a petitioner must meet in a personal restraint petition showing prejudice resulting from misinformation regarding sentencing consequences with the burden required of a defendant in a CrR 7.8 motion. *Id.* at 601-02. *Stockwell* argued to the Court the prejudice standard found under CrR 4.2, the manifest error requirement, mirrored prejudice standard required in a personal restraint petition. *Id.* at 601. The Court rejected *Stockwell*’s argument, noting post-sentence motions to withdraw a guilty plea are not governed by CrR 4.2, but by CrR 7.8(b). *Id.* The Court stated:

CrR 7.8 represents a potentially higher standard than CrR 4.2(f) for withdrawing a plea. Just as a petitioner may need to meet a higher burden when withdrawing a plea postjudgment versus prejudgment, so should a petitioner in the context of a PRP.

Id. at 602. The Court concluded a petitioner, who was seeking to withdraw his guilty plea after being misinformed about the statutory maximum sentence, was required to show the complained error caused actual and substantial prejudice. *Id.* at 602-03.

Therefore, prejudice is not presumed in a collateral attack in the trial court pursuant to CrR 7.8. A defendant seeking to have his

sentence modified in a post-sentencing CrR 7.8(b) collateral attack motion, such as the one Amos filed, must establish the alleged error caused actual and substantial prejudice.

3. Review Is Limited To The Trial Court's Denial Of The CrR 7.8(b) Motion.

The issues identified in the motion to withdraw fail to acknowledge this is an appeal of a CrR 7.8(b) motion. Motion to Withdraw. Amos does not get to relitigate each issue to this Court as if this were a direct appeal of the issues presented in his CrR 7.8 motion. Amos's only course of action in this appeal is to argue the trial court abused its discretion when it reached its decision to deny his motion.

A defendant has a right to appeal the denial of their CrR 7.8(b) motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Yet, on appeal, the only order before the appellate court is the denial of the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509. "The original sentence would not be under consideration." *Id.* Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8 motion. *Id.*

Under the limited review in this matter, Amos does not prevail. This Court must limit this appellate review to a review of the trial

court's decision in the CrR 7.8 hearing, and not allow Amos to relitigate the matter through this appeal.

4. The Trial Court Did Not Abuse Its Discretion When It Determined Amos Had Not Shown He Sustained Actual And Substantial Prejudice, Therefore Amos Had Failed To Meet The Requisite Burden To Entitle Himself To Relief.

The trial court did not abuse its discretion when it denied Amos's CrR 7.8(b) motion. The trial court read all the briefing, and heard the arguments of the parties. The trial court applied the correct legal standard and determined Amos had not met his burden, as required as the person bringing the post-conviction collateral attack. CP 120-22. The trial court did not abuse its discretion when it determined Amos did not meet his burden to show he suffered actual and substantial prejudice by his claimed errors. *Id.* The trial court's denial of the motion was not manifestly unreasonable or untenable. Therefore, the trial court's denial should be affirmed.

Amos asserted he was entitled to relief under CrR 7.8(b)(1). CP 14. Amos argued the trial court improperly imposed an exceptional sentence in excess of the statutory maximum allowed. RP (5/7/19) 3-7, 17-18; CP 14-37, 40-52. Amos based his argument on a misunderstanding of RCW 9.94A.537(6) within the contexts of the Sentencing Reform Act, and its application to concurrent and/or

consecutive sentences imposed pursuant to RCW 9.94A.535. *Id.* Amos asserted the maximum sentence he could receive from the trial court for any Class C felony is five years in total, regardless of how a many separate counts there may be. *Id.* Amos based this argument on RCW 9.94A.537(6) which allows exceptional sentences to be a term of confinement up to the maximum allowed under RCW 9A.20.021. CP 17-23. Amos also argued the rule of lenity should be applied and the trial court should vacate his exceptional sentence and resentence him within the five year statutory maximum sentence. RP (5/7/19) 3-7.

The trial court recognized Amos's position is contrary to the plain language of the statutes and the case law. CP 120-22. A trial court may depart from the standard range without a jury finding, aggravating a sentence, if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). RCW 9.94A.010 is the statute setting forth the purpose of the Sentencing Reform Act:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Therefore, if the trial court determines the standard range does not promote the purpose of the SRA, there is substantial and compelling reasons to impose the exceptional sentence, an aggravating factor applies as a matter of law, then “the trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.” *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotations and citations omitted).

Sentences imposed upon a person for multiple current offenses are generally run concurrent to each other. RCW 9.94A.589(1)(a). Yet, the legislature created an exception to the rule for exceptional sentences:

Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. **Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535...**

Id. (emphasis added). This consecutive sentence provision is also discussed in RCW 9.94A.535:

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

This necessarily shows an exceptional sentence includes the possibility of running multiple current offenses consecutive to each other.

Amos asserted that the five year statutory maximum, RCW 9A.20.021, is incorporated by reference by the wording in RCW 9.94A.535 stating, "subject to the limitations in this section." CP 17-18. Amos also argued "subject to the limitations in this section" language subjects the sentence to the requirements set forth in

RCW 9.94A.537. *Id.* Pursuant to RCW 9.94A.535, “[f]acts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.” Therefore, RCW 9.94A.537 only applies to aggravating circumstances alleged, pleaded, and proved under subsection (3), which are jury findings. RCW 9.94A.535. Amos’s aggravating circumstance was “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished” or the free crimes aggravating factor as it is commonly called. RCW 9.94A.535(2)(c). The free crimes aggravating circumstance is a judge determined circumstance based upon prior criminal history and the current convictions and not subject to RCW 9.94A.537.

“A sentence may not exceed the statutory maximum term set by the legislature.” *State v. Hagler*, 150 Wn. App. 196, 203, 208 P.3d 32 (2009). *Hagler* discusses the how a trial court may not exceed the statutory maximum sentences, as set forth in RCW 9A.20, when the court sentences a defendant to a standard range sentence and community custody. *Hagler*, 150 Wn. App. at 203. It notes how the statutory maximum for a class C felony, such as Identity Theft in the

Second Degree, is five years, and therefore the sentence may not exceed 60 months. *Id.*

Amos's sentence is subject to the limitations of a statutory maximum sentence, which for each count of forgery, is 60 months. RCW 9A.20.021(1)(c); RCW 9A.60.020(3). The trial court did not exceed the statutory maximum sentence for Counts I-IV, as each count received 29 months, 31 months less than the statutory maximum sentence. RCW 9A.20.021(1)(c); RCW 9A.60.020(3); CP 1-6. There is nothing in the statutory framework, language, or the case law that aggregates all of the Class C felonies into one bucket and allows only one 60 month sentence. This is an absurd result, runs contrary to RCW 9.94A.535 and RCW 9.94A.589(1)(a), and the purposes of the Sentencing Reform Act. See, RCW 9.94A.010.

The trial court did not abuse its discretion when it evaluated the statutory framework of RCW 9.94A.535, RCW 9.94A.537, and RCW 9.94A.589 to determine that Amos had been properly sentenced. CP 120-21. The trial court's finding that Amos's reading of the statutes was a novel reading, accurately describes the illogical reasoning of Amos's briefing and argument. CP 121. The trial court did not abuse its discretion when it concluded that "Amos provided no authority that showed his sentence was illegal, therefore, Amos

did not meet his burden pursuant to CrR 7.8(b)(1) to show the court made a mistake, which Amos sustained actual and substantial prejudice from, requiring resentencing.” CP 121. Therefore, this Court should affirm the trial court’s denial of Amos’s CrR 7.8(b) motion.

IV. CONCLUSION

Appellate counsel has correctly determined there are no nonfrivolous issues that could be raised on appeal in this case. The two potential areas counsel identifies have no merit. The trial court did not abuse its discretion when it denied Amos’s CrR 7.8(b) motion to modify his judgment and sentence. This Court should grant appellate counsel’s motion and dismiss this appeal.

RESPECTFULLY submitted this 23rd day of January, 2020.

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