

FILED

AUG 5 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Nos. 28769-6-III, 28771-8-III, 28772-6-III, 28773-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Appellant,

v.

EDWARD SMITH,
RICK NEUMAYER,
JAMIE HUSK,
RANDOLPH CAUL,

Respondents.

CONSOLIDATED APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Harold D. Clarke

RESPONSE BRIEF

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A. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by modifying the defendants' sentences pursuant to CrR 7.8(b)(5). Extraordinary circumstances arose after original sentencing (i.e. the County lost funding for its partial confinement programs) that were neither known nor anticipated. The modification to a different sentence, which was also within the standard range set by the Sentencing Reform Act (SRA), served the interests of justice in these matters. The trial court should be affirmed.

B. APPELLANT'S ASSIGNMENTS OF ERROR

1. "DID THE SENTENCING COURT HAVE AUTHORITY TO MODIFY THE DEFENDANTS' SENTENCES 'AFTER THE FACT.'"

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court had authority under CrR 7.8(b)(5) to alter the sentences after the State lost funding for defendants' partial confinement programs, because these circumstances did not exist at the time of original sentencing and modification was necessary to prevent injustice.

D. RESTATEMENT OF THE CASE

There are four defendants/respondents in this consolidated appeal, including Rick Neumayer, Jamie Husk, Edward Smith and Randolph Caul.¹

¹ This response brief is being submitted by assigned appellate counsel Kristina Nichols on behalf of all four defendants.

Each of the defendants in this matter is similarly situated.

Following termination from drug court, each defendant received a nine-month sentence with partial confinement authorized, including work crew, home detention or work release. (CP 28, 68, 126, 178) Mr. Husk had completed a Pilot Program and would be finishing out his sentence on work release. (CP 145-46) The remaining defendants were all serving their sentences on electronic home monitoring. (CP 82, 32, 142-43; RP 4)

Due to budget issues, the County eliminated its partial confinement programs at the end of 2009. (RP 4-6; CP 82, 32, 142-43) The defendants were informed that, through no fault of their own, they would have to serve out the remainder of their time in total confinement. (*Id.*)

On December 23, 2009, upon motion of the defendants, the trial court amended their judgments and sentences and imposed 6 months confinement, the low end of the standard range. (CP 50-51, 99-100, 162-63, 205-06; RP 18-20) This effectively led to the defendants' release from total confinement because they had credit for time served. (RP 9) The court explained that it would have initially imposed this same sentence if it would have known partial confinement would not be an option.² (RP 18, 20) The State appealed. (CP 52, 101, 164, 207)

² The trial court also considered ordering privately funded electronic home monitoring (e.h.m.), but it questioned whether this constituted a qualifying home detention "program" under the SRA since it would not be State-monitored. (RP 21); *see also* RCW 9.94A.030(28) and (34). This Court need not reach this issue, however, because the 6-

E. STANDARD OF REVIEW

The State mistakenly suggests that the standard of review in this matter is de novo.

It is true that “[w]hether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981(SRA) is an issue of law, which [this Court] review[s] independently.” *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003) (citing *State v. Hale*, 94 Wn. App. 46, 54, 971 P.2d 88 (1999)). However, the issue in this case is not whether the court imposed a sentenced that was unauthorized by the SRA. Unlike in some cases where trial courts have attempted to impose a sentence outside the scope of the SRA³, the court here imposed the SRA’s low-end of the standard range on modification.

The issue in this case, rather, is whether the trial court abused its discretion by modifying the judgments and sentences pursuant to CrR 7.8(b)(5). “The standard of review on a CrR 7.8(b) motion is abuse of discretion.” *State v. Florencio*, 88 Wn. App. 254, 257, 945 P.2d 228 (1997) (reviewing a sentencing modification) (citing *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *State v. Ellis*, 76 Wn. App.

month standard-range sentence that the court did impose was certainly within the SRA’s determinate sentencing scheme.

³ See e.g. *State v. DeBello*, 92 Wn. App. 723, 964 P.2d 1192 (1998) (trial court could not defer or suspend felony sentences since SRA did not authorize such action); *Hale*, 94 Wn. App. 46 (trial court could not give credit against confinement for drug treatment because such a sentence was not authorized by the SRA).

391, 884 P.2d 1360 (1994)). “The court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *Id.* (citing *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966)). *See also State v. Quintero Morelos*, 133 Wn. App. 591, 595-96, 137 P.3d 114 (2006) (reviewing sentence modification under CrR 7.8 for abuse of discretion)

Because the six-month standard-range sentence was within the scope of that authorized by the SRA, the question for these purposes is whether the trial court abused its discretion by modifying the sentences under CrR 7.8(b)(5). As explained below, the trial court did not abuse its discretion by modifying the defendants’ sentences.

F. ARGUMENT

Issue 1: Whether the court had authority under CrR 7.8(b)(5) to alter the sentences after the State lost funding for defendants’ partial confinement programs, because these circumstances did not exist at the time of original sentencing and modification was necessary to prevent injustice.

The trial court acted within its discretion by modifying the defendants’ sentences to the low-end of the standard range in the interests of justice after the State lost funding for the partial confinement programs.

In general, the trial court does not have inherent authority to modify sentences whenever and however it sees fit simply because it imposed the original sentence. *State v. Shove*, 113 Wn.2d 83, 84-91, 776

P.2d 132 (1989); *Florencio*, 88 Wn. App. at 257 (citing *State v. Sampson*, 82 Wn.2d 663, 665-67, 513 P.2d 60 (1973)). The trial court must act within the authority given to it by the SRA. *Shove*, 113 Wn.2d 83. Absent a specific exception delineated in the SRA⁴, “[t]he revision, if proper, must have been authorized by CrR 7.8(b)...” *Florencio*, 88 Wn. App. at 257. *See also Shove*, 113 Wn.2d at 88 (citing CrR 7.8) (final judgments in criminal matters may be altered in those “limited circumstances where the interests of justice most urgently require.”) *And see* 4A WAPRAC CrR 7.8.

“On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- “(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.”**

⁴ The SRA authorizes early release from confinement when there is credit for early release time, a furlough, certain medical emergencies, governor release for extraordinary situations, governor pardon, release within 10 days of scheduled release time or overcrowding at the institution. RCW 9.94A.728 (former RCW 9.94A.150).

CrR 7.8(b) (emphasis added). “A vacation under section (5) [above] is limited to extraordinary circumstances not covered by any other section of the rule.” *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122-23, 110 P.3d 827 (2005) (citing *State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994) (citing *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992))). Importantly, “CrR 7.8(b)(5) does not apply when the circumstances alleged to justify the relief existed at the time the judgment was entered.” *Id.* (citing *Cortez*, 73 Wn. App. at 842).

A modification of a sentence is not proper under CrR 7.8(b) if the circumstances justifying the modification existed at the time the original sentence was imposed. For example, in *State v. Florencio*, the State was not permitted to modify a sentence to include two prior convictions that were in existence at the time of the original sentence. *Florencio*, 88 Wn. App. at 259. Similarly, in *State v. Shove*, it was not proper to amend a sentence from work release to home detention where doing so would have been based on circumstances that should have been known at the time of original sentencing (i.e., the risk of defendant losing her business as a result of confinement was known). *Shove*, 113 Wn.2d at 86, 88 (“*Since these factors can be known at the time of sentencing, there is no need to grant the power to modify the terms of sentences at some later date...*”). Modification of a judgment is not appropriate merely because it appears,

wholly in retrospect, that a different decision might have been preferable”).⁵

On the other hand, a sentencing modification is appropriate under CrR 7.8(b)(5) when circumstances are discovered after the original sentence is imposed that urgently require an alteration of judgment in the interests of justice. For example, in *State v. Klump*, the defendant’s sentence could be modified where his sentence was to run consecutive to that for a federal conviction and the federal sentence was later reversed. *Klump*, 80 Wn. App. 391, 393-98, 909 P.2d 317 (1996). This Court held, “reversal of the federal sentence occurred after the judgment was entered and qualifies as an ‘extraordinary circumstance’ justifying the relief” under CrR 7.8(b)(5). *Id.* at 397.⁶

Here, the State entirely ignored CrR 7.8(b)(5) as a proper vehicle for modifying a judgment and sentence in its appeal, despite the fact that this was the primary and proper basis for the court’s ruling. State’s Opening Brief, *passim*; CP 50-51, 99-100, 162-63, 205-06; RP 18-20. Like in *Quintero Morelos* and *Klump*, *supra*, the defendants in this matter

⁵ See also *Cortez*, 73 Wn. App. at 842 (where defendant was warned at guilty plea hearing that he would be illegally deported, his judgment and sentence could not be vacated under CrR 7.8(b) in order to avoid these known consequences).

⁶ See also *Quintero Morelos*, 133 Wn. App. 591 (This Court affirmed reduction of sentence by one day under CrR 7.8(b)(1) where defense counsel neglected to inform the court that a 365-day rather than 364-day sentence would result in the defendant’s deportation. Judge Schultheis explained from the trial court bench, “I can tell you in good conscience if I had known that that would make a difference, I would have imposed 364 days, because it doesn’t change the number of days that he actually serves.”)

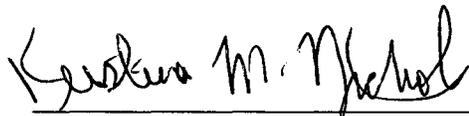
would not have received the sentence they did if the circumstances would have been different at original sentencing. The trial court explained that it would have imposed the six month, low-end standard range sentence in the first place had it known that partial confinement would not be an option. RP 18, 20.

The defendants, who had all been successful with their individual programs, were going to be returned to total confinement through no fault of their own simply because the County lost funding to support their partial confinement programs. This would have interrupted the defendants' work and schooling progress, and it was not what the trial court intended at original sentencing. The County could no longer afford electronic home monitoring, work crew or work release and terminated the programs. These extraordinary circumstances occurred after the defendants were sentenced and were not known or anticipated at original sentencing. The court did not abuse its discretion by finding that these circumstances required modification of defendants' sentences from nine months with partial confinement to six months confinement, both of which were standard range sentences authorized by the SRA. In the interests of justice, and pursuant to CrR 7.8(b)(5), Respondents ask this Court to affirm the trial court's discretionary sentencing modification.

G. CONCLUSION

The trial court did not abuse its discretion by modifying defendants' sentences pursuant to CrR 7.8(b)(5) after the County lost funding to support the defendants' partial confinement programs. The trial court should be affirmed.

Respectfully submitted this 4 day of August, 2010.



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