

FILED

NOV 07, 2011

Court of Appeals
Division III
State of Washington

NO. 297373

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JESSE JAMES REYNOLDS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00313-8

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF FACTS

THE TIMELINE:

January 18, 2002: Defendant commits the crime of Malicious Mischief in the First Degree against various individuals including:

Jim Anderson,
Dennis Miley,
Ken Leaf,
Sonia Tovar,
Gary Allen,
Marily McKee,
Georgia Quackenbush,
Lisa Wood,
Greg Simonson, and
David Nichol. (CP 42-43, 63).

January 22 to January 29, 2002: Defendant commits the crime of Malicious Mischief in the First Degree against other various individuals including:

Donald Hoover,
Karla Flores,
Dale Harding,
Nina Kostyuk,
Hermelinda Munguia,
David Norris,
Chervenell Construction,
Pansy Farrens,
Charles Dietz, and
Beverly Tamburello. (CP 43).

February 1 to February 13, 2002: Defendant commits the crime of Malicious Mischief in the First Degree against other individuals including:

Georgia Quackenbush,
David Nichol,
Gerald Howard,
Kenneth Leaf,
Harry Hoeckelberg,
Greg Simonson,
Shane Burkhead,
Kerrie Tamurello,
Chet Harshman,
David Johnstone,
Pansy Farrens,
Oudone Voraphaychith,
Jessie Ryan,
Sheri Bennett,
Gary Lefebvre,
Glenn Whitman, and
Richard Hendrickson. (CP 44).

February 15, 2002: Defendant commits the crime of Malicious Mischief in the First Degree against:

Greg Simonson,
David Nichol,
Harry Hoeckelberg,
Mike Fleming,
Paul Purdy and
Margaret Leaf. (CP 45).

March 15, 2002: The defendant is charged with the above offenses. (CP 42-45).

April 2, 2004: The defendant is sentenced on the above offenses. (CP 63).

March 21, 2010: The defendant commits the crime of Robbery in the First Degree. (CP 1-2).

April 29, 2010: Defendant pleads guilty to Robbery in the First Degree with a listed offender score of two. (CP 3-11).

May 6, 2010: Defendant is sentenced, with an offender score of two. (CP 14).

June 14, 2010: Defendant files a pro se Motion to Modify or Correct Judgment and Sentence, which he dated June 6, 2010. (CP 24).

He states:

I was charged with four counts of Malicious Mischief as a juvenile under one cause number. At sentencing the State gave me two points under one cause number. I contest that it should be one point because I was charged all four counts of Malicious Mischief under one cause number same criminal conduct I would like for my offender score to be one point and my sentencing range would be 31 to 41 months. Please modify or correct offender score.

(CP 22-23).

July 22, 2010: The defendant's motion is denied. (CP 55).

January 10, 2011: The defendant files another pro se Motion to Modify or Correct Judgment and Sentence, stating:

Other:

On July 10, 2002, I took a plea of guilty under a deferred [sic] Judgment [sic] filed in Benton Co. 07/31/02. Based on basis of addendum and order on multiple count disposition, order of disposition filed on 04/02/04. The use of the addendum in my case was to encompass the balance of the order of disposition for 4 Counts of Malicious [sic] Mischief in the 1⁰ on 05/05/10 I accepted [sic] a plea bargain of Robbery.

Relief

To be Resentenced under my proper offender score of 0 based on Washington Sentencing guidelines. Standard Range for a Level IX is 31-41 months for Robbery in the 1⁰.

(CP 59).

January 27, 2011: That motion is denied.

(CP 68).

February 17, 2011: The defendant files a Notice of Appeal regarding the January 27, 2011,

Order denying his Motion to Correct and Modify Sentence. (CP 71).

Response to Defendant's "Statement of Facts": The defendant did not argue that his juvenile convictions washed out.

The defendant writes, "In January 2011, Mr. Reynolds filed a third Motion to Modify or Correct Judgment and Sentence. (CP 58-65). This time he argued he should have been sentenced based upon an offender score of zero because all of his juvenile convictions washed out. (CP 59)." [Emphasis added; footnote omitted] (Appellate Brief at 3). However, the defendant did **not** claim in CP 59 that his juvenile convictions washed out. The defendant wrote in an attachment:

1⁰ Degree with an incorrect offender score of 2 when it should have been based on 0 score.
Additional grounds for correction of offender score.
See attached Appendix pg. 1 thru 4.

Also RCW 9.94A.525.(5)(a)(9)^[1]
RCW 9.94A.589.^[2] under criminal history
section
Former RCW 9.94A.360(4)^[3] wash-out
period
Case Law State v. Tiscorino, 124 Wn.
App. 476, 98 P.3d 529 (2004).^[4]

(CP 61).

ARGUMENT

1. **RESPONSE TO DEFENDANT'S ARGUMENT NO. 1, "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER MR. REYNOLD'S THIRD MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE."** (Appellate Brief at 5).

A. The defendant's argument is pointless; the defendant's prior convictions do not wash out.

The defendant's class B felonies⁵ committed in 2002 for which he was sentenced in 2004 could

¹RCW 9.94A.525(5)(a)(9) deals with the scoring of serious violent and violent offenses and is not applicable.

²This is probably a reference to the "same course of criminal conduct" argument the defendant brought before.

³The statute referring to wash-out periods is RCW 9.94A.525.

⁴This case has been withdrawn.

not have washed out by 2010, under the ten-year requirement in RCW 9.94A.525(2)(b).

The defendant's argument that the trial court did not sufficiently consider his claim that the 2004 convictions had washed out by 2010 is pointless.

B. The defendant's argument is based on a faulty premise; the defendant did not clearly argue in his last motion that his juvenile offenses had washed out.

CR 7(b)(1), applicable to criminal cases via CrR 8.2, states that a "motion . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." [emphasis added] The defendant did state with particularity in his June 14, 2010, motion (hand-dated June 6, 2010) that he sought relief because he claimed the

⁵Under RCW 9A.48.080, Malicious Mischief in the First Degree is a class B felony.

Malicious Mischief offenses were committed in the same course of criminal conduct. (CP 23).

Nowhere in his second motion, filed January 10, 2011, does the defendant make any statement such as:

- "The Malicious Mischief offenses have washed out."
- "The Malicious Mischief offenses are too old to count."
- "The prior offenses wash out under RCW 9.94A.525(2)(b)."
- "Remember that motion I filed a few months ago? Well, I forgot to say that my juvenile offenses have washed out."
- "Your Honor, let me try it again -- if you are counting all of the malicious mischief offenses, how about saying that they had washed out."

There is not a complete sentence or a citation to the current statute in the January 10, 2011, motion suggesting that the juvenile

offenses have washed out. Even on appeal, the defendant does not cite any document showing that his January 10, 2011, motion was based on a theory that his juvenile offenses had washed out.⁶

C. The defendant is also incorrect in stating that the trial court failed to consider the motion.

There would be a problem if the trial court had categorically refused to consider the motion pursuant to *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). However, there is no such problem here. The trial court did not state that the defendant was barred from filing the motion, that it would not consider a pro se motion, or that the defendant could not file successive motions.

The trial court considered the motion and correctly denied it. The trial court did so because it was a repeat of an earlier motion.

⁶The defendant cites CP 59 as support for the position that his January 10, 2011, motion was based on a wash-out theory. The State urges the court to review CP 59.

D. The defendant is further incorrect in stating that the prosecutor misinformed the court by stating the defendant had filed the same motion previously.

It is helpful to compare the June 14, 2010, and the January 10, 2011, motions side by side:

June 14, 2010	January 10, 2011
<u>TITLE:</u> MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE. (CP 22).	<u>TITLE:</u> MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE (CP 58).
<u>RELIEF REQUESTED:</u> Sentencing range should have been 31-41 months (CP 23).	<u>RELIEF REQUESTED:</u> Sentencing range should have been 31-41 months (CP 59).
<u>BASIS FOR RELIEF:</u> "I was charged with four counts of Malicious Mischief as a juvenile under one cause number. At sentencing the State gave me two points under one cause number. I contest that it should be one point because I was charged all four counts of Malicious Mischief under one cause number same criminal conduct. Also See State v. Palmer, 95 Wn. App. 187, 190-191, 975 P.2d 1038 (1999). Also see State v. Jones, Div. Two	<u>BASIS FOR RELIEF:</u> "On July 10, 2002 I took a plea of guilty under a deferred [sic] Judgment, filed in Benton Co. 07/31/02. Based on basis of addendum and order of multiple count disposition, order of disposition filed on 04/02/04. The use of the addendum in my case was to encompass the balance of the order of disposition for 4 counts of malicious [sic] mischief in the 1 ⁰ , on 05/05/10 I accepted

<p>2006. I also have a Robbery in the First Degree on 03/21/2010. I was given two points under cause No. 10-1-00313-8. It should have been one point not two. see State v. Palmer (1999) same criminal conduct." (CP 23).</p>	<p>[sic] a plea bargain [sic] of Robbery." (CP 59).</p>
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The defendant did not specify how or why his second motion differed from his first.

2. RESPONSE TO ARGUMENT NO. 2, "THE TRIAL COURT ERRED IN NOT APPOINTING COUNSEL FOR MR. REYNOLDS FOR HIS THIRD MOTION TO MODIFY OR CORRECT JUGDMENT AND SENTENCE." (Appellate Brief at 7).

A. An attorney should not have been appointed for this motion because it is without any merit.

A defendant is entitled to appointed counsel on a CrR 7.8 motion if the trial court initially determines that the motion establishes grounds for relief. *State v. Robinson*, 153 Wn.2d 689, 699, 107 P.3d 90 (2005) (citing CrR 3.1(b)(2)). A trial court's decision on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045

(2005). In this case, the defendant's four prior juvenile convictions were not committed on the same day and involved different victims. The convictions were not in the same course of criminal conduct, and ten years did not elapse between his sentencing on those offenses and the commission of the crime herein. The juvenile offenses did not wash out.

CONCLUSION

The Court should affirm the trial court's denial of the defendant's January 10, 2011, motion.

RESPECTFULLY SUBMITTED this 7th day of November 2011.

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Signed at Kennewick, Washington on November 7 2011.

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