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Court of Appeals
Division III
State of Washington
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35486-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GEORGE BARTZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order of June 16, 2017, denying defendant's Motion to Vacate Count II of the Judgment and Sentence entered on October 9, 1991 in Cause No. 91-1-00416-2.
2. The trial court erred in entering the Order of August 9, 2017, denying defendant's Motion for Reconsideration to Vacate Count II, of Cause No. 91-1-00416-2, entered on October 9, 1991.

II. ISSUE PRESENTED

Whether the trial court abused its discretion in declining to vacate the defendant's conviction for first degree statutory rape?

III. STATEMENT OF THE CASE

The defendant pleaded guilty on October 9, 1991, to two counts of first degree statutory rape. CP 9. These offenses were charged under former RCW 9A.44.070. CP 9. Count I alleged offense dates between July 1, 1988 and October 31, 1989. CP 9. Count II alleged offense dates between September 1, 1984 and December 31, 1985. CP 9.

The defendant moved to vacate both convictions in the Spokane County Superior Court on May 15, 2017. CP 1. He claimed that *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011), and *State v. Church*, 2012 WL 1946345, 168 Wn. App. 1025 (2012) (unpublished opinion) stand for the proposition that the repeal of the crimes of statutory rape in 1988

rendered those crimes nonexistent crimes, excusing the defendant from meeting the one-year time bar of RCW 10.73.090. CP 2.

On June 2, 2017, the Honorable Annette Plese vacated count I, but declined to vacate count II. CP 7. Specifically, Judge Plese found that the repeal of the crimes of statutory rape did not apply to crimes occurring before July 1, 1988. CP 10. In response to Mr. Bartz' motion to reconsider, CP 7-8, Judge Plese issued a letter ruling indicating that *Taylor* "did not rule that the underlying conviction should be vacated off Mr. Taylor's record merely because [the crime] no longer existed. They ruled that any requirements of registration under that previous conviction were no longer applicable." CP 11. The court further noted that the repeal clause "did not extinguish liability for acts occurring before July 1, 1988." CP 12. Judge Plese denied the motion to reconsider the earlier ruling.

The defendant timely appealed those rulings.

IV. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO VACATE THE DEFENDANT'S CONVICTION IN COUNT II.

1. Standard of review.

The Court of Appeals reviews a trial court's CrR 7.8 ruling for an abuse of discretion. *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). A trial court abuses its discretion when it bases its

opinion on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

2. The defendant has failed to demonstrate the trial court abused its discretion by not vacating Count II of the judgment and sentence.

Under CrR 7.8(b), a party may move the court for relief from judgment or order. It provides in pertinent part:

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:

...

(4) The judgment is void;

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b)(4) and (5).

Such a motion must be made within a reasonable time. CrR 7.8(b). Here, the defendant claims that his judgment is “invalid on its face” and so, to be entitled to relief, he is required to demonstrate that either CrR 7.8(b)(4) or (5) is met.

The defendant contends that the ruling of Division I of this Court in *Taylor*¹ mandates the conclusion that his conviction for first degree

¹ *Church*, 2012 WL 1946345, cited by the defendant, is an unpublished opinion, with no precedential value, and, like *Taylor*, involves the crime of failure to register as a sex offender. It does not hold that the

statutory rape is an invalid conviction and, therefore, must be vacated. *Taylor* did not so hold. Taylor was convicted of failing to register as a sex offender, with a predicate crime of third degree statutory rape. Division I of this Court determined that statutory rape was not a “sex offense,” due to an inadvertent loophole created by the legislature. It did not hold, as defendant argues, that the repeal of the crimes of statutory rape in 1988 applied to both future and *past acts* of statutory rape.

Such a holding would be contrary to 1988 Laws of Washington, chapter 145, section 25, which stated:

This act shall not have the effect of terminating or in any way modifying liability, civil or criminal, which is already in existence on July 1, 1988, and shall apply only to offenses committed on or after July 1, 1988.

Similarly, under RCW 10.01.040, the legislature has evidenced its intent that any offense committed previous to the time of repeal shall not be affected by such repeal:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all

crime of statutory rape became nonexistent after the legislative repeal of that crime.

respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

This “saving statute” presumptively preserves all offenses previously committed, and all penalties or forfeitures already incurred from being affected by the amendment or repeal of a criminal or penal statute. *State v. Kane*, 101 Wn. App. 607, 610, 5 P.3d 741 (2000). In repealing the crimes of statutory rape and renaming them “child rape” the legislature did not evidence any intention that any formerly completed acts of statutory rape should be affected in any way by the repeal of those statutes.

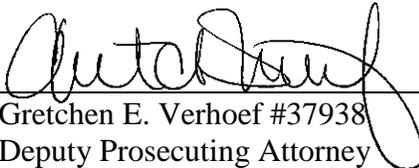
Here, the defendant’s offense of first degree statutory rape, which was committed between September 1, 1984 and December 31, 1985, was completed before the date of the repeal of the statutory rape statutes. Thus, the legislative repeal of the crimes of statutory rape simply does not affect the defendant’s offense charged under the former chapters punishing statutory rape. The trial court did not abuse its discretion in correctly applying the law.

V. CONCLUSION

Taylor did not hold that the crimes of statutory rape are now non-existent crimes. The legislature has not evidenced any intent to affect former convictions for statutory rape when it renamed those offenses “child rape.” The defendant is not entitled to relief and the trial court did not abuse its discretion in declining to vacate this conviction.

Dated this 8 day of February, 2018.

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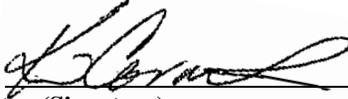
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington,
that on February 8, 2018, I served a copy of the Brief of Respondent in this matter, to:

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2/8/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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