

FILED
DECEMBER 21, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 37596-0-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
CLARK ALLEN TELLVIK,)	
)	
Appellant.)	

PENNELL, C.J. — Clark Allen Tellvik appeals a trial court order regarding his motion for relief from judgment under CrR 7.8. He also appeals the terms of his amended judgment and sentence. As the parties agree, this matter must be remanded for the trial court to assess Mr. Tellvik’s CrR 7.8 motion and for resentencing.

FACTS

In 2016, a jury convicted Mr. Tellvik of first degree burglary, possession of a stolen vehicle, possession with intent to deliver a controlled substance, making or having burglary tools, possession of a stolen firearm, and second degree unlawful possession of a firearm. The jury also found firearm enhancements on the convictions for burglary, possession of a stolen vehicle, and possession with intent to deliver a controlled substance. Mr. Tellvik appealed his convictions, which this court affirmed except for a

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conviction for possession with intent to deliver a controlled substance. *State v. Tellvik*, No. 34525-4-III, slip op. at 8 (Wash. Ct. App. Jun. 14, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/345254_unp.pdf, *rev'd in part sub nom. State v. Peck*, 194 Wn.2d 148, 161, 449 P.3d 235 (2019). The Supreme Court's decision in its consolidated review of *Tellvik* and *Peck* became final on issuance of a mandate on July 31, 2020.

On February 14, 2020, Mr. Tellvik filed a motion for relief of judgment under CrR 7.8. The motion challenged Mr. Tellvik's conviction. It was based on arguments not previously raised on appeal.

Shortly after Mr. Tellvik filed the CrR 7.8 motion, but before issuance of the Supreme Court's mandate, the trial court held a hearing to address errors in the original judgment and sentence. The errors had been brought to the court's attention by the Washington State Department of Corrections. As a result of the hearing, the trial court issued an amended judgment and sentence. The court declined to address the merits of Mr. Tellvik's CrR 7.8 motion, explaining it lacked jurisdiction because the Supreme Court had not yet mandated Mr. Tellvik's appeal back to the trial court. The court then denied Mr. Tellvik's CrR 7.8 motion and directed it to be transferred it to this court for consideration as a personal restraint petition. The petition was later remanded back to the

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trial court as its transfer order failed to meet the requirements of CrR 7.8(c)(2). *See* Order Remanding Personal Restraint Petition, *In re Pers. Restraint of Tellvik*, No. 37412-2-III (Wash. Ct. App. May 7, 2020).

On March 10, 2020, Mr. Tellvik appealed from his amended judgment and sentence and the order denying his CrR 7.8 motion. The trial court later found Mr. Tellvik to be indigent.

ANALYSIS

The issues on appeal pertain to the trial court's disposition of Mr. Tellvik's CrR 7.8 motion and the terms of the amended judgment and sentence. The parties agree Mr. Tellvik is entitled to remand regarding these issues. Thus, little discussion of the issues is necessary.

With respect to the CrR 7.8 motion, we agree with the parties that the trial court had jurisdiction to review the substance of the motion, despite the fact that a mandate had not yet been issued from the Supreme Court. Mr. Tellvik's motion was not time barred under RCW 10.73.090, and neither CrR 7.8 nor RCW 10.73.090 require a CrR 7.8 motion to be filed after a final mandate has been entered in an appeal. Therefore, the trial court should have handled Mr. Tellvik's motion pursuant to the regularly-applicable terms

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of CrR 7.8. We remand for that purpose. *See In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 638-39, 362 P.3d 758 (2015).

Our remand order should not be read to preordain the results of the trial court's CrR 7.8 analysis. The trial court may decide Mr. Tellvik is entitled to a fact-finding hearing or a hearing on the merits. CrR 7.8(c)(2). Or it may conclude Mr. Tellvik's motion must be transferred to this court as a personal restraint petition. *Id.* We express no opinion on these issues.

The parties also agree Mr. Tellvik is entitled to resentencing based on several errors in the amended judgment and sentence. We concur. First, Mr. Tellvik is entitled to resentencing because his offender score includes at least one conviction for simple possession of a controlled substance rendered void by the Supreme Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Second, the term of community custody imposed in relation to Mr. Tellvik's conviction for possession with intent to distribute a controlled substance (Count Three) cannot result in a total combined term (incarceration plus community custody) greater than the statutory maximum of 120 months. Former RCW 9.94A.701(9) (2010). Third, the judgment and sentence cannot include a \$200 criminal filing fee or a DNA (deoxyribonucleic acid) collection fee, as Mr. Tellvik is indigent and has already submitted a DNA sample as a result of a prior


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conviction. RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA). Fourth, the judgment and sentence must not include references to inapplicable sentencing enhancements under RCW 9.94A.533(4)(e) and RCW 9.94.533(8)(b).

CONCLUSION


We remand to the trial court for consideration of Mr. Tellvik's CrR 7.8 motion for relief from judgment. Mr. Tellvik's sentence is reversed and we remand for resentencing pursuant to the terms of this opinion. Given our disposition of this appeal, Mr. Tellvik's motion to modify our Clerk's Ruling denying his motion to extend time to file a statement of additional grounds for review is denied as moot.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Pennell, C.J.

WE CONCUR:



Siddoway, J.



Staab, J.