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COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 14 PM 4:55
NO. 62539-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ADAM HOLLINGSWORTH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. An appellate court will not ordinarily review a claim of error not raised in the trial court, unless the error involves a constitutional right that had practical and identifiable consequences. The error alleged here, the failure to hold a show cause hearing under CrR 7.8, is not constitutional in nature, and Hollingsworth has made no attempt to show practical and identifiable consequences stemming from the lack of a hearing. Has Hollingsworth waived this error for purposes of appellate review?

2. Under the terms of the SSOSA¹ statute, the trial court must impose a sentence within the standard range. Hollingsworth received a SSOSA, under which a large portion of his standard-range sentence was suspended. When he violated the conditions of his sentence, the trial court revoked the suspended sentence. Did the trial court properly refuse Hollingsworth's request for an exceptional sentence below the standard range?

¹ Special Sex Offender Sentencing Alternative.

B. STATEMENT OF THE CASE

Defendant Adam Hollingsworth was charged by information with Rape of a Child in the First Degree. The State alleged that, sometime between March 1 and October 1, 1999, when Hollingsworth was 14 years old, he digitally penetrated the vagina of an eight-year-old acquaintance on multiple occasions. CP 1-4.

While the victim made general disclosure of the abuse at the time to her mother and brother, neither appreciated the seriousness of the abuse and neither took any action. CP 2. When she recounted the abuse in more detail to her older sisters and her mother in 2006, police were notified. CP 3. When contacted by police, Hollingsworth confirmed the victim's allegations, estimating that he digitally penetrated her vagina five or six times over a period of two to three months. CP 3.

Hollingsworth pled guilty as charged. CP 5-27; RP (2-14-07). At sentencing, both the State and the defense recommended a Special Sex Offender Sentencing Alternative (SSOSA). RP (3-9-07) 3-5, 9-12. The trial court followed the recommendation, imposing a low-end sentence of 93 months of confinement, and suspending that sentence on condition that Hollingsworth serve four months in jail, and enter into and

satisfactorily complete a sex offender treatment program.

RP (3-9-07) 13-14; CP 29-38.

Hollingsworth wasted little time in violating his treatment conditions. On August 27, 2007, the Department of Corrections (DOC) filed a Notice of Violation, alleging that Hollingsworth had ingested alcohol 2-3 times, had failed to engage in sexual deviancy treatment as required, and had failed to make payments toward his legal financial obligations. Ex. 1 at 7-12.² The trial court held a hearing on October 1, 2007, at which Hollingsworth admitted the violations. RP (10-1-07) 2-6. While concerned, the State did not ask the court to revoke Hollingsworth's suspended sentence. RP (10-1-07) 4. The court was concerned as well, but decided to allow Hollingsworth to continue in his treatment program. RP (10-1-07) 6-9. The court imposed a sanction of 60 days of confinement, and set a review hearing. RP (10-1-07) 9-10; CP 39-40.

At the next review hearing, held on November 5, 2007, Hollingsworth was in compliance with his treatment requirements. RP (11-5-07) 3; CP 41. The court set another review hearing for

² For ease of reference, the State has numbered the 21 pages of Ex. 1 in consecutive order.

January 7, 2008. RP (11-5-07) 5; CP 41. By the time of that hearing, Hollingsworth had accumulated seven more alleged violations, including failure to participate in sexual deviancy treatment, failure to report for drug testing and treatment, self-admitted ingestion of marijuana, and failure to register as a sex offender. Ex. 1 at 2-6. In addition, he had been terminated from his sex offender treatment program on December 4, 2007. Ex. 1 at 1.

When Hollingsworth failed to appear for the hearing, a bench warrant was ordered. Supp. CP ____ (sub # 60, Motion, Certification and Order for Bench Warrant). The warrant was executed in Oregon on July 18, 2008. Supp. CP ____ (sub # 66, Bench Warrant).

The trial court held a hearing on October 2, 2008. Hollingsworth admitted the allegations, and did not dispute that he had been terminated from his sex offender treatment program. RP (10-2-08) 7, 18. The State asked the court to revoke the SSOSA and impose the suspended portion of Hollingsworth's sentence. RP (10-2-08) 5. Noting that Hollingsworth was now requesting an exceptional sentence below the standard range, the State explained why this was neither appropriate nor possible:

[T]he state is not asking for a sentence of 93 months. The state's position is that the court has already imposed a sentence. The sentence has been imposed. It was imposed back on the original date of sentence and that would – the only options this court has pursuant to the SSOSA statute is either to impose 60 days of confinement per violation or revocation of the suspended sentence. It is not a time at which to revisit the court's original sentence. The court's original sentence is what it is. A 60-day sanction, I would indicate to the court, would not be appropriate in this case because Mr. Hollingsworth does not have a treatment provider.

Sadly, what we normally see or often see in these cases is the defense proposing another treatment provider, one who has done a new evaluation. While I am assured – or I don't believe that Mr. Satoran is going to take Mr. Hollingsworth back, having taken him back one time in the past and then fleeing his program. Depending upon Mr. Hollingsworth's state of mind at this point in time, having been incarcerated, perhaps he could persuade another treatment provider to take him into a treatment program. Again, I have no idea whether that would be appropriate or not. But that has not been presented to the court. So the state's position is truly that the only option for this court at this time, without a treatment provider, is to revoke the sentence and that that sentence has already been imposed in the term of 93 months.

RP (10-2-08) 6-7.

The State also filed written opposition to Hollingsworth's request for resentencing.³ Supp. CP ____ (sub # 74, State's

³ Hollingsworth submitted a written sentencing memorandum as well, but never filed it in the superior court. RP (10-2-08) 5-6, 9, 15, 20-21.

Memorandum in Opposition to Request for Resentencing). The State pointed out that, under the SSOSA statute, an exceptional sentence was not an option. Supp. CP ____ (sub # 74 at 3); RCW 9.94A.670(4) ("the court shall then impose a sentence . . . within the standard sentence range"). Noting that Hollingsworth had relied on his youth in citing RCW 9.94A.535(1)(e)⁴ in support of his request for an exceptional sentence, the State argued that, even if authorized, an exceptional sentence would not be appropriate. Supp. CP ____ (sub # 74 at 4).

Hollingsworth himself told the court that he believed he would have done better with an exceptional sentence instead of a SSOSA, as he did not feel that he needed sexual deviancy treatment. RP (10-2-08) 16. Relying primarily on Hollingsworth's age at the time of this offense, Hollingsworth's attorney asked the court to impose an exceptional sentence. RP (10-2-08) 17.

The trial court rejected the request for an exceptional sentence, and revoked the SSOSA:

I do not believe at this stage of the proceeding that the court should go back and revisit the earlier sentence that was instituted and impose a[n] exceptional sentence downward. I think the court's

⁴ "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

really only appropriate action to take at this time is whether or not to revoke the SSOSA sentence. And the – there is in the record, and by the admission of Mr. Hollingsworth, violations of the SSOSA which are clear in the record.

The court does find that there is a basis for revoking the SSOSA both by Mr. Hollingsworth's admissions and also by the record submitted by Mr. Satoran, other things in the part of Exhibit 1 showing the violations of the SSOSA sentence. And the court believes the appropriate sentence at this point in time given those violations is to revoke the SSOSA sentence and it is so ordered.

RP (10-2-08) 19-20. The court issued a written order finding that Hollingsworth had violated conditions of his sentence and had been terminated from his treatment program, and revoking the order suspending imposition of sentence and directing Hollingsworth to serve the remainder of his sentence of 93 months. CP 42-43.

Following the court's ruling, Hollingsworth moved under CrR 7.8(b)(5) for relief from final judgment, explaining: "We're not asking that he does no time. We're just asking that 93 months is above time." RP (10-2-08) 20. The court denied the motion, finding that "the sentence that was previously imposed, I think, is the appropriate sentence that will be carried out at this time."

RP (10-2-08) 21.

Hollingsworth subsequently submitted a written motion entitled "Defendant's Motion to Modify Sentence." CP 60-67. He cited CrR 7.8(b)(5), and claimed "several substantial irregularities extraneous to the court's actions that demand relief from the defendant's Judgment and Sentence of October 2, 2008." CP 61, 62. The "substantial irregularities" cited included: 1) Hollingsworth was 14 at the time of the rape and a member of a dysfunctional family, and thus allegedly unable to appreciate the wrongfulness of his actions or conform his conduct to the requirements of the law; 2) if Hollingsworth had been charged at the time of the rape he would have been tried in the juvenile justice system; and 3) the rape was a "singularly isolated incident." CP 62-63. Hollingsworth requested a sentence "within the range of 36 to 48 months," and asked that any sentence "not exceed 60 months imprisonment." CP 63.

The trial court denied this motion by written order. CP 45. Hollingsworth never objected below to this procedure. He has now filed this appeal, in which he claims that the trial court's failure to hold a hearing on his motion entitles him to a remand "for a proper show cause hearing." Brief of Appellant at 4.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED HOLLINGSWORTH'S MOTION TO MODIFY HIS SENTENCE.

Hollingsworth contends that the trial court erred in not holding a show-cause hearing on his request for an exceptional sentence pursuant to CrR 7.8(b)(5), following revocation of his suspended sentence under the SSOSA statute. This claim is misplaced for several reasons. First, Hollingsworth waived this claim by failing to request a hearing below, and failing to object when the court denied his request without holding such a hearing. Second, the SSOSA statute requires the trial court to impose a sentence within the standard range; an exceptional sentence is not permitted. Third, there were no substantial irregularities shown that would justify modification of the sentence under the court rule. Finally, any error was harmless, because there is no reasonable probability that the outcome would have been materially different absent the alleged error.

a. Hollingsworth Waived Any Objection To The Lack Of A Show Cause Hearing.

Hollingsworth's claim that he is entitled to a remand stems from the requirements of CrR 7.8(c)(3), which directs the trial court to set a show-cause hearing whenever it decides a motion for relief from judgment. The flaw in this argument is that Hollingsworth never asked for a hearing, nor did he object when the trial court summarily denied his motion by written order.

An appellate court will ordinarily refuse to review claims of error not raised in the trial court. RAP 2.5(a); State v. Tuitoelau, 64 Wn. App. 65, 71, 822 P.2d 1222 (1992) ("it is axiomatic that a party must object and give the trial court an opportunity to rule before this court will consider whether error was committed"); State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (appellate court will not approve a party's failure to object at trial, thus depriving trial court of opportunity to cure the error). An exception is made for manifest error affecting a constitutional right. RAP 2.5(a)(3).

Hollingsworth neither claims nor demonstrates that the error in failing to hold a show-cause hearing is manifest. "Manifest" requires a showing of actual prejudice, i.e., a showing that the

asserted error had practical and identifiable consequences.

Kirkman, 159 Wn.2d at 935. Hollingsworth cites to no witnesses that he wished to call at a hearing, nor any evidence that he intended to introduce. Thus, he has failed to show prejudice from the omission of the hearing.

In any event, the lack of a hearing is not constitutional error; it is based solely on the requirements of a court rule. Thus, it is waived by failing to object. See, e.g., State v. Hughes, 154 Wn.2d 118, 153, 110 P.3d 192 (2005) (because defendant did not object below when trial court failed to afford him his statutory right to allocution, claim will not be reviewed on appeal); State v. Williams, 137 Wn.2d 746, 753-54, 975 P.2d 963 (1999) (because pretrial hearings are simply mechanical devices designed to effectuate substantive rights, mere failure to give CrR 3.5(b) advice of rights is not constitutional error and cannot be raised for the first time on appeal); State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) (defendant may not sit by while due process rights are violated at a hearing, then claim error for the first time on appeal); State v. Robinson, 120 Wn. App. 294, 299-300, 85 P.3d 376, rev. denied, 152 Wn.2d 1031 (2004) (same).

By failing to request a hearing on his motion to modify his sentence, or to object when the trial court denied the motion without a hearing, Hollingsworth gave the trial court no opportunity to correct the omission. This Court should not consider this claim for the first time on appeal.

b. The Trial Court Properly Denied The Request For An Exceptional Sentence.

Hollingsworth asked for and received a SSOSA. Under the terms of the statute, the court was required to impose a standard-range sentence. RCW 9.94A.670(4) ("the court shall then impose a sentence . . . within the standard sentence range")⁵. An exceptional sentence may not be imposed under a SSOSA. State v. Onefrey, 119 Wn.2d 572, 575-76, 835 P.2d 213 (1992).

Hollingsworth appears to assume that his SSOSA sentence was revoked, and the trial court was thus presented with a clean slate and now had discretion to impose an exceptional sentence. This is not accurate. While parties and judges sometimes speak of revoking the SSOSA sentence (e.g., RP (10-2-08) 5, 19, 20), what the court actually does at a revocation proceeding is revoke the

⁵ While the reference is to the current statute, this language has been in the statute since before Hollingsworth committed his crimes.

suspension of the sentence. Hollingsworth was sentenced, under the SSOSA statute, on March 9, 2007. CP 29-38; RP (3-9-07). At that time, the court imposed a sentence of 93 months of confinement. CP 32. The court did not *resentence* Hollingsworth on October 2, 2008, it simply revoked the suspension of the sentence and imposed whatever portion of the 93 months that Hollingsworth had not yet served. See State v. Ibanez, 62 Wn. App. 628, 629, 815 P.2d 788 (1991) (using the term "revocation of the suspension" to refer to what may happen when a defendant has violated conditions of a SSOSA); State v. Daniels, 73 Wn. App. 734, 736, 871 P.2d 634 (1994) (referring to the trial court's power to "revoke the suspended sentence" following a defendant's violation of the terms of a SSOSA).

Even putting aside the specific limitations of the SSOSA statute, the trial court's authority to modify a sentence once imposed is severely circumscribed. In State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989), the trial court revisited a sentence after the defendant had served a portion of it, and declared an exceptional sentence. Id. at 85. The Washington Supreme Court observed that, under the Sentencing Reform Act of 1981 (SRA), a determinate sentence "is ascertained at the time of sentencing, and

generally is not subject to later change." Id. at 86. The court explained the rationale for this conclusion:

The claim that the power to set a sentence carries with it the power later to modify that sentence ignores the importance of finality in rendered judgments. Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require. . . . Modification of a judgment is not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable.

Id. at 88 (citations omitted). See also State v. Harkness, 145 Wn. App. 678, 684-86, 186 P.3d 1182 (2008) (trial court has no inherent authority and limited statutory authority to modify a sentence post-judgment).

Hollingsworth relies on CrR 7.8(b)(5) as authority for modification of his sentence. That rule permits a judgment to be vacated for "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5). Vacation under this subsection 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). The extraordinary circumstances must relate to fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's action.

State v. Olivera-Avila, 89 Wn. App. 313, 319, 949 P.2d 824 (1997).

The rule does not apply when the circumstances alleged to justify relief existed at the time the judgment was entered. Zavala-Reynoso, 127 Wn. App. at 123.

Hollingsworth fails to identify any "substantial irregularities" in the court's proceedings that would support his request to change his standard-range sentence under the SSOSA statute to an exceptional sentence below the standard range.⁶ Nor, try as he will, can Hollingsworth credibly argue that the circumstances on which he relies for relief did not exist when the judgment was entered. His age at the time of the offense, his unsettled family background, and the nature of the crime did not change after sentencing. The fact that he chose to seek a SSOSA instead of an exceptional sentence at the time of sentencing is not a circumstance that justifies the relief he seeks.

Moreover, the general rule under the SRA is that the length of a sentence is not subject to appeal if the punishment falls within the standard range. Harkness, 145 Wn. App. at 684. Hollingsworth

⁶ His reliance on the court's failure to hold a show-cause hearing is circular, since this failure only followed his request under CrR 7.8(b)(5), and cannot serve as its support.

received a standard range sentence; he seeks only to obtain a shorter one. CP 30, 32, 63. This relief is not available to him.

Finally, any error in failing to hold a hearing on Hollingsworth's request for an exceptional sentence was harmless. Nonconstitutional error does not require reversal unless, within reasonable probabilities, the outcome of the proceeding would have been materially different absent the alleged error. State v. Thomas, 110 Wn.2d 859, 862, 757 P.2d 512 (1988). Contrary to Hollingsworth's contention, the trial court *did* consider his request for an exceptional sentence on its merits, and simply rejected it:

Since [the time of sentencing] the record has shown that Mr. Hollingsworth had been in violation of the SSOSA, as the record – as the exhibits show in this case that he has not responded to the treatment or taken advantage of the treatment available through the SSOSA program. And the SSOSA sentence was a privilege that was accorded to Mr. Hollingsworth, and he did not respond to the privilege and violated the SSOSA sentence.

I do not believe at this stage of the proceeding that the court should go back and revisit the earlier sentence that was instituted and impose a[n] exceptional sentence downward. I think the court's really only appropriate action to take at this time is whether or not to revoke the SSOSA sentence. And the – there is in the record, and by the admission of Mr. Hollingsworth, violations of the SSOSA which are clear in the record.

The court does find that there is a basis for revoking the SSOSA both by Mr. Hollingsworth's admissions and also by the record submitted by Mr. Satoran, other things in the part of Exhibit 1 showing the violations of the SSOSA sentence. And the court believes the appropriate sentence at this point in time given those violations is to revoke the SSOSA sentence and it is so ordered.

RP (10-2-08) 19-20. The court was fully aware of Hollingsworth's youth at the time of the crime, and his troubled family background, at the time that it revoked his suspended sentence. Ex. 1 at 14-15. There is no reason to think that the outcome would have been different had the trial court held a hearing on Hollingsworth's request.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hollingsworth's sentence.

DATED this 14 day of August, 2009.

Respectfully submitted,

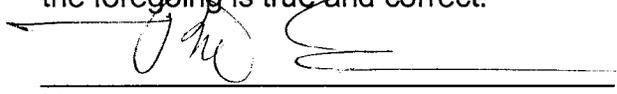
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. ADAM C. HOLLINGSWORTH**, Cause No. **62539-0-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

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