

NO. 65355-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LONNIE BURTON,

Appellant.

2010 NOV 19 PM 1:14

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Whether the defendant is entitled to a hearing, in which his presence is required with appointment of counsel, when an appellate court remands to the trial court for a ministerial act of correcting a judgment and sentence to strike an unconstitutional condition of community placement.

B. STATEMENT OF THE CASE.

In 1994, Lonnie Burton was found guilty by jury verdict of the crimes of rape in the first degree, robbery in the first degree and burglary in the first degree. CP 9. Burton had raped and robbed a 15-year-old boy at gunpoint when the boy, who was home alone, answered the door after school. CP 159-62. The court imposed an exceptional sentence of 562 months of total confinement. CP 11. The court also imposed community placement. CP 15. One of the conditions of community placement imposed by the court, Special Condition 11, read as follows: "Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer." CP 17.

An amended judgment and sentence was filed in 1996, based on a recalculated offender score, imposing the same 562-month sentence. CP 29, 60. Special Condition 11 was imposed again. CP 34.

In 1997, this Court affirmed Burton's convictions but remanded for resentencing because the change in the structure of the 562-month sentence led to a reduction in potential early release credit, and thus raised a presumption of judicial vindictiveness. CP 66-70. A second amended judgment and sentence was entered in 1998, again imposing 562 months of total confinement. CP 77. Special Condition 11 was again imposed. CP 82. This Court affirmed the sentence on appeal, and mandate issued on January 8, 2001. CP 85-98.

Subsequently, Burton filed a personal restraint petition challenging Special Condition 11 as unconstitutionally vague. On January 11, 2010, the Washington Supreme Court granted Burton's personal restraint petition and "remanded to the trial court for amendment of the judgment and sentence consistent with State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)." CP 139.

On April 2, 2010, the trial court entered the order, titled "Order Amending Judgment and Sentence," which struck Special Condition 11 from Appendix H. CP 149-50. No hearing was held.

C. ARGUMENT.

THE TRIAL COURT PROPERLY ENTERED AN ORDER COMPLYING WITH THE WASHINGTON SUPREME COURT'S DIRECTIVE.

Burton contends that his constitutional rights to due process, to be present and to counsel were violated when the trial court entered the order striking Special Condition 11. Burton's claims must be rejected. The trial court's order following the appellate court's directive was a ministerial act that did not require a hearing, Burton's presence or the appointment of counsel for Burton.

In State v. Bahl, 164 Wn.2d at 758, the Washington Supreme Court held that a condition of community placement prohibiting possession of "pornographic materials" is unconstitutionally vague. As a result, in this case, the Washington Supreme Court granted Burton's personal restraint petition challenging Special Condition 11, and directed "the matter is remanded to the trial court for amendment of the judgment and sentence consistent with State v. Bahl." CP 147 (citation omitted).

When a case is remanded by the appellate court, the superior court must strictly comply with a directive from the appellate court that leaves no discretion to the lower court. State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006). See also RAP 12.2 (appellate court may modify the decision reviewed and appellate court's decision is binding on all parties). In this case, the Washington Supreme Court did not remand for resentencing. The court remanded solely for amendment of the judgment and sentence consistent with Bahl, which meant that the trial court had no discretion but to strike Special Condition 11, which was unconstitutionally vague pursuant to Bahl. As such, the trial court's action was purely ministerial.

a. The Trial Court Did Not Violate The Due Process Clause By Entering The Order Striking Special Condition 11 Without A Hearing.

Burton argues that his right to due process was violated by the trial court when it struck Special Condition 11 without holding a hearing. Burton argues that the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 839, 47 L. Ed. 2d 18 (1976), should be used in determining whether a hearing was required. Burton is mistaken. The Mathews v. Eldridge test does not apply in

criminal cases. State v. Heddrick, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009).

In Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), the United States Supreme Court held that Mathews v. Eldridge applies only to civil cases. The Court explained that a defendant's procedural rights in a criminal case are contained in the Bill of Rights, and the Due Process Clause has "limited operation" beyond the Bill of Rights. Id. at 443. Procedures enacted by the states that do not violate a specific right enumerated in the Bill of Rights do not violate the Due Process Clause unless they "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. at 445 (quoting Patterson v. New York, 432 U.S. 197, 201-02, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)). See also District Attorney's Office for Third Judicial Dist. v. Osborne, ___ U.S. ___, 129 S. Ct. 2308, 2320, 174 L. Ed. 2d 38 (2009). Using this test, the Court concluded that placing the burden of proving incompetence to stand trial on the defendant did not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. Likewise, entry of the order striking Special Condition 11, as directed by the appellate

court, without a hearing does not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. The trial court did not violate the Due Process Clause by entering the order without a hearing. Even if it did, any violation was harmless beyond a reasonable doubt. See State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) (due process violation subject to harmless error analysis).

b. **Burton Had No Constitutional Right To Be Present When The Trial Court Entered The Order Striking Special Condition 11.**

Burton argues that he had a constitutional right to be present when the trial court entered the order striking Special Condition 11. Burton is incorrect. A criminal defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." In re Personal Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). For example, a defendant does not have the right to be present during in-chambers or bench conferences on legal matters. Id. The court in Benn held that the defendant did not have the right to be present

at a motion for continuance that did not involve the presentation of evidence, or determine the admissibility of evidence or the availability of a defense. Id. The court alternatively held that if the defendant had a right to be present, violation of that right was harmless error. Id. at 921. Similarly, in State v. Jasper, ___ Wn. App. ___, 240 P.3d 174, 186 (2010), this Court held that the defendant's presence was not constitutionally required when the trial court considered two jury inquiries that raised no factual issues but only questions of law.¹

The entry of the order striking Special Condition 11 did not involve the presentation of evidence, or any determination as to admissibility of evidence or the availability of a defense. The trial court's act was a ministerial one, merely carrying out the directive of the appellate court on a purely legal issue: the constitutionality of Special Condition 11.

Courts in other jurisdictions have held that a defendant's presence is not required for correction of an illegal sentence to a less onerous sentence. In United States v. Erwin, 277 F.3d 727 (5th Cir. 2001), the court modified the defendant's sentence by

¹This Court held that while the defendant's presence was not constitutionally required, the trial court violated CrR 6.15(f)(1) by failing to notify the parties. Jasper, 240 P.3d at 186.

deleting reference to a dismissed conspiracy conviction and thereby reducing the sentence without a hearing. Id. at 730. On appeal, the Fifth Circuit held that "a defendant's presence in court is not required every time judicial action is taken to correct a sentence." Id. at 730. The court held that a downward correction of an illegal sentence does not constitute resentencing, and the defendant was not entitled to be present and was not entitled to hearing. Id. at 731. See also State v. Hadden, 475 F.3d 652 (4th Cir. 2007) (no resentencing hearing required for court to correct defendant's sentence by striking an unlawful 60-month term).

Burton had no constitutional right to be present when the trial court carried out the directive of the appellate court by striking Special Condition 11. Moreover, any violation of his right to be present would be harmless. Benn, 134 Wn.2d at 921.

c. **Burton Had No Constitutional Right To Counsel When The Trial Court Entered The Order Striking Special Condition 11.**

Finally, Burton argues that he had the right to representation of counsel when the Washington Supreme Court remanded for the trial court to strike Special Condition 11. He is again mistaken.

A criminal defendant has a right to the assistance of counsel at every “critical stage” of a criminal proceeding, including sentencing. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A critical stage is “one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case.” Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968). Resentencing can be a critical stage of the proceedings if it involves “more than the court's performing a ministerial act.” State v. Davenport, 140 Wn. App. 925, 932, 167 P.2d 1221 (2007).

The entry of the order amending the judgment and sentence to strike Special Condition 11 was not a critical stage in the proceedings. The trial court’s only action was to strike the condition of community placement that had been found to be unconstitutionally vague in State v. Bahl, 164 Wn.2d at 758, as explicitly directed by the Washington Supreme Court. The sentence was otherwise unmodified. The court exercised no discretion and its act was merely ministerial. Burton had no constitutional right to counsel. Moreover, as with the other alleged errors, any violation of the right to counsel in this limited instance would be harmless error. State v. Frost, 160 Wn.2d 765, 780-82, 161 P.3d 361 (2007).

D. CONCLUSION.

Pursuant to State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009), no appealable issues remain when the trial court does nothing more than carry out the mandate of the appellate court on remand. Accordingly, the State has filed a motion to dismiss this appeal in addition to this brief. This appeal should be dismissed. In the alternative, the trial court's order should be affirmed.

DATED this 19th day of November, 2010.

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 Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LONNIE BURTON, Cause No. 65335-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

11/19/10
Date