

70640-3

70640-3

NO. 70640-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Respondent,  
v.  
SHAYNE ROCHESTER,  
Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
JUN 13 PM 3:24

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE RICHARD D. EADIE

**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

A trial court may modify a defendant's sentence under CrR 7.8(b)(5) only when an unforeseeable irregularity has occurred that undermines the objective of the sentencing court. Where modification is warranted, the court's authority to craft a new sentence remains constrained by the Sentencing Reform Act. Here, the defendant moved under CrR 7.8(b)(5) for the trial court to impose a modified sentence that could not have lawfully been imposed at the time of the original sentencing, based on the defendant's foreseeable parental obligations. Did the trial court correctly rule that it lacked the authority to grant the defendant's motion?

**B. STATEMENT OF THE CASE**

In 2009, the defendant, Shayne Rochester, was found guilty of attempted robbery in the first degree under accomplice liability, with a special finding that one of the participants was armed with a firearm during the crime. CP 13-14, 25-27. He received a standard range sentence of 37 months for the robbery, with an additional consecutive 36 months for the firearm enhancement. CP 14-16. Rochester appealed, and the Court of Appeals reversed the firearm

enhancement because a jury instruction violated State v. Bashaw.<sup>1</sup> CP 39; State v. Rochester, No. 65165-0-I, 163 Wn. App. 1024 (unpublished opinion of September 12, 2011). The State petitioned for review by the Washington Supreme Court. CP 39.

The trial court, finding that Rochester had already served his base sentence on the robbery charge, released Rochester in October of 2011, pending resolution of the State's petition for review. CP 39. In the following year, the Supreme Court overturned Bashaw in State v. Nuñez,<sup>2</sup> and remanded Rochester's case to the Court of Appeals for reconsideration. State v. Rochester, 175 Wn.2d 1017 (2012). In light of Nuñez, the Court of Appeals reversed its earlier decision and found the enhancement instruction to be proper, reinstating Rochester's firearm enhancement. CP 37.

Rochester then filed a motion in the trial court for relief from judgment under CrR 7.8(b)(5), requesting that the court vacate the firearm enhancement or grant an exceptional sentence on the robbery charge. CP 38-48; 1RP 52.<sup>3</sup> His motion was based on the

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<sup>1</sup> 169 Wn.2d 133, 134 P.3d 195 (2010).

<sup>2</sup> 174 Wn.2d 707, 285 P.3d 21 (2012).

<sup>3</sup> The two volumes of the report of proceedings are referred to as follows: 1RP (June 24, 2013) and 2RP (July 3, 2013).

fact that Rochester had acquired sole custody of his four-year-old son since being released from prison, and the harm to the child that would result if Rochester were re-incarcerated to serve his sentence on the firearm enhancement. CP 38-48.

After a hearing, the trial court expressed admiration for Rochester's rehabilitation since being released from prison, but ruled that it did not have authority under CrR 7.8(b)(5) to vacate the enhancement or change the robbery sentence to an exceptional sentence below the standard range based on those circumstances. 2RP 21-30; CP 78. Rochester filed a notice of appeal the same day, and the trial court permitted him to remain out of custody pending the appeal. CP 79; 2RP 40-41.

**C. ARGUMENT**

THE TRIAL COURT CORRECTLY RULED THAT IT HAD NO DISCRETION TO GRANT ROCHESTER'S MOTION TO MODIFY HIS SENTENCE UNDER CrR 7.8(b)(5).

Rochester contends that the trial court abused its discretion when it ruled that it lacked authority under CrR 7.8(b)(5) to modify his sentence, either by striking the sentence on the firearm enhancement or by changing the sentence on the robbery charge to an exceptional sentence below the standard range. This claim

should be rejected. Rochester's personal circumstances are not the kind of unforeseeable irregularity that permits modification of a sentence under CrR 7.8(b)(5), and the new sentences Rochester proposed are not permissible under the Sentencing Reform Act (SRA). The trial court therefore properly concluded that it had no authority or discretion to grant Rochester's motion.

A trial court's ruling on a motion for relief under CrR 7.8 is reviewed for abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion only if no reasonable judge would have reached the same conclusion, or when the court refuses to exercise discretion that it properly possesses. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); State v. Smith, 118 Wn. App. 288, 290, 75 P.3d 986 (2003).

1. Rochester's Personal Circumstances Are Not The Kind Of Unforeseeable Irregularities That Justify Relief Under CrR 7.8(b)(5).

Criminal Rule 7.8(b) states:

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:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.**

(emphasis added). Relief from a judgment pursuant to

CrR 7.8(b)(5) is appropriate only where there are “extraordinary circumstances not covered by any other section of the rule.”

State v. Aguirre, 73 Wn. App. 682, 688, 871 P.2d 616 (1994) (citing State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992)).

The extraordinary circumstances must relate to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” Id. (quoting Shum v. Dep’t of Labor & Indus., 63 Wn. App. 405, 408, 819 P.2d 399 (1991)).

Relief from a judgment may be granted “only in those limited circumstances where the interests of justice most urgently require.”

State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); Aguirre, 73 Wn. App. at 688.

A finding of “extraordinary circumstances” in the context of CrR 7.8(b)(5) requires an irregularity that was unforeseeable when the defendant was originally sentenced and that undermines the objective of the sentencing court, such that a different sentence would have been imposed had the court been able to anticipate the irregularity. State v. Smith, 159 Wn. App. 694, 701, 247 P.3d 775 (2011) (loss of funding for partial confinement programs resulting in total confinement for drug court participants was extraordinary circumstance under CrR 7.8(b)(5)); State v. Klump, 80 Wn. App. 391, 397, 909 P.2d 317 (1996) (reversal of federal sentence relied upon by state sentencing court was extraordinary circumstance under CrR 7.8(b)(5)).

The effect of a judgment on the defendant’s personal life is not an “irregularity” and does not qualify as an “extraordinary circumstance” justifying relief under CrR 7.8(b)(5), however unfortunate or harsh the effect may be. Shove, 113 Wn.2d at 85-89 (fact that sentence might cause defendant to lose her business and be unable to pay restitution not a permissible basis to modify sentence); State v. Cortez, 73 Wn. App. 838, 842, 871 P.2d 660 (1994) (fact that conviction will likely result in deportation not an extraordinary circumstance for purposes of CrR 7.8(b)(5)); Aguirre,

73 Wn. App. at 688 (fact that conviction will likely result in deportation does not justify relief under CrR 7.8(b)(5)).

Furthermore, the fact that Rochester was the parent of a young child was known at the time of sentencing. CP 45.

Under our constitution, only the governor has the power to grant clemency to a sentenced offender, and the legislature cannot take that power away or give a similar power to the courts.<sup>4</sup>

Aguirre, 73 Wn. App. at 689. The use of CrR 7.8(b)(5) to vacate a conviction for humanitarian reasons is thus an unconstitutional usurpation of the governor's pardoning power. Id. at 688-91.

Rochester's request that the trial court relieve him from the rest of his sentence due to the needs of his son was precisely the type of modification for humanitarian reasons that the Aguirre and other cases prohibit, and was essentially a request for commutation of the remainder of Rochester's sentence.<sup>5</sup>

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<sup>4</sup> Indeed, it appears that Rochester is appropriately pursuing a request for clemency from the governor. 1RP 43; 2RP 40-41.

<sup>5</sup> Rochester contends that his request does not intrude on the governor's power to pardon because he seeks only vacation of a sentencing enhancement, not the underlying conviction. Brief of Appellant at 19 n.6. This argument is without support in logic or caselaw, as the governor's constitutional pardoning power includes the power to grant clemency in the form of commutation of part or all of a sentence. In re Pers. Restraint of Bush, 164 Wn.2d 697, 702, 193 P.3d 103 (2008).

As unfortunate as the effect on Rochester's son may be if Rochester returns to prison to complete his original sentence, "[m]odification of a judgment is not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable." Shove, 113 Wn.2d at 88. The trial court thus correctly ruled that it lacked authority CrR 7.8(b)(5) to relieve Rochester from the remainder of his sentence, and properly denied the motion.

2. Neither Of The New Sentences Requested By Rochester Was Permissible Under The SRA.

Rochester asked the trial court to waive the sentence on the firearm enhancement or impose an exceptional sentence on the robbery charge. The trial court lacked authority to grant this request, not only because CrR 7.8(b)(5) did not allow relief from the judgment in Rochester's circumstances, but because the court had no authority under the SRA to impose either of the requested sentences.

CrR 7.8(b)(5) is designed to allow a trial court to respond to an unforeseeable irregularity that undermines the objective of the original sentencing court, and to substitute the sentence that the court would have imposed originally had it foreseen the irregularity. Smith, 159 Wn. App. at 701-02. Thus, even where CrR 7.8(b)(5) does allow a trial court to modify a sentence, the new, modified sentence is still subject to the constraints of the SRA, just as if it had been imposed at the original sentencing hearing. See id.; Shove, 113 Wn.2d at 89 n.3 (1989) (trial courts have discretion in sentencing only where SRA so authorizes).

- a. A trial court may not waive imposition of a mandatory sentencing enhancement.

The SRA imposes a mandatory consecutive sentencing enhancement of 36 months for an offender convicted of attempted robbery in the first degree if the offender or an accomplice was armed with a firearm. Former RCW 9.94A.533(3) (2009).<sup>6</sup> The Washington Supreme Court has made it very clear that a trial court

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<sup>6</sup> The relevant provisions are the same in the current version of the statute.

has no authority to waive the imposition of a mandatory sentencing enhancement. State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999). The trial court thus correctly ruled that it had no authority to waive imposition of the firearm enhancement in Rochester's case. 2RP 21-22.

Rochester urges this Court to disregard the controlling precedent of Brown based on the Supreme Court's holding in State v. Mulholland<sup>7</sup> that sentences for multiple serious violent offenses can be run concurrently as part of an exceptional sentence under RCW 9.94A.535, despite normally being required to be served consecutively pursuant to RCW 9.94A.589(1)(b).<sup>8</sup> Brief of Appellant at 14-15. However, the holding of Mulholland rested on the fact that RCW 9.94A.535, the part of the SRA authorizing exceptional sentences under certain circumstances, specifically allows departure from the provisions of RCW 9.94A.589(1) as part of an exceptional sentence. Mulholland, 161 Wn.2d at 329-31.

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<sup>7</sup> 161 Wn.2d 322, 166 P.3d 677 (2007).

<sup>8</sup> The relevant portions of these statutes are unchanged since the time of Rochester's offense.

In contrast, the SRA does not authorize departure from the mandatory sentencing enhancements of RCW 9.94A.533 as part of an exceptional sentence. RCW 9.94A.535. Because there is no authority in statute or caselaw for a trial court's ability to waive a mandatory firearm enhancement, the trial court properly concluded that it did not have the discretion to waive imposition of the firearm enhancement as requested by Rochester.

- b. A trial court may not grant an exceptional sentence based on a defendant's parental obligations.

The SRA allows a trial court to impose a sentence above or below the standard range for a particular charge if, considering the purposes of the SRA, there are substantial and compelling reasons to do so. RCW 9.94A.535. However, only reasons that relate to the crime itself and make it more or less egregious than other crimes in the same category can properly support an exceptional sentence. State v. Law, 154 Wn.2d 85, 103, 110 P.3d 717 (2005); State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002).

It is well established that, because a defendant's parental obligations are not a factor that makes the defendant's crime less egregious, a parent-child relationship or the potential loss of parental rights is not a valid basis for an exceptional sentence. E.g., Law, 154 Wn.2d at 102-03; State v. Amo, 76 Wn. App. 129, 130, 882 P.2d 1188 (1994); State v. Hodges, 70 Wn. App. 621, 626, 855 P.2d 291 (1993) (cited with approval in Fowler, 145 Wn.2d at 411).

Thus, even if the trial court had known at the time of the original sentencing that Rochester would gain sole custody of his son, that information would not have been a valid basis for granting an exceptional sentence. The trial court therefore properly ruled that it lacked authority to grant Rochester's CrR 7.8(b)(5) motion for an exceptional sentence below the standard range based on Rochester's parental obligations.

Rochester's CrR 7.8(b)(5) motion for modification of his sentence was based solely on his parental obligations and the best interests of his son. Those considerations did not constitute the kind of "extraordinary circumstances" required for relief under

CrR 7.8(b)(5), and the trial court had no authority under the SRA to impose either of the requested sentences. The trial court therefore properly denied Rochester's motion on the grounds that it lacked the discretion to grant it.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of Rochester's motion for relief from judgment under CrR 7.8.

DATED this 15<sup>th</sup> day of June, 2014.

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 Oliver R. Davis, 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. SHAYNE ROCHESTER, Cause No. 70640-3-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.

Dated this 18<sup>th</sup> day of June, 2014.

*U Brame*

Name

Done in Seattle, Washington