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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRIS EUGENE DRAKE, JR., Appellant.	No. 84923-9-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — Darris Drake was sentenced in 2010 and now appeals from the denial of his 2022 motion for resentencing. Although Drake's offender score included a conviction later invalidated by *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), it is undisputed that his score would remain the same at resentencing due to an intervening 2011 theft conviction. Because the trial court did not abuse its discretion when it denied Drake's motion, we affirm.

FACTS

In October 2010, Drake pleaded guilty to assault in the first degree (Count I) and residential burglary while armed with a firearm (Count II). Drake's offender score for Count I was calculated as five, resulting in a standard range of 138-184 months of incarceration under the sentencing reform act of 1981[1] (SRA). His

[1] Ch. 9.94A RCW. The standard sentencing ranges for these particular crimes under these offender scores were the same pursuant to the version of the SRA in effect at the time Drake's crimes of conviction were committed as they are under the current version of the SRA. *See* former RCW 9.94A.510 (2002).

For purposes of precision and clarity, we cite to the version of the SRA applicable to the convictions at issue where appropriate.

offender score for Count II was calculated as four, resulting in a standard range of 15-20 months of incarceration under the SRA, plus an additional 72 months for the firearm enhancement to be served consecutively to the base sentences.[2] The prosecutor agreed to recommend concurrent sentences of 138 months on Count I, the low end of the range on that count, and a high-end sentence of 20 months on Count II. According to the plea agreement, Drake did not join the State's recommendation and was free to argue for the term of confinement he believed was appropriate. The record does not include a transcript of Drake's sentencing hearing but the judgment and sentence (J&S) establishes that, on October 29, 2010, the court imposed terms of incarceration consistent with the prosecutor's recommendation for a total of 210 months' confinement.

More than ten years later, in February 2021, *Blake* invalidated Washington's former statute that criminalized simple drug possession. 197 Wn.2d at 173. Following *Blake*, Drake filed a motion under CrR 7.8 for resentencing. He argued that relief was warranted because his offender scores on Counts I and II each included a point for a 2007 *Blake* offense and removing that point would result in a change to his standard range on each count.

The State opposed resentencing for two reasons. First, on February 11, 2011, not long after entry of the J&S at issue here, Drake was convicted of theft in the second degree in a separate proceeding. Thus, the State argued, "at the time

[2] The length of Drake's sentence for the firearm enhancement was doubled from 36 months to 72 months under RCW 9.94A.533(3)(d), which requires doubling "[i]f the offender is being sentenced for any firearm enhancements under [RCW 9.94A.533(3)](a), (b), and/or (c) . . . and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under [RCW 9.94A.533(3)](a), (b), and/or (c) . . . or [RCW 9.94A.533](4)(a), (b), and/or (c) . . . , or both."

of resentencing, [Drake] will have the same standard range and offender score which . . . will include a worse criminal history th[a]n at the original sentencing" because "[i]t is reasonable to conclude that most sentencing courts would see a conviction for theft in the second degree as being at least as significant if not more significant than a conviction for possessing a controlled substance." Second, the State argued that Drake needed—but failed—to show that the court would impose a shorter sentence if the court were to grant him a resentencing.

In reply, Drake argued that his *Blake* offense "resulted in a sentence of 12 months of incarceration and 9 to 12 months of community control" and he "lost his freedom for 9 months and he will never have those months return[ed] to him, that is a miscarriage of justice." Drake contended that "[t]his miscarriage of justice extends to [his] current sentence because that unconstitutional and voided conviction was considered by the [c]ourt when pronouncing the agreed upon disposition."

On January 11, 2023, the trial court held a show cause hearing on Drake's CrR 7.8 motion.[3] The State argued that Drake was not entitled to relief because "[they] ha[d] the correct offender score, the correct standard range," and "[a]ll that [the court] would be doing at resentencing . . . is removing the [*Blake*] conviction and replacing it with . . . a subsequent theft 2 conviction. . . . And [Drake's] sentence is not something that is going to be . . . completely out of left field or completely incorrect." Meanwhile, Drake argued that "a conviction based on an

[3] Under CrR 7.8(c)(3), "[i]f the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted."

unconstitutional statute cannot be considered in calculating an offender score, and that is exactly what has happened in [his] case." He also argued, again, that he was entitled to resentencing because he "ha[d] his freedom stolen from him for nine months from the prior [*Blake*] conviction as well." Additionally, Drake indicated that he planned to seek an exceptional sentence below the standard range at resentencing.

The trial court denied Drake's motion for resentencing, observing that Drake's offender scores and standard ranges would remain the same at resentencing and that Drake "has already received the low end of the sentence."

Drake timely appealed.

ANALYSIS

I. Standard of Review & Legal Standards

A CrR 7.8 motion for resentencing is a collateral attack. *State v. Molnar*, 198 Wn.2d 500, 509, 497 P.3d 858 (2021). "Relief by way of collateral attack is extraordinary," and the "bases . . . for collateral attack are limited because '[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes costs society the right to punish admitted offenders.'" *State v. Basra*, 10 Wn. App. 2d 279, 287, 448 P.3d 107 (2019) (final alteration in original) (quoting *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982)).

To obtain collateral relief, "a defendant must either show that a constitutional error actually prejudiced them or that a nonconstitutional error amounted to 'a fundamental defect resulting in a complete miscarriage of justice.'"

State v. Pascuzzi, 29 Wn. App. 2d 528, 533, 541 P.3d 415 (quoting *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007)), *review denied*, 3 Wn.3d 1007 (2024). A miscalculated offender score is a nonconstitutional error. *In re Pers. Restraint of Fletcher*, ___ Wn.3d ___, 552 P.3d 302, 314 (2024). Accordingly, Drake needed to show that including the *Blake* offense in his offender score amounted to a fundamental defect resulting in a "complete miscarriage of justice." *Id.*

There are few cases elaborating on the "complete miscarriage of justice" standard, and Division Three of this court recently observed that, "[o]utside of very general statements, [it found] no Washington authority describing standards for determining when nonconstitutional errors . . . will result in a petitioner being granted collateral relief." *In re Pers. Restraint of Quintero*, 29 Wn. App. 2d 254, 309, 541 P.3d 1007 (2024) (footnote omitted). That said, it is well established that the standard for collateral relief based on a nonconstitutional error is more demanding than the "actual and substantial prejudice" standard for constitutional error, which already presents a high barrier to relief. *See In re Pers. Restraint of Wolf*, 196 Wn. App. 496, 507, 384 P.3d 591 (2016) ("[A] collateral attack undermines the strong interest of the courts in finality, and that interest justifies the high and sometimes very difficult actual and substantial prejudice standard."); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) ("Nonconstitutional error requires *more than* a mere showing of prejudice." (emphasis added)); *In re Pers. Restraint of Call*, 144 Wn.2d 315, 329 n.57, 28 P.3d 709 (2001) (the "burden is higher" for nonconstitutional errors than those of

constitutional magnitude); *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 611, 316 P.3d 1007 (2014) (Gordon McCloud, J., concurring) ("[N]onconstitutional errors [are] subject to a far more demanding prejudice inquiry.").

It is also well established that the defendant bears the burden to prove a complete miscarriage of justice by a preponderance of the evidence. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). Furthermore, the defendant may not rely on bald assertions and conclusory allegations to meet that burden. *See State v. Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012) (explaining "bald, self-serving statement[s] without corroboration" insufficient for relief under CrR 7.8); CrR 7.8(c)(1) (motion must "stat[e] the grounds upon which relief is asked, and [be] supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based").

This court's review of a trial court's denial of a CrR 7.8 motion is "'limited to determining whether the trial court abused its discretion in denying [the] motion.'" *Pascuzzi*, 29 Wn. App. 2d at 533 (alteration in original) (quoting *State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005)). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on 'untenable grounds, or for untenable reasons.'" *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009) (internal quotation marks omitted) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

II. Denial of CrR 7.8 Motion for Resentencing

Drake argues that by denying his CrR 7.8 motion, the trial court abused its discretion for a number of reasons. We disagree.

Drake first cites *In re Personal Restraint of Goodwin*[4] for the proposition that a defendant establishes a complete miscarriage of justice by "show[ing] that the sentence imposed upon him was longer than it should have been," and he asserts that "it is undisputed that [his] sentence . . . was nine months longer than it should have been." But the record citations Drake provides do not support that this point is undisputed. One citation is to the part of the show cause hearing where the State conceded only that Drake's CrR 7.8 motion did not need to be transferred to this court.[5] Another is to Drake's own reply in the trial court in support of his motion for resentencing.

Furthermore, *Goodwin* is inapposite. There, Goodwin was sentenced to the high end of the standard range based on a miscalculated offender score. *See Goodwin*, 146 Wn.2d at 864 (noting standard range was 36-48 months on one

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[4] 146 Wn.2d 861, 868, 50 P.3d 618 (2002)

[5] *See* CrR 7.8(c)(2) (requiring the trial court, under certain circumstances, to transfer a CrR 7.8 motion to this court for consideration as a personal restraint petition). It is undisputed that the trial court properly retained Drake's CrR 7.8 motion for consideration on the merits, rather than transferring it to this court.

At oral argument before this court, Drake argued that he is entitled to resentencing under the "plain language" of CrR 7.8(c)(2) Wash. Ct. of Appeals oral argument, *State v. Drake*, No. 84923-9-I (July 24, 2024), at 0 min., 45 sec.; 6 min., 19 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024071139/?eventID=2024071139. That rule provides the following:

> A defendant is entitled to relief under [CrR 7.8(c)(2)(i)] where the person (A) is serving a sentence for a conviction under a statute determined to be void, invalid, or unconstitutional by the United States Supreme Court, the Washington Supreme Court, or an appellate court where review either was not sought or was denied or (B) is serving a sentence that was calculated under RCW 9.94A.525 [governing offender score calculations] using a prior or current conviction based on such a statute.

CrR 7.8(c)(2).

But Drake did not raise this argument in briefing before the trial court or on appeal. *Cf. State v. Kirwin*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007) ("Absent a change in applicable law, we will not consider an issue raised for the first time during oral argument."), *aff'd,* 165 Wn.2d 818, 203 P.3d 1044 (2009). Regardless, we are unpersuaded that CrR 7.8(c)(2), which governs transfers to this court, relieves a defendant claiming nonconstitutional error from demonstrating a complete miscarriage of justice.

count and 0-12 months on other, and Goodwin was sentenced to 48 months and 12 months plus one day, respectively). On collateral review, our Supreme Court held that Goodwin was entitled to resentencing "using a correct offender score." *Id.* at 877-78. In doing so, it did state that "a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Id.* at 868. But, as the State points out in its briefing on appeal, *Goodwin* simply did not reach the issue that is presented here: whether a defendant can establish a complete miscarriage of justice based on an offender score that was incorrect at the time of sentencing but, due to an intervening conviction, was correct at the time the defendant sought collateral relief and would remain correct at resentencing.

Next, and to that end, Drake contends that the trial court abused its discretion by considering what would happen at resentencing, rather than asking whether Drake suffered a complete miscarriage of justice *at his original sentencing*. Drake points out that in the context of a *constitutional* sentencing error, the inquiry into whether a defendant has shown actual and substantial prejudice is backward looking. For example, in *In re Personal Restraint of Meippen*, where the petitioner argued the sentencing court committed constitutional error by failing to comply with the holding set out in *State v. Houston-Sconiers*,[6] our Supreme Court denied relief because the petitioner did not present any evidence that the *sentencing court* "would have imposed a lesser sentence"

[6] 188 Wn.2d 1, 9, 391 P.3d 409 (2017) (holding a court sentencing a juvenile must take defendant's youthfulness into account and "must have absolute discretion to depart as far as they want below otherwise applicable . . . ranges and/or sentencing enhancements").

had it complied. *Meippen*, 193 Wn.2d 310, 317, 440 P.3d 978 (2019); *cf. In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 268-69, 474 P.3d 524 (2020) (petitioner established prejudice where he showed that "[m]ore likely than not, [he] would have received a lesser sentence" had the sentencing court not committed constitutional error).

But again, the "complete miscarriage of justice" standard for nonconstitutional errors is more demanding of defendants than the "actual and substantial prejudice" standard for constitutional errors.[7] *See Davis,* 152 Wn.2d at 672. Drake cites no authority for the proposition that, in applying the more demanding standard, the trial court was precluded from considering the totality of the circumstances, including the fact that, at resentencing, it would be required to consider Drake's subsequent criminal history. Contrary to Drake's contention on this issue, RCW 9.94A.525(22) expressly states the following:

> The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. . . . Prior convictions that were not included in criminal history or in the offender score shall be included upon resentencing to ensure imposition of an accurate sentence.

Moreover, even if the trial court was required to focus on what the original sentencing court would have done, Drake cites no support in the record for his assertion that "the original sentencing court would most likely have imposed a shorter sentence, had it properly calculated his offender score." As noted, Drake says his sentence was "nine months longer than it should have been." But he does

[7] The State suggests in its brief that Drake must satisfy *both* standards. That is incorrect.

not articulate why this "should" have been the case, much less establish that the sentencing court more likely than not would have agreed with him on this point. He assumes that, because his base sentences were concurrent and the low end of the standard range on Count I would have been 129 months instead of 138 months had his offender score been correct, his total sentence would have been 201 months (129 months + 72 months for the firearm enhancement) instead of 210 months (138 months + 72 months for the firearm enhancement).

But this assumption glosses over the fact that the 138-month base sentence on Count I was consistent with what the prosecutor agreed to recommend under the parties' plea agreement. *See State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015) (plea agreement is a binding contract between State and defendant). Drake provided no evidence with his CrR 7.8 motion to show what if any impact his offender score had on the prosecutor's recommendation or the sentencing court's decision. He did not present any evidence about the plea negotiations or his original sentencing hearing such as, for example, evidence that the prosecutor would have recommended—and the sentencing court would have imposed—a lower sentence, or that, had the prosecutor made the same recommendation, the sentencing court would have rejected it and sentenced Drake to the low end of the correct sentencing range.

Drake also did not address whether and to what extent the terms of his plea factor into the "complete miscarriage of justice" inquiry. In that regard, Drake's plea agreement was quite favorable. According to a probable cause affidavit, Drake broke into the home of Erik Burnett on November 24, 2009 and shot Burnett

three times while he was asleep in his bed with his girlfriend and their infant child. The State initially charged Drake with assault in the first degree and burglary in the first degree—both of which are deemed most serious, or "strike" offenses under the SRA. *See* former RCW 9.94A.030(30)(a) (2009) (providing that class A felonies are most serious offenses); former RCW 9A.36.011(2) (1997) ("Assault in the first degree is a class A felony."); RCW 9A.52.020(2) ("Burglary in the first degree is a class A felony."). Drake's criminal history included a prior strike offense, a 2004 conviction for assault in the second degree, putting him at greater risk under the persistent offender accountability act. *See* former RCW 9.94A.030(35)(a)(ii) (2009) (persistent offender is one who has, before the commission of a current most serious offense, "been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score"); former RCW 9.94A.030(30)(b) (2009) (assault in the second degree is a most serious offense). Additionally, the State included firearm enhancement allegations on *both* the assault charge and burglary charge, each of which would run consecutively to the base sentences and each other. *See* RCW 9.94A.533(3)(e) ("Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under [the SRA].").

In exchange for Drake's guilty plea, the State not only reduced the charge

on Count II from burglary in the first degree to residential burglary, a non-strike class B felony,[8] but also removed the firearm allegation from Count I entirely. The State also agreed to dismiss or not file a separate charge for unlawful possession of a firearm in the first degree arising from the same incident with Burnett. And, it agreed to dismiss or not file additional burglary and residential burglary charges that would have double scored against one another and against Drake's conviction on Count II. *See* former RCW 9.94A.525(16) (2008) ("If the present conviction is for Burglary 2 or residential burglary, count priors as in [RCW 9.94A.525(7)]; however, count two points for each . . . prior Burglary 1 conviction, and two points for each . . . prior Burglary 2 or residential burglary conviction."); *see also* former RCW 9.94A.589(1)(a) (2002) (offender scores generally calculated by treating "all other current and prior convictions as if they were prior convictions").

In short, even if Drake were correct about the relevant point in time for the trial court's analysis, he fails to show that it was manifestly unreasonable for the trial court to conclude that Drake's original sentence did not constitute a complete miscarriage of justice. *Cf. Quintero*, 29 Wn. App. 2d at 309-10 (observing that, under federal habeas corpus standards, a petitioner alleging nonconstitutional error must show that the error "amount[s] to something akin to a denial of due process"); *Fletcher*, 552 P.3d at 315 (offender score error resulted in complete miscarriage of justice where sentencing calculations were "dramatically incorrect" and there was "high probability that the mistake affected the original sentence").

Drake next points out that, in denying his CrR 7.8 motion, the trial court

[8] RCW 9A.52.025(2); *see also* former RCW 9.94A.030(30) (2009) (listing strike offenses at time of offense at issue here).

stated that "there is an issue in considering what may have transpired ten years later that may now provide the basis for an exceptional sentence." According to Drake, the trial court "appears to have concluded that Mr. Drake would have been precluded, in a resentencing hearing, from citing any post-conviction developments in a bid for an exceptional sentence below the standard range," and he asserts that "[t]his was error." But Drake takes the trial court's statement out of context. The trial court stated that "*when the* [*c*]*ourt is looking at whether there would have been a different outcome at the time*, I think that there is an issue in considering what may have transpired ten years later that may now provide the basis for an exceptional sentence." (Emphasis added.) That is, it made the unremarkable observation that, to the extent it was asking what the *original* sentencing court would have done, it would be incongruous to consider events that transpired some ten years later. The trial court's comment is not a basis for reversal.

Finally, Drake points out that resentencing would give him the opportunity to request an exceptional sentence below the standard range on the grounds that he served a "lengthy term of confinement" on the *Blake* offense and his base sentence was "clearly excessive" due to the mandatory doubling of his firearm enhancement.[9] As a preliminary matter, this first contention is effectively a request to credit time served as a result of the 2007 conviction that was later invalidated by *Blake* against crimes committed years later. But a collateral attack on the judgment and sentence herein is not a proper vehicle for challenging the sentence

[9] The State correctly points out that Drake cited only medical issues in the trial court as a basis for his anticipated request for an exceptional sentence below his standard range.

imposed on Drake's earlier *Blake* offense. Nor has he offered any authority that would support a trial court's deviation from the standard ranges of the SRA in order to "correct" a conviction and sentence under a statute that was later invalidated. And, as the trial court observed, Drake's current term of confinement is already at the low end of what would remain the standard range at resentencing due to Drake's his 2011 theft conviction. The trial court did not abuse its discretion when it concluded that not giving Drake an opportunity to request an even shorter exceptional sentence would be a complete miscarriage of justice that warrants disturbing a long final judgment.

Affirmed.

WE CONCUR:

Díaz, J.

Bjelkman, J.