

People v. Serrano, N.

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA0704
City and County of Denver District Court No. 96CR651
Honorable Martin F. Egelhoff, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Nathan M. Serrano,

Defendant-Appellant.

ORDERS AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by: JUDGE PLANK*
Bernard and Metzger*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: November 29, 2007

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Appellee

Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2007.

Defendant, Nathan M. Serrano, appeals the trial court's orders denying his motions for postconviction relief filed pursuant to Crim. P. 35(a) and 35 (c). We affirm in part, reverse in part, and remand for a hearing on defendant's Crim. P. 35(c) claim of ineffective assistance of counsel.

In 1996, while on probation from two previous juvenile adjudications, defendant was charged in two separate juvenile cases. In the first case, he was charged with first degree burglary, attempted second degree assault, and felony menacing, and in the second case telephone harassment.

A week after filing the juvenile charges in the first case, the district attorney direct filed felony charges of first degree burglary, third degree sexual assault, and felony menacing against defendant, based on the same incident as the juvenile case. The juvenile court then terminated the first juvenile case.

The parties reached a global disposition and plea bargain in the second juvenile case and the direct filed case. In the juvenile case, defendant pleaded guilty to telephone harassment and an added count of aggravated juvenile offender, and admitted that he violated probation in his two previous juvenile cases. The juvenile

court committed defendant to the Department of Human Services for a determinate period of time not to exceed five years. In the direct filed case, defendant pleaded guilty to added charges of second degree burglary and attempted first degree sexual assault, and was sentenced to ten years adult probation, to run concurrent with, and conditioned upon, defendant completing his juvenile commitment.

In 2000, the probate court imposed a legal disability on defendant, and he was transferred from the Department of Human Services to the Wheat Ridge Regional Center (Center). Defendant subsequently violated the terms of his adult probation by hiding weapons and contraband in his room at the Center, as well as leaving a hospital the Center had sent him to. The trial court revoked defendant's probation and ordered him to complete the remaining portion of his ten year sentence in jail, plus a mandatory five-year parole term.

On June 27, 2002, defendant filed a Crim. P. 35(c) motion. The trial court scheduled a hearing on defendant's claim but did not complete the hearing due to defendant's failure to comply with the trial court's disclosure order. The trial court summarily denied

defendant's Crim. P. 35(a) motion. Defendant then appealed.

Prior to oral argument, a division of this court remanded the case to the trial court for the limited purpose of completing the evidentiary hearing on defendant's Crim. P. 35(c) motion. After holding a hearing, the trial court concluded that the trial court had jurisdiction over defendant's case and that defendant had not established justifiable excuse or excusable neglect. The trial court therefore denied defendant's motion as time barred.

On appeal, defendant contends the trial court erred in denying his motions for postconviction relief.

I.

Contrary to defendant's contention, his motion did not raise a claim of illegal sentence cognizable under Crim. P. 35(a).

A sentence is illegal, and thus subject to correction at any time under Crim. P. 35(a), if it is "not authorized by law" -- that is, if it is inconsistent with the statutory scheme outlined by the General Assembly. *People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006); see *Roberts v. People*, 130 P.3d 1005, 1006-07 (Colo. 2006); *People v. Green*, 36 P.3d 125, 126 (Colo. App. 2001).

A.

Defendant contends the trial court exceeded its authority by conditioning his adult probation on completion of his juvenile commitment. We disagree.

Trial courts are given wide discretion to grant probation and impose conditions upon the probation sentence. *People v. Richards*, 795 P.2d 1343, 1347 (Colo. App. 1989); *People v. Burleigh*, 727 P.2d 873, 874 (Colo. App. 1986). The broad probationary power of the court allows it to grant probation “upon such terms and conditions as it deems best,” when it appears to the court that probation will serve “the ends of justice and the best interests of the public, as well as the defendant.” § 16-11-202(1), C.R.S. 1996. The broad discretionary power of the trial court in determining the conditions of probation is particularly evident in section 16-11-204(2)(XV), C.R.S. 1996, which provides that the court may, as a condition of probation, require that defendant “[s]atisfy any other conditions reasonably related to his rehabilitation and the purposes of probation.” *People v. Burleigh*, 727 P.2d at 874.

We conclude that it was within the discretion of the trial court to impose completion of defendant’s juvenile commitment as a condition of his adult probation. The trial court, as in this case,

can fashion specific conditions of probation to meet the needs of the particular case. *See People v. Burleigh*, 727 P.2d at 874 (fact that section 16-11-204(2) lists some conditions of probation that the court may impose does not restrict the court from imposing other reasonable restrictions). The parties here reached a disposition that they determined best served the interests of justice, while addressing defendant's mental, emotional, and physical health needs. In imposing the recommended sentence, the trial court agreed that this condition was appropriate and reasonably related to defendant's rehabilitation and the purposes of probation.

B.

Defendant also contends that his aggravated juvenile sentence is illegal because he did not meet the sentencing criteria. We disagree.

Defendant pleaded guilty to an added count of aggravated juvenile offender. A juvenile offender is an aggravated juvenile offender if the juvenile is:

Sixteen years of age or older and is adjudicated a juvenile delinquent for a delinquent act which constitutes a felony and either is subsequently adjudicated a juvenile delinquent for a delinquent act which constitutes a crime

of violence, as defined in section 16-11-309(2), C.R.S., or has his probation revoked for a delinquent *act which constitutes a crime of violence*, as defined in section 16-11-309(2), C.R.S.

§ 19-2-804(1)(b), C.R.S. 1996 (emphasis added). Defendant's juvenile probation was revoked and he was sentenced as an aggravated juvenile offender based on his guilty plea in trial court. Defendant contends that because he pleaded guilty to two non violent crimes -- second degree burglary and attempted first degree sexual assault -- the aggravated juvenile offender sentencing provision is not applicable.

Section 19-2-804, however, requires only that defendant's probation be revoked for a delinquent act that constitutes a crime of violence, not that the juvenile be convicted of a crime of violence. Here, defendant was initially charged in district court with first degree burglary and third degree sexual assault, both of which are crimes of violence. See § 16-11-309(2)(E),(H), C.R.S. 1996. At the plea advisement hearing the prosecutor clearly articulated the basis for applying the aggravated juvenile offender statute. She explained that defendant pleaded guilty to attempted first degree sexual assault, stemming from a first degree burglary case, thereby

establishing the crime of violence to support applying the aggravated juvenile offender statute.

Accordingly, because defendant's probation was revoked for committing a delinquent act that constituted a crime of violence, he was properly sentenced as an aggravated juvenile offender.

II.

Defendant argues the prosecutor did not follow the proper procedure to transfer a case from juvenile court to district court, and this failure deprived the district court of jurisdiction. We disagree.

The then applicable transfer statute provided that "[a] petition may be transferred from the juvenile court to the district court only after a hearing as provided in this section." § 19-2-806(1)(b), C.R.S. 1996 (now codified as § 19-2-518(1)(b), C.R.S. 2007 (language identical)).

A transfer hearing is required so that the juvenile court will balance a variety of considerations before determining "whether the interests of the juvenile or of the community would be better served" by transferring jurisdiction to the district court. *See* §§19-2-518(1)(b), 19-2-518(3)(b), & 19-2-518(4)(b), C.R.S. 2007) (a

petition may be transferred to the district court only after a hearing; at such hearing the juvenile court shall consider numerous enumerated factors; however, the weight to be given to each factor is discretionary with the juvenile court).

Here, defendant confessed the petition to transfer as a condition of his plea agreement, thereby essentially stipulating to the existence of factors sufficient to warrant transfer. This was sufficient to meet the procedural requirements for transfer set forth in the statute.

In addition, the juvenile court's transfer ruling was made so that defendant could accept a very favorable plea disposition which he had already negotiated with the prosecution in district court.

We reject defendant's remaining objections to the district court's handling of defendant's cases. The provisions of the Children's Code which defendant cites as requiring referral of a juvenile with developmental disabilities or delays to the nearest community centered board, *see* sections 19-2-104(1)(i); 19-2-104(3)(b)(1); 27-10.5-102 (11), C.R.S. 1996, apply when the juvenile is in the juvenile court system. These provisions impose an obligation on the juvenile court to make referrals as appropriate,

but are not applicable to the district court. Because defendant was in the district court system, these statutes were not applicable to his case.

III.

Defendant contends that on remand that the trial court improperly concluded that defendant did not establish justifiable excuse or excusable neglect to overcome the time bar to his motion for postconviction relief. We agree and remand for completion of the evidentiary hearing on defendant's 35(c) motion for ineffective assistance of counsel.

Except in class one felony cases, a Crim. P. 35(c) motion is time barred if it is brought more than three years after the conviction is final, unless the defendant can establish justifiable excuse or excusable neglect that would permit an untimely attack. See § 16-5-402(1), (2)(d), C.R.S. 2007; Crim. P. 35(c)(3)(I) (“Any motion filed outside of the time limits set forth in § 16-5-402 . . . shall allege facts which, if true, would establish one of the exceptions listed in § 16-5-402(2) . . .”). For purposes of § 16-5-402 and postconviction review, if there is no direct appeal, a conviction occurs when the trial court enters judgment and the

sentence is imposed. *People v. Collier*, 151 P.3d at 671.

Here, defendant's motion was filed six years after he was sentenced, and thus is untimely on its face. The trial court, however, agreed to hold a hearing to determine whether defendant could establish justifiable excuse or excusable neglect for his delay, and thus overcome the statutory time bar. The trial court commenced a hearing but did not complete it because defense counsel did not comply with the trial court's witness disclosure order. Although the trial court indicated that it would reschedule the hearing once defendant came into compliance, defendant appealed the trial court's order denying his Crim. P. 35(a) motion, precluding the trial court from holding a hearing. Before the case was heard on appeal, a division of this court remanded the case to the trial court to complete the evidentiary hearing on defendant's Crim. P. 35(c) motion.

On remand, the trial court again encountered difficulties conducting and completing the hearing. After three unsuccessful attempts, the trial court conducted a hearing on defendant's mental, emotional, and physical health as it pertained to excusable neglect or justifiable excuse for not timely filing his Crim. P. 35(c)

motion. Defendant was unable to attend the hearing due to his health. At the conclusion of the hearing the judge agreed to hold another hearing in order for defendant to testify. The court held an additional hearing, but defendant's grandmother did not permit him to attend that hearing. The trial court found that defendant did not prove excusable neglect or justifiable excuse and denied his motion.

The record reveals that the defendant is mentally retarded, developmentally disabled, and is unable to read. Under these circumstances we conclude the defendant is entitled to an evidentiary hearing on his ineffective assistance of counsel claim. We therefore reverse the 35(c) order and remand to the trial court to conduct a hearing.

IV.

We reject defendant's contention that the justifiable excuse or excusable neglect exception to section 16-5-402(2)(d), C.R.S. 2007, violates due process. The justifiable excuse or excusable neglect exception set forth in this statute provides a criminal defendant with a meaningful opportunity to challenge allegedly unconstitutional convictions, *see People v. Deskins*, 904 P.2d 1358, 1361 (Colo. App. 1995), *rev'd on other grounds*, and is

constitutional. *See People v. Wiedemer*, 852 P.2d 424, 436-38, 440-41 (Colo. 1993); *People v. Boehmer*, 872 P.2d 1320, 1324 (Colo. App. 1993).

The court's order regarding defendant's Crim.P. 35(a) motion is affirmed. The order denying defendant's 35(c) is reversed and the case is remanded to the trial court for completion of the evidentiary hearing on defendant's 35(c) motion.

JUDGE BERNARD and JUDGE METZGER concur.