

COLORADO COURT OF APPEALS

Court of Appeals No.: 02CA2468
Arapahoe County District Court No. 00CR1936
Honorable James F. Macrum, Jr., Judge
Honorable Robert H. Russell, II, Judge
Honorable Richard T. Spriggs, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Joseph Anthony Paiva,

Defendant-Appellant.

JUDGMENT AFFIRMED, SENTENCE VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by: JUDGE MARQUEZ
Webb and Piccone, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: October 13, 2005

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General, Denver, Colorado, for Plaintiff-Appellee

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

Defendant, Joseph Anthony Paiva, appeals the judgment of conviction entered after he pleaded guilty to second degree burglary. He also appeals his sentence. We affirm the judgment, vacate the adjudication as an habitual offender and sentence, and remand for further proceedings.

Defendant was originally charged in case number 00CR1936 with second degree burglary, theft, forgery, and criminal impersonation, but three habitual criminal counts for convictions in 1993 were added later. On August 20, 2001, Judge Robert H. Russell, II denied a Crim. P. 35(c) motion in 00CR1936 alleging justifiable excuse belatedly to attack the prior convictions.

In January 2002, defendant pleaded guilty in 00CR1936 to the second degree burglary charge before Judge James F. Macrum, Jr.

In August 2002, defendant appeared with two attorneys, who were representing him on the 1993 cases as well as some more recent cases including 00CR1936. The prosecution advised the court that it did not have a transcript of the August 2001 hearing. One defense attorney stated that he was going to request reconsideration of the issue of justifiable excuse or excusable

neglect based on several hundred pages of mental health records indicating organic brain injury or very limited IQ, that defendant had been institutionalized since age five, and that the information had not previously been considered. At that hearing, defense counsel stipulated to the existence of defendant's three prior felony convictions and identification. Judge Macrum set a hearing on motions for November 5, 2002, including a collateral attack on the prior convictions.

During an intervening status hearing on October 28, 2002, one of defendant's attorneys withdrew, and the other submitted copies of defendant's mental health records to the court and agreed to submit a supplemental motion. Judge Macrum, noting that they still did not have a transcript reflecting whether the issue of excusable neglect had been ruled on, told defense counsel to get an expert and to prepare to argue the issue on November 5, 2002.

By the November 5, 2002 hearing before Judge Richard T. Spriggs, the transcript of the hearing before Judge Russell had been made available; the transcript reflected that Judge Russell had denied a Crim. P. 35(c) attack on two of the 1993 convictions on the basis of no showing of excusable neglect. Judge Spriggs refused to

overrule Judge Russell's determination. Pursuant to the habitual criminal statute, defendant was sentenced to forty-eight years in the Department of Corrections and five years mandatory parole.

On November 8, 2002, Judge Macrum without comment denied defendant's motion to reconsider the matter of justifiable excuse and excusable neglect.

I.

Defendant contends that his rights to trial and due process were violated because Judge Spriggs refused to hear arguments on suppression and sentenced him as an habitual offender without conducting an habitual offender trial as required by § 18-1.3-803(4), C.R.S. 2005. We conclude that further proceedings are required.

Claims under Crim. P. 35(c) are subject to the time bar of § 16-5-402, C.R.S. 2005. Section 16-5-402 provides, in relevant part, that a defendant has three years from the date of his conviction to commence a collateral attack. If a defendant's motion for postconviction relief is untimely under § 16-5-402 and if the defendant has failed to allege facts that, if true, would establish justifiable excuse or excusable neglect, the trial court may deny the

motion without conducting a hearing. People v. Salinas, 55 P.3d 268 (Colo. App. 2002).

In People v. Wiedemer, 852 P.2d 424, 441-42 (Colo. 1993), the supreme court set forth the following factors to consider in assessing whether justifiable excuse or excusable neglect exists in a particular case: (1) whether circumstances or outside influences prevented a challenge to the prior conviction; (2) whether a defendant who had reason to question the constitutionality of a conviction investigated its validity and took advantage of avenues of relief that were available; (3) whether the defendant either knew that the conviction was constitutionally infirm or had reason to question its validity; (4) whether the defendant had other means of preventing the government's use of the conviction so that a postconviction challenge was previously unnecessary; (5) the time between the date of conviction and the defendant's challenge; and (6) the effect that such period has on the state's ability to defend against the challenge. Whether a defendant has demonstrated justifiable excuse or excusable neglect is a question of fact to be resolved by the trial court. People v. Wiedemer, supra. Ignorance or misunderstanding of the law and lack of legal assistance do not

excuse the late filing of a Crim. P. 35(c) motion. People v. Alexander, ___ P.3d ___ (Colo. App. No. 04CA0437, Jul. 14, 2005).

A.

Defendant contends that Judge Macrum's ruling that defendant would get a hearing to present evidence attacking the validity of his prior convictions was the law of the case and that Judge Spriggs erred by following the earlier ruling of Judge Russell. We do not agree that Judge Macrum's ruling was the law of the case, but agree that defendant should have the opportunity to present additional evidence on the question of justifiable excuse or excusable neglect.

The record reflects considerable confusion stemming from the fact that three district court judges and different defense attorneys and prosecutors participated in the proceedings. Judge Russell determined that any challenge to two of the habitual criminal counts was time barred and that there was no justifiable excuse or excusable neglect for the late challenge. At a subsequent hearing before Judge Macrum and with a newly appointed defense counsel, the People noted that they were still trying to track down the August 2001 transcript.

At the November 5, 2002 hearing, with Judge Spriggs presiding, the People explained that while the hearing had been set for further arguments by the defense on justifiable excuse or excusable neglect, they had finally tracked down the transcript showing that Judge Russell had denied a Crim. P. 35(c) attack on two of the prior convictions on the basis that there was no showing of excusable neglect. Judge Russell had also invited counsel to address whether a further hearing was necessary for the third habitual criminal count; however, it is unclear whether a separate motion was ever filed. While defendant urged Judge Spriggs to reconsider the issue of justifiable excuse, explaining that defendant's mental health records were not before Judge Russell, Judge Spriggs concluded that the Crim. P. 35(c) motion had already been ruled on and that there was no dispute as to the three prior convictions; therefore, the court sentenced defendant to the term required by law.

Under the law of the case doctrine, a prior ruling on a question of law made at one stage of a case becomes binding precedent to be followed in successive stages of the same litigation. People v. Allen, 885 P.2d 207, 212 (Colo. 1994). However, the law of the case does

not preclude a trial court from reconsidering an earlier, nonfinal order in a case, even when that order was entered by a different judge. Pearson v. Dist. Court, 924 P.2d 512 (Colo. 1996); see also People v. Warren, 55 P.3d 809 (Colo. App. 2002) (doctrine is not a limit on a court's power to revisit an issue if court feels such review is necessary).

Here, when Judge Russell ruled, defendant had not yet entered a plea in 00CR1936, and sentence was not imposed until November 2002 when Judge Spriggs ruled. Thus, there was no final judgment until that date. See Pearson v. Dist. Court, supra (prejudgment orders remain interlocutory); People v. Arellano, 185 Colo. 280, 524 P.2d 305 (1974); People v. Harris, 914 P.2d 434 (Colo. App. 1995). In view of the evidence before the court in August 2001, we cannot say that Judge Russell's order was erroneous. Nevertheless, that order did not preclude the trial court from addressing a motion to reconsider based on mental health evidence not previously considered.

The trial court has discretion to decline to apply the law of the case doctrine if it determines that its former ruling is no longer sound because of changed conditions, factual errors in the previous

ruling, intervening changes in the law, or manifest injustice resulting from the original ruling. People v. Allen, supra.

We note that Judge Spriggs stated that there were substantial issues that had never been addressed. While Judge Spriggs also found no motion for reconsideration or renewed Crim. P. 35(c) motion had been filed, the record reflects that evidence questioning defendant's intelligence, mental health, and ability to understand the need for attacking his 1993 convictions was presented to the court at the October 28, 2002 status hearing and that the issue of justifiable excuse or excusable neglect was before the court.

While the issue whether a defendant qualifies for the justifiable excuse or excusable neglect exception is a question of fact to be determined by the trial court, here, the trial court never considered whether defendant's mental health constituted justifiable excuse or excusable neglect under the Wiedemer factors. During oral arguments, the People conceded it was possible that mental illness could constitute justifiable excuse or excusable neglect where there was some nexus between the defendant's mental illness and his failure to challenge the prior conviction in a timely manner. Therefore, under the particular circumstances of

this case, we remand to allow the court to reconsider the issue of justifiable excuse or excusable neglect.

B.

Defendant next contends that the trial court never made a finding that the prosecution proved the habitual offender charges beyond a reasonable doubt. We reject this argument.

Section 18-1.3-803(1), C.R.S. 2005, provides, in relevant part:

If the allegation of previous convictions of other felony offenses is included in an indictment or information and if a verdict of guilty of the substantive offense with which the defendant is charged is returned, the court shall conduct a separate sentencing hearing to determine whether or not the defendant has suffered such previous felony convictions.

Section 18-1.3-803(4), C.R.S. 2005, specifies that if the defendant denies that he or she has been previously convicted as alleged, the trial court shall determine in a separate hearing whether the defendant has been convicted as alleged.

Here, without objection from defendant, the prosecution introduced pen packs from the three prior convictions into evidence. A penitentiary or pen pack is a certified record containing the mittimus, fingerprints, and photographs of an inmate

discharged from the Department of Corrections. Further, at the August 2002 hearing, defendant's counsel stipulated to the three prior felony convictions, stating:

Your Honor, if we have the pen packets, if we have triple certified records, they'll come in. Let's have them come in, and we'll proceed with the next part, but we don't need to have a whole lot of testimony over the fact he has three prior felony convictions. It's whether or not those convictions should stand. We'll confess three prior convictions. I mean, I have the pen packets.

Defendant also stipulated to the issue of identification, stating:

"There is a Court finding that there is [sic] three prior felony convictions and there are exhibits . . . ID and all that is stipulated too."

Judge Macrum reserved ruling on the evidence pending the resolution of the issues relating to the collateral attack on the prior convictions. Before sentencing defendant, Judge Spriggs specifically noted that the three prior felonies had been sufficiently proved. In light of the ample evidence of defendant's prior convictions, we reject his contention that the trial court did not find that the prosecution proved the habitual offender charges beyond a reasonable doubt.

C.

Defendant also raises “other reasons for remand” and specifies that these issues are not presented for litigation, but rather for the sole purpose of showing the necessity of a remand. We have reviewed these issues, but because defendant expressly states that they are not presented for resolution in this appeal, we decline to address them.

II.

Defendant contends that the trial court violated his right to due process of law because once the question of competence arose in 2002, the court had a duty to suspend the proceedings and order an evaluation. More specifically, defendant maintains that a letter dated February 28, 2002 from a doctor to defendant’s counsel raised a real likelihood that defendant was legally incompetent. We disagree.

There is an initial presumption of competency, and no defendant is entitled, as of right, to a competency examination or hearing merely by making a demand therefor. People v. Morino, 743 P.2d 49 (Colo. App. 1987). Section 16-8-110(2)(a), C.R.S. 2005, states, in relevant part, “If the judge has reason to believe that the

defendant is incompetent to proceed, it is his duty to suspend the proceeding and determine the competency or incompetency of the defendant” The trial court, who has observed the defendant’s demeanor, has substantial discretion in determining whether an issue respecting the defendant’s competence has been raised.

People v. Morino, supra.

Here, there is nothing in the record that would have caused the court to doubt defendant’s competency. The doctor’s letter, while recognizing defendant’s limited intellectual capacity, also indicates defendant has the ability to learn and to retain what he learns, and that he has normal ability in nonverbal reasoning and problem solving. In addition, while defense counsel argued that there were mental health issues that justified a late collateral attack on the habitual criminal counts, we note that none of defendant’s prior attorneys raised an issue concerning his competence to proceed in this case. We conclude that no legitimate concern regarding defendant’s competency was raised and therefore, it was not necessary for the trial court to order an evaluation.

III.

We likewise reject defendant's assertion that the introduction of the habitual offender pen packs violated the Confrontation Clause under the holding of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

As a preliminary matter, we note that defendant stipulated to the admission of the pen packs. Additionally, in Crawford, the Supreme Court held that testimonial hearsay is inadmissible unless the proponent demonstrates (1) that the declarant is unavailable and (2) that the opponent had a prior opportunity to cross-examine the declarant. While the Court did not precisely define "testimonial" statements, it excluded business records from that category. Crawford v. Washington, *supra*.

In People v. Shreck, 107 P.3d 1048 (Colo. App. 2004), a division of this court explained that because public records are analogous to business records, public records should not be considered "testimonial" statements for the purposes of applying Crawford. The division in Shreck concluded that a pen pack was an official record of a type not subject to the requirements of Crawford.

Defendant submits that Shreck was wrongly decided and that pen packs do not fall under the public records exception to the hearsay rule because CRE 803(8)(B) specifically prohibits “in criminal cases matters observed by police officers and other law enforcement personnel.” However, the limitation in subsection (B) typically applies to police investigations and other public investigative functions. Stephen A. Hess & Sheila K. Hyatt, Colorado Handbook on Evidence 803(8)(B) (2005); see also United States v. Dancy, 861 F.2d 77 (5th Cir. 1988)(rule excludes records that report the observation as investigation of crimes, not records that merely document routine, unambiguous factual matters). We conclude that the pen packs are admissible as public records and are of a type not subject to the requirements of Crawford.

The adjudication as an habitual offender and the sentence imposed are vacated, and the case is remanded for further proceedings on the issue of justifiable excuse or excusable neglect. If the court on remand determines there is no justifiable excuse or excusable neglect, the adjudication as an habitual offender and the sentence are to be reinstated, subject to defendant’s right to appeal. If the court finds justifiable excuse or excusable neglect, the court

shall conduct further proceedings on defendant's Crim. P. 35(c) motion. In all other respects, the judgment is affirmed.

JUDGE WEBB and JUDGE PICCONE concur.