Supp App. A

581 P.3d 789
Colorado Court of Appeals, Division VII.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Troy L. FIELDS, Defendant-Appellant.

Court of Appeals No. 20CA1708
|
Prior Opinion Announced August 3, 2023, Vacated in 24-5460
|
Announced October 23, 2025

Synopsis

Background: Defendant was convicted in the District Court, Denver County, Edward D. Bronfin, J., of kidnapping and sexual assault, as well as five habitual criminal charges, and sentenced to concurrent sentences of 96 years in prison for kidnapping and life in prison with possibility of parole after 40 years for sexual assault. The Court of Appeals, 2023 WL 12047281, affirmed his convictions and sentences on direct appeal. Defendant appealed. After the Supreme Court denied certiorari, the United States Supreme Court granted certiorari, vacated the judgment, and remanded case for consideration in light of *Erlinger v. United States*, 144 S.Ct. 1840.

Holdings: The Court of Appeals, Pawar, J., held that:

defendant's statutory right to jury trial on habitual criminal charges were not violated when trial court decided habitual criminal counts against defendant;

trial court violated defendant's Sixth Amendment constitutional right to have a jury determine habitual criminal counts;

trial court's error in violating defendant's Sixth Amendment constitutional right was harmless;

trial court acted within its discretion in nullifying request seeking disposition of charges under Uniform Mandatory Disposition of Detainers Act and removal of public defender;

trial court's error in incorrectly instructing jury on elements of second degree kidnapping did not constitute plain error;

even if victim impact testimony was improper, reversal was not warranted on appeal; and

defendant's conviction for burglary was a prior conviction supporting sentencing to life imprisonment under habitual criminal statute for his subsequent conviction for sexual assault.

Affirmed.

Procedural Posture(s): Appellate Review.

City and County of Denver District Court No. 17CR1872, Honorable Edward D. Bronfin, Judge

Attorneys and Law Firms

Philip J. Weiser, Attorney General, Jessica E. Ross, Senior Assistant Attorney General and Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Sean James Lacefield, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Opinion

Opinion by JUDGE PAWAR

***792** ¶ 1 A jury convicted defendant, Troy L. Fields, of kidnapping and sexual assault against the victim, J.C., as well as five habitual criminal charges.[1] Based on the habitual criminal charges, and the fact that Fields had already been adjudicated a habitual criminal in a prior case, the court sentenced him to concurrent sentences of ninety-six years in prison for kidnapping and life in prison with the possibility of parole after forty years for sexual assault.

¶ 2 Fields appealed, arguing the trial court violated the Uniform Mandatory Disposition of Detainers Act (UMDDA), improperly instructed the jury on the elements of kidnapping, ***793** and admitted irrelevant victim impact evidence. He also challenged his adjudication as a habitual criminal and argued that his life sentence was illegal. We affirmed Fields' convictions and sentences. *People v. Fields*, (Colo. App. No. 20CA1708, Aug. 3, 2023), 2023 WL 12047281 (not published pursuant to C.A.R. 35(e)) (*Fields I*).

¶ 3 The United States Supreme Court granted certiorari, vacated our judgment in *Fields I*, and remanded the case for further consideration in light of *Erlinger v. United States*, 602 U.S. 821, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024). *See Fields v. Colorado*, 604 U.S. ——, 145 S. Ct. 1136, 220 L.Ed.2d 429 (2025) (mem.). *Erlinger* held that, under the Sixth Amendment, whether a criminal defendant's prior convictions were committed on different occasions from one another for purposes of the Armed Career Criminal Act is the sort of fact-laden inquiry that a jury must decide. 602 U.S. at 834, 144 S.Ct. 1840. Fields argues that for purposes of Colorado's habitual criminal statute, now codified at section 18-1.3-803, C.R.S. 2025, *Erlinger* also requires a jury to find whether a defendant's prior convictions were separately brought and tried, and whether they arose out of separate and distinct criminal episodes.

¶ 4 Since this case returned to us, the Colorado Supreme Court issued its opinion in *People v. Gregg*, 2025 CO 57, 576 P.3d 725. It held that *Erlinger* applies to Colorado's habitual criminal sentencing statute and "the question of separate and distinct criminal episodes demands a jury finding." *People v. Gregg*, 2025 CO 57, ¶ 24, 576 P.3d 725. Applying *Gregg*, we conclude the trial court erred when it, rather than a jury, decided the habitual criminal counts. But we conclude that the error does not warrant reversal of Fields' convictions on those counts. The result of our analysis with respect to all other issues decided in *Fields I* remains unchanged. We thus affirm Fields' convictions and sentences.

I. Jury Trial on Habitual Criminal Adjudication

¶ 5 Fields asserts that the trial court erred when it adjudicated the habitual criminal counts. He argues that the court's failure to have a jury decide whether the prosecution proved that his prior convictions were separately brought and tried and that they arose out of distinct criminal episodes violated his statutory and constitutional rights. We see no basis for reversal.

A. No Statutory Right

¶ 6 As to Fields' statutory arguments, we discern no error. In 1994, when Fields committed the underlying offenses, "a defendant was entitled to a jury trial on habitual criminal charges." *People v. King*, 121 P.3d 234, 243 (Colo. App. 2005); *see also* § 16-13-103, C.R.S. 1994. But that right was limited to the right to have a jury decide the issue of identity. *People v. Jones*, 967 P.2d 166, 169 (Colo. App. 1997) (the defendant "was not entitled to have any other issues determined by the jury"). And in 1995, the legislature amended the statute to allow a court to determine habitual criminal charges as a matter of law for "all informations filed on or after July 1, 1995."[2] *King*, 121 P.3d at 243.

¶ 7 Although Fields committed the underlying offenses in 1994, the prosecution filed its complaint and information in 2017. Therefore, no jury trial was required. *See id.* Nevertheless, Fields received a jury trial on the issue of identity — a greater protection than he was entitled to by statute. We are not persuaded by his arguments that *King* and *Jones* are inapposite. Instead, we follow their holdings and conclude that his statutory rights were not violated.

B. Sixth Amendment Violation Was Harmless

¶ 8 We reach a different conclusion with respect to Fields' constitutional arguments. We agree with Fields that *Erlinger* instructs that the jury should have determined whether Fields' prior convictions were separately brought and tried and whether they arose out of distinct criminal episodes. ***794** *See Gregg*, ¶ 24 (there are no material differences between the separate-offenses inquiry at issue in *Erlinger* and Colorado's habitual criminal sentencing statute). Because both questions "require[ ] more than a mere determination of 'what crime, with what elements, the defendant was convicted of,' " a jury determination was required. *See id.* (quoting *Erlinger*, 602 U.S. at 838, 144 S.Ct. 1840). Nevertheless, we conclude that the error was harmless.[3]

1. No Structural Error

¶ 9 "Structural errors are constitutional 'defects affecting the framework within which the trial proceeds,' and they require automatic reversal because they defy analysis by harmless error standards." *People v. Washington*, 2022 COA 62, ¶ 25, 517 P.3d 706. Fields argues that his habitual criminal convictions must be reversed because the court's error was structural. We disagree. *Erlinger* applied *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Alleyne v. United States*, 570

U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) — all of which addressed a sentencing judge's determination to increase the mandatory minimum sentence for a crime or to impose a sentence that exceeds the statutory maximum sentence, based on facts not submitted to the jury and proven beyond a reasonable doubt. Error under each of these cases is reviewed for constitutional harmlessness. *See Erlinger*, 602 U.S. at 835, 144 S.Ct. 1840 (describing *Erlinger* as "on all fours" with *Apprendi* and *Alleyne*); *see also People v. Mountjoy*, 2016 COA 86, ¶¶ 14-15, 431 P.3d 631 (collecting cases and noting that both "a majority of the federal circuits" and "[m]any state appellate courts" have consistently applied harmless error review to *Apprendi/Blakely* errors), *aff'd*, 2018 CO 92M, 430 P.3d 389; *Villanueva v. People*, 199 P.3d 1228, 1231 (Colo. 2008) (reviewing *Blakely* error for constitutional harmlessness).

¶ 10 Despite this longstanding precedent, Fields argues that structural error applies because the *Erlinger* Court quoted a structural error discussion from *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). We are not persuaded that this citation supports a structural error analysis. The Supreme Court quoted *Rose* in the context of emphasizing the requirement that a jury must decide whether prior convictions were committed on separate occasions, even if, in many cases, that inquiry may be straightforward.[4] *See Erlinger*, 602 U.S. at 842, 144 S.Ct. 1840 ("There is no efficiency exception to the Fifth and Sixth Amendments."). Despite quoting this discussion, the Court has consistently held that "most constitutional errors," including Sixth Amendment errors, "can be harmless." *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

¶ 11 Fields also argues that, unlike the determination of a single element in an offense, the jury's determination of whether prior convictions were separately brought and tried and arose out of separate and distinct criminal episodes is too multifaceted and unpredictable to be reviewed for harmlessness. We disagree. Instead, these questions "can be definitively established based on the judicial records introduced at the habitual criminal trial." *People v. Nunn*, 148 P.3d 222, 227 (Colo. App. 2006). Accordingly, structural error does not apply.

2. Assuming Preservation, Any Error Was Harmless

¶ 12 Because we conclude that *Erlinger* error is not subject to automatic reversal ***795** for structural error, we must next decide whether reversal is appropriate under the applicable standard. The parties disagree about whether Fields preserved his constitutional arguments. But even if we assume preservation, reversal is not warranted.

¶ 13 We review preserved claims of constitutional error for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116. These errors require reversal unless we can declare that the error was harmless beyond a reasonable doubt. *Id.* "In other words, we reverse if 'there is a reasonable *possibility* that the [error] might have contributed to the conviction.' " *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

¶ 14 For a defendant to be adjudged a habitual criminal under section 18-1.3-801(2)(a)(I), the prosecution must prove beyond a reasonable doubt that the defendant, having been convicted of a felony, "has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." *People v. Williams*, 2019 COA 32, ¶ 37, 446 P.3d 944. "Charges are separately brought where they are 'in separate informations, with separate docket numbers, arising out of separate criminal incidents.' " *Id.* at ¶ 38 (quoting *Gimmy v. People*, 645 P.2d 262, 267 (Colo. 1982)). "[A] predicate conviction can result from either a conviction following trial or a guilty plea." *Id.* Convictions arising from guilty pleas satisfy the requirement of "separately brought and tried" when the underlying charges "would have been tried separately" if not for the guilty plea. *Id.* (citation omitted). Prior crimes arise from distinct criminal episodes where they are separated by enough time and have different victims and locations, such that "proof of neither could have formed a substantial portion of the proof of the other." *Marquez v. People*, 2013 CO 58, ¶ 20, 311 P.3d 265.

¶ 15 At the close of trial and while the jury was still empaneled, the prosecution presented evidence of the following:

- On September 12, 1988, Fields pled guilty to burglary and theft against a business for an offense occurring in Sedgwick County, Kansas, on January 30, 1987.
- On April 8, 1988, Fields pled no contest to burglary and theft against a residence for an offense occurring in Shawnee County, Kansas, on May 11, 1987.

- On November 6, 1989, Fields pled no contest to forgery for an offense that took place in Shawnee County on November 30, 1987.[5]

¶ 16 The record contains charging documents for each of these offenses; they show different dates (separated by a span of months), different locations, different victims, and different case numbers. Given this record, we cannot imagine a scenario in which a jury could have found that Fields' prior offenses occurred as part of the same criminal episode or that the prosecution might have brought and tried them together. Instead, based on this overwhelming evidence, we conclude that any rational jury would have found, beyond a reasonable doubt, that Fields' convictions were separately brought and tried and arose out of distinct criminal episodes. *See Erlinger*, 602 U.S. at 842, 144 S.Ct. 1840 ("Often, a defendant's past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions."); *see also United States v. Butler*, 122 F.4th 584, 590 (5th Cir. 2024) (*Erlinger* error was harmless beyond a reasonable doubt where the record clearly showed that the prior offenses spanned a range of months to years and involved different parties).

¶ 17 Because there is no reasonable possibility that the trial court's error in failing to ***796** try the "separately brought and tried" and "separate and distinct criminal episode" elements to a jury might have contributed to Fields' habitual criminal convictions, reversal is not warranted.

II. Other Issues

A. UMDDA

1. Applicable Law

¶ 18 The UMDDA provides that a prisoner "may request final disposition of any untried indictment, information, or criminal complaint pending against him in this state." § 16-14-102(1), C.R.S. 2025. Once the trial court and prosecution receive a UMDDA request, the prisoner must be brought to trial within 182 days. § 16-14-104(1), C.R.S. 2025. A defendant invokes his rights under the UMDDA if (1) his request substantially complies with the statute's requirements; and (2) the prosecution receives "actual notice," which means "actual knowledge," of his request. *People v. McKimmy*, 2014 CO 76, ¶¶ 20-21, 338 P.3d 333. If a defendant invokes his rights but the trial court fails to comply with the 182-day deadline, the court loses jurisdiction, and the charges must be dismissed with prejudice. § 16-14-104(1).

¶ 19 In reviewing a denial of a motion to dismiss for violation of the UMDDA, we defer to the trial court's factual findings provided they are supported by competent evidence, but we review the court's legal conclusions de novo. *McKimmy*, ¶ 19.

2. Procedural History

¶ 20 The prosecution filed the underlying charges against Fields on March 24, 2017. On May 7, 2017, while Fields was represented by a public defender, Fields' wife, Lisa Fields, sent a fax to the prosecutor and county court requesting final disposition of the charges under the UMDDA and seeking removal of the public defender. On May 19, 2017, the county court issued a minute order noting that it had received these motions, but "[u]nless Lisa Fields is a licensed attorney said motions are null." Fields himself filed a second UMDDA request, which was received on August 2, 2017.

¶ 21 The case was moved to the district court, and a motions hearing was held on November 3, 2017. Representing himself, Fields argued that the county court misapplied the law by nullifying the May 7th UMDDA request and that his right to a speedy trial would be violated unless trial was held by the following day. The prosecutor argued that Fields did not file an effective notice of his rights because the prosecutor's office never received the motion and she was not familiar with the telephone number to which the motion had been faxed.

¶ 22 The trial court deferred ruling on the motion and ordered the prosecutor to investigate whether the May 7th request was received and whether service by fax was sufficient.

¶ 23 At a subsequent hearing, the prosecutor argued that the county court properly exercised its discretion to nullify Fields' UMDDA request. The trial court noted that while the record did not indicate why the county court rejected the May 7th filing "but accepted an almost identical filing ... on August 2nd," it was "not in a position to countermand what [the county court] did." Because the May 7th request was nullified, the court denied the motion to dismiss.

3. Discussion

¶ 24 Fields argues that the trial court improperly relied on the law of the case doctrine because the county court abused its discretion by nullifying the May 7th UMDDA request.[6] We disagree. A criminal defendant is not entitled to hybrid representation — self-representation and representation by counsel — and a court is entitled to ignore pro se filings submitted by a represented defendant. *See People v. Gess*, 250 P.3d 734, 737 (Colo. App. 2010). Moreover, Fields' wife, a nonattorney, filed the request, which she is not authorized to do. *People v. Adams*, 243 P.3d 256, 266 (Colo. 2010) (nonattorneys may not engage in the unauthorized practice of law, including by preparing court pleadings). Because the county court properly nullified the UMDDA request filed by Fields' wife, ***797** the trial court properly concluded that this request was void. *See People v. Warren*, 55 P.3d 809, 813 (Colo. App. 2002) ("Under the law of the case doctrine, prior relevant rulings made in the same case generally are to be followed."); *People v. Dyer*, 2019 COA 161, ¶ 39, 457 P.3d 783 (we may affirm on any ground supported by the record). Accordingly, we discern no error.

B. Kidnapping Instruction

¶ 25 Fields next argues that the trial court reversibly erred by incorrectly instructing the jury on the elements of second degree kidnapping. The prosecution agrees that the instruction was incorrect but argues that reversal is not required.

¶ 26 Second degree kidnapping requires that the defendant knowingly "seizes and carries" a person "from one place to another" without lawful justification or the person's consent. § 18-3-302(1), C.R.S. 2025. Though the elemental instruction correctly listed the elements, a separate definitional instruction said that " '[s]eized and carried' means any movement, however short in distance." Between the time of trial and this appeal, the Colorado Supreme Court held that such an instruction is error. *Garcia v. People*, 2022 CO 6, ¶¶ 20-21, 503 P.3d 135 (this instruction eliminates the seizure element and improperly changes the asportation element from carrying a person from one place to another to "any movement, however short in distance," effectively lowering the prosecution's burden of proof).

¶ 27 Because the error was unpreserved in this case, we reverse only if it was plain. *See Hagos*, ¶ 14. Plain error is error that is both obvious and substantial. *Id.* An error is substantial if it so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Id.*

¶ 28 Since our decision in *Fields I*, the supreme court has made clear that the obviousness of an error for purposes of plain error review must be judged at the time the error was made, not at the time of appellate review. *People v. Crabtree*, 2024 CO 40M, ¶ 4, 550 P.3d 656. At the time of trial, the law was settled that the definitional instruction given here was correct. *See People v. Bondsteel*, 2015 COA 165, ¶¶ 94-97, 442 P.3d 880, *overruled by, Garcia v. People*, 2022 CO 6, 503 P.3d 135; *People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008), *overruled by, Garcia v. People*, 2022 CO 6, 503 P.3d 135. Accordingly, because the error was not obvious, it was not plain error.[7]

C. Victim Impact Evidence

¶ 29 Fields also argues that he is entitled to a new trial based on the improper admission of victim impact evidence. Specifically, he challenges J.C.'s testimony that she "never [again] lived" in the home where she was assaulted and J.C.'s mother's testimony that J.C. "would never let [the mother] turn the lights off day or night" and "would never sleep by herself," choosing to sleep with her mother "because she was so scared with the lights on day and night."

¶ 30 Fields' counsel did not object to this testimony at trial, so again, reversal is not required in the absence of plain error. *Hagos*, ¶ 14. We are not convinced that the testimony was irrelevant, as it had some tendency to lend credibility to J.C.'s testimony that the crime happened as she said it did. *People v. Haymaker*, 716 P.2d 110, 113-14 (Colo. 1986) (though state-of-mind evidence is to be viewed with skepticism, the evidence was not improper because it "substantiated the credibility of the victim" and was not so inflammatory or repetitive as to violate CRE 403). But even assuming that this testimony was improper, reversal is not required. Both J.C.'s and her mother's testimony was brief, was not referenced in closing argument, and "conveyed relatively mundane information when compared with the graphic evidence ***798** otherwise admitted at trial." *People v. Dean*, 2012 COA 106, ¶ 46, 292 P.3d 1066, *aff'd*, 2016 CO 14, 366 P.3d 593.

D. Applicability of Section 16-13-101(2.5), C.R.S. 1994

¶ 31 Finally, we are not persuaded by Fields' argument that his life sentence for sexual assault is illegal. As it did in 1994, the habitual criminal statute requires life imprisonment for any person who was convicted and sentenced as a habitual criminal and "who [was] thereafter convicted of a felony which is a crime of violence." § 18-1.3-801(2.5), C.R.S. 2025; § 16-13-101(2.5), C.R.S. 1994. Five days after the 1994 sexual assault, Fields committed a burglary. He was convicted of burglary and adjudicated a habitual criminal in 1995. He was convicted of the charges in this case in 2019.

¶ 32 Fields argues that his life sentence is illegal because he committed the crime of violence (the sexual assault) before he committed burglary. Put another way, he argues that the burglary cannot serve as the predicate offense under the habitual criminal statute because it occurred after the sexual assault.

¶ 33 Despite Fields' arguments, the statute's plain language unambiguously provides that the sequence of *convictions* — not commission of the offenses — controls. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379 ("If the statute is unambiguous, then we need look no further."); *see also People v. Woodside*, 2023 CO 25, ¶ 17, 529 P.3d 1233 (a conviction is "prior" even if it is for conduct occurring after a second offense where the plain language of the applicable statute does not "contemplate the timing of the underlying conduct"). We therefore conclude that Fields was properly sentenced.

III. Disposition

¶ 34 The judgment is affirmed.

JUDGE FREYRE and JUDGE SCHOCK concur.

All Citations

581 P.3d 789, 2025 COA 84

Footnotes

1 The kidnapping and sexual assault charges stem from events that occurred in 1994, when J.C. arrived home, unlocked the front door of her house, and was pulled in by a man waiting inside. The man held a knife to her throat, repeatedly threatened to kill her, moved her around the house, restrained her, and sexually assaulted her. The case had been cold for twenty-two years when detectives reprocessed DNA taken from J.C.'s vaginal swab and identified a match with a DNA sample taken from Fields.

2 The legislature has since amended the habitual criminal statute to once again require a jury trial on habitual criminal charges. *See* Ch. 344, sec. 1, § 18-1.3-803(1), (4), 2025 Colo. Sess. Laws 1866-67 (effective June 2, 2025).

3 In *People v. Gregg*, the supreme court was not required to address the appropriate remedy when a judge, not jury, makes the habitual offense determination. 2025 CO 57, 576 P.3d 725. Unlike Fields, the defendant in *Gregg* was never adjudicated a habitual criminal. *Id.* at ¶ 39. Because sentencing had not yet occurred, the supreme court only addressed whether double jeopardy precluded a second jury from deciding the habitual criminal counts. Because we conclude that Fields was adjudicated and sentenced in error, we review the error for constitutional harmlessness. C.A.R. 35(c).

4 In fact, the dissent in *Erlinger* observed that because this inquiry is so straightforward, "[i]n most (if not all) cases," *Erlinger* error "will be harmless." *Erlinger v. United States*, 602 U.S. 821, 859, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024) (Kavanaugh, J., dissenting).

5 The prosecution also presented evidence that Fields pled guilty to attempted drug possession for an offense occurring on December 18, 1987, and to attempted drug possession for another offense occurring on September 20, 1989. Depending on the underlying facts, these convictions might or might not have been considered felonies if they had been committed in Colorado. *See* § 18-1.3-801(2)(a)(I), C.R.S. 2025 (if a conviction occurred in another state, it must be for a crime that would be a felony in Colorado to be eligible to enhance a defendant's sentence as a habitual criminal). But even without them, we conclude that there is overwhelming evidence to support Fields' habitual criminal adjudication and sentence.

6 Fields does not appeal the timeliness of his trial as related to his August 2nd UMDDA request.

7 We recognize that we analyzed this issue differently — albeit reaching the same conclusion — in *People v. Fields*, slip op. at ¶¶ 13-21, 2023 WL 12047281 (Colo. App. No. 20CA1708, Aug. 3, 2023) (not published pursuant to C.A.R. 35(e)) (*Fields I*). In that now-vacated opinion, we concluded that even if the instructional error was obvious, it was not substantial based on overwhelming evidence, a conclusion to which we continue to adhere. *Id.* at ¶¶ 17-21. But *People v. Crabtree*, 2024 CO 40M, 550 P.3d 656, is also now dispositive, and so we apply it as well.

Supp App. B

576 P.3d 725
Supreme Court of Colorado.

In re: The PEOPLE of the State of Colorado, Plaintiff,

v.

Andrew Burgess GREGG, Defendant.

Supreme Court Case No. 24SA272
|
September 29, 2025

Synopsis

Background: Defendant was convicted in the District Court, Mesa County, Matthew D. Barrett, J., of robbery, attempt to influence a public servant, and false reporting, and his motion to dismiss habitual criminal counts was granted. People filed petition for order to show cause.

Holdings: In a case of first impression, the Supreme Court, Boatright, J., held that:

Supreme Court would exercise original jurisdiction;

de novo review applied to State's challenge of trial court's post-trial dismissal of habitual criminal charges;

habitual criminal sentencing statute was not facially unconstitutional when properly applied;

double jeopardy clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status; and

double jeopardy did not bar empaneling a second jury to decide defendant's habitual criminal counts.

Order to show cause made absolute; habitual criminal charges reinstated.

Márquez, C.J., filed an opinion concurring in part and dissenting in part in which Hood, J., joined.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

Original Proceeding Pursuant to C.A.R. 21, Mesa County District Court Case No. 23CR289, Honorable Matthew D. Barrett, Judge

Attorneys and Law Firms

Attorneys for Plaintiff: Daniel P. Rubinstein, District Attorney, Twenty-First Judicial District, Johanna G. Coats, Special Deputy District Attorney, Jeff M. Van der Veer, Special Deputy District Attorney, Grand Junction, Colorado

Attorneys for Defendant: 2nd-Chair, Britta Kruse, Daniel Pollitt, Denver, Colorado Robert P. Borquez, Denver, Colorado

Attorneys for Respondent Mesa County District Court: Philip J. Weiser, Attorney General, Talia Kraemer, Assistant Solicitor General, Denver, Colorado

Attorneys for Amicus Curiae ACLU Foundation of Colorado: Timothy R. Macdonald, Emma Mclean-Riggs, Lindsey M. Floyd, Denver, Colorado

Attorneys for Amicus Curiae Colorado Criminal Defense Bar: Haddon, Morgan and Foreman, P.C., Jacob B. McMahon, Denver, Colorado

Attorney for Amicus Curiae Office of Alternate Defense Counsel: Jonathan Rosen, Denver, Colorado

Attorneys for Amici Curiae Office of the Attorney General and Colorado District Attorneys' Council: Philip J. Weiser, Attorney General, Jillian J. Price, Deputy Attorney General, Brian M. Lanni, Senior Assistant Attorney General, Grant R. Fevurly, Senior Assistant Attorney General, Denver, Colorado

Attorneys for Amicus Curiae Office of the State Public Defender: Megan A. Ring, Public Defender, Meghan M. Morris, Deputy Public Defender, Denver, Colorado

Attorney for Amicus Curiae Spero Justice Center: Dan M. Meyer, Denver, Colorado

En Banc

JUSTICE BOATRIGHT delivered the Opinion of the Court, in which JUSTICE GABRIEL, JUSTICE HART, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

Order Made Absolute

JUSTICE BOATRIGHT delivered the Opinion of the Court.

*727 ¶1 In this original proceeding, we consider two issues: (1) how trial courts should resolve the interaction between the prior version of Colorado's habitual criminal sentencing statute, § 18-1.3-803, C.R.S. (2024), and *Erlinger v. United States*, 602 U.S. 821, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024); and (2) whether the Double Jeopardy Clause bars a trial court from empaneling a second jury to determine a defendant's habitual criminal status. The parties agree that section 18-1.3-803 (the "sentencing statute") previously required a judge to make habitual criminal findings, whereas *Erlinger* requires a jury to make those findings.

¶2 Nevertheless, the People contend that the sentencing statute and *Erlinger* are compatible because a jury could *first* adjudicate the habitual criminal counts (satisfying *Erlinger*), and *then* a judge could confirm or reject those findings (satisfying the sentencing statute). They also posit that, in this case—where a jury found Andrew Burgess Gregg guilty of substantive crimes but did not decide his habitual counts—a new jury can determine those counts without violating his double jeopardy rights. Gregg counters that the sentencing statute is unconstitutional under *Erlinger*. Alternatively, Gregg argues that the Double Jeopardy Clause prevents a court from empaneling a new jury to decide a defendant's habitual criminal charges after it has discharged the jury that issued a verdict on the substantive offenses.[1]

¶3 We agree with the People. Accordingly, we hold that Colorado's former habitual criminal sentencing statute is not facially unconstitutional and can operate within the constitutional *728 limits set forth in *Erlinger*. We also hold that, here, the Double Jeopardy Clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status.

¶4 Therefore, we make the order to show cause absolute and reinstate Gregg's habitual criminal charges so a jury can assess them.

I. Facts and Procedural History

¶5 The People charged Gregg with aggravated robbery, attempt to influence a public servant, and false reporting. They also brought four habitual criminal counts under section 18-1.3-801, C.R.S. (2024),[2] alleging that Gregg had committed four prior felonies. A jury convicted Gregg of robbery, attempt to influence a public servant, and false reporting. The trial court then discharged the jury and set a habitual criminal hearing to determine the habitual criminal counts.

¶6 Before the court held the habitual criminal hearing, the United States Supreme Court announced *Erlinger*, which addressed the Armed Career Criminal Act ("ACCA"). 602 U.S. at 825, 144 S.Ct. 1840. The ACCA mandates enhanced sentences for defendants who have three prior convictions for violent felonies or serious drug offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). *Erlinger* held that defendants are "entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." 602 U.S. at 835, 144 S.Ct. 1840.

¶7 Relying on *Erlinger*, Gregg moved to dismiss his habitual criminal counts. He argued that *Erlinger* precluded the trial court from finding him a habitual criminal under section 18-1.3-801(2)(a)(I), which escalates the sentence for a defendant who has been "three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." Gregg further argued that empaneling a new jury to make this finding would violate the Double Jeopardy Clause. The People opposed Gregg's motion, asserting that jeopardy had not attached to the habitual criminal counts. The People thus argued that the court could first determine whether Gregg was *the person* who was previously convicted; if so, the court could then empanel a second jury to determine whether those prior convictions stemmed from separate and distinct episodes.

¶8 The trial court granted Gregg's motion to dismiss his habitual criminal counts. Without addressing whether *Erlinger* rendered the sentencing statute unconstitutional, the court found that it could not empanel a second jury to assess the habitual criminal counts because jeopardy had attached.

¶9 The People then sought relief under C.A.R. 21, and we issued an order to show cause.

II. Jurisdiction and Standard of Review

¶10 C.A.R. 21 grants this court "sole discretion to exercise our original jurisdiction." *People v. Justice*, 2023 CO 9, ¶ 17, 524 P.3d 1178, 1182 (quoting *People v. Cortes-Gonzalez*, 2022 CO 14, ¶ 21, 506 P.3d 835, 842). However, "[r]elief under

this rule is extraordinary in nature and ... will be granted only when no other adequate remedy is available." C.A.R. 21(a)(2). Previously, we have exercised our discretion under Rule 21 "when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, [or] when a petition raises 'issues of significant public importance that we have not yet considered.' " *People v. Walthour*, 2023 CO 55, ¶ 8, 537 P.3d 371, 374 (alteration in original) (quoting *People v. Kilgore*, 2020 CO 6, ¶ 8, 455 P.3d 746, 748).

¶11 The People argue that this case is one of first impression and of significant public importance. We agree. Determining the relationship between *Erlinger* and the sentencing statute will affect matters of significant public importance—the constitutionality of our sentencing statute and its impact on habitual criminal charges in Colorado. Therefore, we choose to exercise our jurisdiction.

¶12 As for the standard of review, trial courts generally have broad discretion ***729** when imposing sentences, decisions that "will not be overturned absent a clear abuse of that discretion." *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). However, when a sentencing decision involves constitutional issues, the standard of review is de novo. *Id.* Here, the trial court's decision implicates Gregg's constitutional right to a jury. Thus, we review the trial court's decision de novo.

¶13 In construing the sentencing statute, our analysis must "seek to ascertain and give effect to the General Assembly's intent." *McBride v. People*, 2022 CO 30, ¶ 23, 511 P.3d 613, 617. In doing so, we must construe the statute "to avoid constitutional conflicts if possible." *Lopez*, 113 P.3d at 728 (citing *People v. Holmes*, 959 P.2d 406, 415 (Colo. 1998)). Thus, "if a challenged statute is capable of several constructions, one of which is constitutional, the constitutional construction must be adopted." *People v. Schoondermark*, 699 P.2d 411, 415 (Colo. 1985).

III. Analysis

¶14 The People's petition presents two issues, and we address each in turn. First, we assess the interplay between the prior version of Colorado's habitual criminal sentencing statute and *Erlinger*, ultimately determining that this prior version of the habitual criminal sentencing statute remains constitutional. Second, we examine Gregg's double jeopardy concerns and conclude that double jeopardy issues do not prevent a second jury from deciding his habitual criminal counts.

A. The Interaction Between Colorado's Habitual Criminal Sentencing Statute and *Erlinger*

¶15 We begin by examining the prior language of Colorado's habitual criminal sentencing scheme; specifically, sections 18-1.3-801 and 18-1.3-803(4). We next discuss the Supreme Court's decision in *Erlinger*. Finally, we analyze the interaction between the sentencing statute and *Erlinger*.

1. Colorado's Habitual Criminal Sentencing Statute

¶16 Sections 18-1.3-801 to -804, C.R.S. (2024), constitute Colorado's habitual criminal sentencing scheme. This scheme "does not establish a substantive offense but instead provides for increased penalties for repeat offenders based on a defendant's previous convictions." *Campbell v. People*, 2020 CO 49, ¶ 47, 464 P.3d 759, 768. A defendant is a habitual offender, and thus implicated in this sentencing scheme, if they have been convicted of a felony and "three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I).

¶17 Section 18-1.3-803 creates a bifurcated scheme for habitual charges.[3] Specifically, subsection (1) formerly provided that if a guilty verdict was returned on the substantive offense, "*the court shall conduct a separate sentencing hearing* to determine whether or not the defendant has suffered such previous felony convictions." § 18-1.3-803(1) (emphasis added). Subsection (4) was more specific. It provided a two-phase procedure: First, "[t]he *jury* shall render a verdict" on the substantive offense, and then, if the jury's verdict is guilty, "*the trial judge ... shall proceed* to try the issues of whether the defendant has been previously convicted as alleged." § 18-1.3-803(4)(a)–(b) (emphases added). The parties and their amici agree that the plain language of section 18-1.3-803 required a judge to make habitual criminal findings.

2. The Supreme Court's Decision in *Erlinger*

¶18 In *Erlinger*, the Court reiterated that "[v]irtually 'any fact' that 'increase[s] the ***730** prescribed range of penalties to which a criminal defendant is exposed' must be resolved by

a unanimous jury beyond a reasonable doubt." 602 U.S. at 834, 144 S.Ct. 1840 (second alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The Court continued to recognize that there is "a narrow exception" to *Apprendi*'s rule that allows "judges to find only 'the fact of a prior conviction.' " *Id.* at 838, 144 S.Ct. 1840 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)). But because the ACCA's "occasions inquiry" contemplates more than the simple fact of a prior conviction —it instead asks whether those convictions were committed "on occasions different from one another," 18 U.S.C. § 924(e)(1)—the Court deemed this exception inapplicable. *Erlinger*, 602 U.S. at 838, 144 S.Ct. 1840. Therefore, the Court held that Erlinger "was entitled to have a jury resolve [the] ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835, 144 S.Ct. 1840.

¶19 The first question here is how this holding influences Colorado's former habitual criminal sentencing scheme, which enhanced a defendant's sentence for prior convictions "arising out of separate and distinct criminal episodes," § 18-1.3-801(1)(b)(I), but which instructed "the trial judge" to find the fact of such prior convictions, § 18-1.3-803(4). We now turn to that question.

3. Colorado's Former Habitual Criminal Sentencing Statute Is Compatible with *Erlinger*

¶20 A statute is facially unconstitutional when it "is unconstitutional in all its applications." *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010). Gregg argues that *Erlinger* rendered the habitual criminal sentencing statute unconstitutional. He contends that the statute unambiguously removed juries from the habitual criminal phase of trial because it repeatedly stated that "the trial judge" must decide whether the defendant has been previously convicted as alleged. He argues that the legislature's intent to exclude juries from this process is clear because the statute used the word "judge" instead of "factfinder" or "court," and it authorized a "replacement judge" if the judge "who presided" over the substantive phase of the trial was unavailable. § 18-1.3-803(1), (4)(b), (5)(b), (6). In Gregg's view, this conflicted with *Erlinger* because it eliminated juries from the habitual criminal phase of trial.

¶21 The People agree that *Erlinger* requires the jury to find that a defendant's prior convictions arose "out of separate and distinct criminal episodes." *See* § 18-1.3-801(2)(a)(I). But they argue that the former version of the sentencing statute remains constitutional following *Erlinger*. Specifically, the People propose the following two-step procedure: (1) the jury determines whether a defendant's prior convictions arose out of separate and distinct criminal episodes; and (2) if the jury so finds, the judge then conducts a secondary review of the same evidence. They contend that this process complies with both *Erlinger*—because the jury makes the requisite finding —and the sentencing statute—because the trial judge still "determine[s] by separate hearing and verdict whether the defendant has been convicted as alleged." § 18-1.3-803(4).

¶22 To resolve these dueling interpretations, we first look to *Lopez v. People*, 113 P.3d 713 (Colo. 2005). In *Lopez*, we addressed the constitutionality of courts' heightening defendants' sentences based on "extraordinary aggravating circumstances" under section 18-1.3-401(6), C.R.S. (2025). 113 P.3d at 725. We explained that when sentencing requires judicial fact-finding to which the defendant has not stipulated,[4] the rule announced in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), applies. *Lopez*, 113 P.3d at 726–27. "The *Blakely* rule is concerned specifically with defendants' constitutional protections in criminal proceedings, particularly the right to a jury determination, beyond a reasonable doubt, that facts exist that expose the defendant to criminal penalties." *Id.* at 726. We ***731** acknowledged that section 18-1.3-401(6) *could* be applied unconstitutionally but that the possibility of such did not require finding the statute unconstitutional. *Lopez*, 113 P.3d at 728.

¶23 Ultimately, *Lopez* held that section 18-1.3-401(6) is constitutional so long as it is properly applied (i.e., when sentence-enhancing facts considered by the court are either *Blakely*-compliant or *Blakely*-exempt).[5] 113 P.3d at 719, 728. Thus, in construing the statute to avoid a constitutional conflict (as is required), we ratified a process in which a sentencing judge considers facts previously found by a jury. *Id.* at 728–29, 731.

¶24 Though the circumstances here are different, we draw guidance from *Lopez* and utilize the solution in that case as a model. To begin, it is undisputed that *Erlinger* applies to Colorado's habitual criminal sentencing statute because there are no material differences, regarding the inquiry into separate offenses, between the ACCA and section 18-1.3-801. *See* 18 U.S.C. § 924(e); § 18-1.3-801. We recognize that the question of separate and distinct criminal episodes demands a jury

finding because it requires more than a mere determination of "what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 838, 144 S.Ct. 1840 (quoting *Mathis v. United States*, 579 U.S. 500, 511–12, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016)). But while the former habitual criminal sentencing statute instructed "the trial judge" to determine "whether the defendant has been convicted as alleged," § 18-1.3-803(4), it did not explicitly *prohibit* the jury from finding that those prior convictions stemmed from separate and distinct criminal episodes. Nor does *Erlinger* forbid a judge's review of a jury's habitual criminal determination. If there is a procedure that satisfies the requirements of both the statute and *Erlinger*, like in *Lopez*, then, by definition, the statute is not facially unconstitutional.

¶25 Hence, we conclude that under the sentencing statute as applied to cases that arise before the 2025 version went into effect, a jury should first determine whether the defendant's prior convictions were based on charges arising out of separate and distinct criminal episodes. If the jury so finds, then the trial judge should review the jury's findings for sufficiency of the evidence, regarding whether the defendant "has been previously convicted as alleged." *See* § 18-1.3-803(4)(b); *see also People v. LaRosa*, 2013 CO 2, ¶ 35, 293 P.3d 567, 575 (explaining that the sufficiency of the evidence test "requires the court to consider whether a reasonable mind could conclude that 'each material element of the offense was proven beyond a reasonable doubt' " (quoting *People v. Bennett*, 515 P.2d 466, 470 (Colo. 1973))). If the court determines that the jury's findings are supported by sufficient evidence, then it will enter the judgment and thereby satisfy the sentencing statute. Conversely, if the jury does not find that the defendant's prior convictions were based on charges arising out of separate and distinct criminal episodes, then the court must acquit the defendant of the habitual criminal counts.

¶26 Because this procedure complies with *Erlinger*, we hold that Colorado's former habitual criminal sentencing statute is not facially unconstitutional.

B. Double Jeopardy in the Context of Habitual Criminal Sentencing

¶27 We now consider whether, when the jury that found the defendant guilty of the substantive offense has been discharged, the Double Jeopardy Clause bars a trial court from empaneling a second jury to decide the defendant's habitual criminal counts.

1. Double Jeopardy Jurisprudence

¶28 The Double Jeopardy Clauses of the United States and Colorado Constitutions protect against successive prosecutions for the same offense after acquittal and against multiple punishments for the same offense. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18; *see also* ***732** *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *People v. Leske*, 957 P.2d 1030, 1035 n.5 (Colo. 1998). As for habitual criminal counts, that determination is "independent of the determination of guilt on the underlying substantive offense." *Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962).

¶29 In *Bullington v. Missouri*, 451 U.S. 430, 439, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), after the jury found the defendant guilty of murder but imposed a life sentence rather than the death penalty, the Supreme Court held that the Double Jeopardy Clause prevented the state from seeking the death penalty on retrial, reasoning that capital sentencing hearings "have the hallmarks of [a] trial on guilt or innocence." A few months later, we applied *Bullington*'s rationale to habitual criminal sentencing in *People v. Quintana*, 634 P.2d 413 (Colo. 1981), *overruled by*, *People v. Porter*, 2015 CO 34, 348 P.3d 922. There, we noted that Colorado's then-extant habitual criminal statute required notice of "prior convictions by separate counts in the information or indictment, ... a formal arraignment, ... proof beyond a reasonable doubt[,] ... [and] bifurcated trial and separate verdict provisions." *Id.* at 419. We thus held that double jeopardy protections applied because "an adjudication of habitual criminality [may] be made only in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence." *Id.*

¶30 The following year, in *People v. Mason*, 643 P.2d 745, 754–55 (Colo. 1982), we considered a case where the trial court discharged the jury that rendered the verdict on the defendant's substantive offense and then improperly made habitual criminal findings, in violation of the then-extant statute. *See* § 16-13-103(4), C.R.S. (1973) ("[T]he jury impaneled to try the substantive offense shall determine by separate verdict whether the defendant has been convicted as alleged."). We held that double jeopardy principles precluded

a retrial on Mason's habitual criminal counts because the trial court "deprived the defendant of his valued right to a jury verdict on the prior conviction counts *by that particular jury impaneled and sworn to try the case*." *Mason*, 643 P.2d at 755 (emphasis added).

¶31 Years later, in *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), the Supreme Court limited *Bullington* to capital sentencing hearings only. The Court stated that for other sentencing proceedings, the Double Jeopardy Clause is inapplicable because "the determinations at issue do not place a defendant in jeopardy for an 'offense.' " *Monge*, 524 U.S. at 728, 118 S.Ct. 2246. The Court thus held that double jeopardy "does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." *Id.* at 734, 118 S.Ct. 2246.

¶32 *Monge* led us to reverse course and follow federal precedent in *Porter*, where we held that "Colorado double jeopardy law does not apply to noncapital sentencing proceedings." *Porter*, ¶¶ 3–4, 348 P.3d at 923. *Porter* thereby overruled *Quintana*. *Id.* at ¶ 3, 348 P.3d at 923. In doing so, we concluded that *Monge* remained good law post-*Apprendi* because *Apprendi* discussed *Monge* "without questioning its continued viability and exempted 'the fact of a prior conviction' from its holding." *Id.* at ¶ 17 n.4, 348 P.3d at 926 n.4 (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348).

¶33 Most recently, in *Erlinger*, the Court addressed an amicus's argument that because the Double Jeopardy Clause "permits a judge to ask whether the government has charged a defendant for the same crime a second time," it follows that "a judge can also look into the defendant's past conduct to increase his sentence." 602 U.S. at 844, 144 S.Ct. 1840. The Court rejected that argument, stating that the "Double Jeopardy Clause protects a defendant by prohibiting a judge from even *empaneling* a jury when the defendant has already faced trial on the charged crime," whereas the jury trial right provides "entirely complementary protections ... by ensuring that, once a jury *is* lawfully empaneled," the government must prove its case to that jury. *Id.* at 845, 144 S.Ct. 1840. Notably, the Court's discussion of double jeopardy in *Erlinger* did *not* reference *Monge*'s limiting of double jeopardy to capital sentencing hearings. *See id.* at 844, 144 S.Ct. 1840.

***733 2. Double Jeopardy Protections Do Not Apply to Habitual Criminal Counts if the Jury Didn't Render a Verdict**

¶34 In this case, the trial court relied on *Erlinger* and *Mason* to conclude that the Double Jeopardy Clause barred it from empaneling a new jury to decide Gregg's habitual criminal counts. Gregg now argues that this ruling was correct, contending that habitual criminal sentencing hearings implicate double jeopardy because they carry all the "hallmarks of the trial on guilt or innocence," *Bullington*, 451 U.S. at 439, 101 S.Ct. 1852.[6] Additionally, he notes that these adjudications have severe sentencing consequences, such as a potential sentence of life imprisonment. *See* § 18-1.3-801(1)(a).

¶35 Alternatively, Gregg argues that *Monge*, which held that double jeopardy only applies to capital sentencing proceedings, was abrogated by *Erlinger*, and therefore, he urges this court to reconcile our holding in *Porter* (Colorado's equivalent of *Monge*) accordingly. *See Monge*, 524 U.S. at 734, 118 S.Ct. 2246; *Erlinger*, 602 U.S. at 835, 144 S.Ct. 1840; *Porter*, ¶ 4, 348 P.3d at 923. He also suggests that even if *Monge* remains good law, its status is "precarious," which allows us to overrule *Porter* and conclude that the Colorado Constitution requires double jeopardy protections. Gregg references other nonbinding precedent that has recognized the limitations of *Monge* or diverged from it since *Apprendi*.[7]

¶36 But the *Erlinger* court did not overrule *Monge*; in fact, it did not even mention *Monge* aside from a single citation regarding an issue entirely separate from double jeopardy—the validity of the prior conviction exception in *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Erlinger*, 602 U.S. at 838, 144 S.Ct. 1840 (stating that *Almendarez-Torres*'s " 'narrow exception' permitting judges to find only 'the fact of a prior conviction' " persists (quoting *Alleyne*, 570 U.S. at 111 n.1, 133 S.Ct. 2151)). And the Supreme Court has consistently affirmed that double jeopardy protections do not apply to habitual criminal sentencing proceedings because those proceedings "do not place a defendant in jeopardy for an 'offense.' " *Monge*, 524 U.S. at 728, 118 S.Ct. 2246; *see also Graham v. West Virginia*, 224 U.S. 616, 629, 32 S.Ct. 583, 56 L.Ed. 917 (1912); *Parke v. Raley*, 506 U.S. 20, 27, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992); *Almendarez-Torres*, 523 U.S. at 247, 118 S.Ct. 1219 ("[T]he sentencing-related circumstances of recidivism are

not part of the definition of the offense for double jeopardy purposes.").

¶37 We have interpreted the Colorado Constitution in the same manner. *See Porter*, ¶ 29, 348 P.3d at 929. As we explained in *Porter*, the Double Jeopardy Clause is implicated when jeopardy attaches at the first proceeding, that proceeding concludes, and the defendant is later exposed to a second proceeding (i.e., double jeopardy). ¶ 9, 348 P.3d at 924. Yet habitual adjudications do "not involve a new crime or a substantive offense." *People v. Hampton*, 876 P.2d 1236, 1241 (Colo. 1994). That is, "the habitual-criminal statute describes a *status rather than a substantive offense*." *People ex rel. Faulk v. Dist. Ct.*, 673 P.2d 998, 1000 (Colo. 1983) (emphasis added). Moreover, trials with habitual ***734** criminal counts are "bifurcated and proceed[ ] in two phases." *Hampton*, 876 P.2d at 1241. Because "habitual adjudication is only one component of the entire process of conviction," it is not a second proceeding. *Id.* at 1242. And without a second proceeding, there is no double jeopardy concern.

¶38 *Erlinger* does not mandate otherwise. Again, the *Erlinger* court simply rejected the claim that judges (rather than juries) can resolve the ACCA's "occasions inquiry" because they can make double jeopardy determinations. 602 U.S. at 835, 844–45, 144 S.Ct. 1840. When the Supreme Court "revisits a precedent," it usually "consider[s] 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.' " *Ramos v. Louisiana*, 590 U.S. 83, 106, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (quoting *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 248, 139 S.Ct. 1485, 203 L.Ed.2d 768 (2019)). The Court did not conduct that type of analysis in *Erlinger* and, thus, in no way overruled its precedent on double jeopardy. *See* 602 U.S. at 844–45, 144 S.Ct. 1840. Therefore, *Erlinger* does not disrupt the well-settled precedent that double jeopardy protections do not apply in habitual criminal sentencing proceedings. *See Monge*, 524 U.S. at 728, 118 S.Ct. 2246; *see also Porter*, ¶ 26, 348 P.3d at 928 (relying on *Faulk*, 673 P.2d at 1000). Accordingly, we hold that, here, the Double Jeopardy Clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status.

¶39 Applying our holding to Gregg's case, it is undisputed that Gregg's substantive offenses were properly tried by a jury, which the court discharged before it determined his habitual criminal counts. Those habitual criminal counts remain pending, meaning they are part of a single, ongoing proceeding. Thus, there is no double jeopardy issue with empaneling a second jury to decide Gregg's habitual criminal counts.

IV. Conclusion

¶40 For the foregoing reasons, we make the order to show cause absolute and reinstate Gregg's habitual criminal charges so a jury can assess them.

CHIEF JUSTICE MÁRQUEZ, joined by JUSTICE HOOD, concurred in part and dissented in part.

CHIEF JUSTICE MÁRQUEZ, joined by JUSTICE HOOD, concurring in part and dissenting in part.

¶41 Before it was recently amended, Colorado's habitual criminal sentencing scheme expressly required a "trial judge" to adjudicate a defendant's habitual criminal charges. § 18-1.3-803(4)(b), C.R.S. (2024). Specifically, a judge was required to determine whether the defendant "has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I), C.R.S. (2025). Section 18-1.3-803(5)(b) further directed that during the sentencing hearing, the "trial judge" must "consider" any admissions the defendant made during the trial on the substantive offense "only as they affect the defendant's credibility."[1]

¶42 Last year, the U.S. Supreme Court rejected this approach, holding in *Erlinger v. United States*, 602 U.S. 821, 834–35, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024), that to subject a defendant to more severe penalties as a repeat offender, the U.S. Constitution requires a unanimous *jury* to determine beyond a reasonable doubt that the defendant's past offenses were committed on separate occasions.

¶43 The majority nevertheless holds that "Colorado's former habitual criminal sentencing statute is not facially unconstitutional and can operate within the constitutional limits set forth in *Erlinger*." Maj. op. ¶ 3. To preserve the statute, the majority effectively rewrites it to require a jury to make the separate-occasions determination and then require the trial judge to review the jury's findings by a sufficiency of the evidence standard. *Id.* at ¶ 25. The majority points to no language in the statute that supports such a remedy. Instead, it

justifies its method by *735 relying on *Lopez v. People*, 113 P.3d 713 (Colo. 2005). Maj. op. ¶¶ 23–24.

¶44 *Lopez* does not support the majority's approach to preserving the former version of section 18-1.3-803. Moreover, today's opinion suggests that a court may salvage an otherwise unconstitutional statute as long as it articulates some conceivable, constitutional interpretation of the offending provision, however divorced from its actual language.

¶45 I cannot support the majority's use of *Lopez* or its conclusion. The former version of section 18-1.3-803 is plainly unconstitutional, insofar as it violates *Erlinger*. I would therefore sever the unconstitutional language, leaving trial courts to fill the gap with *Erlinger*'s requirement that a jury make habitual factual findings. This approach would allow courts to empanel a second jury for habitual criminal sentencing proceedings (I agree with the majority that this process would not violate double jeopardy) without rewriting the statute. Accordingly, I respectfully dissent in part.

I. The Former Version of Section 18-1.3-803 Runs Afoul of *Erlinger*

¶46 "We determine legislative intent primarily from the plain language of the statute." *Romero v. People*, 179 P.3d 984, 986 (Colo. 2007). We also "construe the statute as a whole, in an effort to give consistent, harmonious, and sensible effect to all its parts." *People v. Diaz*, 2015 CO 28, ¶ 12, 347 P.3d 621, 624. Generally, "words and phrases utilized in a statute should be given effect according to their plain and ordinary meaning because we presume the General Assembly meant what it said." *Town of Minturn v. Tucker,* 2013 CO 3, ¶ 27, 293 P.3d 581, 590.

¶47 Colorado's habitual criminal sentencing scheme mandates an enhanced sentence for felony offenders who have been previously convicted of three felonies "upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I). Section 18-1.3-803 prescribes the procedure for sentencing a defendant as a habitual criminal per the requirements set forth in section 18-1.3-801. Section 18-1.3-803 bifurcates the substantive and sentencing phases of the trial. In the prior version of the statute, the jury's role was to "render a verdict upon the issue of the defendant's guilt or innocence of the substantive offense charged." § 18-1.3-803(4)(a). If the jury found the defendant guilty of the substantive offense, section 18-1.3-803(4)(b) then required the "trial judge" to "*try the issues* of whether the defendant has been previously convicted as alleged." (Emphasis added.) This meant that the trial judge determined whether a defendant committed three previous felonies "upon charges separately brought and tried, and arising out of separate and distinct criminal episodes." § 18-1.3-801(2)(a)(I). Yet *Erlinger* expressly holds that the U.S. Constitution requires that a *jury*, not a judge, make such findings.

¶48 The majority essentially adopts the People's argument that, to run afoul of *Erlinger*, Colorado's habitual criminal sentencing statute must explicitly *prohibit* a jury from making habitual determinations. Maj. op. ¶ 24 ("[Section 18-1.3-803] did not explicitly *prohibit* the jury from finding that those prior convictions stemmed from separate and distinct criminal episodes."); *see also* Reply Brief for Petitioner at 8 ("A [habitual] hearing ... must be before the court *without jury*." (quoting N.Y. Crim. Proc. Law § 400.15(7)(a))).

¶49 But the absence of an express prohibition does not amount to express statutory authorization. Especially here, where the statute is not silent about the identity of the factfinder. We have stated that "[w]e do not add words to the statute or subtract words from it." *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96 (2012) ("[W]hat a text does not provide is unprovided ....").

¶50 Furthermore, the plain language of section 18-1.3-803 requiring a judge, not a jury, to make all factual findings is confirmed by the statutory history of this provision. The statute long provided for a jury to determine whether a defendant was a habitual offender, but in 1995, the General Assembly struck the references to the "jury" as factfinder and replaced them with "trial judge." Ch. 129, sec. 14, § 16-13-103(1), (4), (4)(b), (5)(b), (6), *736 1995 Colo. Sess. Laws 462, 467–68.[2] The only reasonable inference to be drawn from these amendments is that the legislature intended for the judge, and *not* the jury, to be the factfinder in this context. *See People v. McCullough*, 6 P.3d 774, 778 (Colo. 2000) ("[W]hen a statute is amended, it is presumed that the legislature intended to change the law.").

¶51 *Erlinger* now makes clear that the Fifth and Sixth Amendments require a *jury* to determine whether prior convictions arose out of separate episodes if those prior convictions are to be used to enhance a defendant's sentence.

602 U.S. at 834–35, 144 S.Ct. 1840. This means that to the extent section 18-1.3-803 requires a trial judge to make such findings, it is unconstitutional. The General Assembly recognized this and amended the statute in direct response to *Erlinger*.[3] On June 2, 2025, Governor Polis signed that amendment into law. S.B. 25-189, 75th Gen. Assemb., Reg. Sess. (Colo. 2025) ("Concerning Requiring a Jury to Determine Whether a Defendant Has Prior Qualifying Convictions ...."). The amended law substitutes "jury" for "judge" throughout and now[4] requires a jury to determine whether "the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes." *See* Ch. 344, sec. 1, § 18-1.3-803(1), (4), (4)(b), (5)(b), 2025 Colo. Sess. Laws 1866, 1866–68. The legislature's response to *Erlinger* indicates that it understood that section 18-1.3-803 required a judge to engage in impermissible factfinding.

¶52 In sum, the prior version of section 18-1.3-803 is unconstitutional to the extent that it runs afoul of *Erlinger*.

II. *Lopez* Does Not Support the Majority's Adopted Procedure

¶53 Instead of conceding that the former version of section 18-1.3-803 is unconstitutional, the majority adopts a reading of the statute that requires juries to make *Erlinger*-required factual findings and then requires the judge to review those findings under a sufficiency of the evidence standard. Maj. op. ¶ 25. It relies on *Lopez* to justify its approach, explaining that in that case we construed a statute to be "constitutional so long as it is properly applied" in order to avoid a constitutional conflict. *Id.* at ¶ 23. The majority asserts that "[t]hough the circumstances here are different, we draw guidance from *Lopez* and utilize the solution in that case as a model." *Id.* at ¶ 24.

¶54 While the majority's approach appears ***737** to apply the canon of constitutional doubt[5] to section 18-1.3-803, "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 77 L.Ed. 1265 (1933)). In other words, the solution we applied in *Lopez* is inapplicable here because the problem we faced in that case was fundamentally different from the one section 18-1.3-803 presents.

¶55 In *Lopez*, we considered how *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), affected Colorado's aggravated sentencing statute.[6] *Lopez*, 113 P.3d at 715. Specifically, we addressed which facts a judge may constitutionally consider when finding extraordinary aggravating circumstances that may increase a defendant's sentence.

¶56 As we acknowledged, section 18-1.3-401(6), C.R.S. (2025), suggests that a judge may engage in factfinding prohibited by *Blakely* and *Apprendi*:

> In imposing a sentence to incarceration, *the court* shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section *unless it concludes* that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. *If the court finds* such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

(Emphases added.)

¶57 Although the statute directs "the court" to "conclude[ ]" and "find[ ]" circumstances that would increase a defendant's sentence beyond the presumptive range, *id.*, we reasoned that a narrow application of the statute preserved its constitutionality. *Lopez*, 113 P.3d at 729–30. Specifically, we held that a trial judge may apply this provision consistent with the constitution so long as the judge relies only on what we termed "*Blakely*-compliant" and "*Blakely*-exempt" facts that are "present in the record of a sentencing hearing as section 18-1.3-401(6) requires." *Id.* at 729. *Blakely*-compliant facts are those "admitted by the defendant, found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes," and a *Blakely*-exempt fact is the fact of a prior conviction.[7] *Id.* at 723.

***738** ¶58 Stated differently, we construed the statute to require a judge to base aggravating circumstances determinations on at least one fact that had already been determined consistent with *Blakely* and catalogued in the "record of the sentencing hearing and the presentence report." § 18-1.3-401(6); *see also Lopez*, 113 P.3d at 731. This was a reasonable construction because section 18-1.3-401(6) "does not mandate a restricted or increased sentencing range based on judicial fact-finding." *Lopez*, 113 P.3d at 719.

¶59 By contrast, the prior version of section 18-1.3-803 expressly *required* judicial factfinding. There is no way to simply narrow this mandate consistent with the requirements of *Erlinger*. The majority's solution is to create an entirely new factfinding process by a jury and convert the judicial factfinding to judicial review. The majority asserts that this process is permissible because *Lopez* authorizes a judge to base their habitual determination on "facts previously found by a jury." Maj. op. ¶¶ 23–24. But unlike the aggravated sentencing statute in *Lopez*, the relevant facts under section 18-1.3-803 were not previously constitutionally determined by a jury. Instead, subsections (4)(b), (5)(b), and (6) of that statute required such facts to be determined by "the trial judge."

¶60 Thus, unlike the narrowed construction we authorized in *Lopez*, the majority instead *expands* section 18-1.3-803's application well beyond (and directly contrary to) its express language to preserve its constitutionality. *See* Maj. op. ¶ 25. The majority fails to support its novel approach with citation to any authority, and I could find no cases in which we applied *Lopez* similarly.

¶61 Indeed, we have previously refused to extend the holding of *Lopez* when the problem at issue was too plainly different. In *People v. Montour*, 157 P.3d 489, 496–97 (Colo. 2007), we considered whether *Lopez* could be applied in the capital punishment context because eligibility for the death penalty also required a finding of aggravating circumstances. *See* § 18-1.3-1201(2)(a), C.R.S. (2006).[8] We concluded that the *Lopez* approach was inapplicable because the two sentencing schemes were "fundamentally different." *Montour*, 157 P.3d at 496. We reasoned that a judge could not base death penalty eligibility on the single *Blakely*-exempt fact of a prior conviction because the capital sentencing scheme required a finding of multiple factors, and "[c]apital defendants have a right to a jury trial on all aggravating facts used to determine death eligibility" beyond the fact of a prior conviction. *Id.* at 497.

¶62 Simply put, the "solution" that *Lopez* stands for is adherence to the constitutional-doubt canon. Neither *Lopez* nor that canon of construction supports expanding, let alone directly contradicting, a statute's clear procedural requirements. It did not in *Montour*, and it does not here.

¶63 In sum, the majority's effort to preserve the constitutionality of section 18-1.3-803's judicial factfinding provisions is unsupported by *Lopez* and our case law. I recognize that "declaring a statute unconstitutional is one of the gravest duties impressed upon the courts." *People v. Graves*, 2016 CO 15, ¶ 9, 368 P.3d 317, 322. But there is no reasonable constitutional construction of section 18-1.3-803's requirement that a judge make the requisite factual findings to adjudicate a defendant a habitual offender. The General Assembly recognized this and amended the statute accordingly.

¶64 Unlike the majority, I cannot support rewriting the statute to add a jury trial followed by judicial review under a process that was not contemplated by the legislature. The former version of section 18-1.3-803 is unconstitutional insofar as it runs afoul of *Erlinger*, and I would simply declare it so.

III. Section 18-1.3-803's Judicial Factfinding Provisions Are Unconstitutional and Must Be Severed, Leaving *Erlinger* to Fill the Gaps

¶65 While I do not see a possible constitutional application of the former version of section 18-1.3-803 as written, the unconstitutional provisions can be severed while leaving the remaining valid provisions intact. *See* § 2-4-204, C.R.S. (2025). Here, simply carving out ***739** the judge as factfinder would allow *Erlinger* and the constitution to fill the gap, essentially replacing "judge" with "jury." This approach is consistent with section 2-4-204, leaves the habitual criminal sentencing scheme intact, and is what the General Assembly would have preferred to ensure the statute's validity.

¶66 As already discussed, there is no conceivable set of circumstances under which section 18-1.3-803's judicial factfinding provisions can be constitutionally applied. *See Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) ("A statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner."). The language in subsections (4)(b), (5)(b), and (6) charging the "trial judge"

with factfinding must be stricken because it is expressly unconstitutional under *Erlinger*. The question is one of remedy.

¶67 "When a statute is unconstitutional, the proper remedy is determined by looking to legislative intent"—that is, by determining "what the General Assembly would have intended in light of our constitutional holding." *Montour*, 157 P.3d at 502. We also "take guidance from the U.S. Supreme Court, which cautions that we should 'try not to nullify more of a legislature's work than is necessary.' " *People v. Tate*, 2015 CO 42, ¶ 6, 352 P.3d 959, 962 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006)).

¶68 If it is clear the General Assembly would have intended for the law to remain valid, "the constitutional provision may be sustained and the unconstitutional stricken." *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52, 70 (Colo. 1981). This depends on "the autonomy of the portions remaining after the defective provisions have been deleted." *Id.* The remaining portions are autonomous unless they are "so riddled with omissions that [they] cannot be salvaged as a meaningful legislative enactment." *Montour*, 157 P.3d at 502; *see also* § 2-4-204 ("If any provision of a statute is ... unconstitutional, the remaining provisions of the statute are valid ... unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.").

¶69 Applying those principles here, it is clear that the General Assembly's primary intent is to maintain a valid habitual criminal sentencing scheme. It enacted what we now know as the Habitual Criminal Act almost a hundred years ago. Ch. 85, secs. 1–5, 1929 Colo. Sess. Laws 309, 309–12. Its continued purpose is to "punish[ ] more severely 'those individuals who show a propensity toward repeated criminal conduct.' " *Wells-Yates v. People*, 2019 CO 90M, ¶ 1, 454 P.3d 191, 195 (quoting *People v. Dist. Ct.*, 711 P.2d 666, 670 (Colo. 1985)).

¶70 Given the General Assembly's historical and sustained interest in ensuring that Colorado has a valid habitual criminal sentencing scheme, there is little question that it would prefer to invalidate the unconstitutional language rather than invalidate the entire Act. While it is true that the 1995 General Assembly changed the factfinder from a jury to a judge, it surely would have kept factfinding with the jury in light of *Erlinger*'s holding. The recent passage of S.B. 25-189 confirms this. The General Assembly expressly intended for its habitual criminal sentencing scheme to remain valid while complying with the constitution.

¶71 Moreover, the statute is administrable without the designation of "trial judge" throughout. While striking this language leaves no express factfinder, *Erlinger* and the constitution require that a jury fill the gap. *See* U.S. Const. amends. V, VI; Colo. Const. art. 2, § 23; *see also* § 18-1-406(1), C.R.S. (2025). Trial courts will have no trouble applying this constitutional and statutory procedure. They are familiar with the jury as factfinder in felony proceedings and do not need section 18-1.3-803's guidance. The remaining portions of the statute also remain intact, such as the requirement that the court conduct a separate sentencing hearing, § 18-1.3-803(1); that the defendant admit or deny the previous convictions, § 18-1.3-803(3); and that the prosecutor prove the defendant is a habitual offender beyond a reasonable doubt, § 18-1.3-803(4)(b). Whether the factfinder is a ***740** jury or a judge, the habitual criminal sentencing scheme is substantively the same. Put differently, striking "trial judge" does not leave the statute "riddled with omissions" because a sentencing court will follow *Erlinger* and the constitution, and the remaining provisions are independent of the judge as factfinder.

¶72 In sum, section 18-1.3-803's prior designation of the "trial judge" as the procedural factfinder is unconstitutional. However, these provisions can be severed to preserve the habitual criminal sentencing scheme's overall continued validity. This is what the General Assembly would have intended in light of *Erlinger*. It also leaves the remaining portions administrable because *Erlinger* and the constitution require that a jury replace "trial judge." Unlike the majority's approach, this conclusion upholds the General Assembly's intent without transgressing our judicial role.

IV. Conclusion

¶73 The majority rewrites the former version of section 18-1.3-803, a decision unsupported by the statute's plain language, legislative intent, and *Lopez*. I cannot join this approach. Instead, section 18-1.3-803's language designating the "trial judge" as the factfinder cannot survive under *Erlinger*. I would sever that language as unconstitutional. Doing so would leave the habitual criminal sentencing scheme intact, allowing courts to use juries to make habitual findings as *Erlinger* requires. I agree with the majority that courts may empanel a second jury for habitual criminal

sentencing proceedings consistent with double jeopardy protections. Because S.B. 25-189 applies to sentencing hearings held after its effective date, any that were on pause after *Erlinger* may now proceed under this new legislation.

¶74 Accordingly, I respectfully dissent in part.

All Citations

576 P.3d 725, 2025 CO 57

Footnotes

1 The trial court, as a respondent, primarily agrees with Gregg's double jeopardy argument. It alternatively asks us to remand the case for it to address the constitutionality of the sentencing statute in the first instance.

2 This version of the statute was in effect when the underlying events of this case occurred.

3 After oral argument in this case, the legislature passed Senate Bill 25-189, which amends section 18-1.3-803(1) to require "a jury to determine whether ... the defendant has suffered the alleged previous felony convictions, whether the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes" for the purpose of determining whether the defendant is a habitual criminal. S.B. 25-189, 75th Gen. Assemb., Reg. Sess. (Colo. 2025). As amended, section 18-1.3-803(1) allows the court to empanel a new jury to make such a determination "when necessary and as constitutionally permissible." *Id.*

4 Gregg did not admit his prior convictions or stipulate to judicial fact-finding for sentencing purposes.

5 As relevant to this case, prior convictions are *Blakely*-exempt, and thus may be considered by a judge, because "these facts have been determined by a jury beyond a reasonable doubt or admitted by the defendant in a knowing and voluntary plea agreement." *Lopez*, 113 P.3d at 730.

6 According to Gregg, these hallmarks include: notice requirements, § 18-1.3-803(2); defendants' denial or admission, § 18-1.3-803(3); the prosecution bearing the burden of proof, § 18-1.3-803(4)(b); specific rules of evidence, *see* § 18-1.3-803(5)(a)–(b); fact-finding by a jury—except for the fact of a prior conviction, *Mathis*, 579 U.S. at 511, 136 S.Ct. 2243; *Erlinger*, 602 U.S. at 834–35, 144 S.Ct. 1840; and judges' sentencing authority, § 18-1.3-801.

7 Gregg cites two cases from Texas appellate courts, one case from the Ninth Circuit, and another from the federal district court of Massachusetts. *See Ex parte Watkins*, 73 S.W.3d 264, 271 (Tex. Crim. App. 2002) (observing that the "reach of *Monge* was significantly curtailed by a sharply divided Court in *Apprendi* two years later"); *State v. Atwood*, 16 S.W.3d 192, 194 (Tex. Ct. App. 2000) (holding that *Monge* only permitted a retrial if the punishment issue was a legitimate sentence enhancement issue and not an actual element of the offense); *United States v. Blanton*, 476 F.3d 767, 772 (9th Cir. 2007) ("Without question, *Monge* stands for the proposition that, outside of the death penalty context, double jeopardy considerations do not apply to sentencing proceedings. But *Monge*'s analysis of double jeopardy in the sentencing context was undertaken before the Court's decision in *Apprendi*." (citation omitted)); *United States v. Gurley*, 860 F. Supp. 2d 95, 114–16 (D. Mass. 2012).

1 The former version of section 18-1.3-803(6) similarly prescribed judicial factfinding.

2 In the same year, the General Assembly also amended the procedure for the imposition of the death penalty, replacing the factfinder from a jury to a panel of three judges. Ch. 244, sec. 1, § 16-11-103(1)(a), (1)(b), (1)(c), (2), (3), (7)(b), 1995 Colo. Sess. Laws 1290, 1290–93. In 2002, the U.S. Supreme Court held that a jury must act as the factfinder for the imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *see also Woldt v. People*, 64 P.3d 256, 259 (Colo. 2003) (holding "Colorado's three-judge capital sentencing statute ... unconstitutional on its face after *Ring*."). The General Assembly convened a special session following *Ring* to amend the sentencing scheme to reinstate the jury as the factfinder during the sentencing phase of a capital case. *See* Ch. 1, sec. 1, § 16-11-103, 2002 Colo. Sess. Laws, 3d Extraordinary Sess. 1, 1–5. It left unchanged the habitual criminal sentencing provisions that required factfinding by a judge.

3 Multiple comments by the bill's sponsors confirm this. During the May 3, 2025, appropriations meeting, Representative Espenoza stated, "This bill ... was necessary because the U.S. Supreme Court issued ... *Erlinger*." Second Reading of S.B. 189 before the House, 75th Gen. Assemb., 1st Sess. (May 3, 2025). Her co-sponsor, Representative Soper, continued, "This is a very simple bill to codify the Supreme Court's holding within Colorado law.... If we don't make this change then Colorado statute is in violation of the federal constitution as interpreted by the U.S. Supreme Court." *Id.* Similarly, during the third reading in the senate, Senator Snyder, another co-sponsor, stated, "Colorado will be going to a jury determination on habitual status. That comes right out of the Supreme Court *Erlinger* decision ... so we either do it by this well-stakeholded [sic] bill ... or we let the Colorado Supreme Court decide. But realize we are very vulnerable right now." Third Reading of S.B. 189 before the Senate, 75th Gen. Assemb., 1st Sess. (Apr. 17, 2025). The bill passed both houses nearly unanimously.

4 S.B. 25-189 was effective on June 2, 2025, and applies prospectively to sentencing hearings conducted on or after its effective date. Ch. 344, sec. 3, 2025 Colo. Sess. Laws 1868, 1868. This legislation was passed after oral arguments in this case.

5 The canon of constitutional doubt requires a court to interpret a statute "in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *supra*, at 247; *see also Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) ("[W]hile this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not 'plainly contrary to the intent of Congress.' " (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988))).

6 In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. In *Blakely*, the Court defined "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303, 124 S.Ct. 2531.

7 In *Lopez*, we recognized that a judicial finding of "a prior conviction is expressly excepted from the jury trial requirement" under *Apprendi*. *Lopez*, 113 P.3d at 723. *Erlinger* did not go so far as to preclude a judge from determining the fact of a prior conviction. 602 U.S. at 837–38, 144 S.Ct. 1840 (explaining that this exception "persists as a 'narrow exception' permitting judges to find only 'the fact of a prior conviction.' " (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013))). However, our court has reasoned that "the [prior conviction] exception extends beyond the fact of conviction to 'facts regarding prior convictions.' " *People v. Huber*, 139 P.3d 628, 633 (Colo. 2006) (quoting *Lopez*, 113 P.3d at 716). After *Erlinger*, our broad interpretation of the prior conviction exception seems in doubt.

8 Colorado abolished the death penalty on March 23, 2020, for offenses charged on or after July 1, 2020. *See* Ch. 61, sec. 1, § 16-11-901, 2020 Colo. Sess. Laws, 204, 204.

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NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Colorado Court of Appeals, Division VI.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Delmart VREELAND, Defendant-Appellant.

Court of Appeals No. 22CA1704
|
Announced October 16, 2025

Douglas County District Court No. 04CR706, Honorable Patricia D. Herron, Judge

Attorneys and Law Firms

Philip J. Weiser, Attorney General, Patrick A. Withers, Assistant Solicitor General and Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Brownstone P.A., George Thomas, Winter Park, Florida, for Defendant-Appellant

Opinion

Opinion by JUDGE SULLIVAN

***1** ¶ 1 Defendant, Delmart Vreeland, appeals the postconviction court's order denying his most recent motion for postconviction relief. We affirm.

I. Background

¶ 2 In 2004, Vreeland sexually assaulted two teenage boys after promising to pay them in exchange for letting Vreeland photograph them in their underwear. Vreeland also provided both boys with cocaine and alcohol.

¶ 3 In 2006, a jury convicted Vreeland of two counts of inducement of child prostitution, two counts of soliciting for child prostitution, four counts of sexual exploitation of children, two counts of sexual assault, two counts of contributing to the delinquency of a minor, and one count of distribution of a controlled substance. Vreeland appealed his convictions and a division of this court affirmed. *People v. Vreeland*, (Colo. App. No. 08CA2468, Feb. 14, 2013) (not published pursuant to C.A.R. 35(f)) (*Vreeland I*).

¶ 4 In 2017, Vreeland filed his first postconviction petition, which the postconviction court denied. Vreeland appealed the denial and a division of this court affirmed. *People v. Vreeland*, (Colo. App. No. 17CA1648, Aug. 27, 2020) (not published pursuant to C.A.R. 35(e)) (*Vreeland II*).

¶ 5 In 2021, Vreeland filed a second postconviction petition under Crim. P. 35(a) and 35(c), raising thirty-five separate claims. In a detailed order, the postconviction court denied the petition without a hearing. This most recent denial prompted this appeal.

¶ 6 We group Vreeland's contentions in this appeal as follows: (1) the trial court lacked jurisdiction over his case; (2) the postconviction court erred by denying most of his postconviction claims as either successive or time barred; (3) his attorneys in the postconviction phase provided ineffective assistance of counsel; (4) the postconviction court erred by denying his challenge to his illegal sentence; and (5) courts on direct appeal and in the postconviction phase have violated his right to due process by enforcing word limits in briefs.

II. Standard of Review and Applicable Law

¶ 7 We review de novo a district court's denial of a defendant's postconviction motion without a hearing. *See People v. Joslin*, 2018 COA 24, ¶ 5. To warrant a hearing on a Crim. P. 35(c) motion, a defendant must allege facts that, if true, entitle the defendant to postconviction relief. *Id.* at ¶ 4. A district court may deny a defendant's postconviction motion under Crim. P. 35(c) without an evidentiary hearing only where the motion, files, and record in the case clearly establish that the allegations presented in the motion are without merit and don't warrant postconviction relief. *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003).

¶ 8 Postconviction proceedings are designed to prevent injustices after a defendant's conviction and sentencing, not to provide a perpetual right of review. *People v. Hampton*, 528 P.2d 1311, 1312 (Colo. 1974). As a result, a postconviction court must deny any claim that the defendant presented and the court resolved in a previous appeal or postconviction proceeding. Crim. P. 35(c)(3)(VI). But there are exceptions. As relevant here, this bar on successive claims doesn't apply to claims "based on evidence that could not have been

discovered previously through the exercise of due diligence." Crim. P. 35(c)(3)(VI)(a).

*2 ¶ 9 A postconviction court must also deny any claim that the defendant *could* have presented in a previous appeal or postconviction proceeding, except, as relevant in this case, any claim based on evidence that couldn't have been discovered previously through the exercise of due diligence; any claim over which the sentencing court lacked subject matter jurisdiction; and any claim where an objective factor, external to the defense and not attributable to the defendant, made raising the claim impracticable. *See* Crim. P. 35(c)(3)(VII)(b), (d), (e).

¶ 10 In addition, a court may correct a sentence imposed without jurisdiction or not authorized by law "at any time." Crim. P. 35(a).

III. Jurisdiction

¶ 11 We first address two of Vreeland's claims that he characterizes as "jurisdictional." *See* Crim. P. 35(c)(2)(III), (c)(3)(VII)(d). Vreeland contends that (1) the trial's venue in Douglas County, Colorado, was improper; and (2) defects in the charging information deprived the trial court of jurisdiction.

A. Venue

¶ 12 In general, a criminal action must be tried in the county where the offense was committed. § 18-1-202(1), C.R.S. 2025.

¶ 13 Before trial, Vreeland challenged whether Douglas County was the proper venue for his trial. Although the trial court rejected his challenge, he didn't raise any venue argument in his direct appeal. We therefore can't address the merits of his venue argument at this postconviction stage. *See* Crim. P. 35(c)(3)(VII). Contrary to Vreeland's argument, venue isn't a jurisdictional issue that can be raised at any time. *See People v. Joseph*, 920 P.2d 850, 851-52 (Colo. App. 1995).

¶ 14 Vreeland nonetheless asserts that he couldn't raise venue in his direct appeal because the relevant trial court records were "hidden" from him. But even if that were true, Vreeland's venue argument fails for a different reason — it came too late. Absent a showing of good cause, a defendant waives any challenge to venue by failing to raise it in writing within twenty-one days of their arraignment. § 18-1-202(11). Here, Vreeland was arraigned on July 6, 2005. But he didn't raise his venue challenge until seven months later. Nor does he advance any good cause to excuse his delay.

¶ 15 Accordingly, the postconviction court didn't err by denying Vreeland's venue challenge.

B. Sufficiency of the Charging Information

¶ 16 Vreeland argues that the trial court lacked jurisdiction because the charging information (1) didn't contain sufficient information regarding the time and location of his alleged offenses; (2) failed to allege the required mental state for inducement of child prostitution (counts one and two) and soliciting for child prostitution (counts three and four); and (3) didn't include victim information for two of the counts alleging sexual exploitation of children (counts seven and eight).

¶ 17 In a criminal case, a trial court's jurisdiction is invoked by the filing of a legally sufficient complaint, information, or indictment. *People v. Sims*, 2019 COA 66, ¶ 15. A charging document is legally sufficient if it identifies the essential elements of the crime charged in the language of the statute. *Id.* at ¶ 16.

¶ 18 We conclude that the charging information in this case was legally sufficient, thus providing the trial court with jurisdiction. For each count, the information identified the essential elements of the charged offense by generally tracking the language of the relevant statute.

¶ 19 True, the information didn't allege the specific time that Vreeland committed each alleged offense. But the time of their commission wasn't an essential element. *See People v. James*, 40 P.3d 36, 48 (Colo. App. 2001), *overruled in part on other grounds by*, *McDonald v. People*, 2021 CO 64. Moreover, the information *did* identify a date range for each alleged offense, thus giving Vreeland a fair and adequate opportunity to prepare his defense. *See People v. Madden*, 111 P.3d 452, 456 (Colo. 2005).

*3 ¶ 20 The same is true regarding the place where Vreeland's offenses allegedly occurred. The county where an offense is alleged to have occurred generally doesn't

constitute an element of the offense. § 18-1-202(11). But even if it did, the information alleged that each of Vreeland's offenses was "committed, or triable," in Douglas County.

¶ 21 We also reject Vreeland's argument that the information failed to allege the required mental state for counts one through four. The information alleged in counts one through four that Vreeland acted "feloniously." At trial, the court instructed the jury that the prosecution had to prove beyond a reasonable doubt that Vreeland acted "knowingly" when committing counts one through four. The word "feloniously" in a charging document is equivalent to "knowingly." *People v. Trujillo*, 731 P.2d 649, 651 (Colo. 1986). Thus, the information adequately alleged the required mental state that the prosecution had to prove at trial.

¶ 22 Nor are we persuaded that the prosecution's failure to identify the specific child victims in counts seven and eight deprived the trial court of jurisdiction over the sexual exploitation of children charges. In counts seven and eight, the prosecution alleged that Vreeland knowingly prepared, arranged for, published, produced, promoted, made, sold, financed, offered, exhibited, advertised, dealt in, or distributed "sexually exploitative material." § 18-6-403(3)(b), C.R.S. 2004. Under the applicable version of the statute, "sexually exploitative material" means "any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18-6-403(2)(j), C.R.S. 2004. Thus, although the statute required the prosecution to prove that the visual material depicted actual children, nothing demanded "evidence of [the] child[ren]'s identification." *People v. Brown*, 313 P.3d 608, 613 (Colo. App. 2011).

¶ 23 Accordingly, the postconviction court didn't err by rejecting Vreeland's claims that he characterizes as jurisdictional.

IV. Successive Claims

¶ 24 The postconviction court determined that the bulk of Vreeland's remaining claims were procedurally barred. The People defend the court's conclusion under Crim. P. 35(c)(3)(VII), arguing that Vreeland could have presented twenty-nine of his thirty-five claims in a previous appeal or postconviction proceeding. Vreeland disagrees, contending that (1) his claims rely on new evidence; (2) an objective factor, external to the defense, made raising the claims earlier impracticable; (3) his claims haven't been "fully and finally" resolved in a prior judicial proceeding; and (4) certain of his claims asserted that the court imposed an illegal sentence, which the court can correct at any time under Crim. P. 35(a).

A. Newly Discovered Evidence

¶ 25 Vreeland says the following, among other things, constitute new evidence favorable to him: (1) thousands of minutes of recorded telephone calls between himself and his counsel, revealing both his counsel's misconduct and the government's violation of his right to confidentiality with counsel; (2) a videotaped interview of a witness supporting his assertion that no sexual contact occurred in the home; and (3) evidence that government investigators violated a sequestration order and withheld exculpatory material by speaking to witnesses during trial and failing to disclose that an investigator was seen with a witness.

***4** ¶ 26 We conclude Vreeland's asserted new evidence didn't push his claims within Crim. P. 35(c)(3)(VII)(b)'s safe harbor for newly discovered evidence. As to the recorded phone calls and interview tape, Vreeland acknowledged in his petition that both were available either before or during trial.[1] The postconviction court similarly concluded that recorded calls were available to Vreeland before trial. Thus, the recorded calls and interview tape didn't constitute new evidence that "could not have been discovered previously." Crim. P. 35(c)(3)(VII)(b).

¶ 27 In addition, the division in *Vreeland II* previously addressed Vreeland's contention that the recorded calls established his attorneys' blameworthiness, rendering this portion of his claim successive under Crim. P. 35(c)(3)(VI). *See Vreeland II*, ¶¶ 30-32.

¶ 28 Turning to the government's alleged violation of a sequestration order and withholding of exculpatory evidence, Vreeland didn't allege sufficient facts to show that he couldn't have discovered these alleged violations earlier through the exercise of due diligence. Crim. P. 35(c)(3)(VII)(b). Moreover, in resolving Vreeland's first postconviction motion, the postconviction court rejected Vreeland's allegations that a government investigator had inappropriate relationships with witnesses in this case, again

rendering this portion of his claim successive under Crim. P. 35(c)(3)(VI).

¶ 29 Vreeland's remaining allegations of new evidence are undeveloped. In his opening brief, Vreeland mentions briefly that a camera allegedly fell out of the chain of custody, that a victim allegedly lied about his grandfather's suicide, and that the mother of one of the victims allegedly would have provided "impeachment evidence." He also asserts that unspecified "new evidence" supported claims one through ten and twenty-nine in his petition. But Vreeland doesn't develop these arguments, much less explain why such evidence couldn't have been discovered earlier through the exercise of due diligence. We therefore decline to address Vreeland's conclusory arguments. *See People v. Romero*, 2015 COA 7, ¶ 53 (declining to address a Crim. P. 35(c) argument that the defendant presented in a perfunctory and conclusory manner).

B. Objective Factor External to the Defense

¶ 30 We similarly conclude that Vreeland's "objective factor" argument under Crim. P. 35(c)(3)(VII)(e) is undeveloped. Without citing supporting case law, Vreeland devotes just two sentences in his opening brief to this argument. Thus, we decline to address it. *See Romero*, ¶ 53.

C. Fully and Finally Adjudicated Claims

***5** ¶ 31 Relying on *People v. Diaz*, 985 P.2d 83, 85 (Colo. App. 1999), Vreeland argues that the postconviction court should have addressed the merits of his claims that a prior court hadn't yet "fully and finally" resolved. But *Diaz* predates the supreme court's 2004 adoption of Crim. P. 35(c)(3)(VII). *See* Rule Change 2004(02), Colorado Rules of Criminal Procedure (Amended and Adopted by the Court En Banc, Jan. 29, 2004), https://perma.cc/3TUK-PLAX. As discussed above, the current rule bars not only claims that the defendant *actually* raised in a prior appeal or postconviction proceeding but also claims that the defendant *could* have raised. *See People v. Taylor*, 2018 COA 175, ¶¶ 13-20 (discussing the 2004 adoption of Crim. P. 35(c)(3)(VII) and rejecting the defendant's reliance on pre-2004 case law construing the prior version of the rule).

¶ 32 Accordingly, because the *Diaz* division applied a version of Crim. P. 35 that is no longer in effect, Vreeland's reliance on its analysis is misplaced.

D. Illegal Sentence Claims

¶ 33 Sentences that are inconsistent with the statutory scheme outlined by the General Assembly are illegal and may be corrected at any time. Crim. P. 35(a); *People v. Jenkins*, 2013 COA 76, ¶ 11. By contrast, Crim. P. 35(c)(3) authorizes postconviction challenges to the "judgment of conviction" itself. Constitutional challenges to a defendant's conviction or sentence are also governed by Crim. P. 35(c). *People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006). The substance of the postconviction motion controls whether it falls under Crim. P. 35(a) or 35(c), not the label placed on it. *See id.*

¶ 34 With the exception of Vreeland's claim involving count nine, which we discuss below, we agree with the People that none of Vreeland's postconviction claims constitutes an illegal sentence claim under Crim. P. 35(a). While Vreeland attempts to characterize several of his claims as illegal sentence claims — including his challenges to the constitutionality of his convictions and sentence, the sufficiency of the evidence and charging information underlying the habitual criminal charges, and the evidence admitted at the habitual criminal hearing — those claims don't allege that Vreeland's sentence is inconsistent with the General Assembly's statutory scheme. Instead, the claims, at most, allege that these errors *led* to a sentence that is inconsistent with the statutory scheme. The same can be said of all postconviction claims. As a result, these claims don't fall under Crim. P. 35(a) and aren't exempt from the bar on successive postconviction claims.

V. Ineffective Assistance of Postconviction Counsel

¶ 35 Vreeland next contends that the postconviction court erred by denying his claim that the private attorney who represented him in his first postconviction appeal (first postconviction counsel) provided ineffective assistance of counsel. Vreeland also argues that, to the extent we reject his contention that new evidence requires reversal of the postconviction court's summary denial of his second postconviction petition, the attorney who represented him on his second postconviction petition (second postconviction counsel) provided ineffective assistance of counsel.

A. Applicable Law and Standard of Review

¶ 36 A criminal defendant has a constitutional right to the effective assistance of counsel in their defense. *People v. Rainey*, 2023 CO 14, ¶ 1. But this constitutional right doesn't apply during the postconviction phase. *Silva v. People*, 156 P.3d 1164, 1167 (Colo. 2007). Instead, a criminal defendant in Colorado has a limited statutory right to counsel in postconviction proceedings. *Id.* at 1168.

¶ 37 Like an ineffective assistance of trial counsel claim, to prevail on an ineffective assistance of postconviction counsel claim, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced their defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Silva*, 156 P.3d at 1169 (*Strickland* applies to ineffective assistance of postconviction counsel claims). Prejudice in this context means that the defendant has shown a reasonable probability that, but for postconviction counsel's unprofessional errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A defendant must establish both prongs under *Strickland* to succeed on their ineffective assistance of postconviction counsel claim. *People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991).

***6** ¶ 38 Ineffective assistance of postconviction counsel claims present a mixed question of law and fact. *People v. Corson*, 2016 CO 33, ¶ 25. We review the postconviction court's legal conclusions de novo but defer to the court's factual findings if they are supported by the record. *Id.*

B. Analysis

¶ 39 At the outset, we address two threshold issues.

¶ 40 First, Vreeland understandably didn't challenge the effectiveness of his second postconviction counsel below. *See People v. Kelling*, 151 P.3d 650, 657 (Colo. App. 2006) (defense counsel "could not be expected to litigate his own ineffectiveness"). Because that particular claim of ineffective assistance of postconviction counsel hasn't yet been presented to the postconviction court, we will not consider it in the first instance. *See People v. Cali*, 2020 CO 20, ¶¶ 33-36.

¶ 41 Second, the People argue that the limited statutory right to postconviction counsel in Colorado doesn't guarantee those defendants who retain *private* postconviction counsel the corresponding right to effective assistance of counsel under *Strickland*. *Cf. Silva*, 156 P.3d at 1171 (Coats, J., dissenting) ("It is unclear to me whether the majority's rationale contemplates a right to constitutionally effective assistance only for indigent defendants, or if it would extend the same right to non-indigent defendants who hire their own counsel for post-conviction proceedings, even without a corresponding statutory right to counsel."). We need not decide whether Vreeland was entitled to effective assistance from his first postconviction counsel because, even if he was, Vreeland's claim of ineffectiveness fails on its merits.

¶ 42 Turning to those merits, Vreeland argues that his first postconviction counsel provided ineffective assistance by advising him that counsel couldn't complete the opening brief a mere seven days before it was due, forcing Vreeland to complete the brief on his own. According to Vreeland, counsel then advised this court that he would prepare a reply brief to "cure any defects" in the opening brief but then failed to do so, requiring Vreeland to find a new lawyer to complete the reply brief. The *Vreeland II* division ultimately rejected Vreeland's contentions of error.

¶ 43 Even if we assume that first postconviction counsel's performance was deficient, Vreeland hasn't shown prejudice. To prove prejudice, Vreeland needed to show a reasonable probability that, but for his private counsel's failure to file a merits brief, he would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). But Vreeland's second petition for postconviction relief didn't identify any potential appellate issues that his first postconviction counsel should have raised in lieu of, or in addition to, the issues that Vreeland raised on his own. Nor did he explain how such issues were stronger or had a better chance of prevailing than the issues he was able to raise.[2] *See People v. Trujillo*, 169 P.3d 235, 238-39 (Colo. App. 2007). In the absence of such allegations, the postconviction court didn't err by denying Vreeland's ineffective assistance of counsel claim without a hearing. *See id.*; *see also People v. Villanueva*, 2016 COA 70, ¶ 68 (A "conclusory allegation is insufficient to establish prejudice under *Strickland*.").

***7** ¶ 44 Accordingly, the postconviction court didn't err by rejecting Vreeland's ineffective assistance of counsel claim.

VI. Vreeland's Sentence

¶ 45 Vreeland next contends that the postconviction court erred by denying his challenge to his illegal sentence. His argument is twofold: (1) the sentence on one of his sexual assault convictions (count nine) should have run consecutively to the sentences on his other convictions under section 18-1.3-1004(5)(a), C.R.S. 2025;[3] and (2) the trial court failed to exercise judicial discretion when it declined to impose concurrent sentences on the subset of convictions related to each of the two victims, with the two "batches" of sentences running consecutively.

A. Additional Background

¶ 46 In October 2008, the trial court sentenced Vreeland to an indeterminate sentence of twenty-four years to life on count nine under the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), §§ 18-1.3-1001 to -1012, C.R.S. 2025, and to an aggregate 336-year sentence on the other counts. The court's indeterminate sentence on count nine ran concurrently with the sentences on the other counts. The 336-year sentence included 48 years each on counts one through six and count ten, all running consecutively to one another. Vreeland's determinate sentences on the remaining counts ran concurrently to the 336-year sentence.

¶ 47 In June 2025, while this appeal was pending in our court, the postconviction court purported to alter Vreeland's sentence on count nine so that it ran consecutively, rather than concurrently, to his related conviction on count eight for sexual exploitation of children. The court said it was entering its amended sentence "pursuant to" section 18-1.3-1004(5)(a). The court also characterized its amended sentence as a "clerical" correction of the mittimus under Crim. P. 36.

B. Count Nine

¶ 48 We first address whether the postconviction court possessed jurisdiction in June 2025 to amend Vreeland's sentence on count nine while his appeal was pending in this court. *See People v. S.X.G.*, 2012 CO 5, ¶ 9 (appellate court may raise jurisdictional defects sua sponte). We conclude that it didn't. After a party has perfected an appeal of a final judgment, the trial court lacks jurisdiction to entertain any motion for an order affecting the judgment. *People v. Dist. Ct.*, 638 P.2d 65, 66 (Colo. 1981); *see also Molitor v. Anderson*, 795 P.2d 266, 269 (Colo. 1990) ("[T]he filing of a notice of appeal divests a trial court of authority to consider matters of substance affecting directly the judgment appealed from."). A defendant's sentence is part of the judgment of conviction. Crim. P. 32(b)(3).

¶ 49 In this appeal, Vreeland challenged multiple aspects of his sentence, including whether the sentence on count nine should run concurrently with or consecutively to his sentences on the other counts. Given the scope of his challenge, Vreeland's notice of appeal, filed well before the postconviction court's June 2025 order, divested the court of jurisdiction to consider matters directly affecting his sentence. *See Molitor*, 795 P.2d at 269. As a result, the portion of the June 2025 order amending Vreeland's sentence on count nine is void. *See People v. Jones*, 631 P.2d 1132, 1133 (Colo. 1981).

***8** ¶ 50 The postconviction court's characterization of the amendment as a "clerical" correction under Crim. P. 36 doesn't change our conclusion. Crim. P. 36 doesn't allow a trial court to amend a sentence itself; rather, the rule permits the court to make "perfunctory changes" so that the judgment conforms to the sentence actually imposed. *People v. Wood*, 2019 CO 7, ¶ 39 (quoting *People v. Emeson*, 500 P.2d 368, 369 (Colo. 1972)).

¶ 51 Here, the trial court's original sentence on count nine ran concurrently with Vreeland's sentences on the other counts. Attempting to alter the sentence on count nine so that it now runs consecutively to the other sentences doesn't constitute a mere perfunctory change, so Crim. P. 36 doesn't apply. *See id.*

¶ 52 As to the merits of Vreeland's sentencing contentions, the People agree with Vreeland's first sentencing argument in part. They assert that section 18-1.3-1004(5)(a) required the trial court to impose a sentence on count nine that ran consecutively to Vreeland's related conviction on count eight for sexual exploitation of children, reasoning that those two offenses arose from the same incident. The People disagree, however, that Vreeland's indeterminate sentence on count nine must run consecutively to his remaining sentences.

¶ 53 A sentencing court ordinarily has discretion to impose either concurrent or consecutive sentences when the defendant is convicted of multiple offenses. *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007). But under section 18-1.3-1004(5)(a), which has remained unchanged since Vreeland's offenses, the trial court must impose consecutive sentences in SOLSA cases involving multiple convictions

arising from the "same incident" if the court imposes an indeterminate prison sentence for the sex offense.

¶ 54 We decline to disturb the trial court's sentence on count nine. Vreeland doesn't point us to any portions of the record establishing that his conduct underlying count nine and the remaining counts occurred as part of a single incident. *See* C.A.R. 28(a)(7)(B) (appellant's opening brief must contain "citations to the authorities and parts of the record on which the appellant relies").

¶ 55 While the People come closer on the narrower question of whether Vreeland's conduct underlying counts eight and nine occurred as part of a single incident, their supporting record citations also don't show an illegal sentence. Instead of pointing us to evidence introduced at trial, the People rely on the prosecution's closing argument, the charging information, pretrial pleadings, and statements supporting law enforcement's request for an arrest warrant. Absent "affirmative evidence" showing otherwise, we presume that the trial court didn't err when imposing sentence. *LePage v. People*, 2014 CO 13, ¶ 15; *cf. Juhl*, 172 P.3d at 900 (explaining, in the identical-evidence context, that the "mere possibility" that identical evidence may support two convictions isn't sufficient to remove the trial court's sentencing discretion; the evidence must support "no other reasonable inference than that the convictions were based on identical evidence").

¶ 56 Accordingly, we discern no basis for disturbing the trial court's original sentence on count nine.

C. Judicial Discretion at Sentencing

¶ 57 Vreeland's contention that the trial court failed to exercise appropriate discretion at sentencing to impose concurrent sentences on all convictions corresponding to a single victim constitutes an illegal manner claim under Crim. P. 35(a). *See People v. Swainson*, 674 P.2d 984, 986 (Colo. App. 1983), *rev'd on other grounds*, 713 P.2d 479, 480 (Colo. 1986).

***9** ¶ 58 An illegal manner claim must be filed "within the time provided [in Crim. P. 35(b)] for the reduction of sentence." Crim. P. 35(a). Where, as here, the defendant filed a direct appeal of the judgment, they must file their illegal manner claim "within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence." Crim. P. 35(b)(3).

¶ 59 The division in *Vreeland I* issued its mandate affirming Vreeland's convictions on January 28, 2014. But Vreeland didn't file his illegal manner claim until March 4, 2021, more than seven years later. Accordingly, Vreeland's illegal manner claim is untimely.

VII. Word Limitations

¶ 60 Finally, Vreeland contends that his right to due process has been violated because courts on direct appeal and during the postconviction phase have enforced word limits in briefs (including in this appeal), requiring that he abandon certain arguments.

¶ 61 To the extent Vreeland challenges word limits imposed in either *Vreeland I* or *Vreeland II*, those claims either were brought or could have been brought in those proceedings. *See Vreeland II*, ¶ 36. They are therefore barred as successive. Crim. P. 35(c)(3)(VI), (VII).

¶ 62 To the extent Vreeland challenges restrictions imposed by the postconviction court related to his most recent petition for postconviction relief, he fails to identify those restrictions with specificity, so we don't address them. *See Romero*, ¶ 53.

¶ 63 We also aren't convinced that Vreeland was denied a fair opportunity to present his contentions of error in this appeal. *See People v. Oglethorpe*, 87 P.3d 129, 133 (Colo. App. 2003) ("Procedural due process ... requires notice and a fair opportunity to be heard."). Although this court denied Vreeland leave to file an oversized 12,708-word opening brief, he doesn't identify any specific argument that he was forced to abandon as a result. *See* C.A.R. 28(g) (an opening brief is limited to 9,500 words).

¶ 64 Moreover, having reviewed Vreeland's briefs in detail, we conclude that certain portions could have been "editorially revised to a more concise form without any loss, and probably with significant gain, in impact." *People v. Galimanis*, 728 P.2d 761, 763 (Colo. App. 1986); *see also Watts v. Thompson*, 116 F.3d 220, 224 (7th Cir. 1997) (appellate court's enforcement of page limits is a "rather ordinary practice" and didn't amount to a due process violation).

¶ 65 Accordingly, we perceive no due process violation.

JUDGE WELLING and JUDGE GOMEZ concur.

VIII. Disposition

¶ 66 We affirm the order.

All Citations

Not Reported in Pac. Rptr., 2025 WL 2945867

Footnotes

1 Vreeland's postconviction counsel partially backtracked in a supplement to the petition, saying that some of the recorded calls (those recorded while Vreeland was temporarily jailed in Iowa) were sealed and inaccessible before trial. But counsel acknowledged receiving even those recordings more than a year before the postconviction court denied Vreeland's petition. The postconviction court explained that, despite having the recordings for that period, Vreeland failed to provide "a scintilla of support" for his claim. On appeal, too, Vreeland fails to point us to any specific recording in the record that supports his claims. Like the division in *People v. Vreeland*, ¶ 31 n.2 (Colo. App. No. 17CA1648, Aug. 27, 2020) (not published pursuant to C.A.R. 35(e)) (*Vreeland II*), we decline to scour the record to determine if any of the thousands of recorded calls support Vreeland's claims. *See also People v. Gutierrez-Vite*, 2014 COA 159, ¶ 28 ("We will not play archaeologist with the record.").

2 Vreeland suggests that "prejudice can be presumed," but he devotes only one sentence of his opening brief to this argument and cites no supporting case law. We decline to address this undeveloped contention. *See People v. Romero*, 2015 COA 7, ¶ 53.

3 Vreeland acknowledges in his opening brief that his argument on this issue may result in a longer sentence, explaining that "[e]ven if a longer sentence results, it does not change the fact that [he] is suffering from an illegal sentence."

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