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STATE OF WASHINGTON
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No. 102033-3
Court of Appeals No. 38324-5-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

D.G.A.

PETITIONER.

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington asks this court to deny review of the Court of Appeals decision terminating review designated in the defendant's petition.

B. COURT OF APPEALS DECISION

The decision dismissing the appeal as untimely.

C. ISSUES PRESENTED FOR REVIEW

1. Which party has the burden to raise a potential constitutional violation?

2. Did D.G.A. sufficiently assert that his right to appeal was violated by RAP 18.8(b)

D. STATEMENT OF THE CASE

D.G.A. is a frequent and vexatious litigant. He has participated, either as a plaintiff or defendant, in at least 40 cases in the Superior Court, 16 notices of appeal and 26 personal restraint petitions in the Court of Appeals, as well as 14 petitions for review of various types in the State Supreme Court. Motion to Modify Ex. A att 1, 2, and 3. D.G.A. is not a

bumbling amateur, just flailing around and filing things.

Instead, he has shown an understanding of sophisticated legal concepts and rules. Motion to Modify Ex. A att 4. He has filed numerous notices of appeal, both represented and pro se over the decades, including an untimely pro se appeal in 2014.

Motion to Modify Ex. B. In the month prior to filing this case he had filed a motion seeking relief from the time limit to appeal based on the failure to notify him of his rights to appeal, yet he did not assert that basis in this case. Motion to Modify Ex C.

D.G.A. filed a notice of appeal on July 15, 2021, more than 20 years after the judgment and sentence was entered in these cases. In keeping with normal practice, the Court placed the matter on the commissioner's docket for dismissal as an untimely appeal. Motion to Modify Ex D. D.G.A. was to respond by August 25, 2021, with the State filing a memorandum by September 1, 2021. D.G.A. did not file any memorandum, so the State did not respond. The Commissioner

then scoured the record, found an error, then applied the rule that the State had the burden to essentially prove the error harmless, without notifying the State of the error or requesting further briefing. The Commissioner then found the appeal exempt from RAP 18.8(b) and granted extraordinary relief sua sponte, without notice or opportunity to be heard from either party. Motion to Modify Ex E.

The State filed a motion to modify the Commissioner's ruling. The Court of Appeals deferred the motion to the merits, and ultimately granted it, dismissing the appeal as untimely.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. There is a presumption of regularity and compliance with Constitutional Commands. While that presumption is not hard to overcome, D.G.A. did not provide anything to rebut it.

The Court of Appeals was correct. There is a presumption, in force after every guilty plea and after every trial, that the defendant either waived his right to appeal or exercised it with the 30 days allotted. This presumption

necessarily flows from the principle that appellate courts assume regularity in trial court proceedings, and will not presume error or search the record for it. *Tremlin v. Tremlin*, 59 Wn.2d 140, 141, 367 P.2d 150, 151 (1961). “It is not the function or duty of this court to search the record for errors, but only to rule on the errors specifically alleged.” *Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.2d 671, 673 (1980). “Further, even though Meneses is not required to cite to the record or authority in his SAG, he must still inform the court of the nature and occurrence of the alleged errors, and this court is not required to search the record to find support for the defendant's claims.” *State v. Meneses*, 149 Wn. App. 707, 716, 205 P.3d 916, 920 (2009), *as amended* (Apr. 13, 2009), *aff'd in part*, 169 Wn.2d 586, 238 P.3d 495 (2010).

CrR 7.2 requires the Court to inform the defendant of his right to appeal, both after a guilty plea or a trial. Thus in a regularly conducted plea the defendant is aware of his right to appeal, and may choose to exercise it or not. Thus there is a

presumption in a voluntary guilty plea that the defendant is waiving his right to appeal, unless he files the appeal within 30 days. This presumption is not particularly hard to overcome. All it takes is an allegation, backed up by some reason, either in or out of the record, that the defendant did not voluntarily waive his right to appeal. Once that occurs the burden shifts to the State to show a knowing, intelligent and voluntary waiver.

The right to appeal is treated the same as other rights. *State v. Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978). For any right the defendant has to assert the right was violated. Then the State can present evidence or argument that it was not. For example, the defendant is responsible for raising the issue of self-defense. Once he does the burden shifts to the State to disprove self-defense beyond a reasonable doubt. The defendant has the burden of production, the State has the burden of persuasion. *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627, 630 (1999). CrR 3.6 requires the defendant to raise the issue that a search or seizure right was violated. A

defendant wanting to raise the issue of the constitutional right to confrontation must assert that right. *State v. Burns*, 193 Wn.2d 190, 206, 438 P.3d 1183, 1190 (2019). Requiring a defendant to raise the right at issue and give a basis of why or how the right was violated is the way all courts work.

Here RAP 18.8 (b) says that a notice of appeal is untimely and any appeal after filed after 30 days must be dismissed. RAP 18.8(b) may be unconstitutional as applied in certain cases, such as if the defendant did not knowingly, intelligently and voluntarily waive his right to appeal in a criminal case. But statutes and court rules are presumed constitutional. *State v. Waldon*, 148 Wn. App. 952, 962, 202 P.3d 325, 331 (2009). Therefore the burden is on the party seeking to avoid the court rule to allege it is unconstitutional as applied to them. Then the burden may well be on the State to show that it is not, via waiver or some other means. As the Court of Appeals held, a guilty plea does create a waiver of the right to appeal. The defendant's burden may not be a high

hurdle to overcome, but he does at least have to allege a violation of the constitutional right and provide some evidence to overcome the presumption that the trial court did not commit error.

Here D.G.A. did not do that. He did not even allege he was unaware of his right to appeal, or that his lack of knowledge caused a delay. Here D.G.A. did not make any assertion. Instead, the Commissioner searched the record and found evidence that might support that assertion if made. However, D.G.A. did not provide a reason that RAP 18.8(b) was unconstitutional as to him, or that the presumption of regularity that an appellate court engages in was overcome. The Court of Appeals was correct in ruling that there is a presumption in a voluntary plea where no timely appeal was taken that the right was waived. The burden to overcome that presumption may be small, but D.G.A. did not meet it.

2. Alternative means of affirmance.

Even if the Supreme Court disagrees with the Court of Appeals reasoning the outcome is correct, D.G.A.'s appeal should be denied as untimely. Thus this case is a poor vehicle to address these issues.

a. The Commissioner violated RAP 12.1.

The Commissioner searched the record and found an error and decided the motion on that basis without notifying the parties. The Court initially stated “subject to RAP 12.1(b), the rule requires courts to decide cases on the basis of the issues briefed by the parties. RAP 12.1(b) provides: “If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.” The Court then held that “By its clear terms, the rule applies to cases, not motions.” *State v. D.G.A.*, 525 P.3d 995, 998 (Wash. Ct. App. 2023). This holding is illogical. A motion is not something separate and distinct from a case. A motion is a procedural

mechanism by which a party raises an issue in a case. An issue raised in a motion may be dispositive of a case. Here the Commissioner violated RAP 12.1 when she decided this issue on a basis not briefed by the parties. Because D.G.A. did not raise the lack of voluntariness of his waiver in a brief, the Court of Appeals should not have decided the issue on that basis without at least notifying the parties. This violation of RAP 12.1 represents an alternative means of affirmance.

b. D.G.A. was aware of his right to appeal, and did not appeal.

While not addressed by the Court of Appeals, the State did meet its burden under *Sweet* to show that D.G.A. was aware of his right to appeal and chose not to. Had D.G.A. raised an argument that he did not knowingly, intelligently and voluntarily waived his right to appeal, and thus was entitled to extraordinary relief, the State could have easily shown he had been well aware of his right to appeal for decades prior to this notice of appeal.

The Commissioner contended that he was not advised of his rights to appeal and collateral attack, and therefore he has the right to file this untimely appeal. But the issue is not whether he was informed of his rights by the trial court at the time of sentencing, but rather whether the State can establish the defendant knowingly, intelligently and voluntarily waived his right to appeal. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579, 581 (1978). While the Court's notification of rights is relevant to that issue, the failure to do so is not dispositive. "Waiver is the intentional relinquishment or abandonment of a known right or privilege." *Id.* D.G.A. clearly had knowledge of his rights to appeal and collateral attack as evidenced by the multitude of appeals and collateral attacks he filed.

D.G.A. clearly had knowledge of his ability to challenge the voluntariness of his waiver. He filed just such an argument in Grant County Superior Court on August 17, 2021, and could have easily filed such in this case, but chose not to. He has filed over a dozen notices of appeal in the last two decades in

various cases, some pro se and some via counsel. He was clearly aware of his right to appeal years ago but choose not to exercise it until recently. He even filed an untimely pro se appeal in another case in 2014, but did not appeal this case at the same time, even though he was clearly aware he had the right to. This constitutes a waiver.

Appellate Courts presume regularity in lower court proceedings. It is up to a party to allege an irregularity, at which point the burden of proof depends on the issue. There are good reasons for this, as it allows all the parties to be on the same page and present their cases. The Commissioner erred by scouring the record and developing a theory for extraordinary relief when no party raised the issue. The Commissioner further erred by not notifying the parties of the potential error she found. The Commissioner confused the burden of persuasion with the burden of production. D.G.A. had the burden to raise an issue that would show that he was entitled to extraordinary relief. He did not meet that burden. The fact that

the State would then have had the burden of persuasion in showing that he was not entitled to extraordinary relief has no bearing on that fact. If the issue had been properly raised the State would have met its burden of persuasion. The Commissioner's ruling should be reversed, and the appeal dismissed as untimely.

3. Even if D.G.A. has the right to this untimely appeal the State prevails on the doctrine of laches and the merits of the ineffective assistance of counsel claim.

The Court of Appeals did not reach these issues, but for the reasons stated in the State's Response Brief in the Court of Appeals, the State prevails on these other issues.

F. CONCLUSION

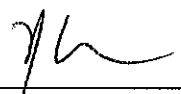
Like almost any constitutional violation, the person alleging a violation has a burden to raise the issue. Once that happens the burden of persuasion may end up on either party, depending on the details. The Court of Appeals correctly held that D.G.A. did not provide enough to sufficiently raise the issue. This does not conflict with any of the cases regarding the

right to appeal. Even if the Court of Appeals was incorrect the outcome was correct, based on RAP 12.1, the fact that D.G.A. was well aware of his right to appeal at the latest almost a decade earlier, and the State prevails on the merits of the case. The petition for review does not implicate a conflict or a substantial legal issue. The petition should be denied.

This document contains 2263 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 26th day of June 2023.

Respectfully submitted,

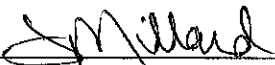
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CERTIFICATE OF SERVICE

On this day I served a copy of the Response to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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