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Supreme Court No. 102822-9
COA No. 57222-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY FISHER,

Petitioner.

PETITION FOR REVIEW

On appeal from the Superior Court for Clark County
No. 11-1-01616-1

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A. IDENTITY OF PETITIONER

Troy Allen Fisher was the defendant in Clark County No. 11-1-01616-1, the appellant in COA No. 57222-2-II, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Fisher seeks review by the Supreme Court of the Court of Appeals decision declining to remand his case to the sentencing court, entered December 19, 2023. Appendix A. On January 23, 2024, a summary ruling was issued stating merely that reconsideration of the Court of Appeals decision was “denied.” Appendix B.

C. ISSUES PRESENTED ON REVIEW

1. Where Mr. Fisher was appointed counsel, albeit without his knowledge or agreement, was the trial court’s failure to address the issue of representation or self-representation properly dismissed by the Court of Appeals where the Court ruled that Mr. Fisher was not entitled to counsel or self-representation one way or the other, despite the

fact that remand is presumed to be de novo and that the order of remand to the trial court did not clearly and expressly limit the issues that Mr. Fisher could raise – therefore allowing Mr. Fisher to raise new issues under State v. Dunbar and State v. Davenport?

2. If the issue arises, the trial court must properly determine if the defendant is represented by counsel, or is properly waiving counsel. Was Mr. Fisher denied his Sixth Amendment right to counsel when the court deemed him to be representing himself?

3. If the court did not allow self-representation, was the defendant denied his Sixth Amendment right to represent himself?

4. In either event, must the case be remanded to the trial court for a new hearing, where neither error identified in assignments of error 2 and 3 is permitted by law to be deemed “harmless,” but rather, require automatic reversal?

5. As argued in Mr. Fisher's Statement of Additional Grounds, at a critical stage, was Mr. Fisher denied his right to effective assistance of counsel under the Sixth Amendment, where trial counsel's failure to contact the appellant prior to the hearing or to advocate for him was a complete absence of counsel under United States v. Cronin?

D. STATEMENT OF THE CASE

Troy Fisher was convicted of three offenses based on the death of Frank Fisher in 2011. CP 5-6. The trial court found Mr. Fisher guilty of first degree murder, and second degree murder, in addition to finding a firearm enhancement and aggravating factors, and sentenced him to 480 months incarceration on July 11, 2013. CP 5-6, 19, CP 69.

In Court of Appeals No. 45129-8-II, the Court found that Mr. Fisher's exceptional sentence was not warranted by the trial court's finding of lack of remorse, and remanded for resentencing. COA No. 45129-8-II, at pp. 1-2, 38-41.

Following a resentencing hearing, the court imposed a term of

380 months, including the 60-month firearm enhancement. CP 48, 50 (March 23, 2016).

In Court of Appeals No. 76736-4-I, the Court of Appeals rejected Mr. Fisher’s arguments regarding several issues, including ineffective assistance of his counsel at his March 23, 2016 resentencing. COA No. 76736-4-I, at p. 66 (July 24, 2017).

On March 3, 2022, based on Mr. Fisher’s personal restraint petition which was deemed timely filed, the trial court was directed to resentence Mr. Fisher. See In re Pers. Restraint of Strandy, 171 Wn.2d 817, 818–21, 256 P.3d 1159 (2011); State v. Caril, 23 Wn. App.2d 416, 434–35, 515 P.3d 1036 (2022) (where Double Jeopardy provides that a judgment and sentence wrongly contains reference to duplicative convictions in violation of Double Jeopardy, the remedy is vacation)) (ruling that “resentencing consistent with Turner is appropriate.”); review denied, 200 Wn.2d 1025 (2023) (citing State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010)).

At the subsequent resentencing on July 1, 2022, Mr. Fisher appeared in court by Zoom. 7/1/22RP at 1-2. At the hearing, one Phillip Ard purported to appear for Mr. Fisher, but Mr. Fisher objected, clearly stating that he was not represented by Mr. Ard and said that he was self-represented. 7/1/22RP at 3-4.

However, the trial court told Mr. Fisher that the court could not entertain any arguments about the propriety of any aspects of his conviction and sentence, because this was neither a resentencing nor an amendment of the judgment and sentence. 7/1/22RP at 4-5. The court repeatedly said that it could not address any other matter except to “enter a new Judgment & Sentence, a Second Amended Judgment and Sentence.” 7/1/22RP at 6.

When Mr. Ard stated that Mr. Fisher, if he was representing himself, he (Mr. Ard) should be deemed standby counsel, the court stated, “Okay. Well, we can structure things today like that[.]” 7/1/22RP at 6.

After the court stated that it had signed the new judgment, the court directed Mr. Fisher, as coordinated by the Department of Corrections virtual hearings representative, to sign a document stating that he acknowledged his presence at this sentencing hearing. 7/1/22RP at 8-9/ Mr. Fisher declined to sign, noting that the court had just told him that this was not a sentencing hearing. 7/1/22RP at 8-9.

Mr. Fisher appealed. CP 69-83, CP 84 (notice of appeal). The Court of Appeals declined to address the issues of representation by counsel or self-representation by ruling that Mr. Fisher had no right to counsel, and could not raise additional issues; the Court also rejected Mr. Fisher's Statement of Additional Grounds. COA No. 57222-2-II (Appendix A), (Appendix B.).

E. ARGUMENT IN FAVOR OF REVIEW

THIS COURT SHOULD ACCEPT REVIEW OF MR. FISHER'S CASE AND REVERSE AND REMAND FOR A NEW HEARING DE NOVO.

1. Review is warranted under RAP 13.4(b)(2) and (3) where the failure to determine representation or self-representation could not be dismissed by a ruling that counsel was not required in the first place, and where Mr. Fisher was entitled to raise new issues on remand.

A criminal defendant has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). Or, he may voluntarily waive this right. Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975).

Accordingly, the right to counsel must be honored, unless waived, or deemed lost. Faretta, supra; Stutzke, supra. Likewise, the right to self-representation must either be respected or denied. McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Therefore, a proper procedure may also be followed by which a defendant is deemed to have lost his right to counsel

involuntarily. State v. Stutzke, 2 Wn. App. 2d 927, 937, 413 P.3d 1037 (2018)). The Court of Appeals decision – where the trial court failed to make these determinations - implicates the foregoing constitutional rights to counsel. Review by the Supreme Court should be granted. RAP 2.5(a)(3).

Further, review is warranted under RAP 2.5(a)(2) and The presumption must be that any resentencing hearing should be de novo. State v. Dunbar, 27 Wn. App. 2d 238, 244–45, 532 P.3d 652, 656–57 (2023). Of course, that presumption most strongly applies in criminal cases. Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

In the interest of truth and fair sentencing, a court on a sentence remand should be able to take any matters into account on behalf of either the government or the defendant. Dunbar, at 245. Mr. Fisher was entitled to the full array of due process rights. Id. In this case, the first order of business was to decide whether Mr. Fisher would be represented by counsel against his will, or whether he would represent himself. Here, Mr. Fisher’s

hearing was conducted in limbo as to whether the defendant was properly represented by counsel, or was representing himself. An erroneous decision regarding representation can never be harmless. United States v. Virgil, 444 F.3d 447, 456 (5th Cir. 2006).

In Mr. Fisher's case, the resentencing hearing of July 1, 2022, was required by Double Jeopardy. 7/1/22RP at 3, 6. Where a double jeopardy violation is evident, a judgment carries facial invalidity. See In re Personal Restraint of Strandy, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011). Although counsel did not communicate with Mr. Fisher prior to the hearing, it is not surprising that Mr. Fisher was appointed an attorney to act as his legal counsel on remand.

At a resentencing, a constitutionally viable judgment and sentence document was required to be issued, with no reference to any second degree murder. See U.S. Const. amend. V; North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). An appellate court order of a resentencing hearing

has long been the remedy in such cases. State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007).

That was the hearing ordered here. Therefore the reviewing court cannot be said to have categorically restricted the hearing to a degree that rendered it purely ministerial. See State v. Dunbar, 27 Wn. App. 2d at 246. In Dunbar, although recognizing that a reviewing court may limit the issues on remand per State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009), such a limited remand must clearly convey the intent to limit the scope of resentencing or the trial court retains discretion. State v. Dunbar, at 246.

Here, the order of remand directed that task the trial court should complete, but “[b]y ordering resentencing without any specific instructions or any prohibitions, the reviewing court returns the case to the trial court to consider every aspect of the offender's sentences de novo.” Dunbar, at 246 ((Emphasis added.)). Review is warranted under RAP 13.4(b)(2).

Finally, review is warranted under RAP 2.5(a)(3) where the right to counsel presents an issue of constitutional magnitude.

2. The defendant must have counsel, or must represent himself.

No proceeding can be conducted in limbo as to whether the defendant is represented by counsel, or is representing himself. Regardless of what the defendant states one way or the other, if the issue is raised, the matter must be decided by the trial court, by one of the prescribed procedures.

3. The court did not protect Mr. Fisher's right to counsel.

A criminal defendant is constitutionally entitled to be represented by counsel at all critical stages of the proceedings. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. “This right extends to resentencing” and, generally, “whenever a court considers any matter in connection with a defendant’s sentence.” Rupe, 108 Wn.2d at 741.

However, the presumption is that a waiver of counsel is not valid, unless an effective waiver of the right to the assistance of counsel plainly demonstrates that the defendant is competent, and knowingly, intelligently, and voluntarily waives the assistance of counsel. Faretta v. California, 422 U.S. at 835; State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

The trial court bears responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what the task entails. Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984)

Here, the court appeared to allow Mr. Fisher to represent himself, with Mr. Ard as standby counsel. 7/1/22RP at 6, 8-9. But no proper procedure was followed as required before permitting a defendant to proceed pro se.

A trial court must determine whether a defendant has validly waived his right to counsel. State v. Madsen, 168 Wn.2d 496, 503-06, 229 P.3d 714 (2010). Doing so requires

that the defendant be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Faretta, at 835.

Here, no inquiry or colloquy was conducted - the court simply stated that it was willing to accept the hearing as structured with Mr. Fisher representing himself. The court abdicated its role to make certain a waiver of counsel is knowingly and intelligently being made. Bellevue v. Acrey, 103 Wn.2d at 210 (citing Faretta, at 835).

Reversal is required - an erroneous decision to permit self-representation can never be harmless. Silva, 108 Wn. App. at 542. Counsel is so fundamental to the right to a fair trial that the erroneous deprivation of that right is structural error. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed .2d 35 (1999).

4. The court wrongly denied Mr. Fisher his right to self-representation.

At other junctures at the hearing, the trial court declined to hear from Mr. Fisher, looked only to lawyer Mr. Ard, and prevented Mr. Fisher from speaking for himself. If the court denied Mr. Fisher his right to represent himself, this was error. Criminal defendants have the constitutional right to self-representation. State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

Mr. Fisher's request was also unequivocal, as it must be. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 162 Wn.2d 1001, 175 P.3d 1093 (2007). Below, Mr. Fisher did not commence his communications with the court complaining about the performance of counsel, which is generally indicative of a defendant whose request to represent himself is made out of frustration. See State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

When the court looked to Mr. Ard to speak for Mr. Fisher and sought his agreement with the new judgment and sentence, Mr. Fisher immediately objected that he had not waived his right to self-representation. 7/1/22RP at 4-5. In such circumstances, reversal was required. United States v. Virgil, 444 F.3d 447, 456 (5th Cir.2006) (holding that Faretta violations, “even at the sentencing stage, are so fundamentally violative of due process that the error is harmful per se”).

5. Reversal is required.

Mr. Fisher need make no argument as to prejudice - prejudice is presumed. See also Neder v. United States, 527 U.S. at 8. However, under RAP 2.5(c)(1), on remand, a trial court has the discretion to address all addressable issues, and exercise its independent judgment, after hearing and considering argument on the breadth and scope of that discretion from the defense. See State v. Kilgore, 167 Wn.2d at 38.

A trial court abuses its discretion when it fails to recognize this discretion. State v. McFarland, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017); see In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007).

In the court below, Mr. Fisher could not advance arguments as to what issues he may address before the court, because the court never resolved, in the first instance, the issue of counsel or self-representation. Mr. Fisher was not permitted by the trial court to speak to any issues, because he was told he was represented by Mr. Ard, and yet after telling those present that it would allow Mr. Ard to consider himself standby counsel, the court nevertheless told Mr. Fisher that it could not address any issues Mr. Fisher himself sought to raise as his own counsel. This was error by any standard.

Mr. Fisher is entitled to remand for resentencing and to proper consultation, before the hearing, with any counsel who is appointed, or if not, then to seek to represent himself.

In either event, through counsel, or as his own counsel, he is entitled to argue, and to persuade the trial court to address issues he seeks to raise. Neither that right, nor that opportunity, has yet been provided, and this Court should reverse and remand to the trial court.

6. Mr. Fisher was also provided with ineffective assistance of counsel where his lawyer did not do anything to advocate for him, and he was therefore completely denied counsel under *United States v. Cronic*.

Structural error occurs, without the need to make any “showing of prejudice,” if a defendant is completely deprived of the assistance of counsel “at a critical stage of his trial,” *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984); *Ayala v. Wong*, 756 F.3d 656, 673 (9th Cir. 2014). At the hearing below, when the court asked Mr. Ard to speak for Mr. Fisher, Mr. Fisher objected:

THE DEFENDANT: Wait, wait, wait, wait. I’m sorry. Mr. Ard does not represent me. I don’t know who this guy is. I’m the one that’s supposed to be notified. I’m the one that’s supposed to be informed on what we’re doing.

7/1/22RP at 4. It is undisputed that Mr. Fisher only learned he had been appointed a lawyer, although where he never requested one, when he was presented with a lawyer who he never met with, and whom he was unaware would be purporting to represent him, at the moment of the hearing as it commenced. Mr. Fisher stated that he was objecting to the new judgment – including, but not limited to, the unsupported imposition of the firearm enhancement - and reiterated that he was representing himself, whereupon the court simply stated that Mr. Fisher could “do whatever you feel is appropriate in this case.” 7/1/22RP at 7.

The court took no action on the constitutional issues before it. As a result of this denial, and as a result of the trial court’s failure to determine representation or self-representation, this was a complete denial of counsel at a critical stage. Cronic, at 2047. This Supreme Court should take review of Mr. Fisher’s case, and reversal is required for a plenary re-sentencing hearing.

F. CONCLUSION

Based on the foregoing, Mr. Fisher asks this Court grant review, reverse, and remand for resentencing.

This brief is composed in font Times New Roman size 14 and contains 2,975 words.

DATED this 22nd day of February, 2024.

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APPENDIX A

Filed
Washington State
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Division Two

December 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TROY ALLEN FISHER,

Appellant.

No. 57222-2-II

UNPUBLISHED OPINION

GLASGOW, C.J. – In 2013, Troy Fisher was convicted of first degree murder and second degree murder for the same homicide. In 2021, Fisher filed a motion for relief from his judgment and sentence in superior court arguing, in relevant part, that his conviction for second degree murder and the references to that conviction in his judgment and sentence violated double jeopardy principles. The motion was ultimately transferred to the Washington Supreme Court, which dismissed most of Fisher’s arguments but remanded to the superior court to file an amended judgment and sentence removing any reference to the second degree murder conviction.

At a hearing to correct the judgment and sentence, Fisher appeared and purported to object to his appointed counsel. The trial court repeatedly explained that the purpose of the hearing was simply to correct the judgment and sentence in accordance with the Supreme Court’s order and did not further engage with Fisher about his representation.

Fisher appeals, arguing that the trial court denied his right to counsel by failing to fully inquire into his request to proceed pro se. He also contends that the court then denied his right to

self-representation by not allowing Fisher to represent himself and to make additional arguments at the hearing. Fisher also argues that the second amended judgment and sentence violates double jeopardy principles. Because the trial court merely corrected a ministerial error as directed in the Supreme Court's order and exercised no discretion, the trial court did not violate Fisher's right to assistance of counsel or self-representation. Accordingly, we affirm.

FACTS

In 2013, following a bench trial, Troy Fisher was convicted of first degree murder and second degree murder for the same homicide. The trial court acknowledged that the second degree murder conviction would merge with the first degree murder conviction and imposed an exceptional sentence. On appeal, we reversed the exceptional sentence and remanded for resentencing within the standard range. On remand, the trial court issued an amended judgment and sentence imposing a standard range sentence. The amended judgment and sentence became final in 2017.

In 2021, Fisher filed a motion for relief from his judgment and sentence in superior court. The superior court transferred the motion to us for consideration as a personal restraint petition, which we determined was improperly successive but possibly exempt from the one-year time bar. Accordingly, we transferred the petition to the Supreme Court. In the petition, Fisher argued that his conviction for second degree murder and the continued reference to that conviction in his amended judgment and sentence violated double jeopardy principles requiring a judgment of acquittal for second degree murder. Fisher also argued that his sentence exceeded the standard range, and the second degree murder conviction was not proven.

A commissioner of the Supreme Court conditionally dismissed Fisher's petition, rejecting most of his arguments but ruling that the continued reference to Fisher's conviction for second degree murder violated double jeopardy such that entry of a second amended judgment and sentence with no such reference was appropriate. Ruling Conditionally Dismissing Pers. Restraint Pet., *In re Pers. Restraint of Fisher*, No. 100626-8 (Wash. March 3, 2022). The Supreme Court's ruling stated, "The personal restraint petition is dismissed on the condition the State promptly procure from the superior court an amended judgment and sentence with no reference to the second degree murder conviction and file a copy of the amended judgment in this court within 30 days of procurement." *Id.* at 3.

At a hearing in the trial court for presentation of an amended judgment and sentence, the State presented a second amended judgment and sentence removing any reference to the murder in the second degree charge and otherwise leaving the judgment and sentence exactly the same. The State informed the court "the personal restraint petition is dismissed once we [make the one change]. So, there's nothing else to be argued or addressed." Verbatim Rep. of Proc. at 3.

The trial court asked Philip Ard, who appeared on behalf of Fisher, if he had any response. Fisher interrupted the trial court, "Wait, wait, wait, wait. I'm sorry. Mr. Ard does not represent me. I don't know who this guy is. I'm the one that's supposed to be notified. I'm the one that's supposed to be informed on what we're doing." *Id.* at 4. Fisher claimed to have had no contact with Ard and stated that he disagreed with the second amended judgment and sentence.

The trial court briefly explained to Fisher that the Supreme Court addressed his argument and did not find it persuasive, noting, "At any rate, we're not here for resentencing. That's not what we're here to do. We're here to enter a Judgment & Sentence pursuant to the Order of the

Commissioner of the Supreme Court.” *Id.* at 4-5. The trial court asked Ard if he had anything else to say, to which Ard responded, “I don’t have anything to add, other than I reviewed it. I do believe that the Second Amended Judgment & Sentence complies with the Supreme Court’s Order.” *Id.* at 5.

Fisher remarked, “I don’t understand why he’s speaking for me.” *Id.* The trial court explained that Ard was his appointed attorney, to which Fisher responded, “I didn’t waive my right to represent myself.” *Id.* The trial court reiterated that the point of the hearing was simply to enter an amended judgment and sentence pursuant to the Supreme Court’s order. Ard offered to operate as standby counsel if Fisher wished to represent himself. The trial court responded:

Well, I mean, we can structure things today like that, but candidly, you know, I’m not really going to accept any other argument because I have read the ruling, conditionally dismissing the personal restraint petition twice to make sure I understand it, and we’re not here for resentencing. We’re here to simply comply with the Order of the Court and to enter a new Judgment & Sentence, a Second Amended Judgment & Sentence, that has no reference to a murder in the second degree conviction.

Id. at 6.

Fisher stated, “I object to all this, the whole proceeding,” claiming he was not prepared and did not understand why Ard was appointed to his case. *Id.* at 7. Fisher refused to sign the second amended judgment and sentence. Fisher appeals.

ANALYSIS

Fisher argues that the trial court denied his right to counsel by failing to properly determine whether he was waiving counsel. He further argues that the trial court then violated his right to self-representation during the hearing. We disagree.

A criminal defendant has a right to the assistance of counsel at every critical stage of a criminal proceeding, including sentencing. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A critical stage is “one where ‘a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.’” *State v. Heng*, No. 101159-8, slip op. at 8 (Wash. Dec. 7, 2023),¹ (internal quotation marks omitted) (quoting *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009)). Resentencing can be a critical stage of the proceedings if it involves “more than the court’s performing a ministerial act.” *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). On the other hand, where the law prescribes and defines the court’s duty as to leave nothing to the exercise of discretion or judgment, the performance of that duty is a ministerial act. *City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 662-63, 898 P.2d 864 (1995).

This case is similar to *State v. Hawkins*, 164 Wn. App. 705, 715, 265 P.3d 185 (2011). There, we held that a defendant’s right to counsel was not violated when he was not appointed counsel for a postconviction hearing at which the trial court simply made a ministerial correction to the judgment and sentence. Here, the trial court merely corrected the judgment and sentence to remove references to the second degree murder conviction, as explicitly directed by the Supreme Court. The sentence was unmodified except to remove the references; substantively, the sentence remained exactly the same. Because the court exercised no discretion, its act was merely ministerial. Consequently, as in *Hawkins*, the trial court’s decision not to engage with Fisher’s

¹ <https://www.courts.wa.gov/opinions/pdf/1011598.pdf>.

arguments about appointed counsel or self-representation did not violate Fisher's constitutional rights.

Moreover, even if Fisher's rights were violated, any such violation was harmless beyond a reasonable doubt. *Heng*, slip op. at 12. The trial court exercised no discretion, it simply made a ministerial correction; Fisher's representation, whether by counsel or not, could not have altered the result of the hearing.

Fisher also argues that remand is necessary because the second amended judgment and sentence "references multiple convictions in violation of double jeopardy." Appellant's Opening Br. at 15. But the record does not support his contention. The second amended judgment and sentence does not reference the second degree murder conviction anywhere.

In a statement of additional grounds for review, Fisher makes several additional arguments, none of which are meritorious. First, he argues that the trial court erred by not entering new findings of fact and conclusions of law to match the second amended judgment and sentence. But there was no requirement that the trial court entered new findings or conclusions. As previously discussed, the trial court did not exercise any discretion, make factual findings, or draw legal conclusions; the trial court simply corrected a ministerial error. As such, there was no need to create new written findings or conclusions pertaining to Fisher's convictions.

Fisher also argues that Ard rendered ineffective assistance of counsel by not investigating, preparing, or contacting Fisher prior to the hearing to correct the judgment and sentence. As discussed, the trial court exercised no discretion at the hearing. No evidence was considered. No arguments were made. The purpose of the hearing was to simply correct the judgment and sentence in accordance with the Supreme Court's remand, which is what the trial court did. Under these

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circumstances, Fisher cannot show that he was prejudiced by counsel's conduct. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Accordingly, this argument fails.

Fisher also argues that the trial court denied him due process and that he should have been permitted to raise issues related to his original sentencing and first appeal at the hearing amending the judgment and sentence. But the law is clear that the trial court's authority to address issues on remand is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Here, the Supreme Court remanded for the trial court to simply correct a ministerial error in the judgment and sentence, it did not remand for resentencing. Accordingly, the trial court did not err by limiting argument at the hearing.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.
Glasgow, C.J.

We concur:

Price, J.
Price, J.

Che, J.
Che, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

January 23, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TROY ALLEN FISHER,

Appellant.

No. 57222-2-II

ORDER DENYING MOTION
FOR RECONSIDERATION

The unpublished opinion in this matter was filed on December 19, 2023. On January 8, 2024, appellant moved for reconsideration. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Glasgow, Price, Che

FOR THE COURT


Glasgow, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57222-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Aaron Bartlett, DPA
[aaron.bartlett@clark.wa.gov]
[prosecutor@clark.wa.gov]
Clark County Prosecutor's Office

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: February 22, 2024

WASHINGTON APPELLATE PROJECT

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Superior Court Case Number: 11-1-01616-1

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