68734-4

687344

NO. 68734-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAMONE ECHOLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Lori K. Smith, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

JENNIFER J. SWEIGERT
Attorney for Appellant

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RULES, STATUTES AND OTHER AUTHORITIES

I. IDENTITY OF MOVING PARTY

Nielsen, Broman and Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2 (i).

III. FACTS RELEVANT TO MOTION

By letter dated August 1, 2012, Nielsen, Broman & Koch was appointed to represent appellant Ramone Echols on appeal from the April 9, 2012 order denying his motion to correct his judgment and sentence. The original judgment and sentence was entered in 1995.

In reviewing this case for issues to raise on appeal, Jennifer Sweigert, a staff attorney at Nielsen, Broman and Koch, has performed the following:

1. Read and reviewed the Verbatim Report of Proceedings from the original sentencing hearing on September 22, 1995.

2. Read and reviewed the clerk's papers.

3. Researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review;

4. Written to Echols explaining the Anders[1] procedure and his right to file a pro se supplemental brief and served him with a copy of this motion.

IV. GROUNDS FOR RELIEF

RAP 15.2(i) allows counsel to withdraw on appeal if counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 83 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997), State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 825 P.2d 336, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Echols to proceed pro se.

Nielsen, Broman and Koch submits the following argument and brief to satisfy its obligations under Anders, Theobald, Pollard, and RAP 15.2(i).

V. BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. The court erred in denying Echols' motion to correct his judgment and sentence.

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[1] Anders v. California, 386 U.S. 738, 83 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

2. The court erred in referring to matters outside the four corners of the judgment and sentence in ruling on Echols' motion.

3. The court erred in transferring Echols' motion to a different judge and courthouse without first granting him notice and an opportunity to be heard.

4. The court erred in failing to transport Echols from prison to the courthouse for a hearing on the motion to correct his judgment and sentence.

Issues Pertaining to Potential Assignments of Error

1. Did the court err in denying Echols' motion to correct his judgment and sentence?

2. Did the court err in referring to matters outside the four corners of the judgment and sentence in ruling on Echols' motion?

3. Did the court err in transferring Echols' motion to a different judge and courthouse without first granting him notice and an opportunity to be heard?

4. Did the court err in failing to transport Echols from prison to the courthouse for a hearing on the motion to correct his judgment and sentence?

B. STATEMENT OF THE CASE

In 1995, appellant Ramone Echols was convicted of first-degree murder that occurred in 1994. CP 37. The judgment and sentence states his standard range as between 262 and 345 months. CP 38. The court imposed 340 months. CP 39. There is a box on the judgment and sentence to check if the jury has entered a special verdict that the defendant was armed with a deadly weapon. CP 37. That box was not checked. CP 37.

On February 1, 2012, Echols filed a CrR 7.8 motion to correct or modify his judgment and sentence. CP 25-39. In it, he pointed out that the standard range for his offense is actually 255-333 months, exactly 12 months lower than the standard range recited on his judgment and sentence. CP 29. He asked the court to vacate the original judgment and sentence and enter a corrected judgment and sentence because his 340-month sentence was 7 months longer than the top of the standard range. CP 31. He also asked that the State be required to appear and show cause why this relief should not be granted. CP 31.

In response, the State supplied a copy of the special verdict form from Echols' case, showing that the jury found he was armed with a deadly weapon. CP 68. Under Former RCW 9.94A.310(4) (1995), 12 months shall be added to the standard range if the defendant was armed

with a deadly weapon. The State argued the standard range described on the judgment and sentence included the 12-month deadly weapon enhancement and the failure to check the box was a scrivener's error. CP 56-59.

On April 9, 2012, the court entered an order denying Echols' motion. CP 96-97. The court entered factual findings that the jury found Echols was armed with a deadly weapon; that the standard sentencing range was 250-333 months plus 12 months for the deadly weapon enhancement for a total standard range of 262-345 months; that the 340 month sentence was within this standard range; and that the box reflecting the deadly weapon special verdict was inadvertently left unchecked. CP 96-97.

On April 13, 2012, Echols filed an objection and reply to the State, arguing that the judgment and sentence was invalid in its face; that the State could not rely on other documents to prove the validity of the judgment and sentence, and that he should be transported to court for a resentencing hearing. CP 100-03.

On April 30, 2012, Echols filed a motion asking the court to reconsider its denial of his motion. CP 105. He also filed a declaration in support of this motion, incorporating his reply and objecting to the changes, without notice or a hearing, of venue and of judge. CP 108-09.

Echols noted his motion to correct his judgment and sentence for hearing at the downtown Seattle King County Courthouse before the same judge who presided over his original sentencing in 1995, Judge Ann Schindler. CP 25, 37-43, 94. But his motion was decided by Judge Lori Kay Smith at the Regional Justice Center in Kent. CP 96-97.

On May 2, 2012, Echols filed notice of appeal from the change of venue, the change of judge, the April 9, 2012 order denying his CrR 7.8 motion to correct or modify his judgment and sentence, and the findings made in that order. CP 111.

C. POTENTIAL ARGUMENT

1. THE COURT ERRED IN DENYING ECHOLS' MOTION TO CORRECT HIS JUDGMENT AND SENTENCE.

"Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time." CrR 7.8. A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence. State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121, 124 (2011) (citing State v. Priest, 100 Wn. App. 451, 456, 997 P.2d 452 (2000)).

In this case, the standard range for Echols' offense was 250-333 months. Former RCW 9.94A.310 (1994). When the jury finds the

defendant committed a violent felony while armed with a deadly weapon, an additional 12 months "shall be added to the presumptive sentence." Former RCW 9.94A.310 (1994). But nothing in the judgment and sentence mentions a deadly weapon enhancement or any basis for an exceptional sentence. CP 37-43. Nor was there any discussion at sentencing of a deadly weapon enhancement.[2] Echols' 340-month sentence is clearly outside the standard range without the enhancement. CP 39. He could argue the court erred in denying his motion to correct this error.

2. THE COURT ERRED IN REFERRING TO DOCUMENTS OUTSIDE THE FOUR CORNERS OF THE JUDGMENT AND SENTENCE TO DETERMINE THE EXISTENCE OF A SCRIVENER'S ERROR.

A judgment and sentence may be challenged after the one-year time limit in RCW 10.73.090 if it is invalid on its face. RCW 10.73.090. "A judgment and sentence is invalid on its face if . . . the alleged defect is evident on the face of the document without further elaboration." In re Pers. Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). Courts cannot look beyond the verdict, judgment, and sentence to determine facial invalidity. State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719 (1986). Echols could argue the court erred when it considered

[2] A motion to supplement the record on appeal with the transcript of the 1995 sentencing hearing was filed on December 18, 2012.

documents, such as the special verdict, the certification for probable cause, and the scoring form, submitted by the State in determining whether his judgment and sentence was facially invalid. CP 121-28.

3. THE COURT ERRED IN TRANSFERRING THE CASE TO ANOTHER JUDGE AND ANOTHER COURTHOUSE WITHOUT GRANTING ECHOLS NOTICE AND A HEARING.

Echols expressly noted his motion to correct his judgment and sentence before Judge Ann Schindler, the same judge who sentenced him in 1995, at the King County Courthouse in downtown Seattle. CP 25, 94. Yet his motion was ruled on by the Honorable Lori Kay Smith at the Regional Justice Center in Kent. CP 96-97. These changes occurred without notice to Echols or an opportunity for him to object.

The essence of due process is notice and a meaningful opportunity to be heard. In re Dependency of M.S., 98 Wn. App. 91, 94, 988 P.2d 488 (1999). Venue in criminal actions lies in the county in which the offense was committed. CrR 5.1. A change of venue is required upon a showing that an action was not prosecuted in the correct county. CrR 5.2. In the trial context, when a judge is unable to continue with a trial, any other judge may be appointed, but if the defendant objects, a mistrial must be granted. CrR 6.11.

Echols could argue that venue was improperly changed from Seattle to Kent, and that upon his motion to reconsider, the court was required to send his motion back to Seattle or, at a minimum grant him notice and an opportunity to be heard on the issues of venue and the judge who would hear the motion. He could argue the court erred in assigning the case to Judge Smith without affording him an opportunity to object.

4. THE COURT ERRED IN RULING ON ECHOLS' MOTION WITHOUT TRANSPORTING HIM TO THE COURTHOUSE FOR A HEARING.

Sentencing is a critical stage of the proceedings at which a defendant is entitled to be present and to have the assistance of counsel. State v. Davenport, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007). CrR 7.8 lays out the procedure on a motion to vacate a judgment: "If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted." CrR 7.8(c)(3).

Because Echols' motion essentially argued that his sentence should be vacated and he should be resentenced within the correct standard range, he could argue the court violated his Sixth Amendment rights to be present and to have the assistance of counsel at the hearing on his motion. He could also argue the court erred in deciding his motion without the hearing required by CrR 7.8(c)(3).

also argue the court erred in deciding his motion without the hearing required by CrR 7.8(c)(3).

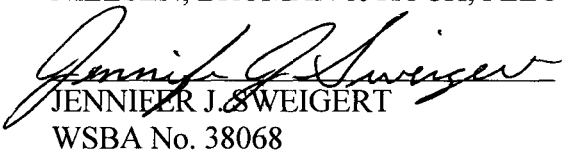
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record, and to permit Echols to proceed pro se.

DATED this 18th day of December, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 68734-4-I
	)	
RAMONE ECHOLS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAMONE ECHOLS
DOC NO. 725548
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER 2012.

X Patrick Mayovsky