

No. 32637-3-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

FILED
April 3, 2015
Court of Appeals
Division III
State of Washington

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO G. SANCHEZ,

Appellant.

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

The Honorable Judges William D. Acey and Scott D. Gallina

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Rigoberto G. Sanchez accepts this opportunity to reply to the State's brief. Mr. Sanchez requests that the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. This Court should deny the State's request to dismiss this appeal as untimely filed.

In its response brief, the State requests this Court dismiss Mr. Sanchez's appeal as untimely filed, pursuant to Rules of Appellate Procedure (RAP) 18.8(b) and RAP 18.9(c)(3). State's Brief pgs. 12-13. For the reasons outlined below, this request should be denied.

First, pursuant to RAP 18.9(c), "[t]he appellate court will, *on motion of a party*, dismiss review of a case" based on several enumerated reasons. RAP 18.9(c) (emphasis added). Here, the State did not file a motion seeking dismissal, but rather, requested dismissal in its response brief. *See* State's Brief pgs. 12-13. Because the State did not file its request by motion as required by the appellate court rules, this Court should decline to consider it. *See* RAP 18.9(c).¹

Second, the State has not established that Mr. Sanchez knowingly, intelligently, and voluntarily waived his right to appeal.

¹ In addition, the State also did not file a cross-appeal seeking affirmative relief such as dismissal of this appeal in its entirety. A notice of cross-appeal is required if a respondent seeks affirmative relief. *In re Arbitration of Doyle*, 93 Wn. App. 120, 126, 966 P.2d 1279 (1998); *see also* RAP 5.1(d) (defining cross-review).

In general, a notice of appeal must be filed within 30 days after entry of the decision the party filing wants reviewed. RAP 5.2(a). The RAPs ordinarily require dismissal of an appeal if the notice of appeal is not filed in a timely manner: “[t]he appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal” RAP 18.8(b). However, this rule has been liberally construed in criminal appeals in light of the constitutional right to appeal a criminal conviction.

The Washington Constitution guarantees the right to appeal in all criminal cases. Const. art. 1, §22. Before the right may be waived, the State must establish that the waiver was knowing, intelligent, and voluntary. *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997); *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

[A]n involuntary forfeiture of the right to a criminal appeal is never valid . . . [A] criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right.

. . . .

[T]he strict application of filing deadlines must be balanced against a defendant's state constitutional right to appeal. *Sweet* is based on the principle that in criminal prosecutions all defendants have a constitutional right to appeal, and there can be no presumption in favor of waiver of a constitutional right. *Sweet* establishes that the State has the burden to demonstrate a defendant understood his right to appeal and consciously gave up that right before a notice of appeal may be dismissed as untimely.

Kells, 134 Wn.2d at 313-14 (citing *Sweet*, 90 Wn.2d at 287).

“Doubts should be resolved in favor of protecting the right to appeal and courts should be slow to deprive a litigant of that right.” *State v. Lewis*, 42 Wn. App. 789, 795, 715 P.2d 137 (1986). There is no presumption in favor of the waiver of the right to appeal. *Tomal*, 133 Wn.2d at 989.

Further, the State and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. amends. VI and XIV; CONST. Art. 1, §22. “[T]he effectiveness of counsel is a circumstance that bears on the validity of a defendant's waiver of the right to appeal and, in turn, on [the appellate] court’s ultimate determination whether to extend the time to file a notice of appeal under RAP 18.8(b).” *State v. Chetty*, 167 Wn. App. 432, 444, 272 P.3d 918 (2012). The Supreme Court has stated:

[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes.

Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (citations omitted).

Here, the record indicates Mr. Sanchez signed a written acknowledgment of his rights on appeal. (CP 103). However, there was no colloquy conducted on the record at sentencing regarding these rights. (RP 187-205). Mr. Sanchez chose to exercise his constitutional right to file an appeal. (CP 109-119). The Notice of Appeal was dated July 8, 2014, within

30 days of the entry of the Judgment and Sentence, the decision Mr. Sanchez wants reviewed. (CP 92-101, 109); *see also* RAP 5.2(a). However, the Notice of Appeal was not filed until July 25, 2014, 46 days after the entry of the Judgment and Sentence. (CP 92-101, 109). Thus, the Notice of Appeal was filed 16 days late. (CP 92-101, 109); *see also* RAP 5.2(a).

Despite this short 16 day delay in filing the Notice of Appeal, there is no indication that Mr. Sanchez made a knowing, intelligent, and voluntary waiver of his right to appeal. The State cannot meet its burden of showing Mr. Sanchez consciously gave up his right to appeal. *See Kells*, 134 Wn.2d at 314. Defense counsel prepared the Notice of Appeal within the filing deadline, indicating Mr. Sanchez wanted to file an appeal. (CP 109). Mr. Sanchez has participated in this appeal, filing a Statement of Additional Grounds. There is no indication in the record before this Court that Mr. Sanchez waived right to appeal. *See Kells*, 134 Wn.2d at 314.

All that is demonstrated here by the 16 day delay in filing the Notice of Appeal is inaction by defense counsel to file the prepared Notice of Appeal in a timely manner. (CP 109). “[A] court may not dismiss a direct appeal for attorney inaction or error.” *State v. Cater*, No. 70435-4-I, 2015 WL 1205002, at *6 (Wash. Ct. App. Mar. 16, 2015) (citing *Tomal*, 133 Wn.2d at 990-91). “[T]he decision to waive the right to appeal must be made knowingly by the defendant and not as the result of his attorney’s negligence.” *Id.* “If the rules are violated by the defendant’s attorney, the

remedy lies in sanctioning the lawyer, not in dismissing the defendant's appeal.” *Id.* (quoting *Tomal*, 133 Wn.2d at 990).

The appellate rules provide that this Court may enlarge the time for filing a notice of appeal due to extraordinary circumstances. *See* RAP 18.8(b). The rule provides, in pertinent part:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b).

“Extraordinary circumstances” has been defined as “circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control.” *Beckman v. DSHS*, 102 Wn. App. 687, 694, 11 P.3d 313 (2000) (quoting *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988)). “In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the Appellant's reasonably diligent conduct.” *Id.* (quoting *Reichelt*, 52 Wn. App. at 765).

Mr. Sanchez presents extraordinary circumstances that justify enlarging the time for appeal by 16 days. Defense counsel's delay in filing the Notice of Appeal that was prepared and signed in a timely manner was a circumstance beyond Mr. Sanchez's control. *See Beckman*, 102 Wn. App. at

694 (quoting *Reichelt*, 52 Wn. App. at 765). Any doubts as to this issue should be resolved in favor of protecting Mr. Sanchez's right to appeal. *See Lewis*, 42 Wn. App. at 795.

Finally, the record shows Mr. Sanchez filed a Motion for Reconsideration of the sentence imposed by the trial court on June 20, 2014, 11 days after entry of the Judgment and Sentence. (CP 92-101, 104-108). Although the record shows no formal order was entered denying this Motion for Reconsideration, this offers a possible explanation for why defense counsel did not file the Notice of Appeal until July 25, 2014, that he was waiting for a ruling on this motion. RAP 5.2(e) extends the time for filing a Notice of Appeal for 30 days after orders are entered deciding certain enumerated post-conviction motions. *See* RAP 5.2(e).

For the aforementioned reasons, this Court should deny the State's request to dismiss this appeal as untimely filed.²

² Should this Court disagree and wish to grant the State's request to dismiss the appeal, Mr. Sanchez requests this Court instead remand the case to the trial court for an evidentiary hearing and order the trial court to enter findings addressing whether defense counsel's performance was deficient and whether Mr. Sanchez waived his right to appeal. *See State v. Chetty*, 167 Wash. App. 432, 445, 272 P.3d 918, 925 (2012) (imposing this remedy).

2. Mr. Sanchez preserved his objection to the \$3,000 “Mandatory ‘Methamphetamine Clean Up’ Assessment” in the trial court and therefore, the issue should be considered by this Court.

In its response brief, the State argues Mr. Sanchez did not properly object to the \$3,000 “Mandatory ‘Methamphetamine Clean Up’ Assessment” in the trial court and therefore, he cannot challenge this assessment on appeal. State’s Brief pgs. 30-31. The State argues “[w]hile he did object at the sentencing hearing to the imposition of the fine, *the Appellant agreed that the fine was mandatory.*” State’s Brief pg. 31 (citing RP 203) (emphasis added).

The State’s assertion is incorrect. Defense counsel argued at sentencing that this assessment was not mandatory:

I’ve noticed under the section for costs and assessments that there’s been a \$3,000 methamphetamine cleanup assessment. *My reading of that is that it’s not a mandatory thing.* I think it’s mandatory if there’s been a commission of a, ah -- a meth lab or manufacture of it. This is not that type of offense. We heard ample testimony that manufacture of this particular drug has gone south of the border. I don’t think it’s appropriate. Not only that, but per the RCWs, the cost of that are supposed to go to actual cleanup. I am in fear that if that was imposed, it would just sit in the, ah, funds some place and never be used.

(RP 203) (emphasis added).

The dispute between defense counsel and the State was whether the fine was mandatory. (RP 203-204).

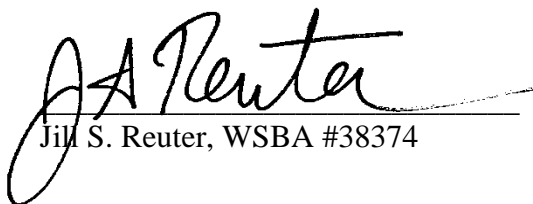
Mr. Sanchez properly objected to the \$3,000 “Mandatory ‘Methamphetamine Clean Up’ Assessment in the trial court and preserved the issue for appellate review. (RP 203). Therefore, the issue should be considered by this Court. *See Appellant’s Opening Brief pgs. 22-24.*

C. CONCLUSION

This Court should deny the State's request to dismiss this appeal as untimely filed.

In addition, Mr. Sanchez preserved his objection to the \$3,000 "Mandatory 'Methamphetamine Clean Up' Assessment in the trial court and therefore, the issue should be considered by this Court.

Respectfully submitted this 2nd day of April, 2015.


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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32637-3-III
vs.)
RIGOBERTO G. SANCHEZ) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 2, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Appellant's Reply Brief to:

Rigoberto G. Sanchez #377069
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191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission from the Asotin County Prosecutor's Office, I also served Benjamin Nichols at bnichols@co.asotin.wa.us and Curt L. Liedkie at cliedkie@co.asotin.wa.us using Division III's e-service feature.

Dated this 2nd day of April, 2015.


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