

No. 48087-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ANGEL A. FERNANDEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. As the motion was frivolous, the trial court appropriately denied the assistance of counsel to Appellant.
2. Any error in the denial of counsel was harmless.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts and will make note of specific factual issues as they arise during the course of argument.

III. ARGUMENT

A. THE MOTION BY APPELLANT WAS FRIVOLOUS

The Appellant's motion was frivolous and his request for counsel was appropriately denied. As Appellant accurately noted, "CrR 7.8 [provides for counsel] after an initial determination has been made that the motion was not frivolous." *State v. Robinson*, 153 Wn.2d 689, 696 n.6, 107 P.3d 90 (2005). Appellant raised a number of issues, but the only issue seriously considered by the trial court was the issue the State conceded. Appellant cites to RP 4, 6-7 and 9-11 to support the idea that both the prosecutor and the court agreed that Appellant's double jeopardy claim had merit, but a careful reading reflects that such agreement extended only to the issue of the judgement and sentence, which the State conceded. Specifically, at RP7, the court denies Appellant counsel because the State essentially agreed to strike the reference to felony murder in the original judgment and sentence. Appellant renewed his

request for counsel and the court noted that “in your motion for appointment of counsel you cite to zero authority,” and then noted that if he could find any additional authority the trial court would reconsider. RP 7. A further review of the reports of proceedings reveals that at no point did the trial court find that Appellant’s motion was meritorious, which is the threshold that must be reached before the right to counsel inures. After the court had reviewed ALL of Appellant’s proceedings and given him ample time to present his argument, the court ultimately concluded that “There is no basis for the argument that the defendant is entitled to be sentenced on just the lesser of the merged offenses...” RP 48. This is the same as the court finding that the motion was frivolous, thus Mr. Fernandez had no right to counsel.

B. ANY ERROR WAS HARMLESS

There is no legal basis for Appellant’s motion to be sentenced on the lesser charge of felony murder, where he had also been convicted of Aggravated Murder. As the trial court noted at RP48, there is simply no legal basis for the relief that Appellant requested. Even if assigned counsel, there is nothing in the record or report of proceedings that suggests the Appellant would have been successful. Appellant cites no case, nor provides any authority to suggest that the issue had any legal merit. Since the trial court declined to find any merit in the Appellant’s claims, there is no record on which to base a finding that Appellant could have been successful with counsel. Any error by the trial court is harmless

because there is simply no evidence to suggest that Appellant's motion had any chance of success, counsel or otherwise.

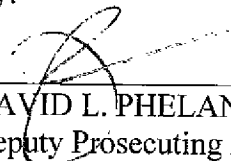
IV. CONCLUSION

The trial court properly denied Appellant's request for counsel. The Appellant's motion was frivolous, had no legal basis, and was appropriately denied. Even if Appellant should have been granted counsel, any error from the denial was harmless, given the complete lack of legal authority to support his claim that because he was convicted of both a lesser and a greater charge, he should be sentenced for the lesser. The trial court should be affirmed and the Appellant is not entitled to any relief.

Respectfully submitted this 28th day of April, 2016.

SUSAN I. BAUR
Prosecuting Attorney

By: _____



DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

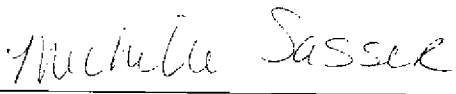
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 28th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

April 28, 2016 - 4:32 PM

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