NO.
COA No. 73098-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE R. LIESCHNER,

Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that discretionary review be denied. If review is granted, the State asks the court to review the issue in part II.

II. ADDITIONAL ISSUE

In a motion to extend time to file a notice of appeal, the State has the burden of proving that the defendant knew of his right to appeal and voluntarily chose not to exercise it. Does the State have the additional burden of proving that this decision was based on adequate advice of counsel?

III. STATEMENT OF THE CASE

On November 20, 2013, a jury found the defendant (petitioner), Dale Lieschner, guilty of possession of a controlled substance with intent to deliver. He was sentenced on December 24. At sentencing, the defendant was advised concerning his right to appeal, both orally and in writing. Sent. RP 8-9; App. A.

Over 14 months later, the defendant filed a notice of appeal from this conviction. He also filed a motion to extend time to file the notice. The motion claimed that he had told his attorney to file a notice of appeal, and the attorney had failed to do so. App. H.

On the parties' joint motion, the Court of Appeals remanded the case for "a factual hearing on whether the appellant has waived his right to appeal." Both parties filed pre-hearing memoranda in the trial court. Both memos focused on the factual issue of whether the defendant had told his attorney to file an appeal. App. I, J. The defendant's memo cited American Bar Association Standards regarding an attorney's duty to advise his client concerning the right to appeal. It did not, however, claim that the attorney was ineffective for failing to provide that advice. App. I at 8-9.

At the hearing, the defendant and his trial attorney both testified. The attorney testified that at sentencing, the defendant "indicated that he did not want to pursue the appeal." Remand RP 6-7. The defendant testified that he told his attorney at sentencing that he wanted an appeal. Remand RP 15-16. The trial court found that the attorney's testimony was credible and the defendant's was not credible. App. M.

The case was then returned to the Court of Appeals for a decision on the defendant's motion under RAP 18.8(b). Both parties filed briefs addressing this question. The defendant's brief did not challenge the trial court's credibility determination. Rather, he argued that the record established that the defendant had received ineffective assistance of counsel. The defendant claimed that this prevented any waiver from being knowing, voluntary, and intelligent.

The Court of Appeals held that the defendant had failed to establish that any inadequate advice resulted in prejudice. It therefore denied the motion for an extension of time. Slip op. at 9. The defendant has now filed a "petition for review" from this decision.

IV. ARGUMENT

A. BECAUSE THE COURT OF APPEALS DECISION IS NOT A "DECISION TERMINATING REVIEW," IT IS ONLY REVIEWABLE VIA DISCRETIONARY REVIEW.

The defendant has filed a "Petition for Review" of the Court of Appeals decision. A petition for review can only be filed of a "decision terminating review." RAP 13.4(a). That term is defined in RAP 12.3(a):

> A "decision terminating review" is an opinion, order, or judgment of the appellate court ... if it:
>
> (1) Is filed after review is accepted by the appellate court filing the decision; and
>
> (2) Terminates review unconditionally; and

(3) Is (i) a decision on the merits, or (ii) a decision by the judges dismissing review...

The term "accepts review" is, in turn, defined by RAP 6.1 and 6.2. When a decision is reviewable as a matter of right, the appellate court accepts review "upon the timely filing in the trial court of a notice of appeal." RAP 6.1. When a decision is reviewable by discretionary review, the court accepts review by granting a motion for discretionary review. RAP 6.2(a).

Here, the defendant was seeking review of a final judgment, which is reviewable as a matter of right. RAP 2.2(a)(1). The notice of appeal was not, however, timely under RAP 5.2(a). The Court of Appeals denied the defendant's motion to extend the filing period. As a result, review was never accepted, so the Court of Appeals decision is not a "decision terminating review."

Any opinion that is not a "decision terminating review" is an "interlocutory decision." RAP 12.3(b). An interlocutory decision can only be reviewed via motion for discretionary review. RAP 13.5(a).

B. UNDER THE STANDARDS FOR GRANTING DISCRETIONARY REVIEW, THIS CASE PRESENTS FACTUAL ISSUES THAT DO NOT WARRANT REVIEW.

The defendant claims that review is warranted under RAP 13.4(b)(4). Because this case is not reviewable by petition for review, that rule is inapplicable. Nor does this case fall within any of the categories specified in RAP 13.5A(a) (which are likewise governed by the standards set out in RAP 13.4(b)). The governing standards are set out in RAP 13.5(b):

Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

(1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or

> (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings ... as to call for the exercise of revisory jurisdiction by the Supreme Court.

Here, the Court of Appeals held that the defendant had failed to establish prejudice from any deficient advice that he received from his attorney. Slip op. at 9. This holding was neither obvious error, probable error, nor a departure from the accepted and usual course of judicial proceedings. At the remand hearing, the defendant introduced no evidence of what additional advice he should have been given. There was accordingly no evidence of how any additional advice would have affected anyone's decision — either the defendant's personal decision or that of a reasonable person in his position.

The defendant claims that the Court of Appeals improperly applied a subjective standard of prejudice. This argument was never presented to that court. Rather, the defendant argued: "Prejudice is established by showing 'a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.'" Supp. Brief of Appellant at 11-12, citing Roe v. Flores-Ortega, 528 U.S. 470, 478, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In support of his argument that prejudice was shown, the defendant pointed to his "expressed concern about revocation of the Montana probation upon conviction." Supp. Brief at 17; Reply of Appellant at 6-7. The defendant cannot complain that the Court of Appeals did exactly what he asked it to: take his own statements and actions into account in deciding whether he had established prejudice. The court's resolution of this factual issue does not warrant review.

C. BECAUSE THERE IS AN INADEQUATE REGARD WITH REGARD TO THE DEFENDANT'S INEFFECTIVENESS CLAIM, THIS CASE IS AN UNSUITABLE VEHICLE FOR RESOLVING LEGAL ISSUES RELATING TO THAT CLAIM.

The defendant asks this court to decide how prejudice will be assessed for ineffectiveness claims involving inadequate advisements concerning the right to appeal. Petition for Review at 9. This case is, however, unsuitable for resolving that issue, because of the inadequacy of the record.

In the defendant's motion for extension of time, he raised no claim that inadequate advice led him to forego his right to appeal. Instead, he claimed that he *did* instruct his attorney to file an appeal and believed that the attorney had done so. Based on these allegations, the parties jointly asked the court to remand the case "for a factual hearing on whether the appellant has waived his right to appeal." Joint Motion for Remand at 1.

Prior to the remand hearing, both parties filed memoranda in the trial court. The defendant's memorandum cited the ABA standards "regarding how defense counsel should advice a client on his appellate rights." App. I at 8. The memorandum did not, however, include any argument about ineffective assistance of counsel. It contained no discussion of prejudice. Nor did it contain any explanation of how the absent of any necessary advice could have affected the defendant's decision. Those arguments were raised for the first time in the Court of Appeals following the remand hearing.

If this court is going to resolve a significant issue of constitutional law, it should do so on a fully-litigated factual record. In the present case, the facts before the court concerning ineffective assistance are those that made their way into the record incidentally, while the parties were litigating other issues. The entire theory on which the defendant now relies was never raised in or resolved by the trial court. If the court wishes

to resolve the issues raised by the defendant, it should do so in a case where the necessary facts have been fully litigated.

D. IF THIS COURT ACCEPTS REVIEW, IT SHOULD DETERMINE WHETHER MOTIONS UNDER RAP 18.8(b) ARE PROPER VEHICLES FOR LITIGATING INEFFECTIVENESS CLAIMS.

If the court accepts review of this case, it should determine whether ineffectiveness claims can be brought under RAP 18.8(b), or whether they need to be raised via personal restraint petitions. That procedural issue has never been addressed by this court. It has significant implications on when such claims can be raised and how they will be addressed.

RAP 18.8(b), on its face, allows an extension of time to file a notice of appeal "only in extraordinary circumstances and to prevent a gross miscarriage of justice." Attorney errors do not satisfy this standard. Shumway v. Payne, 136 Wn.2d 383, 394-97, 964 P.2d 349 (1998); Beckman ex rel. Beckman v. State, 102 Wn. App. 687, 11 P.3d 313 (2000).

In criminal cases, however, defendants have a constitutional right to appeal. The State bears the burden of demonstrating that a voluntary, knowing, and intelligent waiver of the right to appeal. State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978). In Sweet, the defendant's right to appeal was asserted via a post-conviction motion under former CrR 7.7. That rule was the predecessor of the personal restraint petition. See In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982). In subsequent cases, however, claims that a defendant has not waived his right to appeal have normally been raised via motion under RAP 18.8(b) – even though nothing in the language of the rule allows a motion to be granted on that ground. See, e.g., State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998); State v. Cater, 186 Wn. App. 384, 345 P.3d 843 (2015).

The scope of RAP 18.8(b) was further expanded by the Court of Appeals in State v. Chetty, 167 Wn. App. 432, 272 P.3d 918 (2012). There, the defendant filed a motion under that rule over six years after he was convicted. He acknowledged that at the time he was convicted, he was aware of his right to appeal and chose not to. He claimed, however, that this decision resulted from inadequate advice from his attorney concerning the advantages and disadvantages of appeal. The Court of Appeals held that "the effectiveness of counsel is a circumstance that bears on the validity of a defendant's waiver of a right to appeal." Id. at 444 ¶ 32. Consequently, the court allowed an allegation of ineffectiveness to be litigated via a motion under RAP 18.8(b).

This holding has at least two significant effects. First, it nullifies key language in Sweet. There, this court said that the State could demonstrate waiver by showing that the defendant had been properly advised of his right to appeal:

> [I]f a convicted individual is clearly advised of the right to appeal and the procedure necessary to vindicate that right in the manner prescribed by CrR 7.1(b), demonstrates understanding, and is under no unfair restraint preventing vindication, failure to act can be said to be waiver the intentional relinquishment of a known right. Waiver could most clearly be shown by a demonstration in the record that the trial judge questioned the defendant about his understanding of the appeal procedure and his intentions with regard to an appeal.

Sweet, 90 Wn.2d at 287.

Under Chetty, however, advising the defendant of his right to appeal cannot establish a valid waiver. Regardless of he what he was told in court, the defendant can still claim that he received inadequate advice from counsel. What Sweet held to be the clearest possible showing of waiver – a colloquy concerning the defendant's decision not to appeal – is entirely inadequate under Chetty. This means that under Chetty there is no

way for the State to protect a conviction against attempts to appeal years or even decades later.

Second, Chetty creates a new exception to the time limit on collateral attack set out in RCW 10.73.090. This court has never specifically considered how the procedure under RAP 18.8(b) is affected by that statute. It has, however, considered motions under that rule that were brought after expiration of the time limit. Kells, 134 Wn.2d at 312 (motion brought 15 months after sentencing). As a practical matter, motions under RAP 18.8(b) have been treated as exceptions to the time limit. See, e.g., Cater, 186 Wn. App. at 391 (court considered motion filed 23 years after sentencing).

Chetty expands that exception to cover claims of ineffective assistance of counsel with respect to the right to appeal. Such claims are therefore treated differently from any other type of ineffectiveness claim. If a defendant receives inadequate advice from counsel at trial or in connection with a guilty plea, that claim must be raised within one year after the conviction becomes final (absent some statutory exception). See, e.g., In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015). If, on the other hand, the defendant receives ineffective advice from counsel about his right to appeal, under Chetty that claim can be raised years or even decades later.

This holding seriously interferes with the finality of judgments. It is one thing to require the State to ensure that defendants are properly advised of their right to appeal. It is quite another to require the State to respond years after the fact to claims concerning the private conversations between defendants and their attorneys. By the time such claims are raised, memories may have faded and records may be unavailable. As a

practical matter, there may be no way for the State to refute whatever the defendant chooses to say about those conversations.

The State is not claiming that defendants should have no remedy for ineffective assistance concerning their right to appeal. Rather, the State's position is that such claims should be raised in the same way as other ineffectiveness claims – via personal restraint petition or another valid form of collateral attack. Such proceedings have a clearly-established procedure and are subject to a statutory time limit.

This court has never attempted to delineate the scope of issues that can be raised under RAP 18.8(b). If the court grants review in this case, it should examine that issue.

V. CONCLUSION

The motion for discretionary review should be denied.

Respectfully submitted on May 30, 2017.

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DECLARATION OF SERVICE

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Casey Grannis of Nielsen, Broman & Koch (grannisc@nwattorney.net e-mail address).

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

Signed at the Snohomish County Prosecutor's Office.

Sandy Wilson

SANDY WILSON, DATE: May 30, 2017
LEAD LEGAL SECRETARY/Appeals Unit