

No. 64297-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SCOTT FREEBURG,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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COURT OF APPEALS
DIVISION ONE

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A. ARGUMENT.

THE STATE EFFORTS TO DENY FREEBURG THE
RIGHT EFFECTIVE ASSISTANCE OF COUNSEL AT
A COURT HEARING MUST BE REJECTED

Perhaps because there is no constitutionally valid view of the law that would deny Freeburg his rights to due process of law and meaningful assistance of counsel, the State elects to “not separately address,” Freeburg’s contention that he was denied due process of law and effective assistance of counsel by the trial court’s refusal to allow him the time and opportunity to be heard about sentencing errors. Response Brf. at 4 n.8. Yet this case cannot be resolved by ignoring these fundamental rights at issue when Freeburg is serving a sentence of 411 months in prison, this punishment is legally flawed, and he is entitled to a meaningful opportunity to consult with counsel at a court hearing.

Freeburg had a right to counsel under CrR 3.1 and the state and federal constitutions. United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); U.S. amend. 6; Wash. Const. art. I, § 22; see Appellant’s Opening Brief, at 5-8. Defense counsel was not assigned for superfluous reasons and his presence was not supposed to be illusory. Cronin, 466 U.S. at

654-55 (“The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”).

Merely because the prosecution cannot imagine what legal issue Freeburg wished to validly raise is not grounds to deny him the opportunity to meet his attorney before the sentencing hearing and to obtain his attorney’s assistance in presenting his claims to the court. Rather than address the very basic right Freeburg had to counsel and to due process, the prosecution rests its argument on the notion that the trial court lacked any authority to address any terms of Freeburg’s sentence other than fix the flawed community custody order which rendered the judgment and sentence facially invalid.

The trial judge, who was new to Freeburg’s case, said he lacked authority to consider any other aspect of his case beyond the correcting the term of community custody. 9/23/09RP 11. The court misunderstood its authority to exercise discretion in this case due to changes that had occurred in the convictions and sentences in the course of Freeburg’s appeal.

The refusal to exercise discretion is an abuse of discretion. State v. Bunker, 144 Wn.App. 407, 421, 183 P.3d 1086, rev. granted on other issue, 165 Wn.2d 1003 (2008); see State v.

Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). “[I]t is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence.” State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1992).

The prosecution concedes that a trial court has discretion to consider an issue following remand that was not raised and decided in an appeal. State v. Kilgore, 167 Wn.2d 28, 38, 216 P.3d 393 (2009). Furthermore, when the law changes during the course of a case, that change in the law may be applicable to a person whose case is on direct review. See State v. Hanson, 151 Wn.2d 783, 790-91, 91 P.3d 888 (2004).

Kilgore was a retroactivity case resting on the finality of a judgment, not a case about a court’s authority to consider additional issues at sentencing. In Kilgore, the trial court *exercised its discretion* at its re-sentencing hearing, by deciding that no change in Kilgore’s sentence was necessary. 167 Wn.2d at 34. It declined to resentence Kilgore. Most importantly, Kilgore *had a lawyer* who made able and competent arguments on his behalf during the post-appeal hearing.

Unlike Kilgore, the trial court altered Freeburg's sentence by striking the facially invalid term from his judgment and sentence. It contended that it lacked any authority to hear any argument about further issues in the case and refused to give any time for Freeburg to talk to his newly appointed lawyer. 9/23/09RP 10-11.

Kilgore explains that a court may "elect[] to exercise this discretion" at a postjudgment hearing. Id. at 38. It certainly contemplates fair procedures are used at such a hearing.

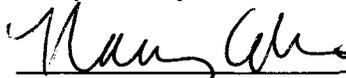
Freeburg's sentencing judge had authority to hear his challenges to his sentence but the judge misperceived that authority. Based on this misperception, the court refused to allow Freeburg minimal time to speak to to brand new lawyer whom he had never met. The court declined even a short continuance. The court's abuse of discretion, which denied Freeburg his right to effective assistance of counsel and a fair opportunity to be heard, requires reversal for a new sentencing hearing.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Freeburg respectfully requests this Court remand his case for further proceedings.

DATED this 28th day of May 2010.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> SCOTT FREEBURG 250835 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MAY, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710