

No. 35433-1-II

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
NOV 11 2011

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THOMAS W. RICHEY,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
NOV 11 2011

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR  
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT IN REPLY ..... 1

    1. THIS COURT MUST REACH RICHEY’S CrR 7.2(b)  
    ARGUMENT ..... 1

    2. RICHEY DID NOT KNOWINGLY, INTELLIGENTLY AND  
    VOLUNTARILY WAIVE HIS RIGHT TO APPEAL ..... 5

B. CONCLUSION ..... 6

**TABLE OF AUTHORITIES**

**Cases**

Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994) ..... 2

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992)..... 2

State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003)..... 2, 3

State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998)..... 4

State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978) ..... 4

State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997) ..... 4

State v. Trask, 98 Wn. App. 690, 990 P.2d 976 (2000) ..... 3

Webster v. Fall, 266 U.S. 507, 69 L.Ed. 411, 45 S.Ct. 148 (1925) .. 2

**Court Rules**

CrR 7.2(b)..... 1, 5

A. ARGUMENT IN REPLY

1. THIS COURT MUST REACH RICHEY'S CrR 7.2(b) ARGUMENT

In his opening brief, Richey argued strict compliance with CrR 7.2(b) is mandatory and the trial court's failure to comply with the rule requires reinstatement of the appeal. The State contends this Court may not reach that argument, because the issue has already rejected by both this Court<sup>1</sup> and the Washington Supreme Court. SRB at 6-8. Specifically, the State contends the Supreme Court's order granting Richey's motion for discretionary review and remanding to the trial court for an evidentiary hearing constitutes a decision on the merits of the issue.

The State cites no authority for its position that the order granting Richey's motion for discretionary review amounts to a binding decision on the merits of this legal issue. Indeed, there is no such authority, as the State's position is contrary to the law.

Presumably the State is relying on the "law of the case" doctrine. The "law of the case" doctrine generally "refers to the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand" or to "the principle

---

<sup>1</sup> This Court's order dismissing Richey's appeal cannot be considered binding authority on any question, because it was reversed by the Supreme Court's order granting Richey's motion for discretionary review.

that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (citing Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)). The doctrine serves “to promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues.” Harrison, 148 Wn.2d at 562 (citation and internal quotations omitted). The courts apply the doctrine in order “to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.” Id. (citation omitted).

Contrary to the State’s position, the law of the case doctrine does not apply in this case. The doctrine applies only in cases where the appellate court previously addressed and decided the merits of a legal theory. Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wn.2d 816, 824-25, 881 P.2d 986 (1994) (citing Webster v. Fall, 266 U.S. 507, 511, 69 L.Ed. 411, 45 S.Ct. 148 (1925)). The doctrine does not preclude the appellate court from considering issues it failed to consider in the first appeal

or from correcting anything the court incompletely or inaccurately considered in the first appeal. State v. Trask, 98 Wn. App. 690, 695, 990 P.2d 976 (2000).

In Harrison, the Supreme Court concluded the law of the case doctrine did not preclude the court from deciding the merits of a legal theory that the court had not decided in the previous appeal. 148 Wn.2d at 562-63. Similarly, here, the law of the case doctrine does not preclude this Court from deciding the merits of a legal theory that the Supreme Court neither addressed nor decided in its order granting the motion for discretionary review. In its order, the court merely stated “[t]hat the Petitioner’s Motion for Discretionary Review is granted,” and that the “matter is remanded to the Pierce County Supreme Court for a hearing to determine whether the Petitioner knowingly, intelligently and voluntarily waived his right to appeal his conviction after his guilty plea.” SRB, Appendix B. The order does not address the legal theory and cannot be considered a decision on the merits of that theory.

Moreover, Richey is aware of no case where an appellate court’s summary order granting a motion for discretionary review and remanding for an evidentiary hearing has been considered a decision on the merits of a legal theory that precludes further

review of that issue. The law of the case doctrine applies to appellate opinions that address and decide the merits of the parties' legal theories. It does not apply to orders that merely direct the trial court to engage in further proceedings.

Finally, when the Supreme Court remanded this case to the trial court for further fact-finding, the court did exactly as the State had requested in its response to Richey's motion for discretionary review. The State had argued the court was bound by its prior decisions in State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978), State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998), and State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997), to remand for an evidentiary hearing on whether Richey knowingly, intelligently and voluntarily waived his right to appeal. CP 159-60. The State asserted, "[t]he State can find no case where this Court has extended the time for filing a notice of appeal for years beyond the time allowed by court rule without first holding an evidentiary hearing on the existence of any waiver." Id.

Thus, the court's decision to remand the case for an evidentiary hearing reflects the court's intention that the record be fully developed before the merits of the legal arguments be determined. There had previously been no finding regarding

whether the trial court complied with the requirements of CrR 7.2(b) at sentencing. On remand, the trial court reviewed the record and found it had not in fact advised Richey of his appellate rights.

5/12/06RP 4. As argued in the opening brief, strict compliance with CrR 7.2(b) is required, and failure to comply constitutes an “extraordinary circumstance” that justifies extending the time deadline for filing a notice of appeal.

The Supreme Court neither addressed nor decided the merits of this argument. The issue is now squarely before this Court. This Court must reach the issue.

2. RICHEY DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO APPEAL

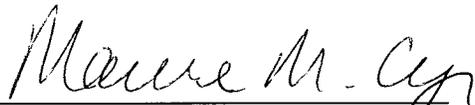
The State contends Richey knowingly, intelligently and voluntarily waived his right to appeal. The State argues the evidence shows Richey was aware he had a right to appeal, and that this necessarily shows he was aware there was a time limit for filing a notice of appeal and that if he did not comply with the time limit, he would irrevocably waive that right. SRB at 17-18. Richey maintains, as argued in the opening brief, that even if the record shows he was somehow informed he had a right to appeal, he was not informed and was not aware that if he did not file a notice of

appeal within 30 days his right to appeal would be irrevocably waived. AOB at 29-33. In fact, the record demonstrates Richey believed he could postpone the appeal until after he pursued his transfer to Scotland. Thus, the State has not met its burden of showing Richey knowingly, intelligently and voluntarily waived his right to appeal. The appeal must be reinstated.

B. CONCLUSION

For the reasons stated here and in his opening brief, Richey's appeal must be reinstated.

Respectfully submitted this 5th day of July, 2007.



MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON, )  
 )  
 RESPONDENT, )  
 )  
 v. )  
 )  
 THOMAS RICHEY, )  
 )  
 APPELLANT. )

NO. 35433-1-II

COURT OF APPEALS  
 DIVISION II  
 07 JUL -9 AM 9:22  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 DEPUTY

**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 5<sup>TH</sup> DAY OF JULY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

P. GRACE KINGMAN, DPA  
 PIERCE COUNTY PROSECUTOR'S OFFICE  
 2000 LAKERIDGE DR SW  
 OLYMPIA, WA 98502-6001

U.S. MAIL  
 HAND DELIVERY  
 \_\_\_\_\_

THOMAS RICHEY  
 929444  
 CLALLAM BAY CORRECTIONS CENTER  
 1830 EAGLE CREST WAY  
 CLALLAM BAY, WA 98326

U.S. MAIL  
 HAND DELIVERY  
 \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF JULY, 2007.

X \_\_\_\_\_ *grc*

FILED  
 COURT OF APPEALS DIV. #1  
 STATE OF WASHINGTON  
 2007 JUL -9 AM 10:51