

No. 39166-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TED JENSEN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Stephen Warning
The Honorable James Warme

REPLY BRIEF

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A. REPLY ARGUMENT

Mr. Jensen appealed several rulings of the trial court issued at his several resentencing hearings. Appellant's Opening Brief, at pp. 2-3 (Assignments of Error). The Respondent State of Washington, in response, has cited cases standing for general propositions in the areas of law pertinent to the issues raised, but has failed to specifically address the errors assigned and the legal arguments raised by Mr. Jensen.

1. THE TRIAL COURT AFFIRMATIVELY MISADVISED MR. JENSEN WITH REGARD TO THE RESOURCES HE WAS ENTITLED TO AS A PRO SE DEFENDANT, AND SUCH RESOURCES WERE IN FACT NOT PROVIDED TO HIM.

The State concedes that, during a colloquy held to determine the validity of Mr. Jensen's request for waiver of the right to counsel, the trial court told the defendant with regard to the resources he was entitled to be provided by the Cowlitz County Jail as a pro se defendant that the fact that he was representing himself did not entitle him to legal resources through the Jail. Brief of Respondent, at p. 11. Subsequently, throughout Mr. Jensen's several hearings held to address resentencing, during which the court also allowed Mr. Jensen to raise a post-conviction motion on

the issue of community custody, the defendant was forced to submit handwritten motions and was unable to properly file copies of judgment and sentence documents supporting his contention that he had not been on community custody at the time of the current offenses.

The Respondent recites instances in which the defendant was able to provide certain documents to the court. However, at no point does the State refute Mr. Jensen's argument that the trial court's misadvisement of the defendant had material consequences in his ability to effectively advocate for himself at the resentencing hearing. Mr. Jensen provided certain documents, critical to his argument on the community custody issue, to his stand-by counsel at the April 10 resentencing hearing. RP 31. However, he apparently did not file originals or copies of the documents, or provide copies to the court. Mr. Jensen had in fact asked the court for a continuance of the sentencing hearing, submitting a handwritten pleading stating that the Jail had provided him no "access to basics needed for proper/adequate preparation of materials for court." CP 138. Mr. Jensen specifically stated that

he had been unable to access “writing materials, access to copies, [and] time required to secure records [and] documents.” CPP 138.

~~The misadvisement as to the resources a pro se defendant is entitled to be provided, and the denial of those resources, requires reversal of Mr. Jensen’s sentence and remand for a new sentencing hearing.~~

For similar reasons, the trial court did abuse its discretion in failing to grant the defendant’s motion for a continuance of the resentencing hearing, where the defendant had been denied access to reasonable resources for preparation of his defense.

2. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY FAILING TO RULE ON THE DEFENDANT’S POST-CONVICTION MOTION ON THE ISSUE OF COMMUNITY CUSTODY.

~~The Respondent contends any post-conviction motion~~ by Mr. Jensen regarding the issue of community custody was time-barred, including because any such motion must have been a CrR 7.8(b) motion for a new trial based on newly discovered evidence. Brief of Respondent, at pp. 15-16.

The Respondent completely ignores the fact that the trial court in Mr. Jensen’s case, by virtue of rulings in several instances,

granted the defendant leave to raise a post-conviction motion to address the issue of the point the State sought to add to his offender scores on ground that he was on community custody at the time of the current offenses. Both Judge Warning and Judge Warne below granted the defendant's request that his contentions pertaining to the issue of proof of the community custody point should be addressed. On March 25, 2009, Mr. Jensen moved to supplement the record with documentation showing that he was not on community custody, including a handwritten submission seeking to admit this documentation and an explanation why it had not been produced at trial. RP 2; CP 90-92. The court stated, "You can file whatever motions you choose." RP 2. It was clear at the hearings before both Judges Warning and Warne that it was the defendant's desire to litigate these issues, and therefore to expand the scope of the hearing to include matters beyond the mere formality of a resentencing to add the point to his offender score that the State envisioned. RP 7-8, 17. Although Judge Warne at one point stated it was skeptical as to whether Mr. Jensen should be permitted to raise these issues, the court never retracted its ruling that these issues were in fact before the court. RP 26.

-----Section Break (Continuous)-----

In full effect, therefore, the court granted the defendant leave to file a CrR 7.8 motion pursuant to which Mr. Jensen would be allowed, in these post-trial proceedings, to address the issue of the trial court's prior finding that he was on community custody. However, the trial court simply failed to address, or issue a ruling, on the defendant's motion. The court did not give any consideration to Mr. Jensen's handwritten motion regarding the issue of community custody. CP 90-92. There is no reason why such a ruling would have been inappropriate, where the defendant raised it several times over the course of his resentencing hearings.

Furthermore, such a motion may be brought on numerous grounds. It is ironic that the Respondent concludes that the defendant must have been raising the post-trial motion under the particular section of Rule 7.8 – newly discovered evidence -- which allows the Respondent to then contend that the motion was time-barred, and also faults the defendant for failing to provide documents explaining the particular basis for the motion. The fact that the defendant was not provided with reasonable access to legal resources as a pro se defendant, complained of in the Appellant's Opening Brief, and herein, prevented Mr. Jensen from

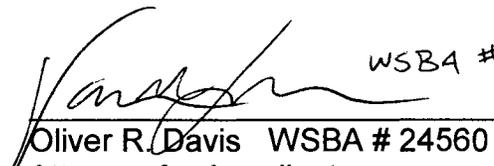
doing just that. Rule 7.8 provides for other bases for seeking a new trial besides new evidence, and furthermore, Rules 7.4(b), 7.5(b) and indeed 7.8 allow motions for new proceedings to be raised either in the trial court's discretion, or in the case of Rule 7.8, at the time of judgment. Overall, Mr. Jensen raised matters at an entirely new sentencing hearing, and his inability to utilize proper pro se resources prevented him from litigating their substance, and any issues relating to time bar, in the court below.

-----Section Break (Continuous)-----

B. CONCLUSION.

Based on the foregoing and on his Appellant's Opening Brief, the appellant Ted Jensen respectfully requests that this Court reverse the trial court's judgment and sentence.

Respectfully submitted this 4th day of March, 2010.


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STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 39166-0-II
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)	
TED JENSEN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHAEL SHAFFER	(X)	U.S. MAIL
COWLITZ COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
312 SW 1 ST AVE	()	_____
KELSO, WA 98626-1739		

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MARCH, 2010.

X _____ 

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