

FILED

OCT 07 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. ~~27829-8-III~~

40063-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

PAULETTE MELVILLE,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. WHERE APPOINTED COUNSEL NEVER EVEN FILED A NOTICE OF APPEARANCE, THE COMPLETE DENIAL OF COUNSEL CONSTITUTES STRUCTURAL ERROR

The prosecution's response brief never acknowledges or discusses defense counsel's wholesale failure to participate in the case on Melville's brief. The response brief takes no issue with the fact that the trial court found Melville was entitled to counsel and appointed an attorney to represent her. It does not claim that the appointed attorney ever did a single thing to advance Melville's cause, or that he ever appeared in the case in any form whatsoever. Yet the prosecution summarily asserts Melville cannot assert a claim of ineffective assistance of counsel unless she establishes that counsel's failure to represent her affirmatively prejudiced her.

Fortunately, there is a body of case law that addresses and discusses the actual denial of counsel even though these pertinent authorities are nowhere mentioned in the prosecution's brief. When an attorney does not perform his or her most basic function, such as appearing in trial court, it is considered a complete denial of counsel and the accused person need not show prejudice to

prevail. United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932). In addition to the constitutional right to be present and represented by counsel at this stage of the proceedings, Melville had the procedural right to the assistance of counsel. State v. Templeton, 148 Wn.2d 193, 216, 59 P.3d 623 (2002). The court rules deem the appointment of counsel at this stage of proceedings to be “an integral part of the judicial process.” Id.; CrR 3.1; CrR 7.8. The court appointed counsel to represent Melville and the prosecution does not contend that it was error to do so. CP 86-87; 7/2/08RP 4, 8-9.

The appointment of counsel is illusory and meaningless if not predicated on competent representation in a meaningful fashion. The statutory right to counsel must be meaningfully provided. In re Welfare of J.M., 130 Wn.App. 912, 920, 125 P.3d 245 (2005) (citing In re Moseley, 34 Wn.App. 179, 660 P.2d 315 (1983)); see also In re G.A.R., 137 Wn.App. 1, 150 P.3d 643 (2007).

The prosecution does not seem to have read any of the legal arguments discussed in Melville’s opening brief and instead presents a canned legal brief on ineffective assistance of counsel

that has no application to the case at bar. Melville was denied counsel because her appointed attorney never did a single thing in her case. He did not file a notice of appearance; raise any arguments on her behalf; make any pleas for relief; advise her or the court of the proceedings; send her a copy of the court's ruling; or help her file a notice of appeal.

Melville did not acquiesce in her attorney's lackluster efforts on her behalf. She begged the court for a new lawyer and complained of her appointed counsel's complete inattention to her case. The single time she spoke with her appointed attorney, the telephone call only occurred because the court ordered him to speak with her after she complained about his utter failure to contact her. The court's interest in revisiting its earlier sentence and its potential willingness to consider imposing a DOSA could have been successful had counsel participated in the case.

The absolute denial of counsel constitutes a structural error entitling Melville to remand for a new sentencing hearing.

2. THE COURT'S SENTENCING RULINGS  
WERE UNTENABLE AND LEGALLY  
FLAWED, AND THUS REQUIRE  
RESENTENCING

In both its initial sentencing ruling and its later sentencing revision hearing where Melville was unrepresented by counsel, the court did not properly consider the legal criteria for a DOSA or enter reasonable factual determinations.

The prosecution contends that the court validly denied Melville a DOSA based on her extensive criminal history. Response Brief at 5. Yet the Legislature considered an offender's criminal history when enacting the DOSA statute and provided that some offenders would be ineligible based on certain criminal history. RCW 9.94A.660. Melville was **eligible** for a DOSA sentence. Because the Legislature expressly considered criminal history criteria when enacting the statute, the court lacked discretion to deny a DOSA on this basis. It is not only expected, but typical that a person seeking a DOSA would have a criminal history, as the very drug addiction that qualifies a person for a DOSA necessarily implicates the person in committing criminal offenses. Accordingly, criminal history is an untenable basis for denying a DOSA for an individual who meets the statutory eligibility

criteria. The court's reliance on improper criteria in denying Melville's request for a DOSA, as well as the complete denial of counsel even though the court found she was entitled to counsel requires reversal for a new sentencing proceeding.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Ms. Melville respectfully requests this Court reverse his conviction and order a new trial.

DATED this 5<sup>th</sup> day of October 2009.

Respectfully submitted,



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DIVISION THREE**

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STATE OF WASHINGTON,	)	
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	)	NO. 27829-8-III
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	)	
PAULETTE MELVILLE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED THE **REPLY BRIEF OF APPELLANT** OF TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SHADAN KAPRI, DPA	(X)	U.S. MAIL
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**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF OCTOBER, 2009.

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