

NO. 49743-3

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALLAN FORSMAN,

Appellant.

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

The Honorable Jerry Costello

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The resentencing court violated Mr. Forsman's right to represent himself.

2. If Mr. Forsman is deemed to have been represented by counsel, he was entirely deprived of meaningful counsel.

3. The trial court was required, on resentencing, to address all relevant information and arguments as to Forsman's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Forsman represented himself on the collateral attack that secured him the present resentencing hearing and never sought or accepted counsel for the hearing, but the court held, over his protest, that the attorney who was present in the courtroom was representing him. Was Mr. Forsman's right to represent himself violated?

2. If this Court holds that Mr. Forsman was required to affirmatively seek self-representation, he did so, unequivocally. However, the court nonetheless considered him represented by counsel. Was Mr. Forsman's right to represent himself violated?

3. If Mr. Forsman is deemed to have been represented by counsel, was he entirely denied meaningful adversarial counsel, requiring automatic reversal?

4. A resentencing hearing places the defendant's correct sentence at issue. Did the resentencing court err in failing to consider Mr. Forsman's arguments regarding his offender score?

C. STATEMENT OF THE CASE

Sean Allan Forsman, acting as his own counsel, successfully collaterally attacked a sentencing court's calculation of his sentence that was imposed following jury trial convictions in 2013 for several VUCSA drug offenses with school zone enhancements. CP 19, 70, 96; see CP 116-30 (2013 judgment and sentence). The Supreme Court ordered "resentencing consistent with" the case authority that school zone enhancements could not be run consecutively to each other. CP 96 (Supreme Court order and mandate).

a. Resentencing hearing. At resentencing, the court stated that it had no "lawful authority" to address any criminal history, offender score, or other sentencing issues beyond the issue of consecutively-run enhancements. 11/4/16RP at 4-5, 7-9. The court therefore refused to entertain Mr. Forsman's legal arguments, advanced in his pro se written memorandum and made at the hearing, regarding the classification and wash-out of his 1995 conviction for conspiracy to deliver, and regarding "same criminal conduct" issues in the scoring of his 1999

UDC convictions for three cocaine delivery counts, for which he was ordered to serve concurrent sentences. 11/4/16RP at 7-8; CP 88-115 (defendants resentencing memorandum); see RCW 9.94A.525(5)(a)(i) (“The current sentencing court shall determine . . . whether those offenses shall be counted as one offense or as separate offenses[.]”).

The court rejected Mr. Forsman’s argument that the court did have authority, and indeed was statutorily required, to address his sentencing issues pursuant to RCW 9.94A.530(2), which states in part, “On remand for resentencing following . . . collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.” (Emphasis added.) 11/4/16RP at 7-8.

The State indicated it agreed that the court was categorically barred from considering any of Mr. Forsman’s sentencing contentions. 11/4/16RP at 4-5. However, the prosecutor had also prepared an entirely new judgment and sentence document, which the court employed. CP 116-30. But as to Mr. Forsman's issues, the court repeated that this was not a sentencing hearing, and that the court was limited on remand to mere entry of a corrective order running the school zone enhancements concurrent to each other and consecutive to

the base sentence. 11/4/16RP at 4, 7-8.

b. Issues of self-representation at the resentencing hearing.

The resentencing court heard from Department of Assigned Counsel attorney Jane Melby, who was present. Melby told the court that she represented Mr. Forsman. 11/4/16RP at 12-13. She twice told the court that Mr. Forsman's arguments regarding sentencing were properly assessed as non-viable. 11/4/16RP at 13, 15.

Mr. Forsman protested that although he had spoken with possible attorneys (though not Ms. Melby) about handling any future appeal, he had pursued the post-conviction collateral attack on his sentence while acting as his own counsel, he had successfully obtained this resentencing in that same capacity, and he was fully representing himself at the present hearing, pro se. 11/4/16RP at 13-16.

Resolving the ongoing confusion regarding Mr. Forsman's status, the court told Mr. Forsman that ultimately he, in fact, had not been and was not representing himself. 11/4/16RP at 15. The court stated that Ms. Melby was representing him, and then remarked several times that although the court had been permissive in allowing him to stand and articulate his own personal contentions, his counsel of record was Ms. Melby. 11/4/16RP at 13-16.

The court then sentenced Mr. Forsman to mid-range concurrent terms of 90 months incarceration on each count, and imposed concurrent school-zone enhancements, consecutive to the base sentences, for a term of 114 months. CP 122. He appeals. CP 131-32.

D. ARGUMENT

1. The trial court's violation of Mr. Forsman's right to represent himself is an error that requires automatic reversal and remand for a new resentencing hearing.

Mr. Forsman was representing himself at resentencing following his successful collateral attack on the original sentence, during which entire time he also represented himself. By failing to recognize Mr. Forsman's self-representation, the court violated his rights under the federal and state constitutions.

In the alternative, if Mr. Forsman was required to affirmatively assert his right to self-representation in order to avoid having counsel imposed upon him, he did so, unequivocally.

In either event, abridgment of the right to self-representation requires automatic reversal, being a structural defect in the framework of the trial proceedings, rather than a trial error subject to harmless error analysis. McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); State v. Stenson, 132 Wn.2d 668, 737, 940

P.2d 1239 (1997).

a. Counsel was forced upon a *pro se* defendant.

First, the court violated Mr. Forsman's rights by refusing to recognize his right to defend in person, and by instead deciding that he was represented by counsel.

The federal constitution implicitly guarantees the right of a criminal defendant to represent himself. Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); U.S. Const. amends. 6, 14. The Washington Constitution expressly guarantees the right of self-representation, by providing: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Wash. Const. art. I, sec. 22. This state provision affords even greater protection than the federal constitution to an accused person's right to represent himself. State v. Silva, 107 Wn. App. 605, 618, 27 P.3d 663 (2001) (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). It commands, in "clear and explicit" terms, that a criminal defendant may represent himself when he chooses to do so. Silva, 107 Wn. App. at 618; State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and,

it is the defendant, therefore, who must be free personally to decide whether in his particular case

counsel is to his advantage[. a] choice [which] must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n. 46 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1978)).

In this case, Mr. Forsman was convicted at his 2013 trial while represented by counsel. His subsequent direct appeal, in which he was represented by counsel, failed to obtain him a remedy. Mr. Forsman finally obtained relief by his own pro se efforts, on collateral attack. CP 5, 72, 11/4/16RP at 13-16.

Having secured his own return to the sentencing court, Mr. Forsman understandably continued to represent himself, and he does not seek a ruling that his right to proceed *pro se* was self-executing at this hearing, because he already was representing himself. He remarked to the court below that he did not have any specific objection to the court considering Ms. Melby as standby counsel, but he again made clear that he was representing himself. 11/4/16RP at 14 (A court is permitted to appoint standby counsel in the absence of a request, and even over the defendant's objection, but such attorney may not interfere with the defendant's self-representation. Faretta, 422 U.S. at 834 n. 46; Silva, 107 Wn. App. at 627.).

The trial court's refusal to honor Mr. Forsman's pro se status was error, it denied him his right to continue to represent himself upon remand, and the structural violation requires automatic reversal.

b. If Mr. Forsman needed to affirmatively request self-representation in order to maintain his *pro se* status and avoid involuntary acceptance of counsel, he did so unequivocally.

Second, if Mr. Forsman was required to affirmatively request recognition of his pro se status in order to continue to exercise that right, he did so, unequivocally. A court must always allow self-representation where the defendant unequivocally requests it and intelligently waives the right, unless the request is untimely. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001); see also State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010). Mr. Forsman certainly required no continuance, and requested no continuance, nor any other accommodation. Yet the court did not allow self-representation in this case, unjustifiably. And certainly, there was no colloquy held, that could form the basis of a proper trial court refusal to allow self-representation on grounds of detecting some lack of an intelligent decision. See State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). In sum:

The grounds that allow a court to deny a defendant the

right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences, [and] [s]uch a finding must be based on some identifiable fact.

State v. Madsen, 168 Wn.2d at 404-05. None of these bases for denial were submitted much less supported, and the violation of Mr. Forsman's constitutional right to represent himself requires automatic reversal.

2. If Mr. Forsman was represented by Ms. Melby, there was a complete denial of counsel under *Cronic* where the attorney announced that the defense sentencing arguments were not viable, requiring automatic reversal.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. United States v. Cronic, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6; Wash. Const. Art. 1, sec. 22. Sentencing is such a stage. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997).

If Mr. Forsman is deemed to have been *represented* by counsel despite his pro se status, he was denied his right to counsel where the attorney did not adversarially test the prosecution's sentence demand,

or test the State's assertion that the court was categorically barred from considering any offender score issues, or subject the court's scoring or sentence to any challenge. Ms. Melby did not advocate on Mr. Forsman's behalf, but instead did the opposite when she (a) told the court that his arguments were not viable to go forward, and (b) also deemed it proper to assure the court that she had told Mr. Forsman this. This violates Cronic.

A person is denied the right to counsel under Cronic if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Miller v. Martin, 481 F.3d 468, 472 (7th Cir. 2007) (citing Cronic, 466 U.S. at 659). Even when counsel is present in court, where her representation is "so inadequate that, in effect, no assistance of counsel is provided," the "defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied." Cronic, 466 U.S. at 654 n. 11 (quoting United States v. Decoster, 199 U.S.App.D.C. 359, 382, 624 F.2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U.S. 944 (1979)); U.S. Const. amend. 6.

For example, at the trial court level, filing an Anders brief in lieu of an advocate's brief is ineffective assistance requiring automatic reversal. State v. Chavez, 162 Wn. App. 431, 439, 257 P.3d 1114

(2011); see Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 1398–99, 18 L.Ed.2d 493 (1967).

The right to counsel is also violated where a defendant is saddled with an attorney who has a conflict of interest by taking a position directly contrary to her client’s interest, and this violates the defendant’s Sixth Amendment right to a counsel in the form of a conflict-free attorney. See State v. Dhaliwal, 113 Wn. App. 226, 232–33, 53 P.3d 65 (2002); United States v. Mett, 65 F.3d 1531, 1534 (9th Cir.1995); see also United States v. Baker, 256 F.3d 855, 860 (9th Cir.2001) (an “attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action”).

Prejudice is presumed in such cases where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” Cronic, 466 U.S. at 659. Mr. Forsman’s sentence must be reversed. See also State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (“A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal.”).

3. The resentencing court was required to allow Mr. Forsman the opportunity to present all relevant information in determining his offender score.

At the resentencing hearing, the court employed an entirely new judgment document which was drafted by the prosecutor in such a way that it firmly refuted, in substance, the scoring argument that Mr. Forsman was prevented from making under the justification of procedural rules. The new judgment document included the now *type-written* statement that the three 1999 drug convictions, which Mr. Forsman wanted to argue should be counted as the same criminal conduct, were committed on “various dates.” CP 119. The prosecutor also told the defendant and the court that he had decided he would not be asking for an exceptional sentence on any basis, thus apparently asserting that no procedural bar prevented *him* from doing so.

11/4/16RP at 5.

Yet the trial court refused to hear any of Mr. Forsman’s arguments regarding his offender score and sentence. This was error.

When a case returns to the trial court after an appellate remand for resentencing, the prior sentence is no longer the final judgment in the case. See State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). As the Court of Appeals has explained in another case under analogous

circumstances, “[o]nce we vacated McNeal’s original sentence, there was no longer a final sentence, the case was no longer final, and the trial court, therefore, erred when it found that Blakely did not apply to McNeal's resentencing on remand.” State v. McNeal, 142 Wn. App. 777, 787-88, 175 P.3d 1139 (2008); accord State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (when case is “remanded for resentencing,” it means that the “entire sentence was reversed, or vacated . . . [and] the finality of the judgment is destroyed.”).

The only exception is when the resentencing court acts in a purely ministerial capacity and does not exercise any discretion. Kilgore, 167 Wn.2d at 37; McNeal, 142 Wn. App. at 786-87.

Here, the court did not act in a purely ministerial fashion. The prosecutor and the court chose not to include, in the new 2016 judgment, the 2013 judgment’s order at section 4.4a that “[a]ll property is forfeited.” See CP 11; see CP 122; see generally State v. Rivera, ___ Wn. App ___ (COA No. 47326-7) (Div. II) (Mar 14, 2017). 11/4/16RP at 9-10; CP 5-18. In addition, the court addressed anew the question of legal financial obligations, noting the case of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), engaging the defendant in questioning about his personal circumstances, and then entering a

reduced assessment of costs compared to the previous sentencing hearing. 11/4/16RP at 10-11; CP 121; see CP 9. This was an entirely new sentencing hearing, for multiple reasons.

Further, at sentencing, the State bears the burden to prove the defendant's criminal history and offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); see, e.g., In re Flynn, 378 P.3d 154 (July 1, 2016) (memorandum order remanding for State to provide the necessary documentation to prove the Petitioner's offender score). And, RCW 9.94A.530(2) states: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

This statute means what it says, and under it, Mr. Forsman was entitled to advocate for a properly-determined sentence. "When a statute is not ambiguous, a court must determine the Legislature's intent by the language of the statute alone." State v. S.M.H., 76 Wn. App. 550, 559, 887 P.2d 903 (1995). The court must then apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999).

There is nothing ambiguous about the language of this last sentence of RCW 9.94A.530(2). It provides that “the parties” are entitled to relitigate the determination of an offender score if appellate review results in remand for resentencing. Prior determinations do not control, and it is irrelevant whether the evidence or argument submitted at resentencing was not previously submitted. This statutory provision effectively exempts offender score calculations on remand from the common-law “law of the case” doctrine. See State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014) (modifying State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009)) (recognizing propriety of de novo determination of the offender score upon remand for resentencing following appeal).

This Court should reverse and remand for resentencing based on the violations of Mr. Forsman’s rights of representation under the Sixth Amendment and the state constitution, see supra, and should emphasize that he must be afforded his sentencing rights to ask that the court hear his arguments as to his offender score.

E. CONCLUSION

Based on the foregoing, Mr. Forsman respectfully requests that this Court reverse his sentence and remand for resentencing.

Respectfully submitted this 13th day of April, 2017.

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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	NO. 49743-3-II
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SEAN FORSMAN,)	
)	
Appellant.)	

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