

FILED
Court of Appeals
Division II
State of Washington
12/7/2017 3:51 PM

No. 50026-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MCEVOY,

Appellant.

APPELLANT'S REPLY BRIEF

Kitsap County Superior Court No. 14-1-00674-6

JOHN HENRY BROWNE
Attorney for Appellant

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
801 Second Avenue, Suite #800
Seattle, WA 98104
(206)388-0777

TABLE OF CONTENTS

	Page
I. <u>INTRODUCTION</u>.....	1
II. <u>FACTS RELEVANT TO REPLY</u>.....	2
A. TIMELINE OF PLEADINGS AND DUE DATES.....	2
B. SUBSTANTIVE FACTS.....	2
III. <u>ARGUMENT</u>.....	3
A. THIS COURT SHOULD IMPOSE SANCTIONS UNDER RAP 18.9(a) FOR THE STATE’S UNTIMELY FILING...3	3
B. GIVEN THE LACK OF WRITTEN FINDINGS, MR. MCEVOY’S PRESENT CHALLENGE IS PREMATURE BECAUSE HE HAS HAD NO OPPORTUNITY TO APPEAL SUCH FINDINGS.....	4
C. THE TRIAL COURT ABUSED ITS DISCRETION BY INCORRECTLY FINDING THAT IT LACKED DISCRETION TO REOPEN SENTENCING.....	5
IV. <u>CONCLUSION</u>.....	6

TABLE OF AUTHORITIES

	Page
 WASHINGTON CASES	
<u>State v. Friedlund</u> , 182 Wn.2d 388, 341 P.3d 280 (2015).....	4
<u>State v Gallegos</u> , 69 Wn.2d 586, 419 P.2d 326 (1966).....	4
<u>State v. Kilgore</u> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	5-6
<u>State v. Mallory</u> , 69 Wn.2d 532,, 419 P.2d 324 (1966).....	4
<u>State v. McEvoy</u> , No. 46795-0-II (June 14, 2016).....	2
<u>State v. Salgado-Mendoza</u> , ---Wn.2d---, 403 P.3d 45 (2017).....	5
 RULES AND STATUTES	
CrR 7.8.....	4
RAP 2.5(c)(1).....	5
RAP 7.2(e)	4
RAP 10.2(c).....	2, 3
RAP 10.2(i).....	3
RAP 18.9(a).....	3

I. INTRODUCTION

As the state's response is untimely and fails to comply with the applicable Rules of Appellate Procedure, sanctions are required.

On the merits, the state, rightly, concedes that remand is required due to the trial court's failure to enter written findings of fact and conclusions of law to support its clearly excessive sentence.

Given this absence of final written findings to support his exceptional sentence, Mr. McEvoy has had no opportunity to challenge the findings. His present challenge is thus either premature until after entry of findings (which the state seems to concede) or ripe because the parties have sufficiently apprised this Court of the relevant facts and issues.

The state, next, invokes inapposite case law to claim that Mr. McEvoy's challenge to his sentence is untimely and that the trial court's imposition of a sentence nearly four times the standard range as based upon a single aggravating factor already accounted for by the nature of the charges is somehow proper. The cases upon which the state rely, however, demonstrate that the trial court possessed the discretion to conduct a new sentencing hearing. Given that the trial court opined that it lacked such discretion and grounded its ruling on application on this incorrect legal standard, this was error.

The proper remedy is thus remand to the trial court for entry of written findings of fact and conclusions of law with instructions that the court has discretion to revisit sentencing and craft an appropriate and

reasonable punishment. Mr. McEvoy will then have the chance to appeal the written findings, if he so chooses.

II. FACTS RELEVANT TO REPLY

A. TIMELINE OF PLEADINGS AND DUE DATES

This Court granted Mr. McEvoy until September 8, 2017 to file his opening brief. Mr. McEvoy complied.

Pursuant to RAP 10.2(c), the state then had 60 days within which to file its responsive pleading. The state's deadline was thus November 7, 2017, which is 60 days from September 8, 2017.

The state's response is dated November 8, 2017 at 4:03 p.m. This Court closes at 4:00 p.m. The Washington Courts website thus shows the pleading as filed on November 9, 2017.

B. SUBSTANTIVE FACTS

In its unpublished opinion on immediate direct appeal, Division Two "vacate[ed] both of McEvoy's convictions for violating a no contact order and remand[ed] for resentencing consistent with this opinion. State v. McEvoy, No. 46795-0-II at 24-25 (June 14, 2016).

On January 27, 2017 at resentencing, the trial court acknowledged that Division Two had "vacated the misdemeanor counts." Brief of Appellant (App. Br.) at App. C at 2:21-22. Despite controlling case law to the contrary, the judge enunciated that she was "unaware of any case law that would indicate that I have any discretion to resentence [Mr. McEvoy] to anything other than what the mandate tells me to do." Id. at 3:22-25.

After the parties and the court discussed timeliness, waiver, and the court's discretion, the court decided that it lacked any discretion to reopen or reconsider the sentence, but that the issue was preserved for appeal. Id. at 4-26. The court then merely vacated the two convictions and imposed 214 months of confinement.

III. ARGUMENT

A. THIS COURT SHOULD IMPOSE SANCTIONS UNDER RAP 18.9(a) FOR THE STATE'S UNTIMELY FILING

Given the state's failure to comply with RAP 10.2 and untimely filing, sanctions are warranted.

Pursuant to RAP 10(i), an appellate court "will ordinarily" impose sanctions under RAP 18.9 for failure to timely file and serve a brief.

RAP 18.9(a), in turn, states that untimely filing warrants payment of terms or compensatory damages to the aggrieved party or payment of sanctions to the Court, which may condition further participation on compliance with the terms of an order or ruling including payment.

Here, it is especially ironic that the state failed to serve a timely brief where many of the state's substantive arguments have to do with the timeliness of Mr. McEvoy's challenges.

Sanctions, including at least payment of the costs incurred by Mr. McEvoy for counsel to research and raise this issue as well as payment to this Court to deter future non-compliance, are thus warranted.

B. GIVEN THE LACK OF WRITTEN FINDINGS, MR. MCEVOY'S PRESENT CHALLENGE IS PREMATURE BECAUSE HE HAS HAD NO OPPORTUNITY TO APPEAL SUCH FINDINGS

Given the trial court's failure to enter formal written findings, there is not yet a final appealable order so that review is technically premature, though Mr. McEvoy would accept review on the merits. This is the sole issue of timeliness.

The Friedlund Court specifically reiterated that a "trial court's oral or memorandum opinion ... has no final or binding effect unless formally incorporated into the findings, conclusion, and judgment. State v. Friedlund, 182 Wn.2d 388, 394-95, 341 P.3d 280 (2015) (quoting State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966)). "A written judgment and sentence, by contrast, is a final, appealable order." Id. at 395 (quoting State v Gallegos, 69 Wn.2d 586, 587-88, 419 P.2d 326 (1966)). The Court then noted that a superior court's authority to modify a judgment is limited by CrR 7.8 and RAP 7.2.(e) whereas oral rulings are not subject to the same constraints. Id.

The Court thus denied the state's motions to supplement the record with *post hoc* written findings. The Court noted that it would be unfair to the defendants for it to address the merits of the trial court's belated written findings where the defendant has had no opportunity for appeal. Id. at 396.

The state seems to recognize that its argument as to untimeliness is likely undercut by the lack of written findings and Mr. McEvoy's concomitant lack of opportunity to appeal: "[T]he state's concession as to the lack of findings of fact and conclusions of law may impact this issue. The case law very often refers to the trial court's findings in determining the validity of the reasons for the exceptional sentence and in determining whether the sentence imposed was clearly excessive." Brief of Respondent (Resp. Br.) at 19.

Here, then, substantive review of Mr. McEvoy's seemingly clearly excessive sentence is premature given the lack of written findings and the possibility that the trial court might impose a different sentence or offer different reasons for its choice of punishment on remand.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY INCORRECTLY FINDING THAT IT LACKED DISCRETION TO REOPEN SENTENCING

As the trial court's sole reason for refusing to reopen sentencing was its mistaken belief that it lacked such authority, it committed an abuse of its discretion.

A court abuses its discretion when it issues an order unsupported by the record or "based upon the wrong legal standard." State v. Salgado-Mendoza, ---Wn.2d---, 403 P.3d 45, 49 (2017).

As the state notes, a trial court possesses "discretion under RAP 2.5(c)(1) to revisit an exceptional sentence on remand when some but not all of the counts have been reversed, but it need not do so." Resp. Br. at

15 (citing State v. Kilgore, 167 Wn.2d 28, 38, 216 P.3d 393 (2009)). This is the controlling law.

The trial court, by contrast, believed that it lacked any such discretion and acted in reliance of a “wrong legal standard.” The trial court thus abused—rather than failed to apply—its discretion.

IV. CONCLUSION

For the foregoing reasons, remand for resentencing is required due to the trial court’s failure to enter written findings of fact and conclusions of law and failure to realize that it had discretion to resentence Mr. McEvoy anew on prior remand from this Court.

Mr. McEvoy also respectfully and specifically requests that this Court enter a notation that the trial court’s newly drafted findings shall be appealable.

DATED this 7th day of December, 2017.

/s/ John Henry Browne
JOHN HENRY BROWNE, WSBA #4677
Attorney for Brian McEvoy

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

December 07, 2017 - 3:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50026-4
Appellate Court Case Title: State of Washington, Respondent v. Brian McEvoy, Appellant
Superior Court Case Number: 14-1-00674-6

The following documents have been uploaded:

- 500264_Affidavit_Declaration_20171207154202D2546311_9010.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 12.07.2017 Declaration of Service.pdf
- 500264_Briefs_20171207154202D2546311_2724.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 12.07.2017 Appellant's Reply Brief.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- jcross@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Lorie Hutt - Email: lorie@jhblawyer.com

Filing on Behalf of: John Henry Browne - Email: johnhenry@jhblawyer.com (Alternate Email: lorie@jhblawyer.com)

Address:
801 2nd Avenue, Suite 800
Seattle, WA, 98104
Phone: (206) 388-0777

Note: The Filing Id is 20171207154202D2546311