

FILED
September 4, 2015
Court of Appeals
Division III
State of Washington

NO. 321941

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

JOSE LUIS GONZALEZ CASTANEDA

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. Whether the State conceded that the defendant has a right to appeal?
2. Whether the defendant was advised of his appellate rights and whether he waived them?
3. Whether the defendant's Appeal / Petition is time barred?
4. Whether the defendant was entitled to counsel at public expense?

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The State did not concede that the defendant has a right to appeal.
2. The defendant was advised of his appellate rights and waived them.
3. The defendant's Appeal / Petition was time barred.
4. The defendant was not entitled to counsel at public expense.

C. STATEMENT OF THE CASE

The facts with supporting exhibits were set out in the State's Answer to Personal Restraint Petition that is consolidated with his case and incorporated by reference.

The defendant murdered Thomas Marchand on September 29, 1998. The defendant was charged with First Degree Murder by information on October 23, 1998.

Pursuant to plea negotiation the defendant's charge was amended to Murder in the Second Degree on June 18, 2001, by Amended information, and the defendant pled guilty to the amended count. The defendant was sentence on October 23, 2001 to the recommendation of 172 months.

The current attorney for the defendant filed an appeal deemed untimely by the Court of Appeals on March 12, 2014, and was directed to set a presentment date regarding an order of indigency. On June 16, 2014, the defendant filed a Motion for Indigency with the Superior Court.

On June 25, 2014, the Superior Court issued and order denying the motion.

On July 2, 2014, the defendant filed a motion for reconsideration. The Court of Appeals also issued a Commissioner's Ruling on July 18, 2014, remanding the order for consideration in light of the defendant's declaration that he was not advised of his right to appeal his guilty plea. In support, defendant obtained a declaration for trial counsel, who specifically stated: "/

don't recall any specific details of my representation of Mr.

Castaneda. I can state only what my general practices were at the time..."

On September 19, 2014, the Superior Court entered an Order Denying Motion for Order of Indigency on Reconsideration from Appellate Court Commissioner's Remand. The Superior Court on September 19 also entered Findings of Fact and Conclusions of Law.

Included in the findings, the Superior Court found:

- The Statement on Plea of Guilty was prepared by the defendant's attorney and the defendant acknowledged that his lawyer explained and discussed all the paragraphs with the defendant and the defendant understood them.
- There was no indication from the record, or from the defendant's recent declaration, that he was acting with any incapacity or lacked the ability to participate fully.
- In the defendant's recent declaration, the defendant did not recall the events of the crime due to the passage of time, but claimed to have a clear memory of the immigration issue and that the trial judge did not explain any specific time limits of appeal, or that he had knowledge he was giving up any of his rights of appeal.
- The Guilty plea specifically advised the defendant that he was giving up his right to appeal after trial and the defendant did not allege any confusion about this waiver. The defendant then knowingly and voluntarily entered his plea.

- The defendant was also advised of his right of collateral attack in the Judgment and Sentence.
- The defendant sought to accept the State's plea offer to a reduced charge rather than going to trial. The defendant has subsequently made a bare statement that he was not advised of his right to appeal, but does not challenge his knowing and voluntary waiver of his right to appeal.

The Superior Court concluded the defendant was properly advised and waived his right to appeal, and there was no basis to reconsider its previous order denying an order of indigency.

Additionally the defendant was not present in the US legally at the time of the murder and was previously subject to deportation in 1979.

D. ARGUMENT

1. The State did not concede that the defendant has a right to appeal.

Defendant indicates in his brief that the State failed to object to joinder of the defendant's petition with his appeal. It appears the defendant is trying to argue that the State therefore agrees or concedes the defendant has the right to appeal or that his petition was timely. This is incorrect. The joinder by the Court was for the purpose of efficiency, not indicative of any finding of any fact or

right on the merits. The State has, and continues, to assert the defendant waived his right to appeal, and his petition is not timely.

Similarly, the defendant argues the State offered no contravening evidence to the declaration from trial counsel. The declaration of trial counsel is outside the record for an appeal. Moreover, on its face the declaration fails to substantiate the self-serving claim made by the defendant that he was not properly advised of his rights and the consequences of his plea.

2. The defendant was advised of his appellate rights and that he waived them.

The advisements in the Statement of Defendant on Plea of Guilty, which are dictated and required under CrR 4.2, are in accord with CrR 7.2. The record in this case is *not* silent on the advisement. The advisement comes from CrR 4.2(g), para. 5(f) (by pleading guilty a defendant gives up “the right to appeal a finding of guilt after a trial”).

CrR 4.2 and CrR 7.2 do not contradict each other. The first rule, CrR 4.2, speaks to the waiver of a right to appeal a determination of guilt *only*. By pleading guilty (i.e. admitting guilt), a defendant no longer can challenge a finding of guilt, whether on

appeal or by collateral attack. The matter of guilt is conceded. The second rule, CrR 7.2, speaks to the right to appeal *generally*. A defendant who enters a voluntary guilty plea waives his or her right to appeal most issues. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *State v. Wiley*, 26 Wn.App. 422, 613 P.2d 549 (1980). But a guilty plea does not waive the right to “rais[e] collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made.” *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). The two rules are consistent with each other. The court rules properly advise that a defendant has a right to appeal, although a guilty plea will waive some appellate challenges.

The defendant appears to argue that based on the superior court’s compliance with one rule (CrR 4.2), the court of appeals should have assumed the superior court then violated another (CrR 7.2). This is not logical.

The defendant presumably claims that he was not advised of his right to appeal in accordance with CrR 7.2. There is sufficient evidence in the record to demonstrate that the Defendant knew he had a right to appeal.

Under RAP 5.2(a), a party seeking to appeal from a decision of the superior court must file a notice of appeal within 30 days of the decision. The thirty-day rule is strict. Oral notice is not sufficient. *State v. Miller*, 67 Wn.2d 59, 406 P.2d 760 (1965). It is not sufficient to deposit a notice in the mail within 30 days or to file the notice 31 days after the order. *Mackey v. Champlin*, 68 Wn.2d 398, 413 P.2d 340 (1966). The actual notice of appeal must be filed with the trial court within 30 days. RAP 5.2. A court may not circumvent the rule by purporting to vacate a judgment and enter it on a later date. *Cohen v. Stingl*, 51 Wn.2d 866, 322 P.2d 873 (1958). This is because the rule is jurisdictional. *Id.*; *Yand Estate*, 23 Wn.2d 831, 162 P.2d 434 (1945). And an appellant who was unintentionally misled about the date of entry of the judgment is still out of luck. *Isom v. Olympia Oil & Wood Products Co.*, 200 Wash. 642, 94 P.2d 482 (1939).

However, because the right to appeal from a criminal conviction is constitutional in nature, the burden is on the state to show that the defendant made a voluntary, knowing, and intelligent waiver (intentional relinquishment or abandonment) of the right to appeal. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). The state must demonstrate circumstances which give rise to an

inference that the defendant understood the import of failing to timely file a notice of appeal. *State v. Sweet*, 90 Wn.2d at 287. When this is demonstrated, a defendant's failure to appeal "could be shown to constitute waiver." *Id.*

A defendant who enters a voluntary guilty plea waives his or her right to appeal most issues. *Smith*, 134 Wn.2d at 852. This is true even if the defendant did not explicitly agree to waive the right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). However, a guilty plea does not waive the right to "rais[e] collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made." *State v. Majors*, 94 Wn.2d at 356. In 1983, the legislature passed RCW010.40.200, indicating non-citizen defendant must be warned such offense is grounds for deportation, exclusion from admission to the United States before pleading guilty. RCW 10.40.200(1). To give effect to this statute, the standard plea form in CrR 4.2 was amended to include a statement warning noncitizen defendants of possible immigration consequences. That warning statement is not, itself, the required advice; but it creates a rebuttable presumption the defendant has been properly advised. *In*

re Yung-Cheng Tsai, 183 Wn. 2d 91, 101, 351 P.3d 138, 143 (2015); RCW 10.40.200(2); *Sandoval*, 171 Wash.2d at 173, 249 P.3d 1015.

In this case the record supports a finding the defendant was properly advised and waived his right to appeal.

2. After thirteen years it is beyond dispute the defendant intentionally relinquished his right to appeal.

It is apparent that the represented defendant knew he had a right to appeal and was waiving it by taking advantage of the plea agreement and entering his plea. A reasonable person would understand that a defendant who has abandoned the appeal process for thirteen years has made an intentional relinquishment of the right. Consider the statutes on limitation of actions. If the state does not file charges generally within three years, it has given up the right to pursue a criminal action. RCW 9A.04.080(1)(h). Suits for damage of personal property are also generally limited to three years. RCW 4.16.080. For suits regarding real property, cases must be filed at the very latest within ten years. RCW 4.16.020; *Gorman v. City of Woodinville*, 160 Wn. App. 759, 762, 249 P.3d 1040 (2011) (adverse possession claims limited to ten consecutive years). And

there is a statutory time limit of only one year for filing collateral attacks on a conviction. RCW 10.73.090.

An incarcerated person is not distracted in the way that a property owner might be in failing to sue. An incarcerated person does not forget a desire to seek redress. But this Defendant, who has been incarcerated for more than thirteen years, who has had access to legal resources, and yet did not file an appeal, has intentionally relinquished his appeal.

Almost seventeen years have passed since the shooting, and fourteen years since the judgment and sentence was entered. During the interim the Court's and the Prosecutor's files for this case have been archived, and no transcript was prepared for the plea hearing since there was no timely appeal.

In criminal appeals, the law requires a filing of a notice of appeal within thirty days and a collateral attack within one year of the date of finality. Time limits demonstrate the courts' and legislature's valuation of the principle of finality. The finality doctrine maximizes justice. Justice requires bringing to light the true facts. But the proof of these facts disappears with time as evidence and memory degrades. To require the

plaintiff to prove after thirteen years a burden long admitted by and never appealed by the defendant will not produce justice.

A significant amount of time has passed since the defendant's crime of conviction. This period is thirteen times longer than is allowed for even a collateral attack. RCW 10.73.090. It is an unreasonable amount of time on its face. The passage of time is especially prejudicial and oppressive to the state, which has the burden of proof in a criminal trial.

Evidence degrades in the passage of the years. Witnesses move away or pass away; their memories fade and their ability to testify deteriorate after seventeen years later; and those witnesses may be impossible to find. To appeal a conviction for the first time more than seventeen years after the fact, is an abuse of the appellate process and interferes with due process rights of the victim, witnesses, police, prosecutor, and others. "Justice, though due to the accused, is due the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L.Ed. 674 (1934) (Cardozo, J., dissenting).

If this Court does not find that the appeal was intentionally relinquished, then the time bar in RCW 10.73.090 also has no import. The State will be required to defend a murder conviction where the evidence was once strong, but is now likely diminished only because of the defendant's own abandonment of his right and obligation to timely appeal.

3. The defendant's Appeal / Petition is time barred.

There is more than one time limit consideration that is appropriate for the court's review. The nature of the defendant's petition requires that it be subject to the one year time limit of RCW 10.73.090.

The defendant is seeking to withdraw his guilty plea. A defendant seeking to withdraw his plea will generally need to rely on materials that are not part of the superior court's record. That is certainly the case in this petition where the Defendant's claims find no support in the superior court record. Review on direct appeal is limited to the matters in the record. RAP 9.1; *State v. Norman*, 61 Wn.App. 16, 27, 808 P.2d 1159, *review denied*, 117 Wn.2d 1018, 818 P.2d 1099 (1991). Therefore, designating the petition as a direct

appeal requires that the defendant's arguments be stricken as outside the record.

It should be designated as personal restraint petition. The sole means to challenge a guilty plea after judgment is by collateral attack. Under CrR 4.2(f), a motion to withdraw a guilty plea "shall be governed by CrR 7.8."

CrR 7.8 motions, when transferred to the Court of Appeals, are treated as personal restraint petitions. Both motions under CrR 7.8 and PRP's are subject to the one year time limit in RCW 10.73.090. And the Defendant's petition should be time barred under this statute, as should the issue designated as an appeal.

4. The defendant was is not entitled to counsel at public expense.

The authority to find indigency is governed by RAP 15 and RCW 10.73.

RAP 15.1. states:

The rules in this title define the procedure to be used (1) to determine indigency and to determine the expenses of an indigent party to review which will be paid from public funds as provided in rule 15.2, (2) to obtain a waiver of charges imposed by the court as provided in rule 15.3, (3) to claim payment from public funds for services rendered to an indigent party to review as provided in rule 15.4, (4) to allow claims for expense as provided in rule 15.5, and (5) to recover public funds expended on behalf of an indigent as provided in rule 15.6. *The rules in this title apply to all proceedings in the appellate court, except the rules apply to personal restraint*

*petitions only to the extent defined in rule 16.15 (g) and (h) (emphasis added).*¹

RAP 15.2 states in part:

(a) Motion for Order of Indigency. A party seeking review in the Court of Appeals or the Supreme Court partially or wholly at public expense must move in the trial court for an order of indigency. The party shall submit a Motion for Order of Indigency, in the form prescribed by the Office of Public Defense.

(b) Action by the Trial Court. The trial court shall determine the indigency, if any, of the party seeking review at public expense. The determination shall be made in written findings after a hearing, if circumstances warrant, or by reevaluating any order of indigency previously entered by the trial court. The court:

¹ RAP 16.15(g) states: Indigency--Superior Court Determination. The provisions of CrR 3.1 apply to a personal restraint petition transferred to a superior court. If any of the petitioner's expenses incurred in the superior court are to be paid with public funds, the expenses shall be paid with funds appropriated by the county in which the superior court is located.

RAP 16.15(h) states: Indigency--Appellate Court Proceeding. If the restraint is imposed by the state or local government, and if the appellate court determines that petitioner is indigent, the court may provide for the appointment of counsel at public expense for services in the appellate court, order waiver of charges for reproducing briefs and motions, provide for the preparation of the record of prior proceedings and provide for the payment of such other expenses as may be necessary to consider the petition in the appellate court. Invoices for expenses of an indigent person in the appellate court must be submitted to the appellate court which decided the petition in the form and manner provided in rule 15.4, except that a trial court order of indigency is not required and the invoice must be submitted within 45 days after the appellate court decision terminating the proceeding is filed. If a petitioner who claims to be indigent is in the custody of an agency of the Department of Social and Health Services, the clerk of the appellate court will obtain a statement of petitioner's known assets from the superintendent of the institution where petitioner is confined. Statutes providing for payment of expenses with public funds are not superseded.

CrR 3.1 provides for a right to a lawyer in all criminal proceedings, but there is no constitutional right to counsel in post-conviction proceedings, nor to an investigator's assistance, even if the death penalty has been imposed. *In re Personal Restraint of Gentry*, 137 Wash.2d 378, 972 P.2d 125 (1999).

(1) shall grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses for appellate review of:

(a) criminal prosecutions or juvenile offense proceedings meeting the requirements of RCW 10.73.150,...

RCW 10.73.150 states:

Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:

- (1) Files an appeal as a matter of right;
- (2) Responds to an appeal filed as a matter of right or responds to a motion for discretionary review or petition for review filed by the state;
- (3) Is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack as defined in RCW 10.73.090. Counsel may be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence, if the court determines that the collateral attack is not barred by RCW 10.73.090 or 10.73.140;
- (4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. Counsel shall not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence;
- (5) Responds to a collateral attack filed by the state or responds to or prosecutes an appeal from a collateral attack that was filed by the state;

(6) Prosecutes a motion or petition for review after the supreme court or court of appeals has accepted discretionary review of a decision of a court of limited jurisdiction; or

(7) Prosecutes a motion or petition for review after the supreme court has accepted discretionary review of a court of appeals decision.

Pursuant to RAP 15.2 and RCW 10.73.150 there is no authority for the court to grant a motion finding indigency and providing counsel at state expense for a collateral attack. Under RAP 15.2, a criminal case must meet the requirements of RCW 10.73.150 for such a finding. In this case there is no appeal as a matter of right, due the fact that the defendant pled guilty, and waived his right to appeal. Moreover, even if he had been found guilty after trial, his time to seek appeal would have expired long ago.

Even where the PRP has been filed with the COA, there needs to be a determination made by the COA that the issue(s) raised were not frivolous. See RCW 10.73.140; See also *In re Pers. Restraint of Bailey*, 141 Wn.2d 20, 28, 1 P.3d 1120, 1124 (2000) (finding RCW 10.73.140 authorizes summary dismissal of a first PRP, without comment and without requiring the State to respond, if the PRP fails to raise any non-frivolous issues).

Based on the "Pro Se Motion for an Order of Indigency" and PRP filed, it does not appear the PRP is timely either, since the defendant by his own admission is no longer being restrained because of any decision or order of the court in the criminal case.

Similarly there is no basis to file a collateral attack pursuant to CrR 4.2(f) , which provides in pertinent part: "*The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice... If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.*" CrR 7.8 is the rule dealing with vacation of judgments. RCW 10.73.090(2) provides that the term "collateral attack" includes "a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment"

CrR 7.8(b) must be read in conjunction with RCW 10.73.090, which overrides inconsistent provisions in court rule and gives defendants one year to file a petition or motion for collateral attack on a final, valid judgment and sentence. E.g., *State v. Clark*, 75 Wn. App. 827, 831 (1994). RCW 10.73.090(1) states that no petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes

final, if the judgment and sentence is valid on its face, and was rendered by a court of competent jurisdiction.

Additionally the transcript of the sentencing did not include the actual plea, which would have addressed the advisements the court would have made regarding deportation and exclusion. Use of the written form set out in CrR 4.2(g) is sufficient to show a defendant is aware of the consequences of his guilty plea. See *State v. Hennin's*, 34 Wn. App. 843, 846, 664 P.2d 10 (1983); *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). RCW 10.40.200 is satisfied where the written guilty plea form contains the required warning, the defendant affirms the form was read, and the form is signed by both the defendant and the defendant's counsel. *State v. Cortez*, 73 Wn. App. 838, 840-41, 871 P.2d 660 (1994).

E. CONCLUSION

The defendant's appeal is not timely, the right to appeal was waived, and the defendant's appeal should be dismissed.

Dated this 4 day of Sept 2015

Respectfully Submitted by:


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