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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON FALETOGO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99302
(509) 545-3543

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts this appeal is time barred and failure to respect the time bar would result in a gross miscarriage of justice.

III. ISSUES

1. Where the Defendant delayed seeking review for fourteen years until the videotaped evidence of his violent prison assault was destroyed under a proper retention schedule, where reversal is tantamount to dismissal, where the State has demonstrated that the Defendant waived his right to appeal, and where the Defendant's only challenge is to the sentencing range which is incorrect by a single month, shall this Court permit a gross miscarriage of justice by ignoring its own procedure and practice regarding the timeliness of filing an appeal?
2. Should this Court remand for imposition of a sentence within the correct sentencing range?

IV. STATEMENT OF THE CASE

On March 25, 2001, while incarcerated at the Walla Walla State Penitentiary for a 1997 murder, the Appellant/Defendant Aaron Faletogo assaulted another inmate with a “sap” style weapon. CP 1-2. The assault was captured on videotape. *Id.* Faletogo and two others attacked the victim at once. CP 2. Faletogo hit the victim on the head with a pool ball in a sock, knocking him to the floor. CP 2. The victim-inmate had to be transported outside of the prison for medical treatment. CP 1.

The Defendant was charged with assault in the second degree in Walla Walla County. CP 3-4. It would have been his second “most serious” or “strike” offense. RCW 9.94A.030(33)(a) and (b); RCW 9.94A.030(38).

The prosecutor agreed to reduce the charge to a non-strike offense, and the Defendant pled guilty to assault in the third degree with an understanding that the prosecutor would recommend a high-end sentence of nine months. CP 5-14. The plea statement advised that the standard range was 3-9 months. CP 9. He was sentenced on July 8, 2002 and received a 9 month sentence. CP 15-26.

In 2009, the Defendant sent a letter and motion to the court,

appealing from his LFO's. CP 27-45. On February 23, 2011, the court waived the interest and found the Defendant had satisfied his LFO's. CP 46. So much time had passed, the clerk accidentally entered a certificate and order of discharge. CP 47-48. The order was vacated when the clerk realized that the Defendant had not yet served his sentence. State's Memorandum re. Untimeliness, Appendix J. The Defendant will not begin to serve his sentence in this case until approximately 2027, when he has finished serving his murder sentence. CP 65; RP 10.

On December 27, 2016, more than 14 years after his conviction, the Defendant filed a notice of appeal. CP 49-58, 62.

The State filed a memorandum on the untimeliness of the appeal and a motion to modify. The motion to modify attaches three declarations explaining that, after this passage of time and under the proper retention schedule, the videotape of the assault no longer exists.

V. ARGUMENT

A. THE TIME BAR IS DISPOSITIVE OF THIS APPEAL.

In this particular case, the timeliness/waiver question is the

most important issue for this Court's consideration. It will be dispositive¹ of the result and it has thus far not received adequate consideration.

Prior to reviewing the merits of any claim, the Court must first consider procedural bars. *Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1524-25, 137 L.Ed.2d 771 (1997) (recommending that procedural bars be addressed before the merits of the claim). The federal courts will only respect state procedural bars when state courts clearly announce this basis and regularly apply those bars. *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 857-58, 112 L.Ed.2d 935 (1991); *Powell v. Lambert*, 357 F.3d 871 (9th Cir. 2004).

Access to the courts may be regulated by statute of limitations and statutes of repose if the regulation serves a legitimate end. See *United States v. Kubrick*, 444 U.S. 111, 117, 62 L. Ed. 2d 626, 100 S. Ct. 352 (1979); *Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990). Strict application of the time bar promotes fairness to the victim and protects the state's legitimate interest in finality. These

¹ The State does not dispute that a criminal defendant may challenge voluntariness of a guilty plea for the first time on appeal; that a plea is involuntary if the defendant is misadvised as to the correct standard range; and that the correct standard range in this case was 3-8 months.

regulations are constitutional and exist, in part, because “[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access--a reasonable opportunity to be heard.” *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3d Cir. 1985).

By law, a criminal defendant is not afforded years to ponder the wisdom of filing an appeal. The decision to file a notice of appeal must be made within a mere 30 days of the judgment and sentence. RAP 5.2. See also RCW 10.73.090 (the decision to make a collateral attack must be filed within one year). On a sentence of nine months, this Defendant waited 14 years to file an appeal.

1. The Defendant waived his right to appeal.

The State has demonstrated that the Defendant waived his right to this appeal. *State’s Memorandum re. Untimeliness* (Memo). The Commissioner’s ruling did not find otherwise.

The State is not required under CrR 7.2(b) to inform a defendant of his right to appeal, but, failing such advisement, the State must demonstrate waiver by other means. *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998); *State v. Tomal*, 133 Wn.2d 985, 948 P.2d

833 (1997); *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978)).

Faletogo became very well versed in the law and competent to advocate on his own behalf many years (not a mere thirty days) before he finally filed the notice of appeal here. In his murder case, he has filed five PRP's pro se. Memo at 3. And most significantly, in 2009, seven years before filing this notice of appeal, he sought review from his own sentence in this case – successfully. Memo, Appendices F, G, H, and I. It is not plausible that he knew in 2009 that he could seek review of his sentence, but did not realize for an additional seven years that he could appeal from his conviction. On the contrary, by seeking review of his sentence, it is apparent that he “declined to challenge his guilty verdict.” *State v. Devin*, 158 Wn.2d 157, 166, 142 P.3d 599 (2006).

Nor is it plausible that in 2002 Faletogo would have sought to withdraw his guilty plea to a class C felony in order to go to trial on a class B felony (a second strike early in his decades-long incarceration on the murder) in a case in which his brutal, premeditated, and unprovoked assault was caught on camera.

If he had been found guilty of the “violent” offense of second degree assault as originally charged, his sentence range would have

increased to 12+ - 14 months. RCW 9.94A.030(55)(viii) (classified as a violent offense); RCW 9.94A.525(8) (multiplier for violent offense results in offender score of two). And when serving that time, his maximum eligible good time would be significantly reduced. RCW 9.94A.729(3)(d)(ii)(B) (only 33% for a violent offense, not 50%). His community custody term would have increased from 12 months to 18 months. RCW 9.94A.701(2). And it would have been his second strike offense. RCW 9.94A.030(38)(b)(i)(B). With the Defendant's history of violence and his estimated release date of 2028, two strikes would have been an enormous risk for him. His negotiated plea was the far better deal. It would have been deficient performance to advise him to turn down the plea offer and risk trial and second strike.

The State has met its burden of showing a voluntary waiver with evidence of (1) the Defendant's 2009 appeal, (2) his legal sophistication in multiple pro se representations, and (3) the implausibility that he would not seek a plea bargain for a second-strike, violent offense caught on videotape. Faletogo's choice not to timely appeal was a conscious and willful choice not to pursue any appeal. Under the facts of his case, it was the intelligent, informed choice.

The Commissioner did not find otherwise. This waiver should be the end of the matter.

2. Allowing the appeal to proceed so many years later and after a demonstrated waiver causes, rather than prevents, a gross miscarriage of justice.

The Commissioner allowed the appeal to proceed under the catchall provision of RAP 18.8(b), finding that it was appropriate to extend the time to file a notice of appeal by over 170 times (from 30 days to 14+ years) in order to “to prevent a gross miscarriage of justice.” This finding is not justifiable, because the gross miscarriage is in fact the allowing of such an untimely appeal.

The equities are readily apparent. They do not lie with the Defendant.

In this case, the Defendant pled guilty. A guilty plea waives the right to appeal all but 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, 1238 (1980). When the Defendant filed this appeal, he did not claim any specific error. In the Defendant’s declaration and memorandum in support of his motion to extend time to file the appeal, he only spoke in generalities of

effective counsel and voluntariness of the plea. Now that counsel has reviewed the file, the only claim he makes is as to 8 versus 9 months of incarceration. This difference of one month of incarceration for an inmate serving decades is not a gross miscarriage of justice.

On the other hand, if the conviction is reversed after all this time, the State will not be able to retry the case and the Defendant will have gotten away with a violent assault. And the only reason the State will not be able to retry the case is because the Defendant delayed filing an appeal by 170 times the time lawfully allotted. This is not justice.

In a criminal trial, the State bears the burden of proving guilt beyond a reasonable doubt. In a prison assault, even victimized inmates do not testify against each other, because it puts them at further risk of escalating assaults. Therefore, the necessary evidence for such a case is either a video or a correctional officer witness. In this case, the evidence was a video – which no longer exists.

Fourteen years after the date of finality, it is not unreasonable that the State would have destroyed the videotape. The Defendant accepted guilt by pleading to a lesser offense. He did not appeal. He finished paying his LFO's. Fourteen years is almost three times the

maximum penalty for a class C felony and 18 x the length of his actual sentence in this case. RCW 9A.20.021. The County Clerk even filed and then withdrew a certificate of discharge, believing every matter to be concluded. Where a defendant is required to file a notice of appeal within thirty days and a collateral attack within a year, the State reasonably relied upon the law and retention schedule and destroyed the videotape. If the Defendant did not have to complete his murder sentence first, this case would have been served and off the books long ago.

Sixteen years ago, the State's case was rock solid. Today, not only is the video gone but the witnesses' memories and any interest in cooperating with prosecution will have significantly degraded. An appeal will not result in a retrial, but an effective dismissal – and for the sole reason that a legally savvy defendant sat on his hands, and the court refused to apply the time bar.

The granting of an appeal after all this time is a gross miscarriage of justice. A dismissal is not justice for the victim, and it does not deter this or any other offender from similar criminal activity. On the contrary, to permit such an untimely appeal only encourages further untimely appeals.

The appeal must be denied.

B. IF THE COURT TAKES ANY ACTION IN THIS CASE, IT SHOULD ONLY BE TO PERMIT RESENTENCING.

It is the State's position that the appeal must be denied under RAP 5.2. However, if the Court is inclined to take any action to address the Defendant's correct claim that the standard range was 3-8 months, and not 3-9 months, then the State recommends remand for correction of the sentence within 3-8 months. *In re Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670, 672 (2008) (the proper remedy is remand for correction of the error by imposition of a sentence within statutory bounds). This would forestall any collateral attack that the sentence is invalid on its face.

Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed. *In re Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618, 627 (2002) (citing *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)).

It is well established that the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. *In re Carle*, 93 Wash.2d 31, 604 P.2d 1293 (1980). The error is grounds for reversing only the erroneous portion of the

sentence imposed. Consequently, although the probation exceeds the authority granted in RCW 9.95.210, the order as a whole is not void.

State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993, 997 (1980)

(superseded by statute on other grounds).

VI. CONCLUSION

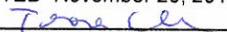
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: November 20, 2017.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Jennifer M. Winkler winklerj@nwattorney.net</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 20, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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