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No. 79973-3

THE DEFENDER ASSOC

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,
Petitioner.

vs.

STEPHEN KLEIN and MELISSA DEIBERT,
Respondents.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

A.	<u>REPLY ARGUMENT.</u>	
1.	The reasons for the fugitive dismissal rule are not dependent on the source of the right to appeal.	1-5
2.	Whether defendants' appeals should be dismissed under the fugitive dismissal rule should not be governed by factually dissimilar cases.	5-7
3.	Application of the fugitive dismissal rule perhaps should be referred to as a forfeiture, rather than a waiver, of the constitutional right to appeal.	7-9
B.	<u>CONCLUSION.</u>	9-10

TABLE OF AUTHORITIES

Table of Cases

<i>Alday v. State</i> , 15 Ariz. 334, 138 P.1043 (1914)	3-4
<i>Evolga v. State</i> , 519 N.E.2d 532 (Ind. 1988)	2
<i>In re Thomas</i> , 533 Pa. 572, 626 A.2d 150 (1993)	3
<i>Redden v. State</i> , 418 A.2d 996 (Del. 1980)	4
<i>State v. Devin</i> , 158 Wn.2d 157, 142 P.3d 599 (2006)	7
<i>State v. Fleming</i> , 41 Wn. App. 33, 701 P.2d 815 (1985)	8 & 9
<i>State v. Handy</i> , 27 Wash. 469, 67 Pac. 1094 (1902)	7 & 9

<i>State v. Johnson</i> , 105 Wn.2d 92, 711 P.2d 1017 (1986)	7, 8 & 9
<i>State v. Kells</i> , 134 Wn.2d 309, 949 P.2d 818 (1998)	5 & 6
<i>State v. Mosley</i> , 84 Wn.2d 608, 528 P.2d 986 (1974)	7,8 & 9
<i>State v. Verikokides</i> , 925 P.2d 1255 (Utah 1996)	3
<i>State v. Sweet</i> , 90 Wn.2d 282, 581 P.2d 579 (1978)	5 & 6
<i>State v. Tomal</i> , 133 Wn.2d 985, 948 P.2d 833 (1997)	5 & 6
<i>State v. Winthrop</i> , 148 Wash. 526, 269 P.793 (1928)	2
<i>Tacoma v. Bishop</i> , 82 Wn. App. 850, 920 P.2d 214 (1996)	8
<i>United States v. McLeod</i> , 53 F.3d 322 (11 th Cir. 1995)	8

Statutes and ordinances

RCW 7.21.040	2
RCW 7.21.050	2

Other Authorities

Arizona constitution, article 2, section 24	4
Delaware constitution, article 4, section 28	4
Indiana constitution, article 7, section 6	2-3
Pennsylvania constitution, article 5, section 9	3
Utah constitution, article 1, section 12	3-4

A. REPLY ARGUMENT.

1. The reasons for the fugitive dismissal rule are not dependent on the source of the right to appeal.

Defendants argue that the rationales justifying the rule that a defendant who flees the jurisdiction of the court during the pendency of an appeal loses his right to appeal do not apply when the right to appeal is based on the constitution. Those rationales are not based on the nature or source of the right to appeal, but on considerations relating to the appellate process and respect for the authority of the courts.

Defendants claim that their appeals are not moot because their convictions may be reversed and remanded for a new trial, even though they may not appear for that trial.¹ How such a trial could be conducted in the absence of the defendant is not clear. Defendants also contend that their disrespect for the court should be punished by some lesser sanction than dismissal of their appeals.² The only other

¹ Brief of Respondents, at 22.

² Brief of Respondents, at 23.

sanction that seems possible³ is a charge of criminal Contempt under RCW 7.21.040, for which the maximum punishment is one year in jail and a \$5,000 fine. This does not seem to be a lesser sanction than dismissing the defendant's pending appeal for Assault or Theft as each of those crimes also has a maximum punishment of one year in jail and a \$5,000 fine. Defendants also argue that their flight does not prejudice the City.⁴ If the appeals were to proceed and a new trial ordered, the City faces obvious difficulties in persuasively presenting a case to a jury years after the event.

Many jurisdictions where the right to appeal is based on the constitution have applied the fugitive dismissal rule and relied on the rationales supporting that rule. The court in *Evolga v. State*⁵ relied on these reasons and rejected the defendant's contention that dismissing his appeal violated his constitutional right to appeal.⁶

³ A defendant's failure to appear for a probation review hearing would not be subject to summary contempt under RCW 7.21.050 as the act did not occur within the courtroom. *See State v. Winthrop*, 148 Wash. 526, 531-32, 269 P. 793 (1928).

⁴ Brief of Respondents, at 23.

⁵ 519 N.E.2d 532, 533-34 (Ind. 1988).

⁶ In Indiana, the right to appeal is found in article 7, section 6 of the state constitution, which provides:

Similarly, in *In re Thomas*⁷ the court relied on considerations relating to the integrity of the appellate process in upholding the dismissal of the appeal of a defendant who had escaped from custody, notwithstanding the constitutional right to appeal.⁸ In *State v. Verikokides*,⁹ the court's refusal to consider the appeal of a defendant who had fled the jurisdiction prior to sentencing was based on "the effect of defendant's absence on the appellate process and his responsibility for the difficulties of sustaining an appeal."¹⁰ In *Alday*

The Court shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal case.

⁷ 533 Pa. 572, 626 A.2d 150, 153 (1993).

⁸ In Pennsylvania, the right to appeal is found in article 5, section 9 of the state constitution, which provides:

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

⁹ 925 P.2d 1255, 1257 (Utah 1996).

¹⁰ In Utah, the right to appeal is found in article 1, section 12 of the state constitution, which provides, in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory

v. State,¹¹ the court dismissed the appeal of a defendant who had absconded and based its decision on the rationale that, if the appeal was considered, the defendant thereafter would appear or not “as he may consider most for his interest.”¹² The rule also has been applied in other jurisdictions where the right to appeal is based on the state constitution.¹³

process to compel the attendance of witnesses in his own behalf; to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

¹¹ 15 Ariz. 334, 138 P. 1043 (1914).

¹² In Arizona, the right to appeal is found in article 2, section 24 of the state constitution, which provides:

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

¹³ See *Redden v. State*, 418 A.2d 996 (Del. 1980) (right to appeal found in article 4, section 28 of Delaware constitution, which provides, in pertinent part, that “[t]he General Assembly may by law regulate this jurisdiction, and provide that the proceedings shall be with or without indictment by grand jury, or trial by petit jury, and may grant or deny the privilege of appeal to the Superior Court; provided, however, that there shall be an appeal to the Superior Court in all cases in which the sentence shall be imprisonment exceeding one (1) month, or a fine exceeding One Hundred Dollars (\$ 100.00)).

The reasons justifying the fugitive dismissal rule do not depend on the source of the right to appeal. Even though the right to appeal in Washington is based on the state constitution, the reasons for the fugitive dismissal rule are no less valid than if the right to appeal was based on a statute or court rule. The superior court erred by refusing to apply the fugitive dismissal rule to defendants' cases.

2. Whether defendants' appeals should be dismissed under the fugitive dismissal rule should not be governed by factually dissimilar cases.

Defendants insist that the issue in this case is controlled by *State v. Sweet*,¹⁴ *State v. Tomal*¹⁵ and *State v. Kells*.¹⁶ Those cases, however, do not involve a defendant who has absconded after filing a notice of appeal. *Sweet* involved a defendant who failed to file a notice of appeal. The court acknowledged that a defendant can lose his right to appeal by failing to act, but noted that the case involved a unique and unusual set of circumstances that prevented the defendant, who wanted to appeal his conviction, from exercising his

¹⁴ 90 Wn.2d 282, 581 P.2d 579 (1978).

¹⁵ 133 Wn.2d 985, 948 P.2d 833 (1997).

¹⁶ 134 Wn.2d 309, 949 P.2d 818 (1998).

right to appeal.¹⁷ Defendants obviously have filed their notices of appeal and no unusual circumstances appear to exist explaining why they have absconded.

Tomal involved a defendant whose attorney failed to diligently pursue an appeal. The court held that, although a defendant may lose his right to appeal through his own inaction, the inaction and negligence of a defendant's attorney would not be sufficient to extinguish a defendant's right to appeal.¹⁸ The City's motion to dismiss these appeals is based solely on the defendants' own conduct rather than that of their attorney.

Kells involved a defendant who was not informed of his right to appeal. Again, defendants obviously were aware of their right to appeal as each exercised it. None of these cases involved a defendant who filed a notice of appeal and then removed himself from the trial court's jurisdiction. The facts significant to the court in those cases simply do not exist with respect to defendants.

¹⁷ *Sweet*, 90 Wn.2d at 289 & 290.

¹⁸ *Tomal*, 133 Wn.2d at 990.

Instead, the issue in this case ought to be controlled by cases that have actually applied the fugitive dismissal rule, such as *State v. Johnson*,¹⁹ *State v. Mosley*²⁰ and *State v. Handy*.²¹ The practice of Washington courts for over 100 years has been to dismiss the appeal of a defendant who, like the defendants in this case, absconds during the pendency of his appeal. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.²² Defendants have not shown that the rationale for this rule is incorrect or that its application has been harmful. The superior court erred by refusing to apply the fugitive dismissal rule to defendants' cases.

3. Application of the fugitive dismissal rule perhaps should be referred to as a forfeiture, rather than a waiver, of the constitutional right to appeal.

In the more recent cases applying the fugitive dismissal rule, this court has stated that a defendant who absconds during the

¹⁹ 105 Wn.2d 92, 711 P.2d 1017 (1986).

²⁰ 84 Wn.2d 608, 528 P.2d 986 (1974).

²¹ 27 Wash. 469, 67 P. 1094 (1902).

²² *State v. Devin*, 158 Wn.2d 157, 168-69, 142 P.3d 599 (2006) (overruling the "abatement ab initio" rule partly because it rests on the erroneous presumption that convicted criminals are innocent and that their pending appeals ultimately would prevail).

pendency of his appeal waives his right to appeal.²³ The City suggests that a more precise term might be that a defendant forfeits his right to appeal. A forfeiture of a constitutional right can result regardless of a defendant's knowledge thereof and irrespective of his intent to relinquish the right.²⁴ For example, in *United States v. McLeod*,²⁵ the court held that a defendant who was abusive and threatening towards his attorney had forfeited his constitutional right to counsel even though he had not been warned of the consequence of such misconduct.

Defendants seem to argue that a constitutional right cannot be forfeited without prior notice of this consequence,²⁶ but one of the cases they rely on for this proposition states to the contrary.²⁷ Defendants reliance on *State v. Fleming*²⁸ is misplaced as a defendant need not take any action in order to assert his right to a jury trial, but the same is not true with respect to asserting the right

²³ *Johnson*, 105 Wn.2d at 97; *Mosley*, 84 Wn.2d at 609.

²⁴ See *Tacoma v. Bishop*, 82 Wn. App. 850, 858-59, 920 P.2d 214 (1996).

²⁵ 53 F.3d 322, 324-26 (11th Cir. 1995).

²⁶ Brief of Respondents, at 29-30.

²⁷ See *Bishop*, 82 Wn. App. at 858-59.

²⁸ 41 Wn. App. 33, 701 P.2d 815 (1985).

to appeal. In *Fleming*, the court concluded that a defendant could not be deprived of his right to a jury trial based on his failure to attend the pretrial conference even if he had been advised of this possible consequence.²⁹ This Court of Appeals decision is plainly inconsistent with cases applying the fugitive dismissal rule, such as *Johnson*, *Mosley* and *Handy*, where an absconding defendant was deprived of the constitutional right to appeal even though he had never been advised of this possible consequence.

As the fugitive dismissal rule applies without regard to the defendant's knowledge that his flight will result in dismissal of his appeal and irrespective of his intent to relinquish the right, it perhaps is more appropriately termed a forfeiture rather than a waiver. Regardless of the terminology used, the superior court erred by refusing to apply this rule to defendants' cases.

B. CONCLUSION.

Based on the foregoing argument, the superior court's decision denying the City of Seattle's motion to dismiss each of

²⁹ *Fleming*, 41 Wn. App. at 36.

these RALJ appeals should be reversed and the cases should be remanded to King County Superior Court for further proceedings.

Respectfully submitted this 23rd day of May, 2007.

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