

66079-9

66079-9

No. 66079-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Hung Van Nguyen,

Appellant.

FILED
COURT OF APPEALS
DIVISION I
2011 SEP 26 AM 11:30

King County Superior Court Cause No. 96-1-02657-0

The Honorable Judge Michael Hayden

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT.....1

I. Mr. Nguyen’s September 15th CrR 7.8 Motion was not properly transferred to the Court of Appeals.....1

II. The sentencing court should have considered Mr. Nguyen’s request for an exceptional sentence.....2

III. Mr. Nguyen’s double jeopardy arguments are properly before the court in this appeal.3

A. Errors in sentencing can be raised at any time.3

B. Mr. Nguyen is constitutionally entitled to appeal the trial court’s judgment and sentence.4

C. Mr. Nguyen must be allowed to appeal constitutional issues associated with the trial court’s decision to impose deadly weapon enhancements.....5

D. The deadly weapon enhancements violate Mr. Nguyen’s double jeopardy rights.....6

CONCLUSION6

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>City of Seattle v. Klein</i> , 161 Wash.2d 554, 166 P.3d 1149 (2007)	4
<i>In re Mulholland</i> , 161 Wash.2d 322, 166 P.3d 677 (2007)	3
<i>In re Quinn</i> , 154 Wash.App. 816, 226 P.3d 208 (2010)	2
<i>State v. Bergstrom</i> , 162 Wash.2d 87, 169 P.3d 816 (2007)	2
<i>State v. Blanchey</i> , 75 Wash.2d 926, 454 P.2d 841 (1969)	2
<i>State v. Ford</i> , 137 Wash.2d 472, 973 P.2d 452 (1999)	3
<i>State v. Grayson</i> , 154 Wash.2d 333, 111 P.3d 1183 (2005)	2
<i>State v. Loux</i> , 69 Wash.2d 855, 420 P.2d 693 (1966)	3
<i>State v. Moen</i> , 129 Wash.2d 535, 919 P.2d 69 (1996)	3
<i>State v. Russell</i> , 171 Wash.2d 118, 249 P.3d 604 (2011)	6

CONSTITUTIONAL PROVISIONS

Wash. Const. Article I, Section 22	4
--	---

OTHER AUTHORITIES

CrR 7.8	1, 2
RAP 2.5	3, 6

ARGUMENT

I. MR. NGUYEN'S SEPTEMBER 15TH CrR 7.8 MOTION WAS NOT PROPERLY TRANSFERRED TO THE COURT OF APPEALS.

Mr. Nguyen filed a CrR 7.8 motion on September 15. CP 47. The parties agree that the trial court was required either to hold a hearing on the motion or to transfer it to the Court of Appeals. Brief of Respondent, p. 6. Respondent claims that the trial judge did transfer the motion. Brief of Respondent, pp. 4-5, citing, *inter alia*, CP 115, 117. If this is correct, then the issue is settled.

However, the record is not so clear. The transfer order cited by Respondent was signed on September 14, 2011—one day *before* Mr. Nguyen's motion was filed. CP 115. It could not address the CrR 7.8 motion filed on September 15. CP 47. Instead, CP 115 is a duplicate of another transfer order sent to the Court of Appeals on September 15, opened under Court of Appeals No. 66084-5-I, and later voluntarily withdrawn by Mr. Nguyen.¹ *See* Order on Transfer (signed and filed September 14, copy to Court of Appeals September 15), Supp. CP; *see also* CP 116.

¹ A review of the ACORDS docket for Court of Appeals No. 66084-5-I confirms that that case was opened on September 23—five days before CP 115 was filed and seven days before a copy of CP 115 was sent to the Court of Appeals.

This duplicate order—CP 115—was apparently sent to the Court of Appeals on September 30th; however, the Court of Appeals (presumably) recognized it as a duplicate, and did not open a new case. Thus Mr. Nguyen’s September 15 CrR 7.8 motion does not appear to have been properly transferred to the Court of Appeals.

II. THE SENTENCING COURT SHOULD HAVE CONSIDERED MR. NGUYEN’S REQUEST FOR AN EXCEPTIONAL SENTENCE.

A trial judge has discretion to consider an offender’s *pro se* arguments, even when the offender is represented by counsel. *In re Quinn*, 154 Wash.App. 816, 841, 226 P.3d 208 (2010) (citing *State v. Bergstrom*, 162 Wash.2d 87, 97, 169 P.3d 816 (2007)). Indeed, “the trial court should make every effort to hear such motions.” *State v. Blanchey*, 75 Wash.2d 926, 938, 454 P.2d 841 (1969).

In this case, Mr. Nguyen asked the court to consider an exceptional sentence. CP 52. The court had the discretion to hear Mr. Nguyen’s *pro se* argument, or to refuse on the grounds that Mr. Nguyen was represented by counsel. *Quinn*, at 841. There is no indication in the record that the court exercised its discretion. *See* RP (9/22/11), *generally*. A failure to exercise discretion is an abuse of discretion. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

Accordingly, Mr. Nguyen's sentence must be vacated, and the case remanded to the trial court for a new sentencing hearing. At the sentencing hearing, the court must decide whether or not to consider Mr. Nguyen's *pro se* arguments. If the court elects to consider those arguments (or if counsel raises the sentencing argument referenced by Mr. Nguyen in his *pro se* motion), it must then exercise discretion and consider whether or not to impose concurrent sentences under *In re Mulholland*, 161 Wash.2d 322, 328, 166 P.3d 677 (2007).

III. MR. NGUYEN'S DOUBLE JEOPARDY ARGUMENTS ARE PROPERLY BEFORE THE COURT IN THIS APPEAL.

A. Errors in sentencing can be raised at any time.

An appellate court has the power and the duty to correct an erroneous or illegal sentence whenever it is discovered. *State v. Ford*, 137 Wash.2d 472, 477-478, 973 P.2d 452 (1999) (citing *State v. Loux*, 69 Wash.2d 855, 858, 420 P.2d 693 (1966), *overruled in part on other grounds by State v. Moen*, 129 Wash.2d 535, 919 P.2d 69 (1996)). This is an exception to the general rule limiting the scope of review. See RAP 2.5. The exception applies even when the claimed error is not jurisdictional or constitutional. *Ford*, at 477-478.

Because Mr. Nguyen challenges an illegal or erroneous sentence, the issue may be reviewed for the first time in this proceeding, even

though it was not addressed in the trial court or in his first appeal. *Id.* Respondent's argument to the contrary is without merit. *See* Brief of Respondent, pp. 12-13.

B. Mr. Nguyen is constitutionally entitled to appeal the trial court's judgment and sentence.

A criminal defendant has a state constitutional right to appeal. Wash. Const. Article I, Section 22; *City of Seattle v. Klein*, 161 Wash.2d 554, 166 P.3d 1149 (2007). This constitutional right should not be diminished merely because a litigant successfully prosecuted an earlier appeal. In this case, Mr. Nguyen successfully appealed from his original judgment and sentence; this successful appeal should not bar him from arguing that his deadly weapon enhancements were imposed in violation of his constitutional rights.

Furthermore, "[t]he right to appeal is not waived unless the State proves that the appellant made a *voluntary, knowing, and intelligent waiver.*" *Klein*, at 561 (emphasis in original). The prosecutor has made no effort to prove that Mr. Nguyen knowingly, intelligently, and voluntarily waived his right to appeal the unconstitutional imposition of deadly weapon enhancements. *See* Brief of Respondent, *generally*. Nor can a waiver be found in the record. *See* RP, *generally*; CP, *generally*.

Finally, although there is a legitimate need for judicial economy in appellate cases, this need cannot overcome a criminal defendant's constitutional right to appeal. In addition, although it would have been preferable for him to raise the issue in his first appeal, at this point, judicial economy favors resolving the issue in the current proceeding. Should the Court refuse to review the errors raised by Mr. Nguyen, the parties will return to court on another occasion to litigate the issue as a separate Personal Restraint Petition.

The Court of Appeals should consider Mr. Nguyen's arguments on their merits. Respondent's argument to the contrary is without merit. *See* Brief of Respondent, pp. 12-13.

C. Mr. Nguyen must be allowed to appeal constitutional issues associated with the trial court's decision to impose deadly weapon enhancements.

In Mr. Nguyen's first appeal, the Court of Appeals reversed the imposition of firearm enhancements and remanded the case to the trial court. CP 22. Mr. Nguyen argued that the court could not impose deadly weapon enhancements; the court overruled Mr. Nguyen's objections and imposed the enhancements. RP (9/22/10) 6-18. Thus, the court considered whether or not to impose the enhancements, and decided in favor of adding them to Mr. Nguyen's sentence. Mr. Nguyen should not be barred from raising constitutional issues that relate to this decision.

Furthermore, the Court has discretion to accept review of any issue. RAP 2.5(a); *see State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.* Even if Mr. Nguyen's arguments should have been raised in his first appeal, the Court should exercise its discretion, accept review of the issue, and address the merits. *Id.*

D. The deadly weapon enhancements violate Mr. Nguyen's double jeopardy rights.

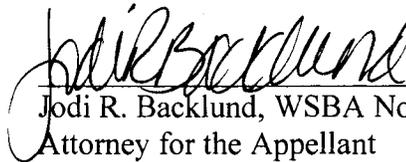
Mr. Nguyen stands on the argument made in his Opening Brief.

CONCLUSION

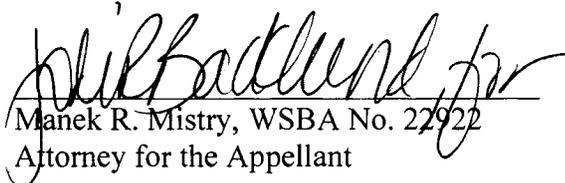
For the foregoing reasons, the lower court's decisions must be reversed and the case remanded for further proceedings.

Respectfully submitted on September 23, 2011.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Hung Van Nguyen, DOC #748016
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

and to:

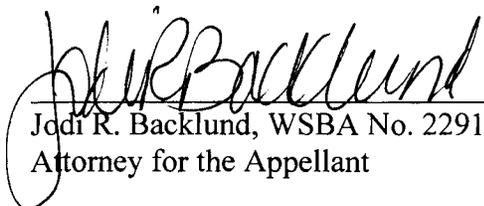
King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

And that I sent the original and one copy to the Court of Appeals, Division I, for filing;

All postage prepaid, on September 23, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 23, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant