

FILED
March 30, 2015
Court of Appeals
Division I
State of Washington

No. 71204-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

This Court should reach the merits of Mr. Gelin’s arguments .. 1

B. CONCLUSION..... 4

TABLE OF AUTHORITIES

Cases

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005) 2

State v. Amos, 147 Wn. App. 217, 195 P.3d 564 (2008) 1

State v. Cheatham, 80 Wn. App. 269, 908 P.2d 381 (1996) 3

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 3

Statutes

RCW 10.73.090(1) 4

RCW 10.73.100(4) 4

Court Rules

RAP 2.2(a)(1) 2

RAP 2.5(a)(3) 3

RAP 2.5(c)(1) 2

A. ARGUMENT IN REPLY

This Court should reach the merits of Mr. Gelin's arguments

The State contends Mr. Gelin's appeal should be dismissed because the amended judgment and sentence is not an "appealable order." SRB at 10-11. This Court should reject that argument because the trial court's amendment of the judgment and sentence amounts to a resentencing and the issuance of a new final order.

In the original judgment and sentence, the trial court imposed an exceptional sentence of 276 months for the first degree assault charge. CP 22. In the amended judgment and sentence, the court imposed an exceptional sentence of 252 months for the first degree assault charge. CP 42. In other words, the court *resentenced* Mr. Gelin to a term of 252 months rather than 276 months. This was more than merely correction of a scrivener's error.

An amended judgment and sentence entered after resentencing is a new "final order" that is appealable as a matter of right. State v. Amos, 147 Wn. App. 217, 195 P.3d 564 (2008). Although "[r]emand to correct a scrivener's error does not result in a new final judgment and sentence, . . . remand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is

appealable as a matter of right.” *Id.*: RAP 2.2(a)(1). Here, the amended judgment and sentence entered after Mr. Gelin’s resentencing is a new final judgment that is appealable as a matter of right.

The State also argues that Mr. Gelin may not challenge the sufficiency of the evidence because he did not raise this challenge in his first appeal, or before the trial court at his resentencing. SRB at 12. But this Court has discretion to reach the issue even though it was not raised in the first appeal. Moreover, it is well-established that a challenge to the sufficiency of the evidence need not be raised before the trial court and may be raised for the first time on appeal.

The Court of Appeals has discretion to review Mr. Gelin’s claims raised in this second appeal. RAP 2.5(c)(1) provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court *may* at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(emphasis added).

By using the term “may,” RAP 2.5(c)(1) is written in discretionary, rather than mandatory terms. *Cf. Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (use of term “may” in RAP 2.5(c)(2) indicates appellate court has discretion to review the propriety

of an earlier decision of the appellate court in the same case). The plain language of the rule affords appellate courts discretion in its application. Id. In the interests of justice, this Court should exercise its discretion and reach Mr. Gelin's claims.

Moreover, in regard to the challenge to the sufficiency of the evidence, it is well-established that such a claim may be raised for the first time on appeal and need not be ruled upon first by the trial court. A challenge to the sufficiency of the evidence may be raised for the first time on appeal because it alleges a manifest error affecting a constitutional right. State v. Cheatham, 80 Wn. App. 269, 271 n.1, 908 P.2d 381 (1996); RAP 2.5(a)(3).

Moreover, a challenge to the sufficiency of the evidence in a criminal case is rarely raised first in the trial court because “[a]ppel is the first time sufficiency of evidence may realistically be raised.” State v. Hickman, 135 Wn.2d 97, 103 n.3., 954 P.2d 900 (1998).

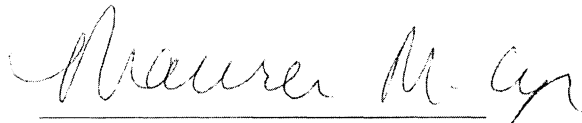
Finally, in the statutes imposing a time limit for filing a collateral attack in a criminal case, the Legislature indicated its intent that an appellate court should reach the merits of a challenge to the sufficiency of the evidence *whenever* such a challenge is raised. Generally, a collateral attack on a judgment and sentence must be filed

within one year after the judgment and sentence becomes final if the judgment and sentence is valid on its face. RCW 10.73.090(1). But that time limit does not apply to a petition or motion that challenges the sufficiency of the evidence. RCW 10.73.100(4). In other words, such a challenge may be raised at any time. Thus, this Court should reach the merits of Mr. Gelin's challenge to the sufficiency of the evidence.

B. CONCLUSION

The trial court resentenced Mr. Gelin when it changed his exceptional sentence for the first degree assault charge from 276 months to 252 months. Thus, the amended judgment and sentence is a final judgment that may be appealed as a matter of right. In the interests of justice, this Court should exercise its discretion and reach the merits of the issues raised in the appeal.

Respectfully submitted this 30th day of March, 2015.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

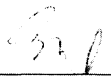
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71204-7-I
v.)	
)	
MILORD GELIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] DEBORAH DWYER, DPA [paoappellateunitmail@kingcounty.gov] [deborah.dwyer@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	() () (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
<p>[X] MILORD GELIN 343765 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584</p>	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710