

Sep 29, 2016, 4:37 pm

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93182-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARLOS VALDEZ,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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ORIGINAL

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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 no error occurred in the conviction and sentencing of the Appellant.

III. ISSUE

Did the Court of Appeals err in declining to review a ruling not yet made at the time the notice of appeal was filed?

IV. STATEMENT OF THE CASE

The Defendant Carlos Valdez was charged with murder in the first degree and pled guilty to murder in the second degree of Yesica Olivos in Walla Walla, Washington with a firearm enhancement. CP 1-14. The prosecutor agreed to recommend a sentence of 183 months. CP 8.

After the sentence was imposed, the Defendant filed a pro se motion to withdraw his guilty plea, citing CrR 4.2, and arguing that the prosecutor was required to enthusiastically support the plea agreement, that the factual basis for the plea was inadequate, that the presentencing

reporter was unqualified to opine on the Defendant's lack of remorse, and that his counsel had a conflict due to having represented a defense witness on a previous occasion. CP 40-43. The State responded. CP 50-63. The Defendant did not note his motion for hearing. Instead, he filed a letter asking to "be informed if my motion [to withdraw guilty plea] has been granted or denied." CP 49.

The Defendant filed two notices of appeal "of the Judgment and Sentence entered on February 9, 2015;" the notices are dated February 24, 2015 and March 16, 2015. CP 44-47. After he filed the notices of appeal, on March 23, 2015, the court denied the Defendant's CrR 4.2 motion. CP 64-65; III RP¹ 20. The Defendant has not filed any appeal seeking review of this ruling.

In this appeal of his conviction and sentence, the Defendant through his attorney raised several claims, including asking the court of appeals to review the lower court's post-conviction ruling on the CrR 4.2 motion. Appellant's Brief at 19-22. The court declined to do so:

RAP 7.2(e) authorizes trial courts to consider postjudgment motions after an appeal has been accepted. Further, RAP 7.2(e) generally requires any party wishing to appeal the postjudgment order to timely file a separate notice of appeal. *See* RAP 5.1(f) (A party wishing to appeal a trial

¹ III RP refers to the transcript for March 23, 2015, the hearing on the Defendant's Motion to Vacate Guilty Plea.

court decision entered pursuant to RAP 7.2 must initiate a separate review); *see also Glass v. Windsor Navigation Co.*, 81 Wn.2d 726, 730, 504 P.2d 1135 (1973) (“A premature notice of appeal is totally ineffective, not merely defective.”). Further, RAP 5.3(a)(3) specifies that a notice of appeal must “designate the decision or part of decision which the party wants reviewed” and, in general, this court will not review an order that was not designated in the notice of appeal. *See* RAP 2.4(a); *see also Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 378, 46 P.3d 789 (2002).

Here, Mr. Valdez failed to properly appeal the March 23, 2015 order denying his motion to withdraw his guilty plea. His premature notices of appeal that did not identify the yet to be entered order were ineffective in this regard. We therefore decline to review the March 23, 2015 order.

Unpublished Opinion at 11-12.

The Defendant also challenged this CrR 4.2 ruling in his Statement of Additional Grounds, arguing that his plea was not knowingly made. He claimed he thought he was pleading to *complicity* to second degree murder, but was actually sentenced to second degree murder. The court noted again that this was procedurally improper, as well as lacking in merit.

... as indicated above, he did not properly appeal the order denying his postjudgment motion to withdraw his guilty plea. Moreover, his argument is unpersuasive. It is well established that “[t]here is no separate crime of being an accomplice; accomplice liability is principal liability.” *State v. Toomey*, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984); *see* RCW 9A.08.020(1). An accomplice has the same standard range sentence as a principal under the Sentencing Reform Act of 1981, chapter 9.94A RCW, with

variations only coming into play when determining exceptional sentences. *See e.g., State v. Moore*, 73 Wn. App. 789, 798-99, 871 P.2d 642 (1994). The lack of any identifiable conviction and sentencing consequences between principal liability and accomplice liability supports our conclusions that Mr. Valdez has failed to demonstrate “extraordinary circumstances” under CrR 7.8(b), let alone “manifest injustice” under CrR 4.2(f).

Unpublished Opinion at 14-15.

In this petition for review, the Defendant continues to challenge the denial of the CrR 4.2 motion, this time adopting his counsel’s argument about procedure under CrR 7.8.

V. ARGUMENT

A. NO RAP 13.4(b) CONSIDERATION PERMITS REVIEW.

A petition for review will only be accepted if the Court of Appeals’ decision is in conflict with a decision of the Court of Appeals or Supreme Court, if there is a significant constitutional question, or if there is an issue of substantial public interest. RAP 13.4(b). The Defendant identifies no such consideration, nor is any present.

The Court of Appeals properly identified that a party may not be heard on a decision that the party did not appeal from, did not identify in the notice of appeal, and was not even existent at the time of the appeal.

B. THE MARCH 23rd ORDER ON THE CrR 4.2 MOTION IS NOT THE PROPER SUBJECT OF THIS APPEAL.

The Defendant challenges the lower court's decision of his CrR 4.2 motion. BOA at 19-20. It is not the proper subject of this appeal.

A notice of appeal must designate the decision, which the party wants reviewed. RAP 5.3(a)(3). This notice of appeal seeks review "of the Judgment and Sentence entered on February 9, 2015." CP 47. It does not seek review of a decision that is neither named in the notice nor even existent at the time of the filing of the notice.

The notice of appeal was filed *before* the decision on the CrR 4.2 motion was entered on March 23, 2015. But a notice of appeal must be filed "*after* the entry of the decision of the trial court which the party filing the notice wants reviewed." RAP 5.2(a) (emphasis added).

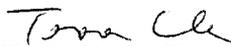
The matter of the CrR 4.2 motion was not before the court of appeals. The court made no error in refusing to address a matter not properly before it.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: September 29, 2016.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Carlos Valdez #379475 1830 Eagle Crest Way Clallam Bay, WA 98326</p>	<p>A copy of this brief was sent via U.S. Mail 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 September 29, 2016, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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Please accept the attached response for filing.

Teresa Chen
Deputy Prosecuting Attorney

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Counsel:

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