

FILED

E MAY 14 2018

WASHINGTON STATE
SUPREME COURT

Court of Appeal

Number 76714-3

95844-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

BOBBY DARRELL COLBERT,
Appellant.

PETITION FOR REVIEW

Bobby D. Colbert
Pro Se Appellant
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2018 APR 30 PM 12:00

A. Identity of Appellant

Bobby Colbert asks this Court to review the Court of Appeals decision terminating review of his direct appeal designated in Part B.

B. Court of Appeals Decision

The Court of Appeals opinion provides no authority to support finding the issues "wholly frivolous." A copy of the decision is in Appendix A. A copy of the order denying the motion for reconsideration is in Appendix B. (Appendix B is premature.)

C. Issues Presented for Review

1. Was The Charging Information Defective For Failing To State An Essential Element Of The Charged Offense ?
2. Is Colbert Entitled To An Application Of A New Rule Of Criminal Procedure ?
3. Was Colbert's Right To Be Present At A Resentencing Hearing Violated ?

D. Statement of the Case

Bobby Colbert was convicted in 2005, following a jury trial, of one count of second degree rape. The court sentenced Colbert to a maximum term of life in prison and a minimum term of 136 months.

Colbert's conviction was affirmed on his first direct appeal. (See State v. Colbert, 134 Wn. App. 1007 (2006)). On June 8, 2007, the Court of Appeals Division One issued its mandate.

On February 9, 2017, Colbert filed a postjudgment Motion To Resentence arguing that his judgment and sentence was invalid based on the fact his maximum term was 10 years on the face of the document.

The trial court elected to exercise its discretion by: 1) retaining the motion, 2) reviewing the claims, 3) granting the relief sought, and 4) signing an Order Modifying Judgment And Sentence. Colbert timely appealed.

E. Argument Why Review Should Be Accepted

Issue One

Was The Charging Information In Colbert's Case Fatally Defective As It Failed To State An Essential Element Of The Charged Offense?

The Court of Appeals found this issue as "wholly frivolous" without providing authority to support the decision.

In this case, the trial court imposed life as the maximum term of confinement. The charging information is void of any notification of an exceptional sentence outside the standard range of 102-136 months. The trial court applied RCW 9A.712 unconstitutionally to the facts of Colbert's case.

The Court of Appeals decision conflicts with:

U.S. Const. amend. 6 ; Wash. Const. art. 1, sec. 22 ; Blakely v. Washington, 542 U.S. 296 (2004) ; Apprendi v. New Jersey, 530 U.S. 466; and CrR 2.1(a)(1).

Issue Two

Does The Status Change In The Procedural Posture Of Colbert's Case Entitle Him To An Application Of A New Rule Of Criminal Procedure ?

The Court of Appeals found this issue as "wholly frivolous" without providing authority to support the decision.

The trial court's Order Modifying Judgment and Sentence fell within RAP 2.2(a). Colbert timely appealed as a matter of right. Division One Court of Appeals accepted review.

The 2007 mandate issued in Colbert's first appeal was destroyed and no mandate has disposed of this direct appeal. RAP 12.7 The new rule announced in State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014), applies now.

The Court of Appeals decision conflicts with:

Jimenez v. Quaterman, 555 U.S. 113, 129 S.Ct. 681, 172 L.Ed. 2d 475 (2009) addressing restoring the pendency of a case.

Issue Three

Was Colbert's Right To Be Present At A Resentencing Hearing Violated By The Trial Court ?

The Court of Appeals found this issue as "wholly frivolous" without providing authority to support the decision. The trial court elected to exercise its judicial discretion by :

- 1) retaining the motion rather than transferring it to the Court of Appeals for consideration as a personal restraint petition (RCW 10.73.090);
- 2) reviewing the motion which essentially means the authority to consider a matter ;
- 3) granting the relief which is beyond the authority of the State or Clerk thereby being contradictory to "scrivener's error" ; and
- 4) signing the Order Modifying Judgment And Sentence under judicial capacity.

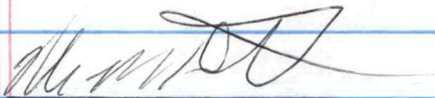
The Court of Appeals opinion conflicts with :

- U.S. Const. amend. 14 ;
- Wash. Const. art. 1, sec. 22 ;
- CrR 3.4 (a).

F. Conclusion

Appellant Colbert respectfully requests this Court to grant :

- 1) Remand to the superior court with an order to hold a resentencing hearing ; or
- 2) Remand to the superior court with an order to conduct a new trial ; or
- 3) Remand to the Court of Appeals with an order to issue an opinion supported by authority ;
- 4) Or any other relief this Court deems necessary.



April 26, 2018

Bobby D. Colbert
Pro Se Appellant
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BOBBY D. COLBERT,)
)
 Appellant.)

No. 76714-3
DIVISION ONE
UNPUBLISHED OPINION
FILED: April 16, 2018

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2018 APR 16 AM 8:46

PER CURIAM. Bobby Colbert appeals superior court orders denying his request to be transported for a hearing and correcting a scrivener's error in his judgment and sentence. Colbert's court-appointed attorney has filed a motion to withdraw on the ground that there is no basis for a good faith argument on review. Pursuant to State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the motion to withdraw must

[1] be accompanied by a brief referring to anything in the record that might arguably support the appeal. [2] A copy of counsel's brief should be furnished the indigent and [3] time allowed him to raise any points that he chooses; [4] the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Theobald, 78 Wn.2d at 185 (quoting Anders, 386 U.S. at 744).

This procedure has been followed. Colbert's counsel on appeal filed a brief with the motion to withdraw. Colbert was served with a copy of the brief and informed of

his right to file a statement of additional grounds for review. He filed a pro se statement of additional grounds.

The facts are accurately set forth in counsel's brief in support of the motion to withdraw. The court has reviewed the briefs filed in this court and has independently reviewed the entire record. The court specifically considered the following potential issues raised by counsel:

1. Did the trial court err in treating an erroneous maximum sentence on the face of Colbert's judgment and sentence as a scrivener's error?
2. Did the trial court err in addressing the scrivener's error without Colbert being present?

The court also considered issues raised by Colbert in his statement of additional grounds:

1. Was the information fatally defective for failing to state all the essential elements of the offense?
2. Is Colbert entitled to a new trial under State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014) when that case is not retroactive, In re Colbert, 186 Wn.2d 614, 380 P.2d 504 (2016), Colbert's direct appeal has long since been mandated, and the current appeal is from the correction of a scrivener's error?

The potential issues are wholly frivolous. Colbert's motion for new counsel and supplemental briefing is denied. Counsel's motion to withdraw is granted. The

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challenged orders are affirmed.

For the Court:

Mann, J.

Appelwick, J.

Beach, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	No. 76714-3-1
Respondent,)	
)	DIVISION ONE
v.)	
)	ORDER DENYING MOTION
BOBBY D. COLBERT,)	FOR RECONSIDERATION
)	
Appellant.)	
_____)	

The appellant, Bobby D. Colbert, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge