

No. 63797-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAMEN SEAN BACHMAN,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

MR. BACHMAN MUST BE RESENTENCED AT A
NEW HEARING AT WHICH HE IS ENTITLED TO
THE ASSISTANCE OF COUNSEL

1. The State's claim that Mr. Bachman was not entitled to
legal representation because he was not resentenced is erroneous.

Despite the State's claim to the contrary, the facts of the case
demonstrate that Mr. Bachman was resentenced.

Without warrant the State claims that "the Supreme Court
did not order [Mr. Bachman] be 'resentenced' anew on remand or
void his original sentence." SRB at 6. First, the State's position is
contrary to the position it took in the Supreme Court. As the
commissioner noted, the State *conceded* that Mr. Bachman's
misdemeanor sentence was erroneous and the State "call[ed] for
Mr. Bachman to be resentenced on his harassment conviction." CP
30. The State further "acknowledge[d] that Mr. Bachman must be
resentenced to reflect that his sentence for harassment is to be
served in jail." CP 30.

Second, the commissioner plainly voided the misdemeanor
sentence and ordered Mr. Bachman be resentenced on that
conviction. The commissioner ordered the State to file an amended
judgment and sentence "resentencing [Bachman] to county jail on

his harassment conviction." CP 31. Further, the commissioner's order imposing that remedy was correct. Where a trial court erroneously orders a defendant to serve a misdemeanor sentence in the custody of the Department of Corrections, the original sentence is void and the remedy is to reverse the sentence. State v. Besio, 80 Wn. App. 426, 429-30, 432, 907 P.2d 1220 (1995). That is what the commissioner did here.

As argued in the opening brief, an appellate court's reversal and remand of a sentence "wipe[s] the slate clean" and the trial court has discretion on remand to reconsider the sentence it earlier imposed. State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) (citing State v. Harrison, 148 Wn.2d 550, 562-62, 61 P.3d 1104 (2003) ("the original sentence no longer exists as a final judgment on the merits.")); see also AOB at 7-8 (and cases cited therein). Thus, when the commissioner reversed and remanded the misdemeanor sentence, the trial court had discretion on remand to reconsider the sentence originally imposed. Contrary to the State's assertions, therefore, the proceeding was not simply "ministerial in nature." SRB at 4. Instead, the proceeding was a full resentencing hearing and a "critical stage" at which Mr. Bachman was entitled to the assistance of counsel.

Consistent with this analysis, the court and the parties treated the proceeding as if it were a full resentencing hearing. In addition to requiring Mr. Bachman be present, the court invited Mr. Bachman to raise issues and present argument regarding both his convictions and his sentence. See, e.g., RP 7, 8.

Moreover, in regard to the sentences for the three felony convictions, the trial court was not required to impose the same sentences that the original trial court had imposed in its oral ruling, and therefore the court's actions in regard to the felony sentences were not merely "ministerial" either. Contrary to the State's assertions, the Supreme Court commissioner's order did not constrain the judge's discretion. The commissioner merely ordered the State to "file an amended judgment and sentence specifying Mr. Bachman's sentence on each of his convictions." CP 30. The commissioner did not state that a particular sentence must be imposed. The commissioner even noted that Mr. Bachman was to be "resentenc[ed]" on those convictions. CP 31 n.1.

In addition, because the three defective felony sentences were entered orally, they were not binding on the trial court at resentencing. See, e.g., State v. Hescok, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999); State v. Mallory, 69 Wn.2d 532, 533-34,

419 P.2d 324 (1966) (noting that oral opinions "cannot be considered as the basis for the trial court's judgment and sentence. A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment."). Hence the trial court had free will to impose any proper sentence at resentencing—making this a critical stage. State v. Davenport, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007) (citing Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968) ("a critical stage is one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case.")).

2. Mr. Bachman was not represented by counsel at the resentencing hearing, requiring reversal. The State contends that because a lawyer, who was not representing Mr. Bachman, was present at resentencing, Mr. Bachman received adequate representation. SRB at 8-9. But the lawyer, Mr. Komorowski, made clear that he was not Mr. Bachman's lawyer, stating, "I've not been formally appointed by the Court, and I think actually for purposes of this hearing, Mr. Bachman is proceeding pro se." RP 4-5. Since the court did not appoint Mr. Komorowski, he cannot be

considered either Mr. Bachman's counsel or standby counsel. At best he acted as a legal advisor. But from the record, it appears doubtful that Mr. Komorowski provided any significant advice. See, e.g., RP 8 (Mr. Bachman was surprised to learn that his motion for new trial required a written statement).

Moreover, even if Mr. Komorowski could be considered "standby counsel," his presence at the resentencing hearing was not sufficient to satisfy Mr. Bachman's Sixth Amendment rights. The fundamental right to be represented by counsel at resentencing is met only by the court appointment of a full-fledged defense attorney—not a standby counsel or a legal advisor. United States v. Taylor, 933 F.2d 307, 312 (5th Cir. 1991) ("Given the limited role that a standby attorney plays, we think it clear that the assistance of standby counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel required by the Sixth Amendment.").

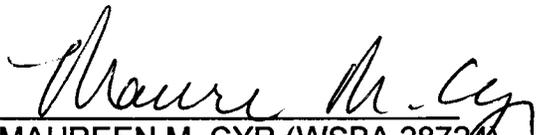
As argued in the opening brief, "[a] complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (citing United States v. Cronic, 466 U.S. 648, 658-59, 659 n.2, 104 S.Ct. 2039, 80 L.Ed.2d

657 (1984)). Denial of counsel at a critical stage is a structural error and requires reversal without a demonstration of prejudice. Heddrick, 166 Wn.2d at 910 n.9 (citing Bell v. Cone, 535 U.S. 685, 696 n.3, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)). Because Mr. Bachman was denied the assistance of counsel at a critical stage of the proceedings, he is entitled to a new sentencing hearing at which he has the right to the assistance of counsel.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Bachman's sentence must be reversed and remanded for resentencing at a hearing at which he has the right to the assistance of a court-appointed attorney.

Respectfully submitted this 23rd day of July 2010.


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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 63797-5-I
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DAMEN BACHMAN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JUNE, 2010, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JUNE, 2010.

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