

No. 63797-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DAMEN SEAN BACHMAN,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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MAUREEN M. CYR  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

Damen Bachman was denied his state and federal constitutional right to the assistance of counsel at his resentencing hearing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant has a state and federal constitutional right to the assistance of counsel at every "critical stage" of the proceedings, including resentencing. Was Mr. Bachman denied his constitutional right to the assistance of counsel, where he represented himself at the resentencing hearing, and he did not knowingly, intelligently and voluntarily waive his right to counsel?

C. STATEMENT OF THE CASE

Damen Bachman was convicted in 2003 following a jury trial in Whatcom County Superior Court of one count of first-degree manslaughter, one count of first-degree burglary, one count of second-degree assault, and one count of misdemeanor harassment. CP 78. After a sentencing hearing, the Honorable David Nichols entered a judgment and sentence. CP 33, 78.

Two fatal defects appeared on the face of the judgment and sentence. First, although the judgment and sentence listed all of the crimes of which Mr. Bachman was convicted, it identified the

offender score, seriousness level, and standard sentence range only for the manslaughter conviction, the most serious of the four charges. CP 29-30, 78-79. It also imposed only an undifferentiated prison sentence of 303 months, which was the standard-range sentence for the manslaughter conviction plus the three consecutive firearm enhancements, but designated no sentence for the other three convictions. CP 30, 82. This was a fatal defect, as the sentences for all of a defendant's convictions must appear on the judgment and sentence form. CP 30; see RCW 9.94A.505(2)(a)(i) (when a person is convicted of a felony, trial court must impose sentence within standard range unless other term of commitment applies); CrR 7.3 (judgment must set forth sentence).

Second, the judge sentenced Mr. Bachman to serve his misdemeanor harassment sentence in prison. CP 30, 82. But a sentence imposed for a gross misdemeanor must be served in county jail. CP 30; RCW 9A.20.020; RCW 9A.20.021(2). Where the law provides a place of imprisonment, the court cannot direct a different place, and if it does so the sentence is void. State v. Besio, 80 Wn. App. 426, 429-30, 907 P.2d 1220 (1995).

Mr. Bachman filed a personal restraint petition (PRP) directly in the Washington Supreme Court.<sup>1</sup> He argued, among other things, that his judgment and sentence was invalid on its face because it did not set forth the sentences for each of the convictions, and because it imposed a prison sentence for the misdemeanor conviction. CP 29-30. The State conceded error and acknowledged that Mr. Bachman must be resentenced. CP 29-30. The Supreme Court Commissioner agreed the judgment and sentence was fatally defective and remanded for resentencing. CP 30-31.

A resentencing hearing was held on July 8, 2009, in Whatcom County Superior Court before the Honorable Charles Snyder. RP 2.<sup>2</sup> Mr. Bachman was present at the hearing but was not represented by counsel. At Mr. Bachman's request, attorney Jon Komorowski appeared as standby counsel. RP 5. Mr. Komorowski explained to the court he did not represent Mr.

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<sup>1</sup> Mr. Bachman had earlier filed a direct appeal raising a different issue and this Court affirmed in an unpublished decision. State v. Bachman, No. 52874-2-I, slip op. (Wn. App. Jan. 31, 2005); CP 73-77. A mandate was issued May 11, 2005. CP 72. Mr. Bachman had also filed an earlier PRP in the Court of Appeals raising several unrelated issues. CP 29. The Court of Appeals dismissed that PRP and the Supreme Court denied review. CP 29; Supreme Court No. 79393-0 (Dec. 26. 2006).

<sup>2</sup> This brief cites only one volume of verbatim report of proceedings, from the resentencing hearing on July 8, 2009, which will be cited as "RP."

Bachman and believed Mr. Bachman was not entitled to the assistance of a court-appointed attorney:

Let me just indicate for the record that Mr. Bachman has been proceeding pro se on the personal restraint petition that brings us before the Court this morning.

As the Court is aware, a person doesn't have the right to counsel at public expense on a personal restraint petition unless counsel is specifically appointed, or the court would order an evidentiary hearing.

Nonetheless, Mr. Bachman requested for instance that I assist him in this matter. I've not been formally appointed by the Court, and I think actually for purposes of this hearing, Mr. Bachman is proceeding pro se. However, I've agreed to assist him in this matter.

RP 4-5. Neither the judge nor the prosecutor disputed Mr. Komorowski's mistaken assumption that Mr. Bachman was not entitled to court-appointed counsel.

Judge Snyder imposed a new sentence for each of the individual felony convictions, at the top end of the standard range for each count, and a new sentence for the misdemeanor harassment conviction. RP 13. The judge also ordered that the misdemeanor sentence be served in the county jail, with credit for time served. RP 13. A new judgment and sentence was filed reflecting the judge's decisions. CP 15-23. Mr. Bachman filed a timely appeal. CP 2-14.

D. ARGUMENT

MR. BACHMAN WAS DENIED HIS STATE AND FEDERAL  
CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF  
COUNSEL AT THE RESENTENCING HEARING

1. Indigent defendants have a constitutional right to court-  
appointed counsel at resentencing proceedings. A criminal  
defendant has a state and federal constitutional right to the  
assistance of counsel at every "critical stage" of the proceedings.  
Const. art. 1, § 22; U.S. Const. amend. 6 ("In all criminal  
prosecutions, the accused shall enjoy the right . . . to have the  
Assistance of Counsel for his defence"); State ex rel. Juckett v.  
Evergreen Dist. Court, 100 Wn.2d 824, 828, 675 P.2d 599 (1984).  
Sentencing is a "critical stage" at which the constitutional right to  
counsel applies. Gardner v. Florida, 430 U.S. 348, 358, 97 S.Ct.  
1197, 51 L.Ed.2d 393 (1977); State v. Robinson, 153 Wn.2d 689,  
694, 107 P.3d 90 (2005).

The right to counsel at sentencing is also specifically  
provided by court rule. CrR 3.1(a) ("The right to a lawyer shall  
extend to all criminal proceedings for offenses punishable by loss of  
liberty regardless of their denomination as felonies, misdemeanors,  
or otherwise"); CrR 3.1(b)(2) ("A lawyer shall be provided at every

stage of the proceedings, including sentencing, appeal, and post-conviction review").

The right to counsel at sentencing applies whenever the trial court considers any matter in connection with the defendant's sentence, which includes resentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

The right to counsel guaranteed by the Sixth Amendment is the same for indigent and financially able criminal defendants. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); State v. A.N.J., \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 81236-5, Jan. 28, 2010). The right of an indigent defendant to court-appointed counsel is also provided by court rule in Washington. See CrR 3.1(d)(1) ("Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial financial hardship to the person or to the person's family.").

In sum, an indigent criminal defendant has a constitutional right to the assistance of a court-appointed attorney at any resentencing proceeding.

2. Mr. Bachman had a constitutional right to the assistance of court-appointed counsel at the July 8, 2009, resentencing hearing. As the Supreme Court Commissioner ruled, Mr. Bachman's judgment and sentence was fatally defective and he was entitled to be resentenced. CP 29-31. The sentence imposed for the misdemeanor harassment conviction was void, because the court had directed that Mr. Bachman serve the sentence in prison. See Besio, 80 Wn. App. at 429-30. Also, the court had imposed a sentence for only the first degree manslaughter conviction and not the other three convictions. CP 78-87. The Supreme Court Commissioner recognized the fatal defects in the sentence and reversed and remanded for resentencing. CP 29-31. On remand, the trial court held a hearing, imposed a new sentence, and entered a new judgment and sentence. CP 15-26. Yet Mr. Bachman was not represented by counsel at the hearing. Because Mr. Bachman had a constitutional right to the assistance of a court-appointed attorney at the resentencing hearing, and did not waive that right, he is entitled to a new sentencing hearing at which he is represented by court-appointed counsel.

The July 8, 2009, hearing was a full resentencing hearing at which Mr. Bachman had the right to the assistance of court-

appointed counsel. When an appellate court reverses a sentence, there is no longer a final sentence, and resentencing is an entirely new sentencing proceeding. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 950, 162 P.3d 413 (2007); State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009); State v. McNeal, 142 Wn. App. 777, 786-87, 787 n.13, 175 P.3d 1139 (2008). "'[R]everse' and 'vacate' have the same definition and effect in this context—the finality of the judgment is destroyed." State v. Harrison, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003).

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 Harrison, 148 Wn.2d at 561-62 ("the original sentence no longer exists as a final judgment on the merits")). The defendant is therefore entitled to a full adversarial proceeding at which he may raise new issues pertaining to his sentence. Toney, 149 Wn. App. at 792.

Because a trial court has discretion to reconsider a sentence that is reversed on appeal, resentencing is a "critical stage" at which the right to counsel attaches. 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"); City of Bothell v. Gutschmidt, 78 Wn. App. 654, 662-63, 898 P.2d 864 (1995) ("[w]here the act to be done involves the exercise of discretion or judgment, performance of that duty is not merely ministerial"). The defendant has a constitutional right to be present with counsel at the new sentencing proceeding. Rupe, 108 Wn.2d at 741; Davenport, 140 Wn. App. at 932.

Here, Mr. Bachman's original sentence was void and he was therefore entitled to an entirely new sentencing proceeding. The trial court had discretion on remand to reconsider the sentence it earlier imposed. White, 123 Wn. App. at 114; Harrison, 148 Wn.2d at 561-62. The court also had legal authority to impose a more lenient sentence than it actually imposed. See Golden v. Newsome, 755 F.2d 1478, 1483 n.9 (11th Cir. 1985) (where sentencing court has legal authority to impose a more lenient sentence than it actually did, imposition of sentence is more than "merely a ministerial ceremony" and denial of right to counsel is presumptively prejudicial). The resentencing hearing was therefore

a "critical stage" at which Mr. Bachman had the right to the assistance of a court-appointed attorney.

3. Mr. Bachman is entitled to a new sentencing hearing at which he has the right to the assistance of court-appointed counsel.

The right to counsel does not depend upon a request by the defendant. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). Although the defendant may waive the right to counsel, the waiver must be knowing, intelligent and voluntary. State v. Tetzlaff, 75 Wn.2d 649, 652, 453 P.2d 638 (1969). The State must prove an intentional relinquishment of a known right or privilege. Brewer, 430 U.S. at 404 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Courts indulge in every reasonable presumption against waiver. Brewer, 430 U.S. at 404; In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). This strict standard applies equally to an alleged waiver of the right to counsel at trial or at a critical stage of the proceedings. Brewer, 430 U.S. at 404.

Here, Mr. Bachman did not knowingly, intelligently and voluntarily waive his right to counsel. A defendant's waiver of the right to counsel must be clear from the record. Acrey, 103 Wn.2d

at 211. The record here shows that standby counsel, Jon Komorowski, was under the erroneous impression that Mr. Bachman did not *have* a right to the assistance of a court-appointed attorney at the hearing. RP 4-5. That assumption was not corrected by either the trial court or the prosecutor. Nothing in the record suggests that Mr. Bachman was aware he had a right to a court-appointed attorney, or that he wished to waive that right.

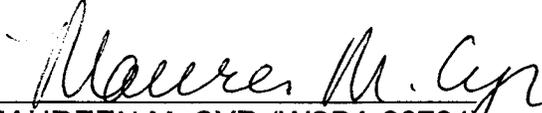
"A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (citing United States v. Cronin, 466 U.S. 648, 658-59, 659 n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Denial of counsel at a critical stage is 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)).

Here, Mr. Bachman was denied his constitutional right to the assistance of counsel at resentencing, a "critical stage" of the proceedings. The error is presumed prejudicial and requires automatic reversal of the sentence and remand for a new sentencing hearing.

E. CONCLUSION

Mr. Bachman was denied his constitutional right to the assistance of a court-appointed attorney at his resentencing hearing, a "critical stage" of the proceedings. The error is structural and requires reversal of the sentence and remand for a new sentencing hearing, at which he has the right to the assistance of a court-appointed attorney.

Respectfully submitted this 5th day of February 2010.

  
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,	)	
	)	
v.	)	NO. 63797-5-I
	)	
DAMEN BACHMAN,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING 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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| <input checked="" type="checkbox"/> DAVID MCEACHRAN, DPA<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> DAMEN BACHMAN<br>861426<br>SCCC<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520                           | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2010.

X \_\_\_\_\_ 