

No. 63797-5-I

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

STATE OF WASHINGTON, Respondent,

vs.

DAMEN SEAN BACHMAN, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the hearing below constitutes a “critical” stage in the criminal proceedings against Bachman such that he was entitled to the formal appointment of counsel or was merely a ministerial act to correct Bachman’s sentence pursuant to the supreme courts Order Conditionally dismissing Bachman’s personal restraint petition.
2. Whether this court should reject Bachman’s assertion that he was denied his constitutional right to the assistance of counsel where Bachman’s trial attorney appeared and actively assisted Bachman in the hearing below.

B. FACTS

1. Facts

Bachman was convicted by jury of first degree manslaughter, first degree burglary, second degree assault and misdemeanor harassment. CP 15-26. At a 2003 sentencing hearing the trial court ordered, in part, Bachman be sentenced to the top of the standard range sentence for each of his convictions, which included a 303 months sentence for Bachman’s manslaughter conviction. CP 29-30; RP 11, 13 (7/8/09).

Bachman’s convictions were affirmed on direct appeal and his judgment and sentence became final in May 2005. Bachman then filed a personal restraint in this Court claiming he did not receive a fair trial because he wore a shock belt during trial for security reasons. This Court found no merit to Bachman’s claims and denied his request for relief. A

petition for review in the Washington Supreme Court of this Court's decision denying Bachman's personal restraint petition was later denied. See, CP 29-31.

Bachman subsequently filed another personal restraint petition directly with the Washington Supreme Court in which he again asserted his right to a fair trial was violated because he wore a shock belt during trial. CP 29-31. Additionally, Bachman claimed for the first time that his judgment and sentence was facially defective because the judgment and sentence failed to delineate the offender score, seriousness level, standard range and sentence for each of his convictions except for the 303 months corresponding to his manslaughter conviction. Bachman also complained that the judgment and sentence appeared to sentence him to prison time for his misdemeanor harassment conviction instead of county jail time as required by statute. Id. The State Supreme Court dismissed Bachman's PRP on the condition that the State "obtain and file an amended judgment and sentence specifying Bachman's sentence on each of his convictions and resentencing him to county jail for his harassment conviction" as required by RCW 9A.20.020, 021(2).

In July 2009 the State filed and obtained the requisite amended judgment and sentence pursuant to the Supreme Court's directive to

correct Bachman's sentence. CP 15-26. Bachman represented to the court at the hearing below that he was appearing pro se but also appeared and was provided legal assistance from his trial attorney Jon Komorowski. See Supp CP ____ (sub nom 156); RP 5. Mr. Komorowski informed the trial court at the hearing below that while he was not formally appointed, he had agreed to assist Bachman with the hearing. RP 5. Komorowski then proceeded to address the trial court with several issues Bachman wished to be considered, including a request for a new trial. RP 7. The trial court declined to address any of Bachman's issues except those pertaining to the request to correct the judgment and sentence. Thereafter, the trial court amended Bachman's judgment and sentence as directed by the Supreme Court to correctly reflect the offender score, sentence range and sentence for each of Bachman's convictions as orally pronounced by the sentencing judge in 2003, and to reflect that Bachman's sentence for his misdemeanor conviction was served in the county jail as required by statute. RP 13, CP 15-26. Bachman timely appeals. CP 2-14.

C. ARGUMENT

1. **Bachman was not entitled to the assistance of counsel below because the trial court's hearing was ministerial in nature to correct Bachman's judgment and sentence. Even if this hearing were characterized as a "critical stage" in the criminal proceedings against Bachman, the record reflects he had the assistance of counsel for the hearing below and therefore was not deprived of his constitutional right to counsel.**

Bachman contends he was denied his state and federal constitutional right to the assistance of counsel when the trial court amended his judgment and sentence below without formal appointment of counsel. Bachman was not entitled to counsel however, because the hearing below was not a "critical" stage in proceedings but rather was ministerial in nature set for the limited purpose for the trial court to correct Bachman's judgment and sentence.

Pursuant to both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at every "critical stage" of litigation. U.S. Const. Amend VI, Wash. Const. Art. 1, §22, State v. Everybodytalksabout, 161 Wn.2d 702, 708, 166 P.3d 693 (2007). A stage is critical if it presents a possibility of prejudice to the defendant. State v. Harrell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). A critical stage is one "in which the defendant's rights may be lost, defenses waived,

privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009), *citing* State v. Agtuca, 12 Wn.App. 402, 404, 529 P.2d 1159 (1974).

Sentencing is generally considered a “critical stage” at which the constitutional right to counsel attaches. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); CrR 3.1 (b)(2). Resentencing can be a critical stage of the proceedings *if* the resentencing involves “more than the court’s performing a ministerial act.” State v. Davenport, 140 Wn.App. 925, 932, 167 P.2d 1221 (2007), *review denied*, 163 Wn.2d 1041 (2008).

Denial of the assistance of counsel at a critical stage is “legally presumed to result in prejudice.” Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts only presume that a defendant was denied his constitutional right to counsel, however, when counsel is “either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” United States v. Cronin, 466 U.S. 648, 658-59, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Appellate court’s review alleged constitutional violations de novo. State v. Castro, 141 Wn.App. 485, 490, 170 P.3d 78 (2007).

In 2003, the trial court pronounced Bachman was to serve the high end of the standard range for each of his four convictions. Bachman's written judgment and sentence however, only reflected the offender score, sentence range and 303 month sentence for Bachman's most serious offense, the manslaughter conviction. After Bachman complained about this in his second personal restraint petition and complained that he was sentenced to prison time instead of county time for his misdemeanor conviction, contrary to statute, the Supreme Court ordered "the State obtain and file an amended judgment and sentence specifying Mr. Bachman's sentence on each of his convictions (along with the seriousness level, offender score and standard range for each conviction), resentencing him to county jail on his harassment conviction, and specifying the credit for time served in jail prior to sentencing." CP 29-31.

Contrary to Bachman's representations, the Supreme Court did not order he be "resentenced" anew on remand or void his original sentence. See, Br. of App. at 3, 9 contrast to, CP 29-30. The Supreme Court instead required the trial court to make ministerial corrections to Bachman's judgment and sentence to reflect the offender score, sentence range and sentences for each of his convictions (as orally pronounced at Bachman's

2003 sentencing hearing) and to reflect that Bachman's misdemeanor sentence be served in the county jail as required by statute. The appellate opinion determines the scope of the remand order. State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009).

In this particular case, the Supreme Court's directive was quite narrow and specifically instructed the parties and the trial court regarding what corrections were to be made to Bachman's judgment and sentence. Thus, the hearing on remand was little more than a matter of housekeeping to clean up, so to speak, Bachman's judgment and sentence to reflect the complete sentence as originally pronounced in 2003 and to reflect that Bachman served his misdemeanor incarceration in the county jail, as required by statute. Bachman faced no possible prejudice from the proceedings because the scope of the hearing was limited, the Supreme Court's directive specific and the issues already litigated in the appellate court. The Supreme Court's ruling conditionally dismissing Bachman's personal restraint petition implicitly gave the trial court no discretion to consider additional issues or reconsider Bachman's sentences anew below. Instead, the Court's order only gave direction to correct Bachman's sentence; corrections ordered at Bachman's request pursuant to his

personal restraint petition. Thus, the nature of the hearing below was not “critical” or adversarial in nature such that the assistance of counsel would be necessary to safeguard Bachman’s rights. Bachman is entitled to the assistance of counsel only at “critical” stages of criminal proceedings against him, not every or any stage of proceedings.

Because the hearing below was not a “critical” proceeding, Bachman was not entitled to the formal appointment of counsel. *See, Garrison v. Rhay*, 75 Wn.2d 98, 449 P.2d 92 (1968) (denial of counsel at hearing on motion to correct sentence did not void proceeding because hearing not “critical” stage); *see also, United States v. Truscello*, 168 F.3d 61, 63-64 (2nd Cir.) (1999) (trial court has authority to correct a sentence at any time where the defendant was present for oral sentencing and where the oral and written sentences do not conflict). Bachman’s contention that he had a constitutional right to counsel at the hearing below should therefore be rejected.

Even if this hearing were characterized as a “critical” stage in the proceedings because the trial court amended Bachman’s judgment and sentence on his misdemeanor conviction to reflect, as required by statute,

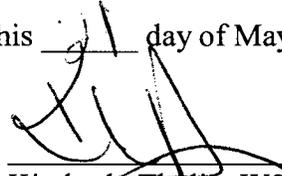
that his sentence be served in the county jail and not with the department of corrections, the record reflects Bachman had the benefit and assistance of his trial counsel, Jon Komorowski at the hearing.

Jon Komorowski, appeared at the hearing below, informed the court he had agreed to assist Bachman and then advocated for him throughout the proceeding. Bachman cannot therefore demonstrate from this record that his attorney was absent or prevented from attending this hearing or assisting him in a meaningful manner. See, United States v. Cronin, 466 U.S. at 658-59. To the contrary, the record demonstrates Komorowski, while not formally appointed to represent Bachman, nonetheless appeared, advocated and reasonably assisted Bachman throughout the hearing. Thus, even if this hearing constituted a critical stage in criminal proceedings, Bachman had the assistance of counsel as contemplated by the Washington state and Federal constitutions. Bachman's contention that he was deprived of counsel, simply because the court did not formally appoint Komorowski to assist him below is disingenuous and without merit.

D. CONCLUSION

The State respectfully requests that this court deny Bachman's request for relief.

Respectfully submitted this 21 day of May 2010.

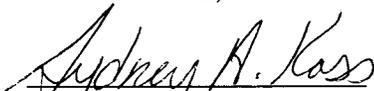


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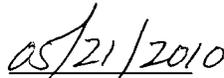
CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Maureen Cyr, addressed as follows:

Washington Appellate project
1511 Third Avenue, Suite 701
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Legal Assistant



Date