

NO. 64297-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SCOTT FREEBURG,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR.

1. The court denied Scott Freeburg his right to due process of law by refusing to give him the opportunity to consult with his newly appointed attorney before conducting a sentencing hearing.

2. The court denied Freeburg his right to the effective assistance of counsel as mandated by the Sixth Amendment and Article I, section 22 of the Washington Constitution, as well as by the requirements of CrR 3.1, when it refused to allow him the opportunity to confer with counsel about issues he wished to present to the court.

3. The court abused its discretion by categorically refusing to consider Freeburg's challenges to his sentence based on the court's erroneous belief that it lacked authority to consider his claims.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The rights to due process of law and the meaningful assistance of counsel require that a defendant in a criminal case have the opportunity to consult with an attorney and to be heard. The court refused to let Freeburg have any time to meet with his newly appointed attorney so that he could receive legal advice about issues he wanted to raise at a sentencing hearing. Did the

court's refusal to permit Freeburg to meet his lawyer and confer about the case deny him his rights to counsel and due process of law?

2. A trial court has discretion to consider arguments at a resentencing hearing as long as those arguments have not been already ruled upon by the appellate court. The judge presiding at Freeburg's resentencing hearing believed he had no authority to consider any issues pertinent to the judgment and sentence beyond the limited issue for which the case was remanded. Where the court misunderstood its discretion to consider additional issues and refused to exercise any discretion based on its mistaken belief that it had no authority to do so, did the court abuse its discretion?

C. STATEMENT OF THE CASE.

On September 23, 2009, Scott Freeburg appeared in court before Judge Richard Eadie for a resentencing hearing, represented by an attorney whom he had never met and who had never worked on his case. 9/23/09RP 3. His newly appointed attorney, Carlos Gonzales, told the court he had been unable to meet Freeburg or speak to him over the telephone due to restrictions the jail imposed on Freeburg as an inmate transferred from the state Department of Corrections (DOC). Id. Gonzales

explained that Freeburg had legal issues he wanted his lawyer to present to the court but “I have not heard them,” and asked for a chance to speak to Freeburg so he could understand the issues Freeburg wanted his attorney to raise. Id.

The court denied the request to give Freeburg any time to meet with his lawyer and amended the judgment and sentence to correct the sentencing error for which the case had been remanded. Id. at 11. The judge told Freeburg that he had no authority to entertain any arguments that were not plainly dictated by the Court of Appeals mandate and therefore, regardless of the merits of his requests, he was unable to consider them. Id.

Judge Eadie had not previously presided over the case, which had been heard by the now-retired Judge Charles Mertel¹ on prior occasions. See CP 122, 90, 75, 43. The complicated procedural history of the case is set forth below, as it is pertinent to the potential array of remaining legal issues notwithstanding the age of the case and the litigation that has already occurred:

In 1998, Freeburg was convicted of first degree felony murder, second degree assault, and first degree burglary, each

¹ Natalie Singer, “Longtime Superior Court judge says it’s time to retire,” Seattle Times (Dec. 28, 2007), available at: http://seattletimes.nwsourc.com/html/politics/2004095920_mertel28m.html.

while armed with a deadly weapon, based on an incident that occurred in 1994, and he received a “three strikes” sentence of life without the possibility of parole under the Persistent Offender Accountability Act. CP 17-34 (State v. Freeburg, 105 Wn.App. 492, 496, 20 P.3d 989 (2001) (COA No. 44294-5-I)). His convictions were overturned on appeal and the case remanded for a new trial. CP 18.

He was convicted after retrial but this Court ruled Freeburg was not a persistent offender and was improperly sentenced to life without the possibility of parole. CP 44-45 (State v. Freeburg, 120 Wn.App. 192, 84 P.3d 292, rev. denied, 152 Wn.2d 1022 (2004) (COA 50545-9-I)).

At a resentencing hearing in 2005, the court imposed a standard range sentence but also imposed three statutorily unauthorized firearm enhancements. CP 95, 100 (COA 55822-6-I, at 10 (unpublished)). This Court remanded the case for resentencing, striking the wholly unauthorized firearm enhancement attached to the first degree murder conviction and imposing deadly weapon enhancements rather than firearm enhancements for the remaining offenses. CP 100. The court also found Freeburg’s attorney’s failure to object to the standard range

constituted a waiver of arguments regarding the accuracy of the offender score calculation and did not address Freeburg's claim that his offender score was incorrect. CP 95.

At the 2007 resentencing, the trial court imposed two deadly weapon enhancements and rejected Freeburg's contention that his standard range was not properly calculated, finding that it had already decided the issue. CP 125 (COA 60999-8-I, at 3 (unpublished)). But because the sentencing court imposed an incorrect term of community custody, this Court again ordered an additional hearing to strike the improperly ordered term, leading to the 2009 sentencing hearing in which Freeburg was barred from consulting with his attorney and presenting arguments after such consultation. CP 121,123.

D. ARGUMENT.

THE COURT DENIED FREEBURG HIS RIGHTS TO
DUE PROCESS OF LAW AND THE MEANINGFUL
ASSISTANCE OF COUNSEL WHEN IT REFUSED
TO LET HIM CONFER WITH COUNSEL AND RAISE
CHALLENGES TO HIS SENTENCE

1. Freeburg has the right to counsel and due process of law at all critical stages of trial proceedings. "The right of effective counsel and the right to review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty." State v. A.N.J.,

Wn.2d __, 2010 WL 314512, *1 (Jan. 28, 2010). Also implicit in the constitutional guarantee of due process of law is that the court must protect the “requirement of fair play” at a sentencing hearing. Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed.2d 1690 (1948); see also State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992) (“The due process clause requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be reliable”); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22.

Sentencing is a critical stage at which the right to meaningful assistance of counsel applies. United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); U.S. amend. 6; Wash. Const. art. I, § 22. One linchpin of effective assistance of counsel is that the attorney understand the issues in the case. Under RPC 1.1, “competent representation requires . . . thoroughness and preparation reasonably necessary for the representation.” The attorney is required to consult with the client about the case and to help the client make informed decisions. A.N.J., 2010 WL 314512, *8-9. Offering confidential legal advice and advocacy is the quintessential requirement of assistance of counsel. Id. Even when appointment of counsel required only by

court rules, counsel's appointment serves as "an integral part of the judicial process." State v. Templeton, 148 Wn.2d 193, 216, 59 P.3d 623 (2002). Likewise, even when a client plans to plead guilty, the attorney is not absolved from responsibility to investigate factual and legal issues and advise the client, because "[a] criminal defense lawyer owes a duty to defend even a guilty client." A.N.J., at *9.

CrR 3.1 sets forth the procedure the court must follow to ensure it complies with the right to counsel, including that the right to counsel "shall accrue as soon as feasible," and "shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review." CrR 3.1(b)(1), (2); Templeton, 148 Wn.2d at 216-17. The court rule requiring the appointment of counsel may not be disregarded or rendered meaningless by prohibiting the attorney from actually representing the client. See Templeton, 148 Wn.2d at 216-17 (discussing court's inherent power to craft rule mandating appointment of counsel).

The degree of attorney-client communication and investigation required by the constitution varies depending on the issues and facts of the case. In the case at bar, defense counsel was appointed to represent Freeburg for a hearing to correct a

sentencing error, and the issue prompting the resentencing was not particularly complex. On the other hand, defense counsel was not assigned for superfluous reasons and his presence was not supposed to be illusory. Cronic, 466 U.S. at 654-55 (“The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”). The constitution guarantees a competent attorney, not simply an appointed attorney. Id. at 655. Freeburg had a number of legal issues he wanted to discuss with his lawyer and present to the court, but the judge refused to let the attorney meet with Freeburg so he could be apprised of the issues Freeburg believed were important to the legality of the punishment imposed. Accordingly, the court refused to grant defense counsel the opportunity to provide adequate assistance of counsel as required by the constitution, court rule, and rules of professional conduct.

Immediately upon his appearance in court on September 23, 2009, Freeburg’s newly appointed attorney advised the court that he had not met with Freeburg and had not been able to speak to him due to constraints placed on Freeburg by the King County Jail. 9/23/09RP 3. Because he was prevented from meeting with Freeburg, he had “not heard” the issues Freeburg wanted to

discuss with him. 9/23/09RP 3. He had not had an opportunity to review, discuss, or research them. Id. at 3-4. Freeburg himself asked the court for at least one or two days so his attorney could present the arguments that he wished to present. Id. at 11. The court refused to give Freeburg any additional time to consult with his attorney or prepare any arguments. Id.

Freeburg also explained that as soon as the hearing concluded, he would be immediately returned to DOC custody and would leave the King County Jail. 9/23/09RP 13. He would have no further opportunity to appear in court unless the court allowed him some additional time. The court said it was constrained by the Court of Appeals decision and could not consider any additional issues Freeburg wanted to present, regardless of their merits. Id. at 11.

2. Freeburg asked for time to confer with his brand new lawyer before presenting challenges to the fairness and accuracy of his judgment and sentence. The court perceived itself as wholly constrained in its decision-making authority by the limited issue upon which the Court of Appeals remanded the case. 9/23/09RP 11. The court told Freeburg that it lacked power to consider any other aspect of his case beyond the correcting the

term of community custody. Id. The court misunderstood its authority to exercise discretion in this case due to changes that had occurred in the convictions and sentences in the course of Freeburg's appeal.

Under RAP 2.5(c), a trial court may revisit an issue on remand that was not decided in an earlier appeal. State v. Kilgore, 167 Wn.2d 28, 38, 216 P.3d 393 (2009). The judge has the authority to exercise its discretion if it chooses to do so. Id.

A judge's failure to appreciate that it has discretion or a categorical refusal to exercise discretion constitute an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). For example, when a court does not consider a request for an exceptional sentence below the standard range, the defendant may appeal from the court's failure to exercise discretion: "it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence." State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1992).

"Indeed, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," thus a court's

incorrect understanding of its discretionary authority is itself error. State v. Quismondo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). The remedy for the court's failure to exercise discretion is a new hearing, "leav[ing] it in the able hands of the trial judge on remand to consider" the discretionary relief requested. Grayson, 154 Wn.2d at 343.

Without letting Freeburg meet or speak to his recently-assigned attorney, the court refused to consider claims Freeburg wanted to raise about his convictions and sentence. The court denied Freeburg his right to consult with counsel and raise issues because it believed it had no authority to entertain any requests for relief, even though the court had authority to consider Freeburg's issues if it wished to do so.

Acting in an *ad hoc pro se* fashion after the court refused to allow him time to meet with his lawyer, Freeburg himself tried to explain some issues he wished to raise as part of his plea for time to meet with his lawyer. 9/23/09RP 5-11. He tried to explain the complicated procedural history of the case and that the accuracy of the sentence had not been properly determined. He asked for one

or two days so he could talk to his lawyer and present his arguments properly. Id. at 11. The judge insisted that it was “limited to instructions I get from the Court of Appeals,” and even if the Court of Appeals was wrong, “I’m not of the level that says so.” Id. at 10-11.

Denying Freeburg the opportunity to consult with his lawyer and present the issues he wished the court to consider denied him the right to the assistance of counsel and the opportunity to be heard as required by the right to due process of law.

3. Freeburg had potentially meritorious complaints about the legality of his judgment and was entitled to consult with his attorney. Freeburg came to court with a list of issues he wanted to talk to his attorney about so his attorney could present any potentially meritorious arguments to the court. 9/23/09RP 4. After the court refused to consider any of Freeburg’s issues, Freeburg tried to explain some of his complaints *pro se*, without having the benefit of the advice of counsel that he desired. Id. at 3, 5-8, 9-11.

Freeburg explained that at trial, he had been charged with and found guilty of firearm enhancements but those enhancements were not authorized by statute and never should have been presented to the jury. He argued that the remedy of imposing

deadly weapon enhancements in lieu of the improperly found firearm enhancements violated his right to receive only the punishment expressly authorized by the jury's verdict. 9/23/09RP 6; see State v. Williams-Walker, _ Wn.2d __, 2010 WL 118211, *5 (Jan. 14, 2010); State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). Additionally, he told the court that the improperly charged multiple firearm enhancements tainted his trial, a contention which finds in the jury's focus on the firearm enhancements in its deliberations rather than the substantive charges. CP 57-58 (Court of Appeals decision explains jury entered verdicts on firearm enhancements the day before deciding the charged offenses and reached guilty verdicts on the charged offenses only the judge pressured further deliberations).

Freeburg told the court that he was entitled to a fair and accurate sentence, disputing the accuracy of his offender score and referencing RCW 9.94A.530(2), which provides, "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." He explained that the issues had not in fact been litigated in the past and that he was entitled to

litigate them, or at least present argument on them so the court could revisit questions that had not been determined. 9/23/09RP 7-8.

He asked “this court for a continuance so that my attorney could brief this because these are serious issues of prejudicial effect.” Id. at 7.

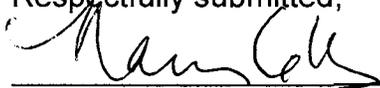
The trial court refused to consider Freeburg’s claims even though they were offered having a chance to meet with his lawyer to properly present his arguments. The court’s erroneous belief that it had no authority to rule on any claims of error and its refusal to allow Freeburg the opportunity to consult with counsel require reversal for a new hearing.

E. CONCLUSION.

Mr. Freeburg respectfully requests this Court vacate his sentence and remand his case for a new sentencing proceeding, at which he is provided the effective assistance of counsel and a meaningful opportunity to be heard.

DATED this 26th day of February 2010.

Respectfully submitted,



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

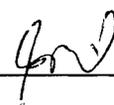
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64297-9-I
v.)	
)	
SCOTT FREEBURG,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH 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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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF FEBRUARY, 2010.

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