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No. 67935-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DONALD LAVERNE HAND,

Appellant.

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REPLY BRIEF

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## I. INTRODUCTION

The state does not dispute the fact that Mr. Hand's sentencing condition barring "possession of pornography" was unconstitutionally vague. Response, pp. 10-11 (citing *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008)).

And the state does not dispute that Mr. Hand can raise the unconstitutionality of this sentencing condition for the first time on appeal. See *State v. Bahl*, 164 Wn.2d 739, 744-45 (challenge to condition of community custody as unconstitutionally vague can be raised for first time on appeal); *State v. Sims*, 171 Wn.2d 436, 444 n.3, 256 P.3d 285, 290 n.3 (2011) (same).

The state makes procedural arguments against granting Mr. Hand relief, instead. It asserts that the remedy for Mr. Hand's probation revocation that was indisputably based in part on violation of that unconstitutional condition is not reversal – because there was another ground that could have supported the revocation. The state, however, cites no controlling authority for using this standard to decide whether reversal is required. Instead, it cites to a 1980 Court of Appeals decision. Response, pp. 12-13. But a 1999 Supreme Court decision -- *State v. Dahl*, 139 Wn.2d 678, 689, 990 P.2d 396 (1999) – is both more recent and more

authoritative. And *Dahl* says that when probation revocation is “based, at least in part,” on an unconstitutional condition like the one in this case, then the remedy is reversal. That Supreme Court decision controls. And there does not seem to be any doubt that Mr. Hand’s probation revocation was “based, at least in part,” on the unconstitutional condition – since that’s what the lower court said it was basing its decision on. Section II.

The state’s only other argument is the one that was already addressed in Mr. Hand’s motion to reinstate his appeal, and then in his reply. Mr. Hand argued that he was entitled to reinstatement of the right to appeal because it was a right of constitutional magnitude – and under the standard governing the constitutional right to appeal, an appeal relinquished without a knowing, intelligent, and voluntary waiver is an appeal that must be reinstated. The state responded that there is no state constitutional right to appeal the revocation of probation, only a state court rule right – so the right is less important and governed by less protective standards. The state argued, specifically, that denial of the court rule right to appeal – by denying the defendant information about that right to appeal and about the pros and cons of exercising that right – has no remedy. The state repeats that argument in its

recent Response, in which it reiterates that violation of the RAP 2.2 right to appeal has no remedy under the constitution, no remedy under RAP 18.8(b), and no remedy under *Seattle v. Braggs*, 41 Wn. App. 646, 705 P.2d 303 (1985). Response, pp. 5-6. In short, the state calls this a right without a remedy. The state errs; if the right has no remedy it is meaningless, as this Court itself explained in its still-controlling decision in *Braggs*. Section III.

**II. IN 1999, THE SUPREME COURT RULED THAT THE REMEDY IS REVERSAL WHEN PROBATION REVOCATION IS “BASED, AT LEAST IN PART,” ON VIOLATION OF AN UNCONSTITUTIONAL CONDITION LIKE THIS ONE; THERE IS NO CONTROLLING AUTHORITY TO SUPPORT THE STATE’S CALL FOR AFFIRMANCE, OR CLARIFICATION, INSTEAD**

The state argues that the remedy is not reversal and remand but instead affirmance, or reversal for “clarification,” because there was another possible ground to support revocation. Response, pp. 10-14.

This proposed remedy, however, contradicts controlling authority. The most recent, controlling, Supreme Court authority on this point is *Dahl*, 139 Wn.2d at 682. In that case, the question was whether the identical due process clause violation formed “at least [a] part” of the basis for the trial court’s probation revocation

decision. The Washington Supreme Court ruled that if the answer is yes, then the error is not harmless. *Dahl*, 139 Wn.2d at 689 (“Because the revocation appears to have been *based, at least in part*, on consideration of the exposure incident, the due process error was not harmless. Dahl is therefore entitled to a new hearing.”) (emphasis added).

The transcript of Mr. Hand’s case shows that the revocation of his probation in this case was “based, at least in part, on consideration” of the violation of the unconstitutional condition. The state does not dispute this point.

Thus, the fact that the state can cite to a 1980 Court of Appeals decision that purports to use a more forgiving remedy, Response p. 12, is irrelevant. The state Supreme Court’s 1999 analysis in *Dahl* must control. And under that controlling state Supreme Court precedent, the proper remedy is for the probation revocation order to be reversed.

We further note that the appellate court decision upon which the state relies – *State v. Dowell*, 26 Wn. App. 629, 632, 613 P.2d 197, *review denied*, 94 Wn.2d 1018 (1980) – was not invariably applied anyway, even pre-*Dahl*. Other appellate court decisions had held that where probation revocation is based on two grounds,

and one of the grounds for that revocation decision was reversed, the remedy is reversal and remand for the trial court to hold another revocation hearing and exercise its discretion anew. *E.g.*, *State v. Escalona*, 49 Wn. App. 251, 256-57, 742 P.2d 190 (1987) (“Although the cases cited by *Escalona* holding that a new hearing is required involve situations in which the revocation was based solely on the new conviction, see *State v. Dowell*, 26 Wn. App. 629, 632 ..., where, as here, the only other violation was the technical one of failing to obtain his probation officer’s permission to change his residence, we find that remand is also appropriate. The ... trial court should be given the opportunity to determine if the facts as altered by our decision still warrant its conclusion. ... We therefore reverse the conviction and remand for both a new trial and revocation hearing.”) (citations omitted). Once again, this confirms that the Supreme Court’s 1999 decision in *Dahl*, rather than the appellate court’s 1980 decision in *Dowell*, controls.

**III. THE STATE ADMITS THAT MR. HAND HAD A RIGHT TO APPEAL, AND DOES NOT DISPUTE THAT HE WAS DENIED THAT RIGHT; ITS ARGUMENT THAT IT IS A RIGHT WITHOUT A REMEDY CONTRADICTS RAP 18.8, BRAGGS, THE CONSTITUTIONAL RIGHT TO APPEAL, AND COMMON SENSE**

As discussed above, the state’s only other argument is that

there is no state constitutional right to appeal the revocation of probation, only a state court rule right – so the right is less important and governed by less protective standards.

Mr. Hand responded to that argument in his Reply re Motion to Enlarge Time to File Notice of Appeal. In that Reply, he explained that there is state and federal authority supporting the argument in favor of a constitutional right to appeal probation revocation proceedings resulting in imposition of sentence. *Id.*, pp. 6-9. Mr. Hand also responded to that argument by explaining that even if the right to appeal is guaranteed only by a Supreme Court rule, it must still be enforced – and that RAP 18.8 and *Seattle v. Braggs* already provided the framework for enforcement.

The state now argues that denial of that court-rule right to appeal – by denying the defendant information about that right to appeal and about the pros and cons of exercising that right – has no remedy. The state asserts that violation of the RAP 2.2 right to appeal has no remedy under the constitution, no remedy under RAP 18.8(b), and no remedy under *Braggs*, 41 Wn. App. 646. Response, pp. 5-6. In short, the state calls this a right without a remedy.

The state errs. If the right has no remedy it is meaningless, as this Court itself explained in its still-controlling decision in *Braggs*. The *Braggs* Court explained that failure to explain the right to appeal and its time limits to the defendant was error, even if it was not constitutional error, and that it warranted the remedy of belated reinstated of appeal. The state argues that this holding of *Braggs* must be limited to situations where there is a court rule specifically mandating that the court tell the defendant that he or she has a right to appeal.

The state is correct that in *Braggs*, there was such a court rule and it was violated. But the holding of *Braggs* – that violation of the right to appeal necessitates a remedy – was not written in such limited terms. Instead, this Court based its holding in *Braggs* on the common sense notion that every right must have a remedy: “even if the state constitution does not require a voluntary, knowing and intelligent waiver of the right to appeal, a question that we do not decide, the right of appeal granted by a statute and court rule is meaningless unless the defendant is properly informed in compliance with a court rule, as revealed by the record, of the right to appeal as well as the time and method for taking an appeal.” *Braggs*, 41 Wn. App. at 650-51 (footnote deleted).

This is the broader rule for which *Braggs* has been cited: "The right of appeal granted by statute and court rule is meaningless, however, unless the defendant is advised of his right to appeal a conviction as well as the time and method for commencing an appeal. *Seattle v. Braggs*, 41 Wn. App. 646, 650 ...." *State v. Lewis*, 42 Wn. App. 789, 793, 715 P.2d 137 (1986).

The state poses the hypothetical problem that a ruling in favor of Mr. Hand will lead to reinstated appeals in all sorts of cases where the defendant did not receive advice on the record of the right to appeal a probation revocation decision. But that's not all that happened in Mr. Hand's case. In addition, as Mr. Hand's unrebutted declaration conclusively establishes, in this case Mr. Hand also lacked actual knowledge of his right to appeal; in this case, Mr. Hand's lawyer failed to discuss with him the right to appeal; in this case, Mr. Hand's lawyer failed to discuss with him any potential issues on appeal; and in this case, there was a meritorious appealable issue that trial counsel failed to identify. The state's fear that a decision permitting Mr. Hand to appeal under these circumstances, would permit all defendants whose probation had been revoked to appeal under all circumstances, is therefore overblown. It would allow only defendants whose probation had

been revoked on a potentially unconstitutional basis to exercise their right to appeal their unconstitutionally imposed sentence – when they proved that they were deprived of the right to appeal the imposition of sentence due to failure of the court, the state, and defense counsel to provide advice of the right to appeal, when they proved that they were deprived of advice of potential issues to be raised on appeal, and when they proved that this led to a situation where they were actually deprived of the ability to raise a meritorious issue.

That seems like exactly the class of people who should have the right to appeal: those who have suffered a violation of a constitutional and/or court rule right, who have suffered prejudice due to that violation, and who merely seek a remedy for the violation of that right.

#### **IV. CONCLUSION**

For the foregoing reasons, the order revoking Mr. Hand's probation should be reversed.

DATED this 21<sup>st</sup> day of August, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21<sup>st</sup> day of August, 2012, a copy of the APPELLANT'S REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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