

COA No. 69650-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SCHREIB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable Michael Rickert
The Honorable David Needy

REPLY BRIEF

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WASHINGTON APPELLATE PROJECT
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STATE OF WASHINGTON
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A. REPLY ARGUMENT

1. THE STATE FAILS TO SHOW THAT MR. SCHREIB MAY NOT WITHDRAW HIS PLEA.

(a). *In re Personal Restraint of Quinn* is inapposite - an erroneous community custody advisement in the plea form is indeed misinformation regarding a direct consequence of pleading guilty.

Community custody is one of the direct consequences of pleading guilty as to which the defendant must be correctly advised before he admits criminal guilt and thus waives the trial to which he is entitled. See, e.g., *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); *State v. Ross*, 129 Wn.2d 279, 285-86, 916 P.2d 405 (1996).

Contrary to the State's arguments, the cogent and succinct discussion found in this Court of Appeals' decision in *In re Personal Restraint of Quinn* is inapposite to the present case, because that issue involved a defendant who plead guilty to a crime with a sentence of imprisonment that was so long including up to Life, that it essentially precluded the serving of **any** community custody period. In those circumstances, this Court briefly entertained and analyzed the State's contention that community custody, for Quinn, was a mere "collateral" consequence of his plea. *In re Personal Restraint of Quinn*, 154 Wn. App. 816, 836, 226 P.3d 208 (2010).

Here, young Mr. Schreib entered a guilty plea based on a plea form that stated he faced 98-130 months imprisonment. Regarding community custody, the plea form, on one page, said that the court could impose 18 -- 36 months community custody, and on another page said that the community custody range was 36 -- 48 months. CP 17-19.¹

The fact that Mr. Schreib, at his later sentencing, was generously given a chance at completing a SSOSA suspended sentence (which by its terms includes no 'post-prison' community custody segment), does not retroactively make community custody a non-direct or collateral consequence of his plea entry, or somehow erase the multiple, and conflicting, misadvisements in his plea form.²

¹ Specifically, Mr. Schreib was advised at one point in the plea form that the community custody range was 18-36 months, and at another juncture that it was 36-48 months. The statement of defendant on plea of guilty states:

IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

* * *

COMMUNITY CUSTODY RANGE: 18 – 36 months.

CP 17. Yet then, paragraph (f)(ii) of Mr. Schreib's plea statement addressing his category of offense states that the community custody range is 36-48 months. CP 18-19.

(b). Mr. Schreib's guilty plea states a variety of different community custody periods as sentencing consequences of the plea, none of which the State can show to be correct, and the State cannot show that the two periods, together, are correct.

The State has not showed in its Response Brief that either of the two conflicting advisements was correct, or explained how (even if one was correct), how two conflicting advisements could possibly equal one correct advisement.

The State asserts that the correct community custody term at the time of Mr. Schreib's guilty plea was 36-48 months. BOR, at p. 9. Assuming *arguendo* that this is correct, the State is therefore effectively **agreeing** that the 18-36 month advisement, appearing on a *different* page of the plea form, was wrong.

Mr. Schreib was told at the time of his plea that he could legally ask the judge at sentencing for as little as 18 months community custody. He was therefore misadvised if the State now asserts the correct range at the time of the plea was 36-48 months, or if it asserts that the correct term is a straight 36 months.

² And of course, in Quinn, this Court ultimately concluded that Mr. Quinn was entitled to withdraw his plea because of the incorrect community custody advisement, irrespective of whether community custody was a direct, or a collateral, consequence. Quinn, at 837 ("Accordingly, even though there remains some uncertainty as to whether Quinn will ever be released from prison and placed on community custody, the same principles that underlie a defendant's right to seek withdrawal of a guilty plea "when he [or she] was not informed of mandatory community placement" apply in this context.") (citing Mendoza).

If the correct advisement was instead 18-36 months, then Mr. Schreib was misadvised, because the plea stated that the community custody range was 36-48 months. State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); State v. Moon, 108 Wn. App. 59, 61-64, 29 P.3d 734 (2001).

If the community custody period is now a straight 36 months, then Mr. Schreib was once again misadvised when he was told his range, if he plead guilty, was 18 to 36 months. Or that it was 36 to 48 months.

The State in its Response Brief disagrees with none of the foregoing. Instead, the State argues in reliance on Quinn that community custody is not a direct consequence of a guilty plea in the first place, so therefore any misadvisement (the State contends) is simply irrelevant and Mr. Schreib cannot withdraw his plea. This argument must fail because community custody was plainly a direct consequence of Mr. Schreib's guilty plea. And, in any event, this Court in Quinn ultimately concluded that Mr. Quinn was entitled to withdraw his plea as involuntary, irrespective of whether community custody was a direct or a collateral consequence. Quinn, at 837. Mr. Schreib may withdraw his plea.

2. THIS COURT SHOULD ALLOW THE LATE NOTICE OF DIRECT APPEAL.

Respondent State of Washington, in answering Mr. Schreib's original motion to file a notice of appeal, conceded the following facts, expressly or by acknowledgment:

1. Mr. Schreib has a constitutional right to direct appeal of his judgment and sentence, guaranteed by Const. art. 1, § 22.
2. Mr. Schreib has never had any such direct appeal of his judgment and sentence.
3. The trial court that issued Mr. Schreib's judgment and sentence violated CrR 7.2(b), by failing to advise him of the time limits for filing a notice of appeal on the record.
4. The judgment and sentence also contains no written advisement of the time limits for a notice of appeal.

A criminal direct appeal may not be dismissed as untimely unless the State proves that Rodney Schreib knowingly and voluntarily intended to waive his right to direct appeal. State v. Devlin, 158 Wn.2d 157, 166, 142 P.3d 599 (2006). In this case, Mr. Schreib was never advised, orally or in writing, of the time limits for filing a notice of direct appeal from his judgment and sentence. As argued in Mr. Schreib's motion and reply, these circumstances in fairness warrant an order allowing the filing of the late notice of direct appeal. Although finality is very much a rightly valued policy of the Washington courts, as stated in RAP 18.8(b), where the judgment

was one entered in a criminal case, the Supreme Court has stated that the strict application of filing deadlines expressed by Rule 18.8 must be balanced against the defendant's state constitutional right to appeal a criminal judgment. State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Thus, for example, in Sweet, the Supreme Court stated that the State may show a defendant waived his right to appeal if, "in addition to showing strict compliance with CrR 7.1(b) [now CrR 7.2(b)] by reading appeal rights to a defendant," the State further shows that the circumstances "reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right." (Emphasis added.) Sweet, 90 Wn.2d at 286.

In the present case, there was no compliance with CrR 7.2(b). Mr. Schreib's failure to have filed a direct appeal flowed directly therefrom, rather than being a relinquishment of a known right on his part. Where Mr. Schreib was never advised of the time limits for direct appeal, as required by CrR 7.2(b) Mr. Schreib's state constitutional right to appeal should prevail, and this Court should extend the time for filing of Mr. Schreib's notice of direct appeal. Wash. Const. art. I, § 22 (amend. 10).

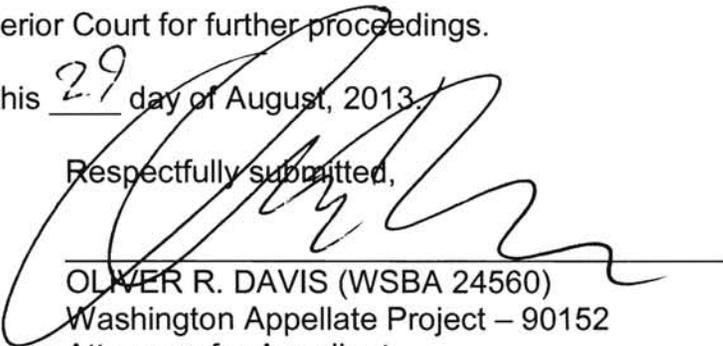
On the timeliness question, Mr. Schreib relies also on his arguments in his Motion to extend time to file notice of appeal under RAP 18.8, and in his Reply to the State's Answer.

B. CONCLUSION

For the reasons stated herein and in the Appellant's Opening Brief, Mr. Schreib respectfully requests that this Court remand his case to the Superior Court for further proceedings.

DATED this 29 day of August, 2013.

Respectfully submitted,



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Washington Appellate Project – 90152
Attorneys for Appellant

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STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 69650-5-I
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RODNEY SCHREIB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2013, 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:

[X] ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) U.S. MAIL () HAND DELIVERY () _____
--	---

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2013.

X _____ 

APPELLATE
CLERK
AUG 29 11:45 AM '13