

No. 35433-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS W. RICHEY,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2007 MAR 28 PM 4:50

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

The Honorable D. Gary Steiner

COURT OF APPEALS
STATE OF WASHINGTON
07 MAR 28 PM 1:52
BY: [Signature]
DEPUTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Because the trial court failed to comply with the mandatory requirements of CrR 7.2(b) at the time of sentencing, and therefore failed to adequately inform Thomas Richey that he had a constitutional right to appeal and that he must follow particular procedures in order to exercise that right, Mr. Richey's appeal, which was dismissed as untimely, must be reinstated.

B. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 3,

Defendant was represented by Larry Nichols of the Department of Assigned Counsel. Mr. Nichols thoroughly went over the Statement of Defendant on Plea of Guilty with defendant, reading aloud the entire document to him.

CP 194.

2. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 4,

Mr. Nichols thoroughly advised defendant of his right to appeal and the time limits associated therewith.

CP 194.

3. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 7,

Defendant understood that he could not pursue a

transfer to Scotland if he had an appeal pending. Defendant understood that he had the choice of pursuing the transfer, or filing an appeal. Defendant further understood that applying for a transfer was an option he had, but that it was not mandatory for him to do so.

CP 195.

4. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 8,

By defendant's own testimony, by May 23, 1989, defendant realized that there was a time limit to the filing of appeals. He acknowledged that he knew, back in 1989, that time was of the essence for filing an appeal.

CP 195.

5. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 9,

Defendant chose to pursue a transfer to Scotland instead of appealing his case.

CP 195.

6. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 10,

Defendant wrote to this court on November 10, 1991 (Plaintiff's Exhibit #1) indicating his transfer was "finally denied," "unless I can get a reduction in sentence." At no time did defendant allege any defect in his case or express a desire to appeal. In 1991 and 2006, defendant was still pursuing a transfer to Scotland.

CP 195.

7. The trial court erred in entering finding of fact No. 11,

In 1992, defendant wrote to the Court of Appeals (Plaintiff's Exhibit #2) asking for additional time to file his notice of appeal, claiming that he could not file an appeal 'because of his transfer process.' He did not claim that he was not advised of the time limits for appeal.

CP 195.

8. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 12,

On April 26, 1999, defendant wrote to the Superior Court Clerk again. (Plaintiff's Exhibit #3). He still held out hope of a successful transfer to a Scotland prison and was actively pursuing this option.

CP 196.

9. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 13,

In 2006, defendant's attorneys continued to negotiate with Pierce County Prosecutor Gerald Horne to try to effectuate defendant's transfer to Scotland.

CP 196.

10. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 14,

Attorney Larry Nichols is a credible witness.

CP 196.

11. In the absence of substantial evidence in the record, the trial court erred in entering finding of fact No. 15,

Defendant is not credible in his assertion that he had never received appellate advice from his attorney, Larry Nichols.

CP 196.

12. The trial court erred in entering conclusion of law No. 2,

That defendant has not shown extraordinary circumstances for failure to file a notice of appeal within 30 days of the entry of his Judgment and Sentence.

CP 197.

13. The trial court erred in entering conclusion of law No. 3,

That defendant has not shown a gross miscarriage of justice herein.

CP 197.

14. The trial court erred in entering conclusion of law No. 4,

Defendant knowingly, voluntarily and intelligently waived his right to appeal.

CP 197.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The time deadline for filing a notice of appeal is conditioned upon the trial court's compliance with CrR 7.2(b) at the time of sentencing. Because the trial court did not comply with CrR 7.2(b) in this case, must the appeal be reinstated?

2. A trial court's findings of fact must be supported by substantial evidence in the record. Where the evidence shows Mr. Richey was not aware that his right to appeal would be irrevocably waived if he did not file a timely notice of appeal, must the trial court's findings to the contrary be stricken?

D. STATEMENT OF THE CASE

On April 23, 1987, Thomas Richey was charged in Pierce County Superior Court with one count of first degree murder and one count of attempted first degree murder. CP 5-6. Mr. Richey pled guilty and was convicted as charged. CP 8-14, 21-26. As part of the plea agreement, the parties stipulated that the trial court should impose an exceptional sentence upward of 65 years. CP 15-17, 23. In accordance with the parties' agreement, the trial court, Hon. D. Gary Steiner, imposed an exceptional sentence of 65 years. CP 9, 11.

The Statement of Defendant on Plea of Guilty advised Mr. Richey that by pleading guilty he was giving up his right to appeal a determination of guilt after a trial. CP 22-23. The statement also advised Mr. Richey that, despite his guilty plea, he maintained the right to appeal his sentence if the sentence was outside the standard range. CP 24. The guilty plea statement contained no

other information regarding Mr. Richey's appeal rights. See CP 97-102.

It is undisputed that the trial court did not advise Mr. Richey on the record at the time of sentencing that he had a right to appeal, and of the procedures and time deadlines he must observe if he wished to exercise that right, as required by CrR 7.2(b). CP 153, 171; 4/23/87RP 2-28; 5/12/06RP 4.

On January 19, 2005, Mr. Richey filed a notice of appeal in superior court, appealing his 1987 judgment and sentence, as well as a motion for extension of time to file the notice of appeal. CP 261-68. This Court denied the motion for extension of time and dismissed the notice of appeal as untimely. CP 63. Mr. Richey filed a motion for discretionary review in the Washington Supreme Court. CP 35-145. On July 13, 2005, the Supreme Court granted Mr. Richey's motion for discretionary review and remanded to the superior court "for a hearing to determine whether the Petitioner knowingly, intelligently and voluntarily waived his right to appeal his conviction after his guilty plea." CP 6.

A hearing was held in April 2006 in superior court before the same trial court judge, Hon. D. Gary Steiner, who had performed the 1987 sentencing. The court candidly acknowledged he had

failed to advise Mr. Richey at the time of sentencing, as required by court rule, that Mr. Richey had a right to appeal and that if he did not file a notice of appeal within 30 days, his right to appeal would be irrevocably waived. 5/12/06RP 4. The court admitted, “The record is just devoid of any advice under the rule.” Id. Nonetheless, the court concluded Mr. Richey had knowingly, voluntarily and intelligently waived his right to appeal. CP 197; 5/12/06RP 3. The trial court entered written findings of fact and conclusions of law.¹ Mr. Richey now appeals from those findings and conclusions.

E. ARGUMENT

1. THE APPEAL MUST BE REINSTATED, AS THE TRIAL COURT FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS OF CrR 7.2(b) AT THE TIME OF SENTENCING

Criminal defendants in Washington have a robust constitutional right to appeal their convictions and sentences. To safeguard this constitutional right, Criminal Court Rule 7.2(b) requires the trial court to inform the defendant, at the time of sentencing, not only that he has a right to appeal, but also of the procedural requirements essential to commencing an appeal. Strict compliance with the rule is necessary and where the trial court fails

¹ A copy of the trial court’s findings of fact and conclusions of law is

to comply with the rule, the time deadline for filing a notice of appeal does not apply. Because the record in this case demonstrates unequivocally that the sentencing court did not comply with the requirements of CrR 7.2(b), the time deadline for filing a notice of appeal does not apply and the appeal must be reinstated.

a. Mr. Richey had a constitutional right to appeal despite his guilty plea. The fact that Mr. Richey pled guilty does not strip him of the right to appeal. An unconditional guilty plea waives only the right to challenge nonjurisdictional defects occurring prior to the plea, and does not waive the right to challenge jurisdictional defects, that is, challenges to the court's "power to enter the conviction or impose the sentence," or challenges to the voluntariness of the plea. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 720, 10 P.3d 380 (2000).

Moreover, the guilty plea agreement in this case expressly reserved to Mr. Richey the right to appeal an exceptional sentence. CP 24 ("If the court goes outside the standard sentence range, either I or the state can appeal that sentence."). Thus, Mr. Richey did not waive his constitutional right to appeal the exceptional

attached to this brief as an appendix.

sentence or to appeal particular defects underlying his conviction, by pleading guilty.

b. Strict compliance with CrR 7.2(b) is essential to safeguard the constitutional right to appeal. Article 1, section 22 of the Washington Constitution grants to criminal defendants who have been convicted of a crime a robust right to appeal.² The state constitution unquestionably “grants not a mere privilege but a ‘right to appeal in all cases.’” State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (quoting Const. art. 1, §22). The Washington Supreme Court has stated unequivocally that the right to appeal provided by the state constitution must be accorded “the highest respect” by the courts. Id.

In addition, there is a federal constitutional component to the right to appeal. Although the federal constitution does not require states to provide avenues of appellate review of criminal convictions, constitutional due process requires that once such avenues are established, the state cannot subject them to “unreasoned distinctions” that would deter a defendant’s “free and unfettered” exercise of his right to challenge his conviction.

Blackledge v. Perry, 417 U.S. 21, 25 n.4, 94 S.Ct. 2098, 40 L.Ed.2d

² Article 1, section 22 (amend. 10) states that “in criminal prosecutions the accused shall have . . . the right to appeal in all cases.”

628 (1974). “When a state chooses to grant such an appeal as of *right*, its availability is a matter of due process.” In re Pers. Restraint of Frampton, 45 Wn. App. 554, 559 n.3, 726 P.2d 486 (1986) (citing Stack v. State, 492 A.2d 599, 603 (Me. 1985); Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985)). As part of its due process obligations, the State must promulgate rules that will safeguard an indigent criminal defendant’s ability to access his right to appeal. Jones v. Rhay, 75 Wn.2d 21, 23, 448 P.2d 335 (1968) (citing Griffin v. Illinois, 351 U.S. 12, 20, 76 S.Ct. 585, 100 L.Ed. 891 (1956)).

Criminal Court Rule 7.2(b) is just such a rule that is intended to safeguard a criminal defendant’s constitutional right to appeal. Jones, 75 Wn.2d at 23; Sweet, 90 Wn.2d at 286-87; State v. Braggs, 41 Wn. App. 646, 650-51, 705 P.2d 303 (1985); State v. Lewis, 42 Wn. App. 789, 793, 715 P.2d 137 (1986). The rule requires the sentencing judge to inform the defendant not only that he has a right to appeal, but also of the procedural requirements and time deadlines necessary to commence an appeal. The rule requires the court to inform the defendant of these requirements “at the time of sentencing,” and further mandates that this advisement

“be made a part of the record.” CrR 7.2(b). At the time Mr. Richey was sentenced in 1987, the rule provided in full:

Procedure at time of sentencing. The court shall, at the time of sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to appeal a sentence outside the standard sentence range; (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived; (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant; and (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal. These proceedings shall be made a part of the record.

Former CrR 7.2(b) (1986).³

The case law consistently provides that strict compliance with CrR 7.2(b) in all respects is mandatory. E.g., Jones, 75 Wn.2d at 23 (“We believe Rule 46(a) [the precursor to CrR 7.2(b)] means exactly what it says and that strict compliance with it in every detail is a mandatory duty of the sentencing judge”); Sweet, 90 Wn.2d at 286-87 (record must show “strict compliance” with the rule); Braggs, 41 Wn. App. at 650-51; Lewis, 42 Wn. App. at 794. These

³ The rule has been amended since 1987, but not in any way material to this appeal. The most significant change occurred in 1991, when the Supreme Court added subdivision (6), which requires the sentencing court to inform the defendant “of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100.” CrR 7.2(b)(6) (1991).

cases recognize the right to appeal is meaningless if the defendant is not made aware that he has such a right or that there are procedural requirements and time deadlines he must meet in order to commence an appeal. Jones, 75 Wn.2d at 23; Braggs, 41 Wn. App. at 650-51; Lewis, 42 Wn. App. at 793. Moreover, consistent with the State's obligations under the Due Process Clause, the court rule reflects an understanding that the duty to inform the defendant of these requirements rests squarely upon the sentencing judge. As this Court held, "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. Thus, even in a case where the defendant is otherwise informed of his right to appeal and of the time deadline for filing a notice of appeal, the record must still show that the sentencing judge advised the defendant at sentencing in compliance with court rule. Lewis, 42 Wn. App. at 793.

c. Failure to comply with CrR 7.2(b) constitutes an "extraordinary circumstance" that requires extending the time deadline for filing a notice of appeal. Generally, the Rules of

Appellate Procedure require a defendant wishing to appeal his conviction file a notice of appeal in the trial court within 30 days after entry of the judgment and sentence. RAP 5.2(a). Ordinarily, the desirability of finality of decisions will outweigh the privilege of a litigant to obtain an extension of time to file a notice of appeal. RAP 18.8(b).

In criminal cases, however, the “strict application of filing deadlines must be balanced against a defendant’s state constitutional right to appeal.” State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998) (citing Sweet, 90 Wn.2d 282). The appellate court has the power and the duty to extend the deadline to file a notice of appeal “in extraordinary circumstances and to prevent a gross miscarriage of justice.” RAP 18.8(b). Due to the importance of the constitutional right to appeal in a criminal case, any doubts about whether extraordinary circumstances exist “should be resolved in favor of protecting the right to appeal and courts should be slow to deprive a litigant of that right.” Lewis, 42 Wn. App. at 795.

It is well established that a trial court’s failure to inform the defendant on the record at sentencing of the procedures for commencing an appeal, as required by CrR 7.2(b), constitutes an

“extraordinary circumstance” that requires extending the deadline to file a notice of appeal. Jones, 75 Wn.2d 21; Braggs, 41 Wn. App. 646; Lewis, 42 Wn. App. 789.

In 1968, in Jones, the Supreme Court unequivocally established that the court rule imposes a mandatory duty on the sentencing court and that strict compliance with the rule in all respects is required. 75 Wn.2d 21. There, the rule at issue was former Rule on Appeal 46(a), a precursor to CrR 7.2(b).⁴ Like CrR 7.2(b), ROA 46(a) required the judge to inform the defendant at the time of sentencing of the right to appeal; that unless a notice of appeal were filed within 30 days after entry of the judgment the right to appeal would be irrevocably waived; that the court clerk would file a notice of appeal on behalf of a defendant acting without

⁴ Former Rule on Appeal 46 (1968) provided:

Appeals in criminal cases. (a) *Superior Court Procedure at Time of Sentencing.*

The superior court shall, at the time of sentencing, unless the judgment and sentence are based on a plea of guilty, advise the defendant

- (1) of his right to appeal,
- (2) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right of appeal is irrevocably waived,
- (3) that the superior court clerk will, if requested by defendant appearing without counsel, file a notice of appeal in his behalf, and
- (4) of his right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal.

75 Wn.2d at 22. CrR 7.2 was adopted in 1973 as part of the original set of CrR rules. 4A Karl B. Tegland, Washington Practice: Rules Practice, at 441 (6th ed.).

an attorney; and that an attorney would be appointed for the defendant if he could not pay. Jones, 75 Wn.2d at 22. The record in Jones showed the court had informed the defendant only that he had a right to appeal. Id. at 22-23. The Supreme Court noted the trial court had therefore complied with only a portion of the rule and did not inform the petitioner expressly of any of the other provisions of the rule, “all of which are vital to a defendant’s constitutional right of appeal.” Id. at 23. Holding that “Rule 46(a) means exactly what it says and that strict compliance with it in every detail is a mandatory duty of the sentencing judge,” the court remanded for reentry of the judgment and sentence in compliance with the rule. Id. at 23-24. The court reasoned, “[u]nless every trial court of this state follows the provisions of Rule 46(a) expressly, the purposes to be accomplished by the rule will be defeated.” Id. at 24.

More recently, the Court of Appeals has similarly required strict compliance with rules requiring the trial court to inform the defendant at sentencing of his appeal rights, and routinely extends the time deadline for filing a notice of appeal in cases where the record shows the trial court did not comply with the rule. In Braggs, Diana Braggs was convicted of misdemeanor theft in Seattle Municipal Court. 41 Wn. App. at 647. At the sentencing hearing,

the judge did not advise Braggs of her right to appeal or of the 14-day time period for filing a notice of appeal, as required by former RALJ 2.7.⁵ Id. The court held that Braggs had therefore made a showing of “compelling circumstances” justifying reversal of the superior court order dismissing her untimely appeal. Id. at 651-52.

The court explained:

To ensure that a defendant’s appellate rights are adequately protected, the record should clearly indicate that the trial court advised the defendant pursuant to RALJ 2.7 of the right to appeal a conviction as well as the time and method for commencing an appeal. Where the record does not so clearly indicate and the appeal notice was untimely filed, compelling circumstances will be found to necessitate extending the appeal notice filing period so that the defendant is not unjustly deprived of the right of appeal.

Id. at 651.

Relying on Braggs, the Court of Appeals reached a similar result in Lewis, 42 Wn. App. 789. There, Ricky Lewis was charged and convicted of two misdemeanor offenses in district court. The

⁵ At the time, RALJ 2.7 provided:

In a criminal case, the judge of the court of limited jurisdiction shall advise the defendant of the defendant’s right to appeal a final decision by filing a notice of appeal in the superior court. The judge shall also advise the defendant that the notice must be served on all other parties and filed in the superior court within 14 days after the final decision in the case, and that the notice must specify the errors claimed by the defendant. Upon request, the court shall supply the defendant with a standard form of notice of appeal.

record showed the district court judge did not orally advise Lewis of his right to appeal or of the 14-day time-limit for filing a notice of appeal until two weeks after sentencing. *Id.* at 791. The Court of Appeals held that although Lewis had signed a statement of “rights and proceedings” prior to his conviction, which informed him in writing that he had a right to appeal and of the time deadline for filing a notice of appeal, this was insufficient to advise Lewis of his rights as required by RALJ 2.7. *Id.* at 793. In order for compliance with RALJ 2.7 to be found, the court explained,

‘[t]he record should *clearly* indicate that the trial court advised the defendant pursuant to RALJ 2.7 of the right to appeal a conviction as well as the time and method for commencing an appeal. Where the *record* does not so clearly indicate and the appeal notice was untimely filed, compelling circumstances will be found to necessitate extending the appeal notice filing period so that the defendant is not unjustly deprived of the right of appeal.’

at 794 (quoting *Braggs*, 41 Wn. App. at 651) (emphasis in *Lewis*).

Thus, “compelling or extraordinary circumstances” existed to dictate extending the filing period. *Id.*

The rule has been superseded by CrRLJ 7.2(b).

d. The State cannot establish a defendant knowingly, voluntarily and intelligently waived his right to appeal where the sentencing court did not inform the defendant of his appeal rights on the record as required by CrR 7.2(b). In this case, the State conceded and the trial court candidly admitted that the court had not informed Mr. Richey of his appeal rights on the record at the time of sentencing as required by CrR 7.2(b). CP 153, 171; 5/12/06RP 4; see 4/23/87RP 2-28. But the trial court nonetheless concluded Mr. Richey knowingly, voluntarily and intelligently waived his right to appeal. CP 197. The court's conclusion was incorrect. Consistent with the case law discussed in the previous section, Supreme Court case law makes clear that a defendant cannot be found to have knowingly, voluntarily and intelligently waived his right to appeal if he was not adequately informed by the trial court at sentencing of his appeal rights as required by CrR 7.2(b).

The trial court's interpretation of CrR 7.2(b) is a matter of law subject to de novo review. Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997). In interpreting the rule, this Court applies the same principles applied when construing the meaning of a statute drafted by the Legislature. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). The "cardinal

principle” is that the court ascertain and carry out the intent of the drafting body. Id.

Supreme Court case law interpreting CrR 7.2(b) makes clear that the State must show the trial court strictly complied with CrR 7.2(b) as a necessary precondition for establishing the defendant’s knowing and intelligent waiver of the right to appeal. In Sweet, the court established that in order to show a defendant waived his appeal rights, the State must demonstrate not only that the trial court “strictly complied” with CrR 7.2(b), but also 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.” 90 Wn.2d at 286-87. Thus, to establish a defendant knowingly, voluntarily and intelligently waived his right to appeal, the State must show two things: (1) that the defendant was “clearly advised of the right to appeal and the procedure necessary to vindicate that right in the manner prescribed by [former] CrR 7.1(b) [now CrR 7.2(b)],” and (2) that the defendant “demonstrate[d] understanding, and [was] under no unfair restraint preventing vindication.” Id. at 287.

The Supreme Court has not wavered from the fundamental principle enunciated in Sweet in its subsequent case law. The

court's subsequent holdings are consistent with the principle that the trial court's compliance with CrR 7.2(b) is a necessary precondition to a finding that the defendant knowingly, intelligently and voluntarily waived his right to appeal. In State v. Tomal, for instance, the record did not indicate that the trial court had informed the defendant at the time of sentencing of the right to appeal and the timing requirements associated with that right. 133 Wn.2d 985, 990, 948 P.2d 833 (1997). Therefore, the State had not proved the defendant's failure to timely pursue the appeal constituted a knowing, intelligent and voluntary abandonment of the right to appeal. Id. Similarly, in Kells, the Supreme Court held CrR 7.2(b) did not require a trial court to inform a defendant of the right to appeal a declination order. 134 Wn.2d at 313. Thus, the State could prove Kells had voluntarily, intelligently and knowingly waived his right to appeal the declination order without demonstrating that the trial court had complied with the court rule. Id.

In cases in which the Supreme Court has held the State demonstrated the defendant's knowing, intelligent and voluntary waiver of the right to appeal, the court has likewise consistently indicated that "strict compliance" with CrR 7.2(b) is necessary. In those cases, the record clearly demonstrated the trial court had

complied with the rule. In In re Personal Restraint of Hanson, for instance, the court held the defendant's untimely filing of a notice of appeal constituted a waiver of the right to appeal, where the record clearly indicated the trial court had read the defendant his appeal rights at sentencing as required by former CrR 7.1(b) (now CrR 7.2(b)), and the defendant had replied, "Yes, I understand." 94 Wn.2d 798, 620 P.2d 95 (1980). Similarly, more recently in State v. Devin, the Supreme Court concluded the State had demonstrated Devin knowingly, intelligently and voluntarily waived his right to appeal where he was notified at sentencing, as required by CrR 7.2(b), that he would irrevocably waive his right to appeal if he failed to pursue it within 30 days, "and yet he did just that." 158 Wn.2d 157, 166, 142 P.3d 599 (2006).

In sum, Mr. Richey is aware of no case in which the Supreme Court has held the State demonstrated the defendant's knowing, intelligent and voluntary waiver of the right to appeal despite the trial court's failure to inform the defendant of his appeal rights on the record at sentencing as required by court rule. To the contrary, the court stated unequivocally in Sweet that "strict compliance" with CrR 7.2(b) is a necessary precondition to a finding of waiver, and the court's subsequent cases are consistent with this

principle. Thus, there is no authority for the trial court's conclusion in this case that Mr. Richey waived his right to appeal despite the court's failure to advise him at sentencing of his rights and the procedures he must follow to exercise his rights, as required by CrR 7.2(b). The court's conclusion that the State could demonstrate a knowing, intelligent and voluntary waiver of the right to appeal on this record was erroneous.

e. The time limit for filing a notice of appeal should not apply where the defendant does not receive notice of its terms by the sentencing court as required by court rule, as that is the rule applied in the context of collateral attacks. Just as there is a time deadline to file a notice of appeal, there is also a time deadline to file a motion for collateral attack. Generally, a petition or motion for collateral attack in a criminal case must be filed within one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090. Specific exceptions to the one-year time limit are provided by RCW 10.73.100. The trial court is required by statute to advise the defendant of this time limit at the time judgment and sentence is pronounced. RCW 10.73.110. The statutes imposing the time deadline for collateral attacks, providing

for exceptions to the deadline, and requiring the trial court to notify the defendant of the deadline, were all enacted in 1989. Laws of 1989, ch. 395, §§ 1, 2, and 4.

CrR 7.2(b) was amended in 1991 to take account of the time limit imposed by RCW 10.73.090 and the notification requirement of RCW 10.73.110. 4A Tegland, Washington Practice, *supra*, at 442. As amended, the rule states “[t]he court shall, immediately after sentencing, advise the defendant . . . of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100.” CrR 7.2(b)(6). As with the required advisement regarding the time limit for filing a notice of appeal, the court’s advisement of the time limit for a collateral attack “shall be made a part of the record.” CrR 7.2(b).

Like the time deadline for filing a notice of appeal, the one-year time limit for collateral attacks serves to counteract the significant potential for collateral review to undermine the finality of litigation. In re Pers. Restraint of Runyan, 121 Wn.2d 432, 453-54, 853 P.2d 424 (1993). Despite the preference for finality, however, courts do not apply the time limit for collateral attacks in cases where the defendant did not receive notice of the time limit by the court at sentencing as required by statute and court rule.

To the contrary, the courts have unequivocally held the time limit of RCW 10.73.090 is conditioned on compliance with RCW 10.73.110 and CrR 7.2(b)(6). State v. Golden, 112 Wn. App. 68, 78, 47 P.3d 587 (2002) (citing In re Pers. Restraint of Vega, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992)); State v. Robinson, 104 Wn. App. 657, 664, 17 P.3d 653 (2001). Courts recognize that RCW 10.73.110 and CrR 7.2(b)(6) are unambiguous and impose an imperative duty on the trial court to advise the defendant at the time judgment and sentence is pronounced of the time limit specified in RCW 10.73.090. Golden, 112 Wn. App. at 78.

Vega provides that when notice is required by statute, failure to comply creates an exception to the time restriction, and a petition for collateral review cannot be dismissed as untimely. 118 Wn.2d at 451. Thus, where a defendant is not given the required notice provided in RCW 10.73.110, a collateral motion is not time barred. Golden, 112 Wn. App. at 78-79; Robinson, 104 Wn. App. at 664. The notice requirement provided by the court rule is equally binding. Golden, 112 Wn. App. at 78-79; see also, e.g., State v. Blilie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997) (where statute and court rule are not in conflict, they are equally binding); Hellenthal,

144 Wn.2d at 431 (court rules interpreted in same manner and to same effect as statutes drafted by Legislature).

Moreover, courts uniformly refuse to impose the time limit for collateral attacks when the defendant did not receive notice of the time limit at sentencing as required by statute and court rule, regardless of how much time has passed. In Golden, Golden collaterally attacked his juvenile disposition eight and one-half years after the fact. 112 Wn. App. at 71. The passage of time was not a relevant consideration. Because the juvenile court had never informed Golden of the time limit as required by statute and court rule, the time limit did not apply. Id. at 78-79. Similarly, in State v. Calhoun, Calhoun filed a collateral attack challenging the validity of his guilty plea more than 10 years after the judgment and sentence was entered. 134 Wn. App. 84, 87-88, 138 P.3d 659 (2006). But because the record did not reflect that the trial court advised Calhoun of the one-year time limit at the time judgment and sentence was pronounced, the time limit did not apply. Id. at 89.

Mr. Richey is aware of no case where the appellate court held the one-year time limit for collateral attacks applied even though the trial court had failed to inform the defendant of the time limit on the record at sentencing as required by statute and court

rule. The case law is consistently to the contrary. Thus, courts require strict compliance with the notification requirements of RCW 10.73.110 and CrR 7.2(b)(6), even though the right to collateral relief is significantly broader than the scope of the privilege guaranteed by the state constitution. See Runyan, 121 Wn.2d at 441-44.

In contrast to the right to collateral review, however, the right to a direct appeal is guaranteed by the state constitution, and due process requires the State to promulgate and enforce procedures that will safeguard that right. See discussion above. Thus, ensuring the defendant receives adequate notice of the time limit for filing a notice of appeal is even more critical than ensuring he receives adequate notice of the time limit for filing a motion for collateral attack. Courts should therefore adopt a rule in the case of direct appeals that is consistent with the rule adopted in the case of collateral attacks. Such a rule would help to ensure that the vital constitutional right to a direct appeal is adequately protected.

f. The time deadline for filing a notice of appeal does not apply in this case, as it is undisputed that the trial court did not inform Mr. Richey of the deadline at sentencing as required by CrR 7.2(b). The State conceded and the trial court candidly admitted

that the court did not inform Mr. Richey of his right to appeal, and the procedures he must observe to exercise the right, on the record at the time of sentencing as required by CrR 7.2(b). CP 153, 171; 5/12/06RP 4; see 4/23/87RP 2-28. As argued above, the time deadline for filing a notice of appeal is conditioned on the trial court's compliance with CrR 7.2(b). Thus, the time deadline does not apply in this case and the appeal must be reinstated.

2. THE TRIAL COURT'S FINDING THAT MR. RICHEY KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO APPEAL IS NOT SUPPORTED BY THE EVIDENCE

The trial court found Mr. Richey knowingly, intelligently and voluntarily waived his right to appeal, despite the judge's acknowledgement that he had not informed Mr. Richey of his appeal rights and the time limits associated therewith at the time of sentencing as required by court rule. As argued above, the trial court's failure to notify Mr. Richey of his appeal rights and the time deadlines on the record at sentencing as required by court rule precludes a finding that Mr. Richey knowingly and intelligently waived his right to appeal. In addition, the trial court's finding that Mr. Richey knowingly, intelligently and voluntarily waived his right to appeal is not otherwise supported by the evidence.

In making its ultimate determination that Mr. Richey waived his right to appeal, the court primarily relied on the following findings: (1) that Mr. Richey's appointed attorney, Larry Nichols, "thoroughly went over the Statement of Defendant on Plea of Guilty with defendant, reading aloud the entire document to him;" (2) that Mr. Nichols "thoroughly advised defendant of his right to appeal and the time limits associated therewith;" (3) that Mr. Richey, who is from Scotland, pursued the possibility of transferring to Scotland under an international treaty so that he could serve his sentence there; (4) that Mr. Richey understood he could not pursue a transfer to Scotland if he had an appeal pending and that he chose to pursue a transfer to Scotland instead of appealing his case; (5) that Mr. Richey realized at least by May 23, 1989, that there was a time limit for filing an appeal; (6) that Mr. Richey never expressed in his prior letters to the trial court or the Court of Appeals that he wished to appeal or that he was not advised of the time limits for appeal. CP 194-96. These findings either are not supported by the evidence or do not sustain the court's conclusion that Mr. Richey knowingly, intelligently and voluntarily waived his right to appeal.

a. Substantial evidence must support the trial court's findings of fact. To survive a challenge on appeal, the findings

made by a trial court must be supported by substantial evidence in the record. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). "Substantial evidence is evidence sufficient in quantum to persuade a fair-minded person of the truth of the stated premise." State v. Thetford, 109 Wn.2d 392, 406, 745 P.2d 496 (1987).

Where findings are not supported by substantial evidence, they must be stricken. Truck Ins. Exchange v. Merrell, 23 Wn. App. 181, 184, 596 P.2d 1334 (1979).

b. The trial court's findings and conclusions are not supported by the record. The State has the burden to show Mr. Richey knowingly, intelligently and voluntarily waived his right to appeal. Sweet, 90 Wn.2d at 286; accord Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). The record must show Mr. Richey was clearly advised he had a right to appeal and must also show he was clearly advised of the procedure necessary to vindicate that right. Sweet, 90 Wn.2d at 286-87. The record must therefore show he was advised that if he did not file a notice of appeal within 30 days, he would irrevocably waive that right. Id.; CrR 7.2(b). The record shows in this case that even if Mr. Richey was somehow informed that he had a right to appeal, he was not

informed and was not aware that if he did not file a notice of appeal within 30 days his right to appeal would be irrevocably waived.

The trial court found Mr. Richey's attorney "thoroughly went over the Statement of Defendant on Plea of Guilty with defendant, reading aloud the entire document to him." CP 194. Even if such a finding is supported by the record, it provides little assistance in answering the question posed by this case. The guilty plea statement stated only that Mr. Richey would maintain the right to appeal an exceptional sentence despite the guilty plea. CP 23. It provided no information regarding the procedures Mr. Richey must follow in order to exercise his right to appeal. Moreover, the guilty plea statement erroneously stated that Mr. Richey would have no right to appeal his conviction. CP 22-23. As stated above, the guilty plea waived only the right to challenge nonjurisdictional defects occurring prior to the plea; it did not waive the right to challenge the court's power to enter the conviction or impose the sentence, or challenges to the voluntariness of the plea.

Thompson, 141 Wn.2d at 720.

The court also found "Mr. Nichols thoroughly advised defendant of his right to appeal and the time limits associated therewith." CP 194. This finding is also not supported by the

record. Mr. Nichols testified it was his customary practice to advise his clients of the right to appeal, including the time deadline associated with the right. 4/14/06RP 13-14. But he also admitted he could not remember whether he followed that practice in this case. 4/14/06RP 13, 15. He further acknowledged he received a letter from Mr. Richey in July 1989 expressing interest in pursuing an appeal. 4/14/06RP 17-19. But Mr. Nichols also admitted he did not file a notice of appeal on Mr. Richey's behalf and mentioned nothing about the time deadline for filing a notice of appeal in the letter he sent Mr. Richey in response. 4/14/06RP 19; CP 189.

Finally, Mr. Richey contradicted Mr. Nichols's testimony. Mr. Richey testified he was never advised of his right to appeal and the time limitations associated therewith. 4/14/06RP 33. He testified when he asked Mr. Nichols after sentencing about the possibility of an appeal, Mr. Nichols was discouraging and said he could not appeal. 4/14/06RP 33-34. There is no other evidence in the record that Mr. Richey was correctly advised of his appeal right and the time deadlines he must meet. In sum, the record is insufficient to support the trial court's finding that Mr. Richey was correctly advised of his right to appeal and the procedures he must follow in order to exercise the right.

The trial court also found that because Mr. Richey was pursuing a transfer to Scotland, and because he was aware he could not simultaneously pursue such a transfer and an appeal of his conviction, this indicated he had voluntarily waived his right to appeal. CP 195-96. The trial court's finding is not supported by the record, as the record does not show Mr. Richey was aware that by pursuing the transfer to Scotland he was *waiving* his right to appeal at a future date. To the contrary, the evidence shows Mr. Richey believed he maintained the right to pursue the appeal even if the transfer to Scotland fell through. Mr. Richey testified he believed there was no time limit to pursue an appeal and that he could wait until he found out how the transfer situation would be resolved to file a notice of appeal. 4/14/06RP 36.

The trial court also found that by May 1989, Mr. Richey realized that there was a time limit to the filing of appeals. CP 195. This is not supported by the record. The finding is based upon a May 1989 letter Mr. Richey wrote to the director of the Division of Prisons, in which he indicated that "he was aware of a rumor of a time limit regarding a one year time limit regarding appeals." 4/14/06RP 36. The evidence indicates Mr. Richey was aware only of a "rumor" about a time limit for filing an appeal. This hardly rises

to the level of showing Mr. Richey was clearly advised of the procedures he must follow to exercise his right to appeal. Sweet, 90 Wn.2d at 286-87. Moreover, the one-year time limit to which Mr. Richey referred must have been the one-year time limit for filing a collateral attack, which the Legislature enacted in 1989. Laws of 1989, ch. 395, § 1. Thus, Mr. Richey's awareness of a "rumor" regarding a one-year deadline for filing a collateral attack says nothing about whether he was aware of his right to a direct appeal and that the right could be irrevocably waived by failing to meet the deadline for filing a notice of appeal.

In sum, the record does not support the trial court's finding that Mr. Richey knowingly, intelligently and voluntarily waived his right to appeal and the trial court's findings to the contrary must be stricken.

F. CONCLUSION

For the above reasons, Mr. Richey respectfully requests this Court reinstate his appeal.

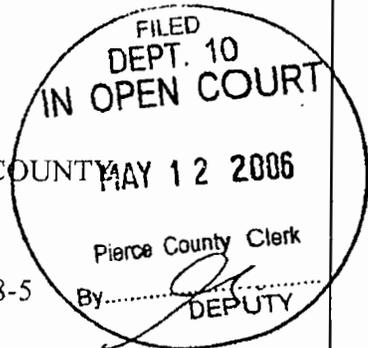
Respectfully submitted this 26th day of March 2007.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX



86-1-00658-5 25455324 FNCL 05-12-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 86-1-00658-5

vs.

THOMAS WILLIAM RICHEY,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: REMAND HEARING

Defendant.

THIS MATTER having come on before the Honorable D. GARY STEINER, Judge of the above entitled court, for a remand hearing on the 14th and 28th days of April, 2006, the defendant having been present and represented by attorneys THOMAS W. HILLIER, II, and WAYNE C. FRICKE, and the State being represented by Deputy Prosecuting Attorneys GERALD T. COSTELLO and P. GRACE KINGMAN, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

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OKIC [Signature]

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FINDINGS OF FACT

I.

On July 13, 2005, the Supreme Court of Washington filed an Order requiring this court to conduct a hearing to determine whether Petitioner (defendant) knowingly, intelligently and voluntarily waived his right to appeal his conviction after his guilty plea.

II.

On April 23, 1987, defendant pleaded guilty to MURDER IN THE FIRST DEGREE and ATTEMPTED MURDER IN THE FIRST DEGREE. A sentencing hearing was conducted on the same day.

III.

Defendant was represented by Larry Nichols of the Department of Assigned Counsel. Mr. Nichols thoroughly went over the Statement of Defendant on Plea of Guilty with defendant, reading aloud the entire document to him.

IV.

Mr. Nichols thoroughly advised defendant of his right to appeal and the time limits associated therewith.

V.

Defendant is very intelligent.

VI.

Defendant is from Scotland. Early on, defendant wished to pursue transfer of his sentence, under an international treaty, so that he could serve his sentence in Scotland. He was anxious to serve his time there. For years, he actively pursued this option.

86-1-00658-5

VII.

1 Defendant understood that he could not pursue a transfer to Scotland if he had an appeal
2 pending. Defendant understood that he had the choice of pursuing the transfer, or filing an
3 appeal. Defendant further understood that applying for a transfer was an option he had, but that
4 it was not mandatory for him to do so.
5

VIII.

6
7 By defendant's own testimony, by May 23, 1989, defendant realized that there was a time
8 limit to the filing of appeals. He acknowledged that he knew, back in 1989, that time was of the
9 essence for filing an appeal.

IX.

10
11 Defendant chose to pursue a transfer to Scotland instead of appealing his case.

X.

12
13 Defendant wrote to this court on November 10, 1991 (Plaintiff's Exhibit #1) indicating
14 his transfer was "finally denied", "unless I can get a reduction in sentence". At no time did
15 defendant allege any defect in his case or express a desire to appeal. In 1991 and 2006,
16 defendant was still pursuing a transfer to Scotland.
17

XI.

18
19 In 1992, defendant wrote to the Court of Appeals (Plaintiff's Exhibit #2) asking for
20 additional time to file his notice of appeal, claiming that he could not file an appeal "because of
21 his transfer process". He did not claim that he was not advised of the time limits for appeal.

22 *

23 *

24 *

86-1-00658-5

1
2 XII.

3 On April 26, 1999, defendant wrote to the Superior Court Clerk again. (Plaintiff's Exhibit
4 #3.) He still held out hope of a successful transfer to a Scotland prison and was actively pursuing
5 this option.

6 XIII.

7 In 2006, defendant's attorneys continued to negotiate with Pierce County Prosecutor
8 Gerald Horne to try to effectuate defendant's transfer to Scotland.

9 XIV.

10 Attorney Larry Nichols is a credible witness.

11 XV.

12 Defendant is not credible in his assertion that he had never received appellate advice from
13 his attorney, Larry Nichols.

14 XVI.

15 Defendant filed a notice of appeal on January 18, 2005, nearly 18 years after his
16 judgment and sentence was filed.

17
18 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

19 CONCLUSIONS OF LAW

20 I.

21 That the Court has jurisdiction of the parties and subject matter.

22 *

23 *

86-1-00658-5

II.

That defendant has not shown extraordinary circumstances for failure to file a notice of appeal within 30 days of the entry of his Judgment and Sentence.

III.

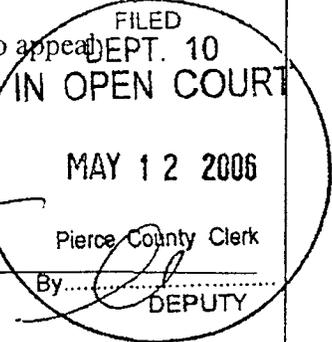
That defendant has not shown a gross miscarriage of justice herein.

VI.

Defendant knowingly, voluntarily and intelligently waived his right to appeal

DONE IN OPEN COURT this 12 day of May, 2006.

D. GARY STEINER, Judge



Presented by:

[Signature]
E. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

[Signature]
GERALD T. COSTELLO
Chief Criminal Deputy Prosecuting
Attorney, WSBA #15738

Approved as to Form:

WAYNE C. FRICKE
Attorney for Defendant
WSB # 16550

THOMAS W. HILLIER, II
Attorney for Defendant
WSB #5193

pgk

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	NO. 35433-1-II
)	
v.)	
)	
THOMAS RICHEY,)	
)	
APPELLANT.)	

07 MAR 29 11:17 AM
STATE OF WASHINGTON
BY *DR*

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 26TH DAY OF MARCH, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DR SW
OLYMPIA, WA 98502-6001 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> THOMAS RICHEY
929444
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2007.

X *me*

2007 MAR 26 PM 4: 51
COURT OF APPEALS
STATE OF WASHINGTON

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711