

NO. 48087-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANGEL FERNANDEZ,

Appellant.

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

The Honorable Stephen Warning, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to the assistance of counsel on his motions to rectify a double jeopardy violation.

Issue Pertaining to Assignment of Error

Under CrR 3.1 and CrR 7.8, individuals are entitled to the assistance of counsel where they have filed a motion establishing grounds for relief. Although appellant filed such a motion, he was denied counsel. Was this reversible error?

B. STATEMENT OF THE CASE

Angel Fernandez – along with accomplice Jesse Osalde – was charged with aggravated murder in the first degree and, alternatively, felony murder in the first degree in connection with the October 11, 1999 death of Edward Ross. CP 11-12.

A jury convicted Fernandez of both offenses and, on August 3, 2000, the Honorable Stephen Warning imposed a sentence of life in prison without the possibility of parole for the aggravated murder conviction. CP 13, 17. Although Judge Warning did not impose a sentence for the felony murder conviction, the Judgment & Sentence notes the existence of that conviction on the first page. See CP 13.

On May 14, 2015, Fernandez filed a pro se "Motion To Dismiss One Of Two Murder Convictions As Violative Of Double Jeopardy." CP 78. Relying on several cases, including State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010), and State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), Fernandez argued that one of his homicide convictions had to be vacated to avoid a double jeopardy violation. CP 78-80.

Fernandez was not present and still in DOC custody for a June 23, 2015 hearing regarding his motion. RP<sup>1</sup> 4. But a deputy prosecutor present for the hearing noted that the Judgment and Sentence had to be amended to delete any reference to one of the convictions. RP 4. The matter was continued to allow the prosecutor to arrange for Fernandez's transport to Cowlitz County. RP 4. The court noted that the issue of whether Fernandez needed counsel could be addressed after his arrival. RP 4.

On July 17, 2015, Fernandez appeared with public defender Terry Mulligan. RP 5-6. Mulligan informed the court that he had spoken to Deputy Prosecutor David Phelan, that Phelan agreed Fernandez's motion should be granted, and that Phelan would be

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<sup>1</sup> "RP" refers to the verbatim report of proceedings for June 8, 2015, June 23, 2015, July 17, 2015, July 21, 2015, August 4, 2015, and August 25, 2015.

drafting a proposed amended Judgment & Sentence. RP 6-7. Phelan was not present at this hearing, however. Instead, Deputy Prosecutor Jody Newby appeared for the State. RP 6. Newby expressed her understanding that Fernandez was not entitled to the assistance of counsel. RP 6. The court agreed and denied Fernandez's motion to appoint counsel to assist him. RP 7-8. The court then continued the matter several days to allow Phelan's participation. RP 5-8.

When the parties appeared again on July 21, 2015, Phelan confirmed that the State was conceding a "scrivener's error" on the original Judgment and that there should not have been a reference to the felony murder conviction. He had prepared an amended Judgment omitting any reference to that crime. RP 9-11. In the meantime, however, Fernandez filed a "Motion for New Trial/Motion to Vacate," in which he argued the proper remedy for the double jeopardy violation was dismissal of the conviction for aggravated murder and sentencing for felony murder. Alternatively, he requested a new trial. CP 81-84; RP 14-24. The court continued the matter again so that Phelan could respond to Fernandez's motion. RP 24-26.

The parties appeared again on August 4, 2015. RP 28. By

then, Fernandez had supplemented his previous filings with a "Motion to Dismiss Judgment and Sentence," in which he argued that the double jeopardy violation on the original Judgment rendered that document invalid on its face, violated his right to due process, and constituted cruel and unusual punishment under the Eighth Amendment. CP 86-88. He also argued conviction for a less serious crime (felony murder) acts as an acquittal on a greater crime (aggravated murder). CP 92. He asked for dismissal of both convictions or, alternatively, sentencing on felony murder only. CP 95. Because Phelan had not been served with a copy of this new motion, the matter was continued once more. RP 28-33.

The parties appeared again on August 25, 2015. RP 34. After hearing argument from Fernandez, RP 34-47, Judge Warning concluded the proper course was to exclude any reference to the felony murder conviction in an amended Judgment. The conviction and mandatory life sentence for aggravated murder were left unaffected. RP 47-48; CP 98-108.

Fernandez timely filed his Notice of Appeal. CP 109-110.

C. ARGUMENT

FERNANDEZ WAS DENIED HIS RIGHT TO THE ASSISTANCE OF COUNSEL.

Although Fernandez's May 14, 2015 Motion for Dismissal does not cite to the procedural rule under which it was brought, it falls under CrR 7.8(b)(4), which permits relief from a "judgment that is void." "A void judgment is one entered by a court 'which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved[.]'" State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005) (quoting Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)) (emphasis added).

A sentence in excess of that authorized by the Legislature results in a void judgment under CrR 7.8(b)(4). See Zavala-Reynoso, 127 Wn. App. at 123 (sentence beyond statutory maximum); State v. Reanier, 157 Wn. App. 194, 200-201, 237 P.3d 299 (2010) (same), review denied, 170 Wn.2d 1018, 245 P.3d 773 (2011). And, by definition, a sentence that violates double jeopardy is not authorized by the Legislature. See State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (although double jeopardy involves a constitutional protection, in deciding whether multiple

punishments are allowed, the inquiry is limited to determining what the Legislature has authorized).

Both the State and Judge Warning properly recognized that Fernandez could not stand convicted of both aggravated murder and felony murder for a single homicide. See Womac, 160 Wn.2d at 650-660. But Fernandez was improperly denied the assistance of counsel on his motions concerning this double jeopardy violation.

CrR 3.1(b)(2) provides that “[a] lawyer shall be provided at every stage of the proceedings, including . . . post-conviction review.” In State v. Robinson, 153 Wn.2d 689, 695-696, 107 P.3d 90 (2005), the Supreme Court held that CrR 3.1(b)(2) entitles a criminal defendant to the appointment of counsel for a motion filed under CrR 7.8 if the trial court makes an initial determination the motion is not frivolous:

It is true that CrR 7.8 does not explicitly state when, if ever, counsel will be provided when motions are made pursuant to this rule. However, CrR 7.8(b) requires that motions be “subject” to the limitations found in statutes that also govern PRPs. We thus interpret CrR 7.8 to provide counsel after an initial determination has been made that the motion is not frivolous much like the procedure used to appoint counsel in PRPs.

Id. at 696 n.6.

The State properly conceded Fernandez's double jeopardy claim had merit. See RP 4, 6-7, 9-11. The trial judge agreed. RP 47-48. Therefore, because Fernandez's argument was not frivolous, he was entitled to the assistance of counsel under CrR 3.1(b)(2), CrR 7.8(b), and Robinson.

The next issue is whether this violation of the right to counsel can be deemed harmless error. Because the right to counsel in this case is rule based, rather than constitutional, it is subject to harmless error analysis. Reversal is appropriate where, within reasonable probabilities, if the error had not occurred, the outcome of the motion would have been materially affected. Robinson, 153 Wn. App. at 697. In Robinson, the Supreme Court found the denial of counsel in the trial court – to assist with a motion to withdraw two guilty pleas – harmless where the Court of Appeals later vacated the one plea for which Robinson may have been entitled to counsel's assistance. *Id.* at 698.

Although Fernandez has already partially obtained the relief he seeks (relief from one homicide conviction), Fernandez also argued below that the proper remedy for the double jeopardy violation (as well as the resulting due process and Eighth Amendment violations) was either a new trial or sentencing solely

for felony murder. Factually and legally, these issues should be investigated and developed at the trial court level with the assistance of counsel to which Fernandez is entitled. Within reasonable probabilities, the outcome below may have differed with this assistance. Compare Robinson, 153 Wn.2d at 697-698 (defendant not entitled to remand with counsel where legal claim for which remand sought never raised in trial court or even in Court of Appeals).

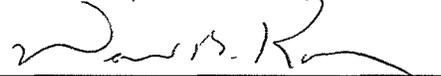
D. CONCLUSION

Fernandez was denied his right to the assistance of counsel. This Court should accept the State's concession that double jeopardy protections prevent his conviction for two homicide offenses. Moreover, this matter should be remanded for the appointment of counsel to pursue Fernandez's arguments regarding the proper remedy for this constitutional violation.

DATED this 28<sup>th</sup> day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     ANGEL FERNANDEZ  
          DOC NO. 286520  
          CLALLAM BAY CORRECTIONS CENTER  
          1830 EAGLE CREST WAY  
          CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF JANUARY, 2016.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**January 28, 2016 - 2:49 PM**

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Court of Appeals Case Number: 48087-5

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