

FILED

JUN 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Consol No. 30377-2-III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEROME J. CURRY, APPELLANT

CONSOLIDATED WITH:

IN RE PERSONAL RESTRAINT OF

JEROME J. CURRY

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

AND

RESPONSE TO PERSONAL RESTRAINT PETITION

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- A. The resentencing court erred when it entered a "Brooks notation" in the resentencing order, in violation of RCW 9.94A.701(9).
- B. Mr. Curry's Sixth Amendment right to the assistance of counsel was violated when he was denied the opportunity to have counsel present at his resentencing hearing.
- C. Mr. Curry's right to a speedy resentencing was violated with a 3-month delay between remand and resentencing.

II.

ISSUES PRESENTED

- A. DID THE SENTENCING COURT FOLLOW THIS COURT'S REMAND INSTRUCTIONS FOLLOWING THE FIRST SENTENCING?
- B. WAS THE DEFENDANT ENTITLED TO AN ATTORNEY FOR THE MINISTERIAL ACT OF AMENDING THE SENTENCING?
- C. WERE THE DEFENDANT'S ALLEGED SPEEDY SENTENCING RIGHTS VIOLATED BY A 90 DAY DELAY?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE DEFENDANT CLAIMS THE SENTENCING COURT DID NOT FOLLOW THE CORRECT PROCEDURE IN SENTENCING.

The State has previously agreed that the first sentencing was incorrect. The maximum time for both incarceration and community custody in this case is 60 months. This court ruled in *Winborne* that the previously followed procedure for sentencing would no longer be acceptable. *State v. Winborne*, -- Wn. App. --, 273 P.3d 454 (2012). The language used by this court in the remand following the first appeal does not appear to comply with *Winborne*.

This court remanded this case to the Superior Court with instructions to amend the sentence according to *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009). An order was entered in compliance with the instructions on the remand order. This resolution did not meet the desires of the defendant and he has filed another appeal, questioning the resentencing done in compliance with the order of remand.

B. THE DEFENDANT IS NOT ENTITLED TO AN ATTORNEY FOR A PURELY MINISTERIAL ACTION.

The defendant argues that he was denied counsel for the purely administrative clarification of the Judgment and Sentence as ordered by this court.

The defendant's arguments fail on multiple grounds. In the first place, the defendant has not established that he is eligible for defense counsel at public expense. The defendant did not request defense counsel. The defendant stated "I kind of want to get this over with but I kind of want to try to get some legal advise on this matter if I can, or legal help or..." Mot. pg. 29.

At this point, the defendant had gone through trial *pro se*.

The defendant was obstreperous at his second sentencing hearing, refusing to sign the defendant's criminal history and refusing to place fingerprints on the Judgment and Sentence. Sent. RP 15, 24. The defendant has not shown the cause for the delay, but considering the defendant was in custody, a 90 day delay does not seem unreasonable.

The defendant appears to have been seeking a motion for a new trial and that motion that was untimely. The defendant seems also to have been attempting to address some unclear and unrelated "*Habeas corpus*" issues that may have been going on in Federal Court.

The defendant's interpretation of his supposed "request" for defense counsel is so confused that no court could be faulted for failing to see a "request" buried in defendant's words.

As if to put a nail through the defendant's arguments, the defendant finally stated that he "...wanted to get this over with but I kind of want to try to get some legal advice on this matter if I can, or legal help or..." Sent. RP 28. The trial court reminded the defendant that representing himself was a bad idea. Sent. RP 28. The trial court stated, "So its good to get it but right now you're representing yourself and that's where we are." Sent. RP 28.

In response to the trial court's statements, the defendant replied: "Okay. That's fine." Sent. RP 28. This statement was an abandonment of any alleged requests for counsel, assuming that a request for counsel can be derived from the disordered statements of the defendant. There was no further discussion of a defense counsel, no request for a continuance, or a straightforward request for representation.

The defendant claims that he was denied the opportunity to have counsel present for the resentencing hearing. The defendant did not request defense counsel, certainly not in a timely manner and the defendant has not shown that he had a right to counsel for a mandated clarification of his sentencing time.

C. THE DEFENDANT CLAIMS HIS SPEEDY SENTENCING RIGHTS WERE VIOLATED.

Perhaps the issue most dispositive on this topic is the fact that there was no lengthy time between the remand order instructing the court to place this matter on the next available docket and the actual date of the second resentencing on October 6, 2011. The time involved was 90 days.

The defendant claims a violation of “speedy sentencing” rules but admits that there is no specific rule governing a sentence delay. The defendant cites to *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983) which has been overruled. In any event the *Johnson* court held that 13 months delay in sentencing was not too long. If 13 months is not too long a delay, it is hard to see how the 90 day delay in this case could be deemed harmful.

Equally interesting is the defendant’s citation to *Pollard v. U.S.*, 352 U.S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957). *Pollard* found delays of nearly two years to be acceptable. Further, in order to make the claim of delay as is being made by this defendant, the defendant must show that the State engaged in deliberate acts to delay the proceedings. *Id.* at 362.

The defendant has not claimed any purposeful delays on the part of the State. It should also be noted that the Court in *Pollard*, stated: “Error in the course of a prosecution resulting in conviction calls for the correction of the error, not the release of the accused.” *Pollard, supra* at 362. It would seem that the

defendant's own cases not only show that there was no violation of whatever "speedy sentencing" rules might exist and even if there had been, the proper remedy would be to correct the problem, not release the defendant as argued by the defendant.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed and this case should be remanded (again) for entry of a proper sentencing order.

PERSONAL RESTRAINT PETITION

The State cannot formulate a cohesive answer to the petitioner's PRP. While the handwriting is clear, the brief appears to be a collection of words often randomly assembled. For example, the opening paragraph of the PRP reads:

I Jerome Curry, defendant comes now on issues was raised before was denied... to give case on evidence was not allowed to give, I Jerome Curry A fair trial, cause miscarriage of justice... *State v. Jackson*, 113 Wash. App. 762, 54 P3d 739 (Div. 2002)

The first paragraph on page two reads in part:

I was denied to show prejudice to the jury... 7 test point of authenticated of transcripts was "bogus" to show prosecutor can get documents on trial day....

The remainder of the PRP continues in the demonstrated gibberish fashion. There is a second PRP received by this court on the same day and forwarded to the State. Neither document presents a comprehensible PRP.

In order to prevail on a Personal Restraint Petition [PRP], the petitioner must demonstrate by a preponderance of the evidence that a constitutional error or a claimed error, which constituted a fundamental defect which inherently results in a complete miscarriage of justice, caused him actual and substantial prejudice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). If the petitioner does not demonstrate actual prejudice, his or her petition will be dismissed. *In re Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

The defendant may not rely on “[b]ald assertions and conclusory allegations.” *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992).

In this case, the petitioner’s poor construction prevents the finding of even an argument regarding constitutional error. Therefore, this PRP should be dismissed.

Dated this 21st day of June, 2012.

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Attorney for Respondent

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

| | | |
|----------------------|---|------------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | Consol No. 30377-2-III |
| v. |) | |
| |) | CERTIFICATE OF MAILING |
| JEROME J. CURRY, |) | |
| |) | |
| Appellant, |) | |

I certify under penalty of perjury under the laws of the State of Washington, that on June 21, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Marie J. Trombley
marietrombley@comcast.net

and mailed a copy to:

Jerome J. Curry
DOC #323160
1313 North 13th Ave
Walla Walla WA 99362

6/21/2012
(Date)

Spokane, WA
(Place)

Kathleen H. Curran
(Signature)