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No. 59266-1-I

3-19-07  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

79973-3

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CITY OF SEATTLE,  
Petitioner.

vs.

STEPHEN KLEIN and MELISSA DEIBERT,  
Respondents.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2007 MAR -9 PM 12:00

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BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR.

1. The superior court erred by denying the City of Seattle's motion to dismiss these RALJ appeals.
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B. ISSUES PRESENTED FOR REVIEW.

1. Where a defendant who has been convicted and has filed a notice of appeal fails to appear for a hearing in the trial court, which issues a warrant for the defendant's arrest, has the defendant waived or forfeited his right to appeal? (Assignments of Error 1, 2, 3 & 4)

2. Does the dismissal of an appeal because the defendant has failed to appear for a hearing in the trial court, which has issued a warrant for the defendant's arrest, violate the constitutional right to appeal? (Assignments of Error 1, 5 & 6)

3. Is the practice followed by Washington courts for over 100 years of dismissing the appeal of an absconding defendant based on considerations unique to federal courts? (Assignments of Error 1, 7 & 8)

C. STATEMENT OF THE CASE.

Each defendant was convicted of a crime in Seattle Municipal Court and filed an appeal under the RALJ rules. Each defendant then failed to appear for a probation hearing in the trial court, which issued a warrant for his or her arrest. The City then moved to

dismiss each appeal because of the outstanding arrest warrant. The superior court denied the City's motions. This court granted the City's motion for discretionary review.

With respect to STEPHEN KLEIN, on March 29, 2006, defendant was convicted of Assault in Seattle Municipal Court. Finding of Fact 1; CP at \_\_\_\_\_. One of the conditions of his suspended sentence was that he was to have no further criminal law violations. Docket in Seattle Municipal Court case 480244; CP at \_\_\_\_\_. The sentence was not stayed pending appeal. Docket in Seattle Municipal Court case 480244; CP at \_\_\_\_\_. At an August 3, 2006, review hearing, defendant admitted that he had been convicted of a new violation, 10 days of his suspended sentence was revoked and defendant was ordered to serve this sentence on work crew. Finding of Fact 3; CP at \_\_\_\_\_. At that time, a review hearing was set for September 18, 2006, to determine if defendant had completed the work crew. Finding of Fact 3; CP at \_\_\_\_\_. Defendant did not appear at that hearing, and the work crew obligation had not been completed so the court continued the case for one week. Finding of Fact 3; CP at \_\_\_\_\_. On September 25, 2006, the court received a probation

report indicating that defendant still had not completed the work crew obligation. Docket in Seattle Municipal Court case 480244; CP at \_\_\_\_\_. The court then issued a warrant for defendant's arrest. Finding of Fact 3; CP at \_\_\_\_\_.

On October 20, 2006, the City of Seattle moved to dismiss defendant's RALJ appeal because of the outstanding warrant. Respondent's Motion to Dismiss Appeal; CP at \_\_\_\_\_. On December 8, 2006, the superior court denied the motion to dismiss. Order Denying City's Motion to Dismiss; CP at \_\_\_\_\_.

With respect to MELISSA DEIBERT, on February 23, 2006, defendant was convicted of Theft in Seattle Municipal Court and her deferred sentence on a prior conviction for Prostitution was revoked. Finding of Fact 1; CP at \_\_\_\_\_. As part of her suspended sentences, defendant was ordered to perform a total of six days of work crew. Dockets in Seattle Municipal Court cases 476891 & 431554; CP at \_\_\_\_\_. The sentences were not stayed pending appeal. Dockets in Seattle Municipal Court cases 476891 & 431554; CP at \_\_\_\_\_. Defendant did not complete the work crew so the court scheduled a review hearing for October 27, 2006. Finding of Fact 3; CP at \_\_\_\_\_.

Defendant did not appear at that hearing, and the trial court issued a warrant for her arrest. Finding of Fact 3; CP at \_\_\_\_.

On November 17, 2006, the City of Seattle moved to dismiss defendant's RALJ appeal because of the outstanding warrant.

Respondent's Motion to Dismiss Appeal; CP at \_\_\_\_ . On December 8, 2006 the superior court denied the motion to dismiss. Order Denying City's Motion to Dismiss; CP at \_\_\_\_.

D. ARGUMENT.

1. A defendant who has affirmatively avoided the trial court's jurisdiction has waived or forfeited his right to appeal.

If a defendant flees the jurisdiction of the court pending an appeal, his constitutional right to appeal is deemed waived.<sup>1</sup> Several rationales have been offered in support of this rule. A litigant who withdraws himself from the power of the court to enforce its judgment also withdraws the questions which he had submitted to

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<sup>1</sup> *State v. Johnson*, 105 Wn.2d 92, 97, 711 P.2d 1017 (1986); *State v. Koloske*, 100 Wn.2d 889, 892, 676 P.2d 456 (1984) (*overruled on other grounds*, *State v. Brown*, 113 Wn.2d 520, 540, 782 P.2d 1013, 787 P.2d 906 (1989)); *State v. Mosley*, 84 Wn.2d 608, 609-10, 528 P.2d 986 (1974).

the court's adjudication.<sup>2</sup> A defendant who flees the jurisdiction of the court is attempting to set the terms upon which he will surrender and is a contempt of the court's authority.<sup>3</sup> The likelihood that an absconding defendant will not appear in the event a new trial is ordered most likely makes the appeal moot.<sup>4</sup>

In applying this fugitive dismissal rule, Washington courts have stated that a defendant waives his right to appeal. A more precise term to describe the result might be that a defendant forfeits his right to appeal.<sup>5</sup> The forfeiture of a right occurs by operation of law and, unlike waiver, without the defendant having made a deliberate informed decision to relinquish it.<sup>6</sup> Many constitutional rights can be forfeited.<sup>7</sup> For example, in *In re Dependency of E.P.*,<sup>8</sup>

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<sup>2</sup> *Johnson*, 105 Wn.2d at 97.

<sup>3</sup> *Mosley*, 84 Wn.2d at 610.

<sup>4</sup> *State v. Handy*, 27 Wash. 469, 471, 67 Pac. 1094 (1902).

<sup>5</sup> As Justice Scalia noted in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 115 L. Ed. 2d 764, 111 S. Ct. 2631, 2647 n. 2 (1991), waiver and forfeiture are not the same, but often are used interchangeably.

<sup>6</sup> Weston, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1214 (1977).

<sup>7</sup> See 3 W. LaFave, J. Israel & N. King, *Criminal Procedure* § 11.3(c), at 548 (2<sup>nd</sup> Ed. 1999) (right to counsel); 4 W. LaFave, § 18.1(d), at 673 (constitutional right to speedy trial); 5 W. LaFave § 24.2(d), at 462-65

a mother forfeited her right to counsel in a termination proceeding by failing to appear for the trial and failing to maintain contact with her counsel, even though she had not been warned about the consequences of her inaction.

The defendants' failure to appear at review hearings demonstrated that they are affirmatively avoiding the jurisdiction of the trial court. They have withdrawn themselves from the power of Seattle Municipal Court to enforce its judgment. Their refusal to submit to the authority of the court is a contempt. Because defendants may never reappear their appeals probably are moot. Defendants have thereby waived or forfeited their constitutional right to appeal, even though they had neither made a deliberate informed decision to relinquish this right nor been warned about the consequences of their inaction. These appeals should have been dismissed.

The superior court believed that these appeals should not be dismissed because the City had not shown that each defendant

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(right to be present at trial); *Davis v. Washington*, \_\_\_ U.S. \_\_\_, 165 L. Ed. 2d 224, 126 S. Ct. 2266, 2280 (2006) (right of confrontation).

knowingly, intelligently and voluntarily waived his or her right to appeal.<sup>9</sup> No case involving the dismissal of an appeal based on the defendant being a fugitive from justice has ever required such a showing. During the past century, the Supreme Court has applied this fugitive dismissal rule at least five times<sup>10</sup> and the Court of Appeals at least once<sup>11</sup> in situations essentially indistinguishable from defendants' cases.

The superior court's reliance on *State v. Sweet*<sup>12</sup> with respect to this point was entirely misplaced as that case involved a defendant who failed to file a notice of appeal, as opposed to a defendant who filed a notice of appeal and then removed himself from the trial court's jurisdiction. The superior court erred by relying on *Sweet* as a basis for denying the City's motion to dismiss these appeals.

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<sup>8</sup> 136 Wn. App. 401, 405-06, 149 P.3d 440 (2006).

<sup>9</sup> Conclusions of Law 2, 3 & 4.

<sup>10</sup> See *Johnson*, 105 Wn.2d at 97-98; *Koloske*, 100 Wn.2d at 891-92; *Mosley*, 84 Wn.2d at 609-11; *State ex rel. Soudas v. Brinker*, 128 Wash. 319, 323-24, 222 Pac. 615 (1924); *Handy*, 27 Wash. at 470-71.

<sup>11</sup> See *State v. Rosales-Gonzales*, 59 Wn. App. 583, 799 P.2d 756 (1990).

<sup>12</sup> 90 Wn.2d 282, 581 P.2d 579 (1978).

2. Application of the fugitive dismissal rule does not violate a state constitutional right to appeal.

The superior court also believed that dismissing the appeal of a defendant who absconds during the pendency of the appeal is incompatible with the right to appeal under article 1, section 22.<sup>13</sup> In *State v. Johnson*,<sup>14</sup> the Supreme Court, in applying the doctrine, stated:

Finally, if the appealing defendant flees the jurisdiction of the court pending an appeal, the defendant waives the right to prosecute the appeal. *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984); *State v. Mosley*, 84 Wn.2d 608, 528 P.2d 986 (1974). Defendants who affirmatively avoid the court's jurisdiction waive their appeal and cannot claim a violation of Const. art. 1, § 22 (amend. 10). *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978).

. . . By failing to appear at the court-ordered probation revocation hearing and failing to submit to the court's authority within the 30-day period allowed by the Court of Appeals, Johnson affirmatively waived his right to prosecute his appeal. *State v. Koloske*, *supra* at 892; *State v. Mosley*, *supra* at 609.

Although not discussing the issue in great detail, the court in *Johnson* rejected the suggestion that dismissing the appeal of an absconding defendant violates his constitutional right to appeal.

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<sup>13</sup> Conclusions of Law 6 & 7.

Courts in other jurisdictions where the right to appeal a criminal conviction is constitutional rather than statutory also have rejected this argument.<sup>15</sup> Application of the fugitive dismissal rule does not violate the state constitutional right to appeal.

The superior court's reliance on *State v. French*<sup>16</sup> with respect to this point was misplaced as that case involved a defendant who fled the jurisdiction prior to being sentenced and, thus, prior to even having a right of appeal. The court in *French* expressly distinguished such a situation from that in which a defendant absconds after having begun the appellate process:

The reasons that justify dismissal of an appeal when an appellant flees become attenuated when applied in the context of a convicted but unsentenced defendant. First, since sentencing has not occurred, there is nothing yet to appeal. Second, upon sentencing of the defendant, the terms of his or her sentence can be appealed. Third, the deterrent effect of dismissal is adequately addressed by the fact that the State may pursue additional charges for the act of

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<sup>14</sup> 105 Wn.2d at 97-98.

<sup>15</sup> See *Commonwealth v. Andrews*, 97 Mass. 543 (1867) (defendant's escape from jail waives his right to appeal under Massachusetts Declaration of Rights, article 12); *Powell v. State*, 99 Tex. Crim. 276, 269 S.W. 443, 448 (1924) (statute requiring dismissal of appeal of defendant who escapes is not unconstitutional as violating the constitutional right to appeal).

<sup>16</sup> 157 Wn.2d 593, 141 P.3d 54 (2006).

fleeing. Fourth, the defendant presumably is not informed of the right to appeal before sentencing, thereby negating the knowledge requirement of a valid waiver. Finally, under the facts of this case, the State has not argued or established prejudice. Declining to extend the doctrine to the facts of this case is consistent with preserving the constitutional right to appeal.<sup>17</sup>

*French* did not purport to overrule any of the cases applying the fugitive dismissal rule to a defendant who has already been sentenced and filed a notice of appeal before fleeing the court's jurisdiction. The superior court erred by relying on *French* as a basis for denying the City's motion to dismiss these appeals.

3. The fugitive dismissal rule is not based on any uniquely federal court considerations.

The superior court also believed that this rule's application in Washington is based on federal cases that do not account for the state constitutional right to appeal.<sup>18</sup> *State v. Handy*,<sup>19</sup> which appears to be the seminal case on this issue, relies on three out-of-state court decisions and one United States Supreme Court decision. *Johnson*,<sup>20</sup>

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<sup>17</sup> *French*, 157 Wn.2d at 602.

<sup>18</sup> Conclusions of Law 8 & 9.

<sup>19</sup> 27 Wash. at 470-71.

<sup>20</sup> 105 Wn.2d at 97.

which seems to be the most recent case applying the doctrine, relies on three Washington decisions and a dissenting opinion in a United States Supreme Court case. The rule does not appear to be grounded on federal precedent.

The fugitive dismissal rule is based on several rationales, including the need to ensure enforcement of the appellate court's orders, the desire to uphold the dignity and efficiency of the court system, the view that escape or absence waives or forfeits any entitlement to relief and the belief that a threat of dismissal deters defendants from fleeing or remaining at large.<sup>21</sup> None of these considerations are distinctly related to federal courts or whether the right to appeal is constitutional rather than statutory. The rule does not rely on federal precedent and is not based on any uniquely federal court considerations. The superior court erred by concluding otherwise.

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<sup>21</sup> Annotation, *Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief – state cases*, 105 A.L.R. 5<sup>th</sup> 529 § 2 [a], at 554 (2003); see also 5 W. LaFave, J. Israel & N. King, § 27.5(c), at 921.

E. CONCLUSION.

Based on the foregoing argument, the superior court's decision denying the City of Seattle's motion to dismiss each of these RALJ appeals should be reversed and the cases should be remanded to King County Superior Court for further proceedings.

Respectfully submitted this 9th day of March, 2007.

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