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NO. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERRO, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.02-1-01117-9

REPLY TO ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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INTRODUCTION

Fero claims that the State's petition for review is untimely. This is so, Ferro claims, because the thirty day period for filing the petition for review began running not from the day on which the Court of Appeals denied the motion for reconsideration, but on the day that the Court issued its opinion. This reading of the rules of appellate procedure ignores two governing points: First, the opinion of the Court of Appeals inheres in the decision denying the motion for reconsideration, such that the "decision deciding" the personal restraint petition was the decision denying the motion for reconsideration, in which the original opinion inheres, and second, Ferro's reading of the rules of appellate procedure would render a portion of RAP 13.4(a) as well as RAP 12. 4(a)(2) meaningless.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER

RAP 13.4(d) allows the Petitioner to file a reply to any new issue raised in the Respondent's answer. Respondent's claim that the Petitioner's motion for discretionary review is untimely is a new issue.

Respondent claims that under RAP 13.5A, the "decision deciding [the] personal restraint petition" was the published opinion of the Court of Appeals, filed January 5, 2016, rather than the decision denying the motion for reconsideration, filed March 3, 2016. But Respondent cites no

authority for this reading of the rule. Although Respondent is correct that RAP 13.5A governs review of decisions deciding personal restraint petitions, the rule curiously refers the litigant to RAP 13.5(a) and (c). RAP 13.5 governs review of interlocutory decisions, of which the decision in this case certainly is not. The decision in this case is a final decision, not an interlocutory one. RAP 13.5A further directs the party seeking review to utilize the considerations governing review from RAP 13.4, not RAP 13.5. This is notable because the considerations governing review of an interlocutory decision under RAP 13.5 are markedly different than the considerations governing review of a decision terminating review under RAP 13.4. Using the considerations governing review outlined in RAP 13.5(b) would, indeed, have been nonsensical because the decision in this case was a decision terminating review by its nature.

Putting aside the curious decision to have decisions on personal restraint petitions governed by RAP 13.5A, which in turn refers to RAP 13.5, the “decision” in this case is the decision denying the motion to reconsider, in which the opinion of the Court of Appeals inheres.¹ Several cases hold that the filing of a motion to reconsider a decision that would be final but for the seeking of further review tolls the time for seeking

¹ It would make more sense to have RAP 13.3 govern decisions deciding personal restraint petitions as decisions terminating review, with reference to RAP 13.4 for considerations governing review.

review. In *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 213-14, 257 P.3d 641 (2011), the Supreme Court, relying on *Skinner v. Civil Service Com'n of City of Medina*, 168 Wn.2d 845, 851, 232 P.3d 558 (2010), held that a timely filed motion for reconsideration tolls the time limit for filing an appeal of the decision in Superior Court. To hold otherwise “‘would undercut judicial efficiency’ by promoting ‘unnecessary filings in the superior court.’” *Mellish* at 214, citing *Skinner* at 852. In *Reeves v. Wilson*, 105 Wash. 318, 320, 177 P. 825 (1919), the Supreme Court held that a motion for a new trial suspends the effect of the judgment until after the determination of the motion and filing of the order denying the motion. “If this were not so, [the appellant] could be deprived of his right to appeal by the court taking under advisement the determination of a motion for a new trial for a period...” longer than the allowable time for seeking review. *Reeves* at 320. Similarly, in *Sitko v. Rowe*, 195 Wash. 81, 83, 79 P.2d 688 (1938), the Supreme Court held “When a motion for a new trial is seasonably made after the final judgment is entered, the time within which notice of appeal must be given, begins to run from the date of entry of the order denying such motion.” *Sitko v. Rowe* at 83, citing *Smith v. Kneisley*, 184 Wash. 26, 49 P.2d 916 (1935). The language of RAP 13.4(a), additionally, supports the argument

that the decision deciding the case inheres in the decision on a motion for reconsideration.

In this case, in fact, the Court of Appeals did not issue its decision on the motion to reconsider until March 3, 2016, six weeks after the State filed the motion. Under Fero's theory, the State was obligated to file a petition for review in the Supreme Court within a mere ten days after filing its motion to reconsider in the Court of Appeals. If this were so, the case would be pending in two appellate courts at the same time. Fero cites no authority which holds that this is the required procedure in personal restraint petition cases. RAP 13.4(a) provides, in relevant part:

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions.

The rule, thus, provides for permissive filing of a petition for review prior to a decision on a motion to reconsider (or motion to publish), but does not require it. Practically speaking, the rule likely contemplates that the party filing a petition for review, under this scenario, is not the party seeking reconsideration of all or part of the decision of the Court of Appeals. It would make no sense, frankly, for the moving party in a motion to reconsider to file a contemporaneous petition for review when such a petition may be rendered unnecessary by the decision on the motion to reconsider.

Alternatively, perhaps Fero assumes that the State was not permitted to seek reconsideration of the opinion of the Court of Appeals—that motions to reconsider are permitted only of decisions on direct appeals, not of decisions on personal restraint petitions. If so, Fero is incorrect. RAP 12.4 specifically contemplates the filing of a motion to reconsider of a decision deciding a personal restraint petition.

RAP 12.4(a) provides (with emphasis added):

(a) Generally. A party may file a motion for reconsideration only of a decision by the judges (1) terminating review, or (2) *granting or denying a personal restraint petition on the merits*. The motion should be in the form and be served and filed as provided in rules 17.3(a), 17.4(a) and (g), and 18.5, except as otherwise provided in this rule. A party may not file a motion for reconsideration of an order refusing to modify a ruling by the commissioner

or clerk, nor may a party file a motion for reconsideration of a Supreme Court order denying a petition for review.

Pursuant to RAP 12.4(b), a motion to reconsider must be filed within twenty days of the decision on which the party seeks review. In practice, a decision on a motion to reconsider will rarely ever be issued within ten days of the filing of a motion to reconsider. In this case, as noted above, it took the Court of Appeals six weeks to issue its decision on the motion. Yet the decision would have to be issued within ten days in order to meet the thirty-day time limit for filing a petition or motion for discretionary review. The State timely filed its petition for review in this case because it was specifically permitted to file a motion for reconsideration, and Fero cites no authority interpreting either RAP 13.5 or 13.5A specifically holding that in the personal restraint context, a party must file a petition for review at the same time it has a pending motion to reconsider the decision on which review would be based.

Even if Fero is correct in her reading of the RAPs, this Court should find that extraordinary circumstances warrant the acceptance of the State's petition for review as timely filed. The RAPs in this area are inconsistent and confusing. As noted above, it makes little sense that RAP 13.5A references RAP 13.5 for the procedure governing discretionary review of decisions deciding personal restraint petitions. RAP 13.5

governs review of interlocutory decisions. The decision in this case is most assuredly *not* an interlocutory decision. It was a decision vacating a nearly twelve-year-old conviction and remanding the case for a new trial. It was a final decision. The procedure in this case should be governed entirely by RAP 13.4. In *Scannell v. State*, 128 Wn.2d 829, 835, 912 P.2d 489 (1996), the Supreme Court found extraordinary circumstances under RAP 18.8 where recent amendments to the RAPs, as well as a lack of decisional case law interpreting the RAP in question, led to confusion of the parties. "This court has been lenient in other cases where court rules caused confusion." *Scannell* at 835. Although the RAPs in question here were not recently amended, there is a lack of case law interpreting them, leaving litigants to sort out the confusion between RAPs 13.5A, 13.5, 13.4, and 12.4. The State asks this Court, if it is inclined to accept Fero's argument as to timeliness, to hold that extraordinary circumstances warrant the acceptance of the State's petition as timely filed.

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CONCLUSION

The State respectfully asks this Court to accept the petition for review as timely filed.

DATED this 1st day of June, 2015.

Respectfully submitted:

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Subject: #92975-1, PRP of Fero - Reply to Answer to Petition for Review

Dear Clerk,

Attached please find the State's *Reply to Answer to Petition for Review*. Please accept this document for filing. Copies have been served on counsel for Respondent via copy of this email message. If you have any questions or need anything further to process this request, please contact me.

Sincerely,

Jennifer Casey
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Please note, I work a job-share schedule: Wednesday afternoons, Thursdays, and Fridays. Please copy my job-share partner, Pamela.Bradshaw@clark.wa.gov, on any reply so that she may take any necessary actions in my absence. Thank you!

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