

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

MARCO BAILON WENCES,

Petitioner

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

Did the Court of Appeals properly deny the defendant the benefit of absconding from justice after conviction but prior to sentencing, by denying him the benefit on appeal from changes in procedural law that would not otherwise have applied to his case?

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion. Slip op. at 1-2. In resolving the issue on which review was granted, the essential facts are the following:

The defendant was convicted by jury verdict on February 23, 2005. His sentencing was set to April 8, 2005. The defendant failed to appear for his sentencing and a warrant issued for his arrest. The defendant appeared for sentencing subject to the warrant on March 23, 2015, almost exactly 10 years later. After being sentenced, the defendant appealed his conviction and sentence. CP 30-31, 88, 3/23/15 RP 3-7.

The Court of Appeals denied the defendant's new suppression argument and upheld his sentence holding that the defendant may not benefit from the prospective changes in the law

governing enhancements that occurred during the decade-long sentencing delay caused by his flight. Slip op. at 1, 6-8.

The defendant has petitioned this court for review on the sentencing issue only. This court granted the defendant's petition for review.

III. ARGUMENT

A. IF A DEFENDANT ABSCONDS FROM JUSTICE AFTER CONVICTION BUT PRIOR TO SENTENCING, HE SHOULD NOT BENEFIT ON APPEAL FROM CHANGES IN PROCEDURAL LAW THAT WOULD NOT OTHERWISE HAVE APPLIED TO HIS CASE.

In 2006, this court overruled its prior holding that a defendant who has fled after conviction but before sentencing and before a notice of appeal was filed has waived the right to appeal from the conviction, unless upon his or her return, he or she can establish the absence was due to matters completely out of his or her control. State v. Estrada, 78 Wn. App. 381, 383, 896 P.2d 1307, 1308 (1995), overruled State v. French, 157 Wn.2d 593, 602, 141 P.3d 54, 59 (2006). "The fugitive disentitlement doctrine is a common law rule which provides that one who flees a court's jurisdiction while on appeal waives his or her right to pursue that appeal." Id. at 600. "We hold the fugitive disentitlement doctrine

generally does not apply to a defendant who absconds after conviction but before sentencing.” Id. at 602.

In reaching its decision in this case, the court of appeals did not deny the defendant his appeal, but denied him the benefit of the new rule of procedure promulgated during the 10 years the defendant chose to abscond from justice. Slip op. at 7-8.

B. REVIEW OF THE DEFENDANT’S SENTENCE SHOULD BE UNDER THE LAW THAT EXISTED AT THE TIME OF HIS CONVICTION.

Courts have consistently held that a fugitive from justice should not be rewarded for absconding. State v. Moore, 63 Wn. App. 466, 820 P.2d 59 (1991); State v. Handy, 27 Wash. 469, 470, 67 P. 1094, 1094 (1902).

In the Moore case, the defendant was denied the benefit of the change in the law regarding presumptively concurrent sentences. The sentencing court applied the law at the time of conviction even though his sentencing did not occur until after the change. State v. Moore, 63 Wn. App. at 470-71.

The U.S Supreme Court has held that when a decision of theirs results in a “new rule,” that rule applies to all criminal cases still pending on direct review. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, new rules of

procedure generally do not apply retroactively to convictions that are already final. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Schiro v. Summerlin, 542 U.S. 348, 351–52, 124 S. Ct. 2519, 2522–23, 159 L. Ed. 2d 442 (2004).

Had Mr. Wences not absconded from justice, he would have been sentenced in 2005. Recuenco III was decided in 2008. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)(Recuenco III). Williams-Walker was decided in 2010. State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). Had he appealed, his direct appeal would have been complete long before the decisions in Recuenco III and Williams-Walker. This court has held that the decisions in Recuenco III and Williams-Walker are not retroactive. This is consistent with the U.S. Supreme Court's ruling in Summerlin. Schiro v. Summerlin, 542 U.S. at 353.

Similar to the decision in Moore, the defendant should not receive the benefit of having absconded from justice for a decade. The Court of Appeals in reaching its decision looked to the decisions in the two Oregon cases. Instead of denying the

defendant his appeal, they applied the law as it was before the defendant absconded. Absent a showing that Recuenco III and Williams-Walker should be applied retroactively, this approach preserved the defendant's right to appeal, but also prevents his benefitting from voluntarily removing himself from the jurisdiction of the court. He was allowed his appeal, but not the retroactive application of a change in procedural law.

When a criminal defendant has had a full trial and the time for at least one round of appeals has past, he should be sentenced according to the law as it was at the time of his conviction and any appeal involved should reflect the rules of procedure as understood at the time. To do otherwise would encourage defendants to abscond before sentencing, thereby delaying their claims indefinitely in hopes that there will be a favorable change in the interpretation of the law. This would inject a degree of uncertainty that is antithetical to the underlying desirability of finality and would encourage poor use of judicial resources by creating a backlog of cases on appeal.

IV. CONCLUSION

When a defendant absconds from justice after conviction but prior to sentencing, he should not be allowed to benefit from changes in the law that are not retroactive. His appeal review should be based on the law at the time. For that reason the judgment and sentence should be affirmed.

Respectfully submitted on March 10, 2017.

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IN THE SUPREME COURT
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THE STATE OF WASHINGTON, Respondent, v. MARCO B. WENCES, Petitioner.

No. 93605-6

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of March, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Jennifer Winkler; Sloanej@nwattorney.net; winklerj@nwattorney.net

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of March, 2017, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office